



MULTNOMAH LAWYER

MULTNOMAH BAR ASSOCIATION
1906

Lawyers associated for justice, service, professionalism, education and leadership for our members and our community. February 2005 Volume 51, Number 2



Changing the Face of the Profession

By Sylvia Stevens, MBA President.

In my first message in this space, I invited all of you to join in MBA activities, pointing out that there is a wide menu of options to choose from. This month I am renewing that invitation, with a special focus on committee service and CLE. While my invitation is directed primarily at women and minority members, it is relevant to you guys who manage law firms and influence the professional activities of your firm lawyers.

I became a lawyer in the early 1980s, not a pioneer by any means, but just in front of the growing tide of women who now make up a critical mass in the profession. In those early days it was rare to see a woman or minority in a leadership position or held out as a legal expert. Many of us worked hard to change the face of the profession and began by joining and participating where ever we could.

I am proud that the MBA was a leader with the formation of the Committee on the Role of Women in the Profession (which over the years morphed into the Equality Committee), members of which were instrumental in the creation of OWLS. Both organizations have done much to encourage and mentor women and minorities who want to participate in professional activities, particularly leadership.

Women participate in the MBA in meaningful numbers. Our CLE speakers are about 33% female, which is slightly higher than the 30% women constitute of the membership. It is an even better statistic when we consider that CLE speakers tend to be lawyers with at least ten years of experience in practice and that women with ten years of experience make up only about 20% of our membership. The statistics are even better for YLS, where women are approximately two-thirds of the CLE speakers.

On the committee side, the representation of women is also good. Of 112 committee positions, 45 are held by women. Here, too, participation by young women lawyers is even greater, with women serving in 34 of 57 YLS committee positions. Women also participate meaningfully in MBA leadership, making up three of the seven committee chairs, four of the five YLS committee chairs, seven of fifteen board positions and five of eleven YLS board positions.

I wish I could give as glowing a report about minority participation. Minority lawyers constitute approximately eight percent of MBA membership, but they represent a much smaller percentage of our CLE speakers, committee members and board members. Recruitment of minority lawyers to participate in MBA activities is a primary objective of my administration and a continuing goal of the Board.

I also do not want to give the impression that we have solved the gender diversity issue once and for all. I would be thrilled to have women participating in much greater numbers. Moreover, participation by women lawyers seems to drop off significantly as

they reach six or more years of practice. I am sure that is a function of having more responsibility at work; it also coincides with the time that many young women start their families. As I discussed in a recent column, we have considerable work yet to do to accommodate the practice of law to the realities of family life. Volunteer professional obligations often, of necessity, take a back seat when lawyers are struggling to balance career and family responsibilities.

Our organization is only as good as the people who participate in it, who hold leadership roles, who develop and implement our goals and help fulfill our mission. Our commitments to professionalism, leadership, service and education are nothing more than empty words if the lawyers who lead and serve the MBA do not reflect the rich and diverse constituency of our community and our membership. I know that our members are people of good heart who believe in the value of diversity and that we will continue to work together to identify obstacles and find realistic solutions. One step along that road is for all the women and minority lawyers who want to participate to come forward so that we can utilize your talents in our journey.



**MBA
3rd Annual
wintersmash**

Valley Lanes
Saturday, February 26
6-9 p.m.

A Multnomah CourtCare fundraiser.

Bring the entire family for
bowling, food and fun.
Register via the insert in this issue
or go to www.mbabar.org.

See page 9 for details.

MBA Board Elections

The MBA bylaws provide for a slate of candidates to be presented to the membership at least 60 days prior to the annual meeting. This slate will appear in an upcoming issue of the *Multnomah Lawyer*. The bylaws also provide for nominations from the membership at large. A nominating petition, endorsed by the nominee and at least 10 other MBA members, **must be received by 5 p.m. on Friday, February 25, in the MBA office**. Ballots will be included with the April newsletter; they will be due in the MBA office by 5 p.m. on Friday, April 29. Winners will be officially "announced" at the MBA Annual Meeting and Dinner on Wednesday, May 18.

MBA CLE

To register for a CLE, please see the inserts in this issue or go to www.mbabar.org.

February

YLS Young Litigators' Forum continues

Thursday, February 17
Annual Presiding and Criminal Courts Update
Hon. Julie Frantz
Hon. Dale Koch

March

Wednesday, March 9
Land Use Landmines and Real Estate Sinkholes – Practical Advice for all Attorneys
Dina Alexander
Roger Alfred

Wednesday, March 30
New Residential Construction Defects: Scraping off the Mold
Dean Aldrich
Robert Muth
Susan Whitney

Thursday, March 31
Direct and Cross Examination – Keeping it Simple and Getting it Right
Hon. Michael McShane
Linda Rudnick

April

Wednesday, April 6
Multnomah County Judges Trial Practices: Judicial Perspectives on Communicating with the Trier of Fact
Hon. Katherine Tennyson
Hon. John Wittmayer
Hon. Janice Wilson

May

Tuesday, May 24
ERISA Litigation
Andrew Altschul
Megan Glor
Sim Rapoport

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Advertising is accepted; advertisers(ments) are not necessarily endorsed by the MBA. The editor reserves the right to reject any advertisement.

DEADLINE for copy: The 10th of the month*

DEADLINE for ads: The 12th of the month*

*or the preceding Friday, if on a weekend.

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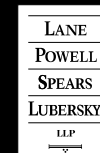
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NEW ON THE SHELF

By Jacque Jurkins, Multnomah County Law Librarian.

OREGON CIVIL LITIGATION MANUAL, 2004 Revision edited Kenneth P. Childs and Charles F. Adams. Published by the OSB Committee on Continuing Legal Education, 2004. (*KF 8840 O7O74)

ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION: Protecting and defending confidentiality, 3d ed. edited by Vincent S. Walkowiak. Published by the ABA Section of Litigation, 2004. (KF 8959 A7 A77)

FUNDAMENTALS OF FRANCHISING, 2d ed. edited by Rupert M. Barkoff and Andrew C Seldon. Published by the ABA Forum on Franchising, 2004. (KF 2023 F86)

FUNDAMENTALS OF FRANCHISING - CANADA edited by Peter Snell and Larry Weinberg. Published by the ABA Forum on Franchising, 2004. (KF 2023 C3 F85)

HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARDS SETTINGS. Published by the ABA Section of Antitrust Law, 2004. (KF 1649 H35)

GOVERNMENT CONTRACTS IN A NUTSHELL, 4th ed. by Noel W. Keyes. Published by Thomson/West, 2004. (KF 850 K49)

LEARNING CURVES: Education advocacy for children in foster care, by Katheen M. McNaughten, with a forward by the Honorable Constance Cohen, edited by Claire Sandt. Published by the American Center on Children and the Law and the National Resource Center on Legal and Judicial Issues, 2004. (KF 3736.5 M36)

THE ABC'S OF THE UCC (Revised) ARTICLE 7: Documents of title by Linda J. Rusch, edited by Amelia H. Boss. Published by the ABA Section of Business Law, 2004. (KF 912.5 A1 A23)

PROBATE PRIMER. Course materials from the Oregon Law Institute September 17, 2004 program in Portland. (*KF 765 O7O73pp)

WORKERS' COMPENSATION PRACTICE IN OREGON: 2004 Update. Course materials from the Oregon Law Institute October 1, 2004 program in Portland. (*KF 3615 O7O73 wc)

ESTABLISHING AND ENHANCING YOUR TRIAL TECHNIQUES: Strategies, skills, and pitfalls to avoid. Course materials from the Oregon Law Institute October 8, 2004 program in Portland. (*KF 8915 O7O73e)

OREGON GOVERNMENT LAW 2004: New chapters in public law. Course materials from the Oregon Law Institute October 15, 2004 program in Portland. (*KF 5300 O7O73)

ESTATE PLANNING: Fixing the common problems. Course materials from the Oregon Law Institute October 22, 2004 program in Portland. (*KF 750 O7O73ep)

HOW TO PREPARE AN INITIAL PUBLIC OFFERING edited by Winthrop B. Conrad, Jr., and Laird H. Simons III. Published by the Practising Law Institute, 2004. (B-1450)

COMMUNICATIONS LAW edited by James C. Goodale. Published by the Practising Law Institute, 2004. (G-810, G-811, G-812)

CALENDAR

For a longer version of the MBA calendar, please visit www.mbabar.org.

February

1
Tuesday, MBA Board meeting

3
Thursday, MBA CLE – How to Prepare a Winning Appeal
See insert or register at www.mbabar.org.

8
Tuesday, YLS Board meeting

Tuesday, YLS Young Litigators' Forum Series continues
Register at www.mbabar.org.

9
Wednesday, Professional Development Financial Planning Seminar – Personal Finances: Improving Your Fiscal Fitness
See insert for details.

10
Thursday, Multnomah Lawyer deadline

15
Tuesday, YLS Young Litigators' Forum Series continues
Register at www.mbabar.org.

17
Thursday, MBA Bylaws Vote
See Announcements for details.

Thursday, MBA CLE – Annual Presiding and Criminal Courts Update
See insert or register at www.mbabar.org.

Thursday, YLS Open House for 3rd Year Law Students

21
Monday, President's Day
MBA closed.

22
Tuesday, YLS Young Litigators' Forum Series continues
Register at www.mbabar.org.

23
Wednesday, MBA East County Social at Main Street Ale House
See Announcements for details.

26
Saturday, MBA WinterSmash
See details on p 9.

March

1
Tuesday, MBA Board meeting

8
Tuesday, YLS Board meeting

9
Wednesday, MBA CLE – Land Use Landmines and Real Estate Sinkholes
See insert or register at www.mbabar.org.

10
Thursday, Multnomah Lawyer deadline

Thursday, Pro Bono Fair
See page 11 for details.

30
Wednesday, MBA CLE – New Residential Construction Defects: Scraping off the Mold
See insert or register at www.mbabar.org.

31
Thursday, MBA CLE – Direct and Cross Examination: Keeping it Simple and Getting it Right
See insert or register at www.mbabar.org.

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Ethics Focus

By Mark Fucile, Stoel Rives.



The New Rules: What's Inside the Box? Part 3 - The No Contact Rule

In this month's installment of our look at the new rules, we'll examine the "no contact with represented parties" rule. The old rule was DR 7-104(A)(1). The new rule is RPC 4.2. The new rule, and its likely application, is very similar to the old one: it generally prohibits a lawyer from communicating on the subject matter of the representation with someone the lawyer knows to be represented. We'll first look at the elements of the rule, then turn to the exceptions and conclude with how it applies in the entity context.

The Elements

Like the old rule, RPC 4.2 has four primary components. First, it prevents a lawyer (acting in either a representative capacity or pro se) from communicating with a represented party and also prohibits a lawyer from using another person (for example, the lawyer's paralegal, secretary or investigator and, in some instances, the lawyer's own client) to make an "end run" around the other side's attorney. Second, although the term "communicate" is not defined in the new rule (nor was it in the old), there is nothing to indicate that it is any less broad than it was in the old rule and, accordingly, will likely apply to many forms of communication (for example, in-person, telephone and surface and electronic mail). Third, it applies to communications "on the subject matter of the representation" (for example, small talk about the weather during a break in a deposition is permitted, but calling the other party with a settlement offer is not). Fourth, the lawyer must actually know that the other party is represented - although that knowledge can be inferred from the circumstances (for example, an opposing party gives you a document suggesting that it was prepared by a lawyer and that the lawyer represents that person).

The Exceptions

Like the old rule, RPC 4.2 also has three exceptions. First, a lawyer can make a direct contact when the lawyer has permission from the other side's attorney. Second, a lawyer can make a direct contact when the communication is authorized by law (for example, a summons) or a court order. Third, a lawyer can make a direct contact when a written agreement (for example, a contract) requires written notice of specified events - as long as the notice is also transmitted to the other party's attorney.

The Entity Context

Oregon has two very helpful ethics opinions applying the no contact rule in the entity context: 1991-80, which addresses the corporate context, and 1998-152, which generally applies 1991-80 to the governmental context. The OSB is in the process of updating and reissuing the current ethics opinions with the appropriate citations to the new rules. As we went to press, the updated opinions had not yet been released. But they are expected to remain the same in this area because the new rule is so similar to the old rule. Assuming that, corporate and governmental officers, directors and management fall within the entity's representation and are "off limits." Corporate and governmental employees for whose conduct a party seeks to hold the entity liable also fall within the entity's representation and are "off limits." By contrast, line-level employees who are simply occurrence witnesses are generally outside the entity's representation and are "fair game." Finally, all former employees are generally "fair game" as long as the contact does not invade the former employer's attorney-client privilege. See *Brown v. State of Or.*, Dept. of Corrections, 173 FRD 265, 269 (D Or 1997) (applying DR 7-104(A)(1) in the entity context).

ANNOUNCEMENTS

MBA Bylaws Changes Proposed

The MBA Board has been working on updating the organization's bylaws. The modifications will update them, make them conform to current practices and improve their format for clarification purposes. **The meeting to approve the proposed changes will occur prior to the Presiding and Criminal Courts Update CLE seminar at the World Trade Center on February 17 at 2:45 p.m.**

Copies of the organization's bylaws, both the "red-lined" and "clean" versions, are available for review at www.mbabar.org. If you have comments after reviewing the proposed changes, please contact Executive Director Judy Edwards at 503.222.3275 or judy@mbabar.org.

MBA East County Social

If you live or work in East County, the MBA hopes you will join us for the next East County Social. This meet-and-greet event will take place at the Main Street Ale House, 333 N. Main in Gresham on Wednesday February 23 from 5:30-7 p.m.

Presiding Judge Dale Koch and Multnomah County Court Administrator **Doug Bray** will be there to provide an East County courthouse update. This will be a great opportunity to meet other East County members of the legal community, share ideas and just enjoy yourself. The cost of this event is \$10 and includes one drink and appetizers. Please RSVP by calling 503.222.3275 or emailing Noëlle at noelle@mbabar.org.

MBA Merit Awards

The MBA Board invites members to submit names for consideration for the 2005 MBA Merit Award. Past recipients have made significant contributions to the MBA, in the form of time, duties and participation. If you have someone in mind who should be considered for the award, please send his or her name and a brief explanation of why he or she should be considered for the award to Judy Edwards at MBA, 620 SW 5th Ave Ste 1220, Portland OR 97204 or to judy@mbabar.org.

MBA Noontime Bicycle Rides

Short, fast rides with hills. Meet at the corner of SW Yamhill and Broadway between noon and 12:10 p.m. Monday and Thursday. Contact Ray Thomas 503.228.5222 with questions, or meet at the start.

March 11 OWLS Roberts Deiz Dinner Dinner

Join OWLS in honoring the recipients of the 2005 Justice Betty Roberts and Judge Mercedes Deiz Awards on Friday, March 11 at the Portland Hilton. This year Judge Ann Aiken, of the U.S. District Court for the District of Oregon, will receive the Justice Betty Roberts Award for the promotion of women in the law and Stella Manabe, Administrator of the Affirmative Action Program of the Oregon State Bar, will receive the Judge Mercedes Deiz Award for promotion of minorities in the law. The event starts at 5:30 p.m. with a silent auction that benefits the OWLS Foundation; dinner follows at 7. Tickets are \$65, or \$40 for those with incomes under \$40,000. Call OWLS at 503.595.7826 or visit www.oregonwomenlawyers.com.

Queens Bench Luncheon

On Tuesday, February 8, Queen's Bench presents Barbara Zolty, MPH, who will discuss Weight and Health Management from the inside out. This monthly luncheon is held from 11:45 a.m.-1 p.m. at Jax Restaurant in Portland. The cost is \$12, no reservation required. For more information contact Shari R. Gregory at 503.226.1057 ext. 14, sharig@oaap.org or Barbara Smythe at 503.226.7391, barbarasmythe@klarquist.com.

Notice from Ancer L. Haggerty, Chief Judge, U.S. District Court Civil Filing Fee Increase

On December 8, 2004, the President signed into law the Consolidated Appropriations Act of 2005, which includes a provision increasing the civil filing fee by \$100, to \$250. This change in the civil filing fee is effective February 7, 2005, 60 days from the date the bill was signed into law.

The Act increased the filing fee for civil actions prescribed by 28 U.S.C. § 1914(a) from \$150 to

\$250. The civil filing fee was last increased in 1996 when it was adjusted from \$120 to \$150.

Multnomah County Family Law Group Proposed

MBA member Mark Kramer seeks your input on whether to form a Multnomah County Family Law Group. The structure would be loosely based upon the Clackamas County model, but the details and themes of the monthly lunch meetings could be expanded to include issues more relevant to mediators, custody evaluators, social and mental health providers, etc.

Please send Mark your input on this idea and your contact information by emailing him at mark@kramer-associates.com. A questionnaire will be available as a link on his Web site, www.kramer-associates.com. If there is positive support for the idea, he will attempt to enlist a steering committee and begin the group within the next several months.

National Board of Trial Advocacy Sets Exams

Attorneys interested in achieving national trial certification in the specialties of civil, criminal or family law trial advocacy should open an application prior to March 1 to be eligible to sit for the April 16 examination. Contact www.nbtanet.org for more information.

2005 O'Connell Conference Slated

The Lane County Bar Association presents a bench/bar conference on Thursday, March 10 at the Knight Law Center, University of Oregon in Eugene. To register, contact Pam Peake at 541.485.0220 or pamela.peake@harrang.com. For other questions, contact Becky Kamitsuka at 541.343.8060 or becky@gcb.com.

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YOUR WASHINGTON COUNTY CONNECTION

FROM THE CORNER OFFICE

This column generally tries to focus on some aspect of professionalism that we occasionally take for granted or miss altogether. While it is sometimes difficult to precisely define the term professionalism, it is somewhat similar to the statement by former U.S. Supreme Court Associate Justice Potter Stewart in *Jacobellis v. Ohio* (1964), an obscenity case, where he commented, "I may not know how to define it but, 'I know it when I see it.'" Here are two recent observations of what the term means in practice.

We sometimes forget that not only do lawyers owe a responsibility to act professionally to other lawyers and the court, but judges have similar responsibilities to lawyers who appear before them. In fact, the Oregon Code of Judicial Conduct provides that "a judge shall be patient, dignified and

courteous to litigants, jurors, witnesses, lawyers, court personnel and members of the public." JR 2-109(A). Recently I had the opportunity to observe an argument to the court. Shortly after the moving party began argument, the judge interrupted counsel and said something to the effect of, "Counsel, you know you have no right to make that argument in this court. Don't go there. You of all people know better." The admonition lasted perhaps ten to fifteen seconds and was made in a rather harsh tone.

After both sides had completed their argument, the court then said something to the effect of, "Counsel, I owe you an apology. When I first interrupted you I spoke in a rather harsh tone and I had no right to do that. I may disagree with you and your legal argument but I have a responsibility to show you the same respect you have shown me. I apologize." As I thought about what had just transpired I realized I had witnessed one of the highest examples of

judicial professionalism, in fact, professionalism in general, that I had seen in my thirty-three years of practice. I am not certain the court had any duty to apologize; my respect for this particular judge was reaffirmed. While it may be hard to apologize for a temporary lapse in professionalism, it is clearly the right thing to do.

Oregon RPC 3.3 (A) (2) [former DR 7-106 (B) (1)] prohibits a lawyer from failing to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. The question arose with a member of the federal bench in Oregon whether this rule required a lawyer to direct the court's attention to a case outside the 9th Circuit. For instance, your research has located a trial court opinion out of the U.S. District Court for the District of West Virginia that is directly on point and directly adverse to your position. Under these rules

are you obligated to disclose the case to the federal judge in Oregon? While the wording of the rule suggests the lawyer has no obligation to bring the decision to the court's attention, that narrow view was rejected in ABA Formal Opinion 280 (June, 1949). The opinion concludes that the disclosure rule applies to "a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case." See also, *In re Greenberg*, 15 N.J. 132, 137, 104 A.2d 46, 49 (1954) limiting the disclosure to state court decisions in state cases, but with respect to federal questions, to decisions of the courts of the U.S. Perhaps one can argue that the expectation is not mandated by the language of the rule, but it is arguably encompassed in the meaning of professionalism. As the Oregon federal judge commented, he would expect no less of an Oregon practitioner appearing in his courtroom.

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Non-Union Employers: Do Your Work Rules Violate the National Labor Relations Act?

By Nelson D. Atkin II, Barran Liebman.



Many employers believe that if their employees are not represented by a union, they don't have to be concerned about the National Labor Relations Act (NLRA). NOT TRUE!

The NLRA broadly protects associational rights of all employees, union or not. Section 7 of the Act gives

employees the right to engage in concerted activities (activities for employees' "mutual aid or protection") even though no union activity is involved and even though no collective bargaining is contemplated by the employees involved. A work rule violates the NLRA if it would "reasonably chill employees in the exercise of their Section 7 rights."

In a new decision, Lutheran Heritage Village-Livonia, 343 NLRB No. 75 (2004), a sharply divided National Labor Relations Board (NLRB) concluded that work rules that prohibited "abusive and profane language," "harassment," (without being limited to sexual harassment), and "verbal, physical and mental abuse," were lawful despite their broad scope.

If a work rule does not "explicitly" restrict activity protected by Section 7,

"...the violation is dependent upon the showing of one of the following: (1) employees had reasonably construed the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." "Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way. To take a different analytical approach would require that the Board find a violation whenever the rule could conceivably read to cover

Section 7 activity, even though that reading is unreasonable."

At the same time, however, the NLRB held several other work rules unlawful. The employer's rules prohibiting solicitation, loitering, and unlawful strikes or work stoppages could reasonably cause employees to believe that some protected Section 7 activity was prohibited, and that would likely have a chilling effect on their exercise of their protected Section 7 rights. That ruling is consistent with longstanding NLRB rulings barring rules which either directly prohibit, or can be interpreted to prohibit, employees from discussing wages, hours, and other terms and conditions of employment.

Although this new decision strengthens the ability of

employers to maintain a harassment-free workplace, it also should serve as a reminder to employers that work rules should be carefully reviewed by labor counsel to make sure they do not cross the fine line that separates legal policies from illegal ones.

Nelson D. Atkin II, a partner at Barran Liebman LLP labor and employment law firm, has been practicing labor and employment law since graduating, cum laude from Syracuse University College of Law in 1974. He is a former chair of the OSB Labor and Employment Law section and he has been an active member of the ABA's section of the Labor and Employment Law Committee on the Development of the Law Under the NLRA, since 1972.

Around the Bar

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Hall practices in the firm's energy section, advising clients on energy law with an emphasis on the electric power industry.

O'Scannlain practices in the firm's corporate section. He advises publicly traded and privately held companies on securities law, equity and debt financings, mergers and acquisitions, SEC reporting and compliance, and general business matters.

Rafter practices in the firm's intellectual property section. He advises technology clients, obtaining patents for them in a wide range of technology fields.

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Why Advertise with the MBA?

The *Multnomah Lawyer* is the official publication and newsletter of the Multnomah Bar Association (MBA) and is a timely and well-read source of information for the entire Portland metropolitan region legal community. Nearly 75% of the lawyers in the metro area are members of the MBA. Our membership includes several hundred suburban lawyers and some Willamette Valley lawyers as well. All new lawyers in Oregon are offered a first-year, free membership in the MBA, which includes a complimentary subscription to the *Multnomah Lawyer*. For more information, please visit www.mbar.org.

Circulation

The newsletter has a circulation of more than 4,000 lawyers, judges and other legal professionals in the Multnomah, Clackamas, Washington and Clark counties.

Interested in Writing Articles?

The MBA is looking for writers and article ideas for the newsletter. If you are interested and/or have an idea for a story, please call or email Judy Edwards, Executive Director, 503.222.3275 or judy@mbabar.org. We are currently recruiting articles related to practice areas, human interest stories or profiles of individuals in the law. Members tell us that they especially enjoy reading profiles of members, analyses of trends in law, tips on points of law and essays on issues in the profession. We also invite letters to the Editor.

AROUND THE BAR



James D. Zupancic

DAVIS WRIGHT TREMAINE
James D. Zupancic, a partner in the firm, was recently elected chairman of the Counselors of Real Estate's (CRE) Oregon Chapter. Zupancic is a general business and real estate attorney at DWT. He regularly advises clients regarding strategic business and corporate issues, real estate acquisitions, development, planning and complex transactions. He has been a member of CRE since 1998. Membership to CRE is a highly selective process. Only 1,100 advisors worldwide and only 13 professionals in Oregon have been invited to call themselves Counselors of Real Estate.



John Chambers

DUNN CARNEY
 The firm announces that **Renee Stineman, Robert Kerr, JoDee Keegan** and **John Chambers** became partners.

Stineman is a litigator who focuses on employment litigation, real estate and commercial litigation. Kerr is a business attorney who works with closely-held businesses on construction, employment and business organization issues. Keegan practices business and commercial law and focuses on business organizations and securities law. Chambers is a litigator who focuses on construction law and general litigation.

Villa-Smith and Hagan are active in numerous family law organizations and committees for the OSB and MBA.

Alex P. Sutton has joined Gevurtz Menashe et al as an associate attorney.

LANDYE BENNETT BLUMSTEIN
Orlando Medina has been named a partner with the firm, where he will continue focusing his practice on federal, state, and international tax planning; mergers, acquisitions, and dispositions for corporations and partnerships; equity compensation; business formations; venture capital financing; and estate planning. In addition, he serves on the Board of Directors for Parent-to-Parent of Oregon.



Bruce C. Hamlin

LANE POWELL
Bruce C. Hamlin, partner at the firm and chair of the products liability and catastrophic injury practice group, has become a sustaining member of the Product Liability Advisory Council (PLAC). Hamlin's practice concentrates in the areas of product liability, catastrophic injury, and commercial and insurance litigation.



Teresa Pearson



David Post



Josh Sasaki

MILLER NASH
Dennis Rawlinson, a partner of the firm, has been named the 2005 President-Elect of the OSB by the OSB Board of Governors.

Jeffrey Condit, a partner of the firm, has been appointed to the Columbia River Gorge Commission by Oregon Governor Ted Kulongoski.

Condit has been with Miller Nash since 1998. He represents clients in government and administrative law and land use planning, including local governance, K-12 and higher education law, public finance, public records and meetings, revenue and taxation, public facilities and utilities, real property law, public contracting, election law, and urban renewal. He has worked extensively at the Oregon Legislature and with state agencies on clients' behalf.

The firm announces three new partners: **Teresa Pearson, David Post** and **Josh Sasaki**.

Pearson concentrates her practice on creditors' rights and insolvency and reorganization. She represents lenders, trade creditors, and other clients in all forums where debtor-creditor issues appear - out of court, bankruptcy court, trial court, and appellate court.

Post concentrates his practice in general business and corporate law, with a particular emphasis on securities law, including

periodic reporting by public companies, and private and public financing transactions.

Sasaki concentrates his practice on general litigation, including corporate governance and shareholder litigation, real estate, insurance coverage, product liability, and personal injury disputes.



David Angeli



Stephen Hall



Brendan O'Scannlain



John Rafter Jr.

STOEL RIVES
 New principals practicing in the firm are **David Angeli, Stephen Hall, Brendan O'Scannlain** and **John Rafter Jr.**

Angeli practices in the firm's trial section. His practice focuses on complex civil and criminal litigation, with an emphasis on health care, securities, financial and white-collar criminal matters.

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Renee Stineman



Kathryn Villa-Smith



Robert Kerr



Julia M. Hagan



Dennis Rawlinson



JoDee Keegan

GEVURTZ MENASHE ET AL
Kathryn Villa-Smith and **Julia M. Hagan** have been promoted to shareholders in the law firm.

Villa-Smith joined the firm in 1993, and focuses on divorce, child custody and parenting time, abuse and neglect issues, FAPA restraining orders, paternity, modifications, domestic partnerships, and grandparents' rights. Hagan joined the firm in 1998, and focuses on divorce, child custody and parenting time, juvenile matters, paternity, abuse and neglect issues, and third party custody. Both



Jeffrey Condit

Tips from the Bench

By Judge John Wittmayer,
Multnomah County Circuit
Court.

Foreign language interpreters in Court

In your civil, criminal or family law case, do you have a client or witness who does not speak or understand the English language well enough? Do you need a foreign language interpreter to interpret the entire court proceeding for your client, or to interpret the testimony of a witness? What are your options for accessing interpreter services?

ORS 45.273 declares it to be the policy of the State of Oregon to provide foreign language interpreter assistance when necessary for court proceedings. ORS 45.275 requires the court to appoint a qualified interpreter in a civil or criminal proceeding whenever it is necessary.

Because interpreters are required to be neutral, you should not expect the judge to allow you to provide your own interpreter. ORS 45.275(1) says that when necessary “[t]he court shall appoint a qualified interpreter in a civil or criminal proceeding....”

In Multnomah County, you need to contact the Court’s Interpreter Services office at 503.988.3515 to arrange for an interpreter. UTCR 7.060 requires attorneys to contact the court four days prior to a proceeding in which a foreign language interpreter is needed to aid the court in scheduling an interpreter.

For court proceedings, interpreters are provided by the court at no cost to the litigants. No fee is charged for this service. Although ORS 45.275(2) may seem to suggest that a fee may be charged for a non-indigent litigant, legislative counsel has interpreted this provision to apply to depositions and other out-of-court matters.

Perpetuation depositions - object or your objection is waived

On December 29, 2004 the Court of Appeals issued its opinion in *Evers v. Roder*, interpreting ORCP 39 I(6), and reminding litigators that you must object to testimony during a perpetuation deposition or you have waived your right to object. It does not work to wait until after the perpetuation deposition has been completed and then later move the court to strike the testimony.

In *Evers*, plaintiff’s expert was perpetuated, and testified about the need for future treatment of plaintiff’s ongoing pain. Plaintiff’s expert testified, without objection, that plaintiff would need “medial branch denervation” treatments in the future. Two weeks after the perpetuation deposition,



defendant filed a “motion to strike” the testimony, arguing that it was not supported by an adequate scientific foundation. *State v. O’Key*, 321 Or 285 (1995). The trial court denied the motion to strike.

ORCP 39 I(6) requires that “[a]ll objections to any testimony or evidence taken at the deposition shall be made at the time and noted upon the record...any objections not made at the deposition shall be deemed waived.”

On appeal, defendant argued that there is a difference between an objection to a question and a motion to strike testimony of a witness. The Court of Appeals rejected this argument. The Court of Appeals ruled that “defendant’s failure to object to (or, what amounts to exactly the same thing, to move to strike) [the expert’s] testimony at the perpetuation deposition waived the right to challenge that testimony at the trial.”

Filing documents “under seal”

Article I, Section 10 of the Oregon Constitution requires that “[n]o court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay***.” In *State ex rel Oregonian v. Deiz*, 289 Or 277 (1980) the Supreme Court broadly interpreted this constitutional provision to permit public and press attendance at juvenile court hearings.

Like court hearings, court files are public records. Any member of the public can look at and obtain copies of the contents of a court file. This is sometimes troubling to lawyers and litigants. Because of this, have you or your client ever felt you needed to file a document “under seal?” This frequently arises with affidavits/declarations and other documents in support of or in opposition to motions for summary judgment. It comes up in other contexts, as well.

The presiding judge reads *State ex rel Oregonian v. Deiz* broadly, and believes it generally applies to court files, as well. He does not, therefore, routinely grant motions to file documents “under seal,” and the presiding judge does not sign orders directing the clerk of the court to take certain steps or actions with respect to filed documents. That the order is “stipulated” by all litigants does not solve the constitutional problem.



By Susan Watts, Kennedy Watts et al and Court Liaison Committee.

Presiding Court Update

Judge Koch reported that if Governor Kulongoski’s recently announced budget for the courts is not increased by the legislature, the court will need to keep staff vacancies open and will be down by 30 to 40 positions as of June 30, 2007. However, the courts will not know what the final budget numbers will be for the 2005-07 biennium until approximately the middle of 2005. No immediate changes are anticipated in the Multnomah County courts for the next 12 months.

In the event of inclement weather, lawyers may check the Web site www.flashnews.net after approximately 5 a.m. to determine whether the courthouse will be closed. Jurors who have been impaneled on a jury should follow the instructions of the trial judge as to whether they should report. All other jurors and prospective jurors should follow the Portland Public Schools schedule. Judge Koch notes that because of constitutional and statutory obligations, the court will rarely be closed.

Judge Koch announced that Judge Nan Waller will be the new Chair of the Judicial Outreach Committee. Judge Edward Jones will be the new head of the Speakers Bureau. If you become aware of an event where a judge from Multnomah County would

be a welcome speaker, please let Judge Jones or Carol Hawkins at the MBA know.

As previously announced, OJIN now has the ability to send out notices by email. These notices will be in lieu of paper notices. However, the Multnomah County court will not utilize this function until all potential problems are addressed and resolved.

Legislative Update

Senator Ginny Burdick will be the new Chair of the Senate Judiciary Committee. Representative Wayne Krieger will chair the House Judiciary Committee. Neither legislator is a lawyer, but they both are strong supporters of the court. Senator Burdick also hopes to hold a committee hearing at the Multnomah County Courthouse during the 2005 session.

Jury Verdict Information

Leslie Kay is working with Doug Bray and Judge LaMar to update and automate the jury verdict information. They hope to have a system in place within the next few months.

Clackamas County Practice and Procedure

The MBA’s Court Liaison Committee will be coordinating with the Clackamas County Bar Association to provide

information regarding practice and procedure in Clackamas County to Multnomah County lawyers in future publications of the *Multnomah Lawyer*.

2005 CourtCare

The 2005 CourtCare campaign is in progress. Last year, the campaign raised \$65,000. This year, the goal is to raise \$85,000.

The WinterSmash bowling fundraiser is scheduled for February 26. Over 12,000 sponsorship dollars have been received so far. This is a fun, family event and lawyers are urged to participate.

Updated MBA Web site

The MBA has updated its Web site. Check it out at www.mbar.org. Also, all lawyers are encouraged to review their personal information on the Web site directory. If corrections are needed, follow the directions online.

Articles Wanted

Local publications are interested in publishing articles by lawyers on law and business topics. If you are interested in writing a piece for a publication, please contact Judy Edwards at the MBA.

If you believe you have sufficient justification to file a specific document or a specific set of documents under seal, you should be prepared to cite to the presiding judge specific legal authority for your request. Any order from the presiding judge granting your request will likely be very narrow.

If you have obtained an order sealing a file, Multnomah County Supplementary Local Rule 1.165(3) requires that you give written notice of that and a copy of the order to the trial court administrator.

If you have any questions about how these matters are currently being handled, you should call the presiding judge’s staff at 503.988.3846.

Profile - Judge Edmonds

Cont. from p. 9

as possible and does not view the constitution as an evolving instrument. He believes that the courts “ought not legislate in the guise of interpretation of the constitution.” That said, Edmonds believes that the constitution is the protector of individual liberties and that the court must be mindful of safeguarding those interests.

Edmond’s advice to those who appear before the court is to “...be prepared, and anticipate the position of one’s opponent. Consider how a holding will

affect all Oregonians. Be responsive to questions from the panel, and educate the court in a nice, respectful way. Be flexible and provide the court with the rationale that leads to a conclusion.” Judge Edmonds regards practicing law as a “noble profession” and this man, whose career and outlook has been shaped by life in the eastern part of the state, puts those ideals into practice each day at the Court of Appeals.

Profile - Walt Edmonds, Judge, Court of Appeals

By Leslie Kay, Regional Director, Multnomah County Office, Legal Aid Services of Oregon and Court Liaison Committee.



Judge Walter I. Edmonds

Court of Appeals Judge **Walter I. Edmonds** grew up on the North Umpqua River near the towns of Wilbur and Winchester. After graduating from Roseburg High School in 1961, he attended Linfield College, wrote for the college newspaper and worked part time for the *McMinnville News Register* covering news and sports. After considering a career in journalism, Edmonds decided to attend law school at Willamette University College of Law. He envisioned becoming a small town lawyer and living the rural life he came to know as a child. After law school he was offered a job as an associate by a sole practitioner with a general practice in Madras. When he was discharged from the Army Reserves in 1967, Edmonds packed all of his belongings into his '57 Ford to begin his legal career in a town and area where he did not know a soul.

That first year in practice, Edmonds was appointed to represent a transient man who was charged with murder. Providing a defense in this tragic case helped Edmonds understand the role that criminal defense

lawyers play in seeing that justice is done even when that role may not be popular in a community.

Within a year of arriving in Madras, Edmonds was appointed as the District Attorney of Jefferson County. During a fateful telephone call, Governor Tom McCall told the new lawyer that 25 was "a little young" to become the district attorney, but he was going to appoint Edmonds anyway. Edmonds found working as a district attorney in a small county to be fascinating. He worked closely with law enforcement and other county officials. On one occasion he personally effectuated an arrest of a man who had barricaded himself in an apartment with a shotgun, because the interim sheriff, an undertaker, did not feel that he had the training to do so. Edmonds would also go on evening state police ride-alongs to help the thinly stretched officers, and on one memorable occasion tackled a robbery suspect who was hiding in some sagebrush near the Warm Springs Reservation. Edmonds had to be cautioned by a tribal officer to release the hammerlock he

applied to the suspect. During this period Edmonds tried a criminal case against future federal Judge Owen Panner, one of the giants of the legal culture in eastern Oregon at the time. (Edmonds lost.)

When Edmonds was 26, attorney Ron Bryant approached him about joining his firm in Redmond. Edmonds accepted and spent the next six years trying cases all over Central and Eastern Oregon. The firm owned a plane, and Edmonds obtained his instrument rating, flying in and out of the small airports that dot the eastern part of the state to try cases in Condon, Fossil, John Day, Prineville, Burns, Pendleton and Baker. He remembers knowing the contents of depositions so well that he could visualize and recall the record on demand. Edmonds learned everything he knew about trying cases from future Court of Appeals Judge Robert Foley, who sat on the 11th Judicial District Circuit Court, and from his partner Joe Larkin, who would debrief his trials. Later, his judicial role models would be Judges John

Copenhaver and Bob Campbell, who sat on the 11th Judicial District Circuit Court. Edmonds became the president of the Central Oregon Bar Association and in 1975 was appointed to the Circuit Court bench by Governor Robert Straub.

The 11th Judicial District at that time encompassed Deschutes, Gilliam, Jefferson, Crook, Grant and Wheeler counties. Edmonds rode the circuit, hearing cases in all six counties. Edmonds was all of 32 when he began and it took some adjustment to referee trials between Owen Panner and others. He learned to command the courtroom using common sense and wisdom.

While living in Madras, Judge Edmonds met and married his wife, Janet, who was a schoolteacher in the Madras School District. In 1980 they moved to Bend from Redmond. They have two children, born in 1975 and 1979. His children grew up on the backs of horses and are now veterinarian students who hope to eventually settle east of the mountains. Edmonds is active in church activities and

with farm work when he is not on the bench.

In 1989 Governor Neil Goldschmidt appointed Judge Edmonds to the Oregon Court of Appeals. He moved his family to West Salem where they purchased a small farm. He is now the Presiding Judge for Department Three of the Court. On the bench, Edmonds has authored over 1600 published opinions. He brings his wealth of experience as both a circuit court judge and trial attorney to the court. Edmonds humbly regards his opinions as those of the court as a whole and acknowledges the role that judicial clerks and staff play in the work of the court. He tends to apply the law in as literal manner

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Multnomah CourtCare and the MBA WinterSmash 2005

By Gregory C. MacCrone, Attorney at Law, YLS Secretary and MBA Fun Committee.



The Third Annual WinterSmash is slated for Saturday, February 26, 2005, from 6 - 9 p.m. Like last year, the event will be held at family-friendly Valley Lanes in Beaverton.

The MBA has reserved all the lanes for its members and their friends, colleagues, and families for an evening of casual fun and food. Bumper lanes will be set up for children over three years old.

The event will serve to kick off fundraising efforts for Multnomah CourtCare. We thank Harrang Long Gary Rudnick P.C. for sponsoring the food and one drink per person.

CourtCare is a collaborative project between the Volunteers of America-Oregon (VOA), your MBA, the Oregon Judicial Department and Multnomah County. It aims to provide a compassionate way to protect young children from unpleasant courtroom situations.

A converted Multnomah County Courthouse jury room serves as a fully-staffed and certified drop-in childcare center for children and infants. CourtCare offers games, toys, art supplies, and books for up to 100 children a month in a safe and nurturing place to play while parents or guardians tend to court business.

Since 2001 when it opened its doors, over 3,300 children aged six weeks to five years have visited the center.

Before the service went into operation, children had to accompany their parents - who often had no other childcare options - into court where they often became disruptive as they witnessed upsetting and emotional scenes, according to Kay Toran, VOA-Oregon President and CEO.

Nearly 95% of the adults using CourtCare are women; approximately 40% are domestic violence survivors. CourtCare staff regularly refer parents to other services, including childcare, domestic violence shelters and providers of food and clothing.

The center seeks to improve the operation of the courthouse by protecting children from potentially disagreeable court settings, by helping ease parents' access to the legal system and, perhaps most importantly, by ensuring that court setting allows for a fair legal process without undue distractions.

Ms. Toran points to the "generosity, spirit, hard work, and long history of public service, the

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Portland Metropolitan area legal community" has contributed to the program's efforts. She takes pride in the fact that CourtCare "has largely been supported through individual lawyers and over 40 area law firms who believe in its mission."

She adds, "The support of the legal community remains key to the survival of this program."

Enjoy the company of your colleagues, some good food, play a game you know you love and support a good cause. Tickets are

\$35 for adults and \$10 for kids 3-12 years old. Price includes food, drink, shoes, balls, lane time, and the satisfaction of knowing you're supporting CourtCare. Register via the insert in this issue of the *Multnomah Lawyer*.

What Partners Want from Associates

No need to be “faster than a speeding bullet”

First Part of a Series

By Gregory C. MacCrone, Attorney at Law and YLS Secretary.



A Typical Situation

In most law firms, work flows down to the youngest, least experienced attorneys. This is simply part of firm life, and it is easy to imagine yourself resigned to an early career filled with poring over boxes of records for privileged documents, cite checking partners' CLE articles, or writing research memoranda.

You very likely may feel overwhelmed (or bored stiff) by the obligations your chosen profession demands of you.

It is a formidable and long-term task to succeed at practicing law as an associate. Not only do you have your work cut out for you, you have a lot of it cut out for you. Your non-lawyer family and friends likely do not or cannot completely understand the mental, often physical, and frequently emotional challenges you face everyday in striving toward professional success. Things, however, are not totally beyond your control.

As associates search for success in their careers, they sometimes overlook their immediate resources. There are people who can empathize with your situation; they are your supervising attorneys. They have been where you are, and they are now where you are going.

By tapping into the experience your senior attorneys offer, you can manage better what may regularly seem as a frantic professional life. Further, if you are thoughtful and motivated, you can prepare yourself to meet his or her expectations when called into action. Your ticket to professional success is just down the hall in the corner office.

“What does it take to be successful associate attorney?”

Intelligence. A focus on details. Responsibility. Eagerness. Honest and ethical behavior. Integrity. Credibility. Professionalism.

These are likely some of the things that come quickly to mind when asking the question. But if the inquiry appears simple, it is only deceptively so, for it vexes not only associates and student clerks, interns, and externs, but also law firm hiring authorities. It is the subject of career guidebooks, law school career service office seminars, and much personal rumination.

Failure to know its answer will present problems for you, your supervising attorney, your firm,

and ultimately, your client. Getting to the answer can pave the way to career success and satisfaction.

So, I posed the above question to a clutch of accomplished, senior attorneys in a number of local firms. They all have a role in their firm's hiring criteria and process and as such are uniquely situated to answer the question. Their answers are below with additional ideas on how one might acquire the skills these practitioners have honed and look for in their associates.

Eschew Obfuscation I: Write Clearly

In the beginning, lawyers were paid by the written word. As law students and young lawyers, we all learned – and accepted without using the critical skills that helped us through law school – to adopt as untouchable certain handed-down language. We write in jargon, foreign languages, awkward phrases and archaic usages, and the passive voice, all of which we compress in nicely, impenetrable inch-tall sentences.

Perhaps it is out of fear of liability or the fact that lawyers often write for other lawyers, that we are slow in moving toward plain English. Whatever the reason, one would think that with over 200 years' experience we would have improved on this front, but American lawyers remain notoriously bad writers. Raymond P. Ward, in an article for the Defense Research Institute several years ago, aptly demonstrated our collective predilection:

“Have you tried the roast beef? Said roast beef is excellent. Please pass same.”

If we sat next to someone at the dinner table who spoke like this, many of us would laugh out loud. But as humans, we learn language mainly by imitation. We know and speak what we hear.

As young lawyers learning the legal lexicon, it is important for us to imitate the language of our more experienced and clearly-spoken colleagues. Moreover, if advocacy can never be mastered and the most we can do is to learn a little and unlearn a lot, then legal writing presents a similar situation. To write with concision and cogency is often more a matter of unlearning than learning certain writing behaviors.

Timothy DeJong, the hiring partner for Stoll Stoll Berne Lokting & Shlachter P.C., a 16-attorney downtown business litigation firm, confirms this. In addition to demonstrated

academic ability, DeJong says “the most obvious requirement for our firm is a solid foundation of legal writing skills.”

He cautions, however, that “it is very difficult for ‘challenged’ writers to improve on the job in the time required to demonstrate success.” The problem may be that many of us probably write this way purely out of habit.

Successful people, however, are simply those with successful habits. If good writing doesn't come naturally to you, work to improve it and know that ingrained habits and inflexible attitudes can slow your success.

We can improve our writing by unlearning phrases and deleting them from our vocabulary. Practice your skills and ask for feedback from lawyers whose writing you admire. Re-read Strunk & White's *The Elements of Style* and consider revisiting *Plain English for Lawyers* by Richard C. Wydick, a noted legal writing authority. Bryan Garner is also a national figure. He teaches CLEs on the subject and has written several books on legal prose. Think about taking a legal course at one of the local colleges or professional schools.

Eschew Obfuscation II: Speak Clearly

Jeffrey Foote is a civil trial specialist at two-attorney Jeffrey P. Foote and Associates, P.C, a products liability and medical malpractice plaintiffs firm. In addition to a strong writing aptitude, Foote as a trial lawyer, knows that strong and clear speaking skills are key to his legal team's success.

“An ability to connect with and communicate with people is essential. We represent people from all walks of life with varied social, educational, economic, and ethnic backgrounds. All of our staff is involved with communicating with them. These are obviously essential skills if the individual will be trying cases to juries.”

To Foote, “people” most relevantly means clients and juries, but his advice is equally applicable to associates in responding to, and working with, their supervising attorneys and more senior colleagues. For a number of attorneys interviewed for this article, clear communication also goes to the issue of reliability.

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Advice from Multnomah County Clerks

By Multnomah County Courthouse Clerks.

Courtroom clerks often act as “gatekeepers” for their judges. To help Multnomah County practitioners understand how to maintain good relations with clerks, the MBA recently conducted an informal survey of clerks. All respondents were guaranteed anonymity and a piece of stale Halloween candy. Here are the Top Ten Items of Clerk Wisdom, as revealed by the survey:

1. Introduce yourself to judges and court staff. If this is your first motion/trial/plea in Multnomah County (or ever), let them know.
2. Be prepared. Fill out paperwork before the hearing, submit briefs and motions well in advance, etc. If you have questions about procedures or paperwork, ask for help.
3. If you will be late, call the judge. If you are delayed in another courtroom, kindly ask that clerk to send an electronic message to the clerk in the courtroom you need to visit next. In some situations, it is acceptable to leave a cell phone number with the clerk, who will then call when you are needed. Do not, however, expect the clerk to act as your personal secretary.
4. Be aware of your general surroundings. Do not read anything on the clerk's computer, do not fiddle with books or paperwork on the clerk's desk, do not lean on the clerk's desk or rest your feet on a table. Get permission before you use the clerk's phone. Only a few clerks have offices outside the courtroom. The rest spend their day multi-tasking in the courtroom.
5. File original paperwork yourself. Make copies for the court. Handing originals to a clerk does not satisfy any “filing” requirement, although some clerks may file originals for you. If those originals are never filed, it's your bar number on the line, not the clerk's. A clerk who refuses to file originals is actually doing you a favor.
6. When you need to discuss something in chambers, ask for permission to enter. Do not hover around the clerk's desk so you can see what is happening in chambers.
7. Some judges require specific seating arrangements in the courtroom. Do not question the setup.
8. As early as possible, inform the clerk of any special needs you have (e.g., audiovisual equipment for exhibits, diabetic client who needs frequent breaks during trial, etc.).
9. When a hearing is canceled, notify chambers immediately. Do not assume the judge will learn about it somehow. Never ask a judge to “hurry up and decide the issue under advisement because we're on for trial next week,” then fail to notify the judge when, four hours later, that trial is set over.
10. The clerk will fill the water pitchers. That said, please do not glare at the clerk if the water runs out mid-hearing and the clerk does not immediately run to fill the pitcher. The clerk will get to it at a non-obtrusive moment.

Renewing Your Membership? Don't Forget VLP....

The MBA thanks the following members, who gave more than the \$20 "check off" suggested donation to the Volunteer Lawyers' Project (VLP).

Dean Aldrich	Peter Glade
Sheldon Aronson	Sarah Greenley
Kenneth Baker	Michael Knapp
James Breathouwer	Courtney Kreutz
Francis Connell III	Paul Sheely

Please remember to look for the check off box on your membership renewal form, and be as generous as possible when donating to VLP.

Call for Pro Bono Award Nominations

Each year, the MBA Board of Directors, LASO and the Oregon Law Center (OLC) join together to recognize the volunteer efforts of exemplary pro bono attorneys. The awards process is overseen by the LASO-OLC Board of Directors Pro Bono Committee. This committee is comprised of MBA, MBA YLS, LASO and OLC board members and staff people. In addition to the internal nomination process, the committee is seeking nominations for the 2004 pro bono awards.

The following awards will be presented at the MBA Annual Dinner in May 2005:

Senior Law Project Outstanding Volunteer Award. This award is presented to a lawyer (or lawyers) who has displayed a special commitment to pro bono services via the Senior Law Project. The Senior Law Project is the longest running pro bono project in Multnomah County (since 1978) and it serves over 1000 clients per year.

Michael E. Haglund Pro Bono Award. This award goes to a young lawyer (or lawyers) who, in the tradition of Michael Haglund, founder of the Volunteer Lawyers

Project, has displayed a special commitment to pro bono services in the previous year. A "young lawyer" is defined as a lawyer who is 36 years old or less OR who has been an attorney for six years or less.

Pro Bono Award of Merit. This award goes to a lawyer (or lawyers) who has displayed a special commitment to pro bono services in the previous year. The recipient of this award sets an example for our legal community in his/her dedication to providing pro bono services to those clients who are unable to afford them.

The criteria used in selecting award winners includes:

- The pro bono work done by the nominee in 2004 (including the number of hours donated and cases taken in the past year)
- The number of years the nominee has served as a pro bono attorney
- The nominee's history of willingness to take cases on an emergency or short-notice basis
- The nominee's efforts to mentor or train new pro bono volunteers
- Other qualities that promote a culture of pro bono work in our legal community.

Awards may be presented to attorneys, law firms or attorney

organizations that do pro bono work. If you know an attorney, firm or attorney organization that has done exemplary pro bono work for a LASO, OLC or MBA YLS* project during 2004, please send us an email or a letter with the following information:

- Nominee's name (attorney, law firm or attorney organization)
- A brief description of the nominee's pro bono efforts, including the name of the organization(s) with which the attorney volunteers
- Your name and contact information.

All nominations must be received by February 28 in order to be considered in the award process. Nominations should be sent to: Maya Crawford at maya.crawford@asoregon.org or LASO, 921 SW Washington Ste 500, Portland OR 97205.

*LASO, OLC and MBA YLS projects include the following: Bankruptcy Clinic, Domestic Violence Project, Pro Se Assistance Project, Senior Law Project, Social Security Panel, Stoel Rives Night Clinic, Neighborhood Legal Clinics, Nonprofit Project and Attorneys for Youth.

What Partners Want

Cont. from p. 10

A partner's expectations will vary according to the project, says Jerome Lidz, a government and appellate law specialist with Harrang Long Gary Rudnick's Portland office. "Sometimes, I just want research and an oral report; other times, I want a fairly polished work product." In getting the assignment from your supervising attorney, you must make doubly sure you get it correctly, because only then will you be able to complete the project to expectation. If you are

not clear on the instructions, you should ask.

Once you have the assignment, "Do what you say you will do when you say you will do it," says Reuel K. Fish, the managing partner for McMinnville's Cummins, Goodman, Fish, Denley & Vickers, PC.

"Nobody is 100% reliable with respect to deadlines, so when you can't make one, you must communicate the fact

to the partner. It's really straightforward malpractice prevention, but sometimes is ignored. Behave pro-actively, explain the situation ahead of time, and solve the problem with your supervising attorney."

Future articles will cover working independently and in a team, staying client focused, being intellectually curious and honing that "can do" attitude.

PRO BONO VOLUNTEERS

Thanks to the following lawyers, who recently donated their Pro Bono services via the Volunteer Lawyers Project, the Senior Law Project, Community Development Law Center, law firm clinics, the Oregon Law Center, the Nonprofit Project and Attorneys for Youth. To learn about pro bono opportunities in Multnomah County, check out the Pro Bono Opportunities Handbook available at www.mbabar.org/docs/ProBonoGuide.pdf.

To volunteer, please call Maya Crawford at 503.224.4086.

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5:00 - 7:30..... Meet service providers who need your help and find pro bono opportunities suited to you at the new Pro Bono Opportunity Fair
6:00 - 7:30..... Pro Bono Challenge Awards Ceremony, honoring attorneys and firms for their pro bono contributions

To register for CLE courses, call Diane Campbell at (503) 431-6426 or e-mail dcampbell@osbar.org

Preregistration is not required for other events. All events are free of charge.

Oregon Principal and Income Act ORS Chp. 129

By Tara Hendison JD, CTFA, Vice President, Allen Trust Company.



who wishes to be fair to all beneficiaries and the intent of the trustor to do?

In the past, trustees have been generally restricted to the language of the trust when determining distributions. The alternatives provided in the new statute boil down to two options, the power of adjustment and the power to convert to a Unitrust.

The Power to Adjust (ORS 129.215)

Generally, trustees are bound by the traditional definitions of principal and income in determining distributions to beneficiaries. Although nothing relieves the trustee from the Prudent Investor Rule, the power of adjustment gives the trustee, under certain circumstances, limited ability to make adjustments between principal and income if the trustee considers it necessary to be fair and impartial in making distributions.

The trustee must consider all relevant factors to the trust and beneficiaries as well as certain restrictions listed in the statute and not all trusts or adjustments will qualify under the statute.

Conversion to a Unitrust (ORS 129.225)

Another option available to the trustee under the new act is the conversion to a Unitrust. A Unitrust is one that pays out a fixed percentage of the trust each year to the income

beneficiaries regardless of actual income earned. In the case of the Oregon statute, the stated percentage is four per-cent of the fair market value of assets. Additionally, the four per-cent payout is not reduced by fees and other trust expenses, as it would be without the Unitrust characterization.

The act dictates the procedure for conversion to the Unitrust. The trustee or any beneficiary(s) must file a petition with the court requesting a court order directing the conversion.

In times of low interest rates, income assets may not create the income anticipated by a trustor who created the trust when interest rates were high. The Unitrust allows the trustee to diversify and invest for total return while still providing a reasonable income for the income beneficiary regardless of how the market is behaving.

It should be noted that while a trust is considered a Unitrust, the power of adjustment is not available. However, the court may be petitioned to reconvert the trust back to its original form at any time.

Judicial Review (ORS 129.220)

Another feature provided by the statute is a limit upon judicial review and control. The court may not second guess the trustee's decision unless it can be shown that the trustee abused his "fiduciary discretion." My

interpretation of this is that if the trustee does his homework and makes a reasonable decision, the court won't change it based solely upon the unhappiness of the beneficiaries. This is a nice bonus for trustees who are worried about litigious beneficiaries just waiting for them to miss dotting an "i" before they go running off to their favorite litigator.

Conclusion

The Oregon Principal and Income Act is filled with other helpful guidance for the trustee in addition to those discussed here. These powers give extraordinary latitude to the trustee not seen

before in the "trust world." Occasionally, market conditions will differ from what those who created the trust anticipated. The power to adjust as well as the power to convert to a Unitrust gives the trustee the power to "fix" distributions to match better what the trustor intended at the time of construction. As trusts and the lawyers who draft trusts become more and more sophisticated, this act will most likely be used less and less. However, I believe it will prove to be another useful tool to allow the Trustee to both perform his fiduciary duty and to keep the spirit of the Trustor's intent alive.

The Oregon Uniform Principal and Income Act is a recently enacted statute in Oregon that among other features, gives trustees alternatives to the language provided in a trust when making distributions to beneficiaries. This act intends to rectify problems that have become knotty issues in the administration of trusts.

It is not uncommon to come across trusts that were written relevant to the market conditions of the time without language allowing for changes in that market. For example, you may have a trust that was written in a time of high interest rates or other circumstances, or one that did not foresee the recent decline of interest rates and therefore the net income produced by these trusts. The result is an unintended reduction in the income distributed to net income beneficiaries. What is a trustee

K. William Gibson Arbitration/Mediation Statewide

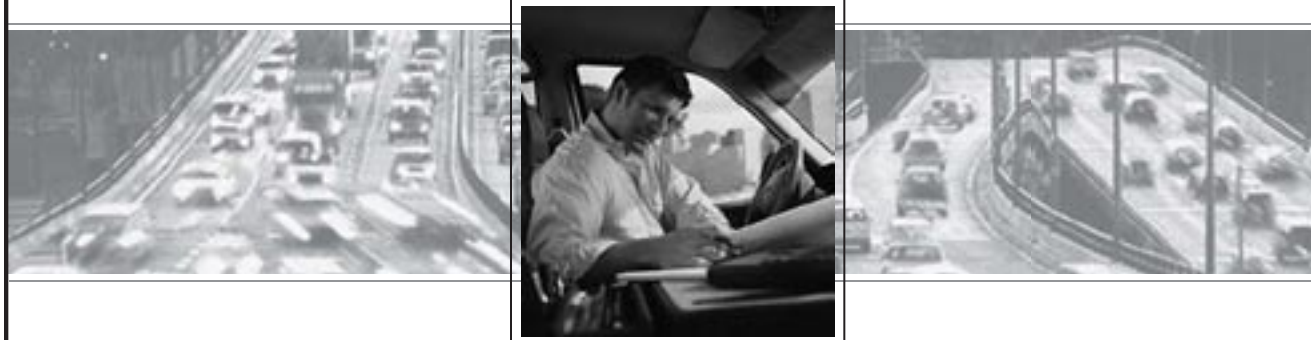


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The First Notch

By Michael Dwyer, Dwyer and Miller and MBA Court Liaison Committee Chair.



for his witnesses. At home in bed his mind raced – *Don't forget to establish venue!*

He was back downtown by five. After rehearsing his opening, he met with the Loss Prevention officers who had witnessed one guy taking skylights from the back of the store to the front on a flatbed, where he handed them off to the defendant who tried to make a no-receipt return of the merchandise. It had worked the day before, but on day two they foiled the scheme. Menashe's job: to prove the defendant had the requisite intent for theft.

He had never seen or conducted a *voir dire*; fortunately, he had watched *The Runaway Jury* with John Cusack and Gene Hackman. To establish rapport, he told the jury he had not done this before. His instincts, however, belied rookie status. Knowing the female manager of an Izod store would probably get bumped by the defendant, Menashe cleverly examined her about the problems of store theft. "Every penny stolen gets passed on to the customer," she said, her words hanging in the courtroom long after she was excused.

Following his intuition, he threw away his four-page opening statement and simply spoke to the jury. They nodded, laughed, made eye contact and paid attention.

He milked the Loss Prevention officers on direct, getting not only their observations but also their opinion that this scheme

was consistent with the familiar pattern of Return Fraud at Home Depot. Then he rested his case.

And began to sweat. Menashe felt the defendant, ably represented by Joe Hagedorn, testified well. A soft-spoken man in his mid-thirties dressed in jeans and sweater, the defendant testified that he met the other guy (who got away) on the MAX train the day before. That man asked him to be a day laborer and meet him at the store. He had no idea he was being asked to engage in thievery. It helped that the defendant testified on direct that he had been convicted of sexual assault, even though his lawyer had fought successfully *in limine* to exclude mention of the nature of the felony.

Menashe went to work poking holes in the defendant's story. Two days in a row? Same pattern? No receipt? Don't even know the other guy? Never did the work for which he was hired?

In closing Menashe led the jury through the elements of the crime. For what seemed like ten seconds in the middle of his closing, his mind went blank. He sensed he was rambling, but snapped out of it. When Hagedorn listed the reasons his client wasn't a thief, and asked the jury to ponder what criminal was dumb enough to commit what was alleged, Menashe was convinced he had lost.

Menashe rose again and argued this wasn't a scheme for fools; it was the Perfect Crime. The store

was an easy mark and they had been successful once already. When he sat down he felt he had saved face but was certain to lose.

The jury was out twenty minutes. Menashe ran upstairs to the DA's office and proudly wrote the word "Guilty" on the board next to his case. He shared his war story, blow by blow. "It was like high school after a fight or a big game," he says about the rush.

Exhausted, he went back to his law firm and told his father. Shawn says Al Menashe, a former MBA President, has always

supported him. But fresh off his jury win, Shawn couldn't resist one gentle dig. "So, Dad, what's *your* record in jury trials?" he asked his father, who has tried scores of domestic relations cases but never one to a jury.

Menashe's tenure with the DA program has ended, and with his return to family law it is unlikely he will be putting his undefeated record in jury trials on the line. But one thing is clear: he isn't likely to forget his first one anytime soon.

For a lawyer there may be nothing more terrifying and exhilarating than that first jury trial. As Shawn Menashe knows.

An '03 UO law school graduate, Menashe can most often be found in his father's law firm quieting the volatile emotions of divorcing clients. But this fall he participated in the valuable *DA For A Day* program, and donned the garb of County Prosecutor for one day each week. Recently, he stood before a jury for the first time.

The night before trial he brought Thai food back to the office and dug into the file. The case involved a scheme to return unpurchased merchandise to Home Depot for store credit. Figuring preparation would compensate for his lack of experience (he had tried maybe seven cases to the bench), Menashe worked past midnight researching evidentiary issues and typing *voir dire* questions, his opening statement and questions

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Meyer & Wyse, LLP, is pleased to welcome Nick Fish back to the practice of law following his recent excursion into the world of politics. Nick will continue his 17 years of practice in the field of labor and employment law.



We are also pleased to welcome David Bean as our new associate. David will continue his family law practice, and will develop a general litigation practice as well. David graduated from Northwestern School of Law of Lewis & Clark College.

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A Century of Service

The MBA's 100th anniversary celebration planning is underway; the main committee and subcommittees have been formed, although there are openings for more members. If you are interested in joining a committee, please contact Judy Edwards at 503.222.3275 or judy@mbabar.org.

The history subcommittee is reviewing old photos and other materials in the MBA's meager archives and has begun to debrief former MBA leaders. As you can see in the photo (right), committee members are enjoying their work. We plan to interview past presidents and others to help fill in the gaps in our historical knowledge.

We are looking for all possible sources of information about the MBA for these past 100 years. If you know of people we should talk to or if you have anything, including anecdotal information, event programs, photos, articles of historical value to the MBA, please contact Judy Edwards.

Right: 100th Anniversary History Subcommittee members Diane Rynerson, Carol Hawkins, Chair Don Marmaduke, Fred Leeson, Katherine O'Neil, Luke Lefler and Herb Anderson



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