Multnomah Bar Association
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Lawyers associated for justice, service, professionalism, education and leadership for our members and our community

Multnomah Lawyer

November 2023
Volume 69, Number 10

Are You Ready for Trial?

by Theresa L. (Terry) Wright
MBA President

At a recent meeting, Presiding Judge Judith Matarazzo indicated that she is seeing more and more attorneys reporting at Trial Assignment that they are not ready for trial. This includes those trials that have been given a "date certain," and ones for which counsel had previously agreed to the dates. She also reported that she is seeing this trend particularly in lawyers who have less experience in trial work than many. Judge Matarazzo indicated that this trend was especially frustrating right now since there are a number of retired judges ready and willing to take on these trials, but they're only available until the end of this year.

I know that many lawyers procrastinate (probably because of our need for perfectionism), but that doesn't always serve us, our clients, other lawyers and clients, and the courts well. It brings to mind some thoughts I have had over the years about trial preparedness.

Some years ago, a judge told me they rarely took a case under advisement, because the decision never gets easier over time. Likewise, postponing trials won't make the preparations or negotiations any easier, and may actually harm those using the legal system for redress of perceived wrongs.

First, the clients. This should be the first consideration when deciding to postpone a trial. A lawyer should always consult with their client to determine if the client consents to a postponement. This consultation should include the pros and cons of such consent. Will the client be appreciably harmed in having to wait for resolution? This includes not only monetary considerations, but physical and psychological as well. Clients are anxious about their cases, and asking them to wait still further for a final resolution doesn't allow them to move on.

Don't continue in the "Covid mindset," in which few cases actually went to trial...

Second, the trial attorney. Will you really be better prepared, mentally and otherwise, if you have a few more months to prepare? Or will you simply put this trial preparation to the bottom of the pile of other pressing matters and have the same amount of time to prepare as now?

Third, the opposing attorney and their clients. Is asking for a postponement the most professional way to handle a case long ago set for trial? The opposing attorney has undoubtedly spent time preparing their case for trial, and will now have to start over. Their client may have already spent a fair amount of money to pay the lawyer to prepare, and for subpoenas and other trial preparation costs.

Fourth, other cases are possibly affected. If you postpone your trial, when it next comes up for Trial Assignment, it takes priority over newer cases. This means that if there are too few judges to handle all the cases ready to be assigned, those attorneys who have been diligent about getting their cases ready are at the least inconvenienced, and probably more when their cases have to be reset. Their clients are facing the same anxiety as are your clients.

Fifth, the court. Multnomah County is the busiest court in the state with the most judges. Whomever is the presiding judge is charged with moving cases through the system. Their ability is hampered by constant changes in trial dates. The administration carefully schedules judicial time in order to ensure cases are resolved as quickly as possible. No one, including the judges, likes judges who had planned for trial suddenly to have no trial over which to preside. They are there to help resolve disputes in a timely manner, and want to do so.

Sixth, as lawyers, we have a duty to act in a professional manner. Being timely prepared for trial is included in this. We owe it to our clients, the public, other attorneys, and the court to uphold this concept of professionalism.

I have a few suggestions.

First, don't agree to a trial date that you cannot keep. Yes, things come up with lawyers, clients, and witnesses. But those should be few and far between. Make sure your witnesses, especially experts, are aware of trial dates and have them on their calendars. Have a concrete plan for completing discovery in adequate time to prepare for trial. Don't continue in the "Covid mindset," in which few cases actually went to trial and set overs were common.

...asking the court for more time is realistically likely not going to enable you to be any better prepared.

Second, if you are not an experienced litigator, find a mentor who can guide you through trial preparation. They should be able to help you develop a calendar to track your discovery and trial preparation, among other things.

Third, if you are involved in an extremely complicated case that may require days or weeks of trial, consider arranging for co- or backup counsel. That way, if something precludes you from litigating a case at the last minute, there is someone to step in to fill the void and avoid having to do this "all over again."

Fourth, remember that asking the court for more time is realistically likely not going to enable you to be any better prepared. I know of few lawyers who feel fully ready for trial, no matter how long they have to prepare. Just do the best you can.

Your clients, the profession, the court, and definitely the public, will appreciate it.

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mba | EVENT

Bench Bar & Bagels

Thursday, November 16
7:30-8:30 a.m.
Tonkon Torp
888 SW 5th Avenue, Suite 1600
Portland

The MBA is hosting the 14th annual "Bench Bar & Bagels" event at Tonkon Torp. Please join your colleagues and members of the judiciary for coffee and a light breakfast. This event is offered at no cost to MBA members and judges. Non-members: $10.

Special thanks to our sponsor and host:

TONKON TORP LLP

Please RSVP to Kathy Modie, kathy@mbabar.org

mba | CLE

See details on p. 3. To register, visit www.mbabar.org/cle and input your OSB number to register at the member rate.

NOVEMBER

11.7 Tuesday
Business Valuation Nuts & Bolts
Paul Heidt, CPA, ASA, ABV
Alina Niculita, ASA, CFA, ARM-BV, MBA
Terry Whitehead, CPA, ASA

11.8 Wednesday
Bar Update: Ethical Issues and Trends Affecting Oregon Lawyers
Nik Chourey

11.15 Wednesday
Whistleblowers and Qui Tam Cases
Vivek Kothari

DECEMBER

12.6 Wednesday
Landlord/Tenant Law Update
Marcel Gesmundo
Emily Rena-Dozier
Leah Sykes

12.12 Tuesday
Ethical Use of Technology: Obligations and Opportunities
Amber Bevacqua-Lynott
Dallis Nordstrom Rohde

12.14 Thursday
Summary Judgment
Wilson Jarrell
Adam Starr

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In This Issue

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MBA Golf Championship Raises Over $7,000 for Legal Aid

On a beautiful September morning our golfers hit the links at Pumpkin Ridge's Ghost Creek course to play in the 23rd Annual MBA Golf Championship. The event raised over $7,000 for the Campaign for Equal Justice to benefit the Volunteers Lawyers Project at Legal Aid Services of Oregon.

A sincere thank you to our terrific sponsors for their generous support, and a special thank you to those sponsors who played in the event or came out to the course to make the day even more enjoyable for the players. Our sponsors and prize donors are listed below.

Special thanks to Theresa (Terry) Wright, MBA President; Tim Resch, Emcee/Immediate Past President; Shelby Smith, Staff Attorney & Pro Bono Coordinator at Legal Aid Services of Oregon; and Kurt Peterson and Chris Thomas, Events Committee.

Golf Results

Congratulations to our contest and prize winners!

First Place Team
Tyler Volm, Kathy Root, Brian Thomas and Fasil Debeb, with -10 for a score of 61.

Second Place Team
Macrae Salisbury, David Corneil, Jill Rizk and Richard Rizk, with -9 for a score of 62.

The competition for second place was very close! There was a three-way tie between the winning team listed above, the team of Mike Tooley, Matthew Noe, Ryan Kuzmanich, and Robert Morris, and the team of Tim Crippen, David Rocker, Brian Jolly and Paul Migchelbrink. Well done, all!

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Jill Rizk

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To learn more about the Volunteer Lawyers Project, visit www.probonooregon.org/volunteer-opportunities

Kathy Root, representing her first-place team

Immediate Past President Tim Resch and President Terry Wright

Calendar

NOVEMBER

9 Thursday
US District Court of Oregon Historical Society Annual Meeting and Dinner
www.usdchs.org/2023-annual-dinner/

16 Thursday
Bench Bar & Bagels 2023
Details on p. 1

23 -24 Thursday-Friday
Thanksgiving Holiday
MBA Office Closed

DECEMBER

1-3 Friday-Sunday
National Interdisciplinary Cannabis Symposium

Umpqua Bank and Columbia Trust Company brought tropical fun to North Plains

Sarie Crothers, law student Garrett Bruner, law student Zach Moore and David Bean

Winning team of Brian Thomas, Fasil Debeb, Kathy Root and Tyler Volm

Van White, Chris Costantino, Tim Resch and Eric Wieland

mba | CLE
Multnomah Bar Association

The MBA will apply for general OSB MCLE credit unless otherwise noted; Washington credit may be obtained independently. Registrants who are unable to attend will receive a link to the archived webcast and written materials. Registration fees are non-refundable.

Unless otherwise noted, all classes are held online.

Business Valuation Nuts & Bolts
Tuesday, November 7 12-1 p.m.
Remote attendance only via Zoom
Members $30/Non-Members $50

Paul Heidt, CPA, ASA, ABV; **Alina Niculita**, ASA, CFA, ARM-BV, MBA; and **Terry Whitehead**, CPA, ASA from Morones Analytics, will provide an overview of the business valuation process from defining the engagement to concluding on value. Attendees will learn about three main approaches to value: the Income, Market, and Asset approaches. The audience will also be provided with an overview on the discounts for lack of control and lack of marketability.

For more information: Contact the MBA at mba@mbabar.org.

Bar Update: Ethical Issues and Trends Affecting Oregon Lawyers
Wednesday, November 8 12-1 p.m.
Remote attendance only via Zoom
Members $30/Non-Members $50

Note: One hour of Ethics OSB MCLE credit will be applied for.

This CLE will cover the ethical issues and trends the Oregon State Bar is encountering through inquiries and complaints, as well as other pertinent ethical topics. **Nik Chourey**, Deputy Counsel for the Oregon State Bar, will present this informative CLE.

For more information: Contact Holly Hayman, Farleigh Wada Witt, at 503.228.6044. For registration questions, contact the MBA at mba@mbabar.org.

Whistleblowers and Qui Tam Cases
Wednesday, November 15 12-1 p.m.
Markowitz Herbold PC, 1455 SW Broadway, Ste 1900 and Online Participation
Members $30/Non-Members $50

Qui Tam, derived from a Latin phrase meaning "he who sues for the king as well as for himself," refers to cases in which private individuals, often referred to as "whistleblowers," bring lawsuits on behalf of the government against individuals or entities that have defrauded the government. **Vivek Kothari**, Markowitz Herbold PC will explore the history, legal framework, and procedural aspects of Qui Tam cases, emphasizing the False Claims Act as a primary statute in such matters. Attendees will gain insight into the complexities of qui tam litigation, the role of whistleblowers, potential rewards, and the critical implications of these cases for both the government and the individuals involved. Additionally, the CLE will provide guidance on navigating the legal nuances, evidentiary requirements, and strategic considerations involved in prosecuting or defending against Qui Tam claims.

Markowitz Herbold is generously providing lunch for in-person attendees.

For more information: Contact Kathryn Roberts, Markowitz Herbold PC, at 503.984.3071. For registration questions, contact the MBA at mba@mbabar.org.

Landlord - Tenant Law Update: 2023 Legislative Change
Wednesday, December 6 12-1 p.m.
Remote attendance only via Zoom
Members $30/Non-Members $50

Please join **Emily Rena-Dozier**, Statewide Housing Support Attorney at Oregon Law Center, and **Marcel Gesmundo** or **Leah Sykes**, Andor Law PC, a Portland firm serving housing providers, for this 60-minute, informative CLE covering the following topics:

- Landlord-Tenant law basics: applications, rent increases, termination notices, court proceedings before tenant removal, and interplay between state and federal law.
- Substantive changes resulting from the 2023 legislative session.
- Changes to the FED process resulting from HB2001.
- Changes to rent increases resulting from SB611.

For more information: Contact Ayla Ercin, Campaign for Equal Justice, at 503.295.8442. For registration questions, contact the MBA at mba@mbabar.org.

Ethical Use of Technology: Obligations and Opportunities
Tuesday, December 12 3-5 p.m.
Standard Insurance Building Atrium, 900 SW Fifth Ave. and Online Participation
Members $60/Non-Members $95

Amber Bevacqua-Lynott and **Dallis Nordstrom Rohde**, of Buchalter, will talk about how technology can be both a blessing and a curse. We are required to have a certain minimum competency, and often the more we know, the more our clients can benefit. But there are limitations. Knowing and understanding the rules surrounding the ethical use of technology can both help us perform better as lawyers, as well as identify and prevent misconduct by others.

For more information: Contact the MBA at mba@mbabar.org.

Summary Judgment
Thursday, December 14 12-1 p.m.
Remote attendance only via Zoom
Members $30/Non-Members $50

Wilson Jarrell, Barran Liebman and **Adam Starr**, Markowitz Herbold will discuss the effective preparation of summary judgment motions and presentation of oral argument, including what to cover in the motions and arguments, how to organize the arguments for maximum persuasive impact, how and when to use exhibits, best practices for presenting oral argument, responding to questions from the judge, and other useful information for preparing for and arguing summary judgment in state and federal court.

For more information: Contact the MBA at mba@mbabar.org.

Visit www.mbabar.org/cle to register online or scan this QR code.

mba | ANNOUNCEMENTS

Not Receiving MBA Emails?

Members are encouraged to opt in to ensure that they successfully receive MBA email communications. Visit www.mbabar.org/opt-in to confirm your email status.

Local Civil Rules Advisory Committee Now Accepting Nominations

The US District Court for the District of Oregon seeks nominations for its Local Civil Rules Advisory Committee. The committee's narrow mission is to ensure conformity between the district's local rules and the federal rules of civil procedure. Generally, the committee convenes only as needed to recommend amendments to the local rules in light of changes to the federal rules. Committee members typically serve four-year terms.

Those selected pursuant to this call for nominations would start their terms in January 2024. Individuals nominated must be lawyers admitted to practice in the District of Oregon who regularly practice in federal court. The court seeks a committee that constitutes a fair cross-section of practitioners in the district and will consider diversity of all kinds, including practice area and geography, when selecting members.

To encourage district-wide representation, applications from outside the Portland area are especially welcome.

To nominate yourself or someone else, please send one or two paragraphs describing the nominee's qualifications. Nominations are due on or before December 1. Please send nominations by email to Melissa_Aubin@ord.uscourts.gov.

Pledge to Increase Access to Justice

Sign the MBA Pro Bono Pledge at www.mbabar.org/probonopledge and commit to taking at least one pro bono case in 2023.

Visit www.mbabar.org/probono to discover pro bono opportunities in Multnomah County.

Volunteers Needed for the Children's Representation Project

The court has an ongoing need for lawyers to volunteer for the Children's Representation Project, and there is a backlog of requests. The court is seeking CLE credit for this representation. The work is rewarding and volunteers do not need to have a domestic relations practice to participate. Contact Brandy Jones (Brandy.L.Jones@ojd.state.or.us).

Broadway Rose Theatre Seeks Board Members

Broadway Rose Theatre is seeking lovers of musical theater for its board of directors. The Broadway Rose is Oregon's premier musical theater company since 1992 and regularly earns national recognition for its commitment to artistic excellence and the development of new works. With an attendance of over 45,000 per year, it remains committed to keeping live theater affordable and accessible to all community members. The company employs over 250 part-time and seasonal staff, artists, technicians, and educators. For information on this commitment to the arts, contact board member Aaron Kirk Douglas at 503.307.7869 or at aaronpdx@outlook.com.

Community Media Nonprofit Seeks Board Members

MetroEast Community Media, a nonprofit providing access to media and internet technology to invigorate civic engagement and inspire diverse voices, is seeking volunteer board members with legal expertise and an orientation to East Multnomah County communities. To learn more, contact Board President Julie Omelchuck (Julie.Omelchuck@gmail.com) or visit www.metroeast.org.

Second National Interdisciplinary Cannabis Symposium, December 1-3

The symposium seeks to bring together law enforcement, judges, the legal profession, in-house counsel, drug court professionals, the drug and alcohol testing industry, academia, and human resource associations and organizations in order to educate each other on the continued changes in cannabis law nationwide that impact our courts and society. For a complete schedule and registration details, visit www.nationalinterdisciplinarycannabissymposium.com.

Noontime Rides

Join all ages of bicycle riders for noontime hill climbs on Mondays and Thursdays. Assemble at noon at the SW corner of Pioneer Square and leave together at 12:15 p.m. Rain or shine. Frequent regroups. Mondays include rotating paceline around SW Fairmount; Thursdays go up through Forest Park. E-bikes okay. Great repeating interval workouts. Contact Ray Thomas, 503.228.5222, if you are a new rider or for additional details.

PDX Starting Grounds

The coffee café in the Central Courthouse offers beverages, breakfast, lunch and snack items. Open Monday through Friday, from 8 a.m.-1:45 p.m. See the menu or order online for takeout at www.pdxgrounds.com.

Ethics Focus

Splitting Fees in Oregon and Beyond

by Mark J. Fucile
Fucile & Reising LLP

In an era of increasing specialization, lawyers frequently partner with counterparts from other firms when representing clients in complex matters. If each firm is billing the client involved separately by the hour, the fee relationship is between each firm and the common client. If the firms are dividing a common fee, however, then Oregon's "fee split" rule - RPC 1.5(d) - comes into play. An easy example is a contingent fee in a complicated personal injury case being divided by a general practice firm and another firm specializing in the particular kind of claim.

In this column, we'll first survey the broad contours of Oregon RPC 1.5(d). Because Oregon's rule differs in significant respects from the ABA Model Rule, we'll then touch on those differences and use Washington as a contrasting illustration.

Before we do, however, four qualifiers are in order.

First, RPC 1.5(d) only enters the mix when two or more law firms are sharing the same fee. As noted earlier, it does not apply to hourly fee arrangements when more than one firm - such as national trial counsel and local counsel for a defense client - are each billing the client separately for their respective work.

Second, RPC 1.5(d) typically does not apply when a firm simply hires a contract lawyer to work on the firm's representation of a client on an hourly or task basis. ABA Formal Opinion 00-420 (2000) addresses charging for contract lawyers generally and *In re Carolan*, 31 D.B. Rptr. 147 (Or. 2017) rejected treating this as a fee-split under RPC 1.5(d).

Third, Comment 8 to ABA Model Rule 1.5 notes that contract law rather than the RPCs typically regulates the division of fees to be received in the future when a lawyer leaves a firm and will be compensated for cases handled at the old firm under a departure agreement. *Gray v. Martin*, 63 Or. App. 173, 663 P.2d 1285 (1983), makes this same point in the context of a partnership agreement involving an Oregon law firm.

Fourth, RPC 5.4(a)(2) exempts fees covered by a law firm sales agreement under RPC 1.17 in several specified scenarios from the fee-split rule.

The Oregon Rule

Oregon RPC 1.5(d) reads in its entirety:

> (d) A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the client gives informed consent to the fact that there will be a division of fees, and
>
> (2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.

ORS 9.515 also specifically permits the division of fees in personal injury or wrongful death cases done in compliance with RPC 1.5(d).

Oregon's rule is based primarily on former Oregon DR 2-107(A) rather than the corresponding ABA Model Rule.

Significantly, Oregon's rule permits a fee division without a lawyer actually working on or otherwise being responsible for the case involved. For example, as long as the other aspects of the rule are followed, a lawyer can compensate another lawyer for simply making a referral. This approach was introduced through a 1986 amendment to DR 2-107(A) that followed in the wake of *In re Potts/Trammell/Hannon*, 301 Or. 57, 718 P.2d 1363 (1986), in which lawyers at separate firms were disciplined for a fee division that was not in proportion to their respective contributions to the work involved.

Oregon RPC 1.5(d) requires the client's "informed consent" to the division - but not in writing. That said, prudent practice suggests confirming the client's consent in writing. The Oregon rule also does not specify when client consent must be obtained. The OSB Ethical Oregon Lawyer (at 3-30), however, counsels that despite this ambiguity, it is wise to confirm client consent at the outset because the fee-split will involve having another firm directly participate in the representation or at least be compensated from the case.

Beyond Oregon

The corresponding ABA Model Rule - 1.5(e) - varies from the Oregon rule on both lawyer responsibility and written confirmation:

> (e) A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
>
> (3) the total fee is reasonable.

Oregon lawyers handling matters in other states, therefore, should carefully review the fee-split rule in that jurisdiction and should not assume that Oregon's rule necessarily controls.

Washington RPC 1.5(e), for example, follows the ABA Model Rule and requires that a lawyer receiving part of a fee-split either participate directly in the case involved or at least share legal responsibility for the case, as Comment 7 to the Washington rule puts it, "as if the lawyers were associated in a partnership." In *Kayshel v. Chae, Inc.*, 486 P.3d 936 (Wash. App. 2021), the Washington Court of Appeals held that failure to confirm the client's consent in writing renders a fee-split void - leaving the law firms involved with only their respective *quantum meruit* claims to the overall fee. *In re Perkins*, Wash. D. Bd. Case No. 19-00013 (2020) (unpublished), in turn, found that the requisite client consent must occur at the outset of the representation.

Around the Bar

Ed Choi

Miller Nash LLP

Miller Nash welcomes **Ed Choi** as partner to the firm's prominent employment team in the Portland office. Choi, with a decade of litigation experience, has a proven record of successfully leading clients of all sizes and across multiple industries through a variety of employment litigation and business disputes. Before joining Miller Nash, he practiced at a boutique Portland-area employment firm following eight years of experience with a prominent international firm.

Choi's practice focuses on complex employment claims and class action defense in state and federal court, arbitration and agency investigations. He has extensive experience litigating wage and hour class actions, discrimination and hostile work environment claims, trade secret disputes, business valuation and shareholder litigation and consumer protection matters. Choi received his law degree at the University of Chicago Law School.

Chenoweth Law Group

The firm welcomes veteran Oregon and California attorney **Merrill Baumann** to help lead its rapidly expanding corporate, business, transactional, technology, and IP practices.

Baumann's work representing local and international clients in technology, gaming, manufacturing, consumer products, and food distribution industries, has given him a breadth of experience and expertise that is unique in Portland. His representation of tech and creative clients includes substantial

Merrill Baumann

intellectual property work, from structuring complex licensing transactions to protection of ideas, creative works, and brands, with trademark and copyright strategies and prosecution of infringers of his clients' valuable IP assets. Baumann has worked on and led mergers and acquisitions transactions for small businesses on up to billion-dollar transactions. He has represented corporate clients regarding climate change regulations and has handled numerous greenhouse gas offset purchases and sales.

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Lawyers, judges, sponsors and law students gathered at the Ecotrust Building on October 24 for the fall Absolutely Social. Photos from the event will appear in the December issue.

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Tips From the Bench

Stopping Unhelpful Discovery Responses

Think Before You Copy and Paste

by Judge Eric L. Dahlin
Multnomah County Circuit Court

"Objection. Objection. **OBJECTION!!!** Objection. Subject to and without waiving but notwithstanding the above objections the responding party agrees to produce all relevant non-privileged documents responsive to this request if any such documents exist."

Have you ever received a response to a request for production of documents that leaves you scratching your head because it is filled with every objection imaginable followed by nothing indicating what, if anything, is going to be produced (or followed by seemingly contradictory assertions about what is going to be produced)? Does it mean there are responsive documents but they are not being produced because of one or more of the many objections? Does it mean the party will produce everything but they nonetheless made the objections as a placeholder to preserve some unknown argument in the future? Or does it just mean that the responding party, right before the response deadline, copied and pasted everything they had in their forms file to get something out the door, but has not yet given much thought to what they are going to ultimately argue and produce?

If you have ever received such a response, you are not alone. Often the responding party will include paragraph after paragraph of every objection under the sun - mistakenly thinking that's what good lawyers do - followed by an unclear statement about what, if anything, is going to be produced. Such responses are not only unhelpful, they could harm the responding party because they can just lead to unnecessary litigation expenses and perhaps even result in the objections being disregarded because they were not specific enough.

Document discovery is not a game, and responses should not be a contest to see who can come up with the longest and most confusing pleading. Rather, the goal in drafting a response to a request for production should be to state every legitimate objection the responding party actually intends to rely on, to explain why the responding party is not going to fully comply with any particular discovery request, and to also make clear what the responding party is and is not producing. That way, the requesting party can decide if they want to push back on and potentially litigate the objections. If there is a motion to compel, it is important that the judge can clearly identify, based on the request and the response, what the actual issues are as opposed to having to wade through an incomprehensible thicket. The objections should be clear enough to stand on their own without further explanation.

ORCP 43B(3) provides that any objection not stated in accordance with ORCP 43B(2) is waived. Some lawyers think this means they better include every objection under the sun, even though they can't think at the time why the objection is needed, because they might later think of a reason why the objection could apply. But ORCP 43B(3) goes on to say that the objecting party still has an obligation to produce documents in response to the request, or any part thereof, not specifically objected to. So, if a responding party makes a slew of objections "just in case" but goes on to say they are producing documents "notwithstanding" the objections, that arguably means that the request is not specifically objected to because, if it *was*, they would not be producing the documents (and one wonders why anyone would ever make an objection only to immediately say "never mind"). Also, there are some judges that may rule that overbroad, boilerplate objections that don't specifically identify the problem with a particular request are not in fact valid objections because they are not sufficiently specific. So, to the extent anyone thinks they should throw the whole kitchen sink at every discovery request in terms of making objections, doing so may actually hurt their cause.

Too often, lawyers think more is better, especially in the context of drafting discovery responses which are so easy to copy and paste. Once a lawyer has drafted language they think is especially clever - or has seen language used by someone else that seems interesting - it is common to add that in the "general objections" of their form responses and then use it in all future responses, regardless of whether it is called for in that instance. Too often, though, lawyers neglect to re-examine what they have used in the past and don't give enough thought about whether it applies to a particular request.

This is not to suggest that lawyers should never copy and paste discovery responses. In fact, it is best practice to have a form file where the attorney can store all objections the attorney might possibly use someday so that the attorney does not have to spend the time drafting from scratch and wordsmithing objections every time they receive a discovery request. And the form file can serve as a checklist to remind the attorney of different objections they may want to consider. But it is important for the lawyer to then aggressively cull out any of the form objections that the lawyer does not intend in good faith to rely on. And it's also important to be clear about whether anything is being withheld, and if so, the parameters of what is being withheld and what is being produced.

The best way to think about this is if you were in court, and the other side made an oral request for documents - how would you respond? You would almost certainly not spend several minutes spewing out every objection you had ever made in the past, which could end up burying the important part of your objections. Rather, you would likely have narrow and tight objections to focus the judge on the real problem to increase the chance that the judge will sustain your objections. You should assert as many objections as you need to, but no more.

Having carefully tailored objections as opposed to overbroad, boilerplate objections will ultimately save time, money and stress for all involved - my admittedly unscientific analysis shows that attorneys get more angry and stressed about silly discovery disputes than any other part of practice - because the parties can devote their energy to dealing with substantive, more interesting matters in dispute instead of wasting time going back and forth conferring on what the discovery responses mean and can avoid many motions to compel.

News From the Courthouse

by Shenoa Payne
MBA Court Liaison Committee

Presiding Judge's Report - Presiding Judge Judith Matarazzo

The fall trial schedule is very busy, and every effort is being made to get both criminal and civil cases out to trial. When attorneys do not report a civil case has settled, it becomes difficult to anticipate how many judges will be needed on any given day. Please inform the court as soon as cases are settled; at Call the court orders a 28-day dismissal order but it would be helpful to know in advance what cases have settled. There are many civil cases that will need more than four days for trial and are waiting for early assignment to a judge. If we know cases have settled, it frees up capacity for early assignments to be made in other cases as opposed to waiting to the morning of Call. On the criminal side, the dockets for the next several months will be very busy with most Fridays having over 100 criminal cases on the docket and half of those are date-certain trials. If you are set for Call, be prepared to go to trial if your case has not already resolved.

Courthouse Update - Barbara Marcille, Trial Court Administrator

Kami White has been hired as a Hearings Referee and will cover high-volume dockets in both the Central and East County courthouses as well as the Justice Center. White comes from the Reynolds Defense Firm. She has a background in mental health and public defense and was the prior Chief Attorney for Major Felonies at Metropolitan Public Defenders.

Recently, representatives from the court attended the Western Regional Conference of Chief Justices and State Court Administrators to review best practices for criminal case management in a post-pandemic world. In addition to Oregon's Chief Justice and State Court Administrator, a team of representatives from Oregon's criminal justice system were invited including Barbara Marcille and Judge Cheryl Albrecht, Presiding Judge Jay McAlpin from Lane County Circuit Court, Columbia County Trial Court Administrator Crystal Reeves, a Washington County Deputy District Attorney, the Multnomah County Director of Metropolitan Public Defenders, and analysts and legal advisors from the State Court Administrator's office. At the conference, discussions focused on emerging best practices from across the country and how to address barriers to getting cases resolved timely.

In addition, members of the Oregon Judicial Department participated in a Strategic Campaign Summit in late September which was facilitated by the National Center for State Courts. Approximately 40 to 50 people attended, including judges and administrators from across the state. The purpose was to review the commitments that the Oregon Judicial Department made during the 2021-23 biennium to improve how to serve the community and deliver justice. The four priority areas for the OJD were determined to be improving services and outcomes for those who are vulnerable or marginalized; improving access to justice; enhancing the public's trust and confidence; and creating a workplace and courthouse culture that is inclusive, welcoming, and affirming. Those commitments were revisited and reviewed with an aim toward establishing priorities, setting new goals, and engaging in long-term planning.

The Oregon Judicial Conference was held October 16-18 with most Oregon judges in attendance. During the state judicial conference, the Multnomah Circuit Court held a conference for staff of the court. Since the pandemic, there has been unusually high staff turnover at the court so finding ways to improve employee satisfaction and retain staff is critical. The court is not able to offer nearly as much remote work flexibility as law offices because much of the work of the court requires employees to be on-site in courtrooms or to provide services to the community. To show employees they are valued, provide training and team building opportunities, and help the workplace to be more supportive and inclusive, the court established this staff conference. This was the second year of the Cultivating Court Professionals Conference at the Multnomah Circuit Court and it was a great success.

Question for the Court?

If you have questions for the court or would like to share feedback about court practices through the Court Liaison Committee, please send your questions or comments to Pamela Hubbs, pamela@mbabar.org, with "Question for the court" in the subject line.

The Honorable David Rees
Judicial Profile

by Tom Melville
MBA Court Liaison Committee

Dedication radiates from the Honorable David Rees in every aspect of his life. From 15 years practicing law at Stoll Berne, to growing and developing as a jurist, all the way to his athletic pursuits of surfing, running and cycling. For instance, having grown up a surfer in his hometown, San Diego, Judge Rees remains dedicated to catching waves, and braves the cold Oregon waters as often as he can.

Judge Rees's dedication is even more evident in his role on the bench. A position he describes as an "interesting job, with very limited feedback." He maintains a sense of humor, jesting that he never knows whether he is being funny in legal circles because lawyers always feel obligated to laugh at the judge's jokes. Nevertheless, he approaches his role with unwavering seriousness and humility, fully aware he occupies a position of significant responsibility both in the courtroom and elsewhere.

Now the eighth most senior judge in Multnomah County, he has held various roles on the bench in his tenure. Judge Rees is poised to take over the position of Chief Civil Judge, replacing the Honorable Christopher Marshall in 2024. Being a chief judge will not take away his other responsibilities. He hopes to continue Judge Marshall's excellent work leading the very capable civil department and will also continue to receive regular judicial assignments. After presiding over hundreds of trials, he is familiar with the obligations service on the bench demands and enthusiastically points out that he learns something new from every trial. He notes that judges even need to find coverage for their regular docket when longer trials are assigned. The collegiality of our county bench was an unspoken theme.

Years of experience in different judicial roles have taught Judge Rees valuable lessons. Presently presiding over the START docket (Success Through Accountability, Restitution and Treatment), he is dedicated to practicing procedural justice as a trauma-informed judge. His commitment extends to studying the science behind behavior change and incorporating these insights into his work to reduce future criminal behavior. The START docket is full of people at high risk of recidivism who have a high need for judicial and community resources. He has found the work challenging, but rewarding and inspiring.

Beyond his judicial duties, Judge Rees remains a dedicated bike commuter, a practice he began as a young lawyer because of the high cost of parking. He continues to this day, unable to recall how many days he's actually driven downtown for work because there are so few. Referring to himself as a "mediocre at best" college athlete, the Stanford cross-country runner continues running, both recreationally and competitively, now into his 50s. The times may have changed, but his commitment and dedication remain.

On a personal note, Judge Rees comes from a family of lawyers and married another (wife, Linly Rees, Portland Office of the City Attorney). He embraces the diverse paths through which a career in the law can wind. He suffered the loss of both parents within the last year and takes from that experience a further defining of perspective about life. This broadened outlook further informs his approach to the job. Although he occasionally reminisces about the camaraderie of a law firm and the joys of advocacy, he takes pride in the impartiality that comes with his judicial position and remains dedicated to helping START candidates embrace recovery and steer clear of future criminal behavior.

Judge Rees has also developed a deep appreciation for juries, viewing them as "attentive and conscientious," a "civic-minded bunch" that are genuinely striving to make the right decisions. He recognizes the weight of his words and actions as a judge, particularly in their potential influence on jurors. His dedication to procedural justice extends to all who end up in his courtroom, including jurors. He values their input and perspectives while striving to have a positive impact on their experience.

A previous profile, published in the September 2009 issue of the

Hon. David Rees

Multnomah Lawyer, noted that "Judge Rees brings approachability, broad trial experience and the ability to facilitate relationships to the bench. All of us who have the good fortune to appear before him will, it seems clear from the get-go, be grateful for those qualities." While these sentiments remain true, they do not fully capture Judge Rees' ongoing dedication to learning and self-improvement, evidenced by his daily bike commute, his study of behavior science, and his commitment to ensuring that others feel at ease, even when he tells a joke. It appears that he may be even better than before, continuously striving to be the best version of himself.

New Director Perspective on the Multnomah Bar Foundation
A Q&A with Danielle Fischer, Bob Steringer, June Wiyrick Flores and Pilar French

Danielle Fischer, Washington Trust Bank

Bob Steringer, Harrang Long P.C.

June Wiyrick Flores, Schwabe

Pilar French, Lane Powell PC

Why did you join the MBF?

Danielle: I joined because of its mission: "To increase the public's understanding of the legal system, to promote civic education, public participation and respect for the law, to improve the quality and administration of the legal system, and to support programs and projects related to the Multnomah Bar Foundation's purpose."

Bob: The most influential lawyer in my legal career, Susan Marmaduke, once served on the MBF Board and was a major driver behind the creation of our biggest program, CourtCare. It's an honor to have the opportunity to continue the important work she did with the MBF.

June: I joined MBF because it was an opportunity to be more involved in supporting the services MBF provides to the community.

Pilar: After the COVID lockdown, and not being able to see so many legal colleagues, joining the MBF Board seemed like a great way to reconnect and help our community return to normal.

Why is the MBF's work meaningful to you?

Danielle: We see immediate, tangible results from the programs we fund - there is a bilingual CourtSupport navigator at the Multnomah County Courthouse who helps people make their way through the courthouse; CourtCare is providing free drop-in care for children whose parents or guardians have business before the court; and lawyers and judges are getting out into the community through CourtConnect to help facilitate dialogue and "demystify" the court system.

Bob: I love how the MBF creatively promotes access to justice with the programs it runs and funds.

June: Being involved in a court proceeding can be a stressful and scary experience for those of us who do not regularly utilize the system (myself included). MBF provides resources and services to people who are unfamiliar with the system or who may not have the resources for help with children while attending court proceedings.These services can help alleviate some of that stress and anxiety.

Pilar: What Danielle, Bob, and June said.

What brought you to the Board?

Danielle: I had lunch with fellow director David Bean and (former MBA president) Jovita Wang and they were talking about the program. David encouraged me to apply and said, "It's a great group of people that meets once a month to support great programs." Who wouldn't want to be a part of that? So, I applied, spoke to the MBF's immediate past president Victoria Blachly and was accepted by the foundation board. It's been a great experience.

Bob: I've been involved with the MBA for over 20 years. My colleagues at Harrang Long P.C. and I have been supporters of the MBF since its founding. So when current President Joe Franco asked whether I would be willing to serve on the Board, agreeing was easy.

June: Victoria Blachly, the immediate past president of the board, asked me if I was interested in serving on the MBF Board. I was familiar with CourtCare and thought this would be a great way to get more involved.

Pilar: That Victoria - she sure knows how to recruit.

What is your favorite MBF-sponsored program and why?

Danielle: That's like asking someone to pick their favorite child. They all provide outreach and support in a different way and help make people's experiences with the court system more welcoming and less intimidating. But, if I had to choose one, it would be CourtCare. My mother was an elementary school secretary for most of her career and really loved children. She passed away in 2021 but I think she would be very proud of my participation on the MBF Board and my efforts to help get CourtCare up and running following its shutdown during the COVID-19 pandemic.

Bob: It has to be CourtCare. Start with the founders' brilliant identification of the public need and their audacious plan for a private organization to meet it. Then consider the smarts and hard work that went into designing an effective program and raising the money to launch it. Because of their work, we are able to provide safe spaces for children and peace of mind to parents with business in the courthouse. It really is an amazing accomplishment.

June: All of them! Each program serves a specific need and has a direct impact on the recipients. If I have to choose one then it is CourtCare. Court is overwhelming for adults, so imagine how scary it is for children. CourtCare gives parents and caretakers a resource so that children can be protected from attending their parent's or caretaker's legal matters.

Pilar: CourtCare. I served on the CourtCare Advisory Board decades ago when it was just starting. It has been a joy to come back and help it continue to thrive. Plus we get to work with incredible people at Volunteers of America Oregon.

Top three reasons that lawyers should contribute to the MBF?

Danielle: 1) You're supporting good causes and will see immediate results through your donation. 2) You're supporting access to the court system for all, which is vital to our democracy, and 3) you can give at a level that's comfortable for you or your firm.

Bob: Along with the Campaign for Equal Justice, the MBF is one of the best vehicles for you to collaborate with your colleagues in the legal community to promote access to justice.

Continud on page 14

mba | Young Lawyers Section

What is the YLS?

An inclusive section of the bar, comprised of any MBA member in practice less than six years or under the age of 36. The YLS provides leadership, networking, professional development and service opportunities. And we have fun!

Ask the Expert

Dear Expert:
Annual reviews are coming up at my firm and I would like to ensure the partners know how hard I have worked this year. Do you have any tips for setting myself up for success as I complete my review?

Sincerely,
Restless About Reviews

Dear Restless About Reviews:

Congratulations! You made it at least a year with your firm and now have the opportunity to show the powers-that-be all your contributions these last several months. Consider the review process your chance to demonstrate to the partners and leadership at your office how much you have learned. Use it as a time to identify what you most enjoyed or would like to hone your skills in moving forward. You can also consider what you do not necessarily want to spend time on in the future, e.g., if your practice area varies, perhaps you want to focus less on one area and develop more expertise in a different area.

Completing your review need not be unpleasant or awkward. You might feel uncomfortable "bragging" about your accomplishments, but don't! Take pride in your achievements and do not be shy about sharing how hard you have worked. Along those lines, if you aren't already, you should be logging your career development throughout the year by, for example, maintaining an easily-accessible document that you can then update every time you take a deposition, write an article, appear at a hearing, speak at a conference, or take the lead on settlement negotiations. Updating the list contemporaneously throughout the year will make it much easier to then transfer concrete examples of work product and business development opportunities that you have capitalized on. Before you know it, you will have a two-page document reflecting how much you have grown in your career development, and now is the time to show it off.

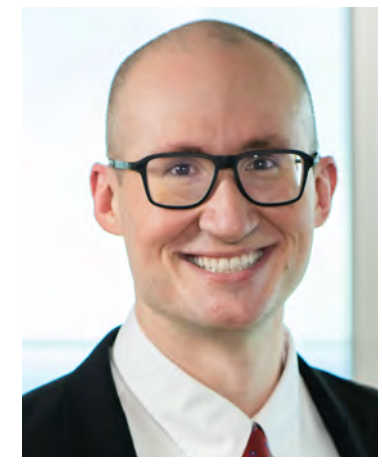
The review process can also be used to tell your firm how you would like your practice to change (or maybe stay largely similar) in the following year. If you worked on an appellate brief and enjoyed the appeals process, for example, tell your firm how you intend to avail yourself of future appellate opportunities. Not only will this demonstrate initiative, but it will also give your partners a heads up that if they have an appellate case in the next few months, they know which associate should be assigned to the case.

Similarly, if you think there are areas the firm could improve upon with associate development, you may be able to productively share ways that you believe might help you (and other associates) down the road. Do you feel like a mentor might help you meet your goals next year? Maybe your firm can connect you with someone who shares your interests. Are you hoping to gain more pro bono experience? Perhaps a fellow associate is working on a case and could use some support. Your firm won't know unless you tell them, so this is the perfect opportunity to make your voice heard.

Good luck and enjoy the process!

Nicolas Ball
YLS Member Spotlight

by A.C. Estacio-Heilich
YLS Board



Nicolas Ball

Nick's path to the practice of law was not a straightforward one. Rather, it was full of twists and U-turns. Though he had been exposed to the practice of law - thanks to his grandfather - his interest in the law as a potential career began in high school after he stumbled upon a biography of President Abraham Lincoln. President Lincoln's lawyering, passion for civics, and his service to the public specifically peeked Nick's interest.

The concept of pursuing a legal career was in the back of Nick's mind when he attended the University of Kansas for his undergraduate education. However, Nick focused his studies on Middle Eastern foreign relations instead. This focus gave him the opportunity to partake in a six-month internship in Washington, DC. A majority of Nick's work involved research, specifically the Syrian Civil War, and preparing reports to policymakers. Though he learned a lot from this experience, something was missing - Nick never had the opportunity to see whether his work impacted the subject of his research. He realized that a career in policy work was not the path for him.

Thus, a U-turn back to the law commenced. Nick took time off after he graduated from the University of Kansas to study for the LSAT. When it came time to select his next destination, the choice came down to either Portland or Denver. Fortunately for us, Nick made the right decision and moved nearly 2,000 miles to Portland. When asked why he chose Lewis & Clark Law School, Nick expressed that even though he had few connections here, the area offered him the opportunity to have a busy and demanding career, while still providing him the ability to explore. He further stated that Portland was an ideal area for him to lay down roots and settle down.

Nick absolutely loved his time at Lewis & Clark. He explained that the rigors of law school brought out the best in him and saw its challenges as a huge confidence booster. Nick did confess that he experienced disappointment in law school. During his 2L year, he did not receive call-back interviews from firms who participated in On-Campus Interviewing. Nick felt deflated when he saw many of his classmates partaking in and receiving job offers through OCIs. Consequently, Nick began questioning whether he was cut out for the practice of law. His disappointment did not last long. In his 3L year, Nick became the Managing Editor of Lewis & Clark's Environmental Law Review - an experience he described as both demanding and rewarding. In addition to law review, Nick also took on a full class-load in his last year of law school. By the time he graduated from Lewis & Clark, Nick realized that he could handle a heavy workload while also setting aside time to enjoy life in Portland.

Nick had two stops prior to getting to his current practice: a year at a construction defect and personal injury firm, and over a year at a worker's compensation defense firm. Though Nick gained valuable skills at these firms, he found that he was not passionate about the work. He wanted his law practice to be more client-facing, which would give him the opportunity to immediately see the impact of his work. In 2022, Nick arrived at his destination, Barran Liebman. The firm checked all of his boxes, including the opportunity to grow a client-facing practice and the ability to practice in the ever-changing world of labor and employment.

In addition to finally finding his niche, Nick found a passion for serving the public. Currently, Nick serves as a member of the Board of Ambassadors for Youth Villages Oregon, a nonprofit organization that provides mental and behavioral services for emotionally and behaviorally troubled youth. He also has been a member of YLS Service to the Public Committee since 2022 and spearheaded a recent volunteer event with the Children's Book Bank.

Nick's journey was long and full of turns. Instead of being discouraged by the dead ends and low points, he always found a route back. When asked if he had any advice for newer attorneys, he offered that, even though there may be rejections along the way, you have to believe two things: your work has value and that you can make it.

The Corner Office PROFESSIONALISM

Questionably Ethical but Professionally Unacceptable

In late May 2020, California attorney Marla Brown posted a series of tweets encouraging violence against Black Lives Matter protestors, including "shoot the protestors," and advocating that MSNBC host Joe Scarborough should have his house burned down "with you in it." Before she deleted her Twitter account, Brown posted that her "remarks were made in a fit of anger at circumstances in general. It was a stupid thing to say. And wasn't directed at anyone's race. Just upset at all the destruction."

Earlier this year, the State Bar of California charged Brown with violations of ethics rules, including moral turpitude and committing a criminal act that reflects on her as a lawyer, by engaging in conduct intended to incite violence.

In early October, a State Bar judge dismissed the charges, noting that although Brown's statements were careless, ill-advised, and unbecoming an attorney, the State Bar did not prove by clear and convincing evidence that Brown intended to incite imminent lawless action. The State Bar is deciding whether to appeal the judge's dismissal. Other states have imposed discipline for similar conduct. *See, e.g., Matter of Traywick,* 433 S.C. 484, 860 S.E.2d 358 (2021), *reinstatement granted*, 438 S.C. 362, 883 S.E.2d 229 (2023) (lawyer's personal Facebook posts, including one insinuating that the death of George Floyd was actually good for the economy, violated the lawyer's oath and warranted a six-month suspension).

Regardless of whether Brown is ultimately sanctioned for her statements, her case highlights an important reminder for attorneys: professionalism is broader than simply our ethical obligations, and a lack of professionalism can have far-reaching consequences and impact on your practice, the public, and the profession.

Ethical Rules are Minimum Requirements

The ethics rules establish the lowest threshold of acceptable behavior necessary to participate as a member of the legal profession. As lawyers, many of us have an urge to test the limits of authority - whether it be legal precedent, processes or procedures. The ethics rules provide us with this minimum standard of conduct needed to maintain active membership in the bar. Neither the Oregon Rules of Professional Conduct (RPC) nor the ABA Model Rules of Professional Conduct address civility or professionalism as a requirement of practice - because they are not. However, these integrated concepts often have a very real impact on our professional success, as well as the public's perception of our profession.

Public and Professional Impact of Unprofessional Conduct

Although this is likely not news to you, the internet is not anonymous. Whether online or in-person, rude and obnoxious behavior is likely to be noticed - particularly if it is controversial. You need to assume that when you speak, write, or post publicly (including on all social media) that the world is viewing you as a lawyer. To many people, this provides you with greater credibility and authority than perhaps the average citizen. Despite lawyer jokes, there is a certain reverence and respect that comes with a law degree and bar licensure. This respect is only amplified by years in practice, expertise, or both.

It is for these reasons that the profession overall is adversely impacted when lawyers act out and negative stories about lawyers are promoted. It is irrelevant in these circumstances if the conduct results in a civil penalty or consequence to the lawyer's license. In fact, it can even be viewed as more egregious when the conduct does not violate any court or bar rule.

For example, a Cleveland law firm recently felt compelled to terminate one of its partners after a text message he sent to a former female colleague was subsequently posted online. The text accused the attorney of "collecting salary from the firm while sitting on your ass" during her maternity leave. The backlash was swift and apparently compelling.

Lasting Professional Damage

There is a misnomer among those that monetize internet clicks that any publicity is good publicity. That is not true for lawyers. In a professional setting, it is one thing to be famous for winning a landmark case or providing access to justice, but it is quite another to be infamous for a public rant. And viral infamy can be lasting.

Even if Brown receives no professional discipline, every Google search conducted by a prospective client from this point forward will likely bring up her "shoot the protesters" posts. She did not likely consider when she was making her controversial remarks that she would need to explain or justify them for the remainder of her professional career. Arguably, any potential short-term licensing ramifications are the least of Brown's concerns. Clearly, if she could go back, she would do things differently.

Be mindful of what you say in public and in writings that could become public. Be intentional, and model professionalism. Because the world is watching, and what you say and do could impact you - and the profession - for many years to come.

The Corner Office is a recurring feature of the Multnomah Lawyer and is intended to promote the discussion of professionalism taking place among lawyers in our community and elsewhere. While The Corner Office cannot promise to answer every question submitted, its intent is to respond to questions that raise interesting professionalism concerns and issues. Please send your questions to mba@mbabar.org and indicate that you would like The Corner Office to answer your question. Questions may be submitted anonymously.

MBA Mentor Program
Sign up by December 1

MBA YLS members (any MBA member in practice less than six years or under the age of 36), can sign up to be matched with a mentor. **More experienced lawyers**, can sign up to participate as a mentor.

Mentors are matched with mentees by MBA Professionalism Committee members based on the responses given on the sign-up form. Let us know what's important to you in a mentor - practice area, firm size, gender, etc. We'll do our best to match you appropriately.

Learn more and sign up: Complete and return the sign-up form available at **www.mbabar.org**. Forms are due to the MBA by December 1.

If you have questions about the MBA Mentor Program, please contact Kathy Modie at kathy@mbabar.org.

omla

OMLA's 24th Annual Summer Social & Fundraising Auction

Many thanks to all of our donors who helped us raise approximately $21,550 to provide bar exam grants to diverse law school graduates! We put ALL of those funds (and then some) right back into the community by distributing 16 bar exam grants to candidates taking the July 2023 bar exam. We will fund more bar exam grants for the February 2024 bar exam.

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www.mbabar.org

Spotlight on Attorney Fees
Recent Trends in Oregon Attorney Fee Case Law

by Stephen Leggatt
Bonaparte & Bonaparte

Attorneys who frequently litigate fee petitions in Oregon's state or federal courts - whether in support or in opposition - are well advised to keep up with developments and trends in attorney fee jurisprudence. Forewarned is forearmed, and - *pace* Walt Kelly - that's not just half an octopus. Knowing how the courts are handling questions about reasonable rates, lodestar enhancements, good billing judgment and the like can help petitioners avoid leaving money on the table (or help respondents keep it there).

Three recent decisions strike me as illustrative and illuminating as to the way things are trending right now in the world of attorney fees. Spoiler alert: the courts seem to be becoming increasingly comfortable with large fee awards, and lodestar enhancements appear to be increasingly common, particularly in the state courts. The recent decisions are:

- Multnomah County Judge Celia Howes' June 8, 2023 decision awarding fees in the amount of $276,380.88 in *Whitman v. USAA Casualty Insurance Company*, Case No. 19CV16005;
- Multnomah County Judge Melvin Oden-Orr's August 8, 2023 decision awarding fees in the amount of $234,835.00 in *Ciferri v. State Farm Fire and Casualty Company*, Case No. 21CV14243; and
- United States District Judge Marco Hernández' September 24, 2023 decision awarding fees in the amount of $699,629.02 in *Don't Shoot Portland v. City of Portland*, Case No. 30:20-cv-917-HZ.

Who Opposes My Motions is My Friend

Whitman was an Underinsured Motorist (UIM)/Personal Injury Protection (PIP) claim arising out of a 2017 motor vehicle collision. Each of the two plaintiffs brought a separate UIM claim and a separate PIP claim, for a total of four claims. Plaintiffs' counsel represented the plaintiffs on a statutory contingency basis, meaning counsel would recover their fees from the defendant pursuant to the governing fee-shifting statute (ORS 742.061) in the event their clients prevailed, and otherwise would not be compensated for their time or efforts.

Plaintiffs and their counsel litigated for over two years before the defendant agreed to settle the PIP claims for the full amounts sought by the plaintiffs, namely $16,207.62 and $2,291.25. The parties took the UIM claims to trial, where one plaintiff prevailed to the tune of $375,000, and the other plaintiff received no recovery. Plaintiffs' fee petition followed, seeking a total of $445,285 in fees, reflecting lodestar fees (reasonable rate times time reasonably expended) of $222,642.50 and a requested 2x multiplier. Full disclosure: I served as plaintiffs' attorney fee expert, offering opinion testimony in support of their petition.

The court and the parties had a complex knot to untangle. All four claims arose out of broadly overlapping facts, two arose under one body of law and two out of a related but distinct body of law, and plaintiffs were unsuccessful as to one of the claims. In advance of the Rule 68 evidentiary hearing to which fee litigants are entitled in state court (no such entitlement to a hearing exists in federal court), Judge Celia Howes had indicated her inclination to consider a multiplier for time spent on PIP claims, and to award no fees at all in connection with the unsuccessful UIM claim. In consequence, the parties needed to either reach a consensus as to which attorney tasks were reasonably related to which claims, or submit their positions to the court for it to make its own determination. It took two hearings, three rounds of briefing, and several express directions from the court, but the parties were able to agree to reasonable lodestar amounts for the PIP claims and the successful UIM claim. It remained for the court to determine whether a lodestar multiplier was appropriate.

Noting that "[t]he risk of nonpayment on a contingency-fee arrangement" could alone be sufficient to justify a multiplier in some cases, Judge Howes determined that, in this case, the factor that made a multiplier appropriate was the defendant's unreasonable delay in conceding plaintiffs' entitlement to PIP coverage. Although the facts giving rise to plaintiffs' PIP entitlement were known to defendant more than a year before litigation commenced, the defendant unreasonably opposed the plaintiffs' claims for over two additional years before agreeing to settle plaintiffs' PIP claims in full. Based on the defendant's decision to oppose plaintiffs' meritorious claims unreasonably, the court applied a 1.5x multiplier to the plaintiffs' PIP lodestar product, and awarded fees in the total amount of $276,380.88.

The lesson for plaintiffs' attorneys in fee-shifting cases is clear: frustrating as it may be to have a defendant oppose your every motion and refuse to concede your client's clear rights... be patient. The more unreasonable your opponent's legal positions, the more likely it is that the court will enhance your compensation as a result. And the lesson is equally clear for defense attorneys: when you can read the writing on the wall that your opponent's position has merit, you keep up the fight at your client's peril. Defending a lost cause to the bitter end can make an anticipated bad outcome much worse.

The Devil is in the Details: Take Care with Your Jots and Tittles

The *Ciferri* plaintiff was a tattoo artist who suffered a theft loss of an estimated $55,000 in vintage tattoo machines from the trunk of his car. The insurer defendant characterized the stolen items as business property rather than as collectibles and applied a $1,500 business property limitation to the loss. The case went to court-annexed arbitration, where the defendant prevailed on its business property theory. At that point, plaintiff's counsel associated with my firm to help pull the fat from the fire it had unexpectedly fallen into. We prepared and circulated a draft motion for partial summary judgment as to the limited legal question of whether the stolen items were indeed business property. After reviewing the draft motion, the defendant conceded that the business property limitation was inapplicable, and agreed to pay the plaintiff the full amount of his estimate of the stolen items' value as collectibles. However, the defendant refused to pay the plaintiff's attorney fees in the amount we requested - at that time we sought fees in the lodestar amount of approximately $120,000 - contending that the lodestar product was disproportionate to the client's recovery. In consequence, we submitted a fee petition to the court.

For many attorneys in the fee-shifting arena, the fight to vindicate a client's rights is the main event, and the post-victory battle over attorney fees may seem like an afterthought. But

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Spotlight on Attorney Fees

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while vindication of the client's rights absolutely is of paramount importance, it is an error not to put the same care into supporting a fee petition as you put into litigating your client's claims. A plaintiff's attorney has two goals: to make the client whole, and to get paid for doing it. We prepared a careful fee petition seeking not $120,000 but, following application of a requested 1.25x lodestar multiplier and addition of "fees on fees" (that is, time spent preparing and litigating the fee petition itself), a total of $234,835.00. We retained a fees expert with a sterling reputation in the legal community who opined with detailed particularity that all of our time expenditures were reasonably necessary to achieving our client's recovery - including time spent developing the statutory tort claim we had brought in parallel with the breach of contract claim that triggered our right to tax the defendant with plaintiff's fees - and that in light of the contingent nature of the representation, the risk of an unsuccessful result justified application of the requested multiplier. By contrast, the defendant opposed our fee petition from the proverbial "30,000 foot" perspective, arguing broadly that our fees were disproportionate to the result and asserting without particularity that some of the time expenditures were excessive. Following a hearing, Judge Melvin Oden-Orr rejected defendant's arguments and awarded plaintiff's fees in the full requested amount.

Again, the lesson is clear: the work you put into litigating a fee petition is likely to pay off. The more evidence you provide to the court to establish the merit of your position, and the more specifically tailored that evidence is to your case, the easier it is for a judge to agree with your client. An argument couched in general terms, untethered to the particulars of the petition, is easy to disregard.

Rate Expectations: A Minor Crisis May Be in the Offing

Don't Shoot Portland was a complex civil rights action arising out of the Portland Police Bureau's use of chemical agents to disperse crowds gathered to protest the May 25, 2020 death of George Floyd at the hands of officers of the Minneapolis Police Department. Following nearly three years of litigation and the efforts of multiple law firms working on behalf of the plaintiffs, the plaintiffs obtained significant injunctive relief limiting the PPB's use of chemical agents and other methods of crowd dispersal, as well as a money judgment. The plaintiffs then moved for award of their attorney fees in the lodestar amount of $1,057,861.50 and invited the court to apply an unspecified multiplier to the lodestar, but did not expressly request award of fees in any specific enhanced amount.

The plaintiffs sought compensation for their attorneys' time expenditures at rates that exceeded the inflation-adjusted 90th percentile rates reported in the Oregon State Bar's 2017 Economic Survey. Judge Marco Hernández found the requested rates to be unreasonably high, and determined that the reasonable rates were, depending on the attorney in question, either the 75th percentile rate or somewhat above that rate as adjusted for inflation to February 2023 (the month in which plaintiffs filed their petition). Judge Hernández noted that, after plaintiffs filed their petition, the OSB released its 2022 Economic Survey. However, he declined to rely on the more recent survey in determining reasonable 2023 rates on the express ground that the 2022 Economic Survey omitted to report prevailing 75th percentile rates.

As I observed in a recent article in the July/August issue of this publication, that omission can be expected to have unfortunate consequences, because many Oregon judges have treated the 75th percentile rates as more important than any others in crafting reasonable fee awards, *see*, *e.g.*, *Garcia v. Waterfall Cmty. Health Ctr., Inc.*, No. 6:20-cv-1800-MC, 2022 U.S. Dist. LEXIS 160119, at *3 (D. Or. Sep. 6, 2022). Judge Hernández found an appropriate way of avoiding the problem in *Don't Shoot Portland*, but in future cases more squarely governed by the 2022 survey, judges may face greater challenges in determining reasonable rates.

Judge Hernández' opinion is also notable for the extent to which it continues the recent trend for courts to recognize that it can be efficient for multiple attorneys to bill for the same work. Plaintiffs were represented by counsel from multiple law firms, and often sent multiple attorneys to hearings and conferences. Judge Hernández expressly rejected defendant's argument that plaintiffs' "staffing model" justifies across-the-board lodestar reductions, and declined to exclude time expenditures on grounds of duplicativeness where no more than three to five attorneys billed for reviewing documents or attending oral argument.

Using rates at or slightly above the 75th percentile, and following reductions in and exclusions of specific time expenditures for block billing, excessively duplicative representation, clerical tasks, and tasks unrelated to the plaintiffs' successful outcome, Judge Hernández awarded the plaintiffs their fees in the lodestar amount of $699,629.02, declining the plaintiffs' invitation to apply a multiplier.

The plaintiffs' fee award was substantial and constituted an excellent result by any standard. But if we were to play armchair quarterback with the benefit of hindsight, we might speculate as to whether the plaintiffs might have achieved a still better outcome had they retained an independent attorney fee expert to offer an opinion that their requested rates were reasonable, and to justify that opinion by specific reference to the attorneys' qualifications, skills, and reputations in the legal community. We might also speculate whether the plaintiffs' invitation for the court to apply a discretionary lodestar enhancement might have been more persuasive had the plaintiffs requested a specific multiplier and justified it through expert opinion as to the risk of an unfavorable result.

To be sure, the federal courts are accustomed to deciding fee petitions without the benefit of expert opinion, and such opinion is not required when filing a fee petition in federal court. But the "best practice" is arguably to offer a supporting expert opinion as to every element of a fee petition whether in state or federal court. Is there a guarantee that Judge Hernández would have issued a higher fee award if plaintiffs had done something differently? Of course not; far from it. But for attorneys who live by fee-shifting statutes, any measure calculated to improve the odds of an optimal result is worth the investment.

MBF

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June: These important programs that allow increased access to the court system would not exist without our continued support. Your donations are tax deductible!
Pilar: 1) Your money will be well spent. 2) The MBF gets things done. 3) What June said.

What is a challenge facing the MBF that you are excited to tackle?

Danielle: Now that we've got CourtCare open again, I think our biggest challenge will be funding it. As people may have read, it is increasingly difficult to find childcare specialists in general, and so we're paying substantially more for quality caregivers because of supply and demand economics.
Bob: Establishing adequate, long-term funding for CourtCare and working with our program partners to attract excellent caregivers are critical challenges that the entire Board is eager to take on.
June: Along with all other for-profit and not-for-profit organizations, we are dealing with a shortage of qualified employees and increased employment costs. As a result, the challenge is developing additional funding sources for the programs.
Pilar: CourtCare is so important for court operations, the parents coming to court, and most importantly, the children. Please give if you can.

What do you like most about Board President Joe Franco?

Danielle: He always jumps in and is one of the first people on the board to volunteer to write an article for the newsletter, make some calls, write a letter to go out to MBA members, etc. He really believes in the mission of both the MBA and the MBF.
Bob: One of Joe's best qualities is that he will be mortified by all the nice things people say about him. He serves the MBF the way he serves his clients, with exceptional professionalism and effectiveness.
June: Joe leads by example. He frequently is the first to volunteer for whatever action is needed, he is collaborative, and open to new ideas.
Pilar: Joe is a steady hand at the helm.

mbf Multnomah Bar Foundation

Classifieds

Positions

Senior Legal Assistant

Full-time (hybrid in-office/remote), MSM Legal, Portland, OR. Established Portland, Oregon law firm specializing in insurance defense and subrogation seeking a senior legal assistant to join our defense team.

Primary Duties and Responsibilities:

- Provide direct support to one of our defense team partners
- Assist with managing a high volume of legal cases from start to finish, ensuring court and client deadlines are met
- Assist with vendor and client billing
- Drafting, preparing and formatting memoranda, correspondence, pleadings, declarations and various other legal documents
- Assist with trial preparation
- Run conflict checks, open new client matters and maintain client files
- Calendar court dates and deadlines
- Communicate with staff, court clerks, sheriffs, opposing counsel, court and recording clerks, clients and vendors
- Assist with document retrieval, review, organization and production

Requirements and Qualifications:

- Associates degree (preferred)
- 5+ years legal office support; less for the right candidate
- Ability to work efficiently in a fast-paced environment with or without direct supervision and coordinate multiple projects
- Excellent written and verbal communication skills
- Self-starter who works well independently
- Strong research, writing and editing skills
- High attention to detail
- Responsive, reliable and hard working
- Excellent time-management, organizational, and problem-solving skills
- Extensive experience with computers and internet
- Familiarity with CLIO or other legal software preferred
- Exercises good judgment

Office hours are 8 a.m.-5 p.m., Monday-Friday. This is a hybrid in-office/remote position. We are asking for someone to be in office at least four days/week while training and three days/week beyond that. We are currently located in downtown Portland, but we will be relocating to John's Landing by December 1.

Salary is based on experience ($60-70k/yr DOE). We offer a generous benefits package (Medical, Dental, Vision, 401k).

Interested candidates should submit a cover letter & resume to: kmarquez@msmlegal.com. Be sure to include your contact information and times of availability.

MSM Legal is an Equal Employment Opportunity employer encouraging diversity in the workplace. All qualified applicants will receive consideration for employment without regard to race, color, religion, national origin, sex (including pregnancy), age, disability, genetic information, citizenship status, military service obligations or other category protected by applicable federal, state or local law.

Associate Attorney

Established Portland, Oregon law firm MacMillan, Scholz & Marks, LLC specializing in insurance defense seeking an entry to mid-level associate attorney with 2-5 years practical experience in civil litigation to complete our insurance defense team.

To learn more about our firm, please visit our website: www.msmlegal.com

We're looking for a team member who…

- Is hard working and responsive
- Exercises good judgment
- Has excellent research, organizational and writing skills

Qualifications:

- Membership in the Oregon State Bar Association REQUIRED
- Membership in the Washington State Bar Association preferred (or qualification for reciprocity)
- Litigation experience is preferred

Salary is based on experience with flexibility for the right candidate ($85,000-105,000/yr DOE).

Benefits include...

- Medical, dental and vision following a 30-day waiting period
- 401k (w/ discretionary matching) and pension profit sharing plan eligibility after 1 year of service
- We offer PLF coverage, State Bar Membership dues and CLE costs
- PTO on an accrual basis with a schedule for increasing vacation days based on years of service

Office hours are 8 a.m.-5 p.m., Monday-Friday

This is a hybrid in-office/remote position to start. We require a minimum of two days/week in office while training and are open to discussion on the hybrid schedule beyond that.

MSM is currently located in downtown Portland, but we will be relocating to John's Landing by December 1.

To be considered, interested candidates should submit a cover letter, resume and law school transcript to: kmarquez@msmlegal.com. Be sure to include your contact information and times of availability.

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Office Space

Offices for Rent - Downtown Portland America Bank Building

Great offices and cubicle spaces available to rent on the 10th Floor American Bank Building 621 SW Morrison St. (facing Pioneer Square). Incudes two really nice conference rooms. All offices have great windows, sunlit with nice urban view.

Next door to all MAX lines, most buses, and the street car. Java Man coffee, Vietnamese street food (Cuôn), Fogo de Chão, and many other nice lunch and happy hour spots w/in easy walk.

Excellent exercise facility. Secure bike parking. Building security. Parking and EV charging nearby.

Collegial, respectful, colleagues in small and sole firms working in Indian and tribal law, juvenile defense, utility, civil rights, environmental, domestic relations, and business law.

Rent starting 12/31/23; Offices: $750-1,000; cubicle space for $500. Lower rents possible for combinations.

Printer/copier/phones/postage/internet/reception available.

Contact Diane Henkels, dhenkels@actionnet.net, phone: 541.270.6001 Please include "PDX office space" in the subject line.

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