



# MULTNOMAH LAWYER

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## Building Community in a Post-Pandemic World

by Jovita Wang  
MBA President



I still remember one of the first Multnomah Bar Association events I attended when I moved back to Portland to practice law. We were at the downtown Kells location, with the downstairs room packed full of lawyers dressed in suits and dresses. At first, I felt overwhelmed by the constant chatter and the crowd. There were so many unfamiliar faces. Then I specifically remember Valerie Colas, at the time on the board of the Young

Lawyers Section, introducing herself to me and during our chat, she encouraged me to get involved with the YLS. To this day, I remember her warmth and the genuine connection I felt from her, the MBA staff, and other members.

Much has changed in our world since that memory. Thanks to Valerie's leadership as president, we were able to adapt quickly to the uncharted territories brought forth by the pandemic that put a pause to in-person events like the above. Like many companies and organizations, the MBA pivoted to virtual events to support and connect with our members over the past year. Personally, I benefited greatly from the MBA Midsized Firm Partner Roundtable meetings, where I learned how other firms were navigating changing environments and keeping employees engaged.

We live in uncertain and perilous times. Even with the protection of vaccines, the aftershocks of COVID-19 are here to stay. Various inequities in our society, highlighted by the pandemic, remain unresolved. It is disheartening how COVID-19 disproportionately put people of color at greater risk, as they are more likely to live in crowded conditions and work in service jobs that cannot be done remotely, among other factors. Even for those fortunate to work remotely, COVID-19 challenged our mental health. Parents were further strained trying to juggle work along with childcare and remote schooling (which, thanks to the hard work of former president Sarah Radcliffe, we have been learning more from the Working Caregivers Legal Profession Survey conducted by the MBA and OWLS). It is important for our community to recognize the challenges faced by various demographics to strengthen our professionalism and empathy.

Together, we must learn how to embrace our societal changes to move forward and build our community. For instance, an unresolved topic is how to safely "reopen" or conduct in-person events. Not everyone is comfortable or ready yet. As we continue to adapt to the "new normal," our profession will need to learn how to incorporate our virtual world with our physical world. The pandemic

**We live in uncertain and perilous times. Even with the protection of vaccines, the aftershocks of COVID-19 are here to stay.**

has demonstrated that we as lawyers can conduct a fair number of events virtually. Many started to question - do we really need all that facetime? Of course, it can be harder to develop camaraderie virtually. Yet, the upside to virtual events is that they level the playing field by providing opportunities to individuals who otherwise could not participate. These individuals might include parents with young children who need the flexibility offered by virtual meetings or individuals with longer commutes.

Sometimes, virtual meetings - done right and with intention - can provide more opportunities for members to meet new individuals through breakout rooms, instead of the default to sticking to the same group of people at an event (which I have been guilty of doing). Suffice to say, even when the pandemic is over, a mix of virtual meetings and events should continue to allow that flexibility and inclusivity. Do not worry though, I am still very much hoping the MBA can safely start hosting in-person events soon.

Indeed, it is my hope that all members find the MBA to be as welcoming a community as it has been to me, regardless of the format. More than ever, we strive for innovative approaches, fresh ideas, and strong voices. That is why this year I will be hosting a Virtual Listening Session every month in which you can ask me any questions about the MBA, share any concerns or suggestions you have, or just have someone to chat with. These chats will occur on the third Wednesday of every month, from 2 to 3 p.m., with the first one happening on September 15. If you prefer meeting one-on-one or in person, please do not hesitate to contact me regarding how the MBA can improve or better provide value to its members. In return, I promise to engage in mindful listening, accept feedback with grace, and follow through. I hope to see you virtually during one of my chats and I hope in person in the near future.

**As we continue to adapt to the "new normal," our profession will need to learn how to incorporate our virtual world with our physical world.**

### Multnomah County Presiding Court Update

Thursday, September 16, Noon-1 p.m.

Online Participation Only

FREE for Members & Non-Members

Multnomah County Presiding Judge Stephen K. Bushong will present an update on the state of the court and court operations in light of recent developments lifting many restrictions imposed during the COVID pandemic. This seminar is designed for attorneys at all levels of experience and questions are strongly encouraged.

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

Free registration at  
[www.bitly.com/PresidingCtUpdate](http://www.bitly.com/PresidingCtUpdate)

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mba|EVENT

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Wednesday, October 13  
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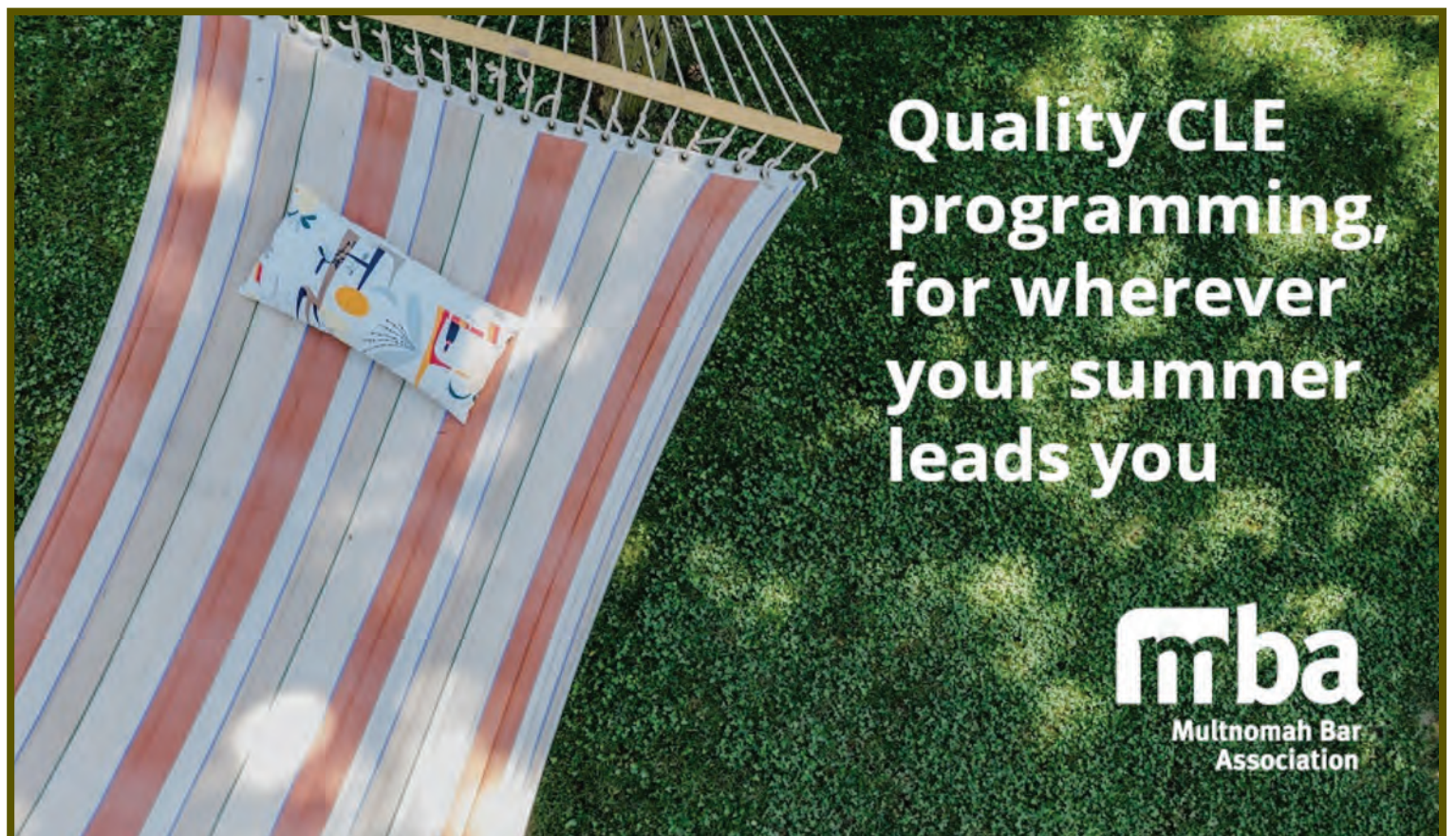
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#### **Annual Family Law Update**

*Approved for two hours of General OSB MCLE credit (Program ID 77858)*

Multnomah County Chief Family Court **Judge Susan Svetkey** is joined by Sarah Bond of Zimmer Bond Fay LLC and **Amy Fassler** of Schulte, Anderson, Downes, Aronson & Bittner for this annual two-hour update. Our speakers provided family law practitioners with information on changes, updates, and reminders regarding Multnomah County Family Court procedures and practices, as well as valuable updates on appellate case law, including recent spousal support cases.

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#### **Mandatory Elder and Child Abuse Reporting**

*Approved for one hour of Abuse Reporting OSB MCLE credit (Program ID 74369)*

This program helps lawyers meet their legal responsibilities as mandatory reporters, while maintaining their ethical obligations to clients.

**Linn Davis** of the Oregon State Bar presents this dynamic and practical discussion on:

- Recognizing elder and child abuse;
- Complying with mandatory reporting requirements; and
- Protecting privilege and confidentiality.

Linn is Assistant General Counsel for the Oregon State Bar and manages the bar's Client Assistance Office. As Assistant Counsel, he regularly fields calls from lawyers on the bar's Ethics Hotline. Linn formerly worked as an assistant disciplinary counsel for the bar and as a prosecutor in New York.

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#### **Mandatory Mental Health and Substance Use**

*Approved for one hour of Mental Health/Substance Use OSB MCLE credit (Program ID 74364)*

A landmark 2016 ABA/Hazelden Betty Ford Foundation national study found that attorneys are nearly twice as likely as the general population to experience problematic alcohol use, and younger attorneys (under 30) are approximately three times as likely. Reported levels of depression, anxiety, and stress were also significantly elevated among attorneys according to the study. Given these realities, the Oregon Supreme Court approved amendments to the MCLE rules requiring mental health, substance use, and cognitive impairment education. The speakers in this CLE talk about when to ask for help for yourself and for colleagues, and how to recognize when someone needs help. You will also hear personal stories of recovery.

This seminar is presented by **Senior Judge Gregory Silver**, Multnomah County Circuit Court, **Mae Lee Browning**, Attorney at Law, **Hugo Gonzalez Venegas**, Oregon State Bar and Harry Wilson, Markowitz Herbold.

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#### **Annual Probate Update**

*Approved for two hours of Oregon Practice and Procedure OSB MCLE credit (Program ID 74370)*

This late-2020 update features **Judge Patrick Henry**, Multnomah County; **Judge Susie Norby**, Clackamas County; and **Judge Janelle Wippen**, Washington County; and **Tim McNeil**, Davis Pagnano McNeil & Vigna LLP. The judges discuss current practices and procedures for each of the tri-county area courts. Tim provides an update of recent case law. This program is a must for all probate practitioners and their staff.

**Purchase now at [www.bitly/AnnualProbateCLE](http://www.bitly/AnnualProbateCLE)**

#### **Guardianships, Conservatorships and Britney Spears**

*Approved for 1.5 hours of general OSB MCLE credit (Program ID 81212)*

The contentious legal battles over Britney Spears' conservatorship in California have sparked a renewed interest in how conservatorships fit into the legal system. Britney's case has lay people and lawyers alike asking what conservatorships are, how conservatorships work, and why conservatorships are established in the first place. In this 90-minute CLE seminar, Jessie Minger, Cable Huston LLP, will provide an overview of conservatorships and guardianships in Oregon, the legal standards for establishing conservatorships and guardianships, and practical information about choosing a professional conservator or a lay person for that role.

Please note that the speaker and the MBA do not endorse any particular position in Britney Spears' case, nor will this presentation evaluate the merits of the case. This presentation is intended to use Britney's case as a starting point to discuss the legal standards, purposes, and practical considerations of conservatorships and guardianships under Oregon law.

**Purchase now at [www.bit.ly/ConservatorshipsBritney](http://www.bit.ly/ConservatorshipsBritney)**

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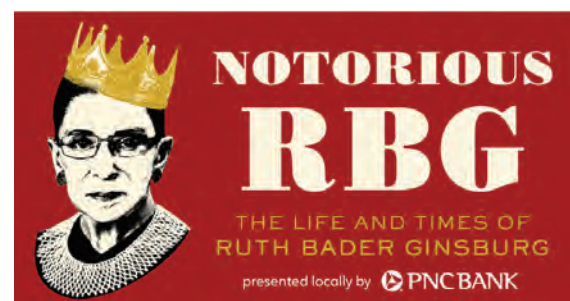


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## RBG-Inspired Event

by Natalie Hedman  
MBA Events Committee

The MBA was proud to present the Notorious RBG Virtual Tour on June 21 via Zoom. This event took everyone in attendance on a virtual tour of The Maltz Museum of Jewish Heritage's Notorious RBG exhibit. This exhibit was a wonderful reminder of the many challenges faced by women and minorities, and how Justice Ruth Bader Ginsburg used her practice of law to effectuate massive cultural change that will never be forgotten or taken for granted by many of us. We are grateful to our sponsor, Morris Stannard & Batalden Family Law PC for helping us make this wonderful opportunity possible.



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The MBA Equity, Diversity & Inclusion Committee invites you to sign the Statement of Diversity Principles. Read and sign the diversity statement and pledge at [www.mbabar.org/diversity](http://www.mbabar.org/diversity).

### Take a Matter that Matters

Sign the MBA Pro Bono Pledge at [www.mbabar.org/probonopledge](http://www.mbabar.org/probonopledge) and commit to taking at least one pro bono case in 2021.

Visit [www.mbabar.org/probono](http://www.mbabar.org/probono) to discover pro bono opportunities in Multnomah County.

### Appellate Courts Clerkship Opportunities

The Oregon Judicial Department is presently accepting applications for its post-graduate clerkship program offered with the appellate courts - the Oregon Court of Appeals and Oregon Supreme Court. The application deadline is September 7. Interested candidates can learn more at [www.bit.ly/appellate\\_clerkship](http://www.bit.ly/appellate_clerkship).

### Noontime Rides

Social distancing will be observed and the rides will continue as scheduled. Short fast rides with hills. Meet at SW corner of Pioneer Courthouse Square (Yamhill & Broadway) between noon and 12:10 p.m., Monday and Thursday. Contact: Ray Thomas, 503.228.5222, with questions, or meet at start.



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## Ethics Focus



by Mark J. Fucile,  
Fucile & Reising LLP

Lawyers often reflexively associate the term “court order” with a “bad” outcome. In several areas of law firm risk management, however, court orders can actually serve important protective functions. The reason is simple: acting consistent with guidance from a court makes it far less likely that the conduct involved will be “second guessed” if a bar complaint or malpractice claim follows later from a disappointed former client or litigation opponent. In this column, we’ll look at three areas in particular where court orders can serve this useful protective function: determining privilege when a

**...acting consistent with guidance from a court makes it far less likely that the conduct involved will be “second guessed” if a bar complaint or malpractice claim follows later...**

law firm client file is subpoenaed; guidance on whether witnesses are represented for purposes of the “no contact” rule; and seeking court permission to withdraw.

### Subpoenas

Subpoenas directed to a law firm’s files put the firm in a difficult position. As a matter of both privilege under OEC 503 and professional responsibility under RPC 1.6, a firm ordinarily has a duty to assert privilege and seek instructions from the client

## Judicial Guidance: When a Court Order is Your Friend

involved when the firm receives a subpoena for the client’s file. Professor Laird C. Kirkpatrick in his leading treatise, *Oregon Evidence*, notes (at 346) that although the lawyer may assert privilege on behalf of the client, the client actually holds the privilege. When the client has died, disappeared or gone out of business without any obvious successor - like a personal representative or a bankruptcy trustee - a law firm is effectively left with a duty to assert privilege but no client to decide whether a file (in whole or in part) should be produced.

In that uncomfortable situation, a law firm can turn to the court in the case involved to seek guidance. Under *Frease v. Glazer*, 330 Or 364, 4 P3d 56 (2000), a client’s file can be submitted to a court under seal for *in camera* review without waiving privilege. The local rules of the court concerned should be consulted for the latest procedures for both sealed filings and *in camera* review. Multnomah County Circuit Court SLRs 5.165 and 5.036, for example, address, respectively, filings under seal and *in camera* review. Having the court - rather than the law firm - decide privilege respects the firm’s duty to the client involved while also protecting it against later assertions that it “guessed wrong.”

### “No Contact” Rule

The “no contact” rule - RPC 4.2 - generally prohibits direct contact with a person represented by counsel on the matter involved. The prohibition is broad and the exceptions have generally been construed narrowly. This combination can present very real practical problems if a lawyer on the other side claims to represent an important set of potential witnesses but you have a nagging suspicion

that the lawyer has overstated that authority. For example, a corporate counsel may claim to represent “all of the company’s employees” or a plaintiff’s lawyer may claim to represent “all of the family witnesses.” In

**The “no contact” rule can be a particularly difficult rule in application and can result in discipline even in the absence of “injury.”**

theory, a lawyer in that position could notice depositions of all of the witnesses involved and then request sanctions if the witnesses disavowed opposing counsel’s representation.

Another path, however, is to seek the court’s intervention in advance. ORS 9.350 allows an opposing party to challenge another attorney’s claimed authority to represent a person. At the same time, RPC 4.2(b) allows direct contact if permitted “by court order[.]” Read in tandem, these provisions would allow the lawyer in our examples to file a motion seeking a determination of opposing counsel’s authority and an associated order permitting direct contact with the witnesses involved.

The “no contact” rule can be a particularly difficult rule in application and can result in discipline even in the absence of “injury.” In *In re Newell*, 348 Or 396, 234 P3d 967 (2010), for example, a lawyer was disciplined under RPC 4.2 for taking the deposition of an occurrence witness who was represented in a separate criminal matter that shared some common facts. Evidence obtained in violation of RPC 4.2 is also subject to potential exclusion. A far safer course when in doubt about

*Continued on page 6*

## Congratulations Kirstin Abel

Bodyfelt Mount is pleased to congratulate Kirstin on her new position as Corporate Counsel for Daimler Trucks North America.

From all of us on the Bodyfelt team, we wish you the very best!



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**Ethics Focus**

*Continued from page 4*

whether a witness is represented, therefore, is to raise the issue with the court.

**Withdrawal**

RPC 1.16(c) obliges lawyers to obtain “permission of a tribunal when terminating a representation” if required by the rules of the court concerned. In addition to meeting that requirement to avoid regulatory discipline and potential court sanctions, a relatively recent Washington Supreme Court decision illustrates another practical benefit of court permission: a defense to a malpractice claim stemming from the withdrawal.

*Schibel v. Eymann*, 399 P3d 1129 (Wash 2017), involved a legal malpractice claim by

former clients against a law firm contending the clients had been harmed by the firm’s withdrawal as trial approached. The law firm, however, had received court permission to withdraw in the underlying matter involved following a hearing at which the former clients raised the same objections that formed the core of their later malpractice claim. In the subsequent legal malpractice case, the Washington Supreme Court held that the court’s order in the underlying matter allowing the firm to withdraw precluded the later malpractice claim as a matter of law. Even if not rising to the level of formal issue preclusion, the fact that a court reviewed a client’s objection and allowed a firm to withdraw nonetheless can produce an important practical barrier to a later claim or bar complaint.

**Pro Bono Volunteers**

Thank you to the following lawyers who recently donated their pro bono services to the Children’s Representation Project or the Volunteer Lawyers Project at Legal Aid Services of Oregon.

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## Around the Bar



Jarell Hunt

### Tonkon Torp

Business attorney **Jarell Hunt** has been elected to the Board of Directors of the Brian Grant Foundation. The Foundation strives to improve the quality of life for those living with Parkinson's disease through exercise and nutrition programs.

Hunt is an associate in Tonkon Torp's Business Department. His practice focuses on contract drafting and negotiation, corporate governance, regulatory compliance, and transactional work - from securities offerings and other capital raises to mergers and acquisitions.



David Hutchinson

### Chenoweth Law Group

The firm is excited to announce two new attorney hires.

**David Hutchinson** joins CLG as an experienced litigator, focusing on business disputes, trust and estate litigation, and construction and real estate disputes. After receiving his bachelor's degree at the University of Oregon, Hutchinson completed his law degree at Syracuse University College of Law in 2014 before moving back to Portland to launch his career as an attorney.



Daniel Lerner

**Daniel Lerner** also joins CLG, bringing his experience as a litigation attorney focused on business and employment related disputes. After receiving his JD

at University of Wisconsin Law School in 2006, Lerner moved back to Portland to practice law, and also spent several years as a volunteer mock trial coach for his alma mater, Lincoln High School.



Nicole Elgin

### Barran Liebman LLP

**Nicole Elgin** has joined the MBA Young Lawyers Section Board of Directors. Elgin has been active with the YLS since 2016, having previously served as chair of the Pro Bono Committee, as a member of the Service to the Public Committee, and as a 3L Liaison for Lewis & Clark Law School. The Barran Liebman team is proud to support Nicole in advancing leadership, networking, professional development, and service opportunities in Oregon's legal community.



Ben Pirie

### Miller Nash LLP

**Ben Pirie** has joined the firm's cannabis industry team. Pirie advises on mergers and acquisitions, negotiating complex contracts and corporate governance, as well as regulatory compliance in the emerging cannabis and hemp industries. Before joining Miller Nash, Pirie was a solo practitioner, where in 2015 he organized the LLCs that received some of the first Oregon Liquor Control Commission (OLCC) retail licenses, and then practiced at a mid-sized, regional firm.

Since the passage of Oregon's Measure 91, Pirie has helped cannabis clients from labs to retailers to obtain and keep every type of recreational marijuana license from the OLCC. He is experienced in structuring complex transactions that provide cannabis brands with access to interstate markets without violating state laws or federal enforcement priorities. Pirie has been recognized nationally for his work in the

cannabis industry as a "Leader in Their Field" by Chambers USA, and currently serves on the executive committee of the OSB Cannabis Law Section.



Christine Slattery

The firm also welcomed attorney **Christine A. Slattery**. Slattery joined the employment team, where she provides advice and counsel on day-to-day employment matters and compliance issues, and conduct workplace investigations and trainings. Slattery previously practiced at national firm Jackson Lewis and then as a sole practitioner for her own employment-focused firm, Slattery Legal Solutions. Slattery is licensed in both Oregon and Washington and holds a certificate from the Association of Workplace Investigators, an organization dedicated to promoting and enhancing the quality of impartial workplace investigations.

Slattery is an experienced employment attorney who counsels Oregon and Washington employers on a wide variety of employment-related issues, including high-risk terminations, employee handbooks, wage and hour issues, family and medical leave, and compliance with state and federal laws prohibiting harassment, discrimination, and retaliation. She also has particularly deep experience conducting independent workplace investigations and trainings on a wide range of issues.



Román Hernández

### Troutman Pepper

Troutman Pepper's Portland Office Managing Partner, **Román Hernández**, was recently named a 2021 Oregon Building Diversity honoree by the Daily Journal of Commerce. The award celebrates diversity, equity and inclusion in the Portland area building industry and environment.

**Tom Marshall**, an associate in Troutman Pepper's Renewable Energy and Capital Projects and Infrastructure practice groups, has been elected to serve on the MBA Young Lawyers Section Board of Directors. An active member of the MBA and YLS since 2016,



Tom Marshall

Marshall will serve on the board during the 2021-24 term.



Ward Greene

### Farleigh Wada Witt

**Ward Greene** has joined the firm as Senior Counsel. Greene has a varied transactional and litigation practice with a focus in commercial law, business reorganization, bankruptcy, collections, employment law and real estate matters. He has represented a number of creditors' committees and debtors in successful Chapter 11 cases, as well as represented corporate and banking clients in general business financing, transactional and corporate matters.

He has been a speaker at the bi-annual Oregon-Washington Uniform Commercial Code Seminar, Northwest Bankruptcy Institute, and numerous MBA and OSB seminars on Uniform Commercial Code, collection law, bankruptcy, real estate financing and lien law.

Greene is the founder of SAGE (Senior Advocates for Generational Equity) and spends much of his time promoting causes which benefit younger and future generations.



Darlene Pasieczny

### Samuels Yoelin Kantor

Attorney **Darlene Pasieczny** ("Pah-setch-nee") has been appointed by the Board of Governors for the Financial Industry Regulatory Authority (FINRA) to serve on the 13-person National Arbitration and Mediation Committee (NAMC). The NAMC advises FINRA on rule changes, regulations, and procedures relating to FINRA's national dispute resolution program. Pasieczny's securities litigation practice includes representing investors in FINRA arbitration with claims against brokerage industry members. Her fiduciary litigation practice includes trust and estate disputes and financial elder abuse. Pasieczny also has a growing appellate practice in Oregon and Washington. She is the current chair of the OSB's Securities Regulation Section and serves on the Public Investors Advocate Bar Association (PIABA) Board of Directors.

*The Around the Bar column reports on MBA members' moves, transitions, promotions and other honors within the profession. The submission deadline is the 10th of the month preceding publication or the prior Friday if that date falls on a weekend. All submissions are edited to fit column format and the information is used on a space-available basis in the order in which it was received. Submissions may be emailed to [mba@mbabar.org](mailto:mba@mbabar.org).*




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**Welcome Rachel Perry**

Bodyfelt Mount is pleased to welcome our newest attorney.

Rachel graduated from Lewis & Clark Law School with honors in 2019 and joins the firm with a background in business and civil litigation.

We are thrilled to have Rachel on the Bodyfelt team.




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## Tips From the Bench

# Success in Gaining an Award of Costs and Attorney Fees Under ORCP68

by Referee Mark A. Peterson  
Multnomah County Circuit Court



First, to be awarded fees, you must plead your party's entitlement to fees. See, ORCP 68 C(2). You must include an allegation of a fact, statute, or rule that authorizes an award of attorney fees in a pleading, or in a dispositive motion filed in lieu of a pleading, e.g., a motion to dismiss. If there is a fee shifting provision in a contract or lease, identify the paragraph where the right to fees may be found. It is a matter of placing the other side on notice that a claim for attorney fees is being presented and that notice should cause opposing parties to consider the total exposure that they face in litigating the case. Do not simply stuff your claim for attorney fees into the prayer for relief at the end of your allegations - the right to fees must be alleged! Also, a claim for attorney fees is not a separate claim for relief nor is it a counterclaim; it is simply an allegation within a claim, an answer, an affirmative defense, or a counterclaim, much as one would allege economic damages. The allegation should not attempt to quantify the claim for fees; an allegation seeking "reasonable attorney fees" is sufficient. Of course, if a claim for attorney fees is not being sought as the value of legal services for litigating the case but, rather, is sought as damages, as stated in ORCP 68 C(1)(a), the amount claimed must be pleaded.

An allegation of a right to attorney fees is deemed denied without the need for a denial in a responsive pleading. Nonetheless, a common practice is to include a paragraph such as, "As to paragraph 18, no response is required." However, if the right to fees is in question, it would be wise to flag the dispute or, better yet, file a motion to strike under ORCP 21 E and get the matter settled sooner rather than later.

If you are claiming an entitlement to attorney fees for prosecuting or defending a case, documenting the hours expended and the tasks undertaken is essential. Reconstructing the time spent will likely result in an unconvincing statement of the time necessitated in handling the case and, in more cases than not, will understate the number of hours actually expended. A degree of specificity and detail is required to satisfy the "...detailed statement of

the amount..." called for in ORCP 68 C(4)(a)(i). Grouping a number of tasks and specifying the time spent, i.e., "interview client, review documents, research statutes and case law, draft complaint, and engagement letter to client = 7.5 hours" is not detailed. See, *Parker v. Scharbach*, 75 Or App 530 (1985), and *Thompson v. Long*, 103 Or App 644 (1990).

Since you are charging a lawyer's rate of hourly compensation, consider how reasonable your time spent appears for any given task. If you spent an unproductive couple of hours, e.g., chasing a legal theory that proves unhelpful, or daily conferences with a client who seems to need constant reassurance, consider listing the time spent but making clear that you are not charging for those hours. It will enhance the reasonableness of the hours for which you are seeking compensation. In the same vein, consider not charging for time spent on tasks that did not advance your client's position. I am thinking of that motion that the judge clearly did not think was well taken. Likewise, if more than one attorney is billing for the same task, consider detailing the hours for each attorney but not charging for what may appear to be a duplication of effort.

The requirements of subparagraph C(4)(a)(i) of Rule 68 can lend support to your claim to be compensated for the hours expended. Unfortunately, many statements of attorney fees make only the slightest reference to the ORS 20.075 factors that enhance, or diminish, the amount of fees that will be awarded. (Including those factors in fee petitions was added to Rule 68 by the Council on Court Procedures in 2002 but have been considered in attorney fee disputes for many years.) A reason articulated for requiring some application of those factors was the challenge judges faced in attempting to determine the reasonableness of a fee request without additional context. I admit that, as a lawyer, I filed many statements of attorney fees that merely listed the ORS 20.075 criteria and noted a plus, a zero, or a minus to indicate whether a particular factor supported my fee request, was neutral or did not apply, or undercut my claim. I also admit that I taught a generation of law students to give the ORS 20.075 factors short shrift. I now see statements that simply list all of the factors, and check them all. If the opposing side took positions that required more hours on your part to prosecute or defend your client's case, adding some narrative to the ORS 20.075 factors is the place to justify what may otherwise appear to be unnecessary research

*Continued on page 11*

## News From the Courthouse



by Bridget Donegan  
MBA Court Liaison Committee

### Report from Presiding Judge Stephen Bushong

#### Use of Masks in the Courthouse

On May 25, Chief Justice Martha Walters issued Chief Justice Order (CJO) 21-016 which allows judges, staff, lawyers, and others using the courthouse to request an exemption from the required use of protective face coverings in certain areas of the courthouse. CJO 20-45 Regarding the Use of Protective Face Coverings in the Oregon State Courts is still in effect and continues to require face coverings for anyone entering any of the courthouses in Multnomah County and in the public areas inside the facilities. Oregon Judicial Department (OJD) staff and judges who have been granted the exception are able to take off their masks in private working areas and courtrooms. The CJO only addresses masks; it does not address social distancing or the requirement that most proceedings be conducted remotely.

CJO 21-016 requires anyone requesting the exemption to show proof of being fully vaccinated. Anyone requesting an exemption during a court proceeding must show proof of vaccination to the judge presiding over the proceeding or the judge's clerk. Showing proof of vaccination includes showing a vaccination card, a copy of a vaccination card, or a cell phone photo of a vaccination card.

On June 28, Chief Justice Walters issued CJO 21-025. Among other things, CJO 21-025 lifts the requirements for masks and social distancing in courthouses statewide, consistent with Executive Order 21-15 issued by Governor Kate Brown on June 25. Presiding judges in each judicial district are authorized to continue or impose mask requirements in court facilities. On June 29, Presiding Judge Stephen Bushong issued a Presiding Judge Order (PJO) that continues to require the wearing of protective face coverings in Multnomah County court facilities through August 1.

#### Other Safety Measures

CJO 21-025 lifted the social distancing requirements in courthouses across the state as of June 30. However, the CJO

provides that any participant to a court proceeding can ask the judge presiding over that proceeding to require social distancing or take other measures to protect the health and safety of the people participating in or attending the proceeding. This may be especially important in juvenile matters due to the lack of an approved COVID-19 vaccine for children under 12. People who are sick or experiencing symptoms of COVID-19 should not come into the courthouse; instead, they should arrange for remote appearance or request a postponement of the hearing. Anyone who has not been vaccinated and is exposed to COVID-19 should quarantine in accordance with Oregon Health Authority guidelines. Although most of the restrictions imposed during the pandemic by the Governor's Executive Orders and Chief Justice Orders have been lifted, everyone accessing the justice system should continue to exercise caution to avoid the continued risk of spreading the virus as new COVID-19 variants continue to surface.

#### Scheduling Jury Trials

In scheduling jury trials through June 30, the court applied the priority jury trial policy adopted last November. On June 29, Presiding Judge Bushong issued a new PJO that addresses jury trials and other court proceedings during the "Transition Period" - June 30 to September 6 - and the "Post-Pandemic Period" - September 7 and thereafter. During the Transition Period, the court will prioritize jury trials in criminal cases to address the many cases that have been awaiting trial during the pandemic. Unless there is a particular urgency, jury trials in civil cases will fully resume beginning September 7. Top priorities during the Transition Period continue to be criminal cases with speedy trial deadlines and criminal cases where the defendant has been in custody for one year or more awaiting trial. Judge Bushong notes there are quite a few of these. The July and August calendars are quite full with priority trials.

During the pandemic, the court's jury trial capacity was limited by the social distancing requirements for jurors in the jury assembly room and

courtrooms. Given the number of courtrooms required to keep the jurors safely distanced, the court could hold up to three priority 12-person jury trials in a week if there were no co-defendants or other conditions that impacted space requirements; two trials per week was ideal. The court can conduct more jury trials during the Transition Period due to the lifting of the social distancing requirement, prioritizing criminal cases as noted above.

Civil jury trials scheduled to begin on or after September 7 will be held in person as scheduled. Civil cases scheduled for trial before September 7 will be rescheduled for a date after September 7, unless there is some particular urgency that justifies conducting the trial during the Transition Period. Remote civil jury trials and civil bench trials can be scheduled during the summer months with the stipulation of the parties, though the court needs at least six weeks advance notice to conduct a fully remote jury trial or to clear a judge's calendar for a bench trial. Judge Bushong is confident that the court will be able to accommodate all of the in-person criminal and civil jury trials scheduled after September 7. If necessary, the court is able to use retired judges to help with the increased workload.

#### Other Court Proceedings During the Transition and Post-Pandemic Periods

The PJO issued on June 29 describes in detail how all court proceedings will be conducted during the Transition and Post-Pandemic Periods. In general, most court proceedings will be conducted remotely during the Transition Period, continuing the practices adopted during the pandemic.

During the Post-Pandemic Period - starting September 7 - many proceedings will be conducted in person, but the court will continue to utilize the technology installed during the pandemic to conduct remote proceedings. The PJO lists the court proceedings that will continue to be conducted remotely during the Post-Pandemic Period. For example, the morning call docket, ex parte matters in Presiding Court, and motion hearings (including summary judgment motions) will generally be conducted remotely after

*Continued on page 12*

## 2021 Campaign Raises Over \$88,000 for the Multnomah Bar Foundation

This year, the Multnomah Bar Foundation (MBF) combined its fundraising efforts into a single campaign to increase the general fund, which would allow the board to direct support where it is most needed, and provide for the development of future projects.

The campaign raised \$88,855: \$59,475 designated by donors for Multnomah CourtCare, \$775 designated for CourtSupport, and \$28,605 for the general fund. Our most sincere thanks to all who supported this effort and made a charitable contribution to the MBF. Special thanks to Judge John Acosta and the US District Court for the District of Oregon Attorney Admission Fund for a \$50,000 donation to benefit CourtCare. Donors who contributed \$150 or more are acknowledged here and on our website.

Traveling firm trophies go to Dunn Carney LLP for the largest donation from a firm, lawyers and staff at \$3,600, and to Richardson Wright LLP for the largest donation per capita at \$87.50 per person. Congratulations, all, and thank you for your generous support!

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*Founded in 2005, the Multnomah Bar Foundation is a 501(c)(3) charitable and educational nonprofit. The mission of the MBF is to increase the public's understanding of the legal system, to promote civic education, public participation and respect for the law, to improve the quality and administration of the legal system, and to support programs and projects related to the MBF's purpose. To learn more, contact Pamela Hubbs at 503.854.5237 or pamelahubbs@mbabar.org, or visit www.mbabar.org/mbf.*



### Tips From the Bench

*Continued from page 10*

or overpreparation. When I see hours of trial preparation claimed for a case that appears uncomplicated and carries a high probability of success, i.e., five hours of trial preparation on a case that takes less than an hour at trial and appears to be incapable of being lost, some clarification may help support those claimed hours. Likewise, noting how settlement offers compare to the final judgment is insightful in determining whether the opposing side was reasonable.

It can take time to add some narrative to the ORS 20.075 factors. Devoting too much time to preparing the statement of fees and costs will not likely be rewarded. Balance your time to give the judge enough to understand your request, being mindful that economy of time and restraint will be rewarded and a blow-by-blow recitation of the case will not.

Although the UTCR Form 5.080 contains a paragraph 6 where a party can seek an award

of attorney fees for time that is projected to be needed to collect the money award or to otherwise enforce the judgment, most judges will not award fees for future projected work, deeming such a claim to be too speculative. This is especially true since 2014 when subsection C(7) was added to Rule 68, specifically providing a procedure for obtaining an additional award of costs and fees that are incurred in enforcing the underlying judgment.

The statement of attorney fees and costs must be served on the opposing party and filed within 14 days of entry of the judgment. (Filing in advance of the judgment is not a problem, except you may not capture all hours expended.) In the past, the 14-day limitation was an absolute deadline and statements filed or served thereafter were denied without exception. An appellate case, *Johnson v. Best Overhead Door, LLC*, 238 Or App 559 (2010), although with debatable analysis likening an ORCP 68 statement to a pleading or motion, called into question the inflexibility

of the deadlines surrounding the filing and service of attorney fee statements. In 2014, subparagraph C(4)(d)(ii) was added to Rule 68 to give discretion to the court in allowing a late filing or late service of the statement. Beware! The discretion was intended to avoid the harsh results from late filings and service. A solo practitioner with pneumonia who discharges herself from the hospital against medical advice but still misses the deadline by a day is a good candidate for discretion allowing the late filing. "I was on vacation and I forgot" or "The press of other cases had me stretched thin" are not likely to be rewarded with allowing the late filing.

If you are on the receiving end of a statement for attorney fees and costs, you can object. File and serve your objection within 14 days of service of the statement on you. Do not assume that the court will exercise its discretion (68 C(4)(d)(ii)) to relieve you from a late filed or served objection. Objections must "be specific and founded in law or fact..." If the proponent of the fees has done a

good job by avoiding block billing and has applied the ORS 20.075 factors, the process of objecting can be more focused. If the party objecting wishes to be heard on the objection, the request for a hearing must be included in the caption of the objection. See Rule 68 C(4)(e).

Although an objection to a statement of attorney fees is "...deemed denied and no responsive pleading shall be necessary," lawyers, wanting the last word, were filing some sort of controverting response. In 2012, paragraph C(4)(c) was added to Rule 68 to formalize what lawyers were doing and to put procedures (the seven-day timeframe) in place. Here again, the original proponent of the fees can ask for a hearing to address the opposing side's objection by placing the request for a hearing in the caption of the response. In a true dispute, objections and responses may include declarations and supporting documents and an evidentiary hearing may be held.

The court is required to rule on the statement of attorney fees (ORCP 68 C(4)(e)(ii)) but is not

obligated to award the amount of fees sought in the statement, even if an objection is filed late or in the absence of an objection. See, ORCP 68 C(4)(f) that uses the word "may." Compare, *Walker v. Grote*, 106 Or App 214 (1991), for the old rule and *Frederickson v. Dittmore*, 132 Or App 330 (1995), for current practice.

The award of court costs and attorney fees will generally be made in a supplemental judgment and money award. It is appropriate to serve your proposed supplemental judgment (without the word "proposed" appearing in the caption or in the footer) with the statement of attorney fees. However, do not file the supplemental judgment document until after the time for objections has passed. Otherwise a judge may overlook the timing, sign the submitted supplemental judgment, and put you in the position of seeking a set aside of your supplemental judgment to allow the opposing side to file their objection.

## National Federation of Paralegals Association Annual Convention

The Oregon Paralegal Association is proud and excited to host this year's National Federation of Paralegal Associations' Annual Convention to be held at the Downtown Hilton Hotel in Portland October 7-10, 2021. The Annual Convention provides an opportunity to attend CLE sessions, workshops, network with paralegals from across the country, advance the paralegal profession during the policy meeting, and visit state-of-the-art legal vendor exhibitors. After attending a NFPA convention, many paralegals find they have a significantly renewed passion, and an increase in their knowledge and confidence in building their profession. We are fortunate to have Chief Justice Martha Walters as the keynote speaker, and the charity spotlighted will be the Multnomah Bar Foundation's CourtCare Program.



For more information on this event, please visit [www.paralegals.org](http://www.paralegals.org).

## News From the Courthouse

*Continued from page 10*

September 7. To ensure fair and equal access to the courts, in-person appearances generally will be accommodated for proceedings scheduled to be held remotely. Judges will be conducting remote proceedings from their courtrooms; lawyers can appear by video or telephone via WebEx.

The court considered feedback from stakeholders in creating the list of ongoing remote proceedings specified in the PJO. Conducting proceedings using remote means can benefit lawyers, litigants and

our community. Lawyers and litigants can save time that would otherwise be spent traveling to and from the courthouse, and avoid the cost of travel, parking, and even childcare. Reducing the number of cars on the road helps with traffic congestion and air pollution. While there are benefits to in-person proceedings, in some instances the benefits of a timely, cost-efficient remote proceeding outweigh the loss of in-person contact. The list of post-pandemic remote proceedings in the PJO was intended to be a starting point for these discussions. The PJO can be amended over the summer months to add to - or subtract from - the list of remote

proceedings. Lawyers who want to provide feedback on this issue should contact the MBA.

### Tips on Submitting Proposed Orders

There are two applicable rules: 1) UTCR 5.100, which describes the steps to take when submitting a proposed order without specifying when to submit the order; and 2) SLR 5.035, which currently states that every motion must be submitted with an order for signature. This makes sense for an ex parte motion but not on a contested motion; when followed, it may complicate the record and cause confusion for judges and court staff. For that reason, the court will propose a revision to

SLR 5.035 during the next cycle for revising supplemental local rules. Any revisions would take effect on February 1, 2022. For now, Judge Bushong recommends lawyers read SLR 5.035 to require submission when an order is ready "for judicial signature." There is no need to file a proposed order when filing a contested motion because the order is not being submitted "for judicial signature" when the motion is filed. Lawyers should submit orders only when they are ready to be signed - when filing an ex parte or uncontested motion, or after the judge rules on a contested motion.

### Central Courthouse

The new downtown courthouse continues to be damaged by vandalism on occasion. There has been more graffiti, the "Jury of our Peers" mural created by local schoolchildren was cracked, paintballs have been splattered onto parts of the building's exterior, and another window was broken recently. At this time, the protective wooden barrier outside the entrance to the courthouse remains in place so that damage to the new building does not prevent the court from operating and the courthouse remains accessible for the public.

## Pro Bono Bake Fundraiser Recap

by Shelby Smith  
YLS Pro Bono Committee

On Thursday, June 24, the YLS Pro Bono Committee held the Pro Bono Bake virtual fundraiser to support the Volunteer Lawyers Project (VLP). Thank you to everyone who supported the fundraiser. The event, held via Zoom, raised more than \$2,500 to benefit the VLP at Legal Aid Services of Oregon (LASO). Participants followed along as our Hipcooks host, Krysten Beidelman, taught us how to make a fresh tomato tart and refreshing garden cocktail. We were joined by Brett Cattani, LASO's Pro Bono Coordinator, who discussed the importance of

the VLP and volunteer lawyers in providing vital legal services to members of our community.

This is just the latest iteration of the annual pro bono fundraiser - past events include a winetasting event and group bike ride. The MBA's support of the VLP originated in the early 1980s, when the MBA created the separate 501(c)(3) organization and dedicated it to providing local pro bono service, complimentary to Legal Aid of Multnomah County. The VLP merged with what would later become LASO in 1998, where it continues today.



YLS Board Director Nicole Elgin prepared the pictured tart and cocktail during the class.

Thank you to the following firms for supporting the event:



## Lawyers for Literacy Campaign Raises \$100,000 for Children's Literacy Nonprofit

by Alayna Herr  
SMART Reading Senior Development Officer

Over 40 law firms and organizations came together this spring in support of children's literacy. In partnership with SMART Reading, the legal community launched the second annual Lawyers for Literacy campaign, a competition to see which firm or organization could raise the most contributions for the statewide children's literacy nonprofit that serves kids in Oregon's highest need schools with books and individualized reading support.

The campaign exceeded its goal by 50% and raised over \$100,000. "We are thrilled with the success," says Sarah Ryan, Chair of Lawyers for Literacy and partner at Jackson Lewis. "We're keeping the campaign open and I invite members of the legal community contribute to this crucial critical work to ensure all Oregon children can realize their full potential through reading."

During the 2020-21 school year, SMART Reading gave away over 140,400 books to more than 17,800 students, as well as piloting new virtual methods for providing reading support.

"The legal community is uniquely positioned to

understand the importance of reading and the written word," says Sarah Ryan. "I believe that's why we saw such an incredible outpouring of support. Especially now when the challenges of learning to read have been compounded by learning loss during the pandemic, our profession is committed to ensuring that future generations of Oregonians have the tools they need to be strong, confident readers."

Miller Nash LLP, Foster Garvey and Ring Bender received honors for raising the most funds during the two-week competition.

"On behalf of the Oregon State Bar, I want to thank all of the firms, organizations, and individuals who stepped up to make a difference for young readers," says OSB CEO Helen Hierschbiel. "We know that reading is a critical skill for children and we're proud to be part of campaigns like Lawyers for Literacy."

Plans are already underway for the third Lawyers for Literacy campaign in Spring 2022, and SMART Reading invites the legal community to get involved! Team Captains are needed to



help spearhead the campaign at their firms. SMART Reading will soon be recruiting volunteers to read with children during the school year. Volunteer opportunities will be remote until at least January 2022. To learn more, contact Alayna Herr at aherr@smartreading.org or 971.634.1626.

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# The MBF Board in the Time of COVID-19

In the midst of the challenges and worries of a difficult year, we continued to work, we cherished time spent with loved ones, and we valued opportunities to pursue our passions and enjoy nature.



1. Wildfire skies, Victoria Blachly
2. Mackenzie Hogan and his family exploring Latourell Falls
3. "Celebrating Easter 2020, with my peeps," Marie Eckert
4. Elizabeth Knight and family, Haystack Rock, Cannon Beach
5. Marie Eckert's daughter and fiancé, happy to be vaccinated!
6. Ben Cox, standing in support for Black Lives Matter
7. Marshal Spector, loving time spent with his granddaughter
8. Ben Cox in the serenity of his flourishing garden
9. Richard Vangelisti enjoying a day of skiing with his daughters
10. Elizabeth and Ethan Knight, Smith Rock State Park

11. Victoria Blachly, a COVID family portrait
12. Judge Amy Holmes Hehn, Arts Week, Seaview, Washington
13. Who is observing whom? Mackenzie Hogan, Olympic Game Farm, Washington
14. Marshal Spector taking his granddaughter for a joy ride!
15. Victoria Blachly and Samuels Yoelin Kantor colleagues Zooming along
16. Home for the holidays; Marie Eckert's daughters escaping lockdown and enjoying the winter sunshine, Tilikum Crossing Bridge, Portland

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### MEET THE TEAM



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## The Corner Office PROFESSIONALISM

Over the past 30 years, as courts have become more expensive and less convenient forums for resolving legal disputes, attorneys, parties and judges all have turned to mediation as an easier and more effective alternative. Costs are reduced and client satisfaction is maximized when a dispute can be brought to a reasonable conclusion without the expense and uncertainty of continued litigation. Mediation provides an opportunity to do that. It works best when approached on its own terms.

The ethics rules don't place special obligations or restrictions upon the conduct of attorneys participating in mediation (but see RPC 2.4 regarding attorneys serving as mediators). Also, ORS 36.220 and 36.222 place tight restrictions on the subsequent disclosure of communications received in mediation, as well as their admissibility in court. With flexible rules and strict confidentiality, mediation is guided in many instances by principles of professionalism rather than ethics.

What are the characteristics of the professional lawyer participating in mediation? Preparation, conciliation and

follow-up are key. Preparation helps the client and the lawyer understand what can and can't be accomplished in mediation. Conciliation is the engine that runs mediation and makes it an effective alternative to litigation. Follow-up ensures that the agreement is properly memorialized and that court calendars are terminated.

Anyone who uses mediation regularly knows the unfortunate scenario that too often develops during the session. The parties spend too much time arguing over matters to be disputed at trial, and nothing gets accomplished toward resolving the case until the last 30 minutes of the meeting, when everything is done in a hurried rush. That process is not necessary, and can be largely avoided with proper preparation.

Preparation in this instance means two things. First, prepare your mediator. You need not prepare for trial, but you do need to give the mediator some familiarity with your case and, ideally, go over some ways that it might be resolved satisfactorily. The best way to do this is to provide a memorandum and perhaps some key exhibits ahead of the mediation.

You need not provide copies to the other side, but give some thought to what is being accomplished by secrecy, and consider writing the memo in such a way that it can be provided or exchanged in advance. Save mediator-only commentary for the event. Remember, one of the beauties of mediation is that it takes place in an information vacuum. You can make concessions and progress toward a satisfactory outcome without compromising your ability to try the case in court, should that become necessary.

Second, prepare your client. Be sure that they understand the other side's case. Have them explain it to you. Don't come into mediation offering \$5,000 on a \$500,000 claim unless you can make it stick. A lawyer who lets the client make a token offer in mediation and then settles for a relatively huge sum on the morning of trial hasn't done anyone - least of all their client - any favors.

Client preparation, properly handled, should make conciliation easier than it otherwise would have been. It is the rare legal case indeed where one side has all the

arrows, and the other side has an empty quiver. Don't let the client come to mediation with that impression, and the job of conciliation becomes much easier. Speak frankly with the client about which parts of the case are strongest, and which parts could be let go in the interest of stopping further expense or maintaining relationships. By the same token, help your client to take an unflinching look at what could go badly if the case were tried. Understand the areas in which conciliation will be necessary as well as helpful before you arrive.

During the mediation, do be, in fact, conciliatory. Avoid confrontations over known hot-button issues. This is not a time to rattle your sword and "win" your case. Instead, encourage both parties to see areas of possible agreement. Work to resolve those matters that can be resolved without trial, and leave for trial only those matters that cannot be resolved amicably. Mediation can reduce the cost and complexity of your trial, even if the whole case cannot be settled.

If the case is settled, make a clear agreement about who is to conduct what follow-up and when. It's so easy to lose track of a case that's been settled, when new crises appear on one's desk every day. Provide a date by which

the settlement documents will be circulated. Keep to that date if it's your responsibility, and politely remind your opponent if the time is getting short. You may have to do it yourself if it comes to that. You do need to keep to the court's timelines to avoid your case being dismissed or set for trial.

Remember that mediation calls on us for professional conduct in greater measure than ethical conduct (though our actions must always be ethical). Taking advantage of the professional nature of mediation will ease your client's transition through this step of the litigation process, and it might even bring closure.

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

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### Positions Available

#### Oregon Law Foundation Executive Director and Oregon State Bar Chief Access to Justice Officer

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#### Office Specialist - Cowlitz County Office of Public Defense

This position serves as liaison between all office staff and the public. This employee

is primarily responsible for reception and department phones, and largely serves as clerical support to the rest of the Office of Public Defense Attorney's divisions' staff. This position supports the Office of Public Defense professional and administrative staff by providing clerical, reception, and secretarial support work, in order to maintain the department's efficiency and service expectations. Cowlitz County Office of Public Defense is an Equal Opportunity Employer. View full position description and apply at [www.bit.ly/Cowlitz\\_Specialist](http://www.bit.ly/Cowlitz_Specialist).

#### Public Defense Attorney - Cowlitz County Office of Public Defense

There are two open positions that were recently created to reduce caseloads. The attorneys filling these positions will act as court-appointed counsel representing indigent people in the courts of Cowlitz County.

The Office of Public Defense represents people charged with criminal law violations in Superior Court (both adult and juvenile) and in District Court. The Office of Public Defense also represents juveniles on civil matters in Juvenile Court; represents adults in civil matters in Superior Courts under the Involuntary Treatment Act; and represents qualifying adults and children in petitions filed under the Uniform Guardianship Act. The attorney may represent clients in all phases of criminal proceedings, including first appearance, arraignment, pretrial hearings, trial preparation and investigation, plea negotiations, trial and sentencing. The attorney may also represent clients on probation violations. The attorney may be assigned to represent indigent clients in involuntary commitment; At Risk Youth/Child in Need of Services and truancy; Uniform Guardianship Act

(UGA), therapeutic courts; and dependency proceedings. Cowlitz County Office of Public Defense is an Equal Opportunity Employer. View full position description and apply at [www.bit.ly/Cowlitz\\_Defender](http://www.bit.ly/Cowlitz_Defender).

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