Fundamentals of Oregon Civil Trial Procedure

Cosponsored by the Litigation Section

Thursday, September 26, 2019
8:30 a.m.–4 p.m.

Friday, September 27, 2019
8:30 a.m.–12:15 p.m.

9 Oregon Practice and Procedure credits
FUNDAMENTALS OF OREGON CIVIL TRIAL PROCEDURE

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SCHEDULE

Thursday, September 26

7:30  Registration

8:30  The Art of Drafting Complaints and Answers

♦ Framing your client’s case
♦ Stating a claim for relief or affirmative defense
♦ Where to file and why
Steve Larson, Stoll Berne PC, Portland

9:00  Mastering the Discovery Basics

♦ Discovery requests
♦ Subpoenas
♦ Other general discovery provisions
Courtney Angeli, Buchanan Angeli Altschul Sullivan LLP, Portland

10:00 Break

10:15  Tips for Taking and Defending a Deposition

♦ How to prepare a client for deposition
♦ Tips on what questions to ask, how to ask them, and how to set up effective impeachment
♦ How to deal with difficult opposing counsel
David Eder, Thuemmel Uhle and Eder, Portland
Joel Sturm, Thuemmel Uhle and Eder, Portland

11:00 E-Filing: Top Ten Tips

♦ You’ve been rejected! Now what?
♦ Relation back of rejected filings
♦ Need help—“who ya gonna call?”
Kimberly Anne Stuart, Washington County Counsel, Hillsboro

11:30 Lunch

12:30 Mastering Key Pretrial Motions

♦ Motions to dismiss
♦ Discovery disputes
♦ Motions for summary judgment
Nathan Morales, Perkins Coie LLP, Portland

1:30  Documenting Settlement Agreements: Best (and Worst) Practices

♦ Essential parts of settlement
♦ Standard forms
♦ Settlement judge compared to a mediator
Stanton Gallegos, Markowitz Herbold PC, Portland
Adam Starr, Markowitz Herbold PC, Portland

2:15 Break
SCHEDULE (Continued)

2:30  Closing Argument
      Gretchen Mandekor, Rosenbaum Law Group PC, Portland

3:15  Show Me the Money—Obtaining and Collecting Your Client’s Judgment
      ✦ Obtaining a proper judgment or confirming an arbitration award
      ✦ How to use creditor rights to locate and collect assets to satisfy your client’s judgment
      John Bachofner, Jordan Ramis PC, Vancouver

4:00  Adjourn

Friday, September 27

8:30  Late Registration

9:00  Anatomy of a Trial
      ✦ How to develop a trial theme
      ✦ The most powerful way to conduct an opening statement
      ✦ The real purpose of closing argument
      ✦ Why less is more . . . when it comes to trial
      Dennis Rawlinson, Miller Nash Graham & Dunn LLP, Portland

10:30 Break

10:45  Appearing in Court: Survive and Thrive!
      ✦ Interactions with court staff, counsel, litigants, and others
      ✦ How to prepare for coming to court
      ✦ What to do when you are before the court
      The Honorable Channing Bennett, Marion County Circuit Court, Salem

11:30  Protecting Your Appeal
      ✦ Trial judge perspective on preservation of error
      ✦ Helpful tips that new practitioners should know about preparing for appeal at the trial level
      The Honorable Lynn Nakamoto, Oregon Supreme Court, Salem
      The Honorable Adrienne Nelson, Oregon Supreme Court, Salem

12:15 Adjourn
FACULTY

Courtney Angeli, Buchanan Angeli Altschul Sullivan LLP, Portland. Ms. Angeli has extensive experience litigating employment cases and providing comprehensive employment law counseling and training to employers. She is past president of the Federal Bar Association Oregon Chapter. Ms. Angeli is a regular speaker and writer on employment law issues and has made numerous joint presentations with federal judges for the Federal Bar Association. She is regularly quoted in the press for her opinion on employment law matters. She has received the Senior Professional in Human Resources (SPHR) certification from the Human Resources Certification Institute (HRCI).

John Bachofner, Jordan Ramis PC, Vancouver. Mr. Bachofner’s practice focuses on litigation and jury trials, as well as insurance coverage, product liability, general business, bankruptcy, and creditors’ rights issues. He is the chair of Jordan Ramis PC’s Litigation Group, past chair of the Oregon State Bar Litigation Section, and an elected member of the OSB Board of Governors. He has taken or defended hundreds of depositions, and he is frequently involved as an expert or arbitrator in binding arbitration of matters. Mr. Bachofner is a frequent lecturer on creditor’s rights, insurance coverage, business, and litigation topics.

The Honorable Channing Bennett, Marion County Circuit Court, Salem. Judge Bennett was appointed by Governor Kate Brown in January 2016. Before that, he was a hearings referee, judge pro tem, assigned to the Criminal Annex, overseeing 90 percent of the county’s criminal cases and leading the annex through the transition to eCourt. In his earlier private practice, he specialized in civil litigation with an emphasis on employment, business, and civil rights law.

David Eder, Thuemmel Uhle and Eder, Portland. Mr. Eder practices in the areas of personal injury and wrongful death, DUII defense, and criminal law. He previously was an assistant city attorney with the City of Beaverton, handling thousands of vehicle-related cases as well as civil litigation and major crimes work. In 2011, he served as an instructor at the National Advocacy Center on the topic of jury selection. He is past chair of the Oregon New Lawyers Division. In 2010, he developed a program to help underemployed and unemployed lawyers receive training from nonprofit organizations; the program was named as the American Bar Association Young Lawyer Section Program of the Year.

Stanton Gallegos, Markowitz Herbold PC, Portland. Mr. Gallegos represents businesses and nonprofits in complex litigation, including cases involving securities, shareholder disputes, breach of contract, ERISA, products liability, class actions, employment discrimination claims, and other torts. He has extensive experience in matters involving securities and financial investments, where he has represented financial institutions and individual investors in matters relating to the sale of mortgage-backed securities, failed investment funds, and challenges to merger transactions. Stanton also represents clients on appeals in state and federal courts, both as parties and as amicus curiae. Mr. Gallegos is a member of the Oregon Hispanic Bar Association board, the Owen M. Panner Inn of Court, the Multnomah Bar Association, the Federal Bar Association, the Federal Bar Council, and the New York City Bar Association. He is admitted to practice in Oregon, Washington, and New York and before the United States Supreme Court.

Steve Larson, Stoll Berne PC, Portland. Mr. Larson has expertise in class actions, consumer cases, antitrust litigation, securities litigation, corporate disputes, intellectual property disputes, unfair competition claims, employment matters, and disputes involving family wealth. He regularly represents individuals and businesses in federal and state court and has obtained class-wide recovery in multiple class actions. Mr. Larson is an active member and past vice president of the Oregon State Bar. As well, he is a member of the Multnomah Bar Association Board of Directors, the American Bar Association Litigation Section and Antitrust Section, the Oregon Trial Lawyers Association, and the National Consumer Law Center Partners Council. He is admitted to practice before the U.S. Supreme Court.
Gretchen Mandekor, *Rosenbaum Law Group PC, Portland*. Ms. Mandekor is a trial lawyer who specializes in representing plaintiffs in personal injury lawsuits and the defense of legal malpractice matters. Over her career, she has successfully tried dozens of jury trials in both state and federal court. Before joining Rosenbaum Law Group, Ms. Mandekor founded and managed her own law firm from 2007 through 2014. She is frequently asked to serve as an arbitrator in personal injury disputes and a speaker on various litigation topics at continuing legal education classes for lawyers. She is a member of the Multnomah Bar Association and the Oregon Trial Lawyers Association.

Nathan Morales, *Perkins Coie LLP, Portland*. Mr. Morales has experience advising and representing businesses with their litigation, appellate, and administrative law issues. In his trial and appellate work, he has assisted with cases involving shareholder disputes, consumer class actions, and professional negligence. He also has represented both state administrative agencies and parties challenging agency action, has filed briefs and argued in the Oregon Court of Appeals and Oregon Supreme Court, and has advised companies on various data privacy matters. In his trial practice, he has briefed and argued numerous pretrial motions, including motions to dismiss, to compel production, and for summary judgment. And in his appellate practice, he has researched and briefed the burden-shifting framework for summary judgment under federal and Oregon law.

The Honorable Lynn Nakamoto, *Oregon Supreme Court, Salem*. Justice Nakamoto joined the Oregon Supreme Court in January 2016, after serving five years as a judge on the Oregon Court of Appeals. She began her career in legal aid services, representing low-income clients in civil matters, first in the Bronx and then, after she moved to Oregon in 1987, in Marion and Polk counties. From 1989 until she became a judge, she was in private practice in Portland, litigating business and employment cases in state and federal trial and appellate courts. Justice Nakamoto is a recipient of the Margaret Brent Women Lawyers of Achievement Award from the ABA Commission on Women in the Profession, the Daniel K. Inouye Trailblazer Award from the National Asian Pacific American Bar Association, and the Owen M. Panner Professionalism Award from the Oregon State Bar Litigation Section.

The Honorable Adrienne Nelson, *Oregon Supreme Court, Salem*. Justice Nelson was appointed to the Oregon Supreme Court on January 2, 2018, making her the first African American to sit on the state’s highest court and on any appellate state court. In 2006, she was appointed as a trial judge on the Multnomah County Circuit Court, the second African American female judge in the state of Oregon. Judge Nelson sits on the American Bar Association Standing Committee on Public Education, is the Oregon delegate to the ABA House of Delegates, chairs the Lewis and Clark Law School Judge Roosevelt Robinson Scholarship Committee, and is vice president of the Owen M. Panner American Inn of Court. She is a frequent speaker on a number of topics including diversity, inclusion, equity, leadership and professional development. Among other honors, Justice Nelson is the recipient of the 2016 of the Multnomah Bar Association Award of Merit, the 2015 Oregon State Bar Diversity and Inclusion Award, and the 2003 Oregon Women Lawyers Judge Mercedes Diez Award.

Dennis Rawlinson, *Miller Nash Graham & Dunn LLP, Portland*. Mr. Rawlinson concentrates his practice on commercial and “bet-the-company” litigation. He has handled many trials and arbitrations on a wide range of commercial subjects, such as breach of contract, commercial torts, construction and design, shareholder disputes, lender liability, real estate, professional negligence, employment, and trademark disputes. He is past president of the Oregon State Bar and founder of the Litigation Institute and Retreat, an annual seminar for seasoned Oregon lawyers. Mr. Rawlinson has had considerable experience working with the media and has been interviewed on client-related matters by Diane Sawyer, Connie Chung, and Katie Couric. He is a frequent writer and speaker on litigation topics.
**FACULTY (Continued)**

Adam Starr, *Markowitz Herbold PC, Portland*. Mr. Starr specializes in complex business and real estate disputes. He is a member of the Federal Bar Association, the Multnomah Bar Association, Oregon Women Lawyers, the Oregon Association of Defense Counsel, the Oregon Trial Lawyers Association, the Oregon State Bar Real Estate & Land Use Section, the State Bar of California Real Property Law Section and Litigation Section, the Bar Association of San Francisco, the Contra Costa County [California] Bar Association, and the Washington State Bar Association Litigation Section. Mr. Starr is admitted to practice in Oregon, Washington, California, and Idaho.

Kimberly Anne Stuart, *Washington County Counsel, Hillsboro*. Ms. Stuart is an assistant county counsel for Washington County. She handles condemnation, bankruptcy, tort, and general litigation matters on behalf of the county. Prior to joining the county, she was a commercial litigator in private practice specializing in bankruptcy, business, and real estate disputes and creditor’s rights, including general counsel advice for businesses and financial institutions in collections, distressed assets, and risk management.

Joel Sturm, *Thuemmel Uhle and Eder, Portland*. Mr. Sturm represents individuals in personal injury and property damage lawsuits. He previously worked in-house for Nationwide Insurance in its Portland Trial Division Office, where his litigation practice involved first- and third-party claims, product liability, automotive and personal injury actions, fire losses, and commercial disputes. Before that, he prosecuted misdemeanor offenses in the Beaverton Municipal Court. Mr. Sturm is chair of the Oregon New Lawyers Division and a member of the Oregon Trial Lawyers Association and the American Bar Association Torts Trial and Insurance Practice Section.
1. Whether to File a Complaint - Case Evaluation
   a. Identify legal theories that will support claims and those that will undermine claims
   b. Identify timing issues for filing
      i. Statutes of limitation
      ii. Competing cases
      iii. Declaratory judgment action by Defendant
   c. Determine if arbitration required by contract or statute
   d. Evaluate damages recoverable
   e. Consider attorney fee issues
Complaints

1. Where to file
   a. Federal Court
      i. Federal question: 28 USC § 1331
      ii. Diversity: 28 USC § 1332
      iii. Venue
   b. State Court: courts of general jurisdiction
      i. Removal risks
      ii. CAFA jurisdiction
      iii. Venue
   c. Factors to consider
      i. Pretrial procedures (expert discovery, dispositive motions, assigned judge, time to trial)
      ii. Jury pool: 6-12 for federal, 12 for state, FRCP 48; ORCP 56
      iii. Jury consensus: Federal Court requires unanimity unless otherwise agreed; State Court requires 75 percent majority, FRCP 48; ORCP 59 G(2)

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Complaints

1. Determine any tender, demand, or notice requirements imposed by contract or law
   a. Oregon Tort Claims Act, ORS 30.275(2)(b)
   b. Class Actions for Damages in State Court, ORCP 32
   c. Fair Debt Collection Practices Act, 15 USC § 1692
   d. Breach of warranty under UCC, § 2-607(3)
   e. Unlawful Trade Practice Act Claims, ORS 646.638

Stoll Berne
1. Mechanics of Drafting a Complaint
   a. Format
      i. Technical Requirements set out in ORCP 16–18, 20, and 68; UTCR 2.010
         1) Oregon Civil Pleading and Practice has templates
         2) Claims not subject to mandatory arbitration must say so, UTCR 13.060
         3) Allege basis for attorney fees in the body of the complaint, not just the prayer, ORCP 68
         4) Can allege based “on * * * information and belief” if unsure of evidence, ORCP 17 C(4)
      ii. Technical Requirements set out in FRCP 8-11 and 38; LR 10
         1) Federal Civil Litigation in Oregon has templates
         2) Need to demand a jury trial in Federal Court, FRCP 38 and LR 38.
         3) Corporate Disclosure Statement required in Federal Court, FRCP 7.1

Complaints

1. Drafting the Complaint to Survive Motion to Dismiss
   a. Federal Court has Twombly/Iqbal pleading standard
      i. Complaint must include facts giving rise to “plausible” entitlement to relief
      ii. Heightened pleading requirements for some claims – Private Securities Litigation Reform Act
   b. State courts require statement of ultimate facts to establish each element of a claim, ORCP 18B
1. Strategy for Drafting the Complaint
   a. Tell your story
      i. How much detail?
      ii. How many facts?
   b. Intended audience
      i. Judge
      ii. Opposing party
      iii. Opposing counsel
      iv. Others
   c. Whether to allege alternative claims for relief

1. Special pleading considerations
   a. Must plead the performance or occurrence of conditions precedent, ORCP 20 A; FRCP 9(c)
   b. Libel and slander, fraud, and mistake must be alleged with more particularity than is ordinarily required, ORCP 20 E; FRCP 9(b)
   c. Class actions must include special allegations, ORCP 32; FRCP 23; LR 23-1
   d. Pleading ordinances of county, city, or town: Use title and date of passage, ORCP 20 D
   e. Nonjoinder of a necessary party: FRCP 19(c) requires allegations of names of necessary parties not joined and reasons why they were not joined – indispensable parties?
1. **Damages**
   a. Prayer and amount sought required, ORCP 18 B, FRCP 8
   b. Special damages (e.g., out-of-pocket expenses such as lost profits and medical expenses) must be alleged with particularity as to both the type and the amount, FRCP 9(g)
   c. Economic damages arising out of a bodily-injury claim must be pleaded with sufficient particularity to advise the defendant of the nature and extent of the damages, ORCP 18 B
   d. General damages or Non-economic damages (e.g., for pain and suffering in a tort claim) need be alleged by only a general description of the injury
   e. Punitive damages: May not plead these in State Court, until allowed by court, ORS 31.725

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**Amended Pleadings**

1. Amendment as of right within timelines, ORCP 23; FRCP 15
2. Amendment by stipulation
3. Amendment by leave of court
1. Strategy for Responding – Case Evaluation
   a. Settle
   b. Remove
   c. Move to Stay
   d. Move to Transfer
   e. Move to Change Venue
   f. Move to Compel Arbitration
   g. Move to Dismiss
   h. Answer

1. Determine deadline for responsive pleading
   a. Oregon State Court: Within 30 days of date of service, ORCP 7 C(2)
   b. Federal Court: Within 21 days of date of service, FRCP 12(a)
   c. Extensions
      i. ORCP 69 B default notice may get you more time
      ii. Not for Removal: Must be filed within 30 days of “receipt by the defendant, through service or otherwise.” 28 USC § 1446(b)
1. **Mechanics of Drafting the Answer**
   a. **Denials:** ORCP 19 A; FRCP 8(b)
      i. By paragraph number
      ii. By fact
      iii. Lack of information may serve as denial
   b. **Admissions:** If a responsive pleading is required, then failure to deny is an admission, ORCP 19 C; FRCP 8(b)(6)

1. **Affirmative defenses**
   a. Generally waived if not raised in responsive pleading
   b. Listed in ORCP 19 B and FRCP 8(c), but not all-inclusive. Any matter that does not amount to a mere denial of the essential elements of plaintiff’s claim
   c. Err on the side of pleading affirmative defenses
   d. **Twombly/Iqbal** and ORCP 18 B *pleading standards* may be applicable to affirmative defenses
1. **Counterclaims**
   
a. A counterclaim does not need to be related to plaintiff’s claim. ORCP 22 A; FRCP 13(b)

b. In Federal Court, a defendant must plead a counterclaim arising out of the same transaction or occurrence as plaintiff’s claim. Compulsory Counterclaim. FRCP 13(a)

c. *Twombly/Iqbal* and ORCP 18 B pleading standards apply

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1. **Cross-claims**
   
a. Against codefendants and must be based on the transaction or property set forth in the complaint. ORCP 22 B; FRCP 13(g)

b. ORCP 22 D(1) and FRCP 13(h) allow the joinder of additional parties as defendants to a counterclaim or cross-claim

c. *Twombly/Iqbal* and ORCP 18 B pleading standards apply
1. **Third-party claims**
   a. Against nonparty who may be liable for all or a part of plaintiff’s claim.
   b. If filed within 14 days of answering, leave of the Federal Court is unnecessary. FRCP 14(a)(1).
   c. In Oregon State Court, a party must obtain leave of court and agreement of other parties if not commenced within 90 days of service of summons and complaint on third party plaintiff. ORCP 22 C(1)
   d. Many considerations before filing third party claim

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1. **Reply**
   a. Appropriate only if a defendant counterclaims (ORCP 13 B; FRCP 7(a)), or if a plaintiff has an affirmative defense to one of defendant’s affirmative defenses. ORCP 13 B
   b. Evaluate whether to file motion in response to counterclaim or affirmative defense
Chapter 2

Presentation Slides: Mastering the Discovery Basics

COURTNEY ANGELOI
Buchanan Angeli Altschul Sullivan LLP
Portland, Oregon
Chapter 2—Presentation Slides: Mastering the Discovery Basics

MASTERING THE DISCOVERY BASICS

September 26, 2019

Courtney Angeli
Buchanan Angeli Altschul & Sullivan LLP

DISCOVERY: THE BIG PICTURE

• Develop claims and defenses
• Prepare for summary judgment
• Drive settlement negotiations
• Obtain evidence (testimony, documents, information) in a usable and admissible form for trial
BEFORE YOU GET STARTED

• Understand differences of state vs. federal court; ambush vs. disclosure
• Know elements of all claims and defenses
• Consider drafting or reviewing jury instructions
• Identify strategic issues/considerations
• Review results of investigation:defenses

THE STANDARD: ORCP 36 B

“For all forms of discovery, parties may inquire regarding any matter, not privileged, that is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party…”
THE STANDARD: ORCP 36 B

ORCP 36 B (1): “…It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

FRCP 26: PROPORTIONALITY

FRCP 26 (b)(1): “Unless otherwise limited by court order, the scope of discovery is as follows: 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, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.”
TIMING OF DISCOVERY: ORCP 39 A

A deposition may be taken at any time “after the service of summons or the appearance of the defendant…”

- No time limits for completion of depositions
- A court may grant a protective order that depositions not be taken when parties should be preparing for trial.

ORCP 36 C

TIMING OF DISCOVERY: FRCP 26

- Initial disclosures must be made “at or within 14 days after the parties’ Rule 26(f) conference…”
- Court generally sets discovery deadlines via scheduling order and will set cutoff date prior to trial
**DISCOVERY TOOLS**

- Depositions (ORCP 39 & ORCP 40)
- Production of Documents and Things and Entry Upon Land for Inspection (ORCP 43)
- Physical / Mental Examinations (ORCP 44)
- Requests for Admission (ORCP 45)
- Subpoena (ORCP 55)

**COORDINATING THE TOOLS OF DISCOVERY**

- Lack of interrogatories in state court – a deposition is important, and consider a corporate deposition!
- Seek other discovery in advance of, and with an eye toward, depositions.
PHYSICAL / MENTAL EXAMINATIONS - ORCP 44

- The Court may order a party, agent, employee, or person in the custody or under the legal control of a party to submit to an examination by a physician or psychologist if their mental or physical condition is in controversy. (ORCP 44 A)

- The party against whom a “civil action is filed for compensation or damages for injuries may obtain copies of individually identifiable health information…within the scope of discovery under Rule 36 B.” (ORCP 44 E)

PHYSICAL / MENTAL EXAMINATIONS - ORCP 44 (Cont.)

- If requested, the person being examined is entitled to a detailed report of their examination including “results of all tests made, diagnoses and conclusions…” or any previous reports made about the same condition.

- After providing the above information, the party requesting the examination is entitled upon request to any other reports of examinations for the same condition made before or after the request, under certain circumstances.
**SUBPOENAS - ORCP 55**

- Notice of Intent to Serve (for SDTs) is required 7 days prior to serving Subpoena (+3 days for mailing Notice)
- Subpoenas requiring appearance must be served “so as to allow the witness a reasonable time for preparation and travel to the place of attendance.”
- Include a witness fee + mileage if requesting attendance–mileage is unnecessary if only requesting documents
- You may serve Subpoena via Certified Mail
- Include a Certification of Records Custodian if you are requesting the production of documents
- Response/objection is due 14 days from date of service (+3 days if served via Certified Mail)

**SUBPOENA ORCP 55—STRATEGIC CONSIDERATIONS**

- Consider whether witness will voluntarily provide evidence sought
- May want to use a subpoena with a party (backed by threat of contempt sanctions) to ensure full cooperation
REQUESTS FOR PRODUCTION: ORCP 43—STRATEGIC CONSIDERATIONS

- Broad vs. narrow
- What’s good for the goose is good for the gander
- Multiple requests
- Consider timing in relation to depositions
- Follow-up!
- Have an RFP addressing info recv’d through subpoena

REQUESTS FOR PRODUCTION

ORCP 43 B(1)

B(1): “…The request shall identify any items requested…by individual item or by category described with reasonable particularity…”
REQUESTS FOR PRODUCTION

ORCP 43 E

E: “A request for ESI may specify the form in which the information is to be produced...”

WRITTEN RESPONSES AND OBJECTIONS TO RFPS

- 30 day presumed time frame (ORCP 43 B(2))
- Any objection not stated in accordance with B(2) is waived (ORCP 43 B(3))
- Continuing duty to produce responsive items during pendency of litigation (ORCP 43 B(4)) – but formally request follow up!
Chapter 2—Presentation Slides: Mastering the Discovery Basics

**BASES FOR OBJECTION?**

- Documents not identified with reasonable particularity
- Not reasonably calculated to lead to discovery of admissible evidence
- Vague or overbroad
- Undue burden
- Privilege

**ESI**

*(ELECTRONICALLY STORED INFORMATION)*

- Be sure at the outset your client and opposing party are not allowing destruction of info!
- According to ORCP 43 E (1): Unless otherwise specified, ESI will be produced in “either the form it is ordinarily maintained or in a reasonably useful form.”
SITE OR “THING” INSPECTIONS UNDER ORCP 43 A(2)

Any party can request “to enter land or other property...of the party...for the purpose of inspection and measuring, surveying, photographing, testing...the property or any designated object or operation thereon...”

DEPOSITIONS: ORCP 39

- May take deposition of any person; non-party deposition may be compelled by ORCP 55
- Oregon Convention: Your witness is deposed at your office
- ORCP 39 C(6) allows deposition of “a public or private corporation or a partnership or association or governmental agency...”
WHY TAKE A DEPOSITION?

- To obtain sworn, memorialized testimony in question-and-answer form before trial, generally from an adverse witness or from a witness whose truthfulness or continued availability is not certain.
- Would a declaration suffice?

SCHEDULING DEPOSITIONS

- Be courteous; schedule depositions through agreement of all parties.
- When scheduling, consider:
  - Availability of documents in advance of deposition;
  - Strategic order;
  - Whether depositions will lead to the necessity for others;
  - Witnesses who will most likely have testimony for summary judgment motions.
HOW CAN YOU USE A DEPOSITION?

• Impeach;
• Admissions;
• For pre-trial motions; and
• For discovery motions.

DEPOSITION BASICS

• Perjury reminder
• Active listening
• Consider using at trial
Applicable Rules and Case Law

According to ORCP 39 D(1) you can question your own witness in deposition, but no leading questions (OEC Rule 611).

CORPORATE / ENTITY DEPOSITIONS: ORCP 39 C(6)

“A party may…name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with particularity the matters on which examination is requested.”
“In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf and shall set forth, for each person designated, the matters on which such person will testify…. The person so designated shall testify as to matters known or reasonably available to the organization.”

**REASONS TO USE AN ORCP 39 C(6) DEPOSITION**

- Get information like an interrogatory provides
- Deposing a witness more than once
- The same witness may be deposed both as an individual and once as a designated representative of a corporation. 
STRATEGIC REASONS FOR AN ORCP 39 C(6) DEPOSITION

• No limit on number of topics that can be specified in a single 30(b)(6) notice;
• While subjects must be identified with “reasonable particularity,” courts have said subjects in notice are a starting point, not an end point. See King v. Pratt & Whitney, 161 FRD 475, 476 (SD Fla 1995).

Corporate Designees Not Limited to Personal Knowledge

A witness testifying as a ORCP 39 C(6) designee does not give his or her personal opinion and is not limited to his or her own knowledge. Rather, “[t]he persons so designated shall testify as to matters known or reasonably available to the organization.”
Thus, while a witness may be able to truthfully testify that he or she cannot recollect information, a [Corporate] designee is not limited to her own recollection and knowledge, but is instead subject to the collective knowledge of the entity.” See *Raytheon Aircraft Co. v. United States*, 2007 WL 2668725 (D Kan Sept. 6, 2007).

**FAILURE TO PREPARE**

If it becomes apparent through the course of the deposition that the corporation’s designee is unable to provide testimony on the matters in the notice, the corporation has a duty to provide a substitute who can provide the required testimony. See *FDIC v. Butcher*, 116 FRD 196, 201-02 (ED Tenn 1986).
SANCTIONS

Sanctions may be properly imposed against a corporation when its designee is unknowledgeable of relevant facts and it fails to designate an available, knowledgeable, and readily identifiably witness because such an “appearance is, for all practical purposes, no appearance at all.” See Resolution Trust Co. v. Southern Union Co., 985 F2d 196, 197 (5th Cir 1993).

REQUESTS FOR ADMISSION: ORCP 45

“After commencement of an action, a party may serve upon any other party a request for the admission…of the truth of relevant matters within the scope of Rule 36 B specified in the request, including facts or opinions of fact, or the application of law to fact, or of the genuineness of any relevant documents or physical objects described in or exhibited with the request.”
REQUESTS FOR ADMISSION: ORCP 45

- Requests for admissions are generally used to save time and narrow the issues that a party must prove at trial.
- Authentication of documents
- Will other parties just stipulate?
- Leverage in settlement
- Ease of trial presentation

DOCKET RFA RESPONSE DEADLINES CAREFULLY

ORCP 45 B: “The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the [answering] party…serves on the [requesting] party…a written answer or objection....”
RFA ANSWERS / OBJECTIONS

- Must state specific reasons for objections.
- “The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.” ORCP 45 B.

RFA ANSWERS / OBJECTIONS

“A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter…the party shall specify so much of it as is true and qualify or deny the remainder.” ORCP 45 B.
RFA ANSWERS / OBJECTIONS

“...May not give lack of information or knowledge as a reason for failure to admit or deny unless the answering party states that reasonable inquiry has been made and that the information known or readily obtainable...is insufficient to enable the answering party to admit or deny.” ORCP 45 B.

HOW TO HANDLE INADEQUATE RFA RESPONSES

- ORCP 45 C allows for a motion to determine sufficiency
- Consequence may be that RFA is deemed admitted
DISCOVERY DISPUTES

- Attempt informal resolution before resorting to the court
- Make an earnest attempt at resolution, ideally in-person
- Sometimes disputes are reasonable
- Have a record of professional and reasonable communications

QUESTIONS?
Chapter 3

Presentation Slides: The Art and Science of Depositions

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THE ART AND SCIENCE OF DEPOSITIONS

David Eder | Joel Sturm
Thuemmel Uhle & Eder

In The Weeds

ORCP 39 – Depositions Upon Oral Examination
**The Highlights**

- **When** – After the service of summons OR the appearance of the defendant.
- **Who** – Anyone! May need a subpoena pursuant to ORCP 55.
- **How Long** – As long as it takes, but you only get one shot.
- **By Telephone** – you can do this (shrug emoji)
- **Recording** – By stenographer or other means but you must state how.

- **Review** – Deponent has a right to review and correct. MUST REQUEST. See section F for procedure
- **Exhibits** – Section G(3)
- **Failure to Appear** – Costs and reasonable attorney’s fees. Requires Notice of Deposition.

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**Deposition of Organization**

- **In Notice AND Suboena** – “describe with reasonable particularity the matters on which examination is requested”.

- **Organization will designate at least one deponent and the matters on which the deponent will testify.** At least 3 days before the depo date.
The Importance of Preparing your Client

- Attire
- Process
- Be Respectful
- Keep it Short and Simple
- Do Not Guess
- Ask for Clarification
- Topic Areas
- Pitfalls
- Objections
Objections

- Evidence will be taken subject to objections with the following exceptions:
  - When necessary to present or preserve a motion under section E (bad faith depos)
  - Court ordered limitation
  - To preserve a privilege or constitutional or statutory right

Your Preparations

“There’s no substitute for work, all the genius in the world, I don’t care who you are. If it's a Red Auerbach, a Jerry West, it doesn’t matter. You can’t replace work” - Danny Ainge

- What is this case about?
- Outlines or Topic Areas
- General Inquiries
- Specific Inquiries
RIDING GIANTS

What to do when you are in the middle of the maelstrom

RIDING GIANTS

- Be aware of the transcript
  - Exhibits
  - Self Contained Questions
  - Body Language
RIDING GIANTS

- Difficult Deponents
  - Be persistent: “I am entitled to an answer”
  - Leaving portions of the deposition open
- Be curious!

Wrapping up after Depositions

- Get to know opposing counsel
- Address any settlement or discovery issues
- Try to get an understanding of where the case is headed - trial or settlement
- What can you do to drive your case towards a positive result?
Chapter 4

Presentation Slides: Oregon State Court E-Filing: Tips and Traps

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Washington County Counsel
Hillsboro, Oregon
Oregon State Court

E-FILING: TIPS AND TRAPS

By Kimberly A. Stuart, Washington County

DISCLAIMER

- These opinions are my own and not the opinion of Washington County or the Office of County Counsel.
- This is not intended as legal advice. If in doubt, contact the court administrator or presiding judge of the court in question.
MAIN RULES & POLICIES FOR E-FILING

- UTCR CHAPTER 21
- ORAP CHAPTER 16
- OJD WEBSITE: https://www.courts.oregon.gov/services/online/Pages/efile.aspx
- Supplemental Local Rules details what may NOT be e-filed

MOST COMMON REASONS FOR REJECTION:

- Wrong filing codes
- No Certificate of Readiness (UTCR 5.100)
- No Filing fee or wrong fee
- Wrong amount of space for Judge’s signature
-Attached files too big
- Wrong envelope
- Wrong parties or changes to caption
- Outdated credit card
- Declaration of third party (not attorney) not wet-ink signed
Are you in trouble?!
Who you gonna call?!

- Don’t panic!
- Call for help
  - Court clerk’s office (Civil/Criminal)
  - Presiding Judge’s chambers
  - Trial court administrator
  - Tyler Technology Help Line – 877.874.8499 or e-file for Courts: 877.687.7870

You've been rejected: What's next?

You can relate back via letter [UTCR 21.080(5)]

Use the exact statutory form of letter
Tips to Prevent and Address Rejection

- Read the rules
- Call the Clerk in advance before filing if you have any questions
- Make sure your credit card information is current
- Save changes as you are filing
- Make sure your filing fits in the envelope – UTCR 21.040 – DOC size < 25MB
- Use the comment box
- If addressing a rejection, use same envelope
- File your relation back letter and docs within three days
- Do not procrastinate!!!
- Don’t be discouraged
Good luck with your filings!
Chapter 5

Presentation Slides: Mastering Key Pretrial Motions

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Key Pretrial Motions

1. Initial Motions attacking form/substance of Complaint
2. Discovery Motions limiting or compelling discovery
3. Summary Judgment Motions resolving or narrowing claims or issues
Attacking form or substance of the Complaint

Defenses that are waived if not raised in the initial response to the Complaint

- Motion to make more definite and certain. *ORCP 21 D; FRCP 12(e)*

- **Motion to Strike.** *ORCP 21 E; FRCP 12(f)*

- Motion to Dismiss for lack of personal jurisdiction, improper venue, insufficiency of process or service of process, another action pending between same parties (Oregon only). *ORCP 21 G; FRCP 12(h)*

Motions to Strike / More Definite and Certain

- **Use a motion to strike against sham, frivolous, or irrelevant pleading/defense.** *ORCP 21 E; see also FRCP 12(f)*

- **Use a motion to strike against sham, frivolous, irrelevant or redundant matter in a pleading.** *ORCP 21 E; FRCP 12(f)*

- Use a motion to make more definite and certain to clarify indefinite or uncertain allegations, especially damages in state court practice. *ORCP 21 D; FRCP 12(e)*

- Must comply with UTCR 5.020(2)
Attacking form or substance of the Complaint

- Defenses that the plaintiff has no legal capacity to sue and action is time barred will be waived if not included in initial response to Complaint or in subsequent amendment with heightened standard. ORCP 21 G(2)

- Lack of subject-matter jurisdiction is never waived. ORCP 21 G(4); FRCP 12(h)(3)

Attacking form or substance of the Complaint

- Defense of failure to state a claim is not waived as long as it is raised by the close of trial. ORCP 21 G(3); FRCP 12(h)(2)

- Motion to dismiss for failure to state a claim should be evaluated as part of initial response to complaint. ORCP 21 A(8); FRCP 12(b)(6)
Motion to Dismiss for Failure to State a Claim

A motion to dismiss for failure to state a claim asks the Court to dismiss a claim because, even accepting all well-pleaded allegations in the Complaint as true and giving the plaintiff the benefit of all favorable inferences that may be drawn from those allegations, the claim fails as a matter of law.  

*ORCP 21 A(8); FRCP 12(b)(6)*

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Motion to Dismiss for Failure to State a Claim

- Documents attached to or incorporated by reference in the Complaint may be considered.
- To survive a motion to dismiss for failure to state a claim, the Complaint must include allegations of material fact regarding each and every element of the claim.
Motion to Dismiss for Failure to State a Claim

Strategic and tactical considerations:
- Potential early end to case
- Narrowing of claims and issues
- Potential stay of discovery
- Settlement posture
- Cost
- May result in an amended & improved complaint
- Issues may be resolved unfavorably
- Assigned judge vs. Motions judge
- More persuasive at summary judgment

Final thoughts
- Remember to meaningfully confer
- May result only in an amended complaint pursuant to FRCP 15(a)(1)(B)
- Ask for oral argument
- Join other motions as required
- Review all applicable rules before filing
Discovery Disputes

Motions aimed at limiting discovery
- ORCP 36; FRCP 26(c)

Motions aimed at compelling discovery
- ORCP 46; ORCP 45 C; FRCP 37; FRCP 36(a)(6)

Limiting Discovery

Motion for Protective Order – ORCP 36 C
For good cause and to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, a Court may order limitations on discovery, including the following limitations:

- No discovery occur.
- Discovery be had only on specified terms & conditions.
- Discovery be had only by a certain method.
- Limiting scope of discovery.
Limiting Discovery

- Limiting who may be present during discovery.
- Limiting ability to open a deposition after it has been sealed.
- Protecting trade secret / confidential material from disclosure.
- Requiring certain documents or information to be filed under seal.
- Shifting cost burden of discovery.

The Court may award expenses incurred with the motion.  *ORCP 36 C; ORCP 46 A(4)*

Compelling Discovery

Motion to Compel – ORCP 46

- Failure to provide medical reports  
  *ORCP 44 B or C*
- Failure of deponent to answer a question  
  *ORCP 39; ORCP 40*
- Failure to make corporate designation  
  *ORCP 39 C(6); ORCP 40 A*
- Failure to produce or permit requested inspection  
  *ORCP 43*
- Failure to produce an insurance agreement  
  *ORCP 36 B(2)*
Compelling Discovery

Motion to Determine Sufficiency – ORCP 45 C

- Challenge answers or objections to Requests for Admission
- Court determines whether an objection to the RFA is justified and whether an answer to RFA complies with the requirements of ORCP 45 B.

Court may award moving party or opposing party the reasonable expenses, including attorney fees, incurred with a motion to compel or motion to determine sufficiency. ORCP 46 A(4); FRCP 37(a)(5)
Discovery Disputes

Final Thoughts
- Confer, Confer, Confer
- No choice but to seek Court assistance
- Remember – loser pays expenses
- Will the motion really advance the case?
- Protective order v. motion to compel?
- Be ready to handle mid-deposition disputes with a call to the Court

Narrowing or Resolving Claims & Issues

Motion for Summary Judgment – ORCP 47 C
- “No genuine issue as to a material fact exists if, based upon 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.”
- Standards differ between ORCP 47 and FRCP 56.
Motion for Summary Judgment

Burden of Persuasion and Proof
- Movant must demonstrate no genuine factual issue
- View facts in light most favorable to non-movant
- Movant bears the initial responsibility of identifying items of record which it believes demonstrate that there are no genuine issues of material fact

Burden shifts to non-movant only if:
- Movant demonstrates that their opponent bears the burden of proof for the claim at trial; and
- Non-movant lacks any evidence to support an essential element of that claim.
- The non-movant must then point to evidence that supports its claim
Motion for Summary Judgment

Partial Summary Judgment

- Court may grant summary judgment in the party’s favor on each claim or defense or any part of each claim or defense on which summary judgment is sought
- Does not produce “judgment” but leaves remaining parts of the case for trial or further resolution

Motion for Summary Judgment

Expert Opinions and ORCP 47 E

If an expert opinion is required to establish a genuine issue of material fact, then the attorney must provide an affidavit or declaration stating:

- “[A]n unnamed, qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact.”
Motion for Summary Judgment

Expert Opinions and ORCP 47 E
The attorney affidavit must be:
• Made in good faith
• Based on admissible facts or opinions obtained from a qualified expert
  • That expert has actually been retained
  • That expert is available and willing to testify
  • That expert has actually rendered an opinion or provided facts that would be a sufficient basis for denying the summary judgment motion

Motion for Summary Judgment

Strategic and Tactical Considerations
• Terminate litigation without a trial
• Narrow or eliminate issues for trial
• Force opponent to make evidentiary showing
• Dispose of particular claims or defenses
• Tipping your hand
• Exposing evidence and weaknesses
• Witness impeachment
• Summary Judgment for Opponent
• Cost
### Motion for Summary Judgment

**Final Thoughts**
- Consider an “early” motion
- Conduct discovery with an eye to summary judgment
- Watch the deadline for filing in state court—60 days prior to trial
- Different conferral requirements in state vs. federal courts
- Adverse party cannot rest on pleadings
- Make appropriate evidentiary objections
- Ask for oral argument
- Remember partial and offensive motions

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![QUESTIONS?](QUESTIONS?)
Chapter 6

Documenting Settlement Agreements:
Best (and Worst) Practices
Stanton Gallegos
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Adam Starr
Markowitz Herbold PC
Portland, Oregon
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Do you have an agreement and can you prove it?

~Know the rules of evidence and admissibility~

- **Oregon**
  - ORS 36.222: In any proceeding to enforce, modify or set aside a mediation agreement, confidential mediation communications and confidential mediation agreements may be disclosed to the extent necessary to prosecute or defend the matter.

- **Federal mediation privilege.**
  - Unclear whether it exists or what it covers.
  - Check local rules.

- **Mediator’s confidentiality agreements.**

- **California**
  - Evid. Code § 1119: all mediation communications and agreements are inadmissible.
  - Evid. Code § 1123: a settlement agreement prepared during mediation is admissible if it is signed by the parties and the agreement provides that it is enforceable or binding or words to that effect.

- **Washington (Uniform Mediation Act)**
  - RCW 7.07.030: mediation communications are privileged and inadmissible.
  - RCW 7.07.040: no privilege if a court finds that the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in a proceeding on a contract arising out of the mediation.

The “Term Sheet” problem.

*This term sheet is an enforceable and binding settlement agreement containing material terms of the agreement*

Email practices.
CONFIDENTIAL SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement ("Agreement") is entered into by and among Clark Kent ("Superman") on the one hand, and Kryptonite Chemical Company ("Kryptonite"), on the other. Superman and Kryptonite are at times referred to singularly as a "Party" and collectively as "Parties."

1. RECITALS

1.1. Superman represented Kryptonite in the matter Kryptonite v. Lex Luthor U.S.D.C. Central Dist. CA, Case No. 8:09-cv-00123-BRO-AN.

1.2. In or around May 2017, Superman filed a lawsuit against Kryptonite (U.S.D.C. Central Dist. CA. Case No. 2:17-cv-9876), alleging among other things, breach of its fee agreement, and asserting that Kryptonite failed to pay Superman amounts owed for representation in the underlying case (the "Action").

1.3. Kryptonite denies the claims in the Action.

In consideration of the Recitals, stated above, and the promises and undertakings set forth below, for other good and valuable consideration which the Parties agree is legally sufficient, and intending to be legally bound hereby, the Parties agree as follows.

2. SETTLEMENT PAYMENTS

2.1. Kryptonite shall pay to Superman $105,000 according to the following schedule:

2.1.1. $50,000 on or before Friday, August 25, 2017;

2.1.2. $20,000 on or before October 31, 2017;

2.1.3. $20,000 on or before November 30, 2017;

2.1.4. $15,000 on or before December 15, 2017 (collectively, the "Settlement Payments").

2.2. Payments shall be made to Superman by wire transfer (instructions to be provided by Superman at the time of execution of this Agreement) or sent to Superman, Attn: Wonder Woman, 999 Lois Lane, Suite 500, Los Angeles, CA. Payments shall be deemed made when tendered. Payments delivered by mail or overnight delivery shall be deemed tendered on the date mailed.

2.3. Notice & Dismissal. Superman shall immediately notify the Court in writing of the conditional settlement of the Action. Within 7 days of the Effective Date, the Parties will take all necessary actions to dismiss the Action with prejudice, and without costs or attorney fees to either Party.

1-SETTLEMENT AGREEMENT
2.4. **Interest.** In the event that Kryptonite fails to make any Settlement Payment, the entire remaining balance due under this Agreement shall immediately begin accruing interest at 10% per annum.

2.5. **Material Breach.** Kryptonite’s failure to make any Settlement Payment on or before the due date is a material breach. Upon such material breach, Superman has the right (but not the obligation) to escalate the remaining balance due under this Agreement and sue for the remaining balance owed.

3. **RELEASE AND WAIVER**

3.1. **Release by Superman.** Superman and each and all of his respective agents, representatives, attorneys, successors, and assigns (singularly and collectively, the “Superman Releasing Parties”) hereby fully, forever, and irrevocably release and discharge Kryptonite and each and all of its respective agents, representatives, attorneys, directors, officers, owners, principals, investors, insurers, members, managers, employees, affiliated companies and entities (singularly and collectively, the “Kryptonite Released Parties”) of and from any and all claims, demands, actions, liabilities, counter-claims, liens, obligations, damages, losses of services, expenses, costs, attorney fees, compensation of any nature whatsoever, and causes of action of any kind, whether in law or equity, of every nature, character, and description, whether known or unknown, anticipated or unanticipated, that the Superman Releasing Parties may now have, or ever may have had, against the Kryptonite Released Parties by reason of any act, omission, transaction, occurrence, conduct, or circumstance that has occurred through the Effective Date.

3.2. **Release by Kryptonite.** Kryptonite and each and all of its respective agents, representatives, attorneys, directors, officers, owners, principals, investors, insurers, members, managers, employees, affiliated companies and entities (singularly and collectively, the “Kryptonite Releasing Parties”) hereby fully, forever, and irrevocably release and discharge Superman and each and all of his respective agents, representatives, attorneys, successors, and assigns (singularly and collectively, the “Superman Released Parties”) of and from any and all claims, demands, actions, liabilities, counter-claims, liens, obligations, damages, losses of services, expenses, costs, attorney fees, compensation of any nature whatsoever, and causes of action of any kind, whether in law or equity, of every nature, character, and description, whether known or unknown, anticipated or unanticipated, that the Kryptonite Releasing Parties may now have, or ever may have had, against the Superman Released Parties by reason of any act, omission, transaction, occurrence, conduct, or circumstance that has occurred through the Effective Date.

3.3. **Released Matters.** The Releases identified above are collectively referred to as the “Released Matters.” The Parties agree the Released Matters do not include any liability or obligations created by this Agreement. Notwithstanding the foregoing, the Parties agree that the Released Matters include any claims arising from the negotiation and execution of this Agreement, including fraud in the inducement.

3.4. **Civil Code Section 1542 Waiver.** The releasing parties hereby knowingly and voluntarily understand that the release and discharge set forth herein is a general mutual release. The releasing parties expressly waive and assume the risk of any and all claims for damages that exist as of the Effective Date, but of which the releasing parties do not know or suspect to exist,
whether through ignorance, oversight, error, negligence, or otherwise, and which, if known, would materially affect either party’s decision to enter into this Agreement. The releasing parties assume the risk that the facts or law may be other than they believe. The releasing parties hereby expressly waive and relinquish any and all rights, if any, conferred upon them by the provisions of Section 1542 of the California Civil Code, which reads:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

4. GENERAL PROVISIONS

4.1. Incorporation of Recitals. The Recitals are incorporated by reference and made a part of this Agreement.

4.2. Effective Date. The Parties have executed this Agreement on August 21, 2017, and it shall be effective on such date (the “Effective Date”).

4.3. Further Documents. Each Party agrees to cooperate fully with the other Party and to execute such further instruments, documents and agreements and to give such further written assurances, as may be reasonably requested by any other Party to better evidence and reflect the transactions described herein and contemplated hereby, and to carry into effect the intents and purposes of this Agreement.

4.4. Mistake. The Parties have investigated the facts pertaining to the subject matters covered by this Agreement to the extent they deem necessary. In entering into this Agreement, the Parties assume the risk of mistake with respect to such facts. This Agreement is intended to be final and binding upon the Parties regardless of any claim of mistake.

4.5. Parties to Bear Own Costs. The Parties shall bear their own fees and costs for this dispute and the Action, including but not limited to attorneys’ fees, court costs, travel expenses, and all other expenses incurred in association with the Action.

4.6. No Admission of Liability. Each Party hereby acknowledges and agrees that this is a compromise settlement that is not in any respect, nor for any purpose, to be deemed or construed to be, or in any way used as evidence of, an admission of, or concession of, any liability whatsoever on the part of any person or entity. This settlement is solely to avoid the costs and uncertainties of litigation and does not reflect either Party’s opinion of the strength of its case. Neither this Agreement nor the fact of the settlement may be used by either Party as evidence in any proceeding, other than to enforce the terms of this Agreement.

4.7. Governing Law. California law shall exclusively apply with respect to the interpretation and enforcement of this Agreement.

4.8. Authority. The Parties hereto represent and warrant that their execution, delivery, and performances of this Agreement have been duly authorized by all necessary and
other corporate or equivalent action and are valid and binding upon such Party. Any individual signing this Agreement on behalf of a Party represents and warrants that he or she has full authority to do so. Each Party likewise represents and warrants that he is competent and has capacity to enter into this Agreement, and does so willingly, intentionally, and without undue influence from any person.

4.9. **Covenant not to Assign.** Each Party covenants and agrees that it has not, and will not, assign, transfer, or convey any rights, claims, actions, or causes of action, whether in law or equity, that they have or may have against any Party with respect to the subject of this Agreement.

4.10. **Severability.** If any provision or part of this Agreement is found by a court of competent jurisdiction to be overbroad, invalid, illegal, or otherwise unenforceable, this Agreement, including all of the remaining terms, shall remain in full force and effect as if such invalid or unenforceable term were never included.

4.11. **Integration.** This Agreement represents the only agreement between the Parties regarding the subject matter hereof, and supersedes all prior agreements, proposals, representations, arrangements or understandings, written or oral, with respect thereto.

4.12. **No Prior Representation.** Each of the Parties hereto acknowledges that no other party nor any agent or attorney of any party has made any promise, representation or warranty whatsoever, express or implied, not expressly contained herein, to induce that party to execute this Agreement and acknowledges that the Party has not executed the Agreement in reliance upon any promise, representation or warranty not contained herein.

4.13. **Binding on Successors.** This Agreement shall be binding on and inure to the benefit of the Parties and their parents, subsidiaries, affiliates, licensees, successors, and assigns.

4.14. **Consultation with Attorney.** Each of the Parties represents that it has consulted with an attorney of its choice concerning this Agreement prior to executing it. Each Party further represents that it has read this Agreement, fully understands its contents, and enters into this Agreement voluntarily and of its own free will.

4.15. **Waivers and Amendments.** This Agreement may be amended, modified, superseded, or canceled, and the terms and conditions hereof may be waived, only by a written instrument signed by the Parties hereto or, in the case of a waiver, by written instrument by the Party waiving compliance.

4.16. **Attorney Fees.** In any action to enforce the terms of this Agreement, the prevailing Party shall be entitled to recover its reasonable attorneys’ fees, experts’ fees, and costs incurred solely in connection with such future action.

4.17. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The Parties agree that signatures transmitted electronically, whether sent via facsimile or as attached files (e.g., PDF), shall be acceptable to bind the Parties and shall not in any way affect this Agreement’s validity.
4.18. **Headings.** All section headings herein are for convenience of reference only and are not part of this Agreement, and no construction or inference shall be derived therefrom.

4.19. **Construction.** This Agreement shall be deemed to have been jointly drafted by the Parties hereto and shall be construed in accordance with its fair meaning and not strictly against any Party. Except as expressly provided in this Agreement, the Parties expressly disclaim any intent to benefit any third parties under the terms of this Agreement.

IN WITNESS WHEREOF, each Party executes this Agreement by a duly authorized representative and acknowledges that it understands and agrees to be bound by this Agreement.

Superman

By: __________________________

 Clark Kent

Its: Authorized representative

Date: August 21, 2017

Kryptonite Chemical Corporation

By: __________________________

 Lex Luther

Its: General Counsel & Vice President, Legal

Date: August 21, 2017
CONFIDENTIAL SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement ("Agreement") is entered into by and among Good Guy on the one hand, and Bad Guy, on the other. Good Guy and Bad Guy are at times referred to singularly as a "Party" and collectively as "Parties."

1. RECITALS

1.1. In or around April 2016, Good Guy filed a lawsuit against Oswald Cobblepot ("The Penguin") alleging negligent construction with respect to the property commonly known as the Waugh Waugh Apartments (located at 1111 SW Ice Court, Gotham City, Oregon) (the "Property") (Oregon Circuit Court Case No. 16CV12345).

1.2. In or around June 2016, Waugh Waugh Apartments also filed a lawsuit against The Penguin alleging negligent construction with respect to the Property (Oregon Circuit Court Case No. 16CV54321).

1.3. In or around July 2016, Waugh Waugh Apartments filed an Amended Statement of Arbitration in Arbitration Services of Portland against Good Guy, Wayne Enterprises, and Bruce Wayne ("Batman") in connection with the sale of the Property from Good Guy to Waugh Waugh Apartments in June 2015 (ASP Case No. 56789).

1.4. In or around June 2016, Good Guy commenced a lawsuit against Bad Guy (D. Or. Case No. 3:16-cv-98765-SB), alleging breach of fiduciary duty and professional negligence in connection with the sale of the Property from Good Guy to Waugh Waugh Apartments ("Bad Guy Action").

1.5. The actions referenced about are collectively referred to as the "Actions."

1.6. Good Guy owns or will own, by the time of the settlement payment all claims previously owned by Waugh Waugh Apartments (including its members, affiliates, or agents) against Bad Guy related to the purchase and sale of the Property.

1.7. Bad Guy and Good Guy desire to settle all claims which they may have against each other in accordance with the provisions in this Agreement.

In consideration of the Recitals, stated above, and the promises and undertakings set forth below, for other good and valuable consideration which the Parties agree is legally sufficient, and intending to be legally bound hereby, the Parties agree as follows.

2. SETTLEMENT AMOUNT

2.1. Bad Guy shall pay to Batman $200,000 (the "Settlement Amount") within 28 days of the Effective Date (defined below). The Settlement Amount check shall be sent to Bruce Wayne, 3333 Cave Road, Gotham City, OR.
2.2. Within 7 days of receipt of the Settlement Amount, the parties will take all necessary actions to dismiss the Bad Guy Action with prejudice, and without costs or attorney fees to either party.

3. RELEASE AND WAIVER

3.1. Release by Good Guy. Good Guy, and as assignee of Waugh Waugh, and each and all of its respective agents, representatives, attorneys, successors, heirs, assigns, insurers, employees, and affiliated companies and entities, including but not limited to Wayne Enterprises and Batman (singularly and collectively, the “Good Guy Releasing Parties”) hereby fully, forever, and irrevocably release and discharge Bad Guy and each and all of its respective agents, representatives, attorneys, directors, officers, owners, principals, investors, insurers, members, managers, employees, affiliated companies and entities, successors and heirs, (singularly and collectively, the “Bad Guy Released Parties”) of and from any and all claims, demands, actions, liabilities, counter-claims, liens, obligations, damages, losses of services, expenses, costs, attorney fees, compensation of any nature whatsoever, and causes of action of any kind, whether in law or equity, of every nature, character, and description, whether known or unknown, anticipated or unanticipated, that the Good Guy Releasing Parties may now have, or ever may have had, against the Bad Guy Released Parties by reason of any act, omission, transaction, occurrence, conduct, or circumstance that has occurred through the Effective Date related to the Property or the Actions.

3.2. Release by Bad Guy. Bad Guy, and each and all of its respective agents, representatives, attorneys, directors, officers, owners, principals, investors, members, managers, employees, affiliated companies and entities, successors, heirs and assigns, (singularly and collectively, the “Bad Guy Releasing Parties”) hereby fully, forever, and irrevocably release and discharge Good Guy, and each and all of its respective agents, representatives, attorneys, successors, heirs, assigns, insurers, employees, and affiliated companies and entities, including but not limited to Wayne Enterprises and Batman, (singularly and collectively, the “Good Guy Released Parties”) of and from any and all claims, demands, actions, liabilities, counter-claims, liens, obligations, damages, losses of services, expenses, costs, attorney fees, compensation of any nature whatsoever, and causes of action of any kind, whether in law or equity, of every nature, character, and description, whether known or unknown, anticipated or unanticipated, that the Bad Guy Releasing Parties may now have, or ever may have had, against the Good Guy Released Parties by reason of any act, omission, transaction, occurrence, conduct, or circumstance that has occurred through the Effective Date related to the Property or the Actions.

3.3. Released Matters. The Releases identified above by the Good Guy Releasing Parties and the Bad Guy Releasing Parties are collectively referred to as the “Released Matters.” The Parties agree the Released Matters do not include any liability or obligations created by this Agreement. Notwithstanding the foregoing, the Parties agree that the Released Matters include any claims arising from the negotiation and execution of this Agreement, including fraud in the inducement.
4. **CONFIDENTIALITY AND NON-DISPARAGEMENT**

4.1. **Confidentiality.** The parties agree to keep the terms of this settlement confidential with the following limited and exclusive exceptions: (1) with regard to the settlement, the parties can tell others that the dispute has been settled in a mutually satisfactory manner; (2) the parties can tell others that there was no determination or finding of wrongdoing by either or any party, or words to that effect; and (3) the parties may disclose the terms of this agreement to their spouses and to their present insurers and/or present or former legal and accounting representatives for business or tax purposes but such disclosure may be made only after any such person agrees to abide by the requirement of confidentiality contained herein, with written notification and approval of the non-disclosing party. The Parties specifically agree that the terms of this Agreement shall not be disclosed to: (i) Christen Bale including his principals, affiliates, members, lawyers, insurers, or consultants, including but not limited to Alfred Pennyworth, Dick Grayson Robin, and Cat Woman; and (ii) Waugh Waugh Apartments, including its affiliates, principals, members, attorneys, or insurers including but not limited to The Joker and Harley Quinn.

4.2. **Non-Disparagement.** The Parties, including their members, management, and principals, agree not to make any statements, either oral or written, or take any other actions that disparage each other.

4.3. **Indemnification.** Wayne Enterprises shall defend and indemnify Bad Guy from any claims made by Waugh Waugh Apartments against Bad Guy that are or were assigned by Waugh Waugh Apartments to Wayne Enterprises.

5. **GENERAL PROVISIONS**

5.1. **Incorporation of Recitals.** The Recitals are incorporated by reference and made a part of this Agreement.

5.2. **Effective Date.** The Parties have executed this Agreement as of the dates set forth below, and it shall be effective on the latest of such dates (the “Effective Date”).

5.3. **Further Documents.** Each Party agrees to cooperate fully with the other Party and to execute such further instruments, documents and agreements and to give such further written assurances, as may be reasonably requested by any other Party to better evidence and reflect the transactions described herein and contemplated hereby, and to carry into effect the intents and purposes of this Agreement.

5.4. **Mistake.** The Parties have investigated the facts pertaining to the subject matters covered by this Agreement to the extent they deem necessary. In entering into this Agreement, the Parties assume the risk of mistake with respect to such facts. This Agreement is intended to be final and binding upon the Parties regardless of any claim of mistake.

5.5. **Parties to Bear Own Costs.** The Parties shall bear their own fees and costs for this dispute and the Actions, including but not limited to attorneys’ fees, court costs, travel expenses, and all other expenses incurred in association with the Actions.

3-SETTLEMENT AGREEMENT
5.6. **No Admission of Liability.** Each Party hereby acknowledges and agrees that this is a compromise settlement that is not in any respect, nor for any purpose, to be deemed or construed to be, or in any way used as evidence of, an admission of, or concession of, any liability whatsoever on the part of any person or entity. This settlement is solely to avoid the costs and uncertainties of litigation and does not reflect either Party’s opinion of the strength of its case. Neither this Agreement nor the fact of the settlement may be used by either party as evidence in any proceeding, other than to enforce the terms of this Agreement.

5.7. **Governing Law.** Oregon law shall exclusively apply with respect to the interpretation and enforcement of this Agreement.

5.8. **Authority.** The Parties hereto represent and warrant that their execution, delivery, and performances of this Agreement have been duly authorized by all necessary and other corporate or equivalent action and are valid and binding upon such Party. Any individual signing this Agreement on behalf of a Party represents and warrants that he or she has full authority to do so. Each Party likewise represents and warrants that he is competent and has capacity to enter into this Agreement, and does so willingly, intentionally, and without undue influence from any person.

5.9. **Covenant not to Assign.** Each Party covenants and agrees that it has not, and will not, assign, transfer, or convey any rights, claims, actions, or causes of action, whether in law or equity, that they have or may have against any Party with respect to the subject of this Agreement.

5.10. **Severability.** If any provision or part of this Agreement is found by a court of competent jurisdiction to be overbroad, invalid, illegal, or otherwise unenforceable, this Agreement, including all of the remaining terms, shall remain in full force and effect as if such invalid or unenforceable term were never included.

5.11. **Integration.** This Agreement and its exhibits represents the only agreement between the Parties regarding the subject matter hereof, and supersedes all prior agreements, proposals, representations, arrangements or understandings, written or oral, with respect thereto.

5.12. **No Prior Representation.** Each of the Parties hereto acknowledges that no other party nor any agent or attorney of any party has made any promise, representation or warranty whatsoever, express or implied, not expressly contained herein, to induce that party to execute this Agreement and acknowledges that the Party has not executed the Agreement in reliance upon any promise, representation or warranty not contained herein.

5.13. **Binding on Successors.** This Agreement shall be binding on and inure to the benefit of the Parties and their parents, subsidiaries, affiliates, licensees, successors, and assigns.

5.14. **Consultation with Attorney.** Each of the Parties represents that it has consulted with an attorney of its choice concerning this Agreement prior to executing it. Each Party further represents that it has read this Agreement, fully understands its contents, and enters into this Agreement voluntarily and of its own free will.

4-SETTLEMENT AGREEMENT
5.15. **Waive/Risk.** Except as otherwise provided in this Agreement, the Parties expressly waive and assume the risk of any and all claims for damages which exist as of the Effective Date, but of which the Parties do not know or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise, and which, if known, would materially affect the Parties’ decision to enter into this Agreement, and assume the risk that the facts or law may be other than they believe.

5.16. **Waivers and Amendments.** This Agreement may be amended, modified, superseded, or canceled, and the terms and conditions hereof may be waived, only by a written instrument signed by the Parties hereto or, in the case of a waiver, by written instrument by the Party waiving compliance.

5.17. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The Parties agree that signatures transmitted electronically, whether sent via facsimile or as attached files (e.g., PDF), shall be acceptable to bind the Parties and shall not in any way affect this Agreement’s validity.

5.18. **Headings.** All section headings herein are for convenience of reference only and are not part of this Agreement, and no construction or inference shall be derived therefrom.

5.19. **Construction.** This Agreement shall be deemed to have been jointly drafted by the Parties hereto and shall be construed in accordance with its fair meaning and not strictly against any Party. Except as expressly provided in this Agreement, the Parties expressly disclaim any intent to benefit any third parties under the terms of this Agreement.

5.20. **Settlement Czar.** Commissioner Gordon is appointed as arbiter of any disputes amongst the parties concerning the further memorialization of this agreement, and has the power to decide such disputes in a binding and summary way, in his discretion.

IN WITNESS WHEREOF, each Party executes this Agreement by a duly authorized representative and acknowledges that it understands and agrees to be bound by this Agreement.

GOOD GUY INVESTORS, LLC
By: Wayne Enterprises, LLC,
its Manager

By: ___________________________
Bruce Wayne, its Manager

Date: February 3, 2017

BAD GUY INVESTMENT REAL ESTATE LLC
By: ___________________________
Oswald Cobblespot
Its: Authorized Representative

Date: February 3, 2017
John,

The parties have an enforceable deal on two material terms: payment + mutual general releases. The email chain alone creates a binding, enforceable settlement.

The settlement agreement you sent, which was supposed to formally memorialize the parties' agreement: does not include mutual releases (it contains a super broad release on behalf of Plaintiff, and a very narrow release on behalf of Defendant), and it contains a myriad of terms that are not part of the parties' agreement, including confidentiality, non-disparagement, and prevailing party attorneys fees. Those terms are not part of the parties' enforceable agreement.

The email is the contract. For example, in **Joao Control & Monitoring Sys., LLC v. ACTi Corp. Inc.**, No. SACV101909DOCRNBX, 2012 WL 13018363 (C.D. Cal. May 18, 2012), the Court held a series of attorney emails created a binding settlement agreement:

“It is well-established that a contract exists if the parties have agreed ... upon the essential terms ..., even though a formal instrument is to be prepared and signed later. . . . For this reason, California courts and federal courts applying California law regularly enforce settlement agreements that contemplate the writing of a future, formal agreement, even if that formal agreement is never finalized.” **Joao Control & Monitoring Sys., LLC v. ACTi Corp. Inc.**, No. SACV101909DOCRNBX, 2012 WL 13018363, at *4 (C.D. Cal. May 18, 2012) (internal quotations and citations omitted) (enforcing email settlement agreement).
Hi Adam,

Attached is a draft of the Settlement Agreement for your review. Please advise.

John

John - Plaintiff accepts the offer. Please send over a formal agreement memorializing our deal.

Thank you,

Adam

Adam M. Starr | Shareholder
Markowitz Herbold PC
1211 SW Fifth Avenue, Suite 3000 | Portland, OR 97204-3730
T (503) 295-3085 | D (503) 274-7424 | Bio | Web | LinkedIn | Vcard
Licensed in California, Oregon and Washington

Adam, I’m authorized to offer $315,000 at this time. My client has now increased more dollar for dollar than your reductions and is becoming extremely
resistant. Please let me know. A mutual release is fine. I will have to draft the agreement as my client insists on it.

Thanks,
John

From: Adam Starr
Sent: Tuesday, March 1, 2019 5:07 AM
To: John Smith <jsmith@js.com>
Cc: Michelle Robles <michellerobles@markowitzherbold.com>
Subject: RE: Plaintiff v. Defendant - confidential settlement communications

Plaintiff will accept $320,000 to settle this matter, payment in 14 days, plus mutual general releases. This offer expires March 13 at 5 pm PT.

From: John Smith [mailto:jsmith@js.com]
Sent: Thursday, February 28, 2019 11:54 AM
To: Adam Starr <adamstarr@markowitzherbold.com>
Cc: Michelle Robles <michellerobles@markowitzherbold.com>
Subject: RE: Plaintiff v. Defendant - confidential settlement communications

Hi Adam,

We have had some changes internally which have caused the delay in getting back to you. So thank you for your patience. I was finally able to speak with my client who has authorized me to communicate a counter offer. At this time, my client offers $300,000 for settlement of this matter. This is a significant increase over our last offer. Please let me if you like to discuss on a call.

Thank you.
John
Chapter 7

Presentation Slides: How to Prepare for and Present a Powerful Closing Argument

GRETCHEN MANDEKOR
Rosenbaum Law Group PC
Portland, Oregon
Chapter 7—Presentation Slides: How to Prepare for and Present a Powerful Closing Argument

HOW TO PREPARE FOR & PRESENT A POWERFUL CLOSING ARGUMENT

WHERE TO BEGIN?

- WHEN TO BEGIN PREPARING FOR CLOSING ARGUMENT
- HOW TO BEGIN PREPARING FOR CLOSING ARGUMENT
- WHAT TO DO TO BEGIN PREPARING FOR CLOSING ARGUMENT
FOCUS ON YOUR THEME

● WHAT DO YOU WANT THE JURY TO DO
● HOW TO CONVINCE THEM TO DO IT

INCORPORATE TIDBITS FROM TRIAL

• Testimony the jury HEARD from witnesses
• Highlight snippets from exhibits the jury SAW
• SHOW demonstratives again
• DESCRIBE what the jury observed
• GET THE JURY’S ATTENTION
KEEP THE JURY AWAKE!

DO NOT STAND IN FRONT OF A PODIUM
DO NOT READ VERBATIM FROM NOTES
DO NOT SUMMARIZE ALL EVIDENCE

KEEP THE JURY ENGAGED & INTERESTED

- Keep it SHORT & concise
- DO NOT overstate or exaggerate
- NO personal attacks
- ENGAGE – be passionate yet true to your own style
- ASK questions for them to ponder & discuss
ADDRESS PROBLEMS & WEAKNESSES

- **DO NOT** ignore problems & weaknesses
- **ADDRESS** bad facts & explain them
- **DO NOT** spend too much time on problems
- **EXPLAIN** the insignificance
- TURN THE TABLE on the other side

DRAW ATTENTION TO JURY INSTRUCTIONS

- Highlight key jury instructions
- Inform the jury about the process
- Educate them about the verdict form
END ON A STRONG NOTE

• DO NOT ramble on about the civil justice system
• DO NOT waste the jury’s time
• LAUNCH right into it
• SUM IT ALL UP
• FINAL words are key
## Chapter 8

**Show Me the Money—Obtaining and Collecting Your Client’s Judgment**

**John Bachofner**

Jordan Ramis PC
Vancouver, Washington

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1The author gratefully acknowledges the assistance of Russ Garrett in the preparation of these materials.
I. OBTAINING A JUDGMENT

A. Pre-Suit Considerations

1. Cost Benefit Analysis, including recovery of legal costs and fees.

2. Risk of Counterclaim.

3. Jurisdiction and forum.
   (a) State Court
   (b) Federal Court
   (c) Bankruptcy Court. An unsecured creditor should consider filing an involuntary petition.

4. Proper Parties.
   (a) Partnership
   (b) Limited Liability Company
   (c) Spouses
   (d) Community Property

5. NEW UTCR 5.180 Consumer Debt Collection Requirement.

   In 2019, the Uniform Trial Court Rules Committee added UTCR 5.180, which places additional obligations in Oregon State court actions to collect a debt.

   (a) Any action for collection of a debt under ORS 646A.670, when the plaintiff is either a debt-buyer or is a debt collector as defined in ORS 646.639 bringing the action on a debt-buyer’s behalf must include in the title: “SUBJECT TO ORS 646A.670(1) and UTCR 5.180(2)”

   (b) In the body (presumably the complaint), include a statement to the effect: “See the Oregon Judicial Department’s website for information about debt-collection cases”

   (c) Attach and incorporate by reference in the Complaint a completed Consumer Debt Collection Disclosure Statement in substantially
the same form as set forth in http://www.courts.oregon.gov/Pages/default.aspx), including a statement that the plaintiff has complied with ORS 646A.670(1).

(d) If the pleading does not comply with the rule, written notice is given to the plaintiff that the case will be dismissed 30 days from the date of mailing the notice unless the plaintiff has complied with the rule by that time.

(e) If the plaintiff moves for entry of a judgment of default, the motion must include a declaration, under penalty of perjury, that the initial pleading complied with ORS 646.670(1).

PRACTICE TIP: Some courts are rejecting complaints for collection of non-consumer debts as non-compliant with UTCR 5.180. If you are filing a non-consumer case to which UTCR 5.180 does not apply, consider including language in the title similar to the following: “Consumer Collection – Not Subject to ORS 646A.670(1) or UTCRT 5.180(2).” In that manner, a clerk may be less inclined to send a notice.

NOTE: The Federal Servicemembers Civil Relief Act, 50 USC §3901 et seq. (“SCRA”) is intended to protect members of the armed forces who are on active duty and can have significant effect on the availability of default judgments, other judicial proceedings, and even interest rates. In 2009, the Oregon legislature enacted HB 2303 (codified in ORS 30.136 – 30.138), which enhanced the SCRA to:

1) Exclude applicable persons from court-ordered arbitration unless stipulated to after the action is commenced;

2) Make forum selection clauses designating a forum other than Oregon voidable by servicemembers who are residents of or reside in Oregon;

3) Expand remedies available to servicemembers for violations of the SCRA;

4) Apply the SCRA to Oregon’s Unlawful Trade Practices Act in ORS 646.605 – 646.652, thereby creating a private cause of action for violation of the SCRA; and

5) Extend certain protections under the SCRA to disabled veterans, disabled service members, and their spouses.

In 2019, legislature amended the statute to reflect federal code reorganization that changed the SCRA to 50 USC §3901. To determine whether a person or their spouse is active military, consult one of many websites that provide that information. The Department of Defense provides that information free of charge at: https://www.dmdc.osd.mil/appj/dwp/status_finder.jsp.
6. **Merits of Case:**

   (a) Summary Judgment

   (b) Sanctions

7. **Alternatives to Litigation:**

   (a) Negotiation (confession of judgment, stipulated judgment or other agreement)

   (b) Alternative Dispute Resolution (arbitration and mediation)

B. **Remedies Available**

   (a) Account stated. An account stated is an agreement between parties that a certain amount is owing and will be paid.

   (b) Accounts. An action on account is an action of assumption for a debt for the recovery of money for services performed, property sold and delivered, money loaned, or damages for the nonperformance of a simple contract, express or implied, when the rights of the parties will be adequately conserved by the payment and receipt of money.

   (c) Goods Sold and Delivered

   (d) Breach of Contract

2. **Equitable Remedy.**

   (a) Quantum Merit or restitution

   (b) Avoidance

3. **Other Remedies.**

   (a) Reclamation

C. **Discovery**

   1. **When?** Discovery should be conducted as soon as possible. It allows the plaintiff to evaluate the case and determine the resolve of the defendant. Moreover, sometimes discovery can lead to settlement.
2. **What type of Discovery?**

   (a) Documents Needed

   (b) Depositions

   (c) Other Discovery

D. **Defenses/Counterclaims**

1. **Statute of Limitations and Statute of Repose.**

   (a) Contract Claims: Six years.

      (i) Account Stated

      (ii) Accounts

      (iii) Goods Sold and Delivered

      (iv) Breach of Contract

   (b) Torts: Two years.

      (i) Misrepresentation

      (ii) Intentional Interference with a business or contractual relationship

      (iii) Holder and in due course

2. **Breach of Warranties.**

   (a) Express Warranty

   (b) Implied warranty of merchantability

   (c) Implied warranty for particular purpose

E. **Judgment - Forms of Judgment created in 2003 (ORS 18.005 et. seq.)**

1. **Definitions (ORS 18.005).**

   • **Judgment document** – a writing in the form provided by ORS 18.038 that incorporates a court’s judgment.
- **Judgment** – the concluding decision of a court on one or more requests for relief in one or more actions, as reflected in a judgment document. The term “Decree” is largely obsolete.

- **General judgment** – the judgment entered by a court that decides all requests for relief in the action except: (1) a request for relief previously decided by a limited judgment; and (2) a request for relief that may be decided by a supplemental judgment.

- **Limited judgment** – a judgment rendered before entry of a general judgment in an action that disposes of at least one entire request for relief, but fewer than all requests for relief in the action, and that is rendered pursuant to a statute or other source of law that specifically authorizes disposition of fewer than all requests for relief in the action. The term limited judgment includes:

  1. A judgment entered under ORCP 67 B or ORCP 67 G;
  2. A judgment entered before the conclusion of an action in a circuit court for the partition of real property, defining the rights of the parties to the action and directing sale or partition; and
  3. An interlocutory judgment foreclosing an interest in real property.

- **Supplemental Judgment** – a judgment that by law may be rendered after a general judgment has been entered in the action and that affects a substantial right of a party. It may only contain provisions that were not included in the general judgment. ORS 18.031.

- **Corrected Judgment** – ORS 18.107 provides the mechanism for correcting a judgment. If the corrected judgment affects the substantial rights of a party, a new appeal period commences. Under this provision, corrections made to a judgment after the appeal period has expired on the original judgment gives the other party another full 30-day appeal period. However, the new appeal period applies only to the corrected provisions of the judgment and any portions affected by the correction.

- **Money Award** – the term “money award” replaces what previously was called a “money judgment.” A money award is a judgment, or portion of a judgment, that requires the payment of money and may only constitute part of the judgment. A “support
award” is a specific type of money award and includes child and spousal support.

- **Execution** – execution is now defined to include only the enforcement of money awards or judgments for delivery of specific real or personal property by writs and other remedies.

- **Civil Action** – a civil action is a proceeding in which a judgment can be rendered that is not a criminal action.

- **Claim** – this term formerly applied to judgments in both criminal and civil actions. In 2006, it was replaced by the phrase “request for relief.”

- **Request for Relief** – this phrase replaces the former term “claim.” It refers to a claim, a charge in a criminal action, or any other request for a determination of the rights and liability of one or more parties in an action that a legal authority allows the court to decide by a judgment.

2. **Requirements for Different Types of Judgments**

   (a) For All Judgments (ORS Ch. 18, ORCP 70A)

   1. A Judgment Document must be “plainly titled as a judgment.”

   2. The title must indicate whether the Judgment Document is a Limited Judgment, a General Judgment, or a Supplemental Judgment.

   3. The Judgment Document must be separate from any other document in the action, but you may attach to the Judgment Document affidavits, certificates, motions, stipulations, and exhibits “as necessary or proper in support of the judgment.”

   4. The Judgment Document must include:

   a. The name of the court rendering the judgment and the case number or other identifiers used by the court for the action;

   b. The names of any parties in whose favor the judgment is given and the names of any parties against whom the judgment is given;
c. The signature of the judge rendering the judgment (or of the court administrator if the administrator is authorized by law to sign the judgment document), and the date the judgment document is signed.

5. If the Judgment awards money, it must include a “Money Award” section. See Section (e) below.

6. All Judgments and Orders submitted must also include a Certificate of Readiness. UTCR 5.100.

(b) Limited Judgments

1. Must include all elements in section (a) above;

2. Must be titled “Limited Judgment”; and

3. Must clearly state which claim(s) is(are) being resolved.

4. It is no longer necessary to include language in a Limited Judgment stating that the Judge has determined that there is no just reason for delay, as long as the Judgment Document is titled “Limited Judgment” (This is a change from former ORCP 67B, which required the magic language to be included in order for a judgment on fewer than all claims against all parties to be final. A judgment titled “Limited Judgment” is, by definition, a determination by the court that it has been determined that there is no just reason for delay.)

5. If a Limited Judgment includes a Money Award, it must include the elements in section (e) below.

(c) General Judgments

1. Must include all elements in section (a) above; and

2. Must be titled “General Judgment.”

3. A General Judgment need not recite what happened to claims resolved by a prior Limited Judgment.

4. If a General Judgment includes a Money Award, it must include the elements in section (e) below.
(d) Supplemental Judgments

1. Must include all elements in section (a) above; and

2. Must be titled “Supplemental Judgment.”

3. If a Supplemental Judgment includes a Money Award, it must include the elements in section (e) below.

(e) Money Awards in Judgment Documents

1. A Judgment Document that includes an award of money but does not include a “MONEY AWARD” section is enforceable, but it does not create an automatic judgment lien.

2. To create a judgment lien, a Judgment Document must include a section titled “MONEY AWARD” immediately above the Judge’s signature. This section is loosely styled after ORCP 70A. Failure to include “MONEY AWARD” does not render the judgment unenforceable, it only precludes the lien effect.

3. The “MONEY AWARD” section of a Judgment Document must include all of the following information, in the following order pursuant to ORS 18.042. That statute was amended by 2015 Oregon Laws Ch. 298 §82 to exempt foreign judgments and support orders from such requirements. Applicable MONEY AWARDS should provide:

   a. The name and address of each judgment creditor and the name, address, and telephone number of any attorney who represents one or more of the judgment creditors

   b. The name of each judgment debtor and, to the extent known by the judgment creditor, the address, year of birth, last four digits of the social security or tax identification number, last four digits of the drivers license number and state of issuance, and name of any attorney for each judgment debtor – but note that if we represent a public body, we cannot include the social security number or drivers license number of a judgment debtor if disclosure would violate state or federal law. (Also note that privacy issues with regard to use of social security numbers may affect this provision.) See SB 240, Oregon Laws 2009, Ch 230,
regarding limitations on personal identification information in judgments.

c. ORS 18.042 requires that a Judgment only include the year of the judgment debtor(s)’ birth, instead of the birth date, and list only the last four digits of the judgment debtor(s)’ social security number, and last four digits of the drivers’ license number.

d. The name of any person or public body other than the judgment creditor’s attorney that is known by the judgment creditor to be entitled to any portion of the money award

e. The amount of the money award (stated separately from amounts of interest and other payments owed)

f. Any interest owed as of the date the judgment is entered in the register, either as a specific amount or as accrual information, including the rate or rates of interest, the balance or balances on which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded and, if compounded, at what intervals

g. Information about interest that accrues on the judgment after entry in the register, including the rate or rates of interest, the balance or balances on which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded and, if compounded, at what intervals

h. For monetary obligations payable on a periodic basis, any accrued arrearages, required further payments per period, and payment dates

i. If the judgment requires payment of costs and disbursements or attorney fees, a statement indicating that the award is made, any specific amounts awarded, a clear identification of the specific claims for which any attorney fees are awarded and the amount of attorney fees awarded for each claim
(f) Responsibility for Preparing a Judgment Document (ORS 18.035)

1. The Judge is supposed to designate the party who should prepare the Judgment Document.

2. If the Judge fails to designate a party, the prevailing party must prepare the proposed Judgment Document; if there is more than one prevailing party, the prevailing parties must reach an agreement as to who will prepare the Judgment Document.

3. Nothing in the first two rules is intended to prevent any party from preparing and submitting a proposed Judgment Document. Be certain to comply with UTCR 5.100 regarding notice!

4. Certificate of Readiness. With the implementation of electronic filing, UTCR 5.100 was amended to include new provisions for Notice and to require that a Certificate of Readiness be attached to any order or Judgment.

One example of a Certificate of Readiness is as follows:

CERTIFICATE OF READINESS – COMPLIANCE WITH UTCR 5.100

I certify that I have complied with UTCR 5.100, and the submission of this Proposed [Order/Judgment] is ready for judicial signature because: (check all that apply):

[ ] I served on opposing counsel not less than three 3 days prior to submission to the court, a true copy of the attached [Order/Judgment]; or

[ ] I mailed to a self-represented party at the party's last known address not less than 7 days prior to submission to the court a true copy of the attached [Order/Judgment], accompanied by notice of the time period to object.

This proposed order or judgment is ready for judicial signature because:

[ ] Each party affected by this proposed [Order/Judgment] has stipulated to [Order/Judgment] as shown by their signature on the document being submitted.

[ ] Each party affected by this proposed [Order/Judgment] has approved its form as shown by their signature on the document being submitted or by an oral or written confirmation of approval sent to me.

[ ] I have served a copy of this proposed [Order/Judgment] on all parties entitled to service as required by UTCR 5.100 and:

a. [ ] No objection has been served on me.
b. [ ] I received objections that I could not resolve with the opposing party despite reasonable efforts to do so. I have filed a copy of the objections I received and indicated which objections remain unresolved.

c. [ ] After conferring about objections, [role and name of opposing party] agreed to independently file any remaining objection.

[ ] The relief sought is against an opposing party who has been found in default.

[ ] An order of default is being requested with this proposed judgment.

[ ] Service is not required pursuant to subsection (3) of this rule, or by statute, rule, or otherwise.

[ ] This is a proposed judgment that includes an award of punitive damages and notice has been served on the Director of the Crime Victims’ Assistance Section as required by subsection (4) of this rule.

By: __________________________
    John R. Bachofner, OSB # 881524

Failure to include a Certificate of Readiness will result in the Order or Judgment being rejected.

3. **Effect of Entry of a Judgment and of Using the Wrong Kind of Judgment**

   (a) Effect of Entry of a Judgment

   1. When a Judgment is entered, it becomes “the exclusive statement of the court’s decision” and governs the rights and obligations of the parties.

   2. A General Judgment incorporates a previous written decision of the court that decides one or more claims and that (1) is not a judgment; (2) is consistent with the terms of the General Judgment and any Limited Judgments in the case; and (3) reflects an express determination by the court that the decision be final as to the claim or claims resolved.
(b) Effect of Using the Wrong Kind of Judgment

1. If a Judgment Document is filed with the Court Administrator and does not state whether it is a Limited Judgment, a General Judgment, or a Supplemental Judgment, and the Court Administrator fails to comply with the requirement that he or she return it to the Judge and instead, makes an entry in the register that a Judgment Document was filed, the Judgment Document has the effect of a General Judgment.

2. When a General Judgment is entered, any claim in the action that is not decided by the General Judgment, or by a previous Limited Judgment, and cannot be decided by a Supplemental Judgment, is dismissed with prejudice unless the judgment document provides that the dismissal is without prejudice.

3. This result does not apply to a general judgment of dismissal – a general judgment of dismissal is without prejudice as to any claim, unless it specifies that it is with prejudice.

4. Judgment Liens

- As discussed above, in order to create a judgment lien, the Judgment Document must include a “MONEY AWARD.” Assuming there is a MONEY AWARD, and the court administrator notes the information in the register, then the judgment creates a judgment lien. ORS 18.042. The effect of the lien is substantially the same as under former law – see former ORS 18.350. The lien attaches to “all real property” of the debtor in the county in which the judgment is entered. Unlike other jurisdictions, Oregon continues to maintain that judgment liens do not attach to equitable interests in property.

- The statutes also distinguish between support awards and money awards that are not support awards. Support awards typically are obligations that occur in the future. The law makes clear that a lien for a support award is not an actual lien, but merely exists a cloud on the title to property owned by the judgment debtor. Until the judgment debtor misses a payment on a support award, no judgment amount exists for which a lien may attach. Accordingly, for priority purposes, or otherwise, no actual lien exists.

5. Res judicata effect of Judgment
6. **Bankruptcy issues related to judgment**
   
   (a) Nondischargeability

   (b) Avoidance Concerns

F. **Attorney Fees**

1. **Damage Limit**

   (a) Torts: Increased to $10,000 effective January 1, 2012. ORS 20.080. Note: Includes 30 day notice and substantiation requirements for pre-suit demands.

   (b) Contracts without Attorney Fee provision: Increased to $10,000 effective January 1, 2010. ORS 20.082. Note: Includes 20 days notice for pre-suit demand.

   (c) Washington: $10,000. RCW 4.84.250.

2. **Contract**

   (a) Evaluate the scope of attorney fee provision

G. **Practical Approach to Problems**

1. **Temper overzealous clients.** Resist the temptation of a client to throw good money after bad money. In other words, assess the likelihood of recovery and advise client accordingly.

2. **Thorough analysis of the claim.** Often when a client comes to a lawyer, the client wants immediate action. You should resist the urgency created by a client and spend the necessary time to complete a thorough analysis of the client’s claim.

3. **Develop a budget.** Identify what needs to be done and costs of accomplishing those tasks. You can share this strategy and budget with a client.

4. **Keep the pressure on.** A creditor who pressures a debtor usually gets paid before other creditors.

5. **Send confirmation letter to clients regarding risks and costs.**
6. **Consider resources from clients.**
   - What is in file?
   - Credit Application
   - Account information
   - Contact information
   - What learn through drive by?
   - Brainstorm various methods of gaining information
     - Purchase product
     - letter with forwarding address
     - Internet searches
   - Ask: Where does debtor get paid and who owes them money?

H. **Stay of Enforcement**

   - The filing of an appeal does not automatically stay a Judgment that is the subject of the appeal. In order to stay enforcement of the Judgment absent bankruptcy, a party must generally seek a stay through the filing of a supersedeas undertaking or bond. ORS 19.330; 19.335. See also ORS 19.340 [waiver of undertaking]; ORS 19.345 [Enforcement in contract action]; ORS 19.350 [Discretionary stay by court].
   - Supersedeas undertaking for transfer of real property requires payment for use and occupation of property.
   - Supersedeas undertaking for transfer of personal property requires compliance upon affirmation of Judgment or payment of amount stated.
   - Judgment for transfer of personal property can be stayed by delivery to court or officer or receiver appointed by court.

I. **Correcting a Judgment**

   - See I.E.1 above. ORS 18.107 controls, but provides for commencement of a new appeal period if substantive rights are changed.

J. **Securing a Judgment**

   - ORS 18.150 provides that, except as provided by law, a Judgment Lien is created automatically in the county in which a Judgment is filed if the document includes a “money award” and complies with ORS 18.042 and 18.048. However, a small claims award of less than $3,000 requires the creditor to create a Judgment Lien under ORS 46.488.

1. **County of filing**

   - In county of filing, Judgment Lien attaches to all real property of Judgment debtor in county, and that they acquire afterward in that county. ORS 18.150.
2. Other Counties

- In other counties, creditor must record the Judgment in the County Clerk Lien Records for each other county in which a lien is sought. Recording is accomplished through recording a certified copy of the Judgment document or a lien record abstract for the Judgment. ORS 18.152. Note: If certificate of extension of Judgment (extending beyond 10 years) is filed after recording, then the certificate must also be recorded in the other counties. See ORS 18.182.

K. Effects of an Appeal

- The filing of an appeal does not stay a Judgment appealed and the creditor may proceed in collection of the Judgment accordingly absent the filing of a supersedeas undertaking or other relief. ORS 19.330.

- ORS 18.154 provides that a debtor who appeals a Judgment may move the trial court for elimination of a Judgment lien upon filing of a supersedeas undertaking and providing for such additional security as the court requires to ensure satisfaction of the Judgment if affirmed on appeal. See also Stay of Enforcement above.

Note: ORS 19.270 clarifies that appeal from a limited or supplemental Judgment applies only to those matters, and not those from the previous Judgment. The trial court retains jurisdiction over other matters.

II. COLLECTING A JUDGMENT

CAUTION: Collection of debts typically requires compliance with the Fair Debt Collection Practices Act, 15 USC §1692 et seq. (“FDCPA”), and/or the Oregon Unlawful Debt Collection Practices Act, ORS 646,639 et seq. (“OUDCPA”), and attorneys do qualify as debt collectors subject to those Acts. The requirements for compliance with the FDCPA and OUDCPA are the subject of entire CLE presentations and beyond the scope of this presentation. Be certain to comply with those Acts if you intend to do any collection work.

A. Notice of Demand to Pay Judgment

- Before a Judgment Debtor Examination can be obtained, ORS 18.265 requires that it be supported by one of the following:

1) Return of a writ of execution showing the Judgment has not been satisfied;
2) Garnishee response to writ of garnishment that does not fully satisfy the Judgment; or
3) Proof of Service of a Notice of Demand to Pay Judgment
   - Notice of Demand must give 10 days to pay Judgment
   - Must be served in same manner as summons or by any form of mail addressed to the debtor and requesting a receipt.
   - Service by mail effective on mailing
B. **Sample Forms**

- As part of a comprehensive re-working of the Judgments chapter in 2003, the Oregon legislature codified several forms to be used in Garnishments. See ORS 18.830 [Writ of Garnishment]; 18.832 [Debt Calculation]; 18.835 [Garnishee Response]; 18.838 [Instructions to Garnishee]; 18.840 [Wage Exemption Calculation]; 18.842 [Release of Garnishment]; 18.845 [Notice of Exemptions; Instructions for Challenge to Garnishment]. **BEWARE: Some forms and instructions were modified effective June 4, 2009**, to comply with new privacy requirements under Oregon Laws 2009, Ch. 230. Make certain you are using the most recent version of the forms.

**Notice of Demand to Pay Judgment Form:**

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASHINGTON

Joe Creditor,  
Plaintiff,  
v.  
Flakey Debtor, an individual,  
Defendant.

TO: Defendant Flakey Debtor

DEMAND IS HEREBY MADE upon you, pursuant to Oregon Revised Statutes section 18.265(1)(a), for payment within ten (10) days of your receipt of this Notice, of that certain judgment entered against you in the above Court.

Payment may be made to Plaintiff through the undersigned attorney for Plaintiff.

PLEASE TAKE NOTICE that your failure to pay may result in further court proceedings.

TOTAL AMOUNT DUE: Judgment in the amount of $1,000,000.00 plus all accrued interest at the rate of nine percent (9%) from the date of entry of Judgment until paid, plus attorney fees in the amount of $37,803.50 and costs in the amount of $670.51.

By  
John R. Bachofner, OSB No. 88152  
Of Attorneys for Plaintiff Joe Creditor
C. IDENTIFYING SPECIFIC RECORDS AND SOURCES OF INFORMATION

1. Motor Vehicle Records – Oregon Department of Transportation – Division of Motor Vehicles

Online: http://www.oregon.gov/ODOT/Get-Involved/Pages/Public-Records.aspx

- Locate vehicles, drivers, residences and insurance
- Account can be established to allow for rapid discovery over phone

BEWARE: ORS 802.179 & 802.181 restrict disclosure & re-disclosure of info

2. Financial Institution Records

- Subpoena typically required
- If business, what about ordering product? Pay by check and determine where check was deposited.

3. Real Estate Records

- Open to public – many counties online
- Title Search
- Skip Trace

4. UCC Records

Online Search: https://secure.sos.state.or.us/ucc/searchHome.action
(Allows search for information on UCC secured transactions, as well as Farm Product notices, IRS Tax Liens, Agricultural Liens, Agricultural Produce Liens, Grain Producer's Liens, Revenue Warrants and Employment Warrants. Search by debtor name (business or individual) or filing number).

- Very effective to determine other liens
- Check to see position and whether worth pursuing

5. Credit Bureau Reports

Online: www.Equifax.com
www.Experian.com
www.TransUnion.com
- If accessible, very good information
Chapter 8—Show Me the Money—Obtaining and Collecting Your Client’s Judgment

- Beware of Fair Credit Reporting Restrictions (FCRA) 15 USC §1681a et seq.

6. Newspapers
   - Search for Debtors in database
   - Residence
   - Notices
   - Articles – sales, purchases, etc.

7. Corporation Division – Business Name Search

Online: http://www.filinginoregon.com/
   - Available in nearly every state
   - Use pre-suit to make certain pursuing correct debtor and name correctly

8. UTILIZING INTERNET RESOURCES
   - Social Media Networks (i.e. Facebook, Linked in, etc.)
   - Accurint through LEXIS

9. USING INVESTIGATORS
   - Check costs
   - Make certain accurate info though
   - Are they going to indemnify you for FDCPA issues?

D. Identifying Fraudulent Conveyances of Assets

   - Traditional approach – Badges of Fraud

   - Modern approach: - UFTA ORS 95.200 et. seq.
     - Bankruptcy 11 USC §548

   - Present and Future creditors - ORS 95.230: Transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
     a) actual intent to hinder, delay or defraud creditor
b) without receiving reasonably equivalent value in exchange, and the debtor: 1) About to engage in transaction with unreasonably small assets; or 2) Intended to incur, or reasonably should have believed would incur debts beyond ability to pay
   - Multiple factors to consider intent (i.e. insider, control, concealment, threatened suit, etc.).

- Present Creditors – ORS 95.240: Transfer without reasonably equivalent value and insolvent.

E. WHEN TO INVOLVE THE COURT

- No Luck Locating Assets
- No Cooperation
- Complete Dead-End, But Probable assets.
- See Preliminary Concerns and Practical Considerations above.

F. JUDICIAL ASSISTED DISCOVERY. Judicial assistance can be obtained in Supplementary Proceedings in aid of execution.

1. POST-JUDGMENT INTERROGATORIES. ORS 18.270 provides that written interrogatories concerning the judgment debtor's property and financial affairs may be served, in the same manner as the summons, or by any form of mail, return receipt requested. The interrogatories must notify the judgment debtor that the judgment debtor's failure to answer the interrogatories truthfully shall subject the judgment debtor to penalties for false swearing and contempt.

   The judgment debtor must answer the interrogatories and return them to the judgment creditor or the judgment creditor's attorney within 20 days after receipt. Should the judgment debtor fail to comply with the interrogatory process, the judgment creditor can file a motion, affidavit and order for the judgment debtor to show cause why he/she should not be held in contempt. ORS 18.270(3). In Washington, See RCW 6.32.015 (order required).
2. **JUDGMENT DEBTOR EXAMINATIONS.** Once a judgment is entered, the judgment creditor may file a motion for a "Judgment Debtor Examination" under ORS 18.265. In Washington, See RCW 6.32 et seq. The motion must be supported by either: a) Proof of service (in manner of summons or by mail with return receipt requested) of a notice of demand to pay the judgment within 10 days; b) A return of a writ of execution showing that the Judgment remains unsatisfied; or c) A garnishee response to a writ of garnishment that does not fully satisfy the judgment. (In Washington notice or execution is not required.) Note that ORS 18.265 now clarifies that garnishments and executions are separate and that either will support a Judgment Debtor Exam. The order requiring the judgment debtor to appear may also contain a restraining order pursuant to ORS 18.265(7). RCW 6.32.120.

Under ORS 18.265 a judgment debtor may be required to attend a Judgment Debtor Examination over 100 miles from the debtor's residence under certain circumstances. See ORS 18.265(4) and (5). RCW 6.32.190. (In Washington, only within the county where they work/reside.) ORS 18.265(2) provides that the only courts that may issue an order requiring the judgment debtor to appear are:

a. The original court in which the judgment was entered;

b. Any Circuit or District Court for the county in which the judgment debtor resides and in which a certified copy of the original judgment or lien record abstract has been recorded pursuant to ORS 18.152; or

c. Any Circuit or District Court for the county in which the principal place of employment of the judgment debtor is located and in which a certified copy of the original judgment or lien record abstract has been recorded pursuant to ORS 18.152. In order to require the appearance of a judgment debtor in any county other than the county in which the original judgment was entered, ORS 18.265
requires, in addition to the motion, a certified copy of the original judgment or the county clerk lien record, an unsatisfied execution or unsatisfied demand for the payment of the judgment following ten days’ notice, or any form of mail demand addressed to the judgment debtor return receipt requested. See also RCW 6.32.240. ORS 18.265 does not expressly require the judgment debtor to produce requested documents at the time of the hearing for examination. Despite the lack of express authority for production of documents in ORS 18.265, ORCP 36, 43 and 39C(5) are not restricted to prejudgment discovery. See also ORS 18.268 and CR 69.

ORS 18.268(1) provides that both the judgment creditor and judgment debtor may subpoena and examine witnesses. Accordingly, ORS 18.268(1) expressly allows a judgment creditor to subpoena witnesses to testify concerning the judgment debtor's property or interest in property. See also RCW 6.32.030.

The witnesses may also be required to produce documents pursuant to a subpoena duces tecum. ORCP 55B (subpoena) also allows for the creditors to require witnesses to produce documents. Document requests should include all documents associated with the debtor's financial affairs including tax returns, check registers, financial records, financial statements, stock certificates, brokerage account summaries, corporate minute books and stock ledgers for those debtors who are sole shareholders of corporations. Also request copies of any documents associate with any transfers of any assets within the previous 12 months.

G. USING MOTIONS TO COMPEL COMPLIANCE WITH POST-JUDGMENT DISCOVERY

- ORS 18.775 Liability of Garnishee.
  - Arises from failure to timely respond to garnishment. Liable for lesser of Garnishment satisfaction or value of garnishable property, and costs (even if no property)
H. GARNISHMENTS: WHEN TO USE WRIT OF GARNISHMENT AND PROPERTY SUBJECT TO WRIT

1. Garnishment is a procedure which enables a creditor to receive tangible or intangible personal property of a debtor in the possession, custody or control of a third-party. The property includes debts, wages or other monetary obligations owing by the third-party. ORS 18.602; ORS 18.615 (post judgment writs).

2. In 2001, the Oregon Legislature substantially revised the garnishment provisions of former ORS 29.125-29.415. Although substantive law was not changed, many of the forms are entirely different and the changes in procedure are worth noting. All of the statutory garnishment forms have been extensively modified. The entire statutory scheme was moved to ORS 18.600 to ORS 18.845.

3. In 2009, the Oregon Legislature changed the law regarding what information is contained on judgments, lien abstracts, and garnishments. For garnishments only the last four digits of the Social Security Number are listed on the garnishment. If a garnishee requests the full SSN for purposes of identifying the correct individual, then the garnishor or garnishor’s attorney may disclose the full SSN. See Oregon Laws 2009, Ch. 230.

4. Debt subject to garnishment:
   
   (i) judgment requiring payment of money, after the judgment is entered and the register of the court or docketed into the court’s docket;
(ii) a support arrearage shown on support records of the Department of Justice;

(iii) monetary obligations imposed under agency orders or warrants recorded in the County Clerk Lien Record;

(iv) a provisional process order under ORCP 83 or 84.

5. **Limitations on garnishments.** Generally, the garnishee is liable only for the amount of the debt up to the limit of the judgment or the value of the property, whichever is less. The debtor's obligation need not be presently due or owing, but the debt must be in existence. A debtor/defendant’s prior assignment of an interest is effective against a later garnishment. *Weyerhaeuser v. Lynch*, 268 Or. 142, 520 P.2d 351 (1974). Equitable interests, property in the custody of the law, conservator, or personal representative and the debtor’s exempt property are not subject to garnishment. ORS 18.618.

6. **Procedure.** Writs are issued either by the court clerk or by an attorney. Under former ORS 29, two forms of writ existed: a wage writ and a non-wage writ. Under ORS 18.607 and 18.830, only one form of writ exists and that writ can be issued either by an attorney or by a court clerk and includes pre-judgment writs. ORS 18.635(2). Attorney issued writs are only issued pursuant to a money judgment entered in the court register. ORS 18.635(3).

7. **Duration of the Writ.** Writs are valid for 60 days after the date of issuance. ORS 18.609(1). A writ is issued when it is signed.

8. **Delivery of the Writ.** Writs are delivered, not served, pursuant to the terms of the statute. An original writ and one certified true copy (or alternatively two certified true copies of the original writ) must be delivered to the garnishee together with the instructions, response form, wage explanation form and search fee. ORS 18.790.
Delivery can occur either in person, by the sheriff or by any other person who carries errors and omissions insurance with at least $100,000 worth of coverage. If the writ is personally delivered by the sheriff, or by another person, as opposed to certified mail, the person delivering the writ must note the date of delivery on the writ actually delivered to the garnishee. ORS 18.652.

Alternatively, and more inexpensively, writs can be delivered by placing the writ in the mail, certified mail, return receipt requested. ORS 18.652 (notice that the garnishee is not obligated to accept the writ delivered through the mail). If the garnishee is a financial institution, the statutory fee must be paid.

The writ is delivered to the following individuals or entities depending upon the type of property levied upon:

a. The individual who holds the property. Either delivered personally to the individual or to the person’s office if they maintain an office.

b. Partnerships. The writ is delivered to the person designated by the partnership to receive service of process, to any general partner or, as of 2006, by office service.

c. Corporations. Any person designated by the corporation to receive service of process (registered agent) may receive the writ. Alternatively, an officer or managing agent may receive the writ.

d. Financial institutions. Writs must be delivered either to the manager, assistant manager, or any other person designated by the financial institution at any office or branch where deposits are received, or at any place where the financial institution is designated a specific place for receiving writs of garnishment. Contrary to some states, delivery of the writ effectively levies upon all property at every branch of the
financial institution located within the State of Oregon upon delivery to a single
proper location and person.

e. Sole Proprietors. As of 2006, a sole proprietor may now designate a person to accept
service of writs of garnishment.

9. **Notice of Delivery to Judgment Debtor Following Delivery of the Writ.** The
person or sheriff who delivered the writ must promptly deliver to the defendant the following
information and items:

   a. A copy of the writ;

   b. The original debt calculation form;

   c. A statutory form of “Notice of Exemption” (ORS 18.845); and

   d. A statutory form of “Challenge to Garnishment” (ORS 18.850). If someone other
   than the attorney who issues the writ, actually delivers the writ, that person (sheriff or
   other person) responsible for delivering the writ must be provided, by the judgment
   creditor, with the current address of the debtor or a statement that reasonable efforts
   have been made to locate the debtor and the debtor’s whereabouts are unknown.
   ORS 18.715.

   In the event that the garnishor/creditor fails to comply with the foregoing section
   under ORS 18.715, statutory penalties, costs and attorney fees may be recoverable by
   the debtor recovering any garnished property. ORS 18.715.

10. **Garnishee’s Responsibilities Upon Receipt of Writ.** The garnishee has a duty
to search his/her/its records under ORS 18.665. Generally, the writ of garnishment includes the
debtor’s social security number, and other identifying information that would allow the garnishee
to locate the debtor’s identity. If the garnishee is a financial institution, the garnishee needs to
check to see if the $15.00 search fee ($10 if Garnishor is Dept. of Revenue) was paid and
delivered with the writ. If the search fee is not paid to the financial institution upon delivery of the writ, the garnishee does not need to respond to the writ. ORS 18.790(3).

a. Garnishees have a number of options at their disposal. Nevertheless, the garnishee must use the statutory form for the garnishee response found at ORS 18.835.

b. The response must be returned within seven (7) calendar days of delivery of the writ. ORS 18.680.

c. The original Response must be returned to the garnishor. A copy must be mailed to the debtor and to the court clerk. ORS 18.690.

d. In the response form, the garnishee should indicate if the writ does not comply with ORS 18 or the garnishee has no property of the debtor/defendant at this time or due in the future.

e. If the garnishee discovers that a bankruptcy was actually filed, or if the garnishee is not the employer and holds no property of the debtors, the garnishee need not file the response with the clerk.

11. **Wages.** If the garnished property is wages, the garnishment is valid for a period of 90 days after the writ is received. ORS 18.625(2)(a). The garnishee should note the date and time of delivery and notify the central payroll department immediately upon receipt. If the payroll department has accrued but undelivered wages, the payroll department should recalculate the debtor’s wages and subtract the garnished funds. Issues typically arise where the checks have been cut days in advance of the payday but have not yet been delivered by the time the writ is delivered to the garnishee/employer.

   Garnishable wages, subject to the writ, are calculated using the statutory form and the “wage exemption calculation” at ORS 18.840. However, there is an interesting inconsistency between the Oregon statutory form listing exemptions and the limitations imposed by federal
Generally, garnishable wages include gross weekly earnings minus amounts required to be withheld by law. Because many of the debtor’s voluntary payments, including 401K contributions, charitable contributions, dues and wage deductions for payments of other creditors, are not required to be withheld by law, they are not considered in the wage exemption calculation form. The wage exemption calculation form does take into consideration exemptions for wages.

At the end of each pay period, the employer/garnishee should send the garnished funds to the clerk (clerk issued writ) or the creditor’s attorney (attorney issued writ) until the 90 days expires.

12. **Issues:**
   a. Multiple writs/priority;

---

1 15 USC §1673 provides:
(a) Maximum allowable garnishment
Except as provided in subsection (b) of this section and in section 1675 of this title, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed
(1) 25 per centum of his disposable earnings for that week, or
(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a)(1) of Title 29 in effect at the time the earnings are payable, whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).
(b) Exceptions
(1) The restrictions of subsection (a) of this section do not apply in the case of
(A) any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review.
(B) any order of any court of the United States having jurisdiction over cases under chapter 13 of Title 11.
(C) any debt due for any State or Federal tax.
(2) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed--
(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and
(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;
except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek.
(c) Execution or enforcement of garnishment order or process prohibited
b. Expiration of writs during the middle of the pay period;

c. Partial releases and releases. ORS 18.842.

13. **Non–Wage Writs.** If the garnishee holds money or property, other than wages, and the property or money is due within 45 days from the date of the delivery of the writ, the garnishee must deliver the property to the plaintiff or the plaintiff’s attorney (unless a claim of exemption has been received) or to the court clerk if the clerk issued the writ. If the property held by the garnishee is not payable in money, but instead is physical property, the garnishee must hold the property pending instructions from the sheriff. ORS 18.685. In such a case, the garnishor must notify the sheriff within 20 days of receiving the garnishee’s response that property must be sold. The garnishor must pay the sheriff and garnishee’s fees immediately. If the garnishee has properly and timely notified the garnishor of the need for sale and has not received instructions from the sheriff on or within 30 days, the garnishee need not turn over the property. ORS 18.685.

14. **Property due outside 45 days after delivery of the writ.** If the garnishee owes a debt or other property that is not yet payable or due until the expiration of 45 days, the garnishee must notify the garnishor who may request a sheriff to sell the property or debt pursuant to ORS 18.755. If the debt or property is due within 45 days after the writ is delivered, the garnishee must pay the funds to the plaintiff’s attorney within five (5) days after it becomes due. ORS 18.732.

**Note:** Employers are prohibited from terminating employment of employees as a consequence of garnishments or child support withholding. ORS 18.385(9); ORS 25.424(3)(a).

No court of the United States or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section.
I. EXEMPTIONS

ORS 18.345 and ORS 18.618 provide the debtor with certain exemptions. Oregon residents are required to use the state exemptions and are not allowed to choose the federal bankruptcy exemptions when they file bankruptcy except as provided by 11 USC §522 relating to choice of exemptions based upon domicile.

Typically, a judgment debtor claims that the property is exempt. ORS 18.322 provides that, except as it relates to sales of residential property subject to a homestead exemption, a debtor's claim of exemption shall be adjudicated in a "summary manner at a hearing" before the court out of which the writ of execution was issued or where the judgment was originally entered or filed (in the case of a foreign judgment) involving a writ of garnishment. ORS 18.345 – 18.362 set forth the majority of the exemptions as to personal property. Some of the more common exemptions include:

1. $5,000 value exemption for tools of the trade; ORS 18.345(1)(c);
2. $3,000 value exemption upon one motor vehicle; ORS 18.345(1)(d);
3. $3,000 for value of household goods and furniture held primarily for personal, family or household use; ORS 18.345(1)(f);
4. Spousal and child support or separate maintenance to the extent necessary for support of debtor and dependants. ORS 18.345(1)(i).
5. ORS 18.345(1)(k) provides a debtor with an exemption of $10,000 of cash or property traceable to a payment or payments on account of personal bodily injury of the debtor or a person on whom the debtor depends; and a payment to compensate the debtor’s loss of future earnings, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor. The prior exclusion of pain and suffering or compensation for actual pecuniary loss was replaced with a simple $10,000 sum. Under former ORS 23.160(1)(j)(B)
compensation for mental anguish was not exempt while compensation for muscular pain arising from physical injury in an automobile was exempt. *In re Bowen*, No. 390-36505-S7 (Bankr. D. Or. July 19, 1991).

6. $400 “...in value in any personal property.” This is typically referred to as the "wild card" exception. However, this exemption may not be used to increase the amount of any other exemption,..." ORS 18.345(1)(p). It is this exemption that is typically used to exempt funds in bank accounts not traceable to any other specific exemption.

7. Homestead. Exemptions concerning the debtor's real estate held primarily for use as the debtor's own residence typically fall within the homestead exemption. Under ORS 18.395, the homestead exemptions (including proceeds from the sale for one (1) year) are $40,000 for a Single debtor, and $50,000 for married debtors. Mobile Home and Real Property exemptions are the same. The amount of exemption for floating homes and manufactured homes changed significantly in 2009 by the Legislature so that those dwelling types have the same exemptions as dwellings on real property regardless of the ownership of the property where the dwelling is located.

8. Prepaid Rent, Security Deposits required on residential lease. ORS 18.395. *See In re Cassarino*, 379 Fed 1069 (9th Cir 2004); *see also In re Schuhman*, 2010 WL 5125321 (Bkcy D Or 12/19/10). Prepaid rent not exempt when not required by lease. Security deposits, prepaid rent under a residential tenancy, and any payments under a land sale contract that become due more than 45 days after service of the writ are not garnishable.

To the extent that the debtor may claim an exemption on the challenge to garnishment form, garnishees must hold property received for at least 10 days in an account separate from the funds used for personal or business expenses. If a challenge to the garnishment is filed within that time, the funds must be delivered to the court clerk immediately. The court clerk will set a
hearing, notify the parties, and the court will entertain the claim, of the debtor, that the funds garnished were exempt. Alternatively, third parties who claim a right to the funds may also use the challenge to garnishment form on the same basis.

J. **GARNISHEE LIABILITY**

Garnishees are personally liable to the plaintiff for the value of the defendant’s property at the time of the delivery of the writ or the amount necessary to satisfy the creditor/plaintiff’s judgment, whichever is less. ORS 18.775. In the event that a garnishee fails to serve the response within seven calendar days from the receipt, the garnishee may be ordered to appear and be found in contempt.

In the event that the garnishee fails to properly complete the form, or if the garnishor believes that the form is improperly completed or erroneous, the garnishee may be ordered to appear for an examination under oath concerning the response. ORS 12.085 provides a one-year statute of limitations from the date the writ is delivered to the garnishee. If the garnishor has not commenced legal action against the garnishee, on the writ, within that time frame, the garnishor’s enforcement rights have expired.

Garnishors, believing that the garnishees have either completed the response to garnishment form improperly or that have failed to respond at all, may apply to the court for an order to show cause why the garnishee should not be held in contempt. ORS 18.778(1). In such a case, the garnishor may ask the court to include language restraining the garnishee from disposing of or injuring the property alleged to be in the garnishee’s possession. ORS 18.778(2). In addition to the order to show cause, the garnishor may serve allegations in interrogatories on the garnishee.

K. **SATISFACTION OF JUDGMENT/MONEY AWARD** ORS 18.225 provides the mechanism for satisfying a Money Award through filing of a satisfaction document. ORS
18.235 also provides a statutory mechanism for the debtor to satisfy a Money Award in a judgment where the creditor fails or refuses to do so following payment of the judgment. If a court finds that the creditor willfully failed to provide a satisfaction under ORS 18.225, the court may render a supplemental judgment awarding reasonable attorney fees to the person making the motion. ORS 18.235.
Chapter 9

Anatomy of a Trial

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1This chapter includes materials prepared in prior years by Gregory A. Smith, James L. Dumas, David K. Miller, James D. Huegli, Carole A. Hewitt, Judge John Jelderks, Thomas V. Dulcich, Barry M. Mount, Jeffrey Kilmer, Peter A. Ozanne, Jeffrey Foote, and Lawrence Wobbrock. The authors thank and acknowledge these individuals for their extensive contributions to this chapter—particularly, Peter Ozanne for his willingness to allow the use of materials from prior years on civil trial motions and Larry Wobbrock and Jeffrey Foote for their extensive contributions on jury instructions, verdicts, findings, and judgments. Elana Flynn, a third-year certified law clerk, wrote the materials entitled “Special Considerations When PIP Is Involved.”
## Chapter 9—Anatomy of a Trial

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I. STRATEGY—WHAT IS MY GOAL?

A. Opening Statement

Many of the most successful trial lawyers in the United States believe that a lawsuit is won or lost at the time an opening statement is made. The opening statement controls the focus of the case at the outset. It should be carefully planned and rehearsed. An opening statement is not merely an opportunity for one lawyer or the other to tell the jury “what the case is about.” It is an opportunity to set the pace and the mood of the jury.

It is critical in opening statement to be concise, confident, and pleasant. On the other hand, it is also necessary to give the jury enough information so that by the time your opening statement is concluded, you have established your credibility and convinced at least some jurors that you should win, even before they’ve heard the evidence. It provides an opportunity to establish your themes that you will use throughout the case. Be completely confident in your knowledge of the law that will be relevant to the jury’s decisions, and emphasize the evidence that will persuade the jury to resolve the legal issues in your client’s favor.

The opening statement is also an opportunity for the accomplished trial lawyer to create some degree of suspense in the minds of the jury. It’s important not to tell the jury all the facts of your case. Keep a few facts back. Tantalize them. Make the trial fun for the jury. Remember, the jurors usually don’t want to be there any more than the parties do.

For example, call the jury’s attention to the testimony of Mr. Smith. The statement might go something like this: “On the third day of trial, we will be calling Mr. Smith. You will find when Mr. Smith testifies that it would have been impossible for the plaintiff to have been at the scene of the accident at the time she stated.”

B. Be Aware of the Jury’s Presence

The jury is watching you and your client every minute in court. When you get up and move around, when your client speaks with you, when you walk in and out of the courtroom, when you are in the elevator, when you are in the hallway, when you are getting into your car, you are under the constant view of the jury. The way you and your client dress and behave can and will affect the jury’s opinion of you and your client, and the outcome of your case.

Trials are not funny matters. Do not laugh and giggle in the elevators. Do not tell jokes. Act appropriately both in the courthouse and outside in the parking lot or anywhere else the jury might observe you and your client. If you are a plaintiff’s attorney and drive a fancy car and the jury sees you get in and out of the fancy car, it could affect the outcome of the case. Not long ago, after a jury was interviewed regarding an extremely low verdict, one of the jurors commented that the plaintiff’s attorney had driven away in a brand-new Porsche. The jurors determined that they were not going to buy that lawyer another “new hot rod” and kept the verdict down for that reason.

Dress appropriately. A courtroom is a place of dignity. Both you and your client should dress conservatively but not so formally as to intimidate the jury. Remember, few of the jurors will have coats and ties on. Likewise, you must strike a balance between their dress and “overkill.” Your client likewise should not stand out but should blend in with the rest of the people in the courtroom, if at all possible.

Keep your client from taking notes and talking to you throughout the trial. Otherwise, it appears that you are not prepared or organized and that your client knows more about the
case than you do. It is also extremely distracting to the jury, the judge, and the other witnesses. Furthermore, it appears to the jurors that you and your client are trying to either “hide something” or put something over on them at the last moment. Insist that your client not demonstrate emotion when either good or bad testimony is presented by the witnesses or when the court rules on motions or objections.

C. **Be Organized, Neat, and Prepared**

Organization and preparation are the key to any trial victory. Before any testimony is presented, you should know what the answers will be and what the purpose of the testimony will be. As a general rule, a lawyer who fumbles around at his or her desk, has papers spread all over the desk, and appears absentminded at trial is not well received by a jury.

If you have trouble following your preparation and presentation of evidence, you can be assured that a jury will as well.

D. **Present Witnesses Logically**

Ordinarily, the plaintiff and the defendant should be called first. Remember, you are telling a story from start to finish. You certainly don’t want to read a book from the last chapter backwards. The plaintiff generally sets the stage for the entire trial, giving the broad overview of what has happened and why. The plaintiff’s story is more or less the prologue to the book, with each individual witness filling in an individual chapter.

The defendant, on the other hand, may or may not be called first, depending on the impact that counsel wants to make on the jury. Remember, the story has already been told, and it is now necessary from the defense standpoint to dismantle the chapters one by one.

E. **Be Polite and Professional**

Juries dislike lawyers who argue and who are unprofessional. Always be respectful of the judge and of the courtroom staff. Often, trial lawyers “close out” the presence of the jury, and the trial moves into a petty bickering match of sarcasm and unprofessional conduct. The jury is embarrassed, the witnesses are embarrassed, and your client should be embarrassed. Take the high road. If opposing counsel belittles you or makes you angry, which causes you to strike back in public, he or she has won the point. Never allow your personal dislike for opposing counsel to affect your professional judgment in front of a jury.

F. **Do Not Overtry Your Case**

Keep in mind that a jury’s mind is like a water glass. Each time a witness is called, each time a piece of evidence is introduced, a little water is added to the glass. Eventually, the glass becomes full. Once the glass is full, no more water can be placed in the glass. The jury cannot absorb any more evidence, cannot remember any more testimony, and will ignore everything else that you do. The pace of your case should result in the water glass filling at the time of the last witness.

Overtrying a lawsuit is sometimes worse than undertrying a lawsuit. The combined wisdom of a jury is astonishing. If you can make your point with one good solid witness—do it. Don’t call five witnesses to testify that the sky was clear and the ground was dry. One believable witness is all that you need.

If your client has a severely fractured leg, call the orthopedist to tell the jury how badly the leg has been damaged. Do not call the orthopedist, the nurse, and the radiologist who read
the x-rays. It’s not going to change the outcome of the case, other than causing you to lose the jury. Once the water glass is full, you’ve lost them.

G. Closing Argument

By the time you get to closing argument, the jury will be tired of listening and anxious to start deliberating. Keep your closing short, and limit it to persuasive arguments on the most important points. Focus your closing on the key decisions that the jury will need to make on the verdict and on the most significant jury instructions.

Give your opponent credit when due. It hurts your case to dispute every point, and it enhances your credibility when you concede a point that is not dispositive. For example, if the opposing party testifies credibly that she was not speeding, concentrate on her inattentiveness, and avoid calling her a liar.

Plan your closing argument before you give your opening statement. This is the only way you can be sure that you have a basis in evidence for the theories you want to argue. Planning your trial in reverse is the best way to create the impact you want.

Because many trial lawyers don’t do this, you can often use to your advantage inconsistencies between the opposing counsel’s opening statement and closing argument. Order a transcript of the opposing counsel’s opening statement or the testimony of a key witness and use it in your closing to point out the gap between what was promised and what was delivered. If you do this, make certain that you are not vulnerable to the same tactic.

II. THE TRIAL NOTEBOOK

A. Organization

The trial notebook is the key to the organization of a trial. It should be complete, indexed, and, for all practical purposes, committed to memory.

In complicated trials, numerous trial notebooks are necessary. A three-ring binder, indexed with tabs, is the easiest way to manage the trial notebook organization.

If the trial notebooks consist of several volumes, it is a good idea to keep them on a rolling cart behind counsel table. Don’t stack everything up in front of you. Otherwise, once again, it appears that you are not prepared, and you will be fumbling around in front of the jury, which is extremely distracting.

The trial notebook should consist of pleadings, an index of all exhibits that are going to be introduced, all medical reports highlighted and indexed, all depositions, and any important memorandums of law.

Remember, the trial notebook is to be used at “trial.” Do not put into the trial notebook extraneous matters, such as unnecessary correspondence, reports that you are not going to use, discovery that would not be necessary at trial, etc.

B. Depositions in a Notebook

The use of depositions, which will be covered later, is critical to a trial. The depositions should be placed in the trial notebook in the order in which the witnesses are intended to testify.
Deposition summaries should be included in front of each deposition in a typed, legible fashion.

Cross-references in each deposition should be prepared as to other depositions, statements of other witnesses, or exhibits. The deposition summaries and cross-references should be concise and easily seen at a glance.

C. The Exhibit List and Exhibits

A list of all exhibits should be included in the trial notebook so that counsel can refer to them virtually instantaneously. Create a separate notebook for your exhibits and a separate notebook for the other party’s exhibits. Do not have the exhibits stacked up in front of you without having an index available for reference. Prepare a notebook of exhibits for the witnesses, the judge, and opposing counsel.

D. Witness Testimony

Preparation is the key to victory in any lawsuit. Many trial lawyers write out each individual question for each individual witness. It’s time-consuming, but it pays off.

Witness examination should be phrased using terminology of questions used and answers provided in the deposition. The preparation must include cross-references to transcript pages in the deposition for impeachment or to rehabilitate a witness. The time and manner of the introduction of exhibits should also be included in the trial testimony section of the trial notebook.

III. USE OF DEPOSITIONS IN TRIAL

Depositions are devastating. The single most important trial tool that a trial lawyer has is the deposition of an opposing party or critical witness. Jurors can forgive a witness for making a mistake. They can forgive a witness for being clumsy on the witness stand. But they will never forgive a witness for being dishonest.

If you are able to use a deposition at the time of trial to impeach a witness and to convincingly show a jury that the witness has given different testimony at different times, it will appear that the witness has been deceptive and has consciously tried to deceive the jury. If that is proved, the jury will disregard most of the rest of the testimony of that particular witness.

On cross-examination, never ask a question (with few exceptions) to which you do not know the answer. Use the deposition for cross-examination. A good discovery deposition is invaluable to make sure that you get in only the questions and answers from the discovery deposition that you feel are important.

On the other hand, depositions from an individual who is in court or from a party may be read freely at any time in front of the jury. If a witness is on the stand and direct examination has been concluded, nothing prevents the practitioner from simply reading from that witness’s deposition. It is much more effective, however, to make the witness answer the question to get in the evidence that you desire and to impeach the witness if he or she forgets what was said earlier.

Make certain to read the entire question and answer to the witness. Do not read only half a sentence or half an answer. Your worthy opponent will catch you in the act and force you to read the rest in front of the jury. More likely than not, the testimony that you did not
read would not have been damaging anyhow. But if you skip the context, it appears to the jury that you as the trial lawyer are once again attempting to be deceptive. They will lose trust in you and, likewise, in your client.

IV. DEMONSTRATIVE EVIDENCE

A. The Visual Connection

Without a visual connection, the jury will speculate. Generally, trials are not fun. Jurors get bored. If you can maintain their interest through visual imagery, they will retain the information that you are attempting to convey.

Demonstrative evidence generally is the most interesting and exciting type of evidence in a trial. At the very least, it gives the lawyer an opportunity to stand up and walk around the courtroom and distract the jury to some degree from what would have otherwise been a humdrum trial.

Photographs, x-rays, mock-ups, physical evidence, documents, and scientific models all provide a visual connection between the spoken word and the impression that you are attempting to leave with the jury.

B. Tell Them—Show Them

Tell the jury what you’re going to show them, then show it to them, and then stop. Demonstrative evidence sits in front of a jury for some period of time. The jurors have an opportunity to see it, evaluate it, and commit it to memory. They will also have an opportunity, as a general rule, to take it into the jury room with them. Unlike verbal testimony, the visual connection will physically be manifest in the courtroom.

C. Trial Toys

After two weeks of trial, we can assure you that the water glass will be full. Distraction is necessary to keep the jury’s interest. There is nothing more exciting to the jury than having something that they can touch, feel, and hold. For example, in a medical malpractice case, bringing in the stainless-steel screws and plates gives the jury a better perspective on what happened and creates interest in the jurors’ minds. These “trial toys” are not only persuasive but interesting. The more interest you can generate in your case and your position, the more likely it is that the jury, by human nature, will be inclined to favor your position. Keep up their interest. Jurors fall asleep. Monotony creates boredom, boredom creates loss of interest, and loss of interest creates lack of concentration. Remember, you know your case very well, and the jury knows it not at all. If you can’t create interest in the jury, then you probably should not have come to court.

V. TESTIMONIAL EVIDENCE

A. K.I.S.S. the Jury

More often than not, juries consist of middle-aged, middle-income individuals whose primary concern is the daily to-do associated with being an attentive parent or grandparent. Members of the jury may have 12 or more years of education, but they are not lawyers or law students. Do not try your lawsuit as though they were. Keep it simple, stupid!

For example, don’t attempt to impress the jury with your knowledge and silver-tongued verbal skills. Use plain language. Make sure your witnesses use plain language.
Have your witnesses testify quickly. Do not spend two hours qualifying your expert. If your expert is an orthopedic surgeon, board-certified, who has been practicing for 20 years and looks like a good witness, that’s about all the jury needs to know in most cases.

Remember the water glass. If you spend two hours qualifying your expert, the jury is going to be asleep, bored, or completely uninterested by the time you get to the meat of your case.

Once you’ve made your point with your witness, there is a four-letter word that you must remember: stop. Keep your testimony short and simple, and then stop.

B. Never Argue with a Witness

Remember, a trial lawyer’s job is to present evidence and not argue. If a witness wants to argue with you, that’s fine. Never argue with him or her. Once a witness begins to argue, a jury becomes convinced that the witness is no longer “independent.” Be polite and courteous—being argumentative has no place in a courtroom.

C. Always Allow a Witness to Escape Gracefully

Juries do not want to be embarrassed. The surgical destruction of a witness on cross-examination makes a wonderful impression on a jury—to a point. But never destroy a witness so completely that he or she does not have at least some way to escape gracefully from the witness stand. Never take away the dignity or respect of any witness if at all possible. It embarrasses the witness and the jury and generates sympathy rather than the desired destruction.

D. Cross-Examination

Cross-examination is sometimes referred to as a “commando attack.” The purpose of cross-examination is to cause damage and nothing more. Never attempt to use cross-examination to prove the prima facie elements of your case. That should be done through your witnesses on direct examination.

Get in—cause maximum damage—and get out.

Often, it is not necessary to cross-examine at all. Cross-examine only if you believe you can cause damage—never cross-examine just because you think the jury feels you should.

Cross-examination must always be short and deadly—keep it that way.

VI. TRIAL MEMORANDUMS

Prepare only on issues of importance.

Trial lawyers often feel that they must prepare a trial memorandum for every trial—not true. Prepare trial memorandums only for issues on which you believe the judge should be educated.

In the ordinary automobile case, it generally is not necessary to prepare a trial memorandum that a stop sign means “stop” or a green light means “go.” The trial judge knows that the car to the right has the right of way.

On the other hand, if there are complicated or important issues of law or fact, a trial memorandum is invaluable. If at all possible, it should be provided to the trial judge immediately upon being assigned to that judge for trial. If the memorandum, pretrial motions,
and jury instructions are provided to the trial judge well in advance of the start of the trial, you will enhance the likelihood that the judge will have time to read the materials and study the legal issues.

As a practical matter, however, many trial judges do not read all trial memorandums unless issues of law or fact are involved about which they are unfamiliar.

Take your cue from the term “trial brief”—be brief. Trial judges have only so much time and, quite frankly, interest in reading trial memorandums. If they are lengthy, they are unlikely to be read.

Keep in mind that a trial judge, much like a jury, has his or her own particular “water glass.” Once again, don’t fill it with material that will not affect the outcome of your case.

Attach to your trial memorandum copies of key cases that you think are important. They are much more likely to be read if they are attached than if you expect the judge to look them up.

**VII. RESOURCES**

A. ORCP 50 through 64.
B. OEC (ORS Chapter 40).
C. *2 Oregon Civil Pleading and Practice* chs 38–41 (Oregon CLE 2012).

**VIII. MOTIONS BEFORE OR AT THE COMMENCEMENT OF THE TRIAL**

A. **View of Premises by Jury (ORS 10.100)**

1. A jury view may be requested when it is important that the jury have a view of the place at which any material fact occurred. But consider time, expense, and “Murphy’s Law.”

2. Notify the court, before trial, of your desire for a jury view.

3. Arrange for the transportation of jurors.

4. Provide the court with specific proposed instructions regarding how the view should occur, including:
   a. Directions to the scene; and
   b. The specific view, objects, or areas at the scene to be pointed out to the jury.

5. A jury view normally takes place after opening statements and before presentation of evidence.

6. Remember, a jury view is generally not considered evidence. This rule has been criticized, however, and jury views are increasingly considered evidence in other jurisdictions.

7. Consider using Google Maps or videotaping the area in question, in lieu of a jury view.
Chapter 9—Anatomy of a Trial

PRACTICE TIPS:

- Consider requesting an instruction that the jury view is not evidence.
- Object to a jury view when:
  - It is time-consuming; or
  - The scene or object can be adequately described to the jury with photographs, videotapes, maps, or drawings.
- Always attend the jury view. Your client should also be present.
- If any improprieties occur during the jury view, make a record with appropriate motions or objections as soon as possible.
- Do not talk about the case to jurors or talk so that they may overhear you. Ensure that your client follows this rule as well.

B. Motion to Exclude Witnesses (OEC 615)

1. It is good practice to move to exclude witnesses from the courtroom during the trial to prevent witnesses from conforming their testimony to the testimony of other witnesses.

2. The motion will be granted unless there is good cause for denying it. (Exceptions include parties, including corporate representatives, and other persons essential to the presentation of a party’s case.)

3. Make the motion before trial. The motion can be made at any time, but a judge is more likely to exercise discretion to deny the motion if some witnesses have testified after hearing the testimony of other witnesses.

4. A party cannot be excluded, even if that party will be testifying. Be sensitive to the identity of the “party” when a corporation is the party.

5. If the presence of a witness is essential to the presentation of your case, ask to have the witness present in spite of the exclusion order.

EXAMPLE: You may wish to have an expert present when another expert is testifying to advise you on cross-examination or to become familiar enough with complex testimony so that lengthy hypotheticals can be avoided.

C. Motion to Limit Evidence (Motion in Limine)

1. File this motion in writing before trial when you believe an adversary will offer irrelevant or prejudicial evidence. Also consider filing this motion to establish the admissibility of evidence that if presented to the jury would pose a risk of mistrial.

2. Motions in limine before trial have historically not been favored by Oregon courts. Often, the court will defer ruling until the presentation of evidence.

3. One purpose of a pretrial motion is to alert the court to potential problem areas in the trial and to educate the court concerning applicable law, in order to reduce the chances of error when the evidence is offered. Frequently, the judge will hold a hearing outside the presence of the jury before receiving the challenged evidence.

4. The denial of this motion before trial is not error. As the moving party, you must protect your record by objecting to the evidence in question when it is offered.
5. If a motion in limine is granted, as the opposing party, you must make an offer of proof.

6. If the motion is denied before trial, as moving party, request the court to order opposing counsel not to mention the disputed evidence during opening statement.

D. Motions Against Pleadings or to Reconsider Pretrial Rulings

Most judges consider it improper to ask the trial court to rule on matters already covered by pretrial rulings unless new facts or law justify reconsideration. Judges often reserve pretrial rulings, however, choosing to defer to the judge assigned to the trial. (ORCP 21 E-G, discussed below, also provides specific grounds to dismiss or strike a complaint at trial.)

E. Request for Findings of Fact (In a Court Trial)

1. In trials to a court, it is usually wise to request findings of fact under ORCP 62.
2. Such requests must be made before the trial begins.
3. Prepare an outline of your proposed findings in advance of the trial.

IX. MOTIONS DURING THE PRESENTATION OF EVIDENCE

A. Motions to Strike Evidence, Objections, and Offers of Proof

1. Your adversary may offer inadmissible or improper evidence.
2. Multiple and timely responses are required (see OEC 103(1)(a)):
   a. Consider not objecting.
   b. Object on specific and appropriate grounds, such as:
      i. Irrelevance;
      ii. Unresponsiveness;
      iii. Exceeding the scope of the question; and/or
      iv. Hearsay.
   c. Ask questions “in aid of objection” in order to establish a basis for objection when that basis is not already clear from the evidence (e.g., qualifications of an expert witness or personal knowledge of witness). Consider requesting that this inquiry be made outside the presence of the jury. As the proponent of the evidence, object to inquiries that are nothing more than disguised cross-examination.
   d. If your objection is sustained, move to strike the improper portion of the evidence or testimony.
   e. Consider requesting a cautionary instruction that tells the jury to disregard the stricken evidence. Do not request this instruction if you think it will serve only to highlight stricken evidence that is highly prejudicial or inflammatory.
   f. Move for a mistrial if the objection and motion to strike are sustained and the proffered evidence is highly prejudicial. But consider the likelihood of success, as well as the expense of retrying the case.
   g. Consider the wisdom of objections during opening statements and final arguments.
3. When direct evidence does not contain a foundation for admissibility (such as an expert opinion), move to strike the evidence at the conclusion of the adversary’s direct examination.

4. When cross-examination reveals a defect in the foundation or that the evidence came from an impermissible source such as hearsay, move to strike as soon as the defect is discovered.

5. Remember to move to strike evidence beyond the scope of the pleadings. If you fail to do so, the trial court may grant a motion to amend the pleadings to incorporate a claim or to award damages based on the admitted evidence, as discussed below.

6. As the proponent of evidence giving rise to an objection that is sustained, you must make an offer of proof to establish the basis for assigning error on appeal (OEC 103(1)(b)).

7. Offers of proof are usually made outside the presence of the jury and in the following fashion:
   a. Tangible or documentary evidence is marked for identification and offered by the proponent;
   b. Sometimes, examination of a witness can be conducted;
   c. Often, the lawyer offering testimonial evidence will be required to recite the proffered evidence in summary fashion. Avoid summaries that simply conclude what ultimate facts or legal standards would be established by the evidence. If possible, prepare such offers in advance and in writing.

B. Motion for Mistrial

1. A motion for mistrial may be made when your opponent offers evidence on, or otherwise discloses to the jury, highly prejudicial matters.

2. A motion for mistrial is also appropriate when misconduct or irregularity occurs, such as:
   a. Jury misconduct; or
   b. Significant contacts between the jury and a party.

3. Think carefully about moving for mistrial. An unsuccessful motion serves to highlight the prejudicial matter. Even if the motion is likely to be successful, retrial is expensive.

C. Motion to Produce Documents

Move to produce documents when the existence of potentially relevant documents is discovered at trial or a witness has reviewed or prepared documents in the course of preparing his or her testimony.

Examples:
1. A doctor’s office notes;
2. Written notes, diaries, and reports of expert witnesses;
3. Prior written or recorded statements of witnesses taken by others and reviewed in preparation for trial.

X. MOTIONS AT THE CLOSE OF YOUR OPPONENT’S CASE AND AT THE CLOSE OF EVIDENCE

A. General Considerations

1. These motions must state specific grounds (ideally, with authority) and must be directed to the particular portion of your opponent’s evidence at issue. Take time to analyze and present these motions clearly on the record. Prepare in advance and consider written motions.

2. If motion at the close of your opponent’s case is denied, you may proceed with the presentation of your case. Beware of presenting evidence that establishes your opponent’s otherwise insufficient claims.

B. Motions to Dismiss or to Strike Pleadings

1. A motion to dismiss or to strike pleadings can be made at trial on four grounds (ORCP 21 G(3)-(4)):
   a. Failure to state ultimate facts constituting a claim;
   b. Failure to join an indispensable party;
   c. Failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense; and
   d. Lack of subject-matter jurisdiction.

2. Trial courts will often attempt to cure the failure of a pleading to state facts sufficient to constitute a claim by permitting amendment.

C. Motion for a Directed Verdict in Jury Trials (ORCP 60)

1. This motion tests the legal sufficiency of your opponent’s evidence in support of his or her claims. You are asking the trial judge to decide whether your opponent’s evidence is sufficient as a matter of law to submit a question of fact to the jury. You are also establishing the necessary basis for an appellate court to review this question of law.

2. A motion for directed verdict will be granted when: (a) the evidence relevant to a claim is uncontradicted and opposed to the underlying theory of recovery, or (b) no evidence was introduced concerning an essential element of a claim.

3. “Any” or “some” competent evidence in the record in support of your opponent’s claim will defeat the motion.

4. A defendant commonly moves for a directed verdict when the evidence is insufficient to establish liability or to prove damage caused by the acts establishing liability.

5. A plaintiff commonly moves for a directed verdict when the defendant is liable as a matter of law or when the plaintiff has been damaged as a matter of law.

6. In practice, some trial courts permit motions for a partial directed verdict against a portion of a case, such as one single claim for relief among several claims, one particular
legal theory out of several asserted, or a particular specification of negligence or breach of contract. These motions are also deemed motions to strike or to dismiss, as discussed below.

7. Remember—if you unsuccessfully move for a directed verdict at the close of your opponent’s case, and either you or your opponent presents additional evidence, renew your motion for directed verdict at the close of all the evidence. ORCP 63 A provides:

“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.” (Emphasis added.)

(See also ORCP 63 B, which permits a trial court, at an adverse party’s request, to submit the case to the jury even though a directed verdict should otherwise be granted.)

8. If a motion for directed verdict is granted, the prevailing party will usually obtain a judgment on the merits. (A provision in ORCP that gives the trial court discretion to enter a judgment of dismissal without prejudice is rarely employed.)

9. ORCP 60 provides that “[a] motion for a directed verdict shall state the specific grounds therefor.” Consider preparing this motion in writing, unless notice will alert your opponent to a curable defect.

D. Motions for Judgment of Voluntary and Involuntary Dismissal

1. A motion for judgment of voluntary dismissal must ordinarily be made five days before the day of trial, except by a stipulation of the parties or order of the court. ORCP 54 A.

2. A motion for judgment of involuntary dismissal is the appropriate vehicle to test the legal sufficiency of your opponent’s evidence in a nonjury trial. ORCP 54 B(2).

3. In state trial court, a judgment of involuntary dismissal operates as an adjudication without prejudice unless the court in its judgment of dismissal specifies otherwise. ORCP 54 B(4). If the state trial court does specify the judgment of dismissal as with prejudice, findings of fact must be made under ORCP 62. ORCP 54 B(2). In federal court, judgment of involuntary dismissal operates as an adjudication with prejudice, unless otherwise specified. FRCP 41(b).

4. There is one important difference between motions for directed verdict and motions for involuntary dismissal. A motion for judgment of dismissal under ORCP 54 B(2) is made when the plaintiff has completed the presentation of the plaintiff’s evidence. At the close of the evidence, the judge sits as the trier of fact and rules on the merits. This difference has important implications for the appeal of a nonjury case.

E. Motion to Strike or to Dismiss Portions of Claims (Or Motion to Withdraw Issues)

1. If your motion for dismissal or directed verdict is denied, move to limit the issues by striking allegations in your opponent’s pleadings that are not supported by evidence. As discussed above, this motion is also considered a motion for partial directed verdict by some courts.

2. Examples of when this motion should be made:

a. Claims of relationship of parties, e.g., employer/employee, fiduciaries;
b. Particular claims of negligence or breach of contract;

c. Particular affirmative defenses;

d. Particular claims for damages not supported by the evidence.

3. Although not as dramatic as a successful motion for directed verdict or judgment of involuntary dismissal, this motion can significantly limit your opponent’s case. The motion requires careful review of the pleadings and the evidence submitted. Again, consider preparing this motion in writing—if advance notice will not result in correction of the defects by your opponent.

F. Amendments to Conform to the Evidence (ORCP 23 B)

1. This motion should be made when you have introduced evidence without objection that supports a claim that was not alleged in the pleadings. (The availability of this motion also reflects the importance to your opponent of timely objection on the ground that the evidence is outside the scope of the pleadings.)

2. Most trial courts will grant this motion, particularly when unexpected evidence is revealed through the testimony of witnesses at trial. But because the court’s ruling on this motion is within its sound discretion, you should avoid having to make this motion when the proof should have been anticipated before trial.

3. Make this motion if your opponent moves to strike with a plausible argument that the proof does not conform to the pleadings. Even if the motion to strike is denied, an amendment to cure the potential defect will reduce the chances of reversal on appeal for that denial.

XI. CORRECTIVE MOTIONS AT THE CLOSE OF EVIDENCE

A. Motion to Reopen Case

1. This motion is ordinarily made for one of two reasons:

   a. Evidence is discovered during the course of trial that materially benefits the moving party’s case; or

   b. The moving party has inadvertently failed to offer important evidence.

2. While a trial court will ordinarily grant this motion, it is a matter within the sound discretion of the court. (Having to ask a court to reopen your case because you inadvertently failed to offer evidence is embarrassing at best. This suggests the need for advance preparation and a trial notebook.)

3. If your motion is denied, make an offer of proof in order to protect your record and provide the Court of Appeals with the basis for determining that denial of the motion was an abuse of discretion.

B. Motion for a Jury Poll (ORCP 59 G(3))

1. If you lose a jury case, always request a poll as soon as the verdict is read.

2. If a poll is not requested before entry of the verdict, any objection to the verdict is waived.
C. Motion to Correct Verdict (ORCP 59 G(4))

1. Examples of incorrect verdicts:
   a. Award of special damages only;
   b. Award of different amounts of damages against joint tortfeasors;
   c. Award of damages greater than the amount prayed for;
   d. Award of punitive damages only; and
   e. Agreement by fewer than the requisite number of jurors on all parts of a verdict.

2. These deficiencies must also be corrected before entry of judgment.

XII. JURY INSTRUCTIONS

Parties are entitled to jury instructions as to their theory of the case if supported by evidence. Hernandez v. Barbo Machinery Co., 327 Or 99, 106, 957 P2d 147 (1998); State v. Davis, 65 Or App 83, 86, 670 P2d 192 (1983). The function of charging the jury is to state to the jurors all matters of law necessary for their information in giving their verdict. ORCP 59 B.

A. Formulation

1. Uniform Jury Instructions

   a. Oregon State Bar. The Oregon State Bar has adopted uniform jury instructions in both civil and criminal cases. While the Oregon uniform jury instructions are helpful and courts often rely on them, they do not have the force of statute, and it is not error for the court to refuse to give them. Carter v. Mote, 285 Or 275, 292, 590 P2d 1214 (1979).

   i. State Practice. In state court, the uniform jury instructions in civil cases may be requested by Uniform Oregon Jury Instruction number and title, without setting out the body of the instruction. If the uniform instructions contain blanks or alternative choices, the appropriate material to complete the instructions must be supplied in the request. UTCR 6.060(3).

   II. Federal Practice. The United States District Court for the District of Oregon requires jury instructions that are not uniform or model instructions to be set out in full. For Oregon State Bar Uniform Civil Jury Instructions and Ninth Circuit Model Jury Instructions, citation of the instruction number is sufficient. In all cases, each instruction must be set out on a separate sheet. LR 51-1(d).

   b. Other Standard Jury Instructions


   ii. California Uniform Jury Instructions and other sources.

2. Directed Verdict Information—Full and Partial. A request to instruct the jury to return a particular verdict is tantamount to a motion for a directed verdict. Becker v. Pearson, 241 Or 215, 222, 405 P2d 534 (1965). But see Gritzbaugh Main Street Prop. v. Greyhound Lines, 205 Or App 640, 658 n.7, 135 P3d 345 (2006). This is also true with regard to an instruction that
requests the jury to return a particular verdict on one issue of the case, leaving others for the consideration of the jury. See, e.g., Remington v. Landolt, 273 Or 297, 301–02, 541 P2d 472 (1975). The use of a directed verdict instruction is disfavored, and cases have attempted to limit it. Lithia Lumber Co. v. Lamb, 250 Or 444, 450–51, 443 P2d 647 (1968).

**Practice Tip:** A directed verdict instruction should never take the place of a motion for directed verdict. It can act as a “safety net,” however, and form a basis for appeal in situations in which the unsuccessful party should have moved for directed verdict. To be safe, it should be included in virtually every set of jury instructions.

3. Non-Uniform Jury Instructions
   i. Clear. A jury instruction is an instruction to a layperson. The instruction should not recite verbatim statutes, appellate court language, or sections of the Restatement. Rogers v. Meridian Park Hosp., 307 Or 612, 616, 772 P2d 929 (1989); Thornburg v. Port of Portland, 244 Or 69, 73, 415 P2d 647 (1966).

   **Practice Tip:** In using statutes and Restatement sections to formulate jury instructions, the attorney should delete those portions of the statute or section that are irrelevant to the particular case. Likewise, the submitting attorney, without sacrificing meaning, should substitute lay terms for legal terms. See Woosley v. Dunning, 268 Or 233, 255–56, 520 P2d 340 (1974).

   ii. Accurate and Impartial. Instructions that comment on the evidence instruct the jury on the probative value of the evidence and are therefore improper. R.J. Frank Realty, Inc. v. Heuvel, 284 Or 301, 309, 586 P2d 1123 (1978). Generally, to avoid comments on the evidence, attorneys must limit instructions to statements of abstract principles of law without explicit application to concrete facts. Vollstedt v. Vista-St. Clair, Inc., 227 Or 199, 206, 361 P2d 657 (1961). Thus, an instruction (otherwise correct) that closed with “your verdict must be for the defendants,” destroyed the neutral form of the instruction. Ginter v. Handy, 244 Or 449, 451, 419 P2d 21 (1966). A jury instruction stating that “defendants cannot recover,” “the plaintiff is not liable to the defendant,” or “the plaintiff is without liability to the defendant” is inappropriate. St. Paul Mercury Ins. Co. v. Baughman, 61 Or App 534, 537, 657 P2d 1254 (1983). Likewise, it is error to give undue prominence to a phase of the case through repetition in the instructions. Id.

   Instructions must be entirely free from error. The court is not required to edit requested instructions and omit parts that are incorrect or inapplicable. Beglau v. Albertus, 272 Or 170, 179, 536 P2d 1251 (1975) (the requested instruction must be “clear and correct in all respects, both in form and in substance, and *** altogether free from error”).

   iii. Example. Example 1 (attached) involves a fraud case in which the plaintiff contends that the defendant induced the plaintiff to make a gift to the defendant by a fraudulent misrepresentation. The instruction is based on Section 553 of the Restatement (Second) of Torts (1977).

   b. Building-Block Approach. In general, instructions should flow in a logical manner from one to the other. Thus, nonuniform instructions should begin with the general statement setting forth the elements of the claim for relief.
The instructions should then define those terms necessary to understand the general claim for relief. Every general instruction that includes legal terms not commonly understood by laypeople must define the terms. *Musulin v. Woodtek, Inc.*, 260 Or 576, 583–84, 491 P2d 1173 (1971).

A trial judge is not required to give an instruction that, although correct, includes an undefined technical term that could be misunderstood by a jury. *Lampos v. Bazar, Inc.*, 270 Or 256, 279, 527 P2d 376 (1974).

c. **Alternatives.** In order to present your theory to the court and yet avoid the “all or nothing” rule of *Beglau v. Albertus*, 272 Or 170, you should use alternative instructions when there is a doubt as to which rule of law the court will apply. A good discussion of the form of alternative instructions is included in volume 2 of *Oregon Civil Litigation Manual* (Oregon CLE 2004 & Supp 2009).

d. **Examples.** See attached example of requested jury instructions.

e. **Supplemental.** Proposed instructions on questions of law developed by the evidence, which could not reasonably be anticipated at the commencement of trial, may be submitted at any time before the court instructs the jury. ORCP 59 A.

B. **Instructing the Jury**

1. **Written or Oral.** Instructions must be read to the jury by the court. ORCP 59 B; *Hollis v. Ferguson*, 244 Or 415, 423, 417 P2d 989 (1966). The jury instructions must also be reduced to writing, and the jury must take any written instructions with it while deliberating on the verdict. ORCP 59 B.

2. **Submission to Court and Counsel**

a. **Federal Court.** LR 51-1(a):

   “To request model instructions for issues not specific to the subject matter of a case (e.g., instructions located in Chapters 1, 2, and 3 of the Ninth Circuit’s Manual of Model Civil Jury Instructions), submit only the suggested instruction number and title corresponding to the requested instruction. Instructions specific to the issues in the case must be submitted as specified in LR 51-1(b)-(d).”

b. **State Court.** Unless otherwise requested by the court, attorneys must submit proposed instructions to the court at the commencement of the trial. ORCP 59 A.

   UTCR 6.060(1) requires that the requested instructions be filed, and submitted to the trial judge in the manner and time specified by the judge. Check local supplementary court rules for any local requirements.

C. **Exceptions**

1. **Instructions Not Given.** In state court, a party must object to a failure to give an instruction immediately after the judge instructs the jury. The party must state any point of exception on the record with particularity. ORCP 59 H. In federal court, such exceptions must be taken “stating distinctly the matter objected to and the grounds for the objection.” FRCP 51(c)(1).
2. **Instructions Given.** In both state and federal court, in order to preserve error, the attorney must take exception to instructions given to a jury. ORCP 59 H; FRCP 51; *Durham v. Warnberg*, 62 Or App 378, 384-85, 660 P2d 208 (1983).

   If the court finds that the exception is well taken, the court will reinstruct the jury. If the reinstruction is also erroneous, counsel must again take exception. This situation occurred in *Oliver v. Major*, 66 Or App 47, 672 P2d 1227 (1983), in which both attorneys agreed that the particular requested instruction was erroneous. The court reinstructed after a timely objection. The appellant argued on appeal that the subsequent instruction was also erroneous. The failure to make a second exception was tantamount to acquiescence to the given instruction.


   All exceptions must be on the record. ORCP 59 H(2).

   **PRACTICE TIP:** Judges will often invite counsel into chambers before argument to “go over the instructions” and to inform counsel as to the instructions to be given. Objections to adverse instructions can be brought to the court’s attention at that time. But this procedure can never substitute for adequate exceptions after the jury is instructed.

# XIII. VERDICTS AND FINDINGS

A. **Verdicts**

   1. **Types**

      a. **General.** A general verdict is a verdict that pronounces generally on all or any of the issues in favor of either the plaintiff or the defendant. ORCP 61 A(1). The general verdict assesses the amount of recovery. A general verdict that finds in favor of a party seeking money damages, but awards no money, is a proper general verdict. ORCP 61 A(2).

      b. **Special Verdict.** A special verdict is a verdict requiring the jury to answer special written findings on each issue of fact. ORCP 61 B; FRCP 49(a). The use of a special verdict is within the trial court’s discretion. *Hammagren v. Wald Construction, Inc.*, 274 Or 267, 270, 545 P2d 859 (1976).

      c. **General Verdicts with Interrogatories.** The court may submit to the jury a general verdict form, together with written interrogatories on one or more issues of fact. ORCP 61 C; FRCP 49(b). The use of a general verdict with interrogatories is discretionary. *Hammagren v. Wald Construction, Inc.*, 274 Or 267; *Myers v. Cessna Aircraft*, 275 Or 501, 530, 553 P2d 355 (1976).

   According to ORCP 61 C:

   “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.”
FRCP 49(b)(3) similarly states:

“When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

  "(A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;

  "(B) direct the jury to further consider its answers and verdict; or

  "(C) order a new trial.”

ORCP 61 C also states:

“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.”

FRCP 49(b)(4) contains a nearly identical provision.


a. PIP Background. PIP provides a no-fault mechanism to ensure prompt payment of medical bills and lost income and services. *Monaco v. U. S. Fidelity & Guar.*, 275 Or 183, 187–88, 550 P2d 422 (1976). If the PIP insured is not primarily at fault for the accident, the PIP insurer may be able to recover all or a portion of the benefits paid to the PIP insured from the party that was primarily at fault in causing the injury, or that person’s liability insurer. There are three ways in which the PIP insurer can seek recovery of PIP payments from the liability insurer: (1) intercompany reimbursement, ORS 742.534; (2) lien, ORS 742.536; and (3) subrogation, ORS 742.538. For policies issued or renewed on or after January 1, 2016, however, PIP insurers are able to recover the benefits paid to the PIP insured from the liability insurer only after all damages—both economic and noneconomic—have been paid to the PIP insured. SB 411 (2015) (amending ORS 742.544). Previously, the PIP insurer could begin recovering the benefits paid once the PIP insured’s economic damages alone had been satisfied. This change reduced the incidence of PIP insurers’ recovering the benefits paid to the PIP insured. When the PIP insurer can recover, it will likely choose the intercompany reimbursement method, as it did in the vast majority of cases in the prior recovery scheme. The intercompany reimbursement method is the most attractive alternative to the PIP insurer because no attorney fees are involved and it is relatively simple. The PIP insurer might be reimbursed before trial, or the two insurance companies might agree to wait until the injured party’s bodily injury claim against the at-fault driver has been resolved by judgment or settlement.

b. Damages Paid by PIP Can Still Be Plead and Proved at Trial. When the plaintiff has received PIP benefits and the PIP insurer has elected to seek reimbursement under the intercompany reimbursement statute, the question arises whether the plaintiff should plead

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1 Disputes between insurers over such issues of liability and the amount of reimbursement are resolved by arbitration. ORS 742.534(3).
and prove all the PIP benefits that he or she received as part of his or her damages. Nothing in the PIP statutes prevents the plaintiff from doing so, even if the PIP insurer has been reimbursed by the liability insurer before trial. *Koberstein v. Sierra Glass Co.*, 65 Or App 409, 413, 671 P2d 1190 (1983), *modified*, 66 Or App 883 (1984). The plaintiff’s counsel will generally want to prove the full amount of damages, including those amounts advanced by the PIP carrier. If the plaintiff did not prove the full amount of his or her medical expenses, he or she would be unable to respond accurately if asked at trial the amount of those expenses, and he or she would be unable to give the jury a complete account of the facts. *Koberstein*, 65 Or App at 414–15. Often, defense counsel will not stipulate that the medical bills are reasonable or that they were necessarily incurred as a result of injuries sustained in the accident. In that event, the plaintiff must prove those two elements to recover those damages.

c. **PIP Payments as Offset to Judgment When PIP Insurer Chooses Intercompany Reimbursement Method.** The PIP reimbursement can operate as an advance payment that reduces judgment, but only if the PIP insured has been fully compensated. ORS 31.555(2), (3)(b); SB 411 (2015). Under ORS 31.555(2) and (3)(b), the amount of the insured’s judgment can be reduced by the lesser of: (1) the amount of the PIP payments, reduced by the percentage of the insured’s negligence found at trial, or (2) the amount of the reimbursement payment. *Koberstein*, 65 Or App at 414. The purpose of the prepayment provisions of ORS 31.555(2) and (3)(b) is to shield a liability insurer from having to pay both the plaintiff and the plaintiff’s insurer for the same medical expenses. *Koberstein*, 65 Or App at 414. The defendant’s attorney files a cost bill under ORCP 68 C(4) attesting that the PIP insurer has been reimbursed, and judgment is reduced in that amount. ORS 31.555(2), (3)(b). If the PIP insured has not been fully compensated, the plaintiff’s counsel should object to the cost bill (and thus the requested reduction in the judgment) on the grounds that the liability insurer is or was not permitted to reimburse the PIP insurer, and that because it is/was not permitted, judgment should not be reduced. ORS 742.544 provides that the PIP insurer is reimbursed “only to the extent that the total amount of benefits paid [to the PIP insured] exceeds the damages suffered by that person.” Additionally, if the court instructs the jury not to award as damages those amounts paid by PIP, the judgment will not be reduced. *Brus v. Goodell*, 119 Or App 74, 78, 849 P2d 552 (1993).

d. **PIP Payments as Offset to Judgment When PIP Insurer Chooses Lien or Subrogation Reimbursement Method.** In the rare event that the PIP insurer chooses to recover the PIP payments through either lien or subrogation, the plaintiff’s counsel should be aware of the fact that ORS 742.544 might apply. Consequently, the plaintiff’s counsel might argue that the PIP insurer is not entitled to receive the full amount of the asserted lien because the plaintiff’s damages exceed the benefits received by the plaintiff. ORS 742.544. Although only the reimbursement statute, ORS 742.534, refers to the conditional reimbursement rule, ORS 742.544, logically the rule also applies to the lien and subrogation statutes. Because the legislation’s purpose is to protect the injured party’s damages, arguably that purpose should not be thwarted just because the insurance company chose a different recovery device. Joel DeVore, *Solving PIP Problems* ch 3, at 3-6 (Oregon CLE 1994). No Oregon appellate court has yet decided this issue.

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2 This question is resolved when the PIP insurer elects recovery by lien or subrogation: the injured person must include PIP damages in his or her claim when a lien is involved, ORS 742.536(3)(b), and can do so when subrogation is involved, see ORS 742.538(1).
3. After the Verdict Is Rendered

a. Declaration of Verdict. The court inquires of the foreperson whether the jurors have agreed on their verdict. If he or she answers in the affirmative, the verdict is read. In civil cases, three-fourths of the jury may render a verdict. ORCP 59 G(2).

Generally, the same nine must agree on all issues determined by the verdict, and if a lesser number agrees, the court should not receive the verdict. Instead, the court should send the jury out for further deliberation. Shultz v. Monterey, 232 Or 421, 424, 375 P2d 829 (1962).

In Davis v. Dumont, 52 Or App 73, 76–77, 627 P2d 907 (1981), the Court of Appeals held that when the questions presented in a special verdict form are not dependent on each other and involve two separate and independent defendants, the same nine jurors need not agree on each question.

Similarly, when more than nine jurors agree on the finding of liability through a special verdict, different subgroups of nine may agree on the specific amounts of economic and noneconomic damages to award. Such numeric disagreements are permissible as long as they do not present a logical inconsistency with the verdict. Kennedy v. Wheeler, 356 Or 518, 541–42, 341 P3d 728 (2014).

b. Polling the Jury. Upon receipt of the verdict, the jury may be polled. If not enough jurors agree to the verdict, the court will send the jury out for further deliberations. ORCP 59 G(3).

The court is required to poll the jury upon request of a party. If the jurors’ answers are ambiguous or unclear, the court must poll the jury as to each separate question presented, and a failure to do so will result in reversal. Sandford v. Chevrolet Div. Gen. Motors, 292 Or 590, 613–14, 642 P2d 624 (1982).

PRACTICE TIP: Sandford v. Chevrolet Division of General Motors is an excellent example of the necessity of having an unambiguous jury poll. The foreperson announced that the jury’s verdict was nine to three. The jurors, in the subsequent poll, answered unanimously that it was their verdict. The failure of the court to pursue this ambiguity and repoll the jurors as to each question was reversible error.

PRACTICE TIP: If the poll of the jury reveals ambiguous answers, the attorney should ask the court to repoll the jury. For example, in Shultz v. Monterey, 232 Or 421, when several of the jurors were asked, “Is this your verdict?” they stated “yes and no.” No further inquiry was made, and the court received the erroneous verdict.

A dissenting juror on the question of liability may not vote on the question of damages, and if that juror does so, the vote on damages is superfluous. Sprinkle v. Lemley, 243 Or 521, 531, 414 P2d 797 (1966).

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 to the

d. Remand for Further Instruction. When the jury returns an insufficient verdict, the court may either declare a mistrial or reinstruct the jury and resubmit the case. Calvert v. Ourum, 40 Or App 511, 517–18, 595 P2d 1264 (1979); Lewis v. Devils Lake Rock Crushing Co., 274 Or 293, 301, 545 P2d 1374 (1976).

When the trial judge determines that the jury is disregarding the court’s instructions or complying only with the letter of his or her instructions, he or she may reject the second verdict and grant a mistrial. Thus, in the case of Flansberg v. Paulson, 239 Or 610, 399 P2d 356 (1965), the jury first returned a verdict awarding only special damages. After resubmission, it returned a verdict that merely transferred to general damages the amount originally awarded as special damages. The appellate court viewed this as a “defiant disregard” of the court’s instructions and affirmed the declaration of mistrial. 239 Or at 617.

B. Findings


1. Request for Findings. The court is required to make special findings of fact and conclusions of law only if a party requests such findings before trial. Fox & Sons v. Carlton, 42 Or App 689, 692, 601 P2d 835 (1979); ORCP 62 A. If no party makes such a request, the findings may be either general or special. ORCP 62 A. A party lacks standing to object to a general finding unless the party made a pretrial request for special findings. Pietz v. Del Mar Investment Co., 247 Or 468, 473, 431 P2d 275 (1967). Also, one party’s request for special findings and conclusions does not entitle another party to those findings and conclusions. State Highway Com. v. DeLong Corp., 9 Or App 550, 592, 495 P2d 1215 (1972).

2. Proposed Findings

a. State Court. In state court, parties usually prepare the findings, although the court may propose them. ORCP 62 B. Findings must be sufficiently clear to support a judgment. Hawkins v. Teeples and Thatcher, 267 Or 151, 158, 515 P2d 927 (1973); Ierulli v. Lutz Development Co., 73 Or App 311, 315, 698 P2d 504 (1985).

Findings of fact can assume any form, as long as it is clear that the court intended that they be findings of fact. Wells v. Davis, 258 Or 93, 96–97, 480 P2d 699 (1971). Thus, an opinion of the court may constitute findings. Wells, 258 Or at 97.

PRACTICE TIP: If the court sends a letter opinion to counsel, counsel should incorporate it into the trial court record to provide a basis for appellate review.

b. Federal Court. In federal court, the parties generally do not submit proposed findings. Rather, the court prepares them. Requests for findings are not necessary for purposes of review, and an opinion or memorandum of decision will be sufficient if it contains the findings of fact and conclusions of law. FRCP 52(a).
3. Objections
   a. State Court. In state court, counsel must serve proposed findings on the court and parties within ten days. Within ten days after service, an adverse party may object and request different or additional special findings. The court must rule on all objections to findings and requests for other findings within 30 days after the filing of the objections or requests. ORCP 62 B. See generally Gordon Creek Tree Farms v. Layne, 230 Or 204, 358 P2d 1062, 368 P2d 737 (1962).

   b. Federal Court. In federal court, acknowledging that findings are generally not proposed by parties, the manner of objection is by motion to amend the court’s findings or make additional findings. FRCP 52(b). Counsel may make a motion to amend with a motion for new trial, but not later than 28 days after entry of the judgment. FRCP 52(b).

4. Effect
   a. Law Case. In a law case, a finding by the trial court as fact-finder is final and entitled to the same weight as a jury verdict. Gordon Creek Tree Farms v. Layne, 230 Or 204.

   b. Equity Case. In an equity case, in a trial de novo, the findings of the trial judge are nevertheless entitled to great reliance. Evans v. Korman, 264 Or 145, 148, 504 P2d 110 (1972); Sabre Farms, Inc. v. Jordan, 78 Or App 323, 330, 717 P2d 156 (1986). The appellate court, however, is not bound by the trial court’s findings of fact or conclusions of law. Vermeer v. Hickman, 229 Or 569, 572, 368 P2d 77 (1962).

   PRACTICE TIP: In equity cases, the trial judge’s decision will be given great weight on questions of credibility when facts are in dispute. Venture Properties, Inc. v. Parker, 223 Or App 321, 332, 195 P3d 470 (2008). It is often beneficial for the prevailing party, in preparing proposed findings of fact, to specifically include a finding on credibility of important factual witnesses.

XIV. JUDGMENTS

A. Definition
   A judgment is a concluding decision of the court on one or more requests for relief in one or more actions, as reflected in a judgment document. ORCP 67 A; ORS 18.005(8).

B. Judgment for Fewer than All Claims and Parties
   A final judgment may be rendered for one or more, but fewer than all, of the claims or parties in a case if the court determines that there is no just reason for delay. ORCP 67 B; FRCP 54(b). In federal court, the judgment must expressly state that there is no just reason for delay. FRCP 54(b). In state court, the judgment document is valid without an express statement that there is no just reason for delay. Interstate Roofing, Inc. v. Springville Corp., 347 Or 144, 155–56, 218 P3d 113 (2009). The trial court should make a careful consideration of factors to determine whether an early judgment would avoid injustice to the parties and advance the interest of sound judicial administration. A nonexclusive list of those factors is set forth in May v. Josephine Memorial Hospital, 297 Or 525, 532, 686 P2d 1015 (1984). The court need not state the reasons for its express determination that there is “no just reason for delay” in entering a judgment. The decision to direct entry of a judgment under ORCP 67 B is not reviewable on direct appeal. May, 297 Or 525.
PRACTICE TIP: *May v. Josephine Memorial Hospital*, 297 Or 525, overrules a string of Court of Appeals decisions that held that a mere finding that there is no just reason for delay without a statement of reasons by the trial court was insufficient. The case, however, also mandates very close scrutiny by the trial court before entering such an order. Such orders are not to be entered routinely or as a courtesy to counsel.

C. Form

1. **State Court.** Every judgment must be plainly titled as a limited, general, or supplemental judgment and set forth in a separate document. ORS 18.038(1)–(3). The judgment document must include the name of the court, the name of the prevailing party, the name of any parties in whose favor and against whom judgment is given, and the signature of the judge or administrator. ORS 18.038(4).

2. **Federal Court.** Every judgment must be set forth in a separate document in order to be effective. FRCP 58(a).

3. **The Effect of the Form of the Judgment.** *Gibson v. Benj. Franklin Fed. Savings and Loan*, 294 Or 702, 662 P2d 703 (1983), provides a detailed analysis of state and federal rules that concern the form of judgment. In that case, the judge signed “findings of fact, conclusions of law and judgment.” On appeal, the court noted that the judgment was inadequate in that it was not set forth in a separate document. The court further found, however, that the failure to comply was a matter of form only and did not justify the dismissal of the appeal.

PRACTICE TIP: *Gibson v. Benj. Franklin Fed. Savings and Loan*, 294 Or 702, points out the importance of strict adherence to form requirements. The court notes that use of the phrase “judgment order” is improper and incorrect. *Gibson*, 294 Or at 711 n.3. A “judgment” is “the concluding decision of a court on one or more requests for relief in one or more actions, as reflected in a judgment document.” ORS 18.005(8). An “order” is “any other determination *** that is intermediate in nature.” ORCP 67 A. The Supreme Court again reminded lawyers not to use the term “judgment order” in the case of *May v. Josephine Memorial Hospital*, 297 Or 525.

D. Submission

1. **State Court.** The prevailing party must prepare a proposed judgment document, unless the court specifies otherwise. ORS 18.035(1). If multiple prevailing parties exist, the parties may designate one to prepare a proposed judgment document.

2. **Federal Court.** Attorneys may request the prompt entry of judgment by the clerk or by the court. FRCP 58(b). Attorneys may not submit a proposed form of order or judgment “unless stipulated to by the parties or requested by the Court.” LR 5-11(c)(1).

PRACTICE TIP: In complicated cases, it may be appropriate for an attorney to request permission to submit a form of judgment. But a form should not be submitted without first receiving permission from the court.

E. Relation to Appeals

Judgment can be final for fewer than all the parties or all the claims. ORCP 67 B.
Upon entry of judgment, it is enforceable and appealable as provided by law. ORS 18.082(1). Once entered, a judgment governs the rights and obligations of subject parties and serves as official notice of the court’s decision. ORS 18.082(1).

General judgments incorporate previous written decisions of the court that are consistent with the judgment and reflect an express determination that the decision be conclusive as to the requests for relief that are resolved. ORS 18.082(2).

Close examination of the document from which the appeal is taken is essential. It must be from a judgment or appealable order as defined in ORS 19.205. Common errors include appeal from an order granting a motion for summary judgment, rather than from the judgment itself, Miller v. Grants Pass Irrigation, 290 Or 487, 489, 622 P2d 729 (1981), aff’d in part, rev’d in part en banc, 297 Or 312 (1984), and appeal from an order granting a motion for judgment notwithstanding the verdict, rather than the judgment itself, Ragnone v. Portland School District No. 1J, 289 Or 339, 344–45, 613 P2d 1052 (1980).

An appeal from a nonappealable order or judgment is without jurisdiction, and the court will dismiss it on its own motion. Ragnone, 289 Or 339.

**Practice Tip:** The importance of appealing from a proper judgment is seen in the case of Cenci v. The Ellison Company, 289 Or 603, 617 P2d 254 (1980). In that case, the trial court issued an order allowing a motion for summary judgment and subsequently issued a “judgment order” containing the necessary elements of a judgment. The appeal from the order allowing summary judgment was dismissed. More than 30 days had elapsed since the court entered judgment. Therefore, the appeal was permanently barred.

F. Default Orders and Judgments

ORCP 69 is a procedural rule governing the procedure for the taking-of-default order or judgment. ORCP 69 provides that a notice of intent to take default must be served only when the party against whom an order of default is sought has: (1) filed an appearance; or (2) “provided written notice of intent to file an appearance.” ORCP 69 B(2). The Oregon Supreme Court, in Denkers v. Durham Leasing Co., 299 Or 544, 704 P2d 114 (1985), analyzed ORCP 69 and determined that the procedures set forth in that rule did, in fact, represent a significant change from the custom among Oregon attorneys of providing notice of intent to take a default.

The Oregon Council on Court Procedures analyzed Denkers, 299 Or 544, and promulgated amendments to ORCP 69. What follows is the Council’s Staff Comments of 1986 and 1988, which explain the procedure and the changes:

1986:

“It is the custom among Oregon attorneys to provide notice of an intent to take an order of default to an opposing party when they are aware that the opposing party is represented by counsel. This notice is an outgrowth of professional courtesies among members of the Bar. It is not uncommon for one attorney to grant an extension of time for making an appearance to another attorney and to then notify that attorney when extensions of time will no longer be granted. It is believed that the extension of these professional courtesies assists in the efficient handling of disputes and fosters the professionalism of the Bar.
“ORCP 69 has long been read to require the provision of notice prior to seeking an order of default. The Oregon Supreme Court in Denkers v. Durham Leasing, 299 Or 544, 548 (1985), analyzed ORCP 69 and concluded that notice prior to taking an order of default is not required. Notice is required only when making application for a default judgment when the party in default has either appeared or is represented by counsel. It was suggested to the Council on Court Procedures that ORCP 69 should require notice of intent to take a default order when a party has either appeared or is represented by counsel. The Council was concerned that disparate treatment of represented and non-represented litigants in the ORCP presented problems of constitutional dimension.

“This amendment requires that notice be given to all parties who have appeared but against whom a default order has been taken prior to application for judgment only in the event that it is necessary to receive evidence prior to entering judgment.

“Litigants receive notice of the time within which they must appear to avoid default in the summons, ORCP 7. The extensions of courtesies among members of the Bar are not subject to regulation by the ORCP, and such attempts could make the procedural right of litigants rise or fall, depending on whether they are represented by counsel.

“The Council supports these extensions of courtesy among members of the Bar and recognizes the responsibility of all lawyers to abide by established custom and practice, Code of Professional Responsibility, DR 7-106(C)(5), and Ainsworth v. Dunham, 235 Or 225 (1963). The Council does not believe, however, that such courtesies can or should be the subject of procedural requirement.”

1988:

“Upon the recommendation of the Oregon State Procedure and Practice Committee, the Council amended ORCP 69 A to require notice in some circumstances before application for an order of default and amended ORCP 69 B to eliminate any requirement of notice before application for judgment by default. The amended provision requires written notice of intent to seek an order of default only to a party who has appeared or who has provided written notice to the party seeking default of intent to file an appearance.”

EXAMPLE 1—SAMPLE NONUNIFORM JURY INSTRUCTION

Section 553 of the Restatement (Second) of Torts (1977): Fraudulent Misrepresentations Inducing Gifts to Maker or Third Persons

“One who by a fraudulent misrepresentation, or by the nondisclosure of a fact which as between himself and another it is his duty to disclose, intentionally induces the other to make a gift to him or to a third person is subject to liability to the donor for the loss caused by the making of the gift.”
Requested Instruction

A person who by a fraudulent misrepresentation\(^3\) intentionally induces\(^4\) another person to make a gift to him or her is subject to liability to the donor for the loss caused by the making of the gift.

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\(^3\) Define “fraudulent” misrepresentation in following instruction.

\(^4\) Define “induces” in following instruction.
APPENDIX A—PRESENTATION OUTLINE

I. Trial Strategy
   A. Employing a Theme
   B. Creating Credibility
   C. Persuading with Primacy, Recency, and Repetition

II. Techniques
   A. Eye Contact
   B. Brevity/Don’t Overtry Your Case
   C. Behavior Outside the Courtroom
   D. Order of Witnesses

III. The Trial (Part One)
   A. Voir Dire
   B. Opening Statement

IV. The Trial (Part Two)
   A. Testimonial Evidence
      1. Fact Witness Direct Examinations
      2. Expert Witness Direct Examinations
      3. Cross-Examinations
   B. Use of Visual Aids

V. The Trial (Part Three)
   A. Closing Argument
   B. Miscellaneous
      1. Objections
      2. Jury Instructions
      3. Trial Notebook
      4. Pretrial, Trial, and Posttrial Motions

VI. Professionalism
Our objective as trial lawyers is to persuade. In our effort to be thorough and marshal every detail in our client’s favor, we often overlook one of our strongest weapons: our eyes.

It’s been said:

“Eyes are the windows to the soul.”

As we stand before the fact finder, our conviction, credibility, and belief in our client’s contentions are being judged by what appears in our eyes. Too often, in an effort to be thorough, we spend our time with our eyes cast down to our notes like an actor or actress reading a script. As anyone knows who has watched an actor read his lines rather than simply say them, reading is fatal to persuasion.

In his “Theater Tips and Strategies for Jury Trials,” David Ball makes a number of valid and significant points. One of his best points is that reliance on extensive notes undermines our ability to be a persuasive advocate. The best opening statements and closing arguments are given with few or no notes. The advocate opens his or her soul to the fact finder through eye contact. The eyes of an accomplished advocate are forever darting from one juror to another juror, looking for a wrinkled nose, a raised eyebrow, or a nodding head that will suggest a need to paraphrase, repeat a point, or move on to a different subject.

For many of us, trying an entire case without the use of notes of any kind would be impossible (after all, even the best actors and actresses review the script between scenes). For those of us who do use notes, two suggestions may be helpful:

1. Use only skeletal notes. Notes should be limited to a word or at most a phrase that will refresh our recollection of the point to be made. Writing out detailed questions, opening statements, and closing arguments word by word may be helpful as a preliminary exercise, but if used at the time of trial, copious notes make the necessary eye contact impossible.

2. Maintain eye contact whenever words are being exchanged. We should never look at our notes while speaking. We should never look at our notes while listening. We should quickly glance at our notes only when we are not speaking or our witness is not speaking.

A little bit of practice can work wonders. When we need to look at our notes, it is best to finish what we are saying AND STOP TALKING. Then we can look down at our notes. We should not start talking again until after we have looked back up from our notes and have reestablished eye contact. As David Ball suggests:

- Finish the point you are on.
- Pause for a split second. Observe your listener’s reaction (do not dive-bomb into your notes).
- Glance down at your notes. (Do not dawdle there.)
- Look up to establish eye contact.
- Pause for an instant of eye contact.
- Start talking again.

Similarly, when listening to a witness, we should not be looking at our notes or our next question, or we will make the answer seem unimportant. After asking the question, we should listen to the answer. Then, and only then, after the answer has been given and has registered, should we look at our notes for the next question.

A number of benefits will accrue from these habits. Oftentimes we will not need to look at our notes for the next question because the answer will suggest the next question. Other times, when the witness gives us an answer we do not expect, we will have LISTENED to it and be able to react rather than proceeding by rote to our next question like a robot. The next time you give an opening statement, throw away your detailed notes before you arrive in the courtroom. You know your case. Do not cheat yourself and your client by allowing fear, detail, or too much preparation to undermine your ability to persuade.

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2 Published in 1994 by the National Institute for Trial Advocacy.
Chapter 9—Anatomy of a Trial

Comments from the Editor: Tips from the Bench

U.S. District Court Judge Garr M. King, like the other members of the U.S. District Court for the District of Oregon, enjoyed an illustrious career as a trial lawyer before commencing his service on the federal bench. At a recent Federal Bar Association luncheon, he shared with the group a number of insights concerning trial practice, which we should all take the time to consider.

A. OPENING STATEMENT
1. The opening statement is the most important part of a trial presentation because
   a. The jury knows nothing about the case
   b. The jury is alert
   c. It is a great opportunity to persuade
2. Tell a story
   a. Incorporate facts and issues
   b. Tell jurors how you are going to help them resolve the case in your favor
   c. Remember that jurors are anxious
      i. One juror told Judge King that jury duty was "the hardest thing I've ever done"
      ii. Jurors want to do their job well
      iii. Jurors want your help
3. Don’t argue
4. Don’t make statements you can’t prove
5. Use visual aids
   In a complex case, illustrate the cast of characters
6. Be concise but not terse
7. Be specific
8. Build an interesting structure, not just a chronological one

B. WITNESS PRESENTATION
1. Ask simple questions
2. Save a good strong witness for the end of your presentation
3. Do not ask questions more than once
   Jurors often complain that lawyers repeat their questions ("Do they think we’re stupid?")
4. Avoid cumulative questions and cumulative witnesses
5. Be alert to jury’s reaction; read your audience
   Are they falling asleep? Looking at the ceiling?
6. Remember that jurors like visual aids
7. Avoid videotaped testimony; it bores the jury
   a. A jury would rather see an edited transcript, with someone reading it aloud

b. If you must use a video, edit it
8. Use summaries of exhibits
   a. Going through an exhibit page by page with a witness can be boring
   b. This depends on the judge

C. CROSS-EXAMINATION
1. Be cautious; less is more
2. Keep in mind that jurors generally root for the witness, who is seen as the underdog (except an arrogant or expert witness)

D. CLOSING ARGUMENT
1. Review instructions carefully before closing argument
2. Give the jury a road map, telling them how to return a verdict with the jury instructions
3. Walk through special verdict form with jury
   Example: “Here’s the first question, and here’s how we satisfied it”
4. Give jurors the numbers of exhibits you want them to consider
5. Tie up loose ends
   a. You do not need to discuss every bit of evidence or every witness
   b. Hammer home your theory
6. Avoid overlong closing arguments
   Limit to about an hour

E. EXPERT WITNESSES
1. “An expert is a guy from out of town”
2. Experts have questionable credibility with the jury
3. Judge asks jurors what they think of an expert witness; answers may include:
   a. “He seems bought and paid for”
   b. “His figures were helpful”
4. Good expert = good teacher
5. Keep your expert under control
   Ask questions; do not just turn him loose
6. Ask basic questions; explain and define things
7. Use your expert effectively
   a. Consider having the expert “teach” the jury
   b. Consider getting the expert off the stand
   c. Consider having the expert use a chalkboard and/or charts

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8. Prepare visual aids in advance
   a. Judge King will not allow an expert to write out a visual aid in front of the jury
   b. Drawing a diagram is okay, but he recommends preparing the visual aid first and having the expert work with it

F. DEALING WITH JUDGES AND OPPOSING COUNSEL
   1. A judge is like a law student who marks his own examination papers
   2. Jurors usually favor the judge in a fight between an attorney and a judge
      Jurors may favor the attorney if the judge is being unfair or biased
   3. Courtesy and professionalism are essential

G. JUDGE KING’S TIPS FOR A BALANCED LEGAL CAREER
   1. Keep fit
   2. Be ethical
   3. Take vacations
   4. Have many interests
   5. Laugh
   6. Be creative
   7. Don’t take yourself too seriously
Comments from the Editor: “A Recipe for Opening Statements and Closing Arguments”

A lot has been written on opening statements and closing arguments. Over the course of a career, most of us read “volumes” of material dealing with opening statements and closing arguments and attend countless seminars covering these trial practice topics.

Ultimately, however, I find that unless I’ve reduced these materials and seminars to short checklists or abbreviated points (a recipe, of sorts), I run the risk of forgetting what I have learned. I suspect that most of us find that just prior to trial (when we are overworked and sleep-deprived) is not the ideal time to be rereading and restudying to perfect our trial skills. On the other hand, if we can pick up a quick checklist and review it as we’re preparing an opening statement or a closing argument, points garnered over the years from experience, reading, and seminars will be less likely to be overlooked.

Set forth below are a couple of checklists for your consideration. I believe that ultimately the most beneficial checklist is the one that each of us develops individually and reviews and revises over a lifetime of practice rather than one that we find in a treatise or receive at a seminar. Thus the checklist set forth below is really more an example of a methodology for your consideration rather than a specific checklist to adopt. Each of us should, over time, prepare and revise a checklist of points that is suited to our own individual style.

A. Example of Opening Statement Checklist

1. Theme, theme, theme.
   (Select your theme and return to it often.)
2. Simplify, simplify, simplify.
   (Provide a view of the forest, not a description of each of the trees.)
3. Capture attention early.
   (The media correctly recognizes that this needs to be done in 30 seconds or less.)
4. Tell a story with a viewpoint.
   (Think about whether the viewpoint should be from an omniscient narrator, the position of your client, or the position of your adversary.)
5. “Pull the teeth” of your weaknesses.
   (If you haven’t done so in jury selection, disclose your weaknesses before your opponent does it and hurts your credibility.)
6. The facts, the facts, the facts.
   (The “facts,” not “argument,” win cases. Marshal the facts that support your theme and story.)
7. Use visuals.
   (Use charts, a chalkboard, and exhibits to enhance your opening.)

8. “Talk,” don’t give a speech.
   (Don’t have your opening memorized or write it word for word; simply “talk” or “visit” with the jury or the judge.)
9. Tell the fact-finder what you want.
   (Make it clear (particularly if you’re a plaintiff) what it is that you’re asking the fact-finder to do.)
10. Start strong and end strong.
    Similarly, each of us should make an effort to reduce the points we have learned over time from both practical experience and continuing legal education to a checklist of points that can be reviewed as we prepare closing argument.

B. Example of Closing Argument Checklist

1. Thank the jury, but “don’t overdo it.”
2. Avoid notes.
3. Use exhibits and testimony transcripts.
4. Invite the jury or the court to examine exhibits and transcripts.
5. Select and review key jury instructions.
6. Argue credibility.
   (Discuss why your witnesses are more credible than your opponent’s, but don’t accuse anyone of lying.)
7. Establish why your case is important.
   (Argue that more is at stake than simply deciding the outcome of a dispute.)
8. Fulfilled and unfulfilled promises.
   (Return to opening statements and demonstrate your fulfillment of and your opponent’s failure to fulfill promises concerning what the evidence will show.)
9. Suggest, don’t demand.
   (Empower the judge or the jury and suggest why your approach is more just or fair.)
10. Argue inferences.
    (Argue the reasonable and logical conclusions that should be drawn from the evidence.)

I encourage each of you (if you haven’t already done so) to develop your own personalized checklist and then to review and modify it regularly, based on your study and experience. Then each time you prepare an opening statement or closing argument, your recipe (checklist) can be easily used to ensure that the points you have learned over time are not overlooked.

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Comments from the Editor: An Alternative to Mock Jury Trials

Most of us recognize the value of using jury trial consultants and conducting mock jury trials to develop trial themes, determine any gaps in our cases, and determine their strengths, weaknesses, and value.

Engaging trial consultants and conducting mock jury trials can be expensive. The expense can usually be justified only in the most substantial cases we handle. It is difficult, if not impossible, to justify such an expense in a case involving $100,000 or less.

Yet there are some alternatives to consider in our trial preparation. There are other less expensive ways to determine:

- whether we have selected a persuasive theme.
- whether we can get our point across in 30 seconds or less.
- the strengths and weaknesses of our cases.
- whether we have developed a proper “story” for our case.
- whether there are “gaps” or “questions” raised by our story.
- whether we have personalized our story characters.
- whether we have successfully reduced our case to a single persuasive sentence.

What are these less expensive alternatives to mock jury trials? Every day we have opportunities to spend time with “regular folks” whose reactions and opinions concerning our cases may well be as helpful as those of the jury consultant or those of a mock jury panel. Many of these people are available to us at little or no expense.

(a) Gas Station Attendant. Next time you stop to get fuel for your automobile, select a time of the day that is early or late enough that the gas station will not be busy. Service stations providing 24-hour service are ideal in providing these opportunities.

As the gas station attendant is filling your automobile’s tank, get out of your car and ask his or her indulgence in listening to the facts of a case you are handling and providing you with his or her reactions to it. I believe you will find that most attendants are pleased to have the mental stimulus and are flattered by your interest in what they think.

If you go to a service station regularly and try this out, you can easily develop a relationship with one or two service station attendants who will look forward to discussing your next case with you.

(b) Barbers and Hairstylists. Barbers and hairstylists can sometimes be a good barometer of public opinion. Once a month or so, most of us sit for 30 minutes or more with a hair professional with whom we have developed a relationship. I suspect that most of them would be pleased to share their reactions to your case themes and give their opinions on your case’s strengths and weaknesses.

(c) Cab Drivers. Similarly, cab drivers can serve as an excellent alternative to a mock jury panel. It might cost you $40 to ride to and from the airport, but most of them would be pleased to have the mental stimulus of having a case explained to them and providing you with their reactions and opinions. Cab drivers meet a lot of people, listen to a lot of radio, and often have a pretty good sense of public opinion.

The list, of course, goes on and on. Often your 12-year-old son or daughter would be flattered if you would take 20 minutes or so to discuss one of your cases with them to obtain their reactions and opinions. Although you may think that you know what they will say, you often may be surprised.

Another alternative to mock jury trials is simply to videotape yourself giving a mock opening statement. You can then play this videotape for family members, legal secretaries, or other staff members to get their reactions and opinions. You will probably find that by watching yourself on videotape you will gain certain insights on how to improve your persuasion and presentation, with or without the help of others.

There is no question that jury consultants and mock jury trials can offer a wealth of information to improve our ability to persuade. But don’t overlook the opportunity to use less expensive alternatives.

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Comments from the Editor: “Don’t Give a Speech—Talk to the Jury”*

Most of us from time to time have heard the advice, “Don’t give a speech . . . talk to the jury.” But what does it really mean?

Well, most of us finally figure it out after 20 trials or so, but I have always been puzzled why it seems to be such a secret.

The simple explanation is that we use our eyes differently when we give a speech from the way we do when we talk to a jury.

When you give a speech on a stage behind a podium to a large group in an auditorium or a concert hall or a ballroom, your eyes go from one end of the audience to the other and back and forth. You are giving a speech. This is the way we have been taught to give speeches. This is the way politicians do it.

When we are talking to a panel of jurors, however, if our eyes dart from one end of the room to the other and back and forth, the power of our eyes is diluted. Moreover, we give the impression that we are “giving a speech” or that our remarks are simply memorized.

How do we transform this “speech giving” into “plain talk” to the panel?

Really, it’s quite simple. Concentrate on speaking with one juror at a time. Create a relationship. Look at one juror while you make a single point, then think to yourself “thank you,” and then move on to the next juror and make your next point.

As you can see, this will cause your eyes to go from one juror to the next but to move only after you’ve completed the point you are making.

Needless to say, this doesn’t mean that you start with juror number 1 and end with juror number 12. It may well be that the first juror who is looking up and makes eye contact with you is juror number 4. After you finish making your point with juror number 4, you may find that the next natural juror to make eye contact with is juror number 8...and so on.

Inevitably, some jurors are less comfortable with full eye contact than others. If you have a juror who is not comfortable with the eye contact, simply look at that juror pleasantly and then move away a little bit more quickly than you would with the others until the juror gets more comfortable with your gaze.

Don’t give a speech; talk to the jury. Now that the secret is out, most of us can understand why most politicians do not make good jury-trial lawyers.

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Comments from the Editor: Repetition and Skating . . . But Not on Ice

By the time we graduate from law school, we realize that the most powerful techniques for trial practice are primacy (we remember best what we hear first), recency (remember what we heard last), and repetition. Repetition to a degree is the stepsister of the other two techniques. Perhaps because it is overused or misunderstood. Make no mistake about it, however—if used correctly, it is powerful.

1. Misuse of Repetition

When the videotape portraying the police beating of Rodney King was played for the 35th time at trial in the original case before the jury in Simi Valley, California, the jury was so calloused from hearing and seeing it over and over again that the initial reactions of revulsion and horror had drained away. Repetition of the same powerful evidence over and over again can dilute its impact and even result in its having an opposite impact.

As a result of this phenomenon, we should be careful to use strong visceral evidence sparingly. The first time tears come to the plaintiff's face, the jury is moved by them. By the eighth or ninth time, the tears may well have the opposite effect.

Save, savor, and carefully dole out your powerful visceral evidence. This is not where the trial technique of repetition is effective.

2. Repetition of Theme

In contrast, however, when you have finally boiled down all your evidence, the facts, and your theories into a simple one-sentence theme, don’t be afraid to repeat that theme throughout the trial.

For instance, if the theme of your case is that the defendant will not pay for the new plant that your client built for it because demand has fallen off for its product and it doesn’t need the plant, don’t be afraid to ask half a dozen witnesses about the undisputed loss of demand.

Here repetition can be helpful and reinforce your message to the fact finder.

3. Skating

Skating is the trial technique that enables you to dwell on, repeat, and savor great testimony that helps your case.

For instance, in a negligence case against a defendant who has caused an automobile collision, you may discover on cross-examination that the defendant had three beers just before the accident.

This is evidence worth dwelling on, repeating, and savoring. Don’t run the risk of hiding this piece of evidence in a long-winded narrative answer by one witness or limit this evidence to one short question and answer.

The first technique is to repeat the answer in your next question. “After you had the three beers . . . .”

Skating, however, goes further; you can dwell on that answer by asking a series of questions that forces the same answer to be repeated over and over again until you are sure the fact finder (and even sleepy juror number 6) has heard it and will remember it. Here’s a short example based on the answer that the defendant had three beers before the accident:

“Q: Were the three beers that you had light beers or dark beers?
“A: Light beers.
“Q: Were the three beers that you had from the tap or from a bottle?
“A: From a bottle.
“Q: Were the three beers that you had imported or domestic?
“A: Domestic.
“Q: The three beers that you had—did you drink them with a glass or without a glass?
“A: I drank them out of the bottle.
“Q: The three beers that you had—did you drink them slowly or did you drink them fast?
“A: I drank the first fast and the last two slowly.”

You know, the witness knows, and the jurors know that you don’t particularly care whether the three beers were light beers, domestic beers, beers in a bottle, beers served with a glass, or beers drunk fast or slowly. In fact, you have known all this information for some time as a result of discovery. But what you do care about is “skating” over that great evidence, time and time again, until you are certain that repetition will make it memorable.

You are skating . . . but not on ice.

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Comments from the Editor: How to Get Your Point Across in 30 Seconds or Less . . .

We find ourselves in an age of fast food, fast transportation, and fast communication. Scientific advances are conditioning us to expect instant communication, instant responses, and instant gratification.

The business world recognizes that a businessperson who cannot get his or her point across in 30 seconds or less will not be persuasive. When we rise to our feet in court, put pen to paper, or key information into a computer, we should be guided by the same principle.

I recently read How to Get Your Point Across in 30 Seconds or Less, by Milo O. Frank, one of America’s foremost business communication consultants, and found that it echoed what most of us learn over the course of a litigation career about the value of brevity and clarity.

Attention Span

Frank notes that the human mind has an attention span of approximately 30 seconds. Try to concentrate for a moment on a single object, such as a pencil. You will find that in about 30 seconds your mind begins to wander unless additional action recaptures your attention. This simple test corroborates what television, radio, and newsprint advertisers have known for years: You need to capture someone’s attention, get your message across with high impact, and then stop within 30 seconds. Time a few commercials on television. I believe you will find that the most effective ones are those that last 30 seconds or less and follow the methodology set forth below.

Courtroom Application

I have been told and have come to believe that no legal argument that cannot be explained to a colleague in a 3-minute elevator ride will be successful. And if you don’t catch that colleague’s attention in the first 30 seconds, the other 2½ minutes will be wasted. One of the most challenging tasks of our practice is to reduce complex, complicated cases to brief, clear, concise contentions that persuade. The first 30 seconds are the most crucial.

Methodology

Set forth below is a brief summary of the points made by Frank in his book. For the most part they are the same points that trial-technique advocates preach and that experience confirms are valid.

- Identify your objective.
- Reduce your objective to a single persuasive sentence.
- Identify an approach to your objective that will take into consideration the needs and interest of your listener (fact-finder).
- Ensure that each point directly advances your objective and relates to the listener.
- Use imagery to create a picture.
- Tell a story.
- Personalize the story characters (your client).
- Add emotional appeal and idealism.
- Be prepared, but don’t memorize.
- Care about what you are saying and use your voice and gestures to express that care.
- If you wish to emphasize something . . . speak softly.
- When you want the attention of the fact-finder . . . pause.
- Start and end on a high note.

Conclusion

It is not particularly surprising that effective communication, whether in the courtroom or in the boardroom, follows the same principles. This realization may suggest to some of us that we ought to attend fewer litigation seminars and more effective-communication seminars.

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Comments from the Editor: “It’s Only a Matter of Time...”

The value of time is not taught in law school. Instead, we are taught to be careful, detailed, and thorough. Somewhere in our quest to be the best lawyer we can be, we tend to lose our layperson’s recognition of universal truths like “Time is our most valuable possession.”

Experience has taught me that time is the most valuable possession of a fact finder. Honor this principle, and you will succeed. Squander the fact finder’s time, and you will be punished.

A few months ago in this column, I evaluated a book on trial strategy entitled Sponsorship Strategy. One of the principles of the book is worth repeating. The more of a fact finder’s time you take, the better use you should make of it. Otherwise, the use of that time will be held against you.

A case in point is the direct examination by the prosecution in the O.J. Simpson case of the prosecution’s pathologist. The direct examination lasted six days. The cross-examination conducted by Robert Shapiro of the defense team was brief, creating a stark contrast Shapiro’s cross-examination included the admission by the pathologist that after six days, all he could really tell the jury was that:

1. The victims had bled to death.
2. They had been stabbed with a sharp instrument, probably a knife.
3. The murder weapon was probably a single- rather than a double-edged knife.

We can all imagine what the jury (which several times nearly mutinied because of the length of the trial) thought about a direct examination that lasted six days, but that resulted in only three pieces of information. Under sponsorship strategy, the prosecution’s use (“waste”) of the jury’s time will be, and was, held against it.

The lesson here for the rest of us is a simple one. It is a lesson recognized by the advertising industry. In our fast-paced world, advertisers provide us with information by “sound bites” and pictures that change seemingly every “nanosecond.” The message is be “brief, powerful, and clear.”

Applying this to a trial, several suggestions become apparent:

1. Use as few witnesses as possible.
2. Make your direct examinations “brief, powerful, and clear (simple).”
3. Don’t waste the first 60 seconds of each opportunity you speak. These golden moments should not be wasted on preliminaries, procedural and evidentiary foundations, and “warming up.”
4. Objections and courtroom interruptions should be kept at a minimum (object only if you are right and if it is crucial).
5. Cross-examinations should be brief. (Making any more than your three strongest points may dilute the impact of the examination.)
6. Sidebar conferences and requests for conferences with the court (causing the jury to recess) should be kept to a minimum.

Next time you are trying to determine how long to make your direct examination, think about how you enjoy being caught in a traffic jam, waiting in line at a grocery store, or circling the block looking for a parking place. Your direct examination should be no longer than you wish to engage in any of these activities.

Similarly, when you prepare cross-examination, think about how long you can comfortably stand on one foot. In fact, perhaps some trial judges should start forcing us to conduct our cross-examinations while standing on one foot.

I suspect you will find that if you force yourself to be brief and condense your case, you will consciously or unconsciously separate the wheat from the chaff and create a presentation that is not only brief, but also more “powerful and clear.”

Make good use of the fact finder’s time. You will be rewarded for your effort.

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Comments from the Editor: Personal Credibility

It’s not unusual for a client or a referral source looking for a trial lawyer to say that he is looking for a lawyer who is “mean, aggressive, and hostile.” My personal observation has been that “mean, aggressive, and hostile” lawyers tend to receive the same in kind and usually end up costing their clients substantial amounts in unnecessary attorney fees and ultimately alienate the fact finder.

Perhaps we sometimes mistake “meanness, aggressiveness, and hostility” for “personal credibility.”

There is no question that every client and referral source should be looking for a lawyer who will put his or her “personal credibility” on the line for the client. Such a lawyer unleashes his or her personal belief and conviction to support the client’s position.

In a recent seminar given by Wisconsin Federal Appellate Judge Ralph A. Fine, Judge Fine emphasized the importance of the lawyer’s personal credibility in a jury trial.

The Lawyers Know the Real Truth

Judge Fine explained that jurors are convinced that the lawyers know the “real and whole” truth (regardless of the reality of whether they do or don’t) of the case that they bring to trial.

It is not surprising that Judge Fine comes to this conclusion. After all, lawyers spend their time in front of the jury objecting to the introduction of evidence. Obviously, they wouldn’t object if the information they were trying to keep out was not important and hurt their case. Based on these objections, the jurors conclude that the lawyers are attempting to keep them from knowing “the real and whole” truth, which the lawyers alone know. Similarly, lawyers regularly have “secret” conferences with the judge (while the jury is excused) and whispered sidebar conversations with the judge. We all learn at an early age that it is impolite to whisper in the presence of others. Again, the natural conclusion of the jurors is that something is being kept from them. The lawyers know the important facts that the jurors do not.

Personal Credibility

Once one concludes that jurors assume that each of us knows the “real and whole” truth, the most effective way to be persuasive is to be zealously committed to one’s client’s position. Anything less suggests that the lawyer doubts the client’s position.

Judge Fine uses a couple of examples to demonstrate when “personal credibility” is present and when it is not.

Never Apologize

Judge Fine urges trial lawyers never to apologize for their client’s position. Apologies do not curry favor and do not make us likable. Instead they make us look weak and our client’s position suspect.

For example, when Marcia Clark prosecuted O.J. Simpson for the murder of Nicole Simpson, she apologized in opening statement for prosecuting a popular high-profile football star. If in fact, as the jury presumes, she knows the “real and whole” truth (namely, that Simpson had committed the brutal cold-blooded murders), why would she be apologizing?

Don’t Distance Yourself from the Facts

Similarly, Judge Fine criticized Robert Bennett’s recent defense of President Clinton to the charges of Kathleen Willey. In response to some rather graphic allegations by Ms. Willey on the 60 Minutes television news program concerning improper sexual advances by the President, attorney Bennett was careful not to place his personal belief and conviction on the line. Instead he told the television reporter what he understood to be “President Clinton’s version of the facts.” Hiding behind what he referred to as his “client’s account” of the facts instead of responding clearly and directly that his client was not guilty and he would prove so was fatal to his persuasiveness.

Credibility Must Be Consistent with the Facts and Common Sense

Needless to say, a lawyer cannot place his unqualified personal belief and commitment behind a client’s position unless it is believable. Personal credibility must be consistent with the facts and the jurors’ common sense. The lawyer must first analyze the facts and adopt a version of the facts and a theme that is consistent with them and with common sense. Having done so, the lawyer’s most persuasive tool for adoption of the lawyer’s version of the facts and theme is the lawyer’s credibility.

Prohibition Against Announcing Personal Belief

It has long been recognized that even in closing argument lawyers are prohibited from announcing their own personal belief concerning the truth or untruth of the facts or witnesses’ credibility. See, e.g., Fowler v. State, 500 SW2d 643 (Tex Crim App 1973); People v. Bain, 489 P2d 564 (Cal 1971). Why? Because it is so powerful. One can demonstrate one’s personal belief, however, without announcing it.

One does so not by apologizing for prosecuting O.J. Simpson but by stating unequivocally that “I will prove to you that this man is a murderer.” One does so not by hiding behind “the President’s version of the facts” but by stating that “the President is innocent of the charges, and when the time is right we will prove it.”

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Conclusion

Next time someone approaches you and tells you that he or she is looking for a trial lawyer who is “mean, aggressive, and hostile,” I suggest that you encourage him or her to reconsider. What he or she is really looking for is a trial lawyer who will place his or her own personal credibility on the line to support his or her client.
Comments from the Editor: Direct Versus Cross-Examination: A Study in Contrast\textsuperscript{12}

The comparison of the general rules for conducting direct examinations and cross-examinations exposes a common theme. Whatever the rule that applies to direct examination, usually the directly opposite rule applies to cross-examination.

This contrast is not surprising. After all, direct examinations generally consist of eliciting helpful information from cooperative witnesses whose credibility we are attempting to bolster. On the other hand, on cross-examination we are generally attempting to elicit helpful information from an uncooperative witness whose credibility we are attempting to impeach.

A review of six general rules of cross-examination and comparing those rules with comparable rules for direct examination will demonstrate the contrast.

1. **End strongly, start slowly.**

A good direct examination, redirect examination, or recross-examination should start and end strongly (taking advantage of the persuasive techniques of primacy and recency). Similarly, cross-examination should finish strongly ending with the traditional “zinger,” a point that is a guaranteed winner in that it is absolutely admissible, is central to your theory, evokes your theme, is undeniable, and can be stated with conviction. In direct examination the same kind of impact can be made with a “zinger” in the opening line of questions.

In contrast, however, a cross-examination should usually not begin with a “zinger.” Why? Because employing an initial “zinger” will alienate the cross-examination witness and make it impossible to draw from that witness helpful points to generally bolster your case (before turning to hostile questions and ending with a “zinger”).

Starting slowly on cross-examination will allow you to take full advantage of information available from the cross-examination witness before you allow your relationship with him or her to deteriorate into alienation.

First, you can elicit friendly background information that is not threatening, but that may support your theory and theme, such as the achievements and extraordinary training of a defendant who you are attempting to show knew full well what he or she was doing at the time of the complained-of conduct.

Second, after exhausting the friendly information, you can ask questions to build the value of your case by providing affirmative information that will fill in gaps and will be more persuasive coming from an adverse rather than a friendly witness.

Finally, uncontroverted information that is well documented or well settled can be solicited before resorting to your first challenging information questions and finally your hostile questions to the cross-examination witness.

2. **Indirection.**

During direct examination, in the interest of assisting your witness and drawing a clear, easy-to-follow picture for the fact finder, the examiner works hard to make it clear where he or she is going. In contrast, on cross-examination, making it clear to the witness where you are going will only encourage the witness to become evasive, hostile, and argumentative.

For instance, if you are trying to make the point that the witness should have understood the contract or letter the witness read, and you ask the question directly, you will probably not get the answer you want. On the other hand, you can achieve the same goal by indirection. Before concentrating on the simple language of the agreement or letter that the witness has admitted receiving and reading, you can establish the witness’s extensive experience, achievements, and laudable business practices through a series of questions with which the witness will have to agree and that will lead to only one conclusion concerning the witness’s understanding of the agreement or letter.

Questions that could be asked to set up the indirection:

1. You have more than 30 years of experience negotiating contracts, don’t you?
2. You’ve been highly successful in negotiating successful contracts over your career?
3. You regularly hire lawyers to assist you in reviewing important documents?
4. To the extent that you don’t review important documents, you have someone on whom you can rely review them?
5. You insist that important and crucial points that are discovered in documents are brought to your attention?
6. It is this kind of detailed, cautious, and deliberate procedure that has led to your success?

Having established a general practice of careful reading of documents, while at the same time flattering the witness’s achievements and work habits, will allow you by indirection either to obtain the admission or to frame a question concerning understanding of the agreement or letter that will make apparent the answer you should have gotten. If you had flagged in advance where you were going and why you were asking the background questions, the result might have been quite different.

3. **Details first.**

Often in direct examination the most effective procedure is to cover details only after the witness has described the “action” of his or her recollections. Put

differently, it is generally prudent not to interrupt the action of the witness’s story on direct examination with detailed questions about distances, thought processes, and emotional reactions until the action has been told and completed in a series of frames where each point adds an additional action step and captures the fact finder’s attention.

In contrast, on cross-examination the details must be elicited initially so that you can use them to “herd” and “corral” the witness to provide you with the admissions you need. Until the factual background has been laid by the adverse witness that limits the routes of escape and explanation, cross-examination is often ineffective.

4. **Scatter circumstantial evidence.**

   In argument and on direct examination, assembling circumstantial evidence often makes the contention of the proponent persuasive. If the contention of the proponent is that someone was late for an appointment and therefore negligent in his or her driving, assembling circumstantial evidence about the importance of the appointment, the time of the appointment, the time of the accident, the speed of the car at the time of the accident, and the conduct after the accident, including an immediate phone call to the location of the appointment, supports the persuasiveness of the contention.

   In contrast, on cross-examination assembling circumstantial evidence to support a contention will make the contention obvious to the adverse witness and result in encouraging that witness to be evasive, hostile, and argumentative. Thus the circumstantial evidence points should be separated and scattered so that they are obtained either from different witnesses or at different points in the examination so that your ultimate objective and contention is not obvious.

5. **Short questions and short answers.**

   During direct examination the examiner strives for short questions and long narrative answers by the witness. This allows the attention of the fact finder to focus on the witness, not the examiner. Open questions are used. The witness is left unfettered to improve his or her credibility.

   In contrast, allowing the adverse witness to launch into long answers and explanations will doom the cross-examination. The questions should be not only short, but also closed-ended to control and limit the adverse witness’s response. By inching along and adding only one fact at a time, the examiner can control the adverse witness and give the adverse witness little room for argument and evasion.

6. **Attention on the cross-examiner.**

   As referred to above, during classic direct examination, the examiner attempts to place the attention of the fact finder on the witness. The examiner simply shepherds the witness in telling his or her story in a natural, credible, and easy-to-follow manner. In contrast, on cross-examination, the attention should be on the cross-examiner. Cross-examination is often the opportunity for the cross-examiner to argue his or her themes or theories by asking questions the answers to which are often irrelevant. By raising impeaching, contrasting, and contradictory points, the examiner brings attention to himself or herself and thereby exposes the weakness of the recently conducted direct examination.

   As with all rules, there are always exceptions. When in doubt, however, we may do well in cross-examination to simply conduct ourselves in a manner opposite to how we conduct ourselves in direct examination.
Traditionally, the techniques employed in direct examination and cross-examination are directly opposite.

For instance, in direct examination, the examiner attempts to place the attention of the fact finder on the witness. The witness is given free rein and encouraged to tell his or her story in a narrative manner with limited guidance from the examiner.

In contrast, on cross-examination the attention should be on the cross-examiner. The cross-examiner argues his or her themes or theories by asking questions, the answers to which are often irrelevant. The cross-examiner is really raising impeaching, contrasting, and contradictory points, exposing weaknesses in the recently conducted direct examination of the witness. (See Direct Versus Cross-Examination: A Study in Contrast, Lit J, Mar. 1998, at 3.)

A number of respected trial practitioners and trial-technique teachers are challenging this traditional approach. They contend that the direct examination should be tightly controlled by the examiner, that the direct-examination witness should be given little or no leeway, and that the attention of the fact finder during direct examination should be on the examiner, not the witness. They believe that like cross-examination, direct examination is an opportunity for the examiner to argue his or her case “through the window of a witness.”

Set forth below are some of the reasons why this alternative approach to direct examination is gaining favor.

**Alternative Approach to Direct Examination.**

Under this alternative approach, the witness on direct examination is never allowed to answer any more than a sentence. This allows the examiner to do the work and control the examination. It limits the amount of “each bite” of information that is given to the fact finder, improving the possibility of understanding. Moreover, it allows the examiner to take advantage of the additional benefits discussed below.

**Removes Pressure from the Witness.**

Under traditional direct-examination techniques, the witness is placed under a tremendous amount of pressure. He is told that he will be asked, “What happened?” The witness is then expected to tell his story in the way that is most persuasive, articulate, and memorable. The witness is told to “be sure to cover this, be sure to cover that, and don’t forget to say this . . . and by the way, you cannot use any notes.”

Is it really fair to place all this burden on the witness? Is this really the most effective approach to direct examination? Shouldn’t a lawyer be doing the “rowing” (work)?

In contrast, under the alternative approach, the lawyer takes control and does the work. The witness is asked a series of short questions to each of which he gives an answer of only a word or two and in no event any longer than a sentence. The lawyer then leads the witness to the next point. The witness can now relax.

**Employs the Techniques of Persuasion.**

If the lawyer does the work and coaches the witness to give short answers, the lawyer has a full array of persuasive techniques available. First, repetition on the most important and damaging points; the direct examiner can repeat a point several times by rephrasing the question to ensure that it is remembered by the fact finder.

Second, the lawyer can remove from the direct-examination testimony tangential, irrelevant, and side points that clutter up the information the fact finder needs to receive. Third, the lawyer can, by controlling the witness, make the arguments to the jury that are available through the direct-examination witness. Similar to cross-examination, the examiner can argue the case through the “window” of the direct-examination witness.

These techniques are demonstrated [below].

**Allows the Examiner, Not the Witness, to Be the Salesperson.**

In traditional direct examination, it was up to the witness (whether a fact or an expert witness) to be persuasive—to be the salesperson. At least in my experience, most fact finders are suspicious of fact or expert witnesses who appear to be “salespersons.”

In contrast, the fact finder expects the lawyer examiner to be a salesperson. As a result, if the lawyer argues through the direct-examination witness and the witness simply provides short, accurate, and thoughtful answers, the resulting argument is that of the lawyer. The witness’s credibility is not undercut or tainted by the witness’s active effort to sell the point.

**A Sample Examination for Your Consideration.**

Two of the proponents of this alternative approach to direct examination are Judge Herbert Stern (who will be speaking at the litigation retreat at Skamania Lodge in March) and Judge Ralph Adam Fine. One of Judge Fine’s examples of the effectiveness of this technique is taken from the novel Runaway Jury, by John Grisham.

In the novel, a turncoat former employee of a tobacco company is testifying about a memorandum that went to the president of the company, which has since been destroyed by the tobacco company (thereby overcoming the best

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evidence rule problem). The examination follows the traditional method of having the witness do the work.

Q: What was in the memorandum?
A: I suggested to the president that the company take a serious look at increasing the nicotine levels in its cigarettes. More nicotine would mean more smokers, which would mean more sales and more profits.

The question and answer are powerful. But not as powerful as they could be if the lawyer was doing the work. With a single question and answer, there is always the risk that the fact finder will be distracted for the moment and miss or misunderstand the answer.

Now, here’s a sample of the same direct examination where the examiner does the work, limits the answer of the witness and argues the important points to the fact finder “through the window of the direct examination witness.”

Q: Did you read the third paragraph of the memorandum?
A: Yes.

Q: What was the subject of the third paragraph?
A: Nicotine.

Q: What about nicotine was discussed?
A: The nicotine levels in cigarettes.

Q: Did the paragraph suggest that the nicotine levels be increased or decreased?
A: Increased.

Q: If the nicotine levels were increased, would that have any effect on anything?
A: Yes.

Q: What?
A: The number of smokers.

Q: Would increasing nicotine mean more smokers or fewer smokers?
A: More smokers.

Q: More smokers than if the nicotine levels were not increased?
A: Yes.

Q: Would this mean more or fewer sales?
A: More.

Q: Would this mean more or less profit for the company?
A: More.

Q: Would the increased profits be substantial or insubstantial?
A: Very substantial.

Under the second example, with a lawyer doing the work, it would be hard for a fact finder to miss the answer or miss the point. In fact, after the first couple of questions, the factfinder knows the answer to the next question before it’s even answered. Why? Because the answer is compelled by common sense.

One of the advantages of arguing the case through a witness not only on cross-examination but on direct examination is that the fact finder knows the answer before it is given. An answer that the fact finder arrives at on his or her own regardless of the witness’s answer is an answer that will not be subject to impeachment by your adversary.

Summary.

We all have plenty to do and think about at trial. Perhaps that is why allowing the witness to do the work on direct examination is so attractive.

In any event, next time you conduct a direct examination at trial, you may want to consider this alternative approach. You may find that the rewards from this technique far outweigh the detriment of the extra work.
Our ultimate goal as trial attorneys in a jury case is to provide at least some of the jurors with arguments and evidence they can use to support our client during jury deliberations or in a close court case to appeal to a judge’s sense of equity to influence her decision. In either case, however, in order to make a juror a potential advocate for us or to appeal to a judge’s sense of equity, we have to create emotion. The juror or the judge must want to support our view.

“A want” is an emotional, not an intellectual, process. It is usually effectively initiated by the use of viscerals.

1. What Is a Visceral?

Viscerals are words, descriptions, or other communications that appeal to our primal instincts. They appeal to our physical reactions as humans. There’s a wide range of emotions and an even wider range of viscerals that trigger them.

Examples of viscerals are snakes, fingernails across a chalkboard, paper cuts on a tongue tip, a rat scurrying across a warehouse floor, blood, anger, thoughts of home, a child’s laughter, revenge, confrontation, and so on.

2. Using Viscerals

The use of a visceral in a trial theme to punctuate an opening statement or witness examination or to persuade in a closing argument separates the masters from the practitioners among trial lawyers. A master draws word pictures that evoke emotion. A master does not say:

“He injured his arm.”

but says:

“It sliced through his skin into the tendon.”

The first description is mere information. The second employs viscerals that draw attention, evoke emotion, and persuade.

Viscerals are often created by analogies, one of the lawyer’s most potent tools. For instance:

“She felt like she was drinking her own blood.”

or

“It was as dark and silent as a sealed tomb.”

or

“He had a smile as inviting as a roaring fire on a winter day.”

The writers of the classics all recognized and employed the power of viscerals. Shakespeare often has 10 or 20 viscerals in effect at once. Shakespeare’s viscerals demand attention.

If your opponent persuades with dry logic and information and you build your own logic on a visceral framework, your advantage will be apparent.

3. Finding Viscerals.

Finding and stockpiling viscerals for use in cases is fun and easy. You can read the masters—like Shakespeare—consciously noting viscerals.

On the other hand, viscerals are ever-present in modern culture. Watch a movie. Watch television. Watch MTV. The script writers fashion every scene, episode, and passage around the full human experience. They are forever reaching for our emotions. What will make us cry? What will make us laugh? What will disturb us? What will please us? What will make our heart beat faster?

Each of us should train our minds to be sensitive to and conscious of the use of viscerals. To gather them for future case use. To evaluate cases with respect to visceral potential. Then with every new case, every new witness, and every piece of evidence, we should search our catalog of viscerals for the matching and appropriate visceral.

I believe that with a little bit of awareness and a little bit of work, viscerals can help each of us at least to begin approaching the persuasive power of the masters.

Comments from the Editor: “Spice Up Your Case with Viscerals”

Comments from the Editor: Unconscious Effective Practices15

Anyone who has prepared to run a marathon or has become a serious bicyclist knows that you tend to become introverted, introspective, and egocentric. For instance, you worry about whether you’ve placed sufficient oil between your toes to avoid chafing and whether you’ve been able to remove an additional two ounces of weight from your bicycle. So an effective trial practice requires great attention to detail and at times what must seem to be an introverted, introspective, and egocentric approach to the practice.

Discussed below are a few effective practices that most of us regularly employ unconsciously. In an effort to improve our skills of persuasion and to enable us to pass those skills on to those who will follow us, it makes sense from time to time to stop and analyze what good trial practitioners do automatically.

1. Impact points in questions.
   (a) Generally.
   Impact points in questions can have a substantial effect on the persuasiveness of the presentation of evidence.

   Clarity and emphasis are generally improved by placing your impact point near the end of a sentence. The impact point is the word or phrase that you are trying to emphasize, the point the questioner is attempting to draw to the factfinder’s attention. For instance, if the questioner is trying to draw to the factfinder’s attention the time of day (perhaps because the witness was late for work, which begins at 8:30 a.m.), the questioner might ask:
   “You didn’t leave your home that morning until 8:28 a.m.?”

   On the other hand, if the point to be emphasized is the kind of car the witness was driving, the question would be asked:
   “The car you drove that morning to work was a Ferrari?”

   The impact point belongs as close to the end of the sentence as you can place it without twisting your syntax because once you have communicated your point of emphasis the listener tends to stop listening. Put another way, the purpose of your sentence is to get to your impact point. Once you have gotten to it, end the sentence. Keeping impact points in mind generally assists the questioner in shortening his or her sentences and avoiding rambling, complex sentences that often obscure the very point that the questioner is attempting to make.

   (b) On cross-examination.
   Particularly on cross-examination the impact point should be at the end of the sentence, leaving the witness no time to think. Returning to the question:
   “You didn’t leave your home that morning until 8:28 a.m.?”

   That phrasing leaves the witness no time to think before answering the question. The factfinder will notice any unusual hesitation, and it will cause suspicion. In contrast, if the point of emphasis were placed in the middle of a longer complex sentence, the witness would have several seconds to think of a response before answering. A less effective question would be:
   “You didn’t leave your home until 8:28 that morning, and you know that is the case because as you got into your Ferrari you looked at the clock on the dashboard, which lights up when you close the driver’s door?”

   (c) Direct examination.
   Just the opposite practice should be undertaken with your own witness on direct examination, particularly if the witness is nervous. You want to give the witness as much time as possible to answer questions and not present the impact point at the last second unless you are sure the witness is ready to handle the question. For instance, if you want to know what the witness saw on the morning of May 14, 1998, at the corner of the intersection, you might ask:
   “What did you see when you arrived at the intersection after leaving your home and arranging with your wife to have her run the errands you had originally planned to run?”

   (d) Greater emphasis for impact points.
   Impact points can be further emphasized by a number of other speaking techniques, including:

   - Change of pace
   - A pregnant pause before the emphasis point
   - Change in the tone of your voice
   - A slight nod of your head
   - Turning your body toward the factfinder and pausing

   The number of means available to draw emphasis to your impact point are limited only by your imagination. The lesson is to stop and consciously determine the “point” you are trying to make with each question and then deliberately structure the question to increase or decrease the “impact” of the point.

2. Use of the eyes.

   One’s eyes are often the most powerful means of communicating. Actors and actresses know that credibility and persuasion arise only when you put aside your script and look at the other actors and actresses with whom you are communicating. Similarly, seasoned practitioners use

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their notes to only a limited degree as they realize that looking at the witness or looking at the factfinder is too powerful a technique to be lost by dependence on a script.

Impact points again can be emphasized with the use of the eyes. If a particularly important question is being asked of a witness being cross-examined, why not turn to the factfinder and engage the judge’s or jury’s eyes as you ask the question and make your impact point. If necessary, ignore or turn your back on the cross-examined witness. Your eyes draw the factfinder’s attention to your point and subtly communicate that this is a point of importance and emphasis.

3. Images.

The most accomplished trial lawyers do not speak words; they paint images. They use language to draw a word picture, which the factfinder can easily imagine based on his or her experience. Often the specific technique is to use an analogy or a simile. For instance, your expert witness should be prepared well enough to describe the “unanticipated outward vector of lateral stresses on the fission chamber’s brittle ceramic containment wall” by an analogy that likens the action to “a rock smashing through a living room picture window.” The factfinder is able to cut through the scientific jargon and understand the analogy and the point. Each of us can easily imagine a rock smashing through the picture window of a home. Although each of us may be envisioning a different living room, a different picture window, or a different size of rock, the image is nonetheless vivid and allows the witness and the witness’s lawyer to have a private dialog with each of the listeners.

During the course of a hearing or a trial, a memorable image can often be drawn or may even arise as a matter of happenstance. For instance, the witness whose cellular phone rang in his briefcase while he was testifying might provide a rare moment of comic relief. In closing argument, the image of that witness can best be resurrected not by describing the witness’s background, but by simply reminding the factfinder of the memorable incident:

“Remember Mr. Brown, the witness whose cell phone rang while he was on the stand?”

Immediately the factfinder will have in mind the image of the witness to whom you are referring. Similarly, if you want to refer to the expert’s testimony about the vector and stresses, don’t repeat the technical analysis; simply remind the factfinder of the expert who testified about the interaction of the stresses being like “a rock smashing through a living room picture window.”

The beauty of images is that not only do they communicate powerfully in the first place, but also, once an image has been established, the repetition of that image can immediately bring to mind the witness, the result of the experiment, or the point to be made.

4. Conclusion.

All of us are faced with two challenges as we attempt to master the art of persuasion. First, finding the time to prepare with the sufficient detail to be sensitive to issues like impact points, use of the eyes, creating images, and using our passions. Second, stopping when we see an accomplished practitioner employing these methods and analyzing what was done, how it was done, and how it should be modified to work best for us. All of this inevitably leads to introversion, introspection, and egocentricity.
One of the most important but often least effective components of a trial presentation is the direct examination of expert witnesses. It is unusual these days when a trial or arbitration presentation does not include direct examination of at least one expert. Completing such a direct examination is not difficult, but it is rarely done effectively and persuasively.

Set forth below for your consideration are some suggestions for the framework of the direct examination of an expert.

1. The Tickler

For two to three minutes, when an expert first takes the stand, he enjoys a few golden moments when he has the fact-finder’s full attention, and so do you as his direct examiner. Instead of spending the first 15 minutes of testimony on a litany of the background and qualifications of the expert and encouraging the court or jury to daydream or grow bored, ask two or three initial questions that tell the fact-finder who the expert is and why he is there. For instance:

Q. Doctor, can you tell us what kind of doctor you are?
A. Yes, a neurologist.

Q. Is a neurologist a doctor skilled in the diagnosis and treatment of diseases of the nervous system?
A. Yes.

Q. And have you come here today to explain to the fact-finder (court or jury) your diagnosis and treatment of the damage to plaintiff’s nervous system caused by the accident?

In short, within the first two to three minutes, make it clear to the fact-finder who the expert is and what he or she will be talking about.

2. Qualifications

In federal court, curricula vitae and resumes are generally admitted into evidence. In state court, they are admitted by certain judges and upon stipulation by the parties. If you have the opportunity to do so, save precious examination time by introducing the vitae.

It is preferable to cover only the highlights of the expert’s qualifications (which will relate directly to his or her specific opinion) during direct examination and leave the rest of the general background for the fact-finder to obtain from the curriculum vitae. This, of course, means the curriculum vitae should be reviewed and edited so that extraneous matters are deleted.

Nothing encourages the fact-finder’s mind to wander more than 20 minutes of detailed background questioning of an expert that has little to do with his or her opinion in a specific case. An effective discipline is to limit the expert’s qualifications to no more than five minutes or no more than 10 to 15 questions (depending on the expert and the case). Consider covering only the vitae’s highlights and select those highlights for their relevance to the opinion in the particular case.

3. Lead with the Opinion

Unlike lay witnesses who seem to be most believable when they explain the factual basis for their opinions before they give an opinion (i.e., the symptoms of drunkenness as perceived by the witness before the opinion of drunkenness), expert opinion is more powerful if the opinion is given before its basis.

To begin with, if the opinion is held back until a lengthy explanation of the basis is given, the opinion itself may be lost as the fact-finder’s mind wanders. Accordingly, if your expert is going to give three opinions, you should consider having the expert give all three opinions early in his or her testimony in a succinct, systematic manner and explain after each opinion that you will come back to it and explain the basis and procedure in arriving at it.

Such an approach ensures that even in a fact-finder pays attention to only the opening ten minutes of the examination, the fact-finder will understand who the expert is, why he is there, and what his opinions are.

4. Explain the Basis for the Opinion

In my experience, the most persuasive expert testimony is the expert testimony in which the basis for the opinion is well organized, understandable, and succinct.

It is often helpful to use an overhead projector or a chalkboard to list the points or the procedures as the expert testifies about them to reinforce them and demonstrate their interrelationship.

The expert must use common, everyday language—not jargon. The best experts use picture words and analogies, just as the best lawyers use them in a closing argument.

5. Prepare for Cross-Examination

An often overlooked but important component of any direct examination of an expert is to have the expert undercut the adversary’s anticipated cross-examination by explaining away in his or her own words the points you believe he or she will be asked upon cross-examination. Such a preemptive strike, particularly at the end of the direct examination and just before cross-examination, may convince your adversary to either abandon the proposed line of cross-examination or risk the patience of the fact-finder by covering “purported weaknesses,” which you have already shored up on direct examination.

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6. Conclusion

One thing I have learned about direct examination is that it may not be as exciting as cross-examinations, opening statements, and closing arguments, but it is usually the battlefield on which cases are won or lost.

It is a constant challenge to turn the direct examination of an expert into an entertaining and attention-demanding presentation. You may want to consider the above-listed suggestions the next time you conduct the direct examination of an expert. Experience has taught me that no matter how accomplished your direct examination of an expert may be, it can always be made better.
Cross-examination is perhaps the most challenging aspect of our trial presentations. Unlike Raymond Burr in "Perry Mason" television serials, it’s fair to say that we seldom, if ever, force the opposition to concede our claims or dismiss their claims as a result of brilliant cross-examination.

Spend an afternoon at one of the state or federal courthouses watching cross-examinations, and you are likely to witness a number of the techniques listed below, none of which are particularly effective. These traditional techniques and then a proposal for an alternative approach ("remember your mother") are discussed below.

1. Ineffective Cross-Examination Techniques.

   Assume for purposes of illustration that the witness to be examined is an 85-year-old grandfather who claims that on a dark and rainy night at a poorly lit intersection, he witnessed your client’s car (which was attempting to make a left-hand turn in the intersection) run into the plaintiff’s vehicle (which was proceeding through the intersection in the opposite direction). Your client admits that he was trying to make a left-hand turn, but that he simply was in the middle of the intersection with his left-turn indicator on, and that the oncoming plaintiff’s vehicle crossed the centerline and ran into him.

   (a) Useless Niceties.

   Many cross-examinations begin with “useless niceties” that rob you of the opportunity to capitalize on the “golden moments” as you begin your cross-examination. When one begins a cross-examination, the fact-finder (be it judge or jury) will be paying the most attention. These golden moments should not be squandered.

   Useless niceties consist of questions and comments like these:

   “Good morning, Mr. Murphy. How are you doing this morning?”
   “Mr. Murphy, I’d just like to ask you a few questions. Could you give me your attention for a little while?”
   “Mr. Murphy, beautiful weather we’re having, aren’t we, for a state that’s noted for its rain?”

   (b) Repeating Direct Examination.

   After starting the cross-examination by squandering golden moments with useless niceties, the examiner then proceeds to repeat portions of the direct examination, thereby reaffirming and reinforcing the points made on the direct examination—apparently believing that by repeating the direct examination a second time, it will seem less credible. But this tactic almost never works.

   “You testified that my client’s vehicle crashed into the plaintiff’s vehicle while trying to make a left-hand turn, didn’t you?”
   “You claim that my client is the one at fault, don’t you?”
   “You claim that you had a clear and unobstructed view of the accident?”

   (c) Begging.

   Then, after useless niceties and repeating the direct examination, the cross-examiner begins begging the witness to change his story:

   “You can’t be sure that my client’s car hit the plaintiff’s car first, can you?” (The witness asserts that he is sure, despite the begging.)
   “The plaintiff’s vehicle could have just as easily veered into my client’s lane by three or four inches as my client could have veered into the plaintiff’s lane, right?” (The witness denies that this happened.)
   “It all happened so fast, you can’t be absolutely certain that my client’s vehicle was the one that went over the centerline first, can you?” (The witness is certain.)

   (d) Pulling Out the Hatchet and Chain Saw.

   The useless niceties, repeating of the direct examination, and begging are then followed by what I call “pulling out the hatchet and chain saw.” (Just like Freddy Krueger and Jason from Nightmare on Elm Street and Friday the 13th or the demented son in Texas Chainsaw Massacre.)

   You are going to take no hostages. You are going to use a “hatchet” and a “chain saw” to demonstrate that this elderly gentleman is not only mistaken, but also a liar—that he must have some improper motive, such as an economic interest with the plaintiff.

   You pick up the hatchet and start the chain saw. You are ruthless. You maim him. You slash him. You show no mercy. You then sit down and your client leans over and tells you what a marvelous job you did.

   Of course, your client is wrong. Your hatchet and chainsaw massacre may have bloodied the courtroom, but it also completely alienated the fact-finder (judge or jury), who was naturally sympathetic to an elderly gentleman undergoing the foreign experience of testifying in a courtroom and being subject to a cross-examination by an experienced lawyer.

   Most of us realize over time that these types of hatchet and chain-saw cross-examinations are more likely to hurt our client than persuade the fact-finder. It’s surprising,
however, how long it takes many of us to put away the hatchet and chain saw and trade them in for a scalpel. Admittedly, we are misled for a while by the positive comments of our clients, who inevitably compliment us after using the hatchet and chain saw. But the compliments are soon forgotten when the fact-finder comes back with a disappointing verdict or judgment.

2. Conduct Your Cross-Examination as Your Mother Would.

Mothers love us regardless of our foibles. Perhaps this underlying affection explains why the questions of a mother are so effective. Mothers do not use hatchets or chain saws; they use a scalpel to get at the truth.

(a) Childhood Experience.

Most of us have had the childhood experience as an underage adolescent of having our parents leave us at home alone for the weekend. We are given strict orders that no friends are to visit, particularly friends of the opposite sex. We are instructed that there is to be no drinking, no cigarette-smoking, no loud music—yet inevitably, there is.

Try as we might to hide, destroy, or mask the evidence, inevitably our parents, upon returning home, talk with the elderly neighbor who sits in her front window and watches your home about what she saw while they were gone. You then come home from school and undergo the following cross-examination by your mother:

“Our neighbor, Mrs. Smith, was home looking out her window last Saturday night when we were out of town. Did you know that?”

“Cars were parked in front of the house?”

“Cars that belong to your friends?”

“There was loud music?”

“Beer?”

“Smoking?”

“Girls?”

You answer “no” to the first question and then “yes” to her questions like a lap dog barking for snacks. Her cross-examination is effective without being mean-spirited.

(b) Cross-Examining the Witness as Your Mother Would.

You laid the groundwork for trial at the elderly gentleman’s deposition by asking questions as if you were conducting a cross-examination (using leading questions) to ensure that you would get the same answers at trial. Applying the same loving yet direct technique as your mother used on you, you now begin your cross-examination of the gentleman:

“It was dark?”

“It was raining?”

“The intersection was dimly lit?”

“You can’t see without your glasses?”

“You glasses were wet from the rain?”

“You glasses were ‘fogged up’ at times?”

Plus, your deposition work has allowed you to add an additional “distraction” to the cross-examination of Mr. Murphy:

“Let’s talk about your terrier’s attempt to eat the remnants of a fast-food wrapper . . . you understand . . . ?”

“You were walking your terrier?”

“You terrier once ate the remnants of a fast-food wrapper . . . ?”

“It made her ill . . . ?”

“You terrier had a wrapper in her mouth that night . . . ?”

“You were concerned she would be ill?”

“You love your terrier?”

“You were attempting to pull the wrapper from her mouth?”

“That’s when the two cars approached?”

“You were bent over?”

“You were facing away from the intersection?”

“You did not turn around . . . until you heard the crash?”

3. Conclusion.

Next time you have an opportunity to conduct cross-examination (or, for that matter, conduct a cross-examination during deposition in preparation for a trial cross-examination), consider putting away the hatchet and the chain saw and trading them in for a scalpel. After all, Aristotle recognized that “to persuade” we must be “liked.” We are more likely to be “liked” without the hatchet and chain saw.

Conduct your cross with the skill, care, and affection of your mother when she cross-examined you as an adolescent. Your client may not be as effusive with his or her praise after the cross-examination has been completed. But instead of running the risk of alienating the jury by filling the jury box with blood, gore, and limbs, you are likely to find that you have persuaded the jury to your point of view. Most clients would trade an opportunity to compliment us on a ruthless cross-examination for a successful outcome.
Chapter 9—Anatomy of a Trial

An eerie silence fell over the courtroom. The air seemed suddenly heavy. Time stopped. For the first time all twelve jurors were on the edge of their seats. They were fully alert. They seemed to be straining their senses (like bird dogs after prey) to absorb the testimony that was about to come.

It had been quiet in the courtroom before. But nothing like this. It was as if those present in the courtroom were afraid to breathe, lest they distract attention from the questions about to be asked and the answers about to be given.

Some were reminded of old western movies when two cowboys riding through hostile Indian territory would rein their horses to a stop and one would whisper to the other:

“Slim, it’s quiet . . . too quiet.”

The memorandum in the hands of the witness was important. First, it was addressed not to just anyone but to the president of the tobacco company. But more importantly, the original had never been produced. In the hundreds of thousands of documents produced by the tobacco company, it was nowhere to be found. And yet, like a miracle, here was the file copy—carried to court by its author, revealing to all why the original had no doubt been destroyed.

Plaintiff’s counsel, sensing the drama of the moment, waited for the lengthy and unnatural silence to draw the attention of all present in the courtroom to the witness stand. And that it did . . . just like moths in the darkness drawn to a lantern light.

In his opening, plaintiff’s counsel described the witness in more glowing terms, but in simple cold English, he was “a turncoat former employee.” All knew, without translation, that this meant a witness who was not “beholden to the company”—a witness whose job, reputation, and future income were not on the line. A witness whose testimony would not be tainted by his employment relationship with the defendant tobacco company.

Plaintiff’s counsel cleared his throat as a precaution to ensure that the questions he was about to ask would be clear, crisp, and well enunciated.

Q: Did you read the third paragraph of the memorandum?
A: Yes.
Q: What was the subject of the third paragraph?
A: Nicotine.
Q: What about nicotine was discussed?
A: The nicotine levels in cigarettes.
Q: Did the paragraph suggest that the nicotine levels be increased or decreased?
A: Increased.

Q: If the nicotine levels were increased, would that have any effect on anything?
A: Yes.
Q: What?
A: The number of smokers.
Q: Would increasing nicotine mean more smokers or fewer smokers?
A: More smokers.
Q: More smokers than if the nicotine levels were not increased?
A: Yes.
Q: Would this mean more or fewer sales?
A: More.
Q: Would this mean more or less profit for the company?
A: More.
Q: Would the increased profits be substantial or insubstantial?
A: Very substantial.

The stake had been driven into the vampire’s heart. No one in the courtroom missed the importance of these few questions and these few answers. In the minds of most of the jurors, the case was over.

But it was not just the information that was delivered by the above direct examination that had impact. It was the manner in which the direct examination was conducted. Plaintiff’s counsel understood the difference between routine direct examination and powerful direct examination. Plaintiff’s counsel understood the difference between traditional direct-examination techniques and traditional cross-examination techniques and consciously elected to apply the latter in this direct examination.

By adopting a traditional cross-examination style (in which the lawyer does the work and offers the witness only alternatives and no more than a word or two in the witness’s answer), plaintiff’s counsel had argued the important points of this testimony to the jury “through the window of the direct-examination witness,” just as a cross-examiner argues a case to the jury “through the window of a cross-examination witness.”

One of the advantages of arguing the case through a witness on direct examination, just as most lawyers argue their cases through witnesses on cross-examination, is that the answers to the lawyer’s questions are answered by the fact-finder before the witness answers. As a result, if the answer is compelled by common sense, regardless of the witness’s answer, each member of the jury arrives at

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The technique discussed above is not novel. Two of the proponents of this alternative approach to direct examination are trial-technique instructors, Judge Herbert Stern and Judge Ralph Adam Fine. Judge Fine uses an example substantially identical to the one set forth above to show the effectiveness of this technique by borrowing from the novel Runaway Jury by John Grisham.

In stark contrast to the foregoing, the traditional method of direct examination would have the witness do the work. Plaintiff’s counsel would simply ask the witness what the memorandum disclosed, and the witness would be likely to “dump” all the incendiary, high-impact information into a single answer, which could be easily missed by a nonattentive or daydreaming juror.

Q: What was in the third paragraph of the memorandum?
A: I suggested to the president that the company take a serious look at increasing the nicotine levels in its cigarettes. More nicotine would mean more smokers, which would mean more sales and more profits.

The difference in the effectiveness of the two techniques is obvious.

Although arguably the information provided under both of the direct-examination techniques outlined above is substantially similar, this second example is not as powerful as it could be if the lawyer, not the witness, were doing the work. With a single question and answer, there is always the risk that the jury will be distracted for a moment and miss or misunderstand the answer.

Under the first example, with a lawyer doing the work, it would be hard for a member of the jury to miss the answer or miss the point. The questions and answers are “drawn out,” repetitive, and much more dramatic. Moreover, under the first example as discussed above, the jury knows the answer to the question before it is even answered. Why? Because the answer is compelled by common sense.

Today, many established trial techniques and tactics that have been largely unchallenged are being reevaluated by commentators and practitioners to determine whether the assumptions on which they are based are truly sound. One of the areas that is being challenged is the traditional approach to direct examination. As disclosed by the contrast of the two techniques disclosed above, sometimes applying a traditional cross-examination technique to a direct examination can be more effective than employing traditional direct-examination techniques.

Discussed below is a comparison of the traditional rules of direct examination and cross-examination. By understanding how direct examinations are traditionally conducted and understanding how cross-examinations are traditionally conducted, we can then consciously decide whether in a given circumstance (such as the disclosure of the contents of the third paragraph of the memorandum that the tobacco company had destroyed in the above example) abandoning direct-examination techniques and embracing cross-examination techniques for a brief interlude or even for an entire direct examination might make your direct examination more powerful and persuasive.

A comparison of the traditional general rules for conducting direct examination and cross-examination exposes a common theme. Whatever rule applies to direct examination, usually the directly opposite rule applies to cross-examination.

This contrast is not surprising. After all, direct examinations generally consist of eliciting helpful information from cooperative witnesses whose credibility we are attempting to bolster. On the other hand, on cross-examination we are generally attempting to elicit helpful information from an uncooperative witness whose credibility we are attempting to impeach.

A review of six general rules of cross-examination and comparing those rules with comparable rules for direct examination will demonstrate the contrast.

A traditional cross-examination ends strongly but starts slowly. In contrast, a good direct examination, redirect examination, or recross examination should start and end strongly (take advantage of the persuasive techniques of primacy and recency). Similarly, cross-examination should finish strongly, ending with the traditional “zinger,” a point that is a guaranteed winner in that it is absolutely admissible, is central to your theory, evokes your theme, is undeniable, and can be stated with conviction. In direct examination the same kind of impact can be made with a zinger in the opening line of questions.

Cross-examination, however, should usually not begin with a zinger. Why? Because employing an initial zinger will alienate the cross-examination witness and make it impossible to draw from that witness helpful points to generally bolster your case (before turning to hostile questions and ending with a zinger).

Starting slowly on cross-examination will allow you to take full advantage of information available from the cross-examination witness before you allow
your relationship with him or her to deteriorate into alienation.

First, you can elicit friendly background information that is not threatening, but that may support your theory and theme, such as the achievements and extraordinary training of a defendant who you are attempting to show knew full well what he or she was doing at the time of the complained-of conduct.

Second, after exhausting the friendly information, you can ask questions to build the value of your case by providing affirmative information that will fill in gaps and will be more persuasive coming from an adverse rather than a friendly witness.

Finally, uncontroverted information that is well documented or well settled can be solicited before resorting to your first challenging information questions and finally your hostile questions to the cross-examination witness.

Traditional cross-examination employs indirection. In contrast, during the direct examination, in the interest of assisting your witness and drawing a clear, easy-to-follow picture for the fact-finder, the examiner works hard to make it clear where he or she is going. In contrast, on cross-examination, making it clear to the witness where you are going will only encourage the witness to become evasive, hostile, and argumentative.

For instance, if you are trying to make the point that the witness should have understood the contract or letter the witness read, and you ask the question directly, you will probably not get the answer you want. On the other hand, you can achieve the same goal by indirection. Before concentrating on the simple language of the agreement or letter that the witness has admitted receiving and reading, you can establish the witness’s extensive experience, achievements, and laudable business practices through a series of questions with which the witness will have to agree and that will lead to only one conclusion concerning the witness’s understanding of the agreement or letter.

Questions that could be asked to set up the indirection:

1. You have more than 30 years of experience negotiating contracts, don’t you?
2. You’ve been highly successful in negotiating successful contracts over your career?
3. You regularly hire lawyers to assist you in reviewing important documents?
4. To the extent that you don’t review important documents, you have someone on whom you can rely review them?
5. You insist that important and crucial points that are discovered in documents be brought to your attention?
6. It is this kind of detailed, cautious, and deliberate procedure that has led to your success?

Having established a general practice of careful reading of documents, while at the same time flattering the witness’s achievements and work habits, will allow you by indirection either to obtain the admission or to frame a question concerning understanding of the agreement or letter that will make apparent the answer you should have gotten. If you had flagged in advance where you were going and why you were asking the background questions, the result might have been quite different.

In traditional cross-examination, details are given first. In contrast, often in direct examination the most effective procedure is to cover details only after the witness has described the “action” of his or her recollections. Put differently, it is generally prudent not to interrupt the action of the witness’s story on direct examination with detailed questions about distances, thought processes, and emotional reactions until the action has been told and completed in a series of frames where each point adds an additional action step and captures the fact-finder’s attention.

In cross-examination, the details must be elicited initially so that you can use them to “herd” and “corral” the witness to provide you with the admissions you need. Until the factual background has been laid by the adverse witness that limits the routes of escape and explanation, cross-examination is often ineffective.

Traditional cross-examination scatters circumstantial evidence. In contrast, in argument and on direct examination, assembling circumstantial evidence often makes the contention of the proponent persuasive.

In argument and on direct examination, assembling circumstantial evidence often makes the contention of the proponent persuasive. If the contention of the proponent is that someone was late for an appointment and therefore negligent in his or her driving, assembling circumstantial evidence about the importance of the appointment, the time of the appointment, the time of the accident, the speed of the car at the time of the accident, and the conduct after the accident, including an immediate phone call to the location of the appointment, supports the persuasiveness of the contention.
In cross-examination, assembling circumstantial evidence to support a contention will make the contention obvious to the adverse witness and result in encouraging that witness to be evasive, hostile, and argumentative. Thus, the circumstantial evidence points should be separated and scattered so that they are obtained either from different witnesses or at different points in the examination so that your ultimate objective and contention is not obvious.

Traditional cross-examination employs short questions and short answers. In contrast, during direct examination the examiner strives for short questions and long narrative answers by the witness. This allows the attention of the fact-finder to focus on the witness, not the examiner. Open questions are used. The witness is left unfettered to improve his or her credibility.

Allowing an adverse witness to launch into long answers and explanations will doom any cross-examination. The questions should be not only short, but also closed-ended to control and limit the adverse witness’s response. By inching along and adding only one fact at a time, the examiner can control the adverse witness and give the adverse witness little room for argument and evasion.

Traditional cross-examination draws attention to the cross-examiner. In contrast, during classic direct examination the examiner attempts to place the attention of the fact-finder on the witness. The examiner simply shepherds the witness in telling his or her story in a natural, credible, and easy-to-follow manner. In contrast, on cross-examination, the attention should be on the cross-examiner. Cross-examination is often the opportunity for the cross-examiner to argue his or her themes or theories by asking questions the answers to which are often irrelevant. By raising impeaching, contrasting, and contradictory points, the examiner brings attention to himself or herself and thereby exposes the weakness of the recently conducted direct examination.

Having refreshed ourselves of the contrast between the traditional rules of cross-examination and direct examination, let’s now consider (as one of the “new tricks” being urged by commentators and forward-thinking practitioners) abandoning the traditional direct-examination approach on direct examination for a cross-examination approach.

Under such an approach, the direct examination should be tightly controlled by the examiner, the direct-examination witness should be given little or no leeway, and the attention of the fact-finder during examination should be on the examiner, not the witness. Thus, like cross-examination, direct examination becomes an opportunity for the examiner to argue his or her case through the window of a witness.

Under this approach, the witness on direct examination is never allowed to answer any more than a sentence. This allows the examiner to do the work and control the examination. It limits the amount of “each bite” of information that is given to the fact-finder, improving the possibility of understanding. Moreover, it allows the examiner to take advantage of the additional benefits discussed below.

A number of advantages can be realized by using cross-examination techniques to conduct a direct examination and thereby argue your case through the window of a witness.

Under traditional direct-examination techniques, the witness is placed under a tremendous amount of pressure. He is told that he will be asked, “What happened?” The witness is then expected to tell his story in the way that is most persuasive, articulate, and memorable. The witness is told to “be sure to cover this, be sure to cover that, and don’t forget to say this . . . and by the way, you cannot use any notes.”

Is it really fair to lay all this burden on the witness? Is this really the most effective approach to direct examination? Shouldn’t a lawyer be doing the “rowing” (work)?

In contrast, under the alternative approach, the lawyer takes control and does the work. The witness is asked a series of short questions to each of which he gives an answer of only a word or two and in no event any longer than a sentence. The lawyer then leads the witness to the next point. The witness can now relax.

If the lawyer does the work and coaches the witness to give short answers, the lawyer has a full array of persuasive techniques available. First, repetition on the most important and damaging points; the direct examiner can repeat a point several times by rephrasing the question to ensure that it is remembered by the fact-finder.

Second, the lawyer can remove from the direct-examination testimony tangential, irrelevant, and side points that clutter up the information the fact-finder needs to receive. Third, the lawyer can, by controlling the witness, make the arguments to the jury that are available through the direct-examination witness. Similar to cross-examination, the examiner can argue the case through the window of the direct-examination witness.

In traditional direct examination, it was up to the witness (whether a fact or an expert witness) to be persuasive—to be the salesperson. At least in my
experience, most fact-finders are suspicious of fact or expert witnesses who appear to be “salespersons.”

In contrast, the fact-finder expects the lawyer examiner to be a salesperson. As a result, if the lawyer argues through the direct-examination witness and the witness simply provides short, accurate, and thoughtful answers, the resulting argument is that of the lawyer. The witness’s credibility is not undercut or tainted by the witness’s active effort to sell the point.

Having discussed the contrast between traditional techniques of direct examination and cross-examination and having discussed how applying cross-examination techniques to direct examination can sometimes be effective, let’s take a look at a second example of employing cross-examination techniques in direct examination.

This can be demonstrated by a simple intersection collision case, assuming that there is no dispute as to fault. You have the good fortune of learning that the defendant had three beers before the accident.

You call an eyewitness who was present when the defendant had the three beers at a local tavern. Your direct examination, instead of simply setting the scene and asking the witness what he or she saw and again running the risk that in long narrative answers the point and impact of the testimony might be lost, can be transformed by having the lawyer do the work.

Set forth below is another sample of direct examination in which the examiner does the work, limits the answers of the witness, and emphasizes through repetition the point that the defendant had been drinking at the time of the accident through the window of the direct-examination witness.

Q: Did the defendant have a beer?
A: Yes.

Q: Did the defendant have a second beer?
A: Yes.

Q: Did the defendant have a third beer?
A: Yes.

Q: So the defendant had a total of three beers?
A: Yes.

Q: The three beers that the defendant drank—were they imported or domestic beers?
A: Imported.

Q: The three beers that the defendant drank—were they light beers or dark beers?
A: Light.

Q: The three beers that the defendant drank—were they bottled beers or from the tap?
A: Bottled.

Q: The three beers that the defendant drank—did he drink them out of the bottle or with a glass?
A: Out of the bottle.

Q: The three beers that the defendant drank—did he drink them slowly or fast?
A: He drank the first two fast and the last one slowly.

Under that example, with the lawyer doing the work, it would be hard for the fact-finder to miss the fact that the defendant had three beers. In fact, whether the beers were imported or domestic, bottled or from the tap, light or dark, drunk with a glass or from the bottle, or drunk slowly or fast is irrelevant. The point is, the defendant drank three beers, and that point is being driven home so that the fact-finder will not miss it.

The advantage of arguing the case through a witness on direct examination is that it is powerful and undeniable, and it allows you to repeat and emphasize important points.

A good solid understanding of the differences between traditional direct examination and cross-examination should not be the end of your analysis. Consider using cross-examination techniques during all or portions of your direct examinations. Doing so will give you yet another opportunity to argue your case through the window of the witness on the stand.

When you stop and think about it, the potential advantage is obvious. It seems undeniable that in a trial, if one of the lawyers spends 80 or 100 percent of his or her cross- and direct-examination time arguing his or her case through the window of the witnesses on the stand and the opposing attorney using traditional methods gives up the opportunity to argue the case during direct examination (and as a result is able to argue his or her case through the window of the witnesses on the stand only 50 percent or less of the time), the first lawyer will have the advantage.

We all work hard to master the traditional methods of direct and cross-examination. Having mastered those techniques, the battle is not over. One of the keys to continuing to improve our skills is to continue to consider alternative and improved approaches to the persuasive techniques we have mastered. One of the alternatives that may offer the greatest promise is substituting cross-examination techniques in our direct examinations.
APPENDIX C—SAMPLE MOTIONS

UTCR COMPLIANCE

Compliance with UTCR 5.050

Plaintiff requests oral argument on her motion and estimates the time required for oral argument to be 30 minutes. The services of a court reporter are requested.

Compliance with UTCR 5.010

The undersigned certifies that the parties have made a good-faith effort to confer concerning the subject of these motions.

MOTIONS

Plaintiff hereby moves this Court for the following orders:

1. Allowing plaintiff to use an “ELMO” throughout the trial; and
2. Allowing plaintiff to play video excerpts from discovery depositions previously taken in this matter.

Motion 1

Plaintiff hereby moves this Court for an order allowing plaintiff to use an “ELMO” throughout the trial.

Discussion

“ELMOs” are similar to overhead projectors but do not require transparencies. Any document can be placed on an ELMO and viewed on a screen. The screen is about the size of one standard poster-board enlargement. ELMOs have been “built in” to the new federal courthouse in Portland. They are commonly utilized in trials requiring extensive use of demonstrative evidence.

Use of this device will in no way disrupt the proceedings and will decrease clutter and screening associated with the use of multiple easels and enlargements. The ELMO will be made available to defense counsel.

The goals of judicial economy and efficiency and orderly presentation of evidence will be enhanced by the use of the ELMO at trial.

Motion 2

Plaintiff hereby moves this Court for an order allowing plaintiff to play video excerpts from discovery depositions previously taken in this matter.

Use of Deposition in Video Form

The recording of a deposition by nonstenographic means is authorized by ORCP 39 C(4). The rule requires only that the notice of deposition designate the manner of recording and preservation of the deposition. In addition, ORCP 39 G(1) sets forth transcription certification requirements.

No Oregon state court rule or statute expresses a preference regarding videotape versus stenographic presentation of depositions. But the Federal Rules of Civil Procedure (FRCP
32(c)) have addressed the issue and express a preference for use of a nontranscript form such as a videotape when available.

Video presentation of excerpts of the depositions in lieu of reading transcripts is contemplated by ORCP 39, which authorizes the recording of depositions by nonstenographic means and is in conformity with the federal rules.

Plaintiff seeks to present excerpts from the discovery depositions of (here identify party or other deposition witness) as well as nursing and radiology personnel employed by (here identify party or other deposition witness). Attached is an index to the video excerpts, stating the page and line numbers from the deposition transcripts (Exhibit A), together with copies of the deposition excerpts referenced as to each deponent, bracketing each excerpt and identifying the corresponding video number. Also attached is a list of defendants’ objections to specific video excerpts (Exhibit B), which contains the pertinent questions to and answers of the deponents and the stated reason for the objections made during the depositions. These depositions were taken in accordance with plaintiff’s notice of deposition issued to defendants in compliance with applicable ORCPs and recorded by videotape. The notice of deposition contained a designation of the manner of videotape recording. The original recordings have been retained by plaintiff without alteration in compliance with ORCP 39 D(2). A copy of the recording of each deposition is available for filing with the Court upon request of any party under ORCP 39 G(2).

Use of a Deposition as Substantive Evidence

The use of a deposition of an adverse party at the time of trial is controlled by ORS 45.250, OEC 801(4)(b), and OEC 804(3)(a). ORS 45.250(1)(b) authorizes the use at trial of all or a part of the deposition of a party opponent, including an officer, director, or managing agent of a corporation that is a party, for any purpose, so long as it is admissible under the Rules of Evidence. Use “for any purpose” has been held to include an admission of portions of depositions as substantive evidence against all defendants in jury trial. *Stroda v. State Highway Comm.*, 22 Or App 403, 413–14, 539 P2d 1147 (1975).

Such testimony is not otherwise inadmissible as hearsay. OEC 801(4)(b) provides that a statement offered against a party that is the party’s own statement in a representative capacity, or statement by a person authorized by the party to make a statement concerning the subject, is not hearsay.

In our case, all or portions of each of these depositions are admissible as substantive evidence under ORS 45.250, so long as they meet the requirements of relevancy. Each of the deponents would qualify as an officer or agent of the defendant corporation, and therefore, any portion of their depositions would qualify as an admission of a party opponent under OEC 801(4)(b).

In addition, the deposition of a witness who is unavailable as described in ORS 45.250(2) may be used as though the witness were present and testifying at trial. *Hansen v. Abrasive Engineering and Manufacturing*, 317 Or 378, 392, 856 P2d 625 (1993).

Finally, a deposition may be used by any party for the purpose of contradicting or impeaching the deponent during his or her trial testimony. ORS 45.250(1)(a).
If a prior deponent’s trial testimony differs from sworn videotaped deposition testimony, it will be proper for plaintiff to impeach the witness with excerpts from his or her own deposition.

In *State v. Couey*, 40 Or App 155, 594 P2d 438 (1979), it was held that the introduction of a tape recording during the state’s case in chief—made by the arresting officer of the conversation between him and the defendant at the time of the defendant’s arrest—was proper. Additionally, the procedure used with the tape, allowing it to be interrupted so that the defendant officer could be asked and give answers to questions regarding the recording, was held to be proper.
APPENDIX D—“A CIVIL ACTION” VERSUS “IMPROPER ARGUMENT”

It has been my personal and professional experience that trial tactics in Oregon courts (even outside “The Valley”) are unfortunately following trends we read about with dismay in our national law journals. Specifically, I believe that a commitment by attorneys for both sides and the court before trial to try a “good, clean case” is becoming increasingly important.

To that end, I submit, respectfully, the following brief, which attempts to draw a bit of a “bright line” between proper and improper courtroom tactics. In submitting this brief, I do not suggest to the court or adverse counsel any expectations of misconduct.

This brief is submitted as a recognition of my own professional responsibility and an invitation for reciprocal professionalism.

“The trial of a hotly contested lawsuit is a battle, and able lawyers with good intentions sometimes, out of zeal for their client’s success, overstep the lawful bounds of their privileges, as counsel, to the injury of the opposite party. When they do so, it is the duty of the trial courts to stop them and constrain them to keep within the limits of their privileges. When objections are made to improper remarks by counsel, in their addresses to juries, and the courts overrule the objections, and permit counsel to go on with improper statements, such action is reversible error, unless it can be seen by the appellate court, that the adverse party was not injured by such remarks.” Zimmerle v. Childers, 67 Or 465, 474, 136 P 349 (1913) (emphasis added).

Improper argument at trial is not a new problem. Yet the volume of articles and editorials in legal periodicals addressing this issue in recent years indicates escalation. This escalation is not limited to “one side” of the bar or another.

This section is included in plaintiff’s trial memorandum as notice to the Court and counsel that plaintiff’s attorney will do everything in his/her power to try a “clean case” without resorting to “personal” attacks on adverse counsel, defense witnesses, or the defendant. This section is also a request that this Court and opposing counsel make a similar commitment. A review of Oregon case law and ethics opinions emphasizes the legitimacy of this request. “[P]ersonal attacks on opposing counsel have no place in Oregon courts.” We repeat what we have recently said:

“To attempt to [win] by making unwarranted personal attacks on [opposing counsel] *** is not only unfair, but it impugns the integrity of the system as a whole. Such comments dangerously overshadow what a [party’s] case is really about, and we presume that they prejudice a [party].” State v. Halford, 101 Or App 660, 663 n.3, 792 P2d 467 (1990) (emphasis added) (quoting State v. Lundbom, 96 Or App 458, 461, 773 P2d 11 (1989)).

The Halford court quoted EC 7-37:

“‘A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.’” Halford, 101 Or App at 663 n.3.
The rule is not limited to the realm of criminal law. In *Wattenburg v. United Medical Lab.*, 269 Or 377, 525 P2d 113 (1974), it was held that a new trial was warranted because defense counsel engaged in improper argument to the jury concerning the sexually explicit nature of a book that the plaintiff had authored, but that had little relevance to the issues of the case.

*Wattenburg* also raised the issue of the “Hobson’s choice” confronted by a party on the receiving end of “improper argument.” Every trial lawyer and judge knows that repeated objections to an adversary’s “improper argument” tends to diminish the credibility of the objecting attorney in the eyes of the jury. Failure to make such objections, however, eliminates the issue in a subsequent appeal. *Wattenburg, supra*, 269 Or at 388. See also *State v. Pirouzkar*, 98 Or App 741, 746, 780 P2d 802 (1989).

This Hobson’s choice (loss of credibility by repeated objection versus “responding in kind”) was further underscored by *Walker v. Penner*, 190 Or 542, 553–54, 227 P2d 316 (1951) (holding that “responsive” improper argument is not an option: “In other words, ‘two wrongs do not make a right.’”) (quoting 64 CJS Trial § 300).

In the end, it is the trial court’s obligation to assure each party a fair trial—on the merits without injection of improper and collateral matters.
APPENDIX E—LIMITING THE NUMBER OF EXPERTS

“Ordinarily, it should be sufficient for each side to present, say, a single orthopedist, oncologist, or rehabilitation specialist. *** If a party offers testimony from more than one expert in what appears to be a distinct discipline, the party should justify the need for it and explain why a single expert will not suffice. Attorneys may try to bolster the weight of their case before the jury by cumulative expert testimony, thereby adding cost and delay. The court should not permit such cumulative evidence, even where multiple parties are represented on one or both sides.” Michael J. Saks et al., “Management of Expert Evidence” § II.D.2, in Annotated Reference Manual on Scientific Evidence (2d ed 2004) (emphasis added).

The manual above cited In re Factor VIII or IX Concentrate Blood Products, 169 FRD 632, 637 (ND Ill 1996), in support of this rule. In that case, the number of defense witnesses was extensively limited after it was held that the court had not only the power but an obligation to do so (see also Sneath v. Phys. and Surg. Hospital, 247 Or 593, 599, 431 P2d 835 (1967), holding that it was not prejudicial error to exclude cumulative scientific evidence).
Chapter 9—Anatomy of a Trial

APPENDIX F—SAMPLE PLAINTIFF’S SPECIAL JURY INSTRUCTIONS

IN THE CIRCUIT COURT FOR THE STATE OF OREGON
COUNTY OF JACKSON

JAMES WINKLE, Plaintiff,

- vs -

THOMAS J. PURTZER, M.D.;
MICHAEL W. POTTER, M.D.; ROGUE VALLEY NEURO SURGICAL, P.C.

Defendants.

CASE NO. 99-0702-L-1

PLAINTIFF’S SPECIAL JURY INSTRUCTIONS

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GREG SMITH, R.N., P.C.
1781 LIBERTY STREET SE
SALEM, OREGON 97302
PHONE 581-4463
NO. 1: BATTERY

A battery is a voluntary act that causes intentionally harmful or offensive contact with another.

Generally, a physician who performs an operation or administers treatment to which a patient has not expressly or impliedly consented is guilty of a battery. Providing medical therapy to a competent adult without permission is a battery.

Cook v. Kinzua Pine Mills Co., 207 Or 34, 48-59 (1956);
Mayor v. Dowsett, 240 Or 196, 232 (1965); and
Hively v. Higgs, 120 Or 588 (1927).
NO. 2: LACK OF CONSENT: EXCEPTION FOR EMERGENCIES

If, in the course of an operation to which a patient has consented, an emergency condition is discovered, that in the opinion of the surgeon requires another operation to save the patient’s life, the surgeon is justified in extending the authorized operation to the removal of the conditions not anticipated.

Hively v. Higgs, 120 Or 588, 593 (1927);
NO. 3: CONCERT OF ACTION

“Where physicians actually participate together in diagnosis and treatment, they may each incur liability for the negligence of the other even though a more active part in the treatment may have been taken by one of them.”

NO. 4: SUBSEQUENT NEGLIGENT CONDUCT

A defendant is not relieved from liability for his negligent conduct because of the subsequent negligent conduct of another person if the conduct of both is a substantial factor in producing the plaintiff’s injuries; this is so, even where the negligence of each occurs at different times.

Rice v. Hyster, 273 Or 191 (1975);
McEwen v. Ortho Pharmaceutical, 270 Or 375, 418 (1974); and
NO. 5: COMPARATIVE FAULT - TWO OR MORE DEFENDANTS

The Plaintiff has alleged that the injury was caused by the fault of one or more of
the Defendants. You must first resolve this conflict. If you find that one or more of the
Defendants were at fault in one or more of the particulars alleged which combined to
cause the damage, then you must compare the fault of each Defendant to the other. (This
comparison should be made in terms of percentages, which must total 100%).

(“UCJI No. 21.03 and 21.04, Comparative Fault, Two or More Defendants” (modified).)
NO. 6: DOWNSTREAM INJURIES

When an injury established by medical probability as caused by the Defendant(s), makes one more susceptible to subsequent conditions, it is not necessary that medical testimony establish that such future condition is probable but only that it is a possible result.


See also Oregon State Bar CLE “Evidence” Section 36.27, 1986.
CIVIL TRIAL PRACTICE STANDARDS

AMERICAN BAR ASSOCIATION

UPDATED AUGUST 2007
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INTRODUCTION

Since the middle of the 20th Century, trials have been characterized by increasing complexity and transformed by accelerating technology, new causes of action, novel fields of expertise, and the adoption of vastly liberalized codes of evidence. As trials have become more complicated, state and federal courts have developed a multitude of innovative techniques to enhance juror comprehension.

In 1998, the American Bar Association adopted the Civil Trial Practice Standards to standardize and promote the use of these innovative trial techniques. The Standards were drafted by a Task Force of the ABA Section of Litigation that included four past and present Chairs of the Section of Litigation; distinguished plaintiffs’ and defense counsel from around the country — from firms with as few as two lawyers to firms of several hundred; highly respected state and federal judges; and representatives of the Judicial Division of the ABA and the American College of Trial Lawyers. Before they were finalized, drafts of the Standards were distributed for public comment to every state and major local bar association; all sections of the ABA; other bar organizations; and hundreds of state and federal judges, and trial lawyers, across the country.

The Original Standards filled an important gap. They recommended procedures and otherwise furnished guidance that was not available elsewhere and were designed to foster and ensure a fair trial in both state and federal court. Critics of the jury trial have questioned the ability of jurors to decide complex cases fairly. The procedures recommended in the Civil Trial Practice Standards were particularly useful in complex cases and provided jurors the tools they needed to come to fair decisions in all cases.

In light of the passage of time since the Civil Trial Practice Standards were adopted as official ABA policy, a Task Force of the ABA Section of Litigation was formed for the sole purpose of reviewing and updating the Civil Trial Practice Standards. Consistent with the work of the original task force that drafted what became the Civil Trial Practice Standards, the Update Task Force reviewed and evaluated the existing Standards to consider whether they continued to address practical aspects of trial that were not fully addressed by rules of evidence or procedure and consider potential new Standards that would supplement and operate consistently with those rules.

A development of huge proportions in the updating of the original Civil Trial Practice Standards was the adoption in 2005 by the American Bar Association of the Principles for Juries and Jury Trials created by the American Jury Project. As noted in the preamble to the ABA Principles:

The American Bar Association recognizes the legal community’s ongoing need to refine and improve jury practice so that the right to jury trial is
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preserved and juror participation enhanced. What follows is a set of 19 Principles that define our fundamental aspirations for the management of the jury system.

Significant core concepts included within Original Standards 1-10 were evaluated, refined and integrated into the aforementioned 19 Principles that comprise the ABA Principles for Juries and Jury Trials. As a result, in the Updated Standards that follow, five of the initial 10 Original Standards have been deleted and the remaining five have been revised consistent with the ABA Principles. In addition, based on the work of the Update Task Force, three additional revised and four new standards have been integrated into the Updated Civil Trial Practice Standards.

The civil jury trial lies at the foundation of the American system of justice. Promoting improvements in the jury trial is a core mission — and one of the highest priorities — of the American Bar Association and its Section of Litigation. Consistent with the Principles for Juries and Jury Trials, the Updated Civil Trial Practice Standards stand in the highest traditions of the American Bar Association in the service of the courts, both state and federal, and the civil jury system.

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CIVIL TRIAL PRACTICE STANDARDS

PREFACE

These Updated Civil Trial Practice Standards have been developed as guidelines to assist judges and lawyers who try civil cases in state and federal court. The Updated Standards address practical aspects of trial that are not fully addressed by rules of evidence or procedure. They are not intended to be a substitute for existing evidentiary or procedural rules but rather to supplement and operate consistently with those rules. The Updated Standards are predicated on the recognition that, in an era of increasingly complicated evidence and litigation, there are methods for enhancing jury comprehension and minimizing jury confusion that merit wider consideration and use. These Updated Standards are designed to furnish practical guidance for the implementation and use of many of these methods.

The Updated Standards suggest a variety of approaches but recognize that ultimately the trial court must exercise its discretion in light of the circumstances before it, and nothing in these Updated Standards limits that discretion. The Updated Standards are drafted on the assumption that each litigant before the court is represented by counsel. The court's exercise of discretion will necessarily be affected if parties are appearing pro se.

These Updated Standards do not reflect any substantive legal doctrines. They are not comprehensive in the sense that many other issues arise at trial that are not addressed in the rules of evidence or procedure and yet have an impact on a jury's ability to perform its function. They are advisory only and, while they have been drafted to operate consistently with existing law, in the event of any conflict, the law governing in the jurisdiction prevails. It is hoped that, notwithstanding these limitations, these Updated Standards will prove useful to both bench and bar.

AMERICAN BAR ASSOCIATION
SECTION OF LITIGATION
TASK FORCE ON CIVIL TRIAL PRACTICE STANDARDS

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PART ONE: THE JURY

1. Juror Notebooks.

   a. Use & Contents. In appropriate cases where juror notebooks are used, they may include such items as the court’s preliminary instructions, selected exhibits which have been ruled admissible, stipulations of the parties and other relevant materials not subject to genuine dispute, which may include:

   i. Photographs of parties, witnesses, or exhibits;

   ii. Curricula vitae of experts;

   iii. Lists or seating charts identifying attorneys and their respective clients;

   iv. A short statement of the parties’ claims and defenses;

   v. Lists or indices of admitted exhibits;

   vi. Glossaries;

   vii. Chronologies or timelines; and

   viii. The court’s instructions.

   The notebooks should include paper for the jurors’ use in taking notes.

   b. Procedure.

   i. Conferral Requirement. The court should require counsel to confer on the contents of the notebooks before trial begins.

   ii. Parties Not in Agreement. If counsel cannot agree, each party should be afforded the opportunity to submit its proposal and to comment upon any proposal submitted by another party.
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Comment

The ABA Principles for Juries and Jury Trials provide that jurors should, in appropriate cases, be supplied with identical trial notebooks, and set forth the procedures a court should follow in doing so. See Principle 13B. Commentary for the ABA Principles is available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf. This Standard elaborates on the appropriate contents of juror notebooks and the procedures for using them.


It lies within the court’s discretion to decide not only whether but also when notebooks should be distributed. Ordinarily, if notebooks are to be provided, they should be distributed at or near the outset of trial for convenience of reference throughout the proceedings. Alternatively, the court may determine that distribution should follow the introduction of some or all of the exhibits or salient testimony. In either event, the court may permit the parties to supplement the notebooks with additional materials that the court rules admissible or includible later in the trial. Materials that have not specifically been approved by the judge may not be included in jury notebooks.

The court may suggest or, in appropriate cases, direct the parties to prepare notebooks for jurors. This should ordinarily be resolved prior to trial.
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2. **Juror Note-Taking.**

   **Cautionary Instructions.** Jurors should be instructed at the beginning of the trial that they are permitted, but not required, to take notes in aid of their memory of the evidence and should receive appropriate cautionary instructions on note-taking and note use, including that:

   i. Jurors are not required to take notes, and those who take notes are not required to take notes extensively;

   ii. Note-taking should not divert jurors from paying full attention to the evidence and evaluating witness credibility;

   iii. Notes are merely memory aids and are not evidence or the official record;

   iv. Jurors who take few or no notes should not permit their independent recollection of the evidence to be influenced solely by the fact that other jurors have taken notes;

   v. Notes are confidential and will not be reviewed by the court or anyone else. They may not be disclosed to other jurors until deliberations begin; and

   vi. Jurors should also be instructed that after they have reached their verdict, all jurors’ notes will be collected and destroyed.

   **Comment**


3. **Juror Questions for Witnesses.**

   **Cautionary Instructions.** Jurors should be instructed at the beginning of the trial concerning their ability to submit written questions for witnesses including that:

   i. Questions should be reserved for important points only;
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ii. The sole purpose of juror questions is to clarify the testimony, not to comment on it or express any opinion about it;

iii. Jurors are not to argue with the witness;

iv. Jurors are to remember that they are not advocates and must remain neutral fact finders;

v. Jurors are not to reach any definite conclusions until the end of the case, after they have heard all of the evidence and arguments of counsel;

vi. There are some questions that the court will not ask, or will not ask in the form that a juror has written, because of the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case;

vii. Jurors are to draw no inference if a question is not asked -- it is no reflection on either the juror or the question;

viii. Jurors are not to weigh the answers to their questions more heavily than other evidence in the case;

ix. Questions will be accepted only in writing, at the court's invitation, and are not to be disclosed to other jurors; and

x. Any question must be submitted in writing to the court, with the juror's signature or designated number affixed.

Instructions vi., vii. and viii. should ordinarily be reiterated in the final jury charge.

Comment

The ABA Principles for Juries and Jury Trials provide that jurors should ordinarily be permitted to submit written questions for witnesses and set forth procedures a court should follow in doing so. See Principle 13C. Commentary for the ABA Principles is available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf. This Standard sets forth the elements the court should include in its cautionary instructions on jurors’ written questions.

Questioning is primarily the province of counsel, not jurors. With appropriate safeguards, however, juror questioning can materially advance
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the pursuit of truth, particularly when a jury is confronted with a complex case, complicated evidence or unclear testimony. See, e.g., American Judicature Society, TOWARD MORE ACTIVE JURIES: TAKING NOTES & ASKING QUESTIONS 11-14 (1991); Heuer & Penrod, Increasing Juror Participation in Trials Through Note Taking and Question Asking, 79 JUDICATURE 256 (1996); Robert E. Litan (ed.), VERDICT: ASSESSING THE CIVIL JURY SYSTEM 358-60, 390-91 (Brookings 1993); Statement of Robert MacCoun, University of California at Berkeley Graduate School of Public Policy, before the Judiciary Committee of the California State Senate concerning Improving Jury Comprehension in Criminal and Civil Trials at 1 (July 27, 1995).


The practice of jury questioning -- especially oral questioning -- has often been frowned upon, particularly in criminal cases, due to concern that it risks compromising jury neutrality, encouraging premature deliberations, and unduly delaying the proceedings. These concerns can be addressed with proper precautions, as adumbrated in this Standard, and a vigilant trial judge. Moreover, civil actions rarely present the same constitutional issues or liberty interests that foster judicial sensitivity in criminal cases.

Ordinarily, the court should not invite or entertain questions from jurors until after the parties’ examination and cross-examination of a witness has concluded.

The Standard provides that jurors should identify themselves when submitting questions. This is designed to enable the parties and the judge to address any potential or apparent violations of the judge's instructions or the juror's duties.
4. **Instructing the Jury.**

   a. **Notice to Parties.** Before delivering any instructions to the jury, the court should:

      i. Inform counsel on the record of the content of the instructions it intends to deliver;

      ii. Allow argument by counsel concerning the proposed instructions;

      iii. Allow counsel to make a record of any objections; and

      iv. Provide counsel with copies of the instructions.

   b. **Conferral Requirement.** The court should require counsel to confer on the substance of instructions before trial begins.

**Comment**


Judges should require counsel to confer and to seek agreement on substantive instructions before trial begins. Where counsel cannot agree, each party should be required to submit proposed instructions and objections to the opponent’s instructions before trial. The judge should consider having a pretrial conference to rule on instructions prior to trial. At a minimum, where there is dispute over basic, relevant legal principles, the court should advise counsel as to its determination of the law, which will be reflected in its preliminary instructions, so that counsel can prepare their openings, and otherwise finalize preparation of their cases, based on the court’s resolution of the governing law.
5. **Exhibit Availability During Jury Deliberations.**

   a. **Aids.** The court may, in appropriate cases, provide the jurors with aids, in addition to an index, to facilitate their review of the evidence.

   b. **Exhibits Offered for Limited Purposes.** If an exhibit that has been admitted for any limited purpose is provided for juror use during deliberations, the court should consider re-instructing the jury as to the limited purpose of which the exhibit was admitted.

   **Comment**

   The ABA Principles for Juries and Jury Trials provide that jurors should "ordinarily be provided" with exhibits admitted into evidence and with an index to those exhibits. *See Principle 15B*. Commentary for the ABA Principles is available at [http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf](http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf). This standard describes several other steps that may facilitate jurors' use of exhibits during deliberations.

   Subdivision a. recognizes that certain types of aids, in addition to an index, may be necessary for the jury to review evidence efficiently – or, in some cases, at all – during deliberations. Of particular importance are mechanical aids, such as videocassette recorders to review videotapes. The Standard is drafted broadly in view of the large number of items that fall within this category, including those to be developed in the future. In exercising its discretion in this regard, the court should take into account any risk that the aid sent to the jury room, coupled with whatever else is available to the jury, might be used for improper experimentation purposes.

   Subdivision b. is drawn from the cases which find that certain admonitory instructions may be appropriate when evidence admitted for a limited purpose is sent to the jury room. *See, e.g.*, *United States v. Cox*, 633 F.2d 871, 874 (9th Cir. 1980), *cert. denied*, 454 U.S. 844 (1981); *State v. Lord*, 117 Wash. 2d 829, 856-57, 822 P.2d 177, 193-94 (1991).
PART TWO: JUDICIAL PARTICIPATION IN DEVELOPING EVIDENCE

6. **Court-Appointed Experts.** The court may appoint an expert to serve as a judicial tutor as to esoteric subject matter or, in exceptional cases, as a witness to testify at a trial. The same expert may serve in both capacities.

   a. **Selection.**
      
      i. The court should invite the parties to recommend jointly an expert to be appointed by the court.

      ii. If the parties cannot agree, the court should invite them to submit names of a specified number of experts with a summary of their qualifications and an explanation of the manner in which those qualifications "fit" the issues in the case.

      iii. The court may choose one or more experts recommended by each party; it may choose one or more experts from those recommended by any of the parties; or it may reject the experts recommended by the parties and select an expert unilaterally.

      iv. Before selecting an expert, the court should:

         A. Consider seeking recommendations from a relevant professional organization or entity that is responsible for setting standards or evaluating qualifications of persons who have expertise in the relevant area, or from the academic community, and

         B. Afford the parties an opportunity to object to the appointee on the basis of bias, qualifications or experience.

   b. **Scope of Expert’s Duties.** The court should afford the parties the opportunity to participate in defining the scope of the expert’s duties.

   c. **Communications between Court and Expert.** The court should ensure that the parties are aware of all communications pertaining to the merits between the court and a court-appointed expert by:

      i. Permitting the parties to be present when the court meets or speaks with the expert;
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ii. Providing that all communications between court and expert will be in writing with copies to the parties; or

iii. Recording oral communications between court and expert and making a transcript or copy of the recording available to the parties.

d. Communications between Parties and Expert. The court should ensure that every party is:

i. Informed of, and afforded the opportunity to explore, in advance of trial, the findings and opinions of any court-appointed expert; and

ii. Aware of all communications between any party and a court-appointed expert by:

A. Permitting all parties to be present when any party meets or speaks with the expert, or

B. Providing that all communications between any party and the expert will be in writing with copies to all parties.

e. Testimony at Trial. If an expert witness appointed by the court testifies at trial:

i. Questioning. The court ordinarily should not call and question the witness. The witness should be examined by counsel, in an order determined by the court.

ii. No Identification as Court Appointee. The witness should not ordinarily be identified as one appointed by the court.

iii. If Identified as Court Appointee. If the court determines that, in the circumstances, it is appropriate to identify the witness as a court appointee, the court should instruct the jury that:

A. It is not to give greater weight to the testimony of a court-appointed expert than any other witness simply because the court chose the expert;

B. The jury may consider the fact that the witness is not retained by either party in evaluating the witness's opinion; and
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C. The jury should carefully assess the nature of, and basis for, each witness's opinion.

Comment

Trial judges have inherent authority to appoint experts as technical advisors to assist the court. See, e.g., Reilly v. United States, 863 F.2d 149, 156-57 (1st Cir. 1988); Note, Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence, 110 HARV. L. REV. 941, 949-51 (1997). They may also appoint expert witnesses for testimonial purposes under Federal Rule of Evidence 706(c) and similar provisions in force in most states. 2 Joseph & Saltzburg, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES §§ 55.2, 55.3 (Supp. 1994). This Standard applies to experts appointed in either capacity.

Courts should be reluctant to have court-appointed experts testify in jury trials. Identification of an expert with the court may artificially enhance that expert’s status and confer a false aura of authority and credibility.1 It may be difficult for a jury to understand why a court-appointed expert was retained and how the expert is being compensated. The process through which a court-appointed expert arrives at an opinion is often one from which counsel have been excluded. The result may be that neither counsel is comfortable with the approach the expert has taken.

A court-appointed expert may aid both in decision-making and in settlement. Among the myriad services such an expert may provide are: to advise the court on technical issues, to provide the jury with background information, or to offer an opinion on disputed technical issues. The appointment of experts by the court is rare, among other reasons, because of: (1) the cost involved; (2) the difficulty of finding truly neutral experts; (3) the concern that testimony from a court-appointed expert -- if the fact of court appointment is disclosed to the jury2 -- may be perceived as the court

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1 In European countries in which judges decide civil cases to the exclusion of juries, court-appointed experts are not uncommon and, according to a noted comparative law scholar, “[t]he fear is spreading that courts are covertly delegating decision-making powers to an outsider without political legitimacy. … Regularly subjected to dueling experts, adjudicators need not surrender to the authority of science as blindly as those confronted with a single opinion of their chosen expert: they can decide whom to believe by engaging their ordinary judgments of witness[es]’ credibility.” Damaska, EVIDENCE LAW ADRIFT 151-52 (1997).

2 It need not be, under Fed. R. Evid. 706(c) and analogous state provisions.
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taking sides in the controversy; (4) the potential delay involved; and (5) the recurring problem that, by the time the need is known, the appointment may entail significant delay in the proceedings. See generally Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4th § 11.51 (2004); Cecil & Willging, COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706 (Federal Judicial Center 1993) ("Cecil & Willging, COURT-APPOINTED EXPERTS").

The court is not free to engage in substantive ex parte discussions with court-appointed experts on the merits of the case. Canon 3A(4) of the Code of Conduct for United States Judges, for example, provides: "A judge should ... except as authorized by law, neither initiate nor consider ex parte communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." Subdivision (c) of this Standard is designed to afford the court the latitude it needs to communicate with the court-appointed expert while preserving the parties’ rights to be fully apprised of discussions between judge and expert pertaining to the merits.

The procedures suggested in this Standard are drawn from a variety of sources, including the Reilly case; the Federal Judicial Center's MANUAL FOR COMPLEX LITIGATION 4th § 11.51 (2004); Cecil & Willging, COURT-APPOINTED EXPERTS; and Cecil & Willging, Court-Appointed Experts, in Federal Judicial Center, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 525-71 (1994); American Bar Association Section of Litigation, National Center for State Courts & State Justice Institute, JURY TRIAL INNOVATIONS § 4.4 (Munsterman et al. eds., 2d ed. 2006). See also Note, Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence, 110 HARV. L. REV. 941, 954-58 (1997).

Most evidence codes permit the trial court, in its discretion, to disclose the fact of the appointment of the expert witness by the court. See, e.g., Fed. R. Evid. 706(c); Cal. Evid. Code § 722(a); and the numerous state evidence codes modeled on the Federal Rules. Joseph & Saltzburg, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES at §§ 55.2, 55.3. However, this Standard reflects the view -- borne out by Federal Judicial Center research -- that, if the expert's court-appointed status is disclosed, "concern about undue influence [on the jury] seems reasonable." Cecil & Willging, COURT-APPOINTED EXPERTS at 51.

The court may prohibit ex parte communications between the parties and a court-appointed expert. This may be impractical where, for example, the expert needs to contact one or more parties for specimens to examine. Subdivision d. ii. is operative only if the court has not prohibited
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such contact. Subdivision d.i. contemplates that, if the court-appointed expert is to testify at trial, the expert will be subject to the same type and degree of discovery (e.g., deposition, disclosure, interrogatories) as a party-proffered expert.

7. Use of Tutorials to Assist the Court

a. Pretrial Use of Tutorials. In cases involving complex technology or other complex subject matter which may be especially difficult for non-specialists to comprehend, the court may permit or require the use of tutorials to educate the court. Tutorials are intended to provide the court with background information to assist the court in understanding the technology or other complex subject matter involved in the case. Tutorials may, but need not, seek to explain the contentions or arguments made by each party with respect to the technology or complex subject matter.

b. Selection of Type of Tutorial.

i. In any case in which the court believes one or more tutorials might be useful in assisting it in understanding the complex technology or other complex subject matter, the court should invite the parties to express their views on the desirability of one or more tutorials.

ii. Once the court decides to permit or require one or more tutorials, it should invite the parties to suggest the subject matter and format of each tutorial.

iii. If the parties cannot agree on the subject matter and format, the court should invite each party to submit a description of any tutorial it proposes and to explain how that tutorial will assist the court and why it is preferable to the tutorial proposed by another party. The court may approve one or more tutorials proposed by the parties, or the court may fashion its own tutorial after providing the parties with an opportunity to comment on the court’s proposed subject matter and format.

c. Procedures for Presentation. A court may consider the following procedures for the presentation of tutorials:

i. An in-court or recorded presentation by an expert jointly selected by the parties.
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ii. An in-court or recorded presentation by one or more experts on behalf of each party.

iii. An in-court or recorded presentation by counsel for each party.

iv. A combined in-court or recorded presentation by counsel and one or more experts on behalf of each party.

v. An in-court or recorded presentation by an expert appointed by the court, which may include cross-examination by counsel for each party.

vi. Recorded presentations that have been prepared for generic use in particular kinds of cases by reliable sources such as the Federal Judicial Center.

d. Trial Use of Tutorials. In cases involving complex technology or other complex subject matter which may be especially difficult for non-specialists to comprehend, the court may permit or require the use of tutorials to educate the court or jury during one or more stages of the trial. Trial tutorials are intended to provide the court or jury with background information to assist in understanding the technology or other complex subject matter involved in the case. Tutorials may, but need not, seek to explain the contentions or arguments made by each party with respect to the technology or complex subject matter.

e. Selection of Type of Tutorial. The court should use the process set forth in 7.b. above.

f. Procedures for Presentation.

i. In a bench trial, the court may consider using any of the procedures set forth in 7.b. above.

ii. In a jury trial, the court should consider the use of tutorials in connection with interim statements and arguments as provided in Standard 9.

iii. In both bench and jury trials, the court should provide parties with a full opportunity to present admissible evidence in support of their cases that may differ from or quarrel with information presented in a tutorial and to argue that the information presented in a tutorial should be rejected by the court or jury.
Comment


The use of tutorials is not, however, limited to patent cases, or even to technology cases. For example, in In Re Pharmaceutical Industry Average Wholesale Price Litigation, 230 F.R.D. 61, 67 (D. Mass. 2005), the Court received tutorials on the structure of the pharmaceutical markets.

Indeed, tutorials have been recognized to be so helpful in understanding complex subjects, that at least one Circuit Judge has expressed regret where the Circuit Court did not have the benefit of a tutorial that was presented to the District Court but not recorded:

I salute the district court and the parties for having held a tutorial on the technology. It was undoubtedly valuable to the district judge. The only problem is, it was unreported (which is understandable, as a principal benefit of a tutorial is the opportunity for informal exchange) and thus, it was unavailable to assist us. In future cases where such formats are used – and I encourage it, having benefited from similar tutorials when I served as a district judge – I urge district judges and litigants to consider the possibility of videotaping the tutorial for whatever assistance it may be to the court of appeals.
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PART THREE: JUDICIAL CONTROL OVER TRIAL PRESENTATION

8. Limits on Trial Presentation.

a. Procedure. Limits on trial presentation should be imposed only after the court has:
   
i. Made an informed analysis of the case and of the parties' plans for trial;

   ii. Discussed with the parties the possibility of voluntary, self-imposed limits; and

   iii. Afforded the parties the opportunity to be heard as to the amount of time, or number of witnesses or exhibits, they believe they require in order to present their positions fairly.

b. Discretion. Subject to the judge's ultimate responsibility to ensure a fair trial and to afford the parties a fair opportunity to be heard, the court should consider whether to enforce voluntary limits agreed to by the parties or to impose reasonable limits on trial presentation, including limits on:

   i. The total time to be allowed each party or side for all direct and cross-examinations;

   ii. The length of examination and cross-examination of particular witnesses;

   iii. The number of witnesses or exhibits to be offered on a particular issue or in the aggregate; and

   iv. The length of opening statements and closing arguments.

c. Notice to Parties. The court should notify the parties of any limits it intends to impose sufficiently in advance of trial to permit them to prepare their cases accordingly.

d. Factors. In fashioning trial presentation limits, the court should consider:

   i. The complexity of the case;

   ii. The claims and defenses of the parties;
iii. The respective evidentiary burdens of the parties;

iv. The subject matter of evidence that is considered for limitation; and

v. Whether proposed limits allocate trial time fairly.

e. **Types of Limits.** If the court determines that limits are appropriate, it is generally preferable to limit the total amount of time allocated to each party or side, rather than to limit the number of witnesses or exhibits, or the duration of a particular examination.

f. **Modification.** The court should reassess imposed limits in light of developments during trial, and may grant an extension upon a showing of good cause. After trial has commenced, the court ordinarily should not shorten imposed limits, in light of the parties' reliance thereon, absent disposition of claims or defenses as to which evidence or argument was planned.

g. **Methodology.** If the Court determines to limit the total time allowed to each party, it should enter a written order setting forth those limits and describing the methodology for implementing them.

i. The Order should make clear what activities are and are not included in the total time limit. Specifically, it should state whether the limit applies to opening statements, closing statements, all witness examinations (whether conducted live in Court or by the reading or playing of previously taken testimony), and time spent reading evidence into the record or publishing evidence to the jury. In general, the time limit should not apply to breaks, time spent arguing motions, objections or discussing other matters with the Court.

ii. The Order should designate a neutral person or persons who will be in charge of timing the proceedings. That person could be the Judge, the court reporter, or some designated courtroom official such as a courtroom deputy or clerk.

iii. The Order should state that at the end of each trial day, the Court should announce the total elapsed time to be charged to each party for that day and the total time remaining for each party. Those times should be noted for the record at the end of each trial day. The Order should require that any disputes about elapsed time should be raised and resolved immediately.
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Comment

The ABA Principles for Juries and Jury Trials provide that the Court “after conferring with the parties, should impose and enforce reasonable time limits on the trial or portions thereof.” See Principle 12A. Commentary for the ABA Principles is available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf. This standard suggests for the Court several steps and procedures in furtherance of that objective.

The power of the court to impose reasonable time limits on a trial derives from the inherent power of the court and from codified sources such as Fed. R. Civ. P. 16(c)(4) and (15), Fed. R. Evid. 403 and 611(a), and analogous provisions in force in most states. MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1170-71 (7th Cir.), cert. denied, 464 U.S. 891 (1983); Hicks v. Commonwealth, 805 S.W.2d 144, 151 (Ky. App. 1991); Varnum v. Varnum, 586 A.2d 1107, 1114-15 (Vt. 1990); Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4TH §§ 11.644, 12.35 (2004); 2 Joseph & Saltzburg, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES §§ 13.2, 13.3 (Supp. 1994); 2 Id. §§ 45.2, 45.3.

This Standard is premised on the principle that courts should be reluctant to interfere with counsel's control over the presentation of their case and should ensure that each side has the opportunity to present its case fully and fairly, and on the corollary that trial courts therefore "should not exercise this discretion as a matter of course," Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 609 (3d Cir. 1995), and witnesses should not be excluded "on the basis of mere numbers." MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1170-71 (7th Cir.), cert. denied, 464 U.S. 891 (1983). In many cases, efficient management of court time can obviate the need for the imposition of time limits. See generally FINAL REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA at Part D, Recommendations 31-34, pp. 66-68 (1993).

Tailored judicial scrutiny is necessary before any limits are imposed. The court should ascertain at the outset whether counsel can voluntarily satisfy the court's reasonable concerns about its docket and the jury since, by definition, they know the case far more intimately than the court. For the same reason, if limits are appropriate, it is generally preferable to limit the total amount of time allocated to each party or side, rather than to limit the number of witnesses or exhibits, or the duration of a
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particular direct or cross-examination. See Hon. Pierre N. Leval, From the Bench: Westmoreland v. CBS, 12 LITIGATION No. 1 at 7 (Fall 1985); Hon. William W. Schwarzer, Reforming Jury Trials, 132 F.R.D. 575, 579 (1990); American Bar Association Section of Litigation, National Center for State Courts & State Justice Institute, JURY TRIAL INNOVATIONS § 4.1 (Munsterman et al. eds., 2d ed. 2006).

Before imposing limits, the court should indicate to counsel its own view of the time that should be required for trial in cases in which the court believes that counsel’s assessment is unrealistic or that the time requested is so clearly excessive as to amount to an unacceptable drain on public resources and imposition on the jury. The court should provide counsel with an opportunity to reassess their time requirements and seek, where possible, to reach a consensus on a realistic trial schedule before imposing its own view. In no event should the court permit any party to be prejudiced because of arbitrary time limits.

The substance of this Standard is drawn in part from the case law (see, e.g., General Signal Corp. v. MCI Telecommunications Corp., 66 F.3d 1500, 1508 (9th Cir. 1995); Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 609 (3d Cir. 1995)); the Federal Judicial Center's MANUAL FOR COMPLEX LITIGATION 4th §§ 12.24, 12.35 (2004); and ABA TRIAL MANAGEMENT STANDARDS 1, 2 and 3 (1992).

9. Interim Statements and Arguments.

a. Discretion. In cases of appropriate complexity, the court should afford counsel the opportunity during trial to address the jury to comment on, or to place in context, the evidence that has been, or will be, presented.

b. Factors. In deciding whether to permit counsel to address the jury during trial, the court should consider:

   i. The duration of the trial;

   ii. The number and complexity of the legal and factual issues; and

   iii. The volume and complexity of the evidence.

c. Procedure.

   i. The court should allow each side to address the jury.
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ii. Time should be allocated equally to each side or equitably if there are conflicting interests among parties on the same side.

iii. The court may:
   A. Allocate to each party or side a total amount of time that may be used at counsel's discretion at any reasonable point during the trial;
   B. Allocate to each party or side a certain amount of time that must be used within prescribed intervals or will be forfeited; or
   C. Schedule interim addresses at prescribed points during the trial.

iv. If timing is left to counsel's discretion pursuant to subdivision c. iii. A. or B., counsel may not choose a time that interferes with another party's presentation of evidence or with the court's schedule.

v. Counsel's remarks should be confined to the meaning or significance of the evidence and its relationship to the issues.

vi. The court should remind the jury of the difference between evidence and counsel's statements.

Comment

The ABA Principles for Juries and Jury Trials identify “mini-or interim openings and closings” as a trial technique to be considered by the parties and courts to enhance juror comprehension. See Principle 13G. Commentary for the ABA Principles is available at http://www.abanet.org/jury/pdf/final%20commentary_july_2015.pdf. This standard outlines suggested procedures for implementing such openings and closings.

Permitting counsel to address the jury to comment on the evidence in long or complex cases, or cases dealing with particularly complicated evidence or issues, is endorsed by the Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4th §§ 12.21, 12.34 (2004), and is not uncommon. See, e.g., Consorti v. Armstrong World Indus., 72 F.3d 1003, 1008 (2d Cir. 1995); ACandS, Inc. v. Godwin, 340 Md. 334, 407-09, 667 A.2d 116, 152-53 (1995). See also Robert E. Litan (ed.), VERDICT:
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ASSESSING THE CIVIL JURY SYSTEM 389 (Brookings 1993); Hon. Robert M. Parker, Streamlining Complex Cases, 10 REV. LITIG. 547, 553-54 (1991); Hon. Pierre N. Leval, From the Bench: Westmoreland v. CBS, 12 LITIGATION No. 1 at 66-67 (Fall 1985). This Standard adopts the flexible approach urged by these authorities, recognizing that juror comprehension may substantially be advanced by affording counsel the opportunity to summarize and place in context evidence that has been, or is to be, presented.

Whether these interim remarks to the jury should be characterized as "interim argument," which is the description frequently found in the cases (see, e.g., Armstrong and ACandS, supra), or "supplementary opening statements," which is the Federal Judicial Center's phrase (Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4th § 12.34 (2004)), is less important than a clear recognition of the purpose: to afford counsel the opportunity to comment on the meaning and significance of evidence as it is presented. Highly inflammatory rhetoric is out of place. See, e.g., ACandS, 340 Md. at 407-09, 667 A.2d at 152-53.

10. Order of Proceedings. In cases of appropriate complexity, the court should exercise its discretion to alter the traditional order of trial where that will enhance jury comprehension and recollection or facilitate the effective presentation of evidence and argument, without unfair advantage to either side. Among the alternatives the court should consider are:

a. Venire Panel. In advance of voir dire, presenting to the entire venire panel:
   i. Preliminary instructions
   ii. Opening statements (in either abbreviated or complete form).

b. Issue Organization. Organizing the trial by issue, or clusters of issues, with each party presenting its opening statement and evidence on a designated subject matter before proceeding to the next.

c. Interim Instructions. Giving interim instructions.

d. Interim Statements and Arguments. Permitting interim statements and arguments (see Standard 9, supra).

e. Sequential Verdicts. Submitting issues or claims to the jury sequentially, if a decision on one issue may render others moot or may facilitate
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settlement, or if alternative claims involve differing or conflicting theories of liability or damages.

f. **Post-Impasse Argument.** Permitting additional arguments by counsel after the jury has reached an impasse in deliberations.

**Comment**


The court is vested with the inherent power to control the mode and order of proceedings before it, a power that is codified in part in Fed. R. Civ. P. 16(c)(13)-(14), 42, 50 and 52, and Fed. R. Evid. 611(a), and analogous provisions in force in most states. See, e.g., 2 Joseph & Saltzburg, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES §§ 45.2, 45.3 (Supp. 1994).

11. Demonstrative Evidence.

a. Preview. As with all other exhibits, the court should afford each party an adequate opportunity to review, and interpose objections to, demonstrative evidence before it is displayed to the jury.

b. Unwieldy Evidence. Voluminous, complicated or other information that cannot conveniently be examined in court should be presented, when practicable, in the form of a chart, diagram, graph or other demonstrative evidence. At the request of a party, the court should provide guidance concerning admissibility before substantial expense is incurred.

Comment

Demonstrative evidence is the generic label applied to exhibits that share the common characteristic of visualizing for the factfinder data that have been, or can be, admitted into evidence. Common types include diagrams, charts, graphs, models, photographs, maps, plats, videotapes, animations, and computer simulations. Although demonstrative evidence has occasionally been contrasted with "real" evidence, most courts now hold that in some circumstances, and with a proper foundation, demonstrative evidence may be admitted for all. For example, a chart that summarizes voluminous, admissible data may be independently admissible into evidence under Rule 1006 of the Federal Rules of Evidence and analogous provisions in force in most states (2 Joseph & Saltzburg, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES §§ 70.2-70.3 (Supp. 1994)). Similarly, photographs are admissible as substantive evidence. United States v. May, 622 F.2d 1000, 1007 (9th Cir.), cert. denied, 449 U.S. 984 (1980); State v. Pulphus, 465 A.2d 153, 161 (R.I. Sup. Ct. 1983); 3 Wigmore, EVIDENCE § 790 (Chadbourn rev.).

Subdivision a. Because demonstrative evidence can be quite potent, it should not be shown to the jury until the court is satisfied that the evidence is admissible. This Standard therefore articulates the practical necessity that the opponent be afforded the opportunity to view the exhibit -- before it is shown to the jury. This Standard reflects the procedure suggested by the case law and the Federal Judicial Center. See, e.g., Robinson v. Missouri, 16 F.3d 1083, 1088 (10th Cir. 1994); Brandy v. French, 638 F.2d 209, 212 (10th Cir. 1981); Mills v. Nichols, 467 So. 2d 924, 930-31 (Miss. Sup. Ct. 1985); Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4th § 12.31 (2004). Under the 1993 amendments to the Federal Rules of Civil Procedure, Rules
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26(a)(2)(B)-(C) and 26(a)(3)(C) require the pretrial disclosure of all non-impeachment exhibits, including demonstrative evidence. See also Standard 20 (Motions in Limine).

Subdivision b. Generally, "[c]ourts look favorably upon the use of demonstrative evidence because it helps the jury understand the issues raised at trial." People v. Burrows, 148 Ill. App. 3d 208, 213, 498 N.E.2d 682 (1986). See also Hon. William W. Schwarzer, Reforming Jury Trials, 132 F.R.D. 575, 588 (1990) (“Much evidence becomes more comprehensible when presented with visual aids, such as a chart summarizing data, a chronology, an enlarged picture of an object, a diagram of a building, or a map.”). Exercising powers such as those codified in Federal Rule of Evidence 611(a), which most states have adopted (2 Joseph & Saltzburg, Evidence in America: The Federal Rules in the States §§ 45.2-45.3 (Supp. 1994)), the court should encourage counsel to package information in the most concise and understandable format. At the same time, because the reduction of voluminous or complicated data into demonstrative form can be expensive, the court should provide a requesting party with a preliminary ruling or at least parameters of admissibility before substantial expense is incurred. This subdivision reflects the view set forth in the Federal Judicial Center's Manual for Complex Litigation 4th §§ 12.31, 12.32 (2004), and in American Bar Association Section of Litigation/Brookings Institution symposium report, Charting a Future for the Civil Jury System 22 (1992).

12. Summary Exhibits and Witnesses.

a. Discretion. In cases of appropriate complexity, if it will assist the jury to understand the evidence or to determine a fact in issue, the court may receive for illustrative purposes

i. a summary of previously-introduced evidence in the form of a chart, diagram, graph or other demonstrative exhibit, and

ii. accompanying testimony explaining the exhibit and synopsizing the evidence that it summarizes, provided that:

A. all of the summarized items have previously been received in evidence;
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B. the preparer of the summary, or a person suitably knowledgeable as to its preparation and contents, is or has been made available for cross-examination; and

C. the summary and any accompanying testimony are offered in a party's case-in-chief or the court finds exceptional circumstances that warrant use of summary evidence during rebuttal.

b. Factors. Among the factors the court may consider in deciding whether to receive a summary pursuant to Subdivision a. are:

i. The length of the trial;

ii. The number of the issues;

iii. The complexity of the issues;

iv. The number of witnesses;

v. The duration and contents of the testimony;

vi. The number and volume of the exhibits;

vii. The contents of the exhibits;

viii. The accuracy of the summary; and

ix. Whether the proponent has made the summary available for inspection by adverse parties sufficiently in advance of its offer into evidence to provide the adverse parties with a fair opportunity to challenge it.

c. Marked as Exhibit. The summary should be marked as an exhibit whether or not the court admits the summary into evidence. If an objection to the summary is made and overruled, either party should be permitted to make the summary part of the record on appeal.

d. Cautionary Instructions. Prior to receiving a summary pursuant to Subdivision a, the court should instruct the jury that:

i. The summary is not independent evidence but provided only to assist them in evaluating the evidence;
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ii. The jury should closely examine the evidence that is summarized and the accuracy of the summary; and

iii. The jury should disregard the summary to the extent that it finds the summary inaccurate or rejects the underlying evidence that is summarized.

Comment

This Standard addresses illustrative, not substantive, summaries. Accordingly, it does not address exhibits that are admissible for substantive purposes pursuant to Federal Rule of Evidence 1006 or analogous provisions in force in most states. An exhibit offered pursuant to Rule 1006 must satisfy the requirements of that rule — namely, the underlying exhibits (i) must be "voluminous," (ii) must consist of "writings, recordings, or photographs," and (iii) must be admissible, but (iv) need not actually have been admitted into evidence as long as they have reasonably been made available for examination or copying, or both" in advance of trial.

This Standard deals instead with illustrative exhibits offered pursuant to such rules as Fed. R. Evid. 611(a) (and state counterparts in force in most jurisdictions) to summarize the evidence that has previously been offered in evidence at trial. It is both broader and narrower than a Rule 1006 summary. An illustrative summary under this Standard is broader than a Rule 1006 summary in that it need not, for example, summarize only "writings, recordings, or photographs" but may also summarize prior trial testimony, including expert opinion. An illustrative summary under this Standard is narrower than a Rule 1006 summary in that, for example, the items summarized must actually have been received in evidence, while the items summarized in a Rule 1006 summary need merely be admissible and have been made available to the opposition.

This Standard is derived from substantial case law addressing the use, for illustrative purposes, of summary exhibits and witnesses. As reflected in the Standard, the cases generally require that the summarized evidence be received for substantive purposes before the summary is allowed; that the summary be offered during the case in chief — rather than as an anticipatory closing shortly before deliberations begin; and that an appropriate limiting instruction be given to the jury. The cautionary instruction is also drawn from the case law. See generally United States v. Casas, 356 F.3d 104 (1st Cir. 2004); United States v. Fullwood, 342 F.3d 409, 413-414 (5th Cir. 2003); United States v. Buck, 324 F.3d 786, 790-92.
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13. Multiple Parties & Questioning. In a case involving multiple parties, the court should encourage the parties to cooperate in, coordinate, and streamline, the presentation of evidence and the making of objections, and it should be receptive to their efforts to do so. Unless the parties agree to the contrary, the court should permit each separately-represented party to develop the testimony of each witness, subject to reasonable time limitations and avoidance of repetition.

Comment

In any case involving multiple plaintiffs, defendants or other parties on the same side of the caption, there is sometimes an understandable temptation to restrict counsel for co-parties from independently exploring the same subject matter. There is an inherent tension between the systemic need to avoid the needless presentation of cumulative evidence and the parties' need to ensure that salient evidence has been adequately elucidated. Because the parties are most familiar with the evidence, it is sensible in the first instance to encourage them to attempt to reach agreement on procedures that will facilitate the presentation of evidence -- e.g., by designating principal examiners or cross-examiners for particular witnesses -- and to permit an objection made by one party to extend to all parties on the same side of the caption. Except in unusual circumstances, and subject to reasonable time limitations and avoidance of repetition, the court should ordinarily be receptive to the parties' efforts in this regard.

While it is appropriate and necessary for the judge to be vigilant about avoiding waste of court time, the judge should simultaneously be sensitive to arguments that certain subject matter has not been covered, or has been only inadequately covered, by prior questioning. The court should also take into account the existence of any differences in position among parties that are ostensibly aligned in interest (whether or not those differences are in the nature of, or have matured to, cross-claims, third-
party claims or any other sort of formal adversity) and the risk of potential prejudice if apparent coordination by counsel on questioning might generate an inference on the part of the jurors going to the merits (e.g., in a case alleging civil conspiracy). Hence, if the parties are unable to reach agreement, each party should presumptively be afforded an opportunity to examine each witness in a non-repetitive, expeditious fashion.

PART FOUR: EXPERT AND SCIENTIFIC EVIDENCE

14. "Qualifying" Expert Witnesses. The court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so.

Comment

It is not uncommon for a proponent of expert testimony to tender an expert witness to the court, following a recitation of the witness's credentials and before eliciting an opinion, in an effort to secure a ruling that the witness is "qualified" as an expert in a particular field. The tactical purpose, from the proponent's perspective, is to obtain a seeming judicial endorsement of the testimony to follow. It is inappropriate for counsel to place the court in that position.

A judicial ruling that a proffered expert is "qualified" is unnecessary unless an objection is made to the expert's testimony. If an objection is made to an expert's qualifications, relevancy of expert testimony, reliability or any other aspect of proffered expert testimony, the court need only sustain or overrule the objection. When the court overrules an objection, there is no need for the court to announce to the jury that it has found that a witness is an expert or that expert testimony will be permitted. The use of the term "expert" may appear to a jury to be a kind of judicial imprimatur that favors the witness. There is no more reason for the court to explain why an opinion will be permitted or to use the term "expert" than there is for the court to announce that an out-of-court statement is an excited utterance in response to a hearsay objection.

Because expert testimony is not entitled to greater weight than other testimony, the practice of securing what may appear to be a judicial endorsement is undesirable. As United States District Judge Charles R. Richey has observed in a related context, "It may be an inappropriate judicial comment ... for the court to label a witness an 'expert.'" Hon. Charles R. Richey, Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Civil and Criminal Jury Trials, 154 F.R.D. 537, 554 (1994). The prejudicial effect of this practice is accentuated in cases in which only one side can afford to, or does, proffer expert testimony.

When the Advisory Committee on the Federal Rules of Evidence recommended what became the December 1, 2000 amendment to Fed. R.
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Evid. 702, it cited Judge Richey and ended the Advisory Committee Note accompanying the amendment with the following paragraph:

The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert." Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness' opinion, and protects against the jury's being "overwhelmed by the so-called 'experts.'" Hon. Charles Richey, Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials, 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials).

This Standard suggests that the court should not use the term "expert" and that the proponent of the evidence should not ask the court to do so. The party objecting to evidence also has a role to play in assuring that the court does not appear to be anointing a witness as an "expert." A party objecting that a witness is not qualified to render an opinion or that a subject matter not the proper subject of expert testimony should avoid using the word "expert" in the presence of the jury. Any objection in the presence of the jury should be "to the admissibility of the witness' opinion." If the objecting party objects that testimony is inadmissible "expert" testimony and the court overrules the objection, it may appear that the judge has implicitly found the witness to be an "expert." When an objection is made, if the proponent wishes to argue the matter, it should be outside the hearing of the jury. See Fed. R. Evid. 103 (c) (providing that inadmissible evidence should not be heard by the jury).

The utility of the Standard can be undermined if the court is not careful to excise the term "expert" from the instructions it gives to the jury before it deliberates. Juries can be fully instructed on their role in assessing credibility without any mention of the term. The following instruction is illustrative:

Some witnesses who testify claim to have special knowledge, skill, training, experience or education that enable them to offer opinions or inferences concerning issues in dispute. The fact that a witness has knowledge, skill, training, experience
or education does not require you to believe the witness, to give such a witness's testimony any more weight than that of any other witness, or to give it any weight at all. It is important for you to keep in mind that the witness is not the trier of fact. You are the trier of fact. It is for you to decide whether the testimony of a witness, including any opinions or inferences of the witness, assists you in finding the facts and deciding the issues that are in dispute. And, it is for you to decide what weight to give the testimony of a witness, including any opinions or inferences of the witness.

PART FIVE: MOTIONS IN LIMINE

15. Motions & Rulings.

a. **Timing & Subjects.** In advance of trial, counsel should seek, and the court should provide, judicial resolution of significant evidentiary and legal issues that are susceptible of pretrial adjudication and are likely to have an impact of consequence on the trial. Counsel should refrain from making, and the court should defer ruling on, any motion in limine if the nature of the evidence at issue cannot fairly be discerned, or its relevance or significance determined, prior to trial.

b. **Conferral Requirement.** Counsel should be required to confer in an effort to resolve motions in limine before filing any with the court.

c. **Rulings.** The court should issue its ruling before opening statements begin, stating for the record whether its decision is final or whether it prefers to revisit the issue during trial if the objection or proffer is renewed.

Comment

The use of the motion in limine (literally a "threshold motion") to secure a ruling on the admissibility of evidence prior to trial is firmly established in state and federal court. *See generally* Fed. R. Civ. P. 16(c)(3)-(4) and analogous state provisions; Saltzburg, *Tactics of the Motion in Limine*, 9 LITIGATION No. 4 at 17 (1983); Hyde, *The Motion in Limine*, 27 U. FLA. L. REV. 531 (1975). This Standard is predicated on the recognition that certain types of evidentiary rulings often require context -- e.g., whether certain evidence is: (1) relevant; (2) more probative than prejudicial; (3) cumulative; (4) unduly delaying, time-consuming or confusing; and (5) sufficiently trustworthy to fall within certain hearsay exceptions.

The Standard also operates to mitigate some of the practical problems associated with the fact that the rules as to the appealability of *in limine* decisions are far from clear. *Compare United States v. Vest*, 842 F.2d 1319, 1325 (1st Cir.) (absence of objection at trial is "fatal"), *cert. denied*, 488 U.S. 965 (1988); *Allison v. Ticor Title Ins. Co.*, 979 F.2d 1187, 1200 (7th Cir. 1992) ("the law in this circuit is that an unsuccessful motion in limine does preserve the issue for appeal"); *American Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 324 (3d Cir. 1985) ("test is whether an objection at trial would have been more in the nature of a..."
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formal exception or in the nature of a timely objection calling the court's attention to a matter it need consider"); Palmerin v. City of Riverside, 794 F.2d 1409, 1411 (9th Cir. 1986) (circuit's position is "unclear").

This issue can largely be resolved if the court makes it clear whether its pretrial ruling is final. See, e.g., Rosenfeld v. Basquiat, 78 F.3d 84, 90 (2d Cir. 1996) ("Because the district court at the outset made a definitive ruling ... on the admissibility..., there was no need ... to challenge admissibility again during the trial when plaintiff asked to introduce the testimony."). This is consistent with the trend toward efficient judicial case management through effective and meaningful pretrial proceedings. A clear record not only permits parties to plan their trial strategy -- and, potentially, their approach to settlement -- but also avoids unnecessary appellate issues relating to appealability.
PART SIX: BENCH TRIALS

16. Submissions & Rulings.

a. Ruling from Bench. In deciding the appropriateness of ruling from the bench at the conclusion of a trial to the court, the judge should consider the duration of the trial, the complexity of the legal and factual issues involved, the trial briefs, pretrial order or other submissions previously received from the parties, and the prospective advantage afforded by an opportunity to review the transcript, and to receive post-trial submissions from the parties, before ruling. Rulings should be made in a timely fashion.

b. Submissions from Counsel. Prior to rendering its decision, the court should permit counsel to furnish an oral or written statement of position on the law and facts. If complicated legal or factual issues are involved, and depending on the nature and extent of other submissions previously received, the court should ordinarily invite the parties to submit proposed findings of fact and conclusions of law (or like submissions however denominated under applicable law).

Comment

The desire to issue decisions promptly should be tempered by the realization that, as a trial progresses, it is not necessarily a great deal easier for the court than for a jury to keep in mind all of the evidence, and to apply the law to it, particularly where complex legal and factual issues are involved. The present Standard urges the court to permit the parties to submit proposed findings and conclusions to facilitate the decisional process. At the same time, this Standard recognizes that, in particular cases, the parties’ prior submissions may suffice and the cost and additional delay will not offset the potential benefit of written post-trial submissions.

17. Continuity of Proceedings. Subject to the exigencies of its calendar and the needs of the parties, the court should endeavor to hear bench trials without lengthy continuances and interruptions in the proceedings, striving for the same level of continuity it insists on in jury trials.

Comment

Jury trials are ordinarily tried continuously, from opening statement to closing argument, in deference to the schedules of the jurors and in recognition of the adverse effect that lengthy continuances have on jury
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comprehension. Bench trials, in contrast, are sometimes tried very sporadically, with days or weeks intervening between witnesses or in the midst of a single witness's testimony. This approach not only causes hardship to the parties -- who must pay for constant refreshers of counsel -- and to the witnesses, whose schedules may repeatedly be interrupted by readiness alerts, but can also have an adverse effect on the judicial finder of fact.

This Standard takes the position that, subject to the exigencies of its calendar, the court should endeavor to try bench trials in the same continuous fashion that it tries jury trials. It recognizes, however, that in some circumstances the needs of the parties -- e.g., the availability of witnesses or the most expeditious sequencing of the proceedings (see Standard 10) -- may warrant an exception to the presumption that bench trials ought to be tried continuously. See generally FINAL REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA at Part D, Recommendation 31, pp. 66-67 (1993).
18. **Electronic Filing.**

The court should consider the use of electronic filing processes as recommended by the American Bar Association in its Standards Relating to Court Organization, Standard 1.65, "Court Use of Electronic Filing Processes."

**Comment**

This Standard formerly related to computer-readable submissions and provided “the Court should consider requiring the parties to serve and file court papers in computer readable form in addition to, or in lieu of, hardcopy, unless doing so would work undue hardship on a party.”

On February 9, 2004, the ABA House of Delegates adopted Standard 1.65, pertaining to Court use of electronic filing processes. That Standard provides in pertinent part:

Because of the benefits accruing to the courts, the Bar and the public from the use of electronic records, courts should implement electronic filing processes. In doing so, they should follow certain general principles, adopt rules and implement electronic filing processes as follows…”

The Updated Standard has been updated to comport with the ABA Standard Relating to Court Organization, Standard 1.65.

19. **Televised Court Proceedings.** In deciding whether or in what respects to permit a court proceeding to be televised, where that is permitted by applicable law, the court should consider all relevant factors, including:

   a. The identity of the parties;

   b. The nature and subject matter of the proceeding, including any significant social, political or legal issues involved, and any public interest served by televising it;

   c. The identity of participants to the proceeding, including whether witnesses, jurors or minors are involved;

   d. The extent and duration of contemplated television coverage, including:
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i. Whether the entirety of the proceeding, or only portions, would be televised; and

ii. What the broadcast equipment should, and should not, disseminate;

e. The impact of television coverage on the proceeding and any prospective later proceeding (such as trial), including any potential prejudice to:

i. The importance of maintaining public trust and confidence in, and promoting public access to, the judicial system;

ii. The advancement of a fair trial;

iii. The ability to impanel an impartial jury at the time or subsequently; and

iv. The rights of any party, prospective witness, victim, juror or other participant, including any right to privacy, confidentiality or witness sequestration.

f. The impact of television coverage on any law enforcement activity;

g. The objections of any party, prospective witness, victim, juror or other participant in the proceeding; and

h. The physical structure of the courtroom, including whether broadcast equipment can be installed and operated without disturbance to the proceeding or any other proceeding in the courthouse.

Comment

CIVIL TRIAL PRACTICE STANDARDS

court proceedings, some federal judges permit it, and one has found a "presumptive First Amendment right of the press to televise as well as publish court proceedings, and of the public to view those proceedings." *Katzman v. Victoria's Secret Catalog Div.*, 923 F. Supp. 580, 589 (S.D.N.Y. 1996).

It is not the intent of these Standards to take a position on the pros and cons of televising judicial proceedings, but simply to articulate the factors to be considered if the court is weighing whether to do so. The criteria set forth in this Standard are drawn from the cases and from a variety of court rules. Cal. Rule 980; McKinney's 1997 New York Rules of Court § 131.4(c); former S.D.N.Y./E.D.N.Y. Gen. Rules, App. D., R. 4(c); *Katzman*, 923 F. Supp. at 587-88; *Marisol A. v. Giuliani*, No. 95 Civ. 10533 (RJW), 1996 WL 91638 (S.D.N.Y. Mar. 1, 1996).

In implementing this Standard, the Court should be mindful of Principle 7C. of the ABA Principles for Juries and Jury Trials that provides:

If cameras are permitted to be used in the courtroom, they should not be allowed to record or transmit images of the jurors’ faces.


20. Courtroom Technology.

a. Receptivity. Judges should be receptive to using technology in managing the trial and the presentation of evidence.

b. Hardware. The parties should be encouraged to agree on common courtroom hardware, consistent with their rights to confidentiality of, and exclusive access to, work product and privileged information.

Comment

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Subdivision b. recognizes that there is a finite amount of space available in any courtroom and that certain hardware can be shared by the parties without risk of divulging privileged or protected information -- e.g., videotape recorders, monitors, and easels. To the extent that the amount of hardware can be contained, it is in the interests of all concerned to limit it.


a. Edited by Subject Matter.

i. If it will assist the jury to understand the evidence or to determine a fact in issue, the court should permit the parties to edit and present videotaped testimony by subject matter.

ii. The testimony of a single witness, or of multiple witnesses, relating to designated subject matter may be combined into a single presentation.

b. Advance Ruling. Objections to, and rulings on, the admissibility of videotaped testimony should be made sufficiently in advance of its presentation to the jury to permit it to be edited to reflect the court's rulings.

Comment

This Standard operates to apply the same rules to videotape that already apply to textual depositions. It is well settled that "[v]ideotape is generally more effective [than reading a transcript] for the presentation of deposition testimony, for impeachment and rebuttal, and for reference during argument." Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4th § 22.333 (2004), citing Michael J. Henke, The Taking and Use of Videotaped Depositions, 16 AM. J. TRIAL ADVOC. 151, 165 (1992) and Joseph, MODERN VISUAL EVIDENCE § 3.03[2][f] (1984; Supp. 1997).


This Standard addresses only one of the myriad of issues associated with the introduction of videotaped deposition evidence.

This Standard is drawn from a variety of sources, including MANUAL FOR COMPLEX LITIGATION 4th § 12.333 (2004); MODERN VISUAL EVIDENCE § 3.03[2][c]; and Hon. Robert M. Parker, Streamlining Complex Cases, 10 REV. LITIG. 547, 552 (1991).
CIVIL TRIAL PRACTICE STANDARDS

22. Organizing the Complex Case for Trial.

a. Effective Pre-Trial Management. In complex cases, it will assist the ultimate decision-making by the trier-of-fact, whether in a jury or bench trial, if the parties and the Court work closely together from the inception of the case to encourage prompt and meaningful judicial involvement in organizing the complex case for trial through effective pre-trial management.

b. Cooperation Amongst Counsel and the Court. Complex litigation places burdens on both the Court and litigants in terms of proper management of both judicial resources and the resources of the parties. Court supervision and control should be dispensed in the context of mutual cooperation and input between the Court and the attorneys that addresses and is reflective of the needs of both the Court and the parties.

c. Input to the Court. Counsel for the parties should assist the Court in becoming familiar with the substantive issues involved in the complex case at an early date.

i. The Court should request and the parties should submit at an early date a joint status report that includes a proposed Case Schedule and Litigation Plan that outlines the nature and complexity of the case, and

ii. Prior to the issuance of a scheduling order in the case, the Court should conduct a scheduling conference during which the Court and counsel discuss implementation of an appropriate Case Schedule and Litigation Plan.

d. Case Schedule Milestone Dates. The Case Schedule and Litigation Plan entered by the Court should include sequential milestone dates for the parties’ submission and the Court’s determination of substantive motions well in advance of any trial required pretrial statements or pretrial orders.

e. Periodic Monitoring and Conferences. The Case Schedule and Litigation Plan should provide for the Court’s continuing monitoring of the complex case’s progress through periodically scheduled status conferences, which may be telephonic for purposes of convenience, efficiencies and economics. In addition, the Court should allow the parties to request a status conference at any time during the pendency of the action.
Civil Trial Practice Standards

f. Early and Timely Judicial Rulings. The Court should endeavor to familiarize itself with substantive issues in the early stages of the complex case and render timely decisions regarding disputes and motions, particularly those involving issues that can alter the course of the litigation including the costs and burdens experienced by the litigants.

Comment

This Standard is designed to provide guidance in the application and implementation of Fed. R. Civ. P. 16 in furtherance of organizing the complex case for trial. The purpose of Rule 16 is to provide for judicial control over a case at an early stage in the proceedings. The preparation and presentation of cases is thus streamlined, making the trial process more efficient, less costly, as well as improving and facilitating the purposes for settlement. Fed. R. Civ. P. 16 Advisory Committee Notes.

This Standard stresses the importance of cooperative efforts between the Court, the attorneys and their clients to prepare the complex case for trial. As courts have noted:

The purpose of Rule 16 is to maximize the efficiency of the Court system by insisting that attorneys and clients cooperate with the Court and abandon practices which unreasonably interfere with the expeditious management of cases.


Judicial involvement in managing complex litigation does not lessen the duties and responsibilities of the attorneys. To the contrary, complex litigation places greater demands on counsel in their dual roles as advocates and officers of the Court. The complexity of factual and legal issues makes judges especially dependent on the assistance of counsel.

Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4th § 10.21 (2004)

The effective assistance of counsel in organizing the complex case for trial will be advanced when the court’s supervision and control is dispensed in the context of mutual cooperation and between the Court and counsel. The Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4th § 10.13 (2004) states:
CIVIL TRIAL PRACTICE STANDARDS

The attorneys – who will be more familiar than the judge with the facts and issues in the case – should play a significant part in developing the litigation plan and should have primary responsibility for its execution. Court supervision and control should recognize the burdens placed on counsel by complex litigation and should foster mutual respect and cooperation between the Court and the attorneys and among attorneys.

Implementation of the Standard’s suggested use of milestone schedule dates and periodic monitoring conferences is in furtherance of the objectives of Fed. R. Civ. P. 16 to manage the preparation of cases for trial. In Mulvaney v. Rivair Flying Service, Inc. 744 F.2d 1438, 1440 (10th Cir. 1984), the Court observed:

It is enough to note that the management of cases from the time of filing the complaint until the beginning of trial had become unacceptably long, necessitating amendment of Rule 16. While on the whole, Rule 16 is concerned with the mechanics of pretrial scheduling and planning, its spirit, intent and purpose is clearly designed to be broadly remedial, allowing courts to actively manage the preparation of cases for trial.

The Standard’s encouragement of periodic monitoring and conferences is consistent with the use of conferences following the initial conference in complex litigation to help the Court monitor the progress of the case and to address problems as they arise. Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION 4th §, 11.22 (2004).

The Standard’s encouragement of early and timely judicial ruling is consistent with the spirit behind Updated Civil Trial Practice Standard 16 pertaining to submissions and rulings in bench trials and the proposition that “rulings should be made in a timely fashion.”

23. Judicial Involvement With Settlement.

a. Communication of Availability of Settlement Assistance. The court should advise the parties of available forms of settlement assistance at the first opportunity, whether at the initial case management or other hearing or in the initial scheduling or administrative order.

b. Conferral Requirement. The court should direct the parties to confer regarding whether and what forms of settlement assistance are appropriate
CIVIL TRIAL PRACTICE STANDARDS

for the case and when such assistance should be provided. The court should direct the parties to advise the court of the results of their conferral and identify any alternative dispute resolution mechanisms in which all parties consent to participate and the agreed timing of such participation.

c. **Parties in Agreement.** The court should accommodate the parties, to the extent resources are available, by providing any settlement assistance requested, including referral to available alternative dispute resolution mechanisms, such as mediation or settlement conference with a private mediator, senior, magistrate or other judge, or participation by the presiding judge in a settlement conference.

i. If the parties prefer to proceed with a settlement conference before the presiding judge, the court should require the parties to waive recusal as a condition of the presiding judge’s participation. The parties should not be offered a settlement conference with the presiding judge in the context of an expected bench trial.

ii. No party should be required to consent to participation by the presiding judge in a settlement conference. If consent is given, any party should be permitted to withdraw consent at any time, and notice of withdrawal of consent should be made by notice from all parties, without identification of which party is withdrawing consent. The withdrawal of consent does not affect the parties’ earlier waiver of recusal.

d. **Parties Not in Agreement.** If the parties cannot agree on the use of available settlement assistance or the timing of such assistance, the court may order the parties to participate in one or more available alternative dispute resolution mechanisms, other than participation by the presiding judge in a settlement conference.

e. **No Ex Parte Contact With Third-Party Neutral.** The court should not communicate *ex parte* with any third-party neutral, including a senior, magistrate or other judge, involved in an alternative dispute resolution mechanism about the course of negotiations or the merits of the case.

f. **No Delay of Proceedings.** The court ordinarily should not delay proceedings or grant continuances to permit the parties to engage in settlement negotiations.

g. **Final Pretrial Proceedings.** Whether or not a case has previously been the subject of settlement talks or assistance, the court should ordinarily raise
the question of settlement assistance with the parties during final pretrial proceedings. At this point, the parties should have a grounded sense of the strengths and weaknesses of their respective cases that could contribute to a resolution by settlement.

h. Confidential Settlements. Unless contrary to law, if the parties agree to confidentiality, the court should not require the settlement terms to be on the record, even if the court or a court-appointed third-party neutral participated in the conference leading to the settlement.

Comment

The power of a court to direct parties to participate in settlement discussions is explicitly set fourth in the Federal Rules of Civil Procedure. Pursuant to Rule 16(c), a United States District Judge may, in connection with a pretrial conference, “require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.” Fed. R. Civ. P. 16(c). Failure to make a qualified representative available may result in sanctions. Fed. R. Civ. P. 16(f); Schwartsman, Inc. v. ACF Indus., Inc., 167 F.R.D. 694 (D.N.M. 1996).

Consistent with the above Standard, at least on commentator, a sitting Justice of the Massachusetts Superior Court, has recently recognized the importance of obtaining the parties’ consent in the event that a judge who intends to preside over the trial of a case proposes to participate personally in a settlement conference, and has proposed the adoption of an ethical rule requiring such consent. Hon. John C. Cratsley, Judicial Ethics and Judicial Settlement Practices, Dispute Resolution Magazine 16, 18 (2006).

Also, consistent with the Standard, the inadvisability of having a presiding judge participate in settlement negotiations in the context of a non-jury trial has been widely recognized. See Federal Trade Commission v. Freecom Communications, Inc., 401 F.3d 1192, 1208 n.9 (10th Cir. 2005) (District judges assigned to hear a non-jury case should be especially hesitant to involve themselves in settlement negotiations.); Laura M. Warshawsky, Objectivity and Accountability: Limits on Judicial Involvement in Settlement, 1987 U. Chi. Legal F. 369; Wayne D. Brazil, Settling Civil Suits: Litigators’ Views About Appropriate Roles and Effective Techniques for Federal Judges, 84-99 (1985).
APPENDIX H—RECOMMENDED PRACTICES FOR CIVIL JURY TRIALS IN MULTNOMAH COUNTY CIRCUIT COURT

Recommended Practices For Civil Jury Trials in Multnomah County Circuit Court

2008

Multnomah County Presiding Court Task Force on Civil Jury Trial Practices
RECOMMENDED PRACTICES FOR CIVIL JURY TRIALS IN
MULTNOMAH COUNTY CIRCUIT COURT

2008

MULTNOMAH COUNTY PRESIDING COURT
TASK FORCE ON CIVIL JURY TRIAL PRACTICES

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EXECUTIVE SUMMARY

Background of Project

Purpose
Identify practices for civil jury trials likely to increase juror comprehension and satisfaction and improve trial efficiencies.

Criteria
Implementation will not require any changes in rules or precedent; unanimously recognized by a committee of trial judges and experienced practitioners as a "best practice" that should be recommended; gives no advantage to either side.

History
Research, study, discussion, drafting, and review took place 2006–2008 following ABA’s publication of “Principles for Juries and Jury Trials.”

Highlights of Recommended Practices

Scheduling
If counsel believes that an unassigned case presents issues likely to require significant judicial time for pre–trial rulings, counsel should request a Wednesday call date for a pre–trial conference on Thursday with jury selection the following Monday.

Trial Exhibits & Depo. Excerpts
Before trial, counsel should exchange exhibit lists, trial exhibits, deposition excerpts and exhibits and deposition objections; reduce duplication of exhibits.

Neutral Statement of the Case
Before trial, counsel should prepare a joint proposed neutral statement of the case and, if necessary, separately state any objections.
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**Recommended Practices for Civil Jury Trials**

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<tr>
<th><strong>Depositions</strong></th>
<th>A tightly edited video (preferably under 30 minutes) with a synchronized transcript and stipulated summaries of witnesses’ background are encouraged. The court or counsel should explain what a deposition is to the jury.</th>
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<td><strong>Pre-Trial Conference</strong></td>
<td>Do not call a jury until the judge has resolved the neutral statement, admitted stipulated exhibits, considered objections to exhibits and deposition excerpts, and held a preliminary instruction conference.</td>
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<td><strong>Jury Selection</strong></td>
<td>Judges should avoid extensive efforts to &quot;rehabilitate&quot; a juror; if a judge denies a motion to excuse for cause, it should be done outside the presence of the jury; the word &quot;alternate&quot; should not be used with the jury; the judge should not disclose the identity of the alternate jurors.</td>
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<td>The judge should present preliminary instructions to the jury after voir dire and before the evidence begins to aid the jury in understanding what the case is about and what they will need to decide.</td>
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Chapter 9—Anatomy of a Trial

Recommended Practices for Civil Jury Trials

INTRODUCTION

Both the Oregon Constitution and the Constitution of the United States guarantee the right to jury trial in civil cases. For those guarantees to remain meaningful and vital, the bench and bar must continually look for ways to improve the way jury trials are conducted.

Following the 2004 Jury Summit in Multnomah County, convened at the visit of then-ABA President Robert Grey, a committee of judges and lawyers was formed to study the ABA’s newly-released Principles for Juries and Jury Trials. Using these Principles as a template to evaluate jury practices in Multnomah County, work groups were formed to consider improvements to different aspects of jury service in Multnomah County, from information for jurors on the court’s website to more understandable jury instructions. As the evaluation process continued, a task force evolved to focus exclusively on civil trials. The following Recommended Practices for Civil Jury Trials is the product of that process.

The task force was comprised of trial judges and experienced plaintiff and defense counsel from the civil practice bar. The group considered its collective trial experiences, studied research and proposals from jury reform efforts in other states and met from 2006 until early 2008 in crafting these recommendations.

The task force sought to identify practices that would be likely to:

- Increase juror comprehension and understanding;
- Increase juror satisfaction; and
- Result in greater trial efficiency and less waste of jurors’ time.
No practice was adopted as a recommendation unless it was:

- Capable of implementation without any change in court rules or legal precedent;

- Unanimously recognized by the judges and practitioners on the task force as a “best practice” that should be recommended for widespread adoption; and

- Neutral, i.e., it would not result in an advantage to either side in a civil trial.

It is our sincere hope that judges and lawyers will try the practices recommended here. We look forward to hearing from the bench and bar about your experiences using these Recommended Practices in the courtroom.
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RECOMMENDED PRACTICES

I. Trial Scheduling

A. The current case management procedure used by the Presiding Court should be retained as a best practice for cases that are expected to take 5 days or more to try:

1. If the case has not already been designated complex or assigned to a specific judge for all matters, and if the trial is expected to last 5 days or longer, then the parties may send a letter to the Presiding Court requesting pre-assignment to a judge for trial. The letter must be received no later than 30 days before the scheduled call date. Not all requests can be accommodated.

2. If the case is expected to last 2 weeks or longer, the request for pre-assignment must occur at least 45 days before the call date for trial so that additional jurors can be summoned.

3. If a case is pre-assigned for trial, the trial judge may schedule a pre-trial conference before the designated trial date or counsel may request a pre-trial hearing with the assigned judge if they believe the case would benefit from pre-trial rulings on motions in limine, the admissibility of evidence or outstanding discovery issues.

B. For cases on the regular call docket, counsel who believe their case will require significant judicial time for pre-trial rulings should ask for a Wednesday call date, and at call request that pre-trial matters
be handled on Thursday and jury selection begin the following Monday.

II. Exhibits

A. Prior to commencement of trial, counsel should agree upon a date for exchange of an exhibit list and exhibits. Plaintiff’s counsel should initiate a conference to set an exchange date. In the absence of agreement, the exchange should occur no later than noon on the court day prior to trial.

B. Counsel for all parties should deliver an exhibit list together with one copy of each exhibit required to be marked under UTCR 6.080 to opposing counsel and to the trial judge prior to the start of trial. If an exhibit cannot be copied, it should be made available to opposing counsel to inspect prior to the start of trial.

C. Counsel should identify those exhibits to which there are no objections. If there are objections, counsel should inform opposing counsel of the basis for each objection. To the extent there have been stipulations regarding exhibits (e.g., stipulations as to authenticity or relevancy), counsel should clearly identify those stipulations for the judge prior to the commencement of trial.

D. Counsel should eliminate unnecessary duplication of exhibits and attempt to consecutively number exhibits for trial, except as necessary to maintain exhibit numbers used in depositions. If possible, each exhibit should bear only one exhibit number.

E. At the commencement of trial, counsel should deliver to the courtroom clerk those exhibits to which there are no objections,
and, separately identified, those exhibits that may be offered to which there are objections.

III. Neutral Statement of the Case

A. Not later than 5 business days before trial call, counsel should exchange and confer on a proposed neutral statement of the case to be read to the jury panel before voir dire.

B. At the time required for the submission of trial memoranda, counsel should submit to the judge a jointly proposed neutral statement of the case and indicate which portions are agreed upon and, if applicable, where there is a dispute. If there is a dispute, counsel shall submit their own proposed language and may, but need not, also submit written argument.

C. The neutral statement of the case should identify for the jury the parties and the nature of the claims and defenses. The neutral statement should not be a detailed recitation of the evidence and should not be lengthy. Ideally, the neutral statement should be a few paragraphs in length.

IV. Deposition Testimony and Objections

A. Prior to commencement of trial, counsel should agree upon a date for exchange of deposition excerpts to be used at trial.

B. Plaintiff’s counsel should initiate a conference to set an exchange date. In the absence of agreement, the exchange should occur no later than noon on the court day prior to trial (see §VII.E.5.d).
V. **Pre-Trial Conferences**

A. In pre-assigned cases, counsel should contact the pre-assigned judge and schedule a pre-trial conference. The pre-trial conference should take place before the day set for trial.

B. For cases on the regular call docket, please see §1.A, above. For cases on the regular call docket that do not have pre-trial conferences scheduled per §1.A, the pre-trial conference shall take place before the jury is summoned to the courtroom.

C. The jury should not be called to the courtroom until the judge has:
   (1) determined the final form of the neutral statement of the case;
   (2) admitted uncontested exhibits into evidence; (3) considered objections to exhibits; and (4) held a preliminary jury instruction conference to discuss those instructions to be given to the jury at the beginning of the trial after the jury is selected (see §VII.B).

D. Where a party requests that a particular claim not be discussed in the neutral statement of the case or the preliminary instructions at the beginning of trial, the judge should afford all parties an opportunity to be heard on that question before deciding whether to include a particular instruction.

E. In longer trials, the judge should consider modifying the trial schedule so that the judge and counsel can address matters that do not require the jury to be present without making jurors wait. These matters might include trial scheduling issues, evidentiary hearings, trial motions and arguments regarding jury instructions, etc.
VI. Jury Selection

A. The judge should avoid extensive efforts to "rehabilitate" a juror or to reject reasons given implicitly or explicitly by the juror for not serving. Judges should ask open-ended follow-up questions sufficient to probe and assess the ability of the individual to fairly judge the case. Judges should also pay attention to clues such as the juror's demeanor in assessing the credibility of the prospective juror's statements.

1. Where a juror has expressed an opinion or disclosed a prior experience or relationship that raises reasonable concerns about the juror's ability to be fair and impartial, but then also makes statements such as “but I think I could be fair,” a judge should not merely ask whether, notwithstanding the prospective juror’s earlier statement, he or she could be fair and impartial. Rather, the judge should diligently probe the reason for concern about the juror's ability to be fair.

2. If the judge believes that excusing a potential juror may provide a “blueprint” for other potential jurors seeking a way to avoid service, the judge may keep the potential juror seated until the end of jury selection, but shall advise counsel outside the presence of the jurors and before the exercise of peremptory challenges that the juror will be excused for cause.

3. If the judge denies a motion to excuse a juror for cause, the judge should make explicit findings on the record, outside the presence of the jury, supporting that decision.
B. The term “alternate” should – if possible – not be used in the presence of the jury, so that “alternate jurors” are not stigmatized or their role minimized.

1. The judge and counsel should not disclose to the jury which jurors are alternates. If a juror asks about the role or identity of alternate jurors, the judge should explain the role and purpose of alternate jurors and that the identity of alternate jurors will be disclosed at the end of the trial.

2. At the conclusion of the case, the judge should thank the excused jurors and explain their role, including the fact that their presence throughout the trial made it possible for the case to proceed to verdict – whether or not an alternate juror replaced one of the original 12.

VII. Trial Procedures

A. Judges should make every effort to realistically schedule matters other than the trial in such a way as to minimize disruption of the trial schedule. Judges should also educate and train staff in this regard. At a minimum, consideration should be given as to whether the non–trial matter has the potential to significantly interfere with the schedule of trial witnesses and jurors and, if so, whether the non–trial matter can be rescheduled for a later date or time. Staff should also be instructed to determine the actual time needed for non–trial matters. For example, when sentencing and probation violation hearings are scheduled during a civil jury trial, the number of witnesses and the length of time necessary for arguments should be determined.
B. The judge should present to the jury, after voir dire and before evidence begins, preliminary instructions. The purpose of these instructions is to provide assistance to the jury in understanding what the case is about.

1. The instructions should typically include the trial procedures, including note-taking and questioning by jurors, the nature of evidence and its evaluation, the issues to be addressed, and the basic relevant legal principles. These principles should include the elements of the claims and defenses, and definitions of unfamiliar legal terms.

2. The preliminary instructions should not be as specific as the pleadings or the final instructions.

3. If a claim or defense is presented to the jury in the preliminary instructions that is later withdrawn by a party or by the judge, the judge should give an appropriate curative instruction with the final instructions at the conclusion of the trial.

C. At the commencement of trial, the judge should state on the record that the uncontested exhibits have been received into evidence.

D. The judge should permit the jury to ask written questions directed to a witness after the witness’ testimony is completed and before the witness leaves the witness stand. The judge should advise the jurors of this opportunity before the first witness is called. See ORCP 58 B(9).
E. The use of video depositions as a means for presenting deposition testimony is strongly encouraged.

1. With respect to the use of video depositions at trial, the preferred method is to have the video deposition synchronized with a written transcript of the deposition so that jurors are able to read along while they watch the video deposition.

2. Depositions used at trial should be tightly edited.
   a. For all depositions, whether presented by video or reading, counsel should edit depositions down to essential testimony for presentation to the jury. “Essential” means only those portions important to the merits of the case and not duplicative of other testimony. All objections and attorney colloquy should be removed, unless the attorney’s conduct is important for the jury to consider.
   b. To encourage sustained jury attention, every effort should be made to reduce the presentation time of a deposition at trial to no more than 30 minutes.

3. Counsel should agree to a short summary of the witness’ background as well as any other appropriate information in advance of the showing of the video deposition or the reading of deposition testimony. This information should include a brief introduction related to the witness’ background and relationship to the case so that the only testimony of the
witness to be provided to the jury is what is essential to the merits of the case.

4. Either the judge (see §VII.E.6) or counsel offering the deposition testimony should provide a brief explanation to the jury prior to the presentation of the deposition testimony, explaining when the deposition was taken, who was asking questions at the deposition and whether the witness was unavailable to testify at trial or the parties agreed to the presentation of the testimony by deposition.

5. The following is the preferred method for dealing with objections to the use of deposition testimony:

   a. Counsel offering the deposition testimony should mark by brackets in blue the testimony from the deposition transcript it seeks to present to the jury by video or read to the jury from the transcript.

   b. After receiving this transcript from the offering counsel, the responding counsel should note in red on the transcript any objections to the offered testimony and then bracket in red any additional testimony offered.

   c. Upon receipt, offering counsel should note in blue on the transcript any objections to the testimony offered by the responding counsel.

   d. In order to ensure efficient presentation of deposition testimony to the jury, all objections to deposition testimony should be ruled upon prior to the
presentation of the deposition testimony to the jury. Deposition transcripts, with objections marked, should be submitted to the judge when exhibits are submitted. The judge, after providing a hearing, should rule in a timely fashion so as to allow the presenting counsel to do all necessary deposition editing.

6. Prior to the first time deposition testimony is presented to the jury, the judge should instruct the jury that deposition testimony is about to be offered by a party and that jurors should consider this testimony in the same way as if the witness was present to testify in person.

a. The judge should instruct the jury as follows: “A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. You are about to have certain testimony [read to you] [shown by video] from depositions. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present in court to testify.”

b. When counsel intend to present deposition testimony to jurors without the use of a video deposition, the preferred method of presentation is to use a reader who will read aloud all deposition answers. The reader should be instructed to read the deposition answers from the transcript in a neutral way, understanding that
the goal is to provide a fair presentation of the deposition testimony to the jury irrespective of which party obtained the services of the reader. The identity of the reader of the deposition testimony should not be disclosed to the jury.

F. The judge should instruct the jury before closing arguments are made.
PRELIMINARY OBSERVATIONS

1. Difficult Profession

2. Enviable Profession (these lead to an enviable profession):
   a) Rewarding relationships
   b) Privilege of trying cases
   c) Art of persuasion

3. Break The Chain of Habit
   a) Focus on three items
   b) Practice persuasion daily

TRIAL THEME

1. Simplify, Simplify, Simplify!

2. Objective: Jury Adopts Theme
   a) Jury understands
   b) Jury remembers
   c) Jury repeats

3. Transform “hairball of complexity” case into a sentence or two
   a) Universal truth
   b) Common sense
   c) 12-year-old can understand
EXAMPLE THEMES

1. Terry Nichols was not there; He was building a life not a bomb.

2. Case about a drastic and risky medical test . . . that should not have been performed.

3. Case about an owner, who directed us to build a manufacturing plant, which they did not need.

HOW TO DEVELOP A THEME

1. Quiet time
2. Easel, butcher paper, or computer
3. Meet with people with whom you think well
4. List the most significant facts as strengths and weaknesses
5. Develop universal truth
   a) Consistent with common sense
   b) 12-year-old can understand
DEAL WITH BAD FACTS

1. Disclose / keep your theme
2. Change your theme
3. Use against the other side

PRIMACY

1. Remember best / what we hear first
2. Seize golden moment
3. Grab their attention in the first 30- to 40-seconds
RECENTY

1. Remember almost as well . . . what we hear last
2. Finish on the uptake
3. Place risks in the middle of examinations

USE YOUR EYES

1. Windows to the soul / do not blunt your power
2. One or two word outline
3. "Riding a bike"
4. Creating a relationship with jurors
REPETITION

1. Do not "over use" your theme
   . . . but be true to your theme

2. Skating / Looping
   with important evidence

3. Defining moments in cases
Chapter 10

Appearing in Court: Survive and Thrive!

THE HONORABLE CHANNING BENNETT
Marion County Circuit Court
Salem, Oregon

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Interactions with Court Staff, Counsel, Litigants and Others

- CANDOR (ORPC Rule 3.3)
- Credibility is your most valuable commodity and your word is your bond.

Build Credibility with the WORDS OF POWER!

- I DON’T KNOW
- ALWAYS, ALWAYS be candid and honest with the Court, court staff and opposing counsel.
  - ESPECIALLY WHEN IT HURTS!
    - We all make mistakes.
    - We don’t make the facts.

“If you have to eat a toad today, eat it first thing. If you have to eat two toads today, eat the ugly one first.”

YOU CAN ONLY SELL YOUR INTEGRITY ONCE AND YOU CAN NEVER BUY IT BACK.

Courtesy & Professionalism

- Treat every Attorney, Court Staff, Litigant and Judge as you would hope your beloved grandmother would be treated if she was at court.
- Always use honorifics when addressing any adult person in the courthouse:
  - Mr., Ms., or Miss
  - Officer, Detective, Sergeant, Captain
  - Dr., Professor
  - Pastor, Father, etcetera, etcetera
• DO NOT cast aspersions on opposing counsel
  o Even if true and deserved
• This is a formal profession. Don’t be overly familiar in the court
  house halls, chambers and court rooms.
  o ALL EYES ARE ON YOU
• GRANT EVERY PROFESSIONAL COURTESY WHERE POSSIBLE
  o You will definitely need to rely on the professional courtesy of
    Opposing Counsel at some point.
• How do you deny Professional courtesies?
  o Is your client actually prejudiced?
  o Is the Judge going to grant the courtesy if a motion is filed?
  o Does the action you propose to take advance your client’s goal?

PRESENTATION: Verbal and Non-Verbal
• BE ON TIME!!
• Dress like the professional you are (UTCR 3.010)
• Introduce yourself to Staff – every time!
  o First and Last name, and why you are there.
  o Have your case number ready.
    ▪ Be Confident
• Judges come and go, but the Staff are forever. And they never forget.
  o Staff make more decisions about your case than a Judge does.
• Develop your relationship with the Judicial Assistants & Clerks.
  o They run the court house and can help you succeed.
    ▪ Or bury you.
How to Prepare

- FACTS, FACTS, FACTS!!!!!
  - Develop an encyclopedic knowledge of the facts of your case.
- If you cannot state your case in one sentence, you are not prepared.

The Mystical and Secret Tomes (Neither Mystical nor Secret) and How to Use them

- Oregon Rules of Court Volume I – State
- Oregon Rules of Court Volume II – Federal
- Trial Practice, Thomas Mauet
- The Science and Technique of Cross Examination, Ponzer and Dodd

Persuade Using Two Sentences In Every Written Communication

1. Who Are You and Why are You Writing.
2. You Win Because ____.
3. Do not cite cases you have not read completely.
4. Do not string cite cases.

What To Do When You Are Before The Court

- Whether in chambers or the court room:
  - Stand up straight
  - Project
  - Enunciate.
    - State your name & who you represent
    - Tell me your conclusion FIRST.
Persuade The Court and/or Jury Using Two Sentences At The Beginning Of Every Oral Communication

- Why are you here actually?
  - AKA What was your question?
- What are Judges listening for and how to get them to listen to you.

How Do I get The Judge to Sign Things

- Don’t use form orders
- Make it easy for the Judge to say YES.
- ALWAYS TALK TO COURT STAFF ABOUT THEIR PREFERENCES AND YOUR OPTIONS!
Chapter 11
Protecting Your Appeal

THE HONORABLE LYNN NAKAMOTO
Oregon Supreme Court
Salem, Oregon

THE HONORABLE ADRIENNE NELSON
Oregon Supreme Court
Salem, Oregon

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I. APPELLATE LAW MATTERS TO TRIAL LAWYERS

Trial lawyers in civil litigation should be familiar with some basic appellate law to best represent their clients. One of the most important aspects of appellate law for trial lawyers to understand is the preservation of issues for appeal. As a trial lawyer, you may also have to advise your client regarding whether an intermediate ruling by the trial court can be challenged in an appellate court. And, if there is an order or judgment to be addressed in an appellate court, you may be asked to initiate that process. If that occurs, you should understand what that entails.

II. PRESERVING ISSUES FOR APPEAL

A. What is preservation? Basically, "preservation" refers to a prudential policy on appeal: ordinarily, a party must first raise an issue in the trial court before challenging the court’s ruling concerning that issue on appeal. Peeples v. Lampert, 345 Or 209, 219, 191 P3d 637 (2008). An exception to the general preservation requirement is "plain error" review. See, e.g., State v. Reyes-Camarena, 330 Or 431, 435, 7 P3d 522 (2000) (explaining and applying plain error doctrine). In Ailes v. Portland Meadows, Inc., 312 Or 376, 381-82, 823 P2d 956 (1991), the Supreme Court stated that an appellate court may review unpreserved error as plain error only if (1) it is an error of law, (2) the error is "obvious, not reasonably in dispute," and (3) it appears "on the face of the record." The appellate court may then conclude that it will exercise its discretion to consider the alleged error, keeping in mind that such an exercise of discretion is not automatic, and only after explaining its reasons for doing so. Id. at 382. The Supreme Court listed some of the factors that an appellate court may consider in making that determination in Ailes. Id. at 382 n 6. Thus, the bar for "plain error" review is set high, and the exception usually will not relieve a party from the requirement to preserve error for appeal.

B. What is the rationale for the preservation policy? Two major purposes underlie the preservation policy: fairness and efficiency. State v. Stevens, 328 Or 116, 122, 970 P2d 215 (1998). In Davis v. O’Brien, 320 Or 729, 737, 891 P2d 1307 (1995), the Supreme Court stated that "the rules pertaining to preservation of error in trial courts are intended to advance goals such as ensuring that the positions of the parties are presented clearly to the initial tribunal and that parties are not taken by surprise, misled, or denied opportunities to meet an argument." In State v. Wyatt, 331 Or 335, 343, 15 P3d 22 (2000), the court explained that "a party must provide the trial court with an explanation of his or her objection that is specific enough to ensure that the court can identify its alleged error with enough clarity to permit it to consider and correct the error immediately, if correction is warranted."

More recently, in Peeples, the Supreme Court explained the fairness and efficiency purposes in detail: "Preservation gives a trial court the chance to consider and rule on a contention, thereby possibly avoiding an error altogether or correcting one
already made, which in turn may obviate the need for an appeal. See Shields v. Campbell, 277 Or 71, 77, 559 P2d 1275 (1977) ('A party owes the trial court the obligation of a sound, clear and articulate motion, objection or exception, so as to permit the trial judge a chance to consider the legal contention or to correct an error already made.'). Preservation also ensures fairness to an opposing party, by permitting the opposing party to respond to a contention and by otherwise not taking the opposing party by surprise. * * * Finally, preservation fosters full development of the record, which aids the trial court in making a decision and the appellate court in reviewing it. See Outdoor Media Dimensions Inc. v. State of Oregon, 331 Or 634, 659-60, 20 P3d 180 (2001) (to promote judicial efficiency, unpreserved alternative ground for affirmance may be raised on appeal when, among other considerations, record has been fully developed). Our jurisprudence, thus, has embraced the preservation requirement, '[not] to promote form over substance but to promote an efficient administration of justice and the saving of judicial time.' Shields, 277 Or at 77- 78, 559 P2d 1275." 345 Or at 219-20 (citation to Davis omitted).

C. Preservation at work: ORAP 5.45. The preservation requirement is stated in the Oregon Rules of Appellate Procedure in ORAP 5.45. Under ORAP 5.45(1), "[n]o matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court and is assigned as error in the opening brief in accordance with this rule, provided that the appellate court may, in its discretion, consider a plain error." The rules for briefing require a detailed showing that a party has preserved an issue for appeal. Under ORAP 5.45(4)(a), "Each assignment of error shall demonstrate that the question or issue presented by the assignment of error timely and properly was raised and preserved in the lower court." For each assignment of error, a party must "specify the stage in the proceedings when the question or issue presented by the assignment of error was raised in the lower court, the method or manner of raising it, and the way in which it was resolved or passed on by the lower court." Id. More specifically, the party must identify "pertinent quotations of the record where the question or issue was raised and the challenged ruling was made, together with reference to the pages of the transcript or other parts of the record quoted or to the excerpt of record if the material quoted is set out in the excerpt of record." Id. Finally, "[i]f an assignment of error challenges an evidentiary ruling, the assignment of error must quote or summarize the evidence that appellant believes was erroneously admitted or excluded. If an assignment of error challenges the exclusion of evidence, appellant also must identify in the record where the trial court excluded the evidence and where the offer of proof was made; if an assignment of error challenges the admission of evidence, appellant also must identify where in the record the evidence was admitted." Id. Rule 5.45 illustrates that, when you are litigating a case in the trial court, you must take care to preserve issues for appeal adequately, which includes raising issues timely, with specificity, and on the record.
D. When is an issue adequately preserved? The adequacy of preservation in any particular case is a harder question to answer than describing the purposes of preservation. Perhaps of some comfort, you can expect that appellate courts in Oregon will try to be pragmatic and to focus carefully on what happened in the trial court, bearing in mind the purposes of preservation. In *State v. Amaya*, 336 Or 616, 629, 89 P3d 1163 (2004), the Supreme Court emphasized that the preservation rule has a "practical" purpose. The court said that again in a different way in *Peeples*: "Preservation rules are pragmatic as well as prudential." 345 Or at 220. Thus, it explained, the adequacy of preservation varies in different circumstances: "What is required of a party to adequately present a contention to the trial court can vary depending on the nature of the claim or argument; the touchstone in that regard, ultimately, is procedural fairness to the parties and to the trial court. See generally *State v. Hitz*, 307 Or 183, 188, 766 P2d 373 (1988) (distinguishing requirements for 'raising an issue at trial, identifying a source for a claimed position, and making a particular argument'). In some circumstances, the preservation requirement gives way entirely, as when a party has no practical ability to raise an issue. See, e.g., *McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 84, 95 n 6, 957 P2d 1200, modified on recons, 327 Or 185, 957 P2d 1200 (1998) (party not required to take action to preserve an issue that first arose when court issued its order). The same is true if the record establishes that preservation would have been futile, because the trial court would not have permitted an issue to be raised or the record to be developed. See, e.g., *State v. Olmstead*, 310 Or 455, 461, 800 P2d 277 (1990) ('When the trial court excludes an entire class of evidence by declaring, in advance, that it is inadmissible as a matter of law, the ruling renders a further offer futile.'). Finally, a legal right may not be subject to preservation requirements due to the unique nature of the right itself. See, e.g., *State v. Barber*, 343 Or 525, 530, 173 P3d 827 (2007) (unique wording of constitutional requirement of written jury trial waiver precluded ordinary rules of preservation for claim relating to denial of jury trial right)." *Peeples*, 345 Or 220-21 (footnote omitted).

E. Some preservation rules in specific settings in civil practice.

1. Evidence at the summary judgment stage. Only admissible evidence -- namely, evidence that would be admissible at trial -- may be considered in determining a summary judgment motion. *Leonard v. Moran Foods, Inc.*, 269 Or App 112, 119, 343 P3d 693, rev den, 357 Or 324 (2015). If one party submits evidence in support of or in opposition to a summary judgment motion that the other party believes is not admissible, that party must object to the evidence in some way, usually by means of a motion to strike, and also assign error to any adverse evidentiary ruling. *Drey v. KPFF, Inc.*, 205 Or App 31, 36, 132 P3d 663 (2006). If the party objecting to the evidence fails to take those steps, the evidence will be considered in deciding whether the trial court's ruling on the summary judgment motion was correct. *Id.*
2. Evidentiary motions in limine. When a trial court makes a categorical ruling denying or allowing evidence before trial, error is preserved even if the party does not renew its position at trial. See State v. Pitt, 352 Or 566, 574, 293 P3d 1002 (2012). Note, however, that if the presentation of evidence at trial does not unfold as anticipated when the trial court ruled pretrial, a party may have to raise the same evidentiary issue in the light of new trial developments. See id. at 574-75. If the trial court does not finally rule on the evidence before trial and instead waits to make a final ruling at trial, a party must preserve error in the usual fashion at trial. See State v. Adams, 296 Or 185, 189, 674 P2d 593 (1983). In the absence of a final ruling, an appellate court will not consider the merits of a trial court's pretrial, nonfinal ruling on appeal. Id.

3. Evidence at trial. A party that objects to the admission of evidence at trial should state the bases for that objection; however, the party need not cite a specific evidence rule to preserve an objection for appeal. If the trial court sustains an objection to the admission of evidence, the party offering the evidence must make an offer of proof to demonstrate what the evidence would be. State v. Phillips, 314 Or 460, 466, 840 P2d 666 (1992). A party can make an offer of proof either by questioning the witness outside the presence of the jury or by stating, with sufficient specificity, what the evidence would prove. Rains v. Stayton Builders Mart, Inc., 359 Or 610, 634, 375 P3d 490 (2016). When a party offers an exhibit that contains admissible and inadmissible evidence, the party objecting must identify which parts of the exhibit are inadmissible. Otherwise, the trial court's ruling admitting the exhibit will be affirmed on appeal even though the document contains some inadmissible evidence: "It is well established that when evidence is offered as a whole and an objection is made to the evidence as a whole and is overruled, the trial court will ordinarily not be reversed on appeal if any portion of the offered evidence was properly admissible, despite the fact that other portions would not have been admissible had proper objections been made to such portions of the offered evidence." State v. Brown, 310 Or 347, 359, 800 P2d 259 (1990) (quoting Sproul v. Fossi, 274 Or 749, 755, 548 P2d 970 (1976)).

4. Jury instructions. The purpose of requiring exceptions to jury instructions is to give the trial court an opportunity to correct instructions. Delaney v. Taco Time Int'l., 297 Or 10, 18, 681 P2d 114 (1984). The "core preservation principles" apply to preservation of error concerning objections to jury instructions. State v. Vanornum, 354 Or 614, 632, 317 P3d 889 (2013). The objection to a proposed or final instruction (or argument in favor of giving a requested instruction) must be specific enough to permit the court to consider and to correct an alleged error. Id. Although ORCP 59H specifies that a party objecting to an instruction must also except to the trial court's decision to give the instruction, the failure to take an exception will not preclude an appellate court from considering an otherwise timely and sufficiently specific objection to the instruction. Id. at 628-29.
5. Verdict form. Objections to the verdict form are like objections to jury instructions: they must be timely and sufficiently specific for the trial court to identify its alleged error and to correct it. When the trial court record does not reflect the objection to the verdict form that the party raises on appeal, the appellate court will reject the claim of error. See, e.g., Rains, 359 Or at 637-38.

6. Motion for directed verdict. Like jury instructions, such motions must be specific enough to permit the trial court to identify the alleged error and to correct it. Dew v. Bay Area Health Dist., 248 Or App 244, 252-53, 278 P3d 20 (2012). Also take care not to give away a claim of error by virtue of a nonspecific verdict form submitted to the jury. See Shoup v. Wal-Mart Stores, Inc., 335 Or 164, 174-79, 61 P3d 928 (2003) (when the record does not reveal whether, in returning a general verdict for the plaintiff, the jury relied on a valid or an invalid specification of negligence, an appellate court will not consider the defendant’s argument that the trial court erred in submitting the invalid specification to the jury).

7. Motion for mistrial. Timeliness is important. "To preserve error, a motion for mistrial must be timely." State v. Hilton, 187 Or App 666, 676, 69 P3d 779 (2003), rev den, 336 Or 377 (2004). The motion should be made as close in time to the objectionable statement or conduct as practicable. In State v. Shafer, 222 Or 230, 235, 351 P2d 941 (1960), the Supreme Court stated that the "time to move for a mistrial is when the allegedly prejudicial act occurs, not after the incident has been allowed to pass by, for then it is too late for the trial judge to caution the jury and mend the harm." Courts will not permit a party to sit back on a "wait and see" basis and then make a strategic decision to move for a mistrial later, depending on how things have unfolded at trial. See, e.g., State v. Barone, 329 Or 210, 241-42, 986 P2d 5 (1999), cert den, 528 US 1086 (2000) (holding that the defendant’s motion for a mistrial, on the ground that the prosecutor had belittled defense counsel in rebuttal argument, was untimely and not preserved when it was made during the court’s recess for jury deliberation, when or just before the jury had returned its verdict); State v. Wilson, 121 Or App 460, 469-71, 855 P2d 657, rev den, 318 Or 61 (1993) (affirming the denial of the defendant’s motion for a mistrial on the basis of the prosecutor’s suggestion during rebuttal argument that the state had evidence of the defendant’s prior bad acts, when the defendant made the motion after the jury had returned its verdict).

8. Defective verdict. A party must raise an alleged defect in the verdict, such as an apparent inconsistency in a special verdict, before the jury is discharged. See Building Structures, Inc. v. Young, 328 Or 100, 968 P2d 1287 (1998).

9. Motion for JNOV. Pursuant to ORCP 63 A, a party that moves for a directed verdict may move for a judgment notwithstanding the verdict after trial: "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." Generally, a defendant's failure to move for directed verdict will preclude that party from obtaining a JNOV. Stark v. Henneman, 250 Or 34, 36, 440 P2d 364 (1968); Gritzbaugh Main Street Prop. v. Greyhound Lines, 205 Or App 640, 656, 135 P3d 345, adh'd to on recons, 207 Or App 628, 142 P3d 514 (2006), rev'd, 342 Or 299 (2007).

III. TIPS FOR MAKING A GOOD RECORD IN THE TRIAL COURT

A. Understand the challenges facing the trial judge to keep the trial on schedule.

1. Create a realistic trial schedule to reduce time stress. The trial judge may seem overly concerned about "moving things along" when you are trying to make a record, but she or he is probably trying to keep promises about when your trial will be done that were made to the jury, the presiding judge, the litigants in the trial that follows yours, and maybe the judge's own family. In that regard, before you make representations to the court about the number of trial days needed, calculate hours of actual trial time. Account for time that the court may need to address other cases during the trial (such as short criminal matters), normal starting and ending times for the jury, and regular daily recesses, and budget a cushion when estimating how long your own case will take.

2. Use procedures to get as much as possible done before the jury is selected. It makes the trial run more smoothly and usually allows more time "on the record" to hash out motions in limine, objections to exhibits, and at least preliminary jury instructions.

3. If the trial judge doesn't tell you, ask at the beginning of the trial how she or he likes to handle matters on which you need to make a record outside the presence of the jury. Don't expect that every time you say, "I have a matter for the court," the judge will send the jurors out; the judge may simply say "please proceed, we'll deal with that later." You must make sure that there is a "later." The lawyers and judge may agree on a certain time each day to take up matters on the record outside the presence of the jury, at a time the jury would not be present anyway, such as early in the morning (or having the jurors come in later), at the end of the day with the court dismissing the jurors early, or in a longer trial one day or half day when the jury is not coming in at all.

4. Anticipate evidentiary objections that cannot be dealt with in limine and prepare a concise way of stating the objection that avoids a "speaking objection" but alerts the trial judge to the nature of the objection. One or a few words should do it
("hearsay," "lack of foundation," "best evidence," etc.); citing a rule number alone (other than OEC 403 or 803) is probably not as helpful to the judge.

5. On more complex issues that cannot be dealt with in limine (or that you choose not to raise before trial for strategic reasons), consider preparing a pocket brief or memo that is short and to the point. While you are trying to educate a judge under time pressure, keep preservation in mind in the event of a later appeal.

B. Be persistent but respectful when you need to make your record.

1. If the judge says "please proceed" and you don't have a timing problem, make a note that you have a matter for the court and, assuming you don't have an agreed upon time to deal with such matters, ask about addressing it as soon as the jury is sent out the next time: "Your honor, when would be a good time to go into the issue of X?" If you do have a timing problem with creating your record, for example, you need to make an offer of proof with witness Y, but she has to leave, consider saying, "May we have a brief sidebar to discuss a scheduling problem with this issue?" (See below about problems with sidebars.) Some judges want the offer of proof to come from the witness and not a recitation by counsel; don't let your witness leave until you know what the judge will require.

2. When you need to interrupt opposing counsel to make your record. Start to stand up when you will object to a question, but wait until the question is finished before speaking. Standing is usually a cue to opposing counsel, the judge, and the witness that an objection is coming and may even cause the witness to pause for you to state the objection before blurting out the answer. If you have to object during closing argument, you may want to begin with an apology ("I'm sorry to interrupt, your honor [head nod to opposing counsel], but I must object . . .").

3. As events develop at trial, be alert to opportunities to revisit earlier trial court rulings. For example, if opposing counsel opens the door to the evidence, assert the new basis for the evidence to come in.

4. Be prepared to object immediately to a potentially defective verdict, even if it means interrupting the judge's thanks-and-goodbye speech to the jury. See I.E.8 above.

5. When dealing with jury instructions, be prepared not only to defend your own instructions and to object to your opponent's, but also to deal with -- and to object to --instructions crafted by the judge. Deviance from uniform instructions is not a basis of objection.
C. Make sure that what happened is on the record.

1. Beware of conferences in chambers or at a sidebar. Some judges have the capacity to record conferences in chambers, but many do not. A sidebar is almost always off the record. If something happens in chambers or at a sidebar and you need to make a record of it, ask the judge if you can put the matter on the record before the jury is brought in or at the next jury break. *Rains v. Stayton Builders Mart, Inc.*, 264 Or App 636, 655-56, 336 P3d 493 (2014) (rejecting an assignment of error regarding the verdict form), provides an example of what happens when counsel does not place on the record the objections made off the record in chambers.

2. If the judge or clerk asks you to wear a lapel microphone, or to stay close to a table microphone, do it. Even if you think your voice carries well, it may not be making it to the recording.

3. If there was a critical event during the trial, you may want to confirm with the clerk that it was picked up on the record. If the recording failed for some reason, you can ask to make a record of it by describing the event. If the event was not in court, make it part of the record.

4. "May the record reflect" is a useful phrase. Once upon a time, stenographic court reporters would include descriptions such as "witness indicating" or "witness nodding." Without reporters doing it for you, you may need to provide the verbal description of non-verbal acts.

IV. SECURING YOUR APPEAL

Trial counsel should understand when a client has an appealable judgment or order so that the client will be in a position to timely file an appellate challenge to an adverse trial court judgment or, sometimes, an order. And, even if trial counsel does not handle the appeal, trial counsel will sometimes be called on to file a notice of appeal or to assist with preliminary matters in an appeal, such as undertakings.

A. Is there an appealable judgment or order?

1. Judgments. For straightforward limited, general, or supplemental judgments, see ORS 19.205(1), which provides: "Unless otherwise provided by law, a limited judgment, general judgment or supplemental judgment, as those terms are defined by ORS 18.005, may be appealed as provided in this chapter." For judgments corrected under ORCP 71, see ORS 18.107. If the judgment is being changed from a general judgment to a limited judgment because it does not decide all requests for relief, see ORS 18.112.
2. Orders. Some orders can be appealed. In accordance with ORS 19.205(2), an "order in an action that affects a substantial right, and that effectively determines the action so as to prevent a judgment in the action, may be appealed in the same manner as provided in this chapter for judgments." In accordance with ORS 19.205(3), an "order that is made in the action after a general judgment is entered and that affects a substantial right, including an order granting a new trial, may be appealed in the same manner as provided in this chapter for judgments."

3. In limited circumstances, an interlocutory appeal is allowed. See, e.g., ORS 19.225 (class action).

B. Is there an appealable issue?

1. Prejudicial, reversible error. Proceedings in the trial court may not always be flawless. But an error during the trial or another part of the trial court's proceedings does not necessarily translate into a reversal and perhaps a new trial or a second chance of some type for your client. Oregon appellate courts must consider whether an error was harmless, in accordance with a constitutional provision and a statute.

2. Section 3, Article VII (Amended) of the Oregon Constitution provides in part: "In actions 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. ** If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the supreme court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the supreme court." Under ORS 19.415(2), "[n]o judgment shall be reversed or modified except for error substantially affecting the rights of a party."

3. Thus, appellate courts must determine "whether -- in an important or essential manner -- the error had a detrimental influence on a party's rights." Purdy v. Deere and Company, 355 Or 204, 226, 324 P3d 455 (2014). If it did, then the court reverses. See, e.g., Cler v. Providence Health System-Oregon, 349 Or 481, 245 P3d 642 (2010) (closing argument based in part on facts not in evidence was not harmless). On the other hand, if the error was harmless, appellate courts will affirm. See, e.g., State v. Ashkins, 357 Or 642, 660-64, 357 P3d 490 (2015) (although the trial court erroneously instructed the jury, the error was harmless).
4. Mandamus. In limited circumstances, a party may have an alternative to appeal: the ability to file an original proceeding in mandamus while the action is pending in the trial court, ORS 34.110, to challenge the trial court's action or refusal to act. See, e.g., Trinity v. Apex Directional Drilling LLC, 363 Or 257, 434 P3d 20 (2018) (challenge to trial court's decision not to enforce a contractual forum selection clause on ground that decision was outside court's permissible range of discretion).

C. Filing a notice of appeal for your client.

1. If your client wants you to file a notice of appeal, review ORS chapter 19, which governs appeals, and the Oregon Rules of Appellate Procedure. Pay very close attention to deadlines and the technical details of form or contents of the notice and manner of service. Failures will lead to destruction of appellate jurisdiction. See ORS 19.270(1) ("The Supreme Court or the Court of Appeals has jurisdiction of the cause when the notice of appeal has been served and filed as provided in ORS 19.240, 19.250 and 19.255."). In specialized areas of law, for example, juvenile law, there may be additional statutory requirements.

2. Deadlines. Deadlines for filing and serving the notice of appeal are in ORS 19.255. Generally, the notice must be "served and filed within 30 days after the judgment appealed from is entered in the register." ORS 19.255(1). Special rules govern when a timely motion for a new trial or JNOV has been filed. See ORS 19.255(2). Filing and service of cross appeals -- for example, when you are filing a notice of appeal against the appellant -- are covered by ORS 19.255(3). See also ORAP 16.25 and ORS 16.30 re electronic filing of the notice of appeal.

3. Form. See ORS 19.250 and ORAP 2.05 for the contents of a notice of appeal. Note that ORAP 2.05(10)(a) requires proof of service of the notice of appeal on all other parties who appeared in the trial court.

4. A failure to timely file and to properly serve a notice of appeal on parties identified in the notice as adverse parties -- or, if the notice does not specify adverse parties, all parties who appeared in the trial court -- within the time for appeal will result in a jurisdictional failure and a dismissal of the appeal. ORS 19.270(2). Note that if you choose electronic filing of the notice of appeal, you must conventionally serve it. ORS 16.45(3).

5. By filing the notice of appeal, you are counsel of record. Therefore, you must properly move for withdrawal or to substitute or associate counsel, as circumstances dictate. ORAP 8.10.
D. Taking care of undertakings.

1. Even if your client has an appellate lawyer, you may be called on to handle undertakings on appeal. An undertaking on appeal means "a promise secured by sureties or by money, bond or any other security described in ORS 22.020" and includes undertakings for costs and supersedeas undertakings. ORS 19.005(9). See generally ORS 19.300 - ORS 19.360 (statutes addressing undertakings).

2. Undertaking for costs. A $500 undertaking is required to ensure that your opponent's costs are paid if the opponent prevails on appeal. ORS 19.300(1). The undertaking for costs also includes "any amounts that may awarded to the respondent under ORS 19.445" for delay in taking the appeal without probable cause. ORS 19.005(8). The undertaking for costs must be filed in the trial court within 14 days of filing the notice of appeal, see ORS 19.300(1); a failure to promptly file may lead to a motion to dismiss the appeal, see ORAP 7.40.

3. Supersedeas undertaking to stay a judgment. A notice of appeal does not stay the judgment. ORS 19.330. Thus, a judgment is enforceable unless a party obtains a stay, which can be obtained by filing a supersedeas undertaking providing that the appellant will pay the judgment as affirmed on appeal, ORS 19.335(1), (6), or by seeking an order staying the judgment from the court, see ORS 19.350. The type of supersedeas undertaking may be specified by statute for certain types of judgments. See, e.g., ORS 19.335. The undertaking may be negotiated with or objected to by your opponent, see ORS 19.310(1), 19.315(4), 19.305(3); and undertakings may be limited or changed by the trial court, see ORS 19.310(2); 19.340(1). For a judgment on a contract, a respondent on appeal can file its own undertaking to enforce the judgment. ORS 19.345.

4. If the appellant does not file a supersedeas undertaking and voluntarily pays the judgment, doing so can sometimes preclude that party's appeal. See Ramex, Inc. v. Northwest Basic Industries, 176 Or App 75, 80-82, 29 P3d 1211 (2001) (stating the general rule that voluntarily paying the judgment will not preclude an appeal but listing three exceptions to that rule, including when the appellant has concomitantly accepted benefits of the judgment).

E. Are you counsel of record on the appeal?

If you decide to represent the client on appeal, never treat an appellate brief like a memorandum of law in the trial court. You may want to associate experienced appellate counsel if this is your first appeal.

1. Designing the appeal and writing an appellate brief is unlike writing a memorandum of law in the trial court. Pay very close attention to the appellate rules. Also, review readily available sources for writing briefs in Oregon, e.g., the
2. Assigning error. You must pay attention to important procedural requirements that will limit the scope of your client's appeal. One of those pertains to assigning error. As the Court of Appeals explained in *Hayes Oyster Co. v. Dulcich*, 170 Or App 219, 224, 12 P3d 507 (2000) the requirement that an appellant assign error in compliance with the appellate rules is not a "meaningless formality." Rather, "the information that the rules require [to be included in the assignment of error] enables the court and the opposing party to identify the specific ruling the appellant assigns as error, determine whether an objection was properly preserved, and understand the basis for the trial court's ruling." *Id.* Failure to comply with the rules can result in the court not reaching the alleged error.

3. An assignment of error goes to the trial court's ruling. When a ruling rests on two independent grounds, an appellant must assign error to both grounds to succeed on appeal. *Strawn v. Farmers Ins. Co.*, 350 Or 336, 369-70, 258 P3d 1199 (2011). If a party assigns error to only one ground and even if that ground were erroneous, any error is harmless. *See id.* (upholding $8 million punitive damages award because the appellants assigned error to only one of the trial court's two independent grounds for rejecting their objection to the award).
Protecting Your Appeal

Justice Lynn Nakamoto & Justice Adrienne Nelson
Oregon Supreme Court

How Appellate Law Matters to Trial Lawyers

- Preserving issues for appeal
- Making your record
- Recognizing a judgment or order subject to appeal or mandamus
- Understanding appealable issues
- Basics of filing a notice of appeal and undertakings
Prudential and Pragmatic Policy

A party must first raise an issue in the trial court before challenging a ruling concerning that issue on appeal.
Chapter 11—Protecting Your Appeal

Rationale

FAIRNESS

EFFICIENCY

How your work plays out on appeal
ORAP 5.45

Bottom Line: You must raise issues
timely, with specificity, and on the record.
PRESERVATION AT WORK

SETTINGS IN CIVIL PRACTICE

Summary Judgment

• A party must object to inadmissible evidence, usually by a motion to strike.
• On appeal, a party must assign error to any adverse evidentiary ruling.
• Result of failure to take those steps: The evidence will be considered in deciding whether the trial court's ruling on the summary judgment motion was correct.
Evidentiary Motions in Limine

- Categorical Ruling?
- Final Ruling?
- Changed Circumstances?

Evidence at Trial

- Specific objections to specific portions of evidence
- Excluded evidence → Offer of Proof
Jury Instructions and Verdict Form

- Timely object.
- Any objection to, or argument in favor of, a proposed or final instruction must be specific enough to allow the court to consider and correct alleged error.

Motion for Directed Verdict

- Must be timely and specific
- Consider your verdict form in relation to your motion for directed verdict
- Prerequisite to JNOV
Chapter 11—Protecting Your Appeal

Motion for Mistrial

- Timeliness: close in time to objectionable statement or conduct
- Trial court discretion: consider alternatives

Defective Verdict

Again, timeliness is the key: Raise the problem before the jury is discharged.
TIPS FOR MAKING YOUR RECORD

- Realistic trial schedule
- Handle legal issues before trial
Chapter 11—Protecting Your Appeal

Anticipate Trial Issues

• Ascertain the court’s preferences regarding issues to be heard outside the presence of the jury.
• Prepare for evidentiary issues not taken up before trial.
• Prepare to object to and defend jury instructions.

Make Your Record

• Be persistent but respectful.
• Make objections as needed.
• Consider opportunities to revisit adverse rulings on admission of your evidence.
• Don’t let the court discharge the jury if there is a problem with the verdict.
Chapter 11—Protecting Your Appeal

Make sure it’s on the record

- Conferences in chambers and at sidebar
- Courtroom recording
- Critical events in and out of court
- Non-verbal acts

SECURING YOUR APPEAL
Can you appeal the ruling?

If so, how do you initiate an appeal?

1. Is There Jurisdiction?

**Appealable Judgment**
- Generally, no piecemeal appeals

**Appealable Order**
- Affects a substantial right
- Effectively determines the action
Special Cases

**Interlocutory appeals**

- For example, under ORS 36.730, an appeal may be taken from an order denying a petition to compel arbitration or granting a petition to stay arbitration.

**Mandamus relief**

- The court is obligated to perform a particular act.
- The act is required by law and does not involve exercise of judicial discretion.
- No plain, speedy, and adequate remedy in the ordinary course of law.

2. Is Error Preserved?

- "Plain error" review exception.
- Requirements: (1) an error of law, (2) it is "obvious, not reasonably in dispute," and (3) it appears "on the face of the record." If met, the appellate court may exercise its discretion to consider the alleged error.
3. Was The Error Prejudicial?

“No judgment shall be reversed or modified except for error substantially affecting the rights of a party.”

ORS 19.415(2)

See also Article VII (Amended), section 3, of Oregon Constitution

Initiating the Appeal: Notice of Appeal

- Deadlines, matters of form, and proper service are key.
- Failure to follow requirements likely will result in loss of appellate jurisdiction.
Deadline for Notice of Appeal

Generally, 30 days after the judgment appealed from is entered in the register.

Cross Appeal?

- Your client may have to cross appeal to challenge rulings.
- A cross-appeal is not needed to raise an alternative ground to affirm, when you aren’t seeking reversal or modification of the judgment, or when you seek to reverse an intermediate ruling if the case is remanded.
- A notice of cross-appeal must be served and filed within 10 days after expiration of the time allowed for filing a notice of appeal. See ORS 19.255
Undertakings on Appeal

An undertaking on appeal is "a promise secured by sureties or by money, bond or any other security described in ORS 22.020."

1. Undertaking for costs

• Filed in the trial court within 14 days of filing notice of appeal
• A $500 undertaking is required
2. **Supersedeas Undertaking**

- A notice of appeal does not stay enforcement of a judgment.
- The judgment creditor must obtain a stay, which can be obtained through filing a *supersedeas* undertaking to provide for payment of the judgment if it is affirmed on appeal.
- The form and amount is negotiable and may be limited or changed by the trial court.