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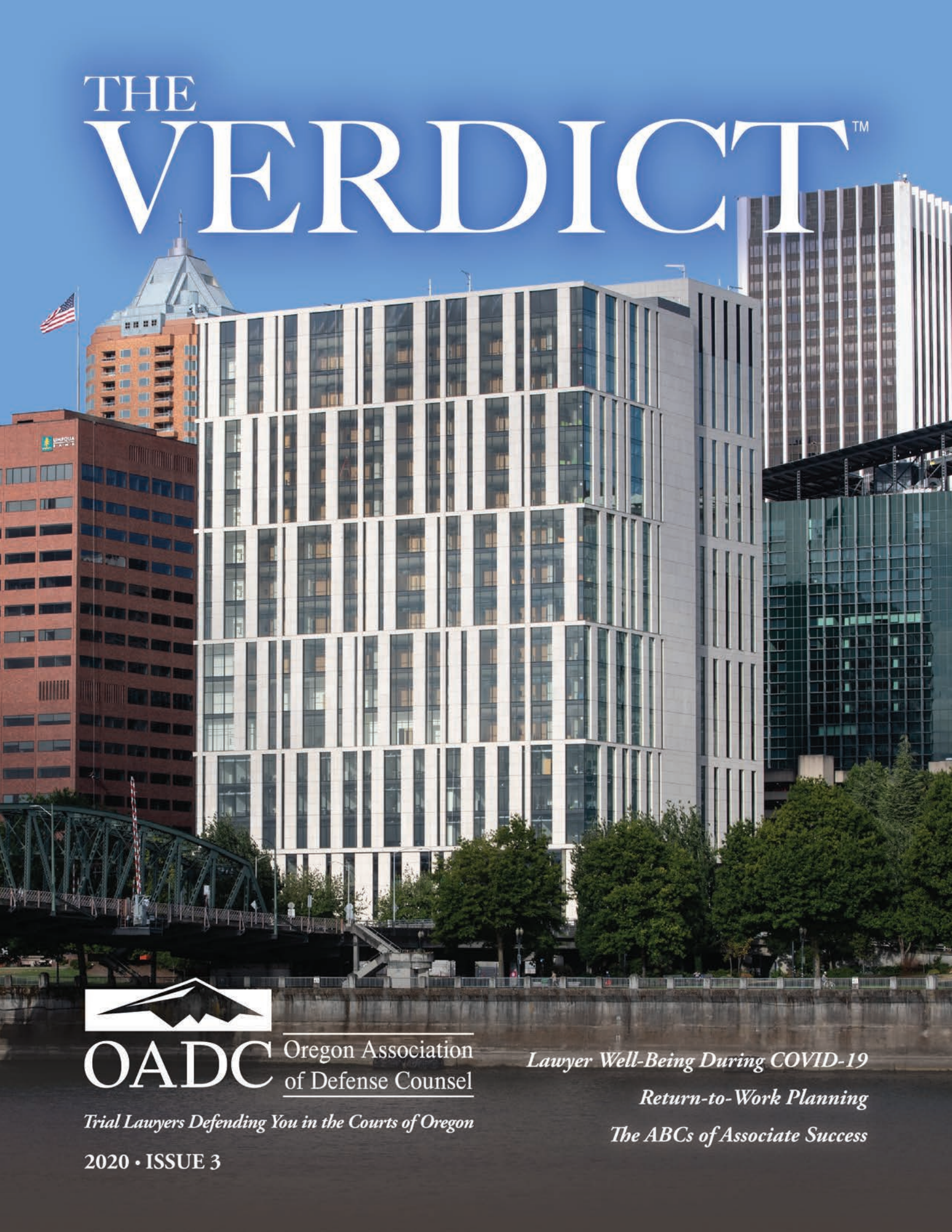

OADC Oregon Association of Defense Counsel

Trial Lawyers Defending You in the Courts of Oregon

2020 • ISSUE 3

Lawyer Well-Being During COVID-19

Return-to-Work Planning

The ABCs of Associate Success

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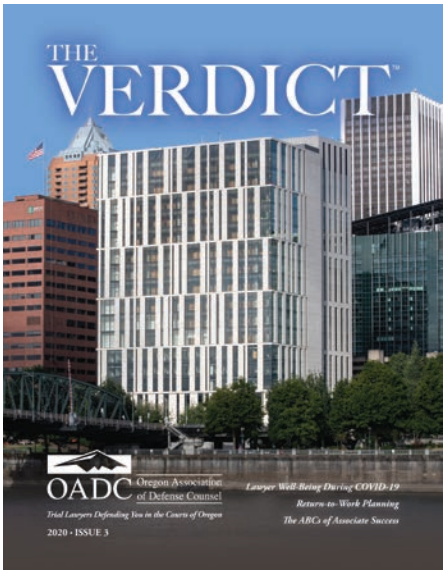


The Verdict™
New Multnomah County Courthouse opens October 5, 2020 at 1200 SW First Avenue, Portland
(Photo courtesy of Motoya Nakamura, Multnomah County)

PRESIDENT'S MESSAGE

A message of ENCOURAGEMENT

Lloyd Bernstein, Bullivant Houser Bailey

While our individual experiences are different, we are all impacted by these unprecedented times. With so much coming at us over the last several months, I wanted to use this space to share some words of encouragement. I thought this poem conveys the message best:

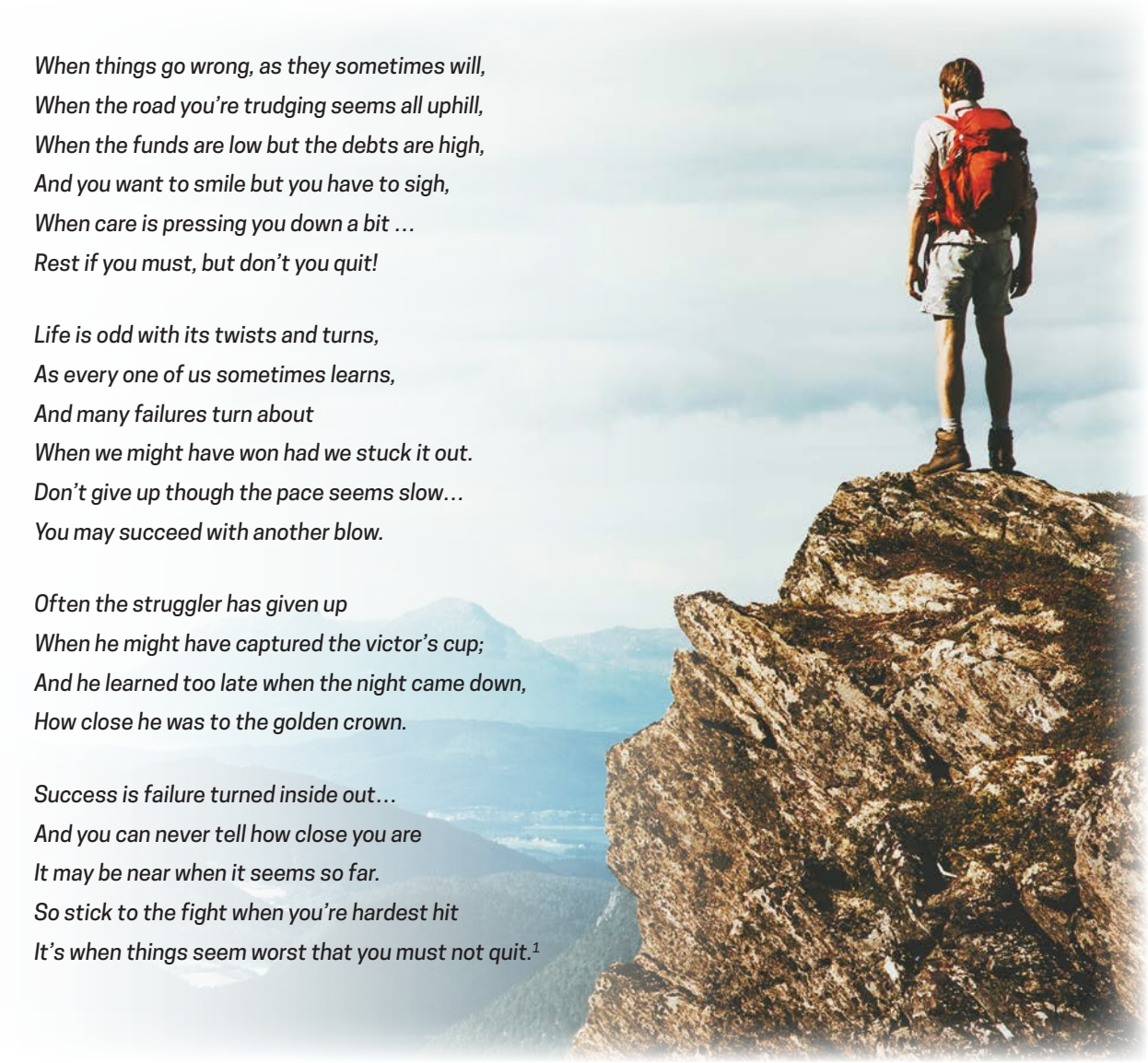
LLOYD BERNSTEIN

When things go wrong, as they sometimes will,
When the road you're trudging seems all uphill,
When the funds are low but the debts are high,
And you want to smile but you have to sigh,
When care is pressing you down a bit …
Rest if you must, but don't you quit!

Life is odd with its twists and turns,
As every one of us sometimes learns,
And many failures turn about
When we might have won had we stuck it out.
Don't give up though the pace seems slow…
You may succeed with another blow.

Often the struggler has given up
When he might have captured the victor's cup;
And he learned too late when the night came down,
How close he was to the golden crown.

Success is failure turned inside out…
And you can never tell how close you are
It may be near when it seems so far.
So stick to the fight when you're hardest hit
It's when things seem worst that you must not quit.[1]



Please feel free to reach out to OADC if you need assistance navigating through the challenges to the practice of law being thrust upon us all. If we cannot help, we will do our best to help you find the resources that can. Above all, remain positive, stay connected and be safe.

Endnote

1 Don't Quit, by Edgar A. Guest.

The Oregon Association of Defense Counsel State Political Action Committee (PAC)

The Voice of the Civil Defense Lawyer

The Oregon Association of Defense Counsel works to protect the interests of its members before the Oregon legislature, with a focus on:

- Changes in civil practice and the court system
- The judiciary and trial court funding
- Access to justice

Your contribution to the Oregon Association of Defense Counsel State PAC will support OADC's efforts in legislative activities and government affairs.

The Oregon Association of Defense Counsel has a comprehensive government affairs program, which includes providing effective legislative advocacy in Salem. We need your help and support to continue this important work. All donations to the OADC State PAC go to directly support our efforts to protect the interests of the Civil Defense Lawyer.

To make a contribution please contact the OADC office to receive a donation form at 503.253.0527 or 800.461.6687 or info@oadc.com.

Return-to-Work Planning—A Constant Evolution

Kjersten Turpen and Elizabeth White
K&L Gates

As workplaces—whether they be offices, retail shops, or restaurants—continue to ease restrictions put in place due to COVID-19 and settle into a new way of operating, employers are getting used to balancing the need for productivity with the paramount goal of employee safety.


KJERSTEN TURPEN

Counsel can advise their employer clients to take a number of measures to set them up for success and decrease the chances of liability later. But the official guidance can be confusing and overwhelming, especially because it comes from multiple sources. Oregon Governor Kate Brown, for example, set out a multi-phase framework to reopen the state that relied on a number of metrics.[1]


ELIZABETH WHITE

At the same time, the Centers for Disease Control and Prevention (CDC) issued flowcharts to guide reopening decisions for workplaces and restaurants.[2] Moreover, the guidance —which may look different from state to state and even county to county—is likely to change as the public health crisis evolves and as the nation waits to see how the addition of the annual flu virus in the fall will impact COVID-19 cases.

Experts have likened the reopening of society to a dimmer switch or car brakes, with limited reopening likely to be followed by further restrictions and even shutdowns on a cyclical basis. It is therefore essential that counsel help their clients keep up with the latest guidance and that employers maintain flexibility as the situation evolves. Among other things, employers should recall what worked and what did not during the initial shutdown, and maintain a list of needed supplies or resources in case of further stay-at-home orders later in 2020 and beyond.

Employers formulating return-to-work plans will also need to update their workplace health and leave policies. Counsel should work closely with employers during this process, which should take into account the possibility of further rounds of closures and reopenings.

Health policies in the workplace

Employers must remember that they are subject to the Americans with Disabilities Act (ADA) and Section 501 of the Rehabilitation Act. COVID-19 does not change an employer's obligation to comply with these laws, though some rules are being relaxed in light of the pandemic. (Note that "covered employers" under the ADA include those with 15 or more employees, including state and local governments. The ADA also applies to employment agencies and labor organizations, and its nondiscrimination standards apply to federal-sector employees under section 501 of the Rehabilitation Act. Oregon's disability law, ORS 659A.103 *et seq.,* applies to employers of six or more employees.)

Most employers know they should encourage employees to practice good hygiene and maintain social distancing as workplaces reopen. If possible, employers should stagger schedules so the space is less crowded and also prohibit communing in areas like office kitchens and pantries.

U.S. Equal Employment Opportunity Commission (EEOC) guidance states that employers are permitted to require the use of masks, gloves, or other personal protective equipment (PPE) at work.[3] Employers are also permitted to administer COVID-19 testing to employees before they enter the workplace and to measure employees' body temperature (though EEOC notes that those with COVID-19 do not always have a fever, and therefore such information may be of limited use).[4] Of course, employers who do implement testing or temperature checks must not discriminate on the basis of an employee's race, ethnicity, or country of origin. The tests should be administered as uniformly and as privately as possible. Employers should provide PPE for those responsible for screenings, if possible, and use social distancing and barriers or partitions to reduce the risk of transmission. In addition, employers must handle these test results in accordance with federal and state privacy laws, which means maintaining them, like all medical records, as confidential records separate from general personnel records.

In the event of illness, sick employees should be required to stay home and return to the workplace only in consultation with their healthcare providers and in observance of the CDC criteria governing home isolation.[5] In addition, employers should consider implementing policies for

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employees who embark on personal travel, including requiring them to work from home for a limited time upon their return.

Documentation

Employers should work with counsel to document all steps taken to address the COVID-19 crisis, including the sources of guidance followed. Proper documentation is important in the event of later claims or litigation alleging discrimination or unsafe working conditions in connection with COVID-19. While some states have passed civil immunity laws for employers and businesses, and both the Oregon Legislature and the U.S. Congress are considering similar measures, employers should not count on immunity against claims that they were negligent in exposing employees or customers to COVID-19. In Oregon, a bill providing immunity may be considered the next time the legislature meets.

State and federal investigations

Employers should also be aware of the potential for state and federal investigations. The Occupational Health and Safety Administration (OSHA) has opened hundreds of COVID-19-related inspections at the federal level, and state attorneys general and other state enforcement agencies continue to initiate their own workplace safety inquiries and investigations. These investigations will likely continue, particularly where outbreaks occur. Employers should continue to be aware of compliance obligations and should continue to develop, implement, and monitor the measures discussed above to minimize the risk of enforcement actions and to create a safe working environment for employees.

Conclusion

The current circumstances demand that employers and their counsel be nimble and remain abreast of the rapidly changing legal landscape. And although the guidance surrounding the reopening of the economy is in flux, there are general rules of thumb that employers can and should follow in implementing return-to-work plans. Those include providing a safe workspace consistent with the above laws and regulations, allowing flexible schedules and remote work where possible, and keeping a record of measures taken in the unfortunate event of later claims or litigation. These fundamentals are key to emerging successfully from the pandemic.

Endnotes

1 *Building a Safe & Strong Oregon,* Oregon.gov, https://govstatus.egov.com/reopening-oregon (last visited Oct 15, 2020).

2 *Businesses and Workplaces,* Centers For Disease Control And Prevention (Sept 2, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html.

3 *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,* U.S. Equal Employment Opportunity Commission (Sept 8, 2020), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

4 *Id.*

5 *Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19),* May 2020, Centers For Disease Control And Prevention (May 6, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html.

Law in the Time of Corona: Lawyer Well-Being During COVID-19

Jack Scholz
Hart Wagner

There's no question the COVID-19 pandemic has had an adverse impact on mental health across the country, and the lawyer population is no exception. With the uncertainty of a deadly virus, on top of social-distancing measures and a looming economic recession, lawyers, like everyone else, are feeling the strain. In fact, a nationwide survey conducted this spring confirms that lawyers are struggling with mental health issues as a result of the COVID-19 pandemic.[1]


JACK SCHOLZ

The legal profession's attention to lawyer well-being is nothing new. Over the past few years, bar associations across the country, including in Oregon, have been closely studying lawyer well-being in an effort to increase wellness within the legal community. In February 2016, the American Bar Association (ABA) and the Hazelden Betty Ford Foundation released a report in the Journal of Addiction Medicine titled *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys.*[2] The report included the findings of the first-ever nationwide study of lawyer substance use and mental health. The report found, among other things, that lawyers experience problematic substance abuse and mental health distress at a higher rate compared to other professional populations.

In August 2017, as a result of the ABA study, the National Task Force on Lawyer Well-Being (Task Force) released its own report titled *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change.*[3] In that report, the Task Force notes that "to be a good lawyer, one has to be a healthy lawyer," and it emphasizes the growing need for lawyer well-being. The Task Force further notes that lawyer well-being is part of a lawyer's ethical duty of competence, and a lawyer's ability to make healthy, positive work/life choices will assure not only individual quality of life, but also responsible decision-making for clients.

In uncertain times like these, now more than ever it is important for lawyers to be cognizant of their own well-being, in addition to that of their colleagues. While every law firm and bar association should promote well-being activities that cater to the needs of its members, the Task Force recommends that lawyers focus on six specific areas to improve well-being: physical health, emotional health, social connections, spirituality, intellectual or creative endeavors, and occupational pursuits. Fortunately, even in the time of COVID-19, lawyers can engage in activities within these six areas.

Physical health

We know that all lawyers should engage in regular physical exercise to benefit their physical, mental, and emotional health. Furthermore, everyone can benefit from a healthy diet and sufficient amounts of sleep. While much of society's focus is on the immediate threat of the COVID-19 pandemic, attention to preventative health-care measures, such as regular visits with a primary care physician (by videoconference, where available), will help to ensure lawyers' long-term physical health. Certainly, members of the legal profession, like the general public, enjoy certain addictive substances such as alcohol and caffeine, and the responsible use of these substances will further promote long-term health.

Emotional health

This is an emotionally challenging time for everyone, and lawyers should recognize the increased importance of identifying and managing mental and emotional stressors. Lawyers should engage in whatever activities help them manage stress, anxiety, and depression. This could include a physical activity, spending time with friends and family, or a creative hobby. Most importantly, lawyers should know when to seek help if they need it. Thankfully, all Oregon lawyers have access to the Oregon Attorney Assistance Program, administered through the Oregon State Bar, which includes confidential counseling services and other career development programs for lawyers, judges, and law students.[4]

Social connections

Even in this era of quarantine, lawyers should strive to develop a sense of connection and maintain a support network while also contributing to

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our non-professional groups and communities. Social-distancing restrictions do not appear to be going away any time soon, and social connections will remain a challenge for quite some time. Fortunately, video-conferencing technology has enabled us to maintain these relationships with family, friends, colleagues, and clients, albeit in a new format.

Spirituality

The Task Force defines spirituality as "a sense of meaningfulness and purpose in all aspects of life." Spirituality is unique to the individual, and it can include worship through an organized religion, meditation, or simply going for a walk. Across the country, people are getting creative with spiritual activities, which now include online church services and yoga classes. No matter what the activity, all lawyers can benefit from a spiritual connection.

Intellectual or creative endeavors

All lawyers should engage in continuous learning and the pursuit of creative or intellectually rigorous activities that foster personal development. Although stay-at-home orders have prevented us from engaging in most group activities, there are many hobbies, such as reading, making music, and cooking, that can be pursued independently or with family.

Occupational pursuits

Finally, with social-distancing restrictions in place, professional development can be a particular challenge. Many of us have spent months working from home, and even with brick-and-mortar offices beginning to re-open, there are modifications, such as closed doors and other physical barriers, that limit social interaction. It will be a long time before we return to the world of coffee dates, networking receptions, and live continuing-education seminars. Nonetheless, lawyers should continue to engage in professional development wherever possible, whether it occurs through a video conference or a simple phone call or email to colleagues.

This year has been a difficult time for everyone, and we have a long road ahead. Bar associations, including ours, continue to promote well-being, and these efforts have never been more important. In select ways, well-being is also easier to achieve under quarantine, with many employers providing more flexible work schedules. As we strive to re-imagine our practices in the age of COVID-19, we must not forget to prioritize wellness in our professional and personal lives.

Endnotes

1 *New Survey of Law Firm Associates Finds Job Security and Cost-Cutting Measures the Top Concerns Amid COVID-19 Pandemic,* Major, Lindsay & Africa (May 14, 2020), https://www.mlaglobal.com/en/knowledge-library/press-releases/new-survey-of-law-firm-associates-finds-job-security-and-cost-cutting-measures-the-top-concerns-amid-covid19-pandemic.

2 Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys,* 10 Journal of Addiction Medicine 46 (2016), *available at* https://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx (last visited Oct. 15, 2020).

3 National Task Force on *Lawyer Well-Being, The Path to Lawyer Well-Being: Practical Recommendations for Positive Change,* (Aug. 14, 2017), http://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf.

4 More information is available at www.oaap.org.

The ABCs of Associate Success

Christine Sargent
Littler Mendelson PC

Kjersten Turpen
K&L Gates

Learning how to practice law is no easy feat, and navigating the ins and outs of associate expectations in a law firm can be just as challenging. While there is no one-size-fits all formula, here are 26 tips for associate success listed from A to Z.


CHRISTINE SARGENT

Absorb the facts of your cases. Associates are often tasked with becoming familiar with the facts of their cases, as well as clients' businesses and industries, before diving into the substantive law involved in a case. An associate who can craft a clear and accurate narrative for the client and partner will be a star.


KJERSTEN TURPEN

Bill better. The reality is that the ability to consistently and accurately track, enter, and finalize your time is one of the most important parts of this job. Learn how to improve billing entries by reviewing pre-bills and the final bills that are actually sent to the client.

Calendar everything. Use a paper calendar, your phone, your computer, or all of the above to track deadlines, meetings, and other appointments, both personal and work related.

Delegate work where appropriate. If a task is not billable and can be easily delegated to your assistant, do it. It will save valuable time and help develop a relationship with some of the most experienced members of the firm.

> Zero in on your goals. If your ultimate goal is to make partner, take the necessary steps to make that possible. If your goal is to start building a client base, network and meet with the experts, i.e., firm rainmakers. If your goal is to simply meet every deadline and produce quality work product, focus on that.

Engage in the legal community outside of the firm. Oregon is a small legal community. Reputation matters.

Find a mentor. Make efforts to attend bar association and law school alumni events where you can meet someone whose career you admire. Meet with them regularly for coffee or lunch. A number of lawyers in the local community genuinely enjoy connecting with newer attorneys. Taking the time to connect with someone who can sponsor your success and answer your questions is extremely worthwhile.

Gift yourself a weekend or week away a few times a year. Having an event to look forward to that is not work related can provide valuable motivation during crunch time.

Health is key. Take care of your physical and mental health. The practice of law is a marathon, not a sprint, and your well-being should be a top priority.

Initiate and be proactive. Instead of saying "Do you want me to write an article?" take the extra steps of thinking of a topic and making specific plans for when and where you want to submit the article. Similarly, if you do not have enough work, speak up and let your colleagues and partners know. Taking initiative on cases when work is slow is also a useful practice. There is work to be done on cases at any given time, even if minimal.

Joke around (when and where appropriate). In other words, do not take yourself too seriously. It is important to keep a sense of humor, and most firms will appreciate the effort. Make efforts to connect and socialize with your fellow associates. Other associates can be great resources both in terms of substantive legal questions and in getting a handle on different partners' preferences. Oftentimes, they'll be able to answer questions about what a particular partner expects if it's not immediately clear.

Know your audience. Are you trying to persuade an arbitrator or judge to rule a certain way? Or are you trying to provide an assessment of a case to a client or partner? The tone will vary significantly depending on the reader. Also, make sure

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you are communicating clearly. Remember that when you are sending an email to a client, they are paying for your thoughts, so avoid making them work to try to understand what you are saying. Deliver a thorough and finished product to both partners and clients.

Log your career development. Keep a document on your computer and update it every time you take a deposition, write an article, speak at a conference, or take the lead on drafting a dispositive motion.

Make time for yourself. Law can be all-consuming. A hobby or volunteer effort can renew motivation and provide valuable perspective in your practice. Plus, it can be fun.

Naiveté and inexperience are expected. Take constructive feedback when offered and run with it. It takes time for a partner to review work product and provide constructive feedback and advice. View that as a gift, and be appreciative of the partner's time.

Over-communicate with the partner on the file. Unless or until you are told otherwise from the partner, make sure you copy them on emails to clients or opposing counsel.

Prioritize business development. Business development can take many forms. Drafting articles and speaking at events are obvious options, but also consider getting involved with leadership in a bar organization or a trade industry group that sparks your interest.

Questions are crucial. As a newer attorney, you are not expected to know everything about the law. Do not be afraid to ask questions, but be thoughtful about the question you are asking. If possible, research first. You can then present a pointed, specific question,

rather than an overbroad, helpless "How do I do this?" There is a reason it is called the "practice" of law.

Return phone calls and emails promptly. Responsiveness is a key component to professionalism in general, but it is especially important when it comes to lawyers. Clients will often place responsiveness at the top of their priorities when choosing an attorney, and it is never too early to get into the habit.

Send follow-up reminders. Add a task to your calendar to send a "check-in" email every time you send a document for signature or review to a client or partner that goes unanswered. People appreciate the follow-up.

Triple-check your work product before sending it to a partner or client.

Understand that partners and clients are busy. Partners and clients have numerous other responsibilities in their work lives. Your cases are not the only ones on a partner's docket.

Value clients' and partners' time as much as your own, or more. Wherever possible, be proactive about submitting drafts to the partner a few days ahead of a deadline to allow time for review.

Witness senior attorneys in depositions, hearings, and client meetings as much as possible. Take advantage of these learning opportunities, even if it means making up the hours at a different time.

[E]Xistential crises are an occupational hazard.

Yield final decisions to the managing attorney on the case. You may disagree with the chosen course of action. While it is important to speak up and let your point of view be heard, the final decision belongs to the partner. Your time will come.

Zero in on your goals. If your ultimate goal is to make partner, take the necessary steps to make that possible. If your goal is to start building a client base, network and meet with the experts, i.e., firm rainmakers. If your goal is to simply meet every deadline and produce quality work product, focus on that.

In sum, remember your ABCs. By following these tips, you can avoid common pitfalls and achieve success as an associate.

Recent Case Notes

Sara Kobak, Schwabe Williamson & Wyatt
Case Notes Editor

Civil Procedure

ORCP 34 B requires substitution of estate within 30 days of notice of death

In *Lacey v. Saunders,* 304 Or App 23 (May 6, 2020), the Oregon Court of Appeals held that "ORCP 34 B is effectively a statute of limitations, operating as the sole procedural means through which a claimant may continue an action that commenced before a defendant's death." Based on that holding, the Court of Appeals concluded that a trial court should have dismissed an action with prejudice because the plaintiff had not substituted the personal representative of an estate within 30 days of the notice of death, as mandated by ORCP 34 B.

Plaintiff initiated an action against the decedent in 2016 and subsequently received notice of the decedent's death on January 8, 2018. More than 30 days later, on February 9, 2018, the decedent's estate moved to dismiss the plaintiff's claims with prejudice on the ground that plaintiff had failed to substitute in the estate within 30 days of receiving notice of decedent's death, as required by ORCP 34 B. In response to the motion, plaintiff sought to substitute in the decedent's estate as a party, and the trial court granted the motion to dismiss without prejudice.

On appeal, the Court of Appeals reversed the trial court's decision not to dismiss the action with prejudice. In reaching its holding, the court analyzed the legislative intent behind ORCP 34 B, which serves as the sole procedural means for continuing an action commenced against a party who dies during the case. Consistent with opinions analyzing ORS 13.080, the precursor to ORCP 34 B, the Court of Appeals determined that ORCP 34 B acts as a statute of limitations that mandates dismissal with prejudice when a plaintiff fails to substitute a personal representative within the 30-day limitations period.

■ ***Daniel Lis***
Buchalter Ater Wynne

Employment

Court of Appeals affirms BOLI's decision to debar contractors for incorrect prevailing wage rate classification

In *Green Thumb Landscape and Maintenance, Inc. v. BOLI,* 304 Or App 349 (May 6, 2020), the Oregon Court of Appeals affirmed the decision of Bureau of Labor and Industries ("BOLI") to debar landscape contractors from receiving contracts for public-works projects for a period of three years as a penalty for intentional violations of the prevailing-wage statute.

The landscape contractors handled a public-works project that required their workers to lay paving stones. The contractors misclassified that work as "Landscape Laborer," which carries a particular prevailing-wage rate. The correct classification for the paving work, however, was "Bricklaying," which was subject to a much higher prevailing-wage rate. BOLI concluded that the extreme penalty of debarment was appropriate based on its finding that the contractors intentionally misclassified the workers.

On appeal, the contractors argued that BOLI's finding of intentionality was not supported by substantial evidence. In affirming BOLI's decision, the Court of Appeals recognized that there are two circumstances under which an employer intentionally fails to pay the prevailing-wage rate: (1) when an employer consciously elects not to determine the prevailing wage; or (2) when an employer knows the prevailing wage but chooses not to pay it. Direct evidence is not required to prove the mental state of an employer. Instead, BOLI may rely upon circumstantial evidence and reasonable inferences.

In reviewing BOLI's penalty, the Court of Appeals framed its inquiry as whether there was "substantial evidence" to support BOLI's finding of intentionality. Although the court recognized that there was evidence supporting the position that the contractors did not act intentionally, the court refused to overturn BOLI's decision because there was sufficient evidence to support BOLI's finding of intentional violations. Such evidence included that the proper prevailing rate was clearly identifiable in documents that BOLI provided to the contractors. Further, the record showed that the contractors

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were familiar with the prevailing-wage rate requirements for public works projects, and an officer of one of the contractors had been investigated and entered into compliance agreements related to other prevailing-wage violations. Based on that evidence, the Court of Appeals affirmed BOLI's decision.

■ ***Daniel Lis***
Buchalter Ater Wynne

Medical Malpractice

No duty on Oregon hospitals to ensure nonemployee physicians provide "quality care" to patients being treated in the facility

In *Towner v. Bernardo,* 304 Or App 397 (May 28, 2020), the Oregon Court of Appeals analyzed whether the record supported a vicarious liability claim against a hospital for the tortious conduct of a non-employee physician, whether plaintiff could state claims for "negligent credentialing" of the non-employee physician, and whether an Oregon hospital has a non-delegable duty to ensure that non-employee physicians provide "quality care" to patients within its facility.

Plaintiff was admitted to the hospital after arriving at the emergency department with severe abdominal pain. Without plaintiff's input, the hospital assigned a non-employee physician to evaluate to plaintiff's case. The physician had privileges at the hospital and visited plaintiff in her hospital room. After evaluating plaintiff's condition, the physician informed plaintiff that she suffered from diverticulitis and would need a laparoscopic colectomy. Plaintiff elected to have the non-employee physician perform the recommended surgery at the hospital.

During the surgery, the non-employee physician lacerated a major blood vessel. The non-employee physician unsuccessfully attempted to repair the damage and caused complications that required plaintiff to move to a different hospital for further treatment. Surgeons at the second hospital discovered significant injuries, including damage to plaintiff's portal vein.

Plaintiff sued the hospital where the surgery was performed, alleging that the hospital had vicarious liability for the non-employee physician's negligence and direct liability for its own negligence. The

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trial court entered limited judgments in the hospital's favor dismissing plaintiff's medical malpractice claims. Plaintiff appealed, raising several assignments of error. In its first assignment of error, plaintiff challenged the trial court's grant of summary judgment in favor of the hospital on the ground that the non-employee physician was not an actual or apparent agent of the hospital and, therefore, the hospital was not vicariously liable. In reversing the grant of summary judgment in favor of the hospital, the Court of Appeals determined that the non-employee physician was not an actual agent of the hospital, but it concluded that a reasonable juror could find that non-employee physician was an apparent agent of the hospital.

In concluding that a reasonable juror could find that the non-employee physician was an apparent agent of the hospital, the Court of Appeals cited evidence that plaintiff had seen the hospital's advertisements and promotional materials touting its surgical services and professional medical staff, including one with an image of the non-employee physician. The court also noted that the non-employee physician was featured on the hospital website, as well as in a photograph in the hallway of the hospital identifying him as "chief of surgery." The non-employee physician also treated plaintiff at the hospital for multiple days, and staff vouched for him and referred to him as one of "our" best. Based on that record, the court concluded that a reasonable factfinder could find that the hospital held itself out as a direct provider of medical care, that the non-employee physician was held out as the hospital's employee, and that the plaintiff relied on those representations. A reasonable factfinder could find that the hospital had a right to control the non-employee physician in his surgery on plaintiff, an additional element required in a vicarious-liability claim where the case arose out of physical injuries.

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After concluding that the trial court erred in granting summary judgment to the hospital with respect to plaintiff's apparent agency theory of vicarious liability, the Court of Appeals evaluated the dismissal of the direct negligence claim against the hospital for "negligent credentialing" of the non-employee physician. The hospital asserted that the negligence claim must fail because it alleged ultimate facts that could be proven, or defended against, only with privileged peer-review materials. The Court of Appeals rejected that argument, finding that "the proof of negligent hiring and supervision allegations does not necessarily require plaintiff to use confidential peer review materials, although those documents may be the most obvious source[.]" The court noted that the hospital's arguments may be successful on "the more developed factual record" of a motion for summary judgment, but that dismissal was not proper under ORCP 21A(8). In reaching that conclusion, the court pointed out that the argument assumed that the hospital in fact had the relevant documents, when it was "at least plausible that plaintiff could seek to prove her allegations based on facts that are no found within [the hospital's] peer review records."

Finally, as to the trial court's grant of the hospital's motion to strike an allegation that a hospital has a non-delegable duty to ensure that non-employee physicians provide quality care to patients treated in the hospital, the Court of Appeals affirmed and concluded ORS 441.055 does not impose such a duty. After analyzing the text, context, and legislative history of ORS 441.055, the court explained that "it may be that hospitals have a nondelegable duty to make credentialing decisions and conduct peer review and therefore cannot outsource those facets of hospital operations to a third party . . .[b]ut it does not follow from the text or context of ORS 441.055 that those structural and organizational requirements contain a latent policy decision" to impose liability on hospitals where non-employee physicians fail to provide quality care. Based on those holdings, the Court of Appeals reversed in part and affirmed in part.

■ ***Emily S. B. Fullerton***
Schwabe Williamson & Wyatt

Public Records

ORS 192.390 requires disclosure of public records more than 25 years old, notwithstanding the exemption for privileged documents

In City of *Portland v. Bartlett,* 304 Or App 580 (June 10, 2020), the Oregon Court of Appeals held that ORS 192.390 requires the disclosure of public records more than 25 years old, even where those records are protected by the attorney-client privilege.

This appeal was taken from a judgment allowing a city to withhold four documents that were sought in a public-records request. The four withheld documents—all created more than 25 years ago—included three city attorney opinions and one memorandum from the then-city attorney to the then-mayor and city commissioners. The city denied defendant's request for the documents, explaining that the documents were exempt from disclosure under ORS 192.355(9)(a) as protected attorney-client privileged communications under OEC 503.

On appeal, the Court of Appeals held that the attorney-client privileged documents are not exempt from disclosure when those documents are public records that are more than 25 years old. In reaching that holding, the court examined the text, context, and legislative history of ORS 192.390. The court concluded that the plain language of ORS 192.390 is capable of only one construction—that is, that "attorney-client privilege *notwithstanding,* public records older than 25 years *shall* be disclosed." This is true especially in light of ORS 192.390's specific exemption for certain enumerated documents, which does not include attorney-client privileged documents. The court also reasoned that OEC 503 and the public-records law work in harmony with each other because OEC 503 provides that privilege is maintained and that ordered disclosure of public records does not constitute a waiver of the privilege.

■ ***Erin Forbes***
Schwabe Williamson & Wyatt

Recreational Immunity

Recreational immunity applies to land subject to public-use and public-trust doctrines

In *McCormick v. State,* 366 Or 452 (May 21, 2020), the Oregon Supreme Court broadly interpreted the word "permit" under Oregon's recreational immunity statute, ORS 105.682, to encompass land upon which the public already may make recreational use through the public-use and public-trust doctrines.

Recreational immunity protects landowners from damages claims for injuries related to public recreational use allowed on their property. Immunity applies when the landowner directly or indirectly permits a person to use the land for recreational purposes. The Oregon

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Supreme Court held that "permits" means to "tolerate" or to "make possible," even in instances where a landowner may not be able to prohibit recreational use. In so holding, the court clarified ORS 105.682's broad scope in providing recreational immunity and in furthering the legislature's vision of encouraging recreational use of land.

This case began after plaintiff was seriously injured after diving off a pier at Lake Billy Chinook. Mostly surrounded by Cove Palisades State Park, Lake Billy Chinook is accessible via state roads and day-use areas in the park. Plaintiff brought a personal injury action against the state after his diving accident, claiming that the state's negligence with respect to boulders below the water adjacent to the pier contributed to his injuries.

The state moved for summary judgment, asserting that it was entitled to recreational immunity. The state argued that it was an owner of the land where plaintiff was injured, it permitted the public to use the land free of charge for recreational purposes, and plaintiff entered the land for a recreational purpose. Setting up a clash between the public-use and public-trust doctrines with the recreational immunity statute, the plaintiff argued that he already was entitled to use the land and did not need the state's permission either "directly or indirectly" to use the lake because Lake Billy Chinook sits on public land. Based on that argument, plaintiff contended that the recreational immunity statute, ORS 105.682, was inapplicable.

The trial court granted the state's motion for summary judgment, finding that ORS 105.682 does not contain any exceptions for waters that are subject to either the public-trust or public-use doctrine. On appeal, however, the Oregon Court of Appeals reversed and agreed with plaintiff's interpretation of the recreational immunity statute. The Court of Appeals found that the state could not directly or indirectly "permit" the public to use Lake Billy Chinook because the public already had a right to use the lake. Because the entitlement to make recreational use of Lake Billy Chinook already existed, the court reasoned that the state had no ability to "permit" recreational activity within the meaning of the statute. Based on that reasoning, the Court of Appeals held that recreational immunity did not apply in this instance.

The Oregon Supreme Court disagreed. On review, the Supreme Court scrutinized the text and context of Oregon's recreational immunity statutes to interpret the word "permit." In addition to "authorize," the Supreme Court concluded that the term "permit" under the statute also can mean to "tolerate" or "make possible" (the latter of which was significant in this case because the plaintiff admitted he could not practically access the lake without the day-use areas).

The court also looked to the legislative intent behind recreational immunity, noting that the statute serves as an incentive for landowners to hold their land open for recreation, even when the public already has a right to use the land recreationally. To hold in the plaintiff's favor would cause landowners to limit their liability by reducing the availability of their lands.

The Oregon Supreme Court's interpretation of ORS 105.682 means that an owner's ability to "permit" recreational use of land is not contingent upon whether the owner can prohibit that use. The Supreme Court also clarified that recreational immunity applies to all types of land—public or private—including navigable waters, beaches, and land that is subject to easements or prescriptions for public recreational use. In so holding, the Oregon Supreme Court found that the public-trust and public-use doctrines are not absolute, yielding to recreational immunity.

■ ***Jonathan A. Stamm***
Schwabe Williamson & Wyatt

Landlord/Tenant

Oregon Court of Appeals upholds Portland ordinance requiring landlords to pay relocation assistance to residential tenants

In *Owen v. City of Portland,* 305 Or App 267 (July 8, 2020), the Oregon Court of Appeals rejected a challenge to the legality of Portland's recently adopted ordinance requiring residential landlords to pay relocation assistance to tenants after either terminating the lease without cause or increasing the rent by more than 10 percent.

In 2017, the City of Portland adopted an ordinance requiring a landlord to give 90 days' notice to a tenant in order to terminate a lease without cause. The ordinance also requires a residential landlord to pay "relocation assistance" to a tenant where the landlord either: (1) terminates a rental agreement without cause; or (2) proposes a rent increase exceeding 10 percent, and the tenant elects to move out. The ordinance sets the amount of relocation assistance by size of "dwelling unit" as follows: $2,900 for a studio, $3,300 for a one-bedroom, $4,200 for a two-bedroom and $4,500 for a three-bedroom or larger unit. The ordinance also requires landlords to give tenants written notice of their ordinance rights and allows tenants to sue non-complying landlords for damages equaling three months' rent and payment of relocation assistance, as well as attorney fees and costs.

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Plaintiffs in this case were residential landlords in Portland. Plaintiffs filed a declaratory judgment action against the city, contending that the ordinance is expressly preempted by ORS 91.225, impliedly preempted by ORS 90.427, and violates Article 1, section 21, of the Oregon Constitution as it applies to existing leases. The trial court rejected those arguments and dismissed plaintiffs' action. On appeal, the Oregon Court of Appeals agreed with the trial court and upheld the ordinance against the challenges.

First, the Court of Appeals rejected the express preemption argument. ORS 91.225(2) generally prohibits cities from "control[ing] the rent that may be charged" for residential property. Plaintiffs argued that ORS 91.225(2) prohibits laws which have the effect of influencing the rent which may be charged. The court held, however, that the statute prohibits only direct regulation of the amount of rent to be paid to a landlord, which is distinguished from relocation assistance payments from a landlord to a tenant in certain circumstances.

Second, the Court of Appeals rejected that the ordinance was impliedly preempted by ORS 90.427. ORS 90.427 allows a landlord to terminate certain tenancies with less than 90 days' notice (although it has since been amended) and without payment of relocation assistance. In upholding the ordinance, the court reasoned that landlords can comply with both statutes even though the ordinance is less generous to landlords than the statute.

Finally, the Court of Appeals rejected the constitutional challenge under Article I, section 20. That provision of the Oregon Constitution provides that no law "impairing the obligation of contracts shall ever be passed." In rejecting that challenge, the Court of Appeals reasoned that the ordinance is not inconsistent with the constitution because it does not impair existing contractual obligations. Instead, it imposes new obligations under existing contracts.

Finally, the Court of Appeals noted that the judgment dismissing plaintiffs' claims was

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not the proper disposition of a declaratory judgment action. Instead, in such actions, the court's disposition must declare the respective rights of the parties. As such, the court vacated and remanded the judgment so the trial court could enter a judgment stating the respective rights.

■ ***Chester Hill***
Cosgrave Vergeer Kester

Jury Instructions

Oregon Supreme Court announces a new methodology for witness-false-in-part instructions

In *State v. Payne,* 366 Or 588 (July 2, 2020), the Oregon Supreme Court rejected the idea that the witness-false-in-part instruction is disfavored, and it announced a methodology that trial courts should apply when deciding whether to give the instruction.

Both the Uniform Criminal Jury Instructions (UCrJI 1029) and the Uniform Civil Jury Instructions (UCJI 10.04) contain witness-false-in-part instructions. Both instructions are based on ORS 10.095(3). That statute says "The jury, subject to the control of the court, in the cases specified by statute, are the judges of the effect or value of evidence addressed to them, except when it is thereby declared to be conclusive. They are, however, to be instructed by the court on all proper occasions: … (3) That a witness false in one part of the testimony of the witness may be distrusted in others[.]"

The Supreme Court's decision focused on ORS 10.095(3), which applies to both criminal and civil trials. The case involved a criminal prosecution for third-degree sexual abuse. The assault allegedly occurred in the defendant's vehicle.

At trial, a police officer testified about the contents of his police report, which quoted the complainant as stating that she did not attempt to flee the defendant's vehicle because "[t]here is no doubt that if I ran, a strong muscular black man could catch me." At trial, the complainant denied ever describing the defendant as a "strong muscular black man."

Based on the contradiction between the police officer's testimony and the complainant's testimony, the defendant requested the witness-false-in-part instruction. The defendant's theory was that the jury could conclude the complainant had lied at trial about what she said to the police, and her false testimony to the jury on that issue called into question the truthfulness of all of her testimony.

The trial court declined to give the instruction. The Oregon Court of Appeals affirmed the conviction, finding the failure to give the instruction, even if error, was not prejudicial. The Oregon Supreme Court granted review.

On review, the Oregon Supreme Court first rejected the commonly held notion that the witness-false-in-part instruction is disfavored. Most of the decision then addressed the standard of review to be applied on appeal from a trial court's decision declining to give the instruction. That meant deciding whether a trial court's decision is reviewed for abuse of discretion or error of law.

The Supreme Court ultimately held that it would review the trial court's decision for error of law. The court explained that its current practice is to apply an error-of-law standard to a trial court's decision to not give a requested instruction. Applying that standard to a ruling declining to give a witness-false-in-part instruction would be consistent with the practice regarding other jury instructions.

The court then moved to the methodology a trial court should apply in deciding whether to give the instruction. Noting that ORS 10.095(3) says the witness-false-in-part instruction should be given "on all proper occasions," The court scrutinized that wording and ultimately settled on a test for its use. Specifically, the court explained the "proper occasion" for giving the instruction "exists when, considering the testimony and other evidence viewed in the light most favorable to the party requesting the instruction, the trial court concludes that sufficient evidence exists for the jury to decide that at least one witness consciously testified falsely and that false testimony concerns a material issue." *Id.* at 607.

Applying that test to the facts of the case, the Supreme Court held the trial court had erred by failing to give the requested instruction because there was evidence from which the jury could find the complainant had lied about what she told the police. The court also held that the failure to give the instruction was prejudicial and warranted a new trial.

■ ***R. Daniel Lindahl***
Bullivant Houser Bailey

Evidence

Proof-of-loss records submitted by insured lending institution to its insurer were admissible as business records under OEC 803(6)

In *Arrowood Indemnity v. Fasching,* 304 Or App 749 (June 10, 2020), the Oregon Court of Appeals held that proof-of-loss records submitted by a lender to an insurer in a subrogation claim fell into OEC 803(6)'s exception from hearsay for business records.

Defendant took out student loans through a lending institution that purchased an insurance policy to insure its portfolio of student loans, including defendant's loans. The loans, and the corresponding insurance, were eventually purchased by

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and assigned to a different bank. When defendant defaulted on the loans, the bank successfully filed a claim of loss with the insurer. The insurer then filed a subrogation claim against defendant seeking reimbursement of the amount that it paid to the bank. In support of its motion for summary judgment on its subrogation claim, the insurer presented a sworn affidavit from an employee with personal knowledge of the insurer's business practices. The affidavit contained the bill of sale, assignment, and assumption agreements between original lender and the bank, defendant's loan applications, and copies of checks from insurer to the bank showing payment of the claim.

The trial court granted the insurer's motion for summary judgment and denied defendant's cross-motion. On appeal, the sole issue was whether the proof-of-loss records submitted with the insurer's affidavit were admissible as business records pursuant to OEC 803(6) because the records were not originally created by the insurer, and there also was no affidavit from the bank attesting to the reliability of the records.

In reviewing that question, the Court of Appeals affirmed the judgment in favor of the insurer, finding that the proof-of-loss records could be distinguished from other, non-admissible statements (such as those voluntarily given to police officers) because of the circumstances under which they were made. The court noted that third-party statements within business records are an exception from hearsay when: "(1) the third party had a duty to accurately record the information in the regular course of its business; (2) the third party had a duty to accurately report that information to the business whose records are being offered; and (3) the business whose records are being offered adopts and relies upon that third-party information in the regular course of its own business." *Id.* at 758.

In this case, because the original lender and the bank had a legal duty to truthfully provide the proof-of-loss statements within the regular course of business and because the insurer relied upon such statements in its regular course of business, the Court of Appeals held that the statements were admissible. In addition, because defendant never took issue with the truth of the information within the statements or offered evidence to the contrary, the Court of Appeals held that the evidence provided by insurer was sufficient to meet its burden for summary judgment.

■ ***Rosa Ostrom***
Schwabe Williamson & Wyatt

Courthouse Masks and a few *GREAT BIG* thank yous!

To the OADC Membership,

Since the COVID-19 pandemic began, our courts have been working to provide a safe environment for Oregonians to work and participate in proceedings in courthouses across the state.

When it became apparent that face coverings were essential to that endeavor, and that many were arriving at court without them, we appealed to the Oregon State Bar for help. The Oregon Association of Defense Counsel not only answered the call, it led the effort. OADC's leaders coordinated the project, working with other bar groups and in direct, daily contact with our Marshal's office. OADC's members donated thousands of disposable masks and cloth face coverings that were essential to allow us to provide critical services to those in need.

With real gratitude, I want to extend my thanks and the thanks of the Oregon Judicial Department to the Oregon Association of Defense Counsel—your leaders, staff and members—for all your amazing support.

— Sincerely,
Martha L. Walters
Chief Justice

Courthouse Masks and a few *GREAT BIG* thank yous!

Allen Law
Bullivant Houser
Christy Doornink
Connie Elkins McKelvey
Corvallis Sewing Brigade
Deb's Creations
Fitzwater Law
Gordon & Polscer
Hart Wagner
Illa Gilbert-Jones
Janice Morgan
Janet Billups
Judge Claudia Burton
Keating Jones Hughes
Law Offices of Julie D. Elkins
Legal Aid Services of Oregon
LegalEase Consulting
Lindsay Hart
Linn County Sewing Brigade
Lisa Kenn Family Law
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Oregon Department of Justice
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Oregon Trial Lawyers Association
Oregon Women Lawyers
OSB Elder Law Section
Paulson Coletti Trial Attorneys
Portland Mask Project
Reinisch Wilson Weier
Robert Beatty-Walters
Robert G. Dolton Attorney at Law
Rockford Investigations
Saalfeld Griggs
Schwabe Williamson and Wyatt
Sheehan & Sheehan
South Asian Bar Association of Oregon
Sussman Shank
Vicki Smith

All efforts, large and small, were critical to making this project a success, and as a membership OADC should be very proud to have carried this project forward for the Chief Justice and all of our local courthouses.

Thank you to everyone who made this effort a success. In particular, the OADC Board of Directors would like to thank and recognize the personal effort by our past OADC President **Gordy Welborn** who spearheaded a partnership between **Hart Wagner, Keating Jones Hughes, Lindsay Hart,** and a collection of traditionally plaintiff-oriented law firms. Together they collectively donated 30,000 of the nearly 100,000 masks that were donated by OADC members.

Legislative Update

Rocky Dallum, Tonkon Torp
OADC Lobbyist

Any political update is fraught with uncertainty, but summarizing and forecasting political events in 2020 is particularly challenging. The governor and legislators have continuously reacted this year to a myriad of pandemic-related challenges, the dynamic economic environment, and of course, the devastating wildfires last month. At the same time, candidates attempt to conduct campaigns while contending with limited opportunity for public outreach, the macro-level effects of national politics, and rapidly changing public opinion on major issues in our state. With two special sessions behind us this year and an election around the corner, the outlook for the rest of the year and the 2021 Legislative Session is to say the least, opaque.

ROCKY DALLUM

The Oregon Legislature has already convened two special sessions in 2020 and multiple budget meetings, with continued speculation over a third special session later this year. This 1st Special Session in June addressed responses to COVID, police accountability in the wake of the nightly demonstrations and calls for racial justice, and some items left from the incomplete February "short" session. Meanwhile, the legislative "Emergency Board" met regularly throughout the summer to spend federal CARES Act money, causing significant rifts between local governments, the legislature, and the governor's office over how funds should be utilized and allocated.

In early August, given significant reduction in state income tax and lottery revenues, the legislators convened the 2nd Special Session of 2020 to rebalance the state budget. In addition, lawmakers passed several bills related to unemployment to address the continued delay of payments to out-of-work Oregonians. One of the major takeaways following adjournment of the 2nd Special Session was the lack of transparency or public participation as legislators met inside a closed Capitol building and took no public testimony on bills.

September brought more turbulence. The legislature met for its quarterly committee hearings, but by then, the public (and legislators') focus had shifted to wildfire response and preliminary discussion over topics for next year's session. The state economists delivered the surprise of the week by reporting that the projection for the state's biennial budget had improved by around $1.7 billion since the May forecast. While the long-term health of Oregon's labor market and revenue collections is uncertain, the budget news certainly reduces the need to call a special session before the legislature reconvenes in 2021.

As any of us with a television, internet access, or a mailbox know, this is all happening concurrently with the 2020 general election. Undoubtedly, the presidential race will be the biggest factor in this year's election. Voters' response to races down the ballot is highly dependent on geography and the latest current events (which seem to change hourly). Barring some significant surprise, Oregon's Congressional races likely won't bear much intrigue. The secretary of state's race will be critical in Oregon, particularly as the legislature takes up redistricting in 2020, or, if the governor vacates her position.

On the legislative front, the balance of power is unlikely to change, but either party gaining or losing seats could mark big shifts in policy outcomes next year. Republicans are looking to try to win back several open seats on the coast in districts with more Republican and conservative voters where long-serving Democrats are retiring. Democrats are targeting central Oregon, where similarly, several incumbent Republicans represent districts with registration numbers favoring Democrats. Of course, depending on major trends around the presidential election, voter turnout, and a variety of issues, we could always see some surprises in other parts of the state.

The outcome of the election will shape whether Democrats may want to call a third special session. It will also determine whether Oregon Democrats maintain supermajorities and therefore can raise revenue to address longer-term revenue challenges or will require a bipartisan approach. Finally, the presidential election could influence Oregon's leadership, if a new president were to tap current elected incumbents for federal jobs, setting off a chain reaction of open seats. Even after the dust settles, there will be a significant lingering question on how and when Oregon's legislature convenes a special session or even conducts the 2021 session—particularly in light of public health guidelines, constitutional and statutory process requirements and timelines, and the public sentiments over transparency and participation.

Petitions For Review

Sara Kobak, Schwabe Williamson & Wyatt
Case Notes Editor

The following is a brief summary of cases for which petitions for review have been granted by the Oregon Supreme Court. These cases have been selected for their possible significance to OADC members; however, this summary is not intended to be an exhaustive listing of the matters that are currently pending before the court. For a complete itemization of the petitions and other cases, the reader is directed to the court's Advance Sheet publication.

***State v. Ramoz,* S067290 (A163802), 299 Or App 787, 451 P3d 1032 (2019) (en banc). Argument heard Sept. 18, 2020.**

In this criminal case, the state appealed a trial court's order granting a new trial to a defendant under ORCP 64 after the defendant consented to the jury instructions, but the trial court concluded that the instructions were legally incorrect after the jury returned its verdict. On review, the issue is: "May a trial court grant a new trial under ORCP 64 B(1), based on an '[i]rregularity in the proceedings of the court,' if the trial court inadvertently omits the requisite mental state when instructing the jury on the elements of the offense and no one notices the omission until after the verdict has been accepted?"

***State v. Phillips,* S067088 (A165985), 298 Or App 743, 450 P3d 54 (2019). Argument heard Sept. 18, 2020.**

In this criminal action, the Oregon Court of Appeals held that a trial court correctly admitted into evidence, for impeachment purposes under OEC 609, a prior conviction for second-degree assault that originally was entered in 1994 and then entered a second time in 2011 following a retrial after post-conviction relief. The issue on review is: "Whether a prior conviction is admissible under OEC 609 if it originally occurred more than 15 years before the present case, but, because of post-conviction relief resulting in a retrial, the conviction was reentered less than 15 years earlier."

***Lubbers v. Shuba,* S066749. Argument scheduled for Nov. 17, 2020.**

In this original mandamus proceeding, the issue on review is whether the circuit court erred in compelling a non-party former trustee to comply with a subpoena duces tecum and to produce documents containing confidential and attorney-client privileged information between the former trustee and attorneys from whom he sought advice when acting as trustee for various trusts.

***Simi v. LTI Inc.,* S067483 (A168738), 301 Or App 535, 456 P3d 673 (2019). Argument scheduled for Jan. 21, 2021.**

In this workers' compensation proceeding, the Oregon Court of Appeals issued a divided decision. In the majority decision, the Court of Appeals affirmed an order of the Workers' Compensation Board setting aside a decision of an administrative law judge that directed an employer to reopen an accepted claim and that assessed a penalty under ORS 656.262(11)(a). On review, the issue is: Whether "ORS 656.272(7)(c) requires insurers and self-insured employers to reopen a claim for processing upon any finding that an omitted claim is compensable, regardless of the pendency of an appeal or review of that compensability finding."

***Wright v. Turner,* S067882 (A164003), 303 Or App 759, 466 P3d 682 (2020). Oral argument scheduled for Jan. 28, 2021.**

This automobile insurance coverage dispute arises after a second trial on remand following the Oregon Supreme Court's decision in *Wright v. Turner,* 354 Or 815, 831, 322 P3d 476 (2014) (*Wright II*), which held that whether the circumstances of a multi-car collision "establish more than one 'accident' ordinarily will be a question of fact." On review before the Oregon Supreme Court, the issues are whether the Court of Appeals was correct in holding that the plaintiff bore the burden of proving how many accidents occurred and, if

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PETITIONS FOR REVIEW
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more than one accident occurred, how damages should be apportioned to each accident.

***Batten v. State Farm Mutual Auto. Ins. Co.*, S067887. Oral argument scheduled for Jan. 28, 2021.**

In this insurance dispute about uninsured or underinsured motorist (UM/UIM) benefits, all plaintiffs were injured in motor vehicle accidents with an uninsured or underinsured motorist, and each of their insurance policies included a provision that prohibited the insured from recovering UM/UIM benefits from more than one policy for the same injury. The certified question from the Oregon federal district court to the Oregon Supreme Court asks: (1) "Are anti-stacking provisions regarding uninsured and underinsured motorist coverage … enforceable under ORS 742.500 to 742.506?"

***Sherman v. State of Oregon*, S067742 (A167156), 303 Or App 574, 464 P3d 144 (2020). Oral argument scheduled for Jan. 28, 2021.**

In this tort action against a state agency for alleged negligent failure to protect a child from abuse in foster care, the trial court dismissed plaintiff's claim as untimely under the statute of ultimate repose in ORS 12.115. The Oregon Court of Appeals reversed, holding that ORS 30.275(9)—the statute of limitations for the Oregon Tort Claims Act (OTCA)—does not supersede the exception to the statute of ultimate repose for child-abuse claims under ORS 12.117. On review, the issue before the Oregon Supreme Court is: "Does the 10-year statute of ultimate repose in ORS 12.115 apply to claims of child abuse brought against public bodies under the Oregon Tort Claims Act?"

Honorable Brandon M. Thompson

Washington County Circuit Court

A BIOGRAPHY

Inspired by his older brother to join the debate team in high school, Judge Brandon M. Thompson has always had a natural ability to weigh the pros and cons of an issue. A gifted debate team member, he earned a scholarship to the University of North Dakota. Many debates later and after taking second in the nation at the Cross-Examination Debate Association National Tournament in 1996, Judge Thompson finished his undergraduate studies at Fort Hayes State University in Kansas.

When the time came to decide where to attend law school, Judge Thompson, a Seattle native, found Lewis & Clark Law School in the Pacific Northwest to be a natural choice. During law school, he began building his trial skills as a certified law student at the United States Attorney's Office. Upon graduating, he began his career at the District Attorney's office in Multnomah County, where he served for seven years prosecuting misdemeanors, domestic violence and juvenile crimes. During that time, Judge Thompson found it rewarding to stand up for those who did not have the power to defend themselves and to work towards exposing abuses of trust and power, despite the politics that can be involved in those types of cases. Even more rewarding was the chance to see, through those cases, people who had been the victims of crime stand up for themselves.

Judge Thompson continued his trial career as counsel for Farmers Insurance Company, serving in that role for almost a decade. In addition, Judge Thompson served as

a *pro tem* judge for Washington County Circuit Court. In that capacity, he heard civil motions and presided over small claims and eviction cases. While a career as a trial lawyer is not for everyone, being in the courtroom comes naturally to Judge Thompson, and the bench was a natural next step.

Governor Kate Brown announced Judge Thompson's appointment to the Washington County Circuit Court on February 13, 2020. His current assignment is in the juvenile department, where he assists in family issues involving children and juvenile crimes. In this role, his prior experience volunteering at St. Andrew Legal Clinic with low income clients in family law matters and his work with the public at the Beaverton Severe Weather Homeless Shelter provides him with the perspective to approach matters with compassion and equity.

Beyond his position on the bench, Judge Thompson is a federally licensed locomotive engineer, which enables him to pursue his passion for trains. He has been collecting and restoring model trains most of his life. He volunteers for the Oregon Coast Scenic Railroad, a nonprofit organization with a focus on education about the history of railroads in the United States, which involves restoration and operation of steam locomotives.

In addition to contributing to his community, Judge Thompson enjoys spending time with his wife, two children, and two rescue dogs. Judge Thompson enjoys watching his children play sports and hiking with his family.

■ ***Submitted by Christina Ho***
Thenell Law Group

Defense Victory!

Christine Sargent, Littler Mendelson
Defense Victory! Editor
Contributing authors Dylan Hallman, Joel Petersen, Michelle Smigel, and Tessan Wess

Jury Finds *No Respondeat* Superior Liability

On February 20, 2020, Kenneth J. Abere, Jr. and Tessan Wess of Lewis Brisbois Bisgaard & Smith obtained a defense verdict in *Jon Mosley v. Rouge Portland, LLC,* Multnomah County Circuit Court Case No. 18CV58754. Judge Judith Matarazzo presided. Leonard Berman represented plaintiff.

Plaintiff alleged claims against defendant, a night club, for false arrest, battery, and intentional infliction of emotional distress arising from a physical confrontation between a patron who had been ejected from the club and a security bouncer who was on his way to work. Defense counsel asserted an affirmative defense of no *respondeat superior* liability because the bouncer was not clocked in and was not otherwise acting within the course and scope of his employment. Additionally, to the extent there was such vicarious liability, defense counsel argued that the physical contact by the bouncer was undertaken in self-defense.

The jury deliberated for an hour and a half and returned a verdict in favor of defendant. The jury determined there was no *respondeat superior* liability. Because the bouncer was not a named defendant in the suit, the inquiry ended there.

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DEFENSE VICTORY!
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Defense Verdict in Motor Vehicle Accident Trial

On October 31, 2019, Eric Pickard of Allstate Office of Staff Counsel obtained a no-damages defense verdict in *Andy Dean v. Kenneth Lim,* Case No. 17CV53134, a motor vehicle accident lawsuit tried before Clackamas County Circuit Court Judge Jeffrey S. Jones. Kellie Furr and Rebecca Graham represented plaintiff.

On an icy day in January 2016, defendant slid into the rear end of plaintiff's vehicle after braking for over one hundred feet, causing minimal vehicle damage. Defendant admitted negligence for causing the collision. Plaintiff claimed aggravation of a lower-back injury and cervical facet syndrome. Plaintiff sought $485,000 in non-economic damages.

At trial, defense counsel presented testimony of a biomechanical expert who concluded that plaintiff's vehicle was struck at three miles per hour or less. Plaintiff's counsel argued that the biomechanical expert was not credible and that the treating medical providers should be relied upon. Defense counsel argued that plaintiff had exaggerated the severity of the collision and his injuries. The jury found that the defendant's negligence was not a cause of damages to the plaintiff and awarded no damages.

Attorneys' Fees Not Part of "All Appropriate Relief"

In October 2019, Anna Sortun and Megan Reuther of Tonkon Torp obtained a defense verdict in a two-week whistleblower jury trial in *Denise Crosbie v. Asante Ashland Community Hospital, LLC,* Jackson County Circuit Court Case No. 17CV44213. Mark Lansing and

Andrew Wilson represented plaintiff. Judge Timothy Gerking presided.

Plaintiff brought three claims of retaliation under ORS 659A.199, ORS 659A.030(1)(f), and ORS 654.062(5). Plaintiff also brought claims for wrongful discharge and intentional interference with economic relations, but those claims were dismissed before the case went to the jury. Although the elements of the three retaliation claims were essentially identical, the jury returned a defense verdict under ORS 659A.199 and ORS 659A.030(1)(f) but awarded damages to plaintiff under ORS 654.062(5). Following trial, plaintiff filed a petition to recover attorneys' fees and costs, claiming she was statutorily entitled to fees. Defendant objected to the petition on the ground that ORS 654.062(5) does not provide for recovery of attorney fees. The court faced the question of whether the statutory phrase "all appropriate relief" includes attorneys' fees. On January 31, 2020, the court issued a written opinion concluding that ORS 654.062(5) does not give rise to attorneys' fees for a prevailing plaintiff, citing Oregon appellate decisions that have repeatedly stated that attorneys' fees are not recoverable unless a statutory or contractual provision specifically authorizes an award of fees. The case is currently on appeal.

Summary Judgment Granted and Sanctions Awarded in King County Case Involving Negligent Entrustment

On January 10, 2020, King County Superior Court Judge John Erlick granted defendant's motion for summary judgment in *Scott Kemp et al. v. Shane A. Abbott et al.,* Case No. 18-2-13670-9 KNT. Dylan Hallman of Maloney Lauersdorf Reiner represented defendants. Brian Russell represented plaintiffs. Plaintiffs' claims arose out of alleged injuries incurred in a motor vehicle accident. Plaintiff sued the owner of the vehicle that rear-ended them, as well as the owner's friend who was actually driving the vehicle at the time of the accident, alleging that the car owner negligently entrusted his vehicle to his friend.

Plaintiffs' claims against the car owner were based in part on their belief that the car owner was a passenger in the vehicle at the time of the accident. Relying on *Finney v. Farmers Insurance Company,* 92 Wn.2d 748 (1979), plaintiffs sought summary judgment, arguing that there was a presumption that the car owner's friend was his agent at the time of the accident. However, plaintiffs' understanding of the facts was incorrect and the uncontroverted evidence was that the car owner was not in the vehicle when the accident occurred. Moreover, because plaintiffs had been operating under this false belief, they failed to develop any evidence suggesting that the friend was the car owner's agent. On this basis, the car owner filed a cross-motion for summary judgment. The court ultimately agreed with the car owner and dismissed him with prejudice. The court also permitted the car owner to seek sanctions based on plaintiffs' miscitation to *Finney.*

The Scribe's Tips for Better Writing

Dan Lindahl
Bullivant Houser Bailey

Dating Advice: Properly Punctuating Dates

DAN LINDAHL

If my experience is a fair indication, there is considerable confusion about the proper punctuation of dates. The rules are, for the most part, undisputed and uncontroversial—despite the fact they are rarely followed.

When just the month and year are used, there is no comma between the two:

- *Correct:* The election is scheduled for November 2020.
- *Incorrect:* The election is scheduled for November, 2020.

Either "November 2020" or "November of 2020" is acceptable, but the former is preferable because it omits the clutter of the unnecessary preposition "of."

When using a month-date-year formulation, the normal rule is to insert a comma after the year:

- *Correct:* The last Beatles concert was August 29, 1966, at San Francisco's Candlestick Park.
- *Incorrect:* The last Beatles concert was August 29, 1966 at San Francisco's Candlestick Park.

There is, however, an argument to be made that there should be no comma after the year when the month-date-year act as an adjective. In those situations, the second comma can needlessly misdirect the reader to pause when, in fact, the goal is to move the reader forward to the noun.

Consider each of these sentences:

- The court's October 31, 2020 order compelling production of financial records was an unpleasant surprise.
- The court's October 31, 2020, order compelling production of financial records was an unpleasant surprise.

One can argue the first sentence is more effective because the reader moves smoothly from the date to the noun without pausing to consider the purpose of the second comma.

Finally, dates are yet another realm plagued by apostrophe abuse. When referring to decades or centuries, the dominant practice is to omit any apostrophe:

- *Correct:* The 1940s were dominated by the Second World War.
- *Incorrect:* The 1940's were dominated by the Second World War.
- *Correct:* The 1900s are called the American Century by some historians.
- *Incorrect:* The 1900's are called the American Century by some historians.

Association News

New and Returning Members

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

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Bullivant Houser Bailey

Tonyia Brady
Oregon School Boards Association

Elliot Field
Oregon School Boards Association

Leta Gorman
Bullivant Houser Bailey

Chantal Guzman-Schlager
Garrett Hemann Robertson

Jonathon Himes
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