



MULTNOMAH LAWYER

MULTNOMAH BAR ASSOCIATION
1906

Lawyers associated for justice, service, professionalism, education and leadership for our members and our community. December 2005 Volume 51, Number 11



From the President

By Kelly Hagan, Schwabe Williamson & Wyatt and MBA President.

The constitution of the Multnomah County Bar Association was adopted. The Bylaws were also adopted at this meeting. Fifty Gentlemen signed the membership role [sic].

The Object of the MBA set forth in the Constitution was:

“To raise and maintain the dignity and honor of the legal profession, and to prevent it from degenerating into a business; to increase its usefulness in promoting the due administration of Justice; to cultivate social intercourse among its members, and to enforce such discipline among its members as shall promote the observance of dignity and courtesy among the members of both bar and bench, and prevent unprofessional conduct; and to recommend, advocate and work for the enactment of such laws as shall promote good government.”

- Portland, Oregon, February 17, 1906

The MBA's original charter eloquently expresses our ambitions. My purpose in writing this month is to point out how strikingly familiar they are 100 years later, and to ponder for a moment on how we have performed.

Going over the board minutes and resolutions of the MBA, one cannot help but be struck by the reoccurring themes in our 100-year history. The core concerns of lawyers seem not to have changed much; they appear in each generation like a family resemblance, shaped by a different time but unmistakably related. There is a pleasing continuity in this, but also a question: How have we done? You may expect me to answer that our goals call for unceasing effort and that by their nature they are unreachable. But indulge me, kind reader, by asking the questions that our charter poses.

Are we more honorable and more dignified now than we were 100 years ago, or has the practice of law become more commercial? I suspect that we are more sensitive to ethical impropriety now than ever before. As social sanctions have weakened a stronger institutional vigilance has arisen. But I also believe that the practice of law is increasingly driven by marketplace imperatives. Thus, today we 'eat what we kill.' The traditional lockstep of associate, junior partner, and senior partner, with its emphasis on firm loyalty, experience, and proven ability, has given way to the bottom line. We still honor lawyers' lawyers, but we pay them according to their economic contribution, not their professional standing.

Are we more useful promoters of the justice system? I don't know that we fare so well on this score. Our judges are underpaid, the criminal justice system overburdened and our court facilities badly in need of expansion and replacement. I read in last week's paper

that the Two Main Place parcel, identified for years as a prime location for a new downtown courthouse, will be developed as a 15-story high rise. Many prominent members of the association have labored long and hard on blue ribbon panels and study groups to site a new downtown facility. We have lent our credibility to and diligently participated in "the process." But where is the political will that built our existing county courthouse in 1914? How would the MBA's Founders, who were so influential in the construction of our courts' current home, judge us?

Have we cultivated social intercourse among our members and promoted professionalism on the bench and among the bar? On this point, I give us high marks. Without an official means of discipline, the association has nevertheless contributed by education and example to a legal culture that is the envy of the nation. Together with the leadership of our firms and a respected judiciary, we have largely succeeded in avoiding the predatory flavor of so many metropolitan legal communities.

Finally, have we worked for laws leading to good government? As I have observed in this space, our association is self-consciously nonpartisan and narrow in its political goals. We oppose measures that we think threaten the independence of the judiciary. We advocate for more funding for the judicial department and for new courtroom facilities. Our members contribute in other venues to the legislative and regulatory process. We have helped where we could.

The MBA's centennial is a good time to reflect on where we have been and where we are going. We have much to be proud of, and more to do. We have always aspired to high ideals, and we will continue to strive for them. On behalf of the association, thank you for your contributions to the cause.

2006 MBA Professionalism Award Nominations sought

Do you know a lawyer who is a joy to work with, someone who goes above and beyond the minimum professionalism standards? Nominate him or her for the 2006 MBA Professionalism Award.

Past recipients have been **Raymond Conboy, Thomas H. Tongue, Randall B. Kester, Frank Noonan Jr., Donald W. McEwen, Don H. Marmaduke, Noreen K. Saltveit McGraw, Thomas E. Cooney, John D. Ryan, George H. Fraser, Barrie Herbold, Walter H. Sweek, Daniel E. O'Leary, Mark R. Wada, Sandra A. Hansberger, Robert C. Weaver and Walter H. Grebe.**

Any MBA practicing attorney member, except a member of the MBA Professionalism Committee or the MBA Board of Directors, is eligible to receive this award. Former nominees may be re-nominated. For more information and a nomination form, go to www.mbabar.org.

MBA CLE

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

December

Thursday, December 15
Ethics Update
Mark Fucile

January

Fridays, January 13, 20, 27
YLS Young Litigators Forum
continues

Tuesday, January 24
Low-Rent, High-Tech: Effective Use of Technology in the Courtroom
David Markowitz
Troy Moody

Wednesday, January 25
Measure 37 – Where are we now?
Carrie Richter
Rick Sanai

February

Wednesday, February 1
Separate Property Litigation after Kunze: "What's mine is MINE!"
Bill Howe
Don Tarlow

Fridays, February 3, 10, 17, 24
YLS Young Litigators Forum
continues

Tuesday, February 28
Off-Site Escapades: Employment Issues Relating to Out of the Workplace Behavior
Courtney Angeli
Scott Hunt

March

Wednesday, March 1
Annual Family Law Update
Hon. Elizabeth Welch
Gary Zimmer
Bill Schulte

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MULTNOMAH BAR ASSOCIATION
620 SW FIFTH AVE., SUITE 1220
PORTLAND, OREGON 97204

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ASSOCIATION
620 SW 5TH AVE SUITE 1220
PORTLAND, OREGON 97204
503.222.3275
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WWW.MBABAR.ORG

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DEADLINE for copy: The 10th of the month*

DEADLINE for ads: The 12th of the month*

*or the preceding Friday, if on a weekend.

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NEW ON THE SHELF

By Jacque Jurkins, Multnomah County Law Librarian.

THE OREGON NONPROFIT CORPORATION HANDBOOK, 4th ed. by Cynthia Cumfer and Kay Sohl. Published by the Technical Assistance for Community Services, 2005. (Ref. KF 1388 C85)

THE LAWYER'S GUIDE TO CREATING PERSUASIVE COMPUTER PRESENTATIONS, 2d ed. by Ann E. Brenden and John D. Goodhue. Published by the ABA Law Practice Management Section, 2005. (KF 320 A9 B74)

THE SUCCESSFUL LAWYER: Powerful strategies for transforming your practice by Gerald A. Riskin. Published by the ABA Law Practice Management Section, 2005. (KF 300 R67)

HOW TO CAPTURE AND KEEP CLIENTS: Marketing strategies for lawyers, edited by Jennifer J. Rose. Published by the ABA General Practice, Solo & Small Firm Section, 2005. (KF 316.5 H68)

THE COMPLETE GUIDE TO DIVORCE PRACTICE: Forms and procedures for the lawyer, 3d ed. by Larry Rice. Published by

the ABA General Practice, Solo & Small Firm Section, 2005. (KF 533.5 R52)

PRODUCTS LIABILITY IN A NUTSHELL, 7th ed. by David G. Owen and Jerry J. Phillips. Published by Thomson/West, 2005. (KF 1296 O84)

SAILING IN DANGEROUS WATERS: A director's guide to data governance by E. Michael Power and Roland L. Trope. Published by the ABA Section of Business Law, 2005. (KF 1422 P69)

ECONOMETRICS: Legal, practical, and technical issues. Published by the ABA Section of Antitrust Law, 2005. (KF 8968.23 E26)

MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, 2005 ed. Published by the ABA Section of Antitrust Law, 2005. (KF 9066 A5 M64)

WETLANDS LAW AND POLICY: Understanding section 404, edited by Kin Diana Connolly, Stephen M. Johnson, and Douglas R. Williams. Published by the ABA Section of Environment, Energy, and Resources, 2005. (KF 5624 W47)

EMPLOYMENT LITIGATION, 2d ed. with model jury instructions. Published by the ABA Section of Litigation, Employment and Labor Relations Law Committee, 2005. (KF 8984 E39)

BROWN v. BOARD OF EDUCATION: Its impact on public education, 1954-2004. Introduction by Juan Williams, edited by Dara N. Byrne. Published by Word for Word Pub. Co., 2005. (KF 4155 B76)

A SECOND COURT THAT WORKS: Judicial implementation of permanency planning reforms by Mark Hardin, H. Ted Rubin, and Debra Ratternan Baker. Published by the ABA, 1996. (KF 3735 H37s)

SUMMARY OF CALIFORNIA LAW, 10th ed. by Bernard Ernest Witkin. Published by the Witkin Legal Institute, 2005. (KF 387 C34w)

INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE, edited by Barton Legum. Published by the ABA Section of International Law, 2005. (KF 8400 I56)

CALENDAR

For a complete MBA calendar, please visit www.mbabar.org.

December

1 Thursday, MBA CLE – Summary Judgment Practice
See insert to register or visit www.mbabar.org.

2-3 Friday-Saturday, OCDLA Winter Conference
Visit www.ocdla.org for details.

5 Friday, Governor's deadline for receiving judicial applications

6 Tuesday, MBA Board meeting

Tuesday, YLS Board meeting

9 Friday, Multnomah Lawyer deadline

Friday, Ebony & Ivory Dinner Auction at Airport Sheraton
See Announcements for details.

13 Queens Bench Holiday Luncheon
See Announcements for details.

14 Wednesday, Judicial Brown-Bag in Courtroom 508
See details on p. 8 and at www.mbabar.org.

Wednesday, YLS Drop-in Social and Toy Drive at Aura
See details on p. 10.

15 Thursday, Wells Fargo Financial Planning seminar
See enclosed insert or visit www.mbabar.org.

Thursday, MBA CLE – Ethics Update with Mark Fucile
See insert to register or visit www.mbabar.org.

26 Monday, Holiday – MBA closed

28 Wednesday, Multnomah Bar Foundation Board meeting

January

2 Monday, Holiday – MBA closed

3 Tuesday, MBA Board meeting

10 Tuesday, Multnomah Lawyer deadline

Tuesday, YLS Board meeting

13 Friday, YLS Young Litigators Forum (through March 10)
See insert or register at www.mbabar.org.

16 Monday, Martin Luther King Jr. Holiday – MBA closed

19 YLS Peer to Peer Orientation
See details on p. 10.

24 Tuesday, MBA CLE – Technology in the Courtroom
See insert or register at www.mbabar.org.

25 Wednesday, Multnomah Bar Foundation Board meeting

Wednesday, MBA CLE – Measure 37: Where are we Now?
See insert or register at www.mbabar.org.

Wednesday, MBA East County Social

26 Thursday, MBA Open House

February

1 Wednesday, MBA CLE Separately Acquired Property
See insert or register at www.mbabar.org.

7 Tuesday, MBA Board meeting

10 Friday, Multnomah Lawyer deadline

14 YLS Board meeting

20 Monday, Presidents Day – MBA closed

22 Wednesday, Multnomah Bar Foundation Board meeting

25 Saturday, MBA 4th Annual WinterSmash at 20th Century Lanes
See p. 6 for details.

28 Tuesday, MBA CLE – Off-Site Escapades: Employment Law
See insert or register at www.mbabar.org.

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Residential Services in Newberg, Oregon
Outpatient Services in Tigard, Oregon

Ethics Focus

By Mark J. Fucile, Fucile & Reising.

Old Friends in Familiar Places: OSB Reissues Ethics Opinions



When the new Rules of Professional Conduct went into effect at the beginning of this year a significant project remained: updating the OSB's library of ethics opinions to incorporate the new rules. The OSB has now completed that project. The new ethics opinions have been approved by the OSB's Board of Governors and are now available at www.osbar.org.

In updating the opinions, the OSB took a very practical approach. It kept the same order as the old set and simply plugged in the new rules and made any appropriate additional changes. In other words, if you are looking for old opinion 1991-1, an updated opinion on the same subject is now available in opinion 2005-1. Under RPC 8.6, opinions approved by the OSB's Board of Governors are called "formal" opinions and those issued by the OSB's Legal Ethics Committee and its General Counsel's Office are called "informal" opinions. In this column, we'll look at some of the primary formal opinions in four areas: conflicts, confidentiality, the no contact with represented parties' rule and fee agreements.

Conflicts. Current client conflicts under RPC 1.7 are summarized generally in Formal Opinion 2005-158 and applied using the context of a civil automobile accident case. 2005-158 provides both a useful example and an analytical framework for deciding whether conflicts exist involving multiple current clients. Formal Opinion 2005-82 plays a similar role in the criminal law context. Formal Opinions 2005-11, 2005-17 and 2005-174, in turn, do the same for former client conflicts under RPC 1.9. When read in concert, these three opinions offer practical advice on parsing former client conflicts arising from both the similarity of matters and the potential need to use a former client's confidential information. Formal Opinions 2005-85 and 2005-122 give guidance on two related areas. 2005-85 deals with an important question that is often a predicate to analyzing conflicts: who is the client in a particular circumstance. 2005-122 discusses the situations in which advance waivers of future conflicts may be appropriate.

Confidentiality. Formal Opinions 2005-23, 2005-110 and 2005-136 all contain general summaries of the confidentiality rule, RPC 1.6. Although each of these opinions is built around a different factual context, they all contain useful summaries of the confidentiality rule along with citations to other related ethics opinions and case law. Several of the exceptions to the confidentiality rule, in turn, are examined in separate opinions: 2005-34 (client perjury); 2005-104 (self-defense); 2005-105 (client criminal activity); and 2005-136 (litigation between the lawyer and the client).

Contacts with Represented Parties. Formal Opinions 2005-6 and 2005-147 outline generally RPC 4.2's "no contact with represented parties" rule. Formal Opinions 2005-80 and 2005-152, in turn, apply RPC 4.2 in the corporate and governmental context by delineating who is, and is not, a represented party for purposes of the rule.

Fee Agreements. The formal opinions touch on a wide spectrum of fee-related issues under RPC 1.5. Many deal with non-hourly fee arrangements, including the following on, respectively, contingent and fixed/flat fees: contingent - 2005-13 (domestic relations), 2005-15 (installments), 2005-54 (conversion to hourly) and 2005-124 (contingent fees generally); and flat/fixed—2005-98 and 2005-151. Formal Opinion 2005-133 discusses fee financing arrangements and Formal Opinion 2005-97 covers modifications of fee agreements. Finally, Formal Opinion 2005-1 outlines withdrawal for nonpayment of fees.

Even within these four areas, the opinions cited here are not exhaustive lists. They illustrate, however, the depth of resources available to lawyers facing questions in these and other areas. There are also search engines on the OSB's Web site and in the Casemaker library to help navigate through the 175 formal opinions adopted by the OSB.

ANNOUNCEMENTS

A Century of Service Celebration

MBA's 100th anniversary celebration launches in January with four additional pages in the center of the *Multnomah Lawyer*. Each issue will focus on one topic, starting with interesting people in the legal community during the last 100 years. Other topics will include MBA projects such as CourtCare, professionalism and judicial screening; legal aid for the poor; young lawyers section; women in the bar; changing practice of law; diversity in the bar; law-related organizations; and a few practice area focuses. If you are interested in writing articles on any of these topics, please contact Judy Edwards at 503.222.3275 or judy@mbabar.org.

Commitment to Professionalism

The Professionalism Statement developed by the MBA Professionalism Committee is ready for MBA members to purchase and display in their offices. The statement is printed on quality 11" x 14" parchment paper and suitable for framing. A smaller version of the statement is displayed in the Multnomah County courtrooms.

Reconfirm your commitment to professionalism; purchase your professionalism statement today! Visit www.mbabar.org for more information and to place your order.

Ebony & Ivory Returns

The Oregon Chapter of the National Bar Association (formerly known as the Association of Oregon Black Lawyers) presents Ebony and Ivory on Friday, December 9 at 6:30 p.m. at the Airport Sheraton Hotel, 8235 Airport Way, Portland; dress is semi-formal attire.

This law student scholarship fundraising event is a fun time and includes dinner, a silent auction and lots of music and dancing. Individual tickets are \$65 each, \$110 per pair and a table for 10 is \$700. Sponsors (organizations that purchase tables or make other significant contributions) will be acknowledged in the written program. For more information, contact Ernest Estes at eeestes@bpa.gov.

Mona Buckley is the new CEO of the Professional Insurance Marketing Association, a national trade association of insurance agencies, brokers and carriers administering association-sponsored insurance.

Oregon Law Foundation Grant

The Oregon Law Foundation has \$200,000 available for a one time only special project grant. The special project funds will be granted only to those programs that provide direct civil legal services to persons of lesser means. The grant applications must be received by the OLF not later than 5 p.m. Friday, December 16. For more information please go to www.oregonlawfoundation.org or contact Judith Baker at 503.431.6323 or Dawn Nelson at 503.431.6373.

Queens Bench Holiday Luncheon

Queens Bench will hold its annual Holiday Luncheon Honoring Women Judges on Tuesday, December 13 at the Queen Marie Ballroom of the Embassy Suites Hotel, located in downtown Portland. **Hon. Cheryl Albrecht** will speak, and the winners of the 2006 Justice Betty Roberts and Judge Mercedes Deiz Awards will be announced.

The cost is \$18, payable in cash or by check at the door. Doors open at 11:45 a.m. Reservations are not required or accepted, other than for invited members of the judiciary. For more information contact **Shari Gregory** at sharig@oaap.org or Barbara Smythe at barbara.smythe@klarquist.com.

Attorney Basketball League Forming

What: Attorney Basketball League (all members of the bar and law students are eligible). Teams and individuals are welcome. The cost is to be determined. **When:** Informational meeting is December 6 at noon. The league will start in January and games will be on Sunday evenings, continuing into March. **Where:** The informational meeting will take place at Schwabe Williamson & Wyatt. The

games will likely take place at the Tualatin Hills Park and Recreation District Gym on SW 158th Ave. **Who:** The league organizer is Nathan Wilson, who may be reached at 503.710.1720 or nbwilson@qwest.net. **Why:** Good fun and an opportunity to compete with your fellow lawyers.

MBA Noon Time Bicycle Rides

Multnomah Bar Association noon time bike rides - short fast rides with hills. Meet at SW Yamhill and Broadway between noon and 12:10 p.m., Mondays and Thursdays. Contact **Ray Thomas** 503.228.5222 with questions, or meet at the start.

Law Related Sister City Visit to Bologna in May 2006

As part of our sister city relationship, a visit to Bologna for judges and lawyers has been organized for early May of next year. While we plan on keeping the delegation small, there is room available. The official part of the trip is scheduled for May 2 through May 5, 2006. Those who are interested should contact **Judge Edward Jones** at the Multnomah County Courthouse.

Multnomah County Family Law Group Meeting

Monday, December 19, noon to 1:30 p.m. at Jake's Grill, Sharon James, of Multnomah Family Court Services will address the group. She will explain how to effectively guide your client through the evaluation and mediation process. If you have questions you would like James to address, or suggestions regarding future meetings or other issues, please email them to mark@kramer-associates.com. To be added to the distribution list, email **David Bean** at dib@meyerwyse.com.

Browning Law Offices - 26th Annual Open House

Friday, December 16, 5-8 p.m., Browning Law Offices, 3012-B Pacific Ave, Ballard Towne Square Shopping Center, Forest Grove.

Meriwether Lewis Found Guilty!

Two juries convict Captain Meriwether Lewis of canoe theft but find him not guilty of homicide; Reuben Fields innocent of homicide

By Carrell Bradley.

Captain Meriwether Lewis was found guilty of stealing a canoe from the Clatsop Indians a few days before he left Fort Clatsop for home in March of 1806. The guilty verdicts were returned by two separate juries in mock trials that were convened on October 20 and 22 and held in the Mark O. Hatfield US Courthouse in Portland, with US District Judge Owen M. Panner, presiding. The same two juries found Captain Lewis and one of his men, Reuben Field, innocent of homicide for killing two Blackfoot Indians during the exploration of the Marius River, located in what is now Montana, then a part of the Louisiana Territory.

The mock trials were a joint effort of the Oregon Historical Society and the

Lewis & Clark Law School, headed up by Assistant Dean Lisa LeSage and assisted by attorney C. Lane Borg. Four students from the law school acted as attorneys in the case: Aubrey Baldwin and Kimberly Martin were US federal prosecutors and Frank Lupo and Jennifer Coughlin were attorneys for the defense. All four are third year law students.

Witnesses were Tye Coboway (the Clatsop Indian chief who owned the canoe), portrayed by C. Lane Borg, a Portland attorney; York, Captain Clark's slave (who was ordered to steal the canoe), played by Paul Knauls Jr.; Sacagawea (who testified that Captain Lewis indicated that she, her husband and baby might be left with the Clatsops for lack of a canoe), who was portrayed by Lisa Watt; George Droulliard (master

hunter and witness to the killings), portrayed by Roger Wendlick; Reuben Field (who stabbed an Indian to death), played by Tom Holland; Joseph Field (brother of Reuben Field, a hostile witness who testified about the killing), played by Todd Bradley, a Portland attorney; Captain Meriwether Lewis (who in his defense testified he needed the canoe to get the corps home and that he killed the Indian in self defense and to prevent the Indians from stealing his horses and guns), portrayed by Carrell F. Bradley, retired attorney. Dr. John Pierce, Executive Director of the Oregon Historical Society read the histories of the witnesses before they testified. The trials were written and produced by Carrell F. Bradley. Both trials were open to the public and played to overflow crowds.



Left to right: Carrell Bradley, Aubrey Baldwin, Lisa LeSage, Frank Lupo, Judge Owen Panner, C. Lane Borg, Kimberly Martin and Jennifer Coughlin.



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Make Your Retirement Savings Last – Tips for Baby Boomers

By Adina Flynn, Ameriprise Financial Advisors.

On July 1, 2005, the nation's baby boomers started turning age 59 ½. What's so important about age 59 ½? This half birthday is a milestone on the road to retirement when you can begin to make withdrawals from your IRA, 401(k) plan and other tax-qualified retirement accounts without paying an IRS tax penalty for early withdrawals.

However, if you are turning 59 ½ soon, use caution. Remember this isn't a windfall; it's your hard-earned money that you have been saving and investing to support your retirement years. This is an ideal time to assess if you are on track to realize your retirement aspirations and to seek advice on how to best create an income stream during your retirement years.

Generating a steady stream of income in retirement that will last through your lifetime requires planning and it's best to get advice from a financial planning professional. However, here are some useful tips that may help get you started.

1. Don't underestimate your life expectancy. Boomers are living longer and healthier lives, and that increases the possibility of outliving retirement assets. Americans in their early 60s,

on average, can expect to live another 20 years or longer, according to Congressional Budget Office estimates. Your retirement income strategy needs to account for these years.

2. Withdraw no more than 4-5% of your retirement savings annually. If you withdraw too much from your portfolio, especially in the early years of retirement or when the stock market is down, you put yourself at greater risk of running out of money.

3. Stay invested for the long-term. Some retirees move all of their investments out of the stock market and into fixed rate products. Since you could potentially live 20 years or more in retirement, an overly conservative strategy can be just as unwise as investing too aggressively. That's because inflation erodes your purchasing power over time as well as the "real value" of investments. A well-diversified, balanced investment portfolio can produce current income and growth for future needs.

4. Create a "cash" bucket. Set aside cash to cover three to five years of expenses so you're not forced to sell stocks or bonds if we experience a "down" market. Every 6-12 months,

re-balance by trimming from the best performing assets to replenish the cash.

5. Prepare for the unexpected. A serious health setback, the early death of a spouse, a change in or discontinuance of employer-sponsored retirement benefits are all risks you may face in retirement. It's always wise to create a financial strategy that accounts for life's little – and big – surprises.

6. Annuities can help. Consider using part of your retirement portfolio to buy an immediate annuity, which can provide you with a guaranteed income stream for as long as you live. An immediate annuity provides a way to create your own "pension" in your retirement years.

This information is being provided only as a general source of information and is not intended to be the primary basis for investment decisions. It should not be construed as advice designed to meet the particular needs of an individual investor. Please seek the advice of a financial advisor regarding your particular financial concerns. Consult with your tax advisor or attorney regarding specific tax issues.

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Bill has been an active litigator since 1966. He has been recognized as one of the "Best Lawyers in America" since the first edition in 1983. Bill is a member of the American Academy of Matrimonial Lawyers and a frequent contributor to legal education programs.

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MBA 4th Annual wintersmash

Saturday, February 25
6-9 p.m.

20th Century Lanes
3350 SE 92nd
10 minutes from downtown Portland.

A Multnomah CourtCare fundraiser.

Mark your calendar, and look for more
details in upcoming issues of the
Multnomah Lawyer.

Divorce?

Two words:
"Best Lawyers"

The 2005-06 edition of "Best Lawyers in America" lists only seven family law attorneys in Portland. We have three of them: Albert A. Menashe, Eric C. Larson, and William J. Howe III.

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The firm you want on your side

AROUND THE BAR



Clarence Belnavis

FISHER & PHILLIPS

Clarence Belnavis, an experienced labor and employment litigator, has joined the firm as a partner. Belnavis has been practicing labor and employment law for more than eleven years.



Stuart Allen

STUART ALLEN

Stuart Allen, president and founder of Allen Trust Company, was recently named chair of the Trust Committee of the Oregon Bankers Association. The committee is responsible for keeping members apprised of changes as they affect the fiduciary activities of Oregon banks and trust companies.



Jeff Sagalewicz



Connie Tsai

MILLER NASH

The following firm attorneys have been selected for inclusion in the 12th edition of *The Best Lawyers in America*. In the area of banking law - **Lou Henry**; bankruptcy and creditor-debtor rights law - **Dennis Rawlinson**, **Peter Richter** and **Tom Sand**; corporate law - **Don Burns**; healthcare law - **Lou Livingston**; labor and employment law - **Dean DeChaine** and **Chris Helmer**; maritime law - **Jon Goodling**; real estate law - **David Culpepper**; tax law - **Conrad Moore**. Former firm partner and recently appointed Multnomah County Circuit Court Judge **Jerry Hodson** was honored for both commercial litigation and environmental law.

The firm welcomes associate **Jeff Sagalewicz** to the litigation department, where he will focus his practice on commercial and business litigation. Associate **Connie Tsai** has joined the business department, where she will focus her practice on business and commercial finance.

BALL JANIK

Sarah J. Ryan, chair of the employment department at the firm, has been elected to the Board of Make-A-Wish Foundation* of Oregon, which grants the wishes of children with life-threatening medical conditions. The Oregon chapter serves children from the ages of 2 ½-17 years who live in Oregon and Clark County Washington.

TONKON TORP

Anna Sortun is an associate in the firm's litigation department with an emphasis on labor and employment law.

Bruce Berning has been elected chair of the firm's managing board. Berning, a partner in the business department, has a broad business and corporate law practice, including mergers and acquisitions, commercial law and contract drafting and representation of lenders and borrowers.

Darcy Norville has also been elected to a three-year term on the managing board. Norville is a partner in the firm's business department and is the chair of the firm diversity task force. Her practice encompasses general business and corporate law, with an emphasis on executive compensation and employee benefits.

GORDON & POLSCER

The firm recently joined more than 80 member law firms in the International Society of Primerus Law Firms. Admission to the society includes a rigorous screening process. **Gordon & Polscer** represents insurers and other corporate and business clients in complex civil disputes and litigation.

CABLE HUSTON ET AL

Governor Ted Kulongoski reappointed **Don Haagensen** of Cable Huston et al to a four-year term on the Governing Board of the Oregon Department of Geology & Mineral Industries. Haagensen is currently vice-chair of the board.



Don L. Kraemer Jr.

SCHWABE WILLIAMSON & WYATT

Schwabe shareholder **Don L. Kraemer Jr.**, co-chair of the firm's technology and business practice group, was appointed by the Oregon Innovation Council to serve as a technical advisor.



Robert S. Banks Jr.

BANKS LAW OFFICE

Portland attorney **Robert S. Banks Jr.** is the 2005-2006 president of the Public Investors Arbitration Bar Association, a nonprofit, international bar association consisting of more than 720 attorneys dedicated to the representation of investors in disputes with the securities industry. Banks represents investors in claims against stock brokers, financial advisors and others who have improperly managed investment accounts.



Renee Rothauge



Henry "Chip" Lazenby

BULLIVANT HOUSER BAILEY Firm partner **Renee Rothauge** has been named to the Oregon Ballet Theatre Board of Trustees for 2005-2006. She is a trial lawyer handling complex business disputes. Rothauge is chair of the firm's intellectual property group and her practice emphasizes enhancing and protecting trademarks, copyrights, trade secrets and patents.

Henry "Chip" Lazenby has been appointed co-chair of the Sustainable Development Commission. Lazenby is of counsel with Bullivant, where he focuses his practice on general business advice, real estate, development and government affairs.



Alex M. Duarte

ALEX M. DUARTE

Alex M. Duarte, Corporate Counsel for Qwest Communications International, was recently elected as President of the Board of Directors of the Hispanic Metropolitan Chamber. Duarte, Qwest's attorney for its Oregon operations and its resident attorney in Portland, practices telecommunications, regulatory and administrative law.



Jeff Batchelor

MARKOWITZ, HERBOLD, GLADE & MEHLHAF **Dave Markowitz** and **Peter Glade** were honored in the 2006 guide *The Best Lawyers in America* for their work in the area of commercial litigation. **Jeff Batchelor** was named in the areas of alternative dispute resolution and appellate law.

ERIN K. MACDONALD

Erin K. MacDonald recently established her own office for the practice of law in Portland, providing professional legal services on a contract basis to lawyers and law firms, including legal research and writing, drafting pleadings, document review, pretrial preparation and trial support.



Maryann Yelnosky

BULLARD SMITH

Maryann Yelnosky has joined the firm as a partner. Yelnosky has been representing Oregon employers for 19 years. Her practice focuses on defending employers in litigation, as well as advising employer on employee management and termination.

STOEL RIVES

Victor Kisch has joined the firm as a partner. Kisch's 20-year practice encompasses employment litigation, labor relations and counseling.

Amy Joseph Pedersen has also joined Stoel Rives as a partner. Pedersen's practice focuses on both employment counseling and litigation.



Kathleen Doll

Kathleen Doll spent a week in Mississippi providing free legal advice to victims of Hurricane Katrina. Doll joined a team of volunteers organized by the Young Lawyers Division of the Mississippi Bar and worked out of FEMA disaster relief centers (often makeshift tent facilities) in the state's hardest hit areas, including Waveland, Moss Point, Ocean Springs, Gulfport and Biloxi.



Andrew J. Bobzien

WARDINSKY & BOBZIEN **Andrew J. Bobzien** has been appointed as an Associate Judge in the Tribal Court for the Confederated Tribes of the Grand Ronde Community. Bobzien will continue his family law practice while fulfilling his part-time duties in tribal court hearing Indian child welfare cases.

Tips from the Bench

By Judge John A. Wittmayer, Multnomah County Circuit Court.



that judge assumes responsibility for all future hearings involving that family.

This approach has the benefit of continuity. When a judge hears the temporary child custody or parenting time matter, it is usually better for the litigants if the same judge later hears the trial, and after hearing the trial, the same judge hears modification motions.

When seeking modifications after a General Judgment, lawyers should remember to check to see if there is a “judge of the case,” i.e. a judge who has assumed responsibility for all future matters in that case. If there is a “judge of the case,” all modification paperwork can be routed directly to that judge, and hearings can be scheduled directly with the judge’s office. This usually will mean that a hearing can be set more quickly than if there is not a “judge of the case.”

“Blakely fix” trials - estimating how long your criminal trial will take

The world of criminal litigation has changed dramatically since the United States Supreme Court issued its opinion in *Blakely v. Washington*, 542 US 296 (2004). In *Blakely* the Supreme Court ruled that a criminal defendant has a right to a jury trial on almost any fact in dispute that affects the sentence that may be imposed and that the state must prove such facts beyond a reasonable doubt. *Blakely* and its progeny have eliminated an upward departure from a presumptive sentence found in sentencing guidelines based on aggravating factors absent either a waive by the defendant or a jury trial on those factors with proof beyond a reasonable doubt.

In response to *Blakely*, the 2005 Oregon Legislature passed what is commonly known as a “Blakely fix.” Senate Bill 528 (Or Laws 2005, Ch 463) establishes a procedure for notice from the state to the defendant that the state intends to seek an upward departure from the sentencing guideline presumptive sentence, and for a jury trial on those issues, subsequent to the jury verdict on the “guilt phase” of the case.

This change in the law can have a substantial effect on how long a case will take to try if the state is seeking an upward departure sentence. For instance, if you thought your felony drug case jury trial would take one or two days to try on the guilt phase, you need to consider how long it will take to have the same jury hear a contested trial on the alleged aggravating factors if the defendant is found guilty in the first phase of the trial. You should factor this possibility into your estimates whenever you report ready for trial.

Amended pleadings in civil litigation

You are defending a civil case and plaintiff seeks to file an amended complaint. Or, you are representing plaintiff, and defendant seeks to file an amended answer. The proposed amendment represents a significant departure from the previous posture of the case, and the case is almost a year old, and is set for trial in 30 days. How often has this happened to you?

After a responsive pleading is filed, “a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” ORCP 23A. So, as a practical matter, what does it mean to say “when justice so requires?”

In argument on a late motion to amend, the party opposing the amendment should be prepared to tell the court what he/she would have done differently to prepare the case for trial had the proposed amendment been included in the pleadings earlier. Simply asserting that the late amendment is “prejudicial” without more will almost never be enough to convince a judge not to allow the amendment. The party seeking to amend should be prepared to tell the judge why that party is so late in seeking the amendment.

If the motion to amend is very close to the trial date, you might expect the motion judge to conditionally allow the amendment, i.e. allow the amendment only if the presiding judge also grants the opposing party’s trial set-over request. With this approach, late amendments allow adverse counsel sufficient time to deal with the moving of the goal posts, but if the case is very old and the presiding judge will not re-set it, the case proceeds on the previous pleadings.

Family law - “one judge, one family”

For years, Multnomah County has been a “one judge, one family” county, to the extent possible. This means that once a judge hears a matter on a case (or involving a family) that lasts an hour or more (i.e., a “significant substantive contested hearing”)



Jury Verdict Report

The Jury Verdict Report subcommittee reported on its progress. A more usable form of the information has been produced, but committee members agreed there needs to be more specific information on the type of claim and who has been dismissed out of the case and why. After some discussion, it was agreed that what the committee thinks would be most useful is to create an index that contains important details of the case so that it can be used as a starting point for research. Committee members agreed that it would be helpful for presenting clients with the realities of cases in Multnomah County.

Judicial Brown Bag Report

December 14 at noon will be the next Judicial Brown Bag meeting, hosted by Judge Janice Wilson in courtroom 508. Judge Wilson heads up the Motions Panel in Multnomah County. The event will be announced in the newsletter and on the MBA Web site.

MBA’s 100th Anniversary Celebration

The MBA’s *A Century of Service* celebration is coming up, Saturday, May 13, 2006 at the Portland Art Museum. It will be a party-type event, with food stations, music and dancing. Additional newsletter pages will feature MBA milestones, historical law-related articles and profiles of a few lawyers and judges. Seven videotaping sessions of panels of lawyers on various MBA and law topics have been completed. They will be edited down to about an eight minute video, which will be shown at the celebratory event. The full sessions will be archived by the MBA. The committee members noted that the MBA’s prompting of other legal organizations for their historical information has caused these organizations to review their own history.

News of the Judiciary

Judge Koch reported that Oregon Supreme Court Justice Paul DeMuniz was selected by the members of the Supreme Court to be the next Chief Justice.

Chief Justice Carson will step down from the position as Chief Justice on December 31, but will remain on the Supreme Court as an associate justice throughout 2006. This succession arrangement provides a one-year familiarization period for the Chief Justice Elect before the 2007 Legislative Assembly convenes. The 2007 vacancy on the Supreme Court, due to then Justice Carson’s retirement, will be filled in the 2006 general election cycle.

There was discussion about the importance of education about the constitutional role of judges and how committee members might support this need in our community. The importance of a nonpartisan judiciary, as we have in Oregon, was discussed. Judge Koch mentioned that there is an initiative petition in South Dakota to create a special oversight jury for judges, which would review their decisions and decide whether, in its analysis, the law was applied correctly.

Katherine O’Neil Honored in October

Katherine O’Neil, a 1977 graduate of Lewis & Clark Law School, was presented its distinguished graduate award in October by Dean Huffman. O’Neil is a partner in Graff & O’Neil and serves as a mediator and arbitrator at state and federal trial and appellate levels. She is past president of the US District Court of Oregon Historical Society and one of the founders of Oregon Women Lawyers.

In addition, O’Neil was presented with the US District Court of Oregon Historical Society’s Second Annual Lifetime Service Award at the annual banquet on October 27. The first was awarded to Randall Kester in 2004.

O’Neil also serves on the MBA’s 100th Anniversary Committee and has been instrumental in

helping to pull together the organization’s history. She has moderated the video panels that will commemorate *A Century of Service*, the theme for the 2006 MBA 100th anniversary.

The MBA congratulates Katherine and thanks her for years of exemplary service to the bar and profession in general. Well done!



Katherine O’Neil
Photo by Dan Carter

Profile: Judge Eric J. Bergstrom Multnomah County Circuit Court

By Aaron Stuckey, Davis Wright Tremaine and MBA Court Liaison Committee member.

While he was only recently appointed to the bench, Multnomah County Circuit Court Judge Eric J. Bergstrom is no stranger to the challenges and long hours that come with his new position. As members of the criminal bar have long known and as a growing number of civil attorneys are quickly discovering, Judge Bergstrom has all the tools to be a valuable member of the judiciary for years to come. He brings to the bench a calm demeanor, impressive intellect, sound judgment and a strong work ethic, traits that earned him a reputation as a topflight criminal trial lawyer and the support of all segments of the local bar.

The underpinnings of Judge Bergstrom's success can be traced to his family and upbringing. As a child, Judge Bergstrom was repeatedly told that "life is a do-it-yourself job," a motto that was not only preached but faithfully practiced in his family. His father, a Swedish immigrant, came to the United States by himself at the age of 17, excelled in school and is now a distinguished

Oregon physician. His mother came from a very poor family, but worked her way through college and graduate school to become a long-time teacher and, later, a successful realtor. Judge Bergstrom's family now owns and operates an award-winning winery in Dundee, where his brother is the head winemaker.

Hard work and self-reliance were expected from Judge Bergstrom at an early age. Through much of his childhood in Beaverton and also while pursuing his political science degree at the University of Oregon, Judge Bergstrom held more odd jobs than he can remember and often several at a time, including berry picker, ski shop stock boy, cook, hardware store employee, upholsterer, lifeguard, swim instructor and landscaper.

After obtaining his law degree from Lewis & Clark, Judge Bergstrom went to work at the Multnomah County District Attorney's office. In his 15 years in the D.A.'s office, Judge Bergstrom rose through the ranks and ultimately became the head of the Gang and Robbery Unit.

He tried nearly every type of criminal case, from misdemeanor to death penalty cases. Among his most memorable was a groundbreaking racketeering case that he successfully brought against a street gang, a case that uncovered new tools for law enforcement to use in addressing gang activity but which was also plagued by the murders of three gang members during the pendency of the case.

Over the years, a number of attorneys and judges encouraged Judge Bergstrom to consider a move to the trial bench. After experiencing nearly all he could at the D.A.'s office, he submitted his name for consideration. In August 2005, he met with Governor Kulongoski for what Judge Bergstrom thought would be one of many interviews the Governor would conduct before making an appointment to fill the position formerly held by Judge Rosenblum. Instead, and much to Judge Bergstrom's surprise, the Governor ended the meeting by announcing that he was appointing him to the position.

Judge Bergstrom is quick to credit his fellow Multnomah County judges for his smooth transition to the bench. He counts many of them as his close friends and valued mentors. One judge who made an early and lasting impression on Judge Bergstrom was the late William Keys, before whom he frequently appeared as a young deputy D.A. Judge Bergstrom fondly recalls the time he was in Judge Keys's courtroom when a bomb threat forced an evacuation of the courthouse. While the rest of the courthouse was evacuated, Judge Keys invited Judge Bergstrom into his chambers, where they patiently waited out the bomb threat talking and eating apple pie from his mini-fridge.

Notwithstanding the many demands of his professional life, Judge Bergstrom's foremost passion and priority is spending time with his two children, twelve-year-old daughter Sarah and nine-year-old son Michael. Whether it is participating in Cub Scouts or coaching their soccer and basketball teams, he remains deeply involved in all facets of their lives.



Judge Eric J. Bergstrom

Judge Bergstrom enjoys running, biking and golf, but skiing has long been his favorite outdoor activity. While his days as a competitive ski racer are over, he still loves to hit the slopes and most of his recent family vacations have been to skiing locations.

A profile of Judge Bergstrom would not be complete without mentioning some other characteristics that may not be readily apparent in the courtroom. He is remarkably personable and disarming and has a rich sense of humor, which was on full display in his memorable performance at a recent lawyer stand-up comedy competition for charity. In all, Judge Bergstrom is an exciting new addition to the Multnomah County bench.



MULTNOMAH BAR ASSOCIATION

100TH ANNIVERSARY

1906 - 2006

PAST PRESIDENTS

1906-07 S.C. Spencer
 1907-08 W.M. Cake
 1908-09 George Shepherd
 1909-10 Gus Moser
 1910-11 Charles Schnabel
 1911-12 Harrison Allen
 1912-13 Arthur Langguth
 1914-16 J.F. Boothe
 1916-17 Lotus Lee Langley
 1917-18 William M. Davis
 1918-19 Clarence Gilbert
 1919-20 Barg Leonard
 1920-21 John Winter
 1921-22 Clarence Gilbert
 1922-24 Robert Tucker
 1924-26 W.W. Davis
 1926-27 John Stevenson
 1927-29 George Shepherd
 1929-31 James Crawford
 1931-34 Eugene Oppenheimer
 1934-35 Omar Spencer
 1935-36 Alfred Kelley
 1936-38 John Beckwith
 1938-39 Charles R. Spackman Jr.
 1940-41 Irming Rand
 1942-43 Hugh Barzee
 1944-45 Carl A. Dah

1946-48 No Record

1949-50 Nicholas Jaureguy
 1951-53 No Record
 1954-55 Harold Davidson
 1955-56 Herbert H. Anderson
 1956-57 Randall B. Kester
 1957-58 Donald S. Richardson
 1958-59 Wendell Gray
 1959-60 Phillip J. Roth
 1960-61 George H. Fraser
 1961-62 William F. Bernard
 1962-63 John U. Yerkovich
 1963-64 Herbert C. Hardy
 1964-65 Frank E. Nash
 1965-66 Burl L. Green
 1966-67 John L. Schwabe
 1967-68 Dwight L. Schwab
 1968-69 John R. Hay
 1969-70 Clifford B. Olsen
 1970-71 John R. Gilbertson
 1971-72 Howard A. Rankin
 1972-73 Edwin J. Peterson
 1973-74 James F. Spiekerman
 1974-75 John R. Faust
 1975-76 Garr M. King
 1976-77 Thomas H. Tongue
 1977-78 Martin J. Howard

1978-79 John J. Haugh
 1979-80 Don H. Marmaduke
 1980-81 Robert A. Bennett
 1981-82 Marvin S. Nepom
 1982-83 Leonard A. Girard
 1983-84 Douglass M. Hamilton
 1984-85 Michael D. Schrunk
 1985-86 Walter H. Grebe
 1986-87 Jerome E. LaBarre
 1987-88 Susan M. Hammer
 1988-89 Walter H. Sweek
 1989-90 Michael E. Haglund
 1990-91 Ruth M. Spetter
 1991-92 Cynthia L. Barrett
 1992-93 Marc D. Blackman
 1993-94 Monte Bricker
 1994-95 John H. Holmes
 1995-96 Lynn T. Nagasako
 1996-97 Edwin A. Harnden
 1997-98 Albert A. Menashe
 1998-99 S. Ward Greene
 1999-2000 Judy Danelle Snyder
 2000-01 Ruth A. Beyer
 2001-02 Michael A. Greene
 2002-03 Robert D. Newell
 2003-04 Robert J. Neuberger
 2004-05 Sylvia E. Stevens

The Perfect Protege

By Paul Burton, Vision Mechanix.

It's old news that developing a relationship with one or more experienced people can greatly facilitate your professional development. The haloed sanctum of the mentoring relationship is one of the few environments in which new lawyers can freely express their questions and concerns about practice.

Unlike formal mentoring programs, traditional mentoring is an organic process that develops between individuals over the course of many small interactions. It's a bottom up development involving two participants - the mentor and the protégé. This article focuses on what protégés can do to facilitate the development and success of their mentoring relationships.

Good Seeds Sown.

Understanding the characteristics of a successful mentoring relationship will greatly improve your chances of developing one yourself. Virtually all mentoring relationships consist of the following traits:

- **Experienced senior member and less experienced protégé.** The significant thing to remember here is that the experience gap is more important than the age gap.
- **Personal and professional affinity.** The individuals must have enough things in common to develop a relationship.

- **Both mentor and protégé committed and willing.** Needless to say, if the participants aren't committed to the relationship and willing to make the effort.... As a protégé you have to affirm your own commitment and seek out mentors who are equally interested in working with you.
- **Respect, trust and confidentiality maintained.** Keeping the relationship and its inner workings professional and private is absolutely critical to its success and longevity. Protégés should assume that all information communicated in the mentoring relationship is not intended for public consumption. Better safe than sorry.
- **Multiple mentoring relationships possible.** With today's professional landscape so hectic, multiple mentoring relationships make more sense. Developing several mentoring relationships takes the pressure off the individual mentors increasing the candidate pool.

The Protégé Role. There are several key components every protégé must appreciate and follow for a mentoring relationship to develop and prosper:

- **Initiative.** You own your end of the developmental and management efforts. Identifying potential mentors and seeking ways to develop a relationship with them takes creativity and mindfulness.

- **Goal Setting.** It's really important to set some realistic, periodically measured milestones for the relationship. You can suggest these as easily as your mentor can.
- **Receptivity.** This is a tough one for most lawyers. You need to be receptive to your mentor's suggestions. The whole point is they have a lot to teach you.
- **Worthiness.** Do what you say you will do. Protect the confidentiality and trust of the relationship. Be worthy.
- **Appreciation.** Remember that mentors are not just giving you their time, they're giving you the benefit of their years of experience. You will recognize this value throughout your entire career.

Mentoring has been a productive career development practice for millennia. If protégés understand what is expected of them and what they can do to promote these relationships, they will benefit greatly from the mentoring environments they establish.

Paul Burton is a member of the MBA and a former corporate finance attorney with an extensive background in professional and organizational development. He can be reached at paul@visionmechanix.com.

The YLS Professional Development and Education Committee Announces the First Annual 2006 Peer-To-Peer Program Orientation

What: An opportunity for newer and younger attorneys to join small, specialized groups of their peers to provide support to each other in the practice of law. The YLS PDE Committee will facilitate each group's start-up and assist each group in developing a structure that best fits the needs of the group's members.

Why: An unparalleled forum for attorneys to expand their social network, connect with their contemporaries who practice in the same area and engage in a support network.

When: Thursday, January 19, 2006 ~ 5:30 - 7:00 p.m.

Where: Red Star Club Room, SW Fifth and Alder, Portland

RSVP: To Noëlle Saint-Cyr at noelle@mbabar.org or call 503.222.3275

Groups Forming: Defense Litigation; Employment; Business Litigation; Solos/Small Firms; Family Law; Plaintiff Litigation; Estates/Trusts; Business; and Environmental Law. If you have ideas for additional groups please contact Aaron Denton at: adenton@martinbischhoff.com.

Appetizers provided. No-host bar.

Come Celebrate the Holidays with Jovial Lawyers at a Festive Place with a Spirited Purpose!

MBA YLS Holiday Drop-in Social & Toy Drive

Wednesday, December 14, 2005

Aura Lounge & Restaurant (Back Lounge)
1022 W. Burnside
5:30-7 p.m.

Live Jazz starts at 8 p.m.

As part of its annual Holiday Social, the MBA YLS sponsors a toy drive for the Toys for Tots organization. Please bring a new, unwrapped toy to the social on the 14th from 5:30 to 7 p.m. Light appetizers will be served. Sponsored by the MBA YLS Membership Committee.



You may also drop off toys before the 14th at the Multnomah Bar Association's office, located at 620 SW 5th Avenue, Suite 1220.

Please contact Brenna Tanzosh with any questions at (503) 224-7077.



Welcome New Admittees!

The Annual New Admittee Welcome and Social was held on November 10. The YLS Membership Committee, with the aid and sponsorship of LexisNexis, welcomed the new admittees with an evening of appetizers, wine and an opportunity to learn about membership and volunteering in the MBA. Also in attendance were YLS Board members, committee chairs, and MBA staff. In a brief address, MBA President Kelly Hagan, YLS President Eric Waxler and the YLS committee chairs all expressed their congratulations to the new admittees and encouraged them all to become involved with the YLS.



New lawyers Ian Gates and Meg Heaton, winners of the two \$100 cash drawings from LexisNexis, are pictured with Paul Zallar of LexisNexis.

YLS Thanks LexisNexis for its Continued Support

On November 10, LexisNexis sponsored the New Admittee Social for the newest members of the Bar. In addition to its generous support of the event, LexisNexis provides new attorneys with significant discounts. For more information on the services that LexisNexis provides, please contact Paul Zallar at 503.348.6012 or paul.zallar@lexisnexis.com.



David Kong, Tiffany Brandreth, Liani Reeves and Ryan Hagemann at the YLS and OMLA Drop-in Social

YLS and OMLA Drop-in Social

On October 26, the YLS and the Oregon Minority Lawyers Association (OMLA) held a joint drop-in social at the Lotus in downtown Portland. It was the best attended social in recent history with close to 100 people present. People mingled and enjoyed socializing. Appetizers were provided by the YLS and OMLA. Special thanks to OMLA co-chair, Liani Reeves and YLS Membership Committee member Jeni Lassell for organizing the social. Join us for our next drop-in social on December 14 at Aura.

ABA Publications Picks at Member Discount

The Legal Assistant's Practical Guide to Professional Responsibility, Second Edition Professional responsibility is at the core of delivering effective legal services. Legal assistants are expected to obey the ethics rules by which their lawyer employers are bound. To help legal assistants stay on top of ethics issues, the ABA Center for Professional Responsibility has updated *The Legal Assistant's Practical Guide to Professional Responsibility*. The new edition reviews the ethics issues that are relevant to paralegals, legal assistants, secretaries and other employees of law firms, corporations and law-related

organizations and offers guidance that can be adapted to practice in any jurisdiction. The MBA member price for this book is **\$31.96**, regularly \$39.95.

Dispute Resolution Ethics: A Comprehensive Guide lays out the groundwork for dispute resolution ethics at a time when the public is clamoring for ethical behavior in all walks of private and professional life. The text was written by leading practitioners and academics in the dispute resolution field and contains extensive appendices with 15 documents containing everything from the Model Standards of Conduct for Mediators to the

Principles for ADR Provider Organizations. The MBA member price for this book is **\$39.96**, regularly \$49.95.

To purchase these books or to see what others have said about them, log onto www.ababook.org and enter your member discount source code PAB5EMUL. This discount applies to these and any publications featured on the ABA Web site. We also invite you to attend the First Annual Ethics Tune-Up MBA CLE seminar on December 15. You may sign up by visiting www.mbar.org.

A 1972 Chevrolet Caprice Classic Does Not a Paycheck Make

By Jeff Brecht, Sussman Shank.

The Oregon Court of Appeals recently pondered the age-old question of whether employers may pay their employees with old cars in lieu of cash. Sadly, unless certain statutory requirements are met, the answer is "no."

In *Presley v. Bureau of Labor and Industries* (BOLI), an employee sued a used car dealership for unpaid wages. The facts of the dispute are somewhat uncertain, as the administrative law judge (AJL) who presided at the underlying hearing found that neither party was particularly credible. Apparently, though, the dealership and the worker entered into an agreement whereby the dealership would pay the worker \$200 for every vehicle the worker sold plus an additional amount "at an undetermined rate." During the worker's employment, he performed a variety of tasks, from washing and selling vehicles to performing mechanical work to selling cell phones for one of the dealership's sideline ventures.

Eventually, the worker quit and filed a claim with BOLI against the dealership for unpaid wages. The dealership did not bother to record the worker's hours on the job, but at the hearing the worker produced a spiral notebook that he claimed recorded each day's hours, along with a description of the tasks he performed.

The dealership argued that the notebook was an after-the-fact fabrication. The ALJ found that the notebook was authentic but inaccurate, as it recorded hours purportedly worked before the dealership was open and after it was closed. Accordingly, the ALJ adjusted downward the amount of wages owed.

The dealership also argued that the worker was an independent contractor, not an employee, and therefore, that Oregon's wage and hour laws did not apply. The ALJ, and on appeal, the court, did not agree. Both found that the worker was an employee because the dealership controlled the time and nature of the worker's duties and the bulk of those tasks - washing and selling used cars - "required little if any skill and initiative."

The dealership also claimed that the worker agreed to take a 1972 Chevrolet Caprice Classic as payment in full for his unpaid labor and that it had met its wage payment obligations by giving the worker the old Chevy. The worker denied any such agreement occurred. Again the ALJ and Court of Appeals disagreed with the dealership. The court explained that, under ORS 652.610(3)(b), the dealership would be entitled to apply the value of the old Chevy against the amount of wages owed to worker only if that

deduction was "authorized in writing by the employee, [was] for the employee's benefit, and [was] recorded in the employer's books[.]" But there was no written authorization, and the dealership's books contained no record of a deduction. Accordingly, the court upheld the ALJ's order that the dealership was required to pay the worker unpaid wages plus penalty wages and a civil penalty.

Employers should take away at least two important lessons from this case. First, keeping timely, accurate and contemporaneous records of all hours worked, including overtime, wages and other conditions and practices of employment is essential. This basic record keeping is required by ORS 653.045. Second, employers must make sure that any deductions made from employee wages are authorized in writing by the employee, are for the employee's benefit and are recorded in the employer's books, as required by ORS 652.610.

Jeff Brecht can be reached at 503.243.1652 or via email at jeffb@sussmanshank.com.

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

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Employee Termination: Err on the side of "payment"

By Elizabeth Semler, Sussman Shank.

In *Wilson, et al. v. Smurfit Newsprint Corp.* 197 Or. App. 648 (Ct App. 2005), the Oregon Court of Appeals attempted to clarify when a failure to pay wages on termination qualifies as "willful" such that penalty wages can be imposed. The decision also addressed a number of other interesting issues related to employee termination and the penalties which can be imposed for failure to pay wages and unauthorized deductions from wages.

The case arose from the defendant's sale of its Newberg facility to another company ("SP"). The plaintiffs received notice from the defendant that their employment would be terminated upon the sale to SP. Defendant's and SP's contract required SP to offer employment to substantially all of the defendant's employees, and all but five were rehired.

After the sale, a group of employees sued the defendant for various employment law violations, including failure to pay wages upon termination and unauthorized deductions from wages. The court concluded that "an employer need not pay wages owed at termination if it reasonably believes that the employee cannot make a *prima facie* case that the wages are due and owing. However, the employer does not escape the obligation merely because it believes it has an affirmative defense or counterclaim against the employee's claim – even if, in fact, such a defense or

counterclaim exists." Instead, in such a case, the employer must pay the wages and then bring a separate action for damages.

Based on this definition of "willful," the *Wilson* court concluded that the defendant acted "willfully" when it failed to pay severance until after the Ninth Circuit Court of Appeals affirmed the arbitrator's decision that the sale to SP constituted a permanent closure of the Newberg facility. The court found that the defendant became aware of its obligation to pay severance when the arbitrator held that the defendant had decided to permanently close the Newberg facility, not the date the decision was affirmed.

As a result, the defendant's failure to pay severance after it acquired the requisite information on which to base its decision to pay (i.e., after the arbitrator's decision) was found to be willful and a penalty of 30 days' wages was imposed.

Another interesting issue discussed in *Wilson* was whether the plaintiffs were entitled to recover both penalties for unpaid wages on termination and penalties for unauthorized deductions from wages (medical insurance premium payments improperly deducted during the transition period). The court held that by withholding pay without authorization, the defendant incurs penalty wages.

The lesson of *Wilson* is that regardless of the circumstances of an employee termination, employers should err on the side of payment of all amounts arguably due to avoid penalties. Employers should also be very careful when making deductions made from wages – particularly in the context of a business transition such as a sale or business closure.

Elizabeth A. Semler is a member of Sussman Shank's Litigation and Employment Law Groups.

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The Corner Office

Client Communications

Returning Phone Calls

Empty your voicemail each night. Return calls every morning. Keep a pad by your phone. Write down the day, time, name, number and issue for each call and check it off as you return. When returning calls, note in the file if you left a message or what the discussion with the client was about. Your client file should have a phone log history of every discussion you have with your client. Save your phone pads; that way, if you need a recently used number, you can get it quickly. Return all calls within 24 to 48 hours. If it is a long weekend, or you are out on vacation or sick leave, your voice mail should say when you will be back. Always condition the expectations of your client base so that they know you will call them back and when they usually can expect to hear from you.

Have instructions on your outgoing message for callers to leave specific information, and the order in which you want to hear it.

Proactive vs. Reactive

When you do call a client, have the file in front of you, so that

you know the discussion topic. If your client has a spouse and children, know their names. If your client owns a pet, know the pet's name too. As human beings we need to be more proactive instead of reactive in our communications with our clients. Make the effort to know your clients well enough, not just to address or patch up the immediate problem but also to solve it, if it can be done. A proactive person can solve problems better, because he or she considers the person, not just "a client with a specific issue or a case-type." Every case that walks through the door is a miniature universe of people, events and a history. Knowing this universe will make you a better attorney for the client, a creator of solutions. If you are just looking at your clients as an assembly line of issues, then you are practicing law in a reactive fashion. Keep a page inside the file, on top of other papers, to write down particular or special things about the person or the case, so that you have instant recall when your clients call and you pick up their files.

Preparing a Person to Listen

A high volume caseload usually means the handling of small or big disasters for a huge number of people, all the time. Clients walk into your office worried, emotional and not informed on where they are in the big picture. Often clients become frustrated because they ask a simple question, "What is going to happen to me?" The answer we give has no structure with a bunch of "Ifs." When people are scared, they cannot process information well; your advice will be lost and your clients will become more upset. Your first goal in effective client communication is to manage fear and worries to a level where your clients can listen.

When clients walk in the door with a type of case that you are familiar with, delay throwing advice at them. First, get to know them, listen to what they have to say, discover what they want to have happen, and then give them a simple framework for where they are in the big picture and where their cases would go procedurally, including time lines. This last part is critical, because the procedure or life-cycle of cases must be explained for advice to have any context. Finally, when the client asks, "What is going to happen to me?" and you give an answer, that client now has a mental framework to hold this information and your advice. Clients will regain a sense of control this way, they will feel better and then they will be able to absorb advice. Keep your clients informed

about their cases, tasks, time lines and what to expect at a hearing in front of a judge. Clients appreciate this discussion.

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. While The Corner Office cannot promise to answer every question submitted, its intent is to respond to questions that raise interesting professionalism concerns and issues. Please send your questions to mba@mbabar.org and indicate that you would like The Corner Office to answer your question. Questions may be submitted anonymously.

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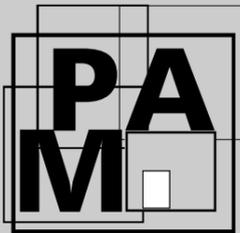
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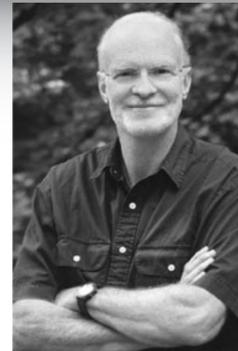
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