MULTNOMAH LAWYER

MULTNOMAH BAR ASSOCIATION
1906

Lawyers associated for justice, service, professionalism, education and leadership for our members and our community. **November 2004 Volume 50, Number 10**

Absolutely Social a Success

About 200 lawyers, judges and sponsors gathered at The Benson Hotel on October 5 for the fall "Absolutely Social" Social – The Grape Escape. The event featured wine tastings from three Oregon wineries. Canned food and cash donations were collected and donated to the Oregon Food Bank – thanks to all those who contributed!

"Absolutely Social" Social Generously sponsored by

Bank of the Cascades
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The next MBA Social will be held in February. Look for details in upcoming issues of the *Multnomah Lawyer*.

Elise Bouneff, Paul Migchelbrink and Robert Neuberger pictured above. Elise Bouneff, VP with Bank of the Cascades, serves on the Oregon Law Foundation Board. She successfully proposed a significant increase to the interest rate that the bank pays on IOLTA trust accounts and elimination of netting of charges from interest earned. As a result, the bank's overall contribution to the Oregon Law Foundation will potentially increase from approximately $660 per year to over $36,000, making it the leader amongst Oregon community banks supporting the IOLTA program.

Pictures cont. on p. 7

MULTNOMAH BAR ASSOCIATION
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Anneke Haslett and Lauren Harkins of Legal Northwest join Catherine Brinkman and Greg Levinson of the YLS Board.

Attendees from the Lewis & Clark Law School.

Greg MacCrone, Tamara Russell and David Bean from the YLS Board.

2005 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 2005 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 and Robert C. Weaver.

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 see the insert in this issue or go to www.mbabar.org.

MBACLE

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

November

Tuesday, November 2
Diversity in the Workplace
Steve Hanamura

Thursday, November 4
Multnomah County Evidence Update
Hon. Edward Jones
Hon. Michael McShane
Roy Pulvers

Tuesday, November 9
New Ethics Rules
Sylvia Stevens
Mark Fucile
Steven Moore

December

Thursday, December 2
Arbitration – Mastering Procedure and Drafting Agreements
Victor Kisch
Carl Neil

Thursday, December 9
Drafting Pre- and Post- Nuptial Agreements that Stick
Josh Kadish
Michael Yates

Friday, December 10
The Management of Nonprofits and the Further Adventures of HIPAA
Kelly Hagan
Walter Grebe

January

Tuesday, January 4
YLS Young Litigators' Forum begins

Thursday, January 27
Annual Family Law Update
Hon. Elizabeth Welch
Bill Schulte
Gary Zimmer

In This Issue

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

DEADLINE for copy: The 10th of the month*
DEADLINE for ads: The 12th of the month*
**or the preceding Friday, if on a weekend.*

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Display Advertisment:
Renee "Max" Maxwell
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Carol Hawkins
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NEW ON THE SHELF

By Jacque Jurkins, Multnomah County Law Librarian.

BLACK'S LAW DICTIONARY, 8th ed. edited by Bryan A. Garner. Published by Thomson/ West, 2004. (Ref. KF 156 B53)

ANATOMY OF A LAW FIRM MERGER: How to make or break the deal: Hildebrandt International, 3d ed. Published by the ABA Law Practice Management Section, 2004. (KF 300 A53)

THE AMICUS BRIEF: How to be a good friend of the court, 2d ed. by Reagan William Simpson and Mary R. Vasaly. Published by the ABA Tort Trial and Insurance Practice Section, 2004. (KF 8748 S55)

A MANUAL FOR STYLE FOR CONTRACT DRAFTING by Kenneth A. Adams. Published by the ABA Section of Business Law, 2004. (KF 807 A33)

THE COMMERCIAL LEASE FORMBOOK: Expert tools for drafting and negotiation, edited by Dennis M. Horn. Published by the ABA Section of Real Property, Probate and Trust Law, 2004. (KF 593 C6)

THE ABC's OF THE UCC by Carl S. Bjerre and Sandra M. Ricks. Published by the ABA Section of Business Law, 2004. (KF 912.5 A1 A23)

THE ELECTION LAW PRIMER FOR CORPORATIONS, 4th ed. by Jan Witold Baran. Published by the ABA Section of Business Law, 2004. (KF 4886 B37)

STRATEGIES FOR SECURED CREDITORS IN WORKOUTS AND FORECLOSURE by Patrick E. Mears. Published by the ABA Committee on Continuing Professional Education, 2004. (KF 1501 M45)

MANNING ON ESTATE PLANNING, 6th ed. by Jerome A. Manning, Anita S. Rosenbloom and Seth D. Slotkin. Published by the Practising Law Institute, 2004. (KF 750 M35)

THE COMPLETE QDRO HANDBOOK: Dividing ERISA, military, and civil service pensions and collecting child support from employee benefit plans, 2d ed. by David Clayton Carrad. Published by the ABA Section of Family Law, 2004. (KF 3512 C37)

THE BUSINESS TAX RETURN HANDBOOK, 2d ed. by Jack Zuckerman and William F. Wolf. Published by the ABA Section of Family Law, 2004. (KF 6450 Z83)

THE CLEAN AIR ACT HANDBOOK, 2d ed. edited by Robert J. Martineau and David P. Novello. Published by the ABA Section of Environment, Emergy, and Resources, 2004. (KF 3812 C52)

ENVIRONMENTAL ASPECTS OF REAL ESTATE AND COMMERCIAL TRANSACTIONS: From Brownfields to green buildings, 3d ed. edited by James B. Witkin. Published by the ABA Section of Real Property, Probate and Trust Law, 2004. (KF 1298 E57)

INTERNATIONAL TRADEMARK AND COPYRIGHTS: Enforcement and management edited by John T. Masterson. Published by the ABA Section of International Law and Practice, 2004. (KF 3180 I57)

CALENDAR

To register for CLEs, please see inserts inside this issue.

November

2
Tuesday, MBA CLE – Diversity in the Workplace
See insert or register at www.mbabar.org.

Tuesday, MBA Board meeting

4
Thursday, MBA CLE Multnomah County Evidence Update
See insert or register at www.mbabar.org.

9
Tuesday, YLS Board meeting

Tuesday, MBA CLE – New Ethics Rules
See insert or register at www.mbabar.org.

10
Wednesday, *Multnomah Lawyer* deadline

10-12
Wednesday-Friday, PLF "Learning the Ropes for New Lawyers"
Register at www.osbplf.org.

18
Thursday, New Admittee Social at Red Star Club Room
Call the MBA at 503.222.3275 to RSVP.

25-26
Thursday-Friday, Thanksgiving Holiday
MBA office closed.

December

1
Wednesday, East County Social at McMenamin's Edgefield
Register by emailing noelle@mbabar.org.

2
Thursday, MBA CLE Arbitration: Mastering Procedure and Drafting Agreements
See insert or register at www.mbabar.org.

7
Tuesday, MBA Board meeting

9
Thursday, MBA CLE – Drafting Pre- and Post-Nuptial Agreements that Stick
See insert or register at www.mbabar.org.

10
Friday, *Multnomah Lawyer* deadline

Friday, MBA CLE – The Management of Nonprofits and the Further Adventures of HIPAA
See insert or register at www.mbabar.org.

14
Tuesday, YLS Board meeting

24
Friday, Holiday
MBA office closed.

January 2005

4
Tuesday, MBA Board meeting

Tuesday, YLS Young Litigators Forum begins
See insert or register at www.mbabar.org.

10
Monday, *Multnomah Lawyer* deadline

11
Tuesday, YLS Board meeting

19
Wednesday, MBA Open House

27
Thursday, MBA CLE - Annual Family Law Update
See insert or register at www.mbabar.org.

February

1
Tuesday, MBA CLE - Human Resource Issues for the Small Firm
See insert or register at www.mbabar.org.

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

Ethics Focus

By Mark Fucile, Stoel Rives.

Telling Clients About Mistakes: When Do You Need a Conflict Waiver?

It's every lawyer's nightmare: a serious mistake occurs in handling a case. You're not sure whether it can be repaired or not. The client isn't yet aware of the mistake – or its potential impact. Do you need a conflict waiver from the client to proceed? In two decisions earlier this year, the Oregon Supreme Court looked at when a lawyer who may have committed malpractice needs a conflict waiver to continue handling the case. The Supreme Court didn't draw a bright line in either case, but collectively the pair of decisions offer useful insights into the considerations involved.

In the first, *In re Obert*, 336 Or 640, 89 P3d 1173 (2004), the lawyer missed a filing date and, as a result, the client's appeal was dismissed. The lawyer researched whether the appeal could be reinstated. He concluded that it could not and eventually withdrew. The OSB charged the lawyer with violating DR 5-101(A)(1), which is the Oregon personal conflict rule and is similar to ABA Model Rule 1.7(a)(2) elsewhere, because he had not immediately obtained a conflict waiver from the client upon learning that the appeal had been dismissed.

In the second, *In re Knappenberger*, 337 Or 15, 90 P3d 614 (2004), the opposing party had moved to dismiss an appeal on an asserted procedural defect in service and the appeal was later dismissed on that basis. In the meantime, the lawyer continued to work on the appeal and a related cross-appeal. As in Obert, the Bar charged the lawyer with violating DR 5-101(A)(1) because he had not immediately obtained a conflict waiver from the client when the other party had moved to dismiss the appeal.

In both Obert and Knappenberger, the Supreme Court rejected the Bar's argument that a conflict waiver is required immediately upon a problem surfacing that could possibly lead to a later malpractice claim. Having rejected the Bar's proposed bright line, though, the Supreme Court declined to draw one itself. Instead, the Supreme Court looked to the text of DR 5-101(A)(1), which finds a conflict – albeit a waivable one – "if the exercise of the lawyer's professional judgment on behalf of the lawyer's client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests." The Supreme Court emphasized the impact on the lawyer's professional judgment in Knappenberger and echoed this same approach in Obert: "It suffices to say that, to prove a violation of DR 5-101(A), the Bar cannot assert simply that an error occurred and, therefore, created some risk, however minimal, of impaired professional judgment as a result of the potential malpractice liability. Rather, the Bar must show by clear and convincing evidence that the lawyer's error, and the pending or potential liability arising from that error, will or reasonably may affect the lawyer's professional judgment. That conclusion will depend on the facts and circumstances of each case." 337 Or at 29; accord 336 Or at 648.

Although Obert and Knappenberger were disciplinary cases, the conflict waiver trigger resonates well beyond that context. In Oregon and elsewhere, a lawyer's violation of the conflict rules may also signal a breach of the lawyer's fiduciary duty of loyalty to the client. See *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 843 P2d 442 (1992). Further, the Supreme Court in Obert addressed another facet of the malpractice web – a lawyer's failure to tell the client that an error occurred. In Obert, the lawyer waited five months before telling the client that the appeal had been dismissed. The Supreme Court found that this constituted a misrepresentation by material omission. (336 Or at 649.) In doing so, the Supreme Court cast this failure to communicate in fiduciary terms as well: "[W]e think … that a lawyer effectively jettisons his or her fiduciary responsibility to safeguard a client's confidence and trust when the lawyer knowingly withholds from a client the all-critical fact that the court has spoken and the client's case is over." Id.

The Professional Liability Fund provides both guidance on malpractice-related conflict issues and expert assistance in evaluating and "repairing" problems that may have occurred. As Obert illustrates, even if a conflict waiver isn't necessary, prompt communication with the client and attention to the problem is.

ANNOUNCEMENTS

MBA East County Social at Edgefield
On Wednesday, December 1, at 5:30 p.m., MBA members and other east county attorneys are invited to socialize at McMenamins' Edgefield, 2126 SW Halsey in Troutdale. Cost is $10. Please RSVP to Noëlle Saint-Cyr at noelle@mbabar.org.

MBA Professionalism Award Nominations
Do you know a lawyer who goes above and beyond the minimum professionalism standards? Nominate him or her for the 2005 MBA Professionalism Award. 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 see the insert in this issue or go to www.mbabar.org.

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

Queen's Bench Luncheon
On November 9, pioneer woman lawyer Caroline Stoel helps welcome new admittees at this kick-off luncheon, which will be held at Jax Restaurant, between 11:45 a.m.-1 p.m. The cost is $12. No reservation required. New admittees, please RSVP to Kimberly Kaminski so you may be honored. For more information please contact Kim Kaminski at 503.281.2022, kaminski_law@msn.com or Shari R. Gregory at 503.226.1057 ext. 14, sharig@oaap.org.

Federal Bar Association (FBA)
The Oregon chapter of the FBA forwarded the following notice concerning electronic availability of case file information. This information is also available at the court's website, http://www.ord.uscourts.gov.

Notice Regarding Electronic Availability of Case File Information
Effective: November 1, 2004
Litigants and counsel of record should not include sensitive information in any document filed with the court unless such inclusion is necessary and relevant to the case. Any personal information not otherwise protected will be made available over the Internet via PACER. If sensitive information must be included, certain personal data identifiers must be partially redacted from the pleading, whether it is filed traditionally or electronically: Social Security numbers, financial account numbers, dates of birth and the names of minor children.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers specified above may:
(1) File an unredacted document under seal. This document shall be retained by the court as part of the record, or
(2) File a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete identifier. The reference list must be filed under seal, and may be amended as of right. It shall be retained by the court as part of the record.

The court may, however, still require the party to file a redacted copy for the public file. In addition, exercise caution when filing documents that contain the following:

(1) Personal identifying number, such as driver's license number;
(2) medical records, treatment and diagnosis;
(3) employment history;
(4) individual financial information; and
(5) proprietary or trade secret information.

Counsel is strongly urged to share this notice with all clients so that an informed decision about the inclusion of certain materials may be made. If a redacted document is filed, it is the sole responsibility of counsel and the parties to be sure that all pleadings comply with the rules of this court requiring redaction of personal data identifiers. The clerk will not review each pleading for redaction.

If you have any questions concerning the foregoing, please contact Chief Deputy Clerk Camile Hickman at 503.326.8090.

Compensation for Legal Secretaries Hits New High

By David O'Brien, Legal Northwest.

Legal Northwest saw significant changes in the market for legal support staff in 2004. Most notably, wages for high-end legal secretaries and paralegals reached record highs, despite sluggish yet optimistic increases in demand. The enclosed insert *Legal Northwest 2004 Starting Salary Survey for Support Staff* reflects these changes.

High-end legal secretaries found starting salaries pushing the $50,000 mark in the larger downtown firms. The demand for quality legal secretaries stayed steady, with some growth stemming from firms actually adding positions. The market hadn't seen that type of activity for the previous three years. The supply for quality legal secretaries remained low, pushing the high-end salaries up.

Firms often express frustration to Legal Northwest over the lack of qualified legal secretary resumes they received from classified ads. The main reason the supply stayed low is because local secretaries were reluctant to make lateral moves. Quality legal secretaries with strong skills and a good work history will not leave good paying jobs unless: (1) they make at least the same amount of money and equivalent benefits; and (2) there is the potential of a better working relationship with the attorneys they will be supporting. So, they are being very picky and the market allows them to be so. This was off-set a bit by an increase in the influx of quality secretaries moving in from out of state.

The growth in the demand for paralegals is one of the most encouraging signs for the legal marketplace in 2004. Firms remained conservative in hiring, but Legal Northwest saw firms strengthening their paralegal staffs with new hires. The starting salary in law firms for a high-end paralegal breached the $60,000 mark this year for the first time since Legal Northwest starting tracking this information.

Low-end and mid-range wages for support staff did not see the same rise in salaries. There continue to be a lot of people looking to break into the legal market on the low end of the salary scale. So firms have not been forced to increase those wages. These people are often college educated, with strong computer and communication skills. People with good experience but spotty work histories did not see wage increases either.

Overall, Legal Northwest saw in 2004 the first sustained positive signs of growth for the legal support marketplace since 1999 – and that is good news for all of us (even if you have to pay more for the high-end people you're looking for to help your practice flourish).

St. Andrew Legal Clinic Celebrates 25 Years of 'Bridging the Gap'

By Laura Heiser, St. Andrew Legal Clinic.

On September 30, hundreds of past and present volunteers, supporters and staff gathered in downtown Portland to celebrate St. Andrew Legal Clinic's 25th Birthday. Since its inception, St. Andrew Legal Clinic (SALC) has provided legal services to over 30,000 low-income individuals and families in Portland. All legal representation is provided in the area of family law and most cases are extremely complex, with issues like drug use, domestic violence and/or child abuse.

St. Andrew Legal Clinic was originally founded in 1979 by two attorneys who were members of St. Andrew Catholic Church, Judge Keith Raines and Tom Caruso. They saw a huge, unmet need for the working poor population who simply could not afford the cost of hiring private attorneys. Their solution was to form a low-cost legal clinic, located across the street from the church in NE Portland, where it is still located today. The clinic has grown dramatically since its inception, with two branch offices operating in Washington and Clackamas counties, with a total of 13 full-time staff attorneys and hundreds of volunteer attorneys. The three clinics combined serve over 2,000 individuals and families annually.

There are an estimated 250,000 people each year in Oregon who fall into "the gap" that SALC helps to bridge. When families are threatened by lack of access to the courts, the effects are far-reaching, not only to the family involved but also to the larger community. The effects result in additional work for police departments, social service agencies, and the court system, as the number of unrepresented litigants increases. Because of SALC, children are growing up in safer environments and families have increased financial security, stayed off of welfare and have become more productive members of our society.

As a nonprofit, SALC could not exist without its dedicated volunteers and the continued private donations from foundations, companies and individuals. The clinic receives no funding from the Campaign for Equal Justice. To make a tax-deductible donation in honor of SALC's 25th Anniversary, please make checks payable to St. Andrew Legal Clinic and send to SALC c/o Development Department, 807 NE Alberta St, Portland OR 97211. For more information about volunteering for SALC, call 503.281.1500 ext. 20.

MBA Membership Drive Underway

The 2005 MBA membership renewal drive has started, and you should have received your membership renewal by now. If you have questions about your membership, please call Guy Walden at the MBA at 503.222.3275.

The White Collar Labyrinth: Oregon Employers Maneuver Through New FLSA Rules

By Laurie Hager, Sussman Shank et al.

On August 23, 2004, the "White Collar Exemption" changes to the federal overtime rules under the Fair Labor Standards Act of 1938 (FLSA) took effect. Oregon has its own set of overtime rules under ORS Chapters 652 and 653, and OAR 839-020-0004 and 839-020-0005. A right to overtime is considered beneficial to an employee and therefore, rules requiring overtime instead of the exemption are more beneficial to the employee. When the federal and state overtime rules conflict, those most beneficial to the employee prevail. Consequently, some of the preexisting Oregon rules still apply.

The following is a general overview of some of the new federal overtime exemption rules for white collar employees and how they affect Oregon employers.

Executive (Supervisory) Employee
Pursuant to the new federal rules, to be subject to the executive overtime exemption, an Oregon employee must: (1) spend most (generally greater than 50%) of his or her time performing executive work; (2) have certain weight applied to his or her decision to hire, fire, or advance another employee; and (3) earn a weekly salary of $455 or greater. (The new federal threshold of $455 replaces the preexisting Oregon weekly salary threshold of $282).

Administrative Employee
Pursuant to the new federal rules, to be subject to the administrative overtime exemption, an Oregon employee must: (1) spend most (generally greater than 50%) of his or her time performing administrative work; and (2) earn a weekly salary of $455 or greater. However, despite a change in the federal rules, Oregon employees must still perform work directly related to the policies of the employer in order to be subject to the administrative exemption.

Professional Employee
Pursuant to the new federal rules, to be subject to the professional overtime exemption, an Oregon employee must: (1) spend most (generally greater than 50%) of his or her time performing professional work; and (2) earn a weekly salary of $455 or greater. However, despite employers' new option under the federal rules to pay an hourly or fee basis amounting to $455 per week in order to subject the employee to an overtime exemption, Oregon employees still must earn a weekly salary of at least $455 for an exemption to apply.

Outside Salesperson
Under Oregon rules, 70% of the employee's hours must be spent on outside sales to be subject to the exemption. Oregon's preexisting rules still apply on this issue despite the federal rules' change from requiring 80% of hours in outside sales, to requiring that outside sales be the "primary duty" of the employee (meaning only greater than 50% of hours be in outside sales).

Highly Compensated Employee
Under this new federal rule, an employee qualifies for the exemption from overtime simply by earning $100,000 or more annually, if he or she performs office or non-manual work, and "customarily and regularly" performs just one of the exempt duties of an administrative, executive, or professional employee. Oregon does not currently have a similar exemption, and therefore, Oregon employers must still pay overtime for these employees unless another recognized exemption applies.

What's an Oregon employer to do?
If Oregon employers are unsure of whether the new federal rule or the state rule applies to a particular situation, they should consult an attorney. However, Oregon employers should keep in mind that the rule most beneficial to the employee generally applies, and that many employees that were exempt prior to August 23, 2004 are no longer exempt because of threshold salary increase to $455 per week. Oregon employers should also consider whether it would be better to increase an employee's salary to at least $455 per week and reevaluate job functions to qualify for an exemption, or to keep the lower salary and be subject to overtime rules.

Although the relevant administrative body in Oregon has considered changing its rules to conform more to the federal rules to make compliance easier, until that happens, Oregon employers must compare each aspect of the federal and state rule to determine which one applies. Also, employers should monitor US Congressional consideration of the new FLSA rules, since the House voted in favor of blocking the legislation on September 9.

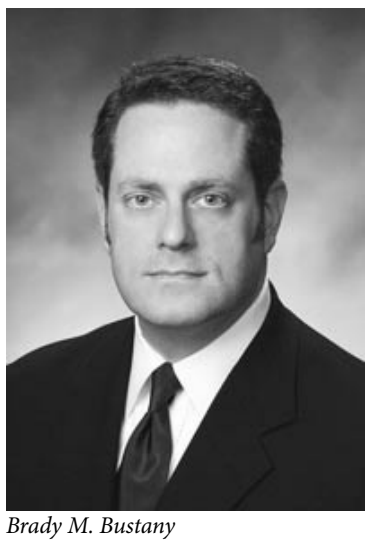
Laurie R. Hager is an attorney in the employment law department of Sussman Shank. She may be reached at 503.227.1111 or laurie@sussmanshank.com.

Around the Bar

GEVURTZ MENASHE ET AL
Shawn Menashe has been appointed vice-chair of the ABA's Young Lawyers Division, family law section. His term is effective 2004-2005.

Michelle K. McClure

LANDYE BENNETT BLUMSTEIN
The firm welcomes **Michelle K. McClure** as a new partner to its Portland office, where she will continue to focus her practice on products liability, construction defects, healthcare and personal injury litigation.



Brady M. Bustany

Leah B. Cronn

LANE POWELL ET AL
Brady M. Bustany has joined the firm as an associate in the litigation department, where he will focus his practice on commercial and health care litigation.

Leah B. Cronn has joined the firm as an associate in the litigation department, where she will focus her practice in the area of white collar criminal defense and government enforcement, representing business entities and individuals who are facing regulatory enforcement issues, government investigations and criminal prosecutions.

Clifton Molatore

MILLER NASH
The firm has launched an extensive community service program for its staff members. Under this program, any employee actively involved in a nonprofit organization can have his or her contributions to a single charitable organization "matched" by the firm for up to $150.

In addition to the matching contribution, each full-time employee will receive an annual allotment of 15 paid hours off for volunteering his or her services to any nonprofit organization benefiting the community, as long as the community service is not political in nature, ballot-related, or directly benefiting a religious institution.

The new support-staff policy is in addition to the $150 annual matching contribution and 120 hours of credit for pro bono legal services available to firm lawyers. "We believe our program sets a new standard for community giving among local law firms," says Tom Sand, Managing Partner. "We decided it is time to step up to the plate and truly demonstrate one of our firm's longstanding core values - a strong commitment to public service in the communities of the Northwest where we live and work."

In 2003, Miller Nash contributed over $142,000 in cash to 90 different agencies and provided more than $725,000 worth of pro bono legal services.

Miller Nash welcomes **Clifton Molatore** to its Portland office. Molatore, an associate in the business department, focuses his practice on secured financing, corporate bankruptcy matters and loan workouts and restructuring.

SCHWABE WILLIAMSON & WYATT
The firm received top honors for the "Best Professional Services Website" in the Web Marketing Association's 2004 WebAwards. The international award recognizes Schwabe's Web site, www.schwabe.com, as one of the most effective Web sites on the Internet today.

The firm also continues to earn recognition for its technology law expertise with the election of shareholder **Michael Cohen** to the executive committee of the OSB's Computer and Internet Law Section.

Cohen co-chairs Schwabe's intellectual property practice group, along with Schwabe shareholder **Al AuYeung**, and he specializes in intellectual property protection, enforcement and licensing, complex litigation and entertainment law.

Schwabe attorney **Román Hernández** is among 50 "Great Leaders" recognized in the October PowerBook issue of *Oregon Business* magazine.

The magazine's editors selected Hernández for its annual feature, which profiles business leaders from around the state. He was selected for his extraordinary efforts to support Oregon's business growth, community development and economic expansion.

John A. Schwimmer

SUSSMAN SHANK
The firm announces its firm management for the coming year. **Jeffrey C. Misley** has been re-elected managing partner for fiscal year 2005. **Nena Cook** has been appointed the litigation practice group chair. **Michael G. Halligan** has been elected to a two-year term of the firm's management committee. **Barry P. Caplan** will continue as the practice group chair for the bankruptcy/creditors' rights group. **John E. McCormick** will continue as the practice group chair for the business group.

The firm welcomes **John A. Schwimmer** as special counsel of the firm, where his practice focuses on complex business litigation for such clients as Cendant Corp., Goldman Sachs, Public Storage, Inc. and SunAmerica in the areas of securities, contracts, corporate governance, class action defense, "business divorce," real estate, insurance and intellectual property.

TONKON TORP
Robert E. Hirshon, chief executive officer of the firm and former president of the ABA, met with students and faculty at the University of the Pacific, McGeorge School of Law to share his perspective on challenges facing attorneys and law firms.

During Hirshon's day-long visit, he taught a class on professional ethics, delivered the keynote luncheon address to students and faculty, and led a roundtable issues discussion focusing on the challenges confronting the legal profession with the McGeorge faculty and managing partners of Sacramento law firms. In his keynote luncheon speech, Hirshon discussed the role of the ABA in judicial selection, the need for greater pro bono work among practicing lawyers and other topics related to leadership and professionalism.

Hirshon has worked closely with state legislatures, members of Congress, White House staff and federal agencies, and has lectured throughout the country on various insurance, banking, civil litigation and civil justice issues. Following his tenure as ABA president, he joined the firm in 2003 as its first CEO.

Absolutely Social a Success (continued)

Joshua Williams, Judge Ed Jones and his wife Jenny Cooke.

Judge Jerome LaBarre, Mary Jo King and Judge Mike King share stories of being past president.

Hina Chaschin of Naegeli Reporting Corp, Steve Shropshire and Ron Heard.

Tips from the Bench

By Judge John Wittmayer, Multnomah County Circuit Court.

Conferring on Civil Motions

"UTCR 5.010 Certification: I certify that before filing this motion, I made a good faith effort to confer with opposing counsel."

How many times have you either written this or read it? Does this certification comply with the rule? UTCR 5.010(1) requires you to make a good faith attempt to confer with adverse counsel before filing certain civil motions. UTCR 5.010(3) requires you to certify compliance with the rule when you file your motion.

UTCR 5.010(3) says the certificate will be sufficient if it "states that the parties conferred or contains facts showing good cause for not conferring." The "standard language" certification quoted above does not comply with the rule. The certification must either say you actually did confer, or it must contain facts that permit the Court to determine if good cause exists for you not actually conferring.

The Multnomah County Circuit Court Civil Motion Panel recently discussed this rule. The Motion Panel agreed that to "confer" means to actually talk to each other, in person or on the phone. The Motion Panel Judges emphasize that lawyers work things out best when they talk to each other in "real time." You cannot "confer" via a letter or email. A letter sent from one lawyer to another stating an intent to file a motion if it is not conceded does not establish good cause for not conferring. Even a letter inviting opposing counsel to call and confer before a motion is filed is not sufficient if the moving party does not make a follow-up phone call in an attempt to speak with opposing counsel. Likewise, a phone message that says "please call me about the case," without specifying the issues to be discussed, is not a good faith effort to confer.

In *Nelson & Nelson*, 117 Or. App 157, 161 (1992) the Court of Appeals ruled that the certification of compliance with UTCR 5.101 is mandatory. If the certification is absent, the court has no authority to grant the motion. It is reasonable to conclude that if the certification is deficient, the court, likewise, has no authority to grant the motion.

Dissolution of Marriage Trials – Proposed Distributions

When you go to trial on a dissolution of marriage case, each lawyer submits to the trial judge a written "proposed distribution of assets and liabilities." Reading the submission from wife's lawyer and comparing it to the submission from husband's lawyer often makes me think these people are not talking about the same assets and liabilities, or maybe even the same marriage! Each describes assets and liabilities using different names, and each includes or omits assets and liabilities the other has omitted or included. It is very difficult for the trial judge to reconcile these differences.

Suggestion: Get together with the other lawyer and submit a joint document so you are describing the items in the same manner. You should include a column for each litigant to list that litigant's view of the value of the asset, etc, and you could also include a column with blanks for the trial judge to use as a worksheet. A side benefit of this procedure is that it should also help you to settle your cases earlier.

The Court's Web site

Our Multnomah County Circuit Court is interested in improving our court Web site to make it more useful to you, your clients and the public. If you have any suggestions about either the content or the format of the web site, please let me know by email at john.a.wittmayer @ojd.state.or.us.

The MBA takes this opportunity to thank speakers **James Cartwright** of Cartwright & Associates, **Jonathan Levy** of Cavanaugh Levy Twist and **Richard Pagnano** of Davis Pagnano & Williams for agreeing, on short notice, to teach *The Dark Side of Revocable Living Trusts* CLE Seminar on October 5th.

Court Liaison Committee October Meeting

Judge Edward Jones explained what the Judicial Outreach Committee (JORC) has done since it first began to meet in January 2003. Since then, 65 presentations have been given to civic, senior and religious organizations, to audiences ranging from about 12 to over 200. The third legislators' open house was held October 7 at the Multnomah County Juvenile Facility.

A near, year-long juror appreciation project, being coordinated by **Judge Ellen Rosenblum**, started with a two-hour symposium on October 20. The project will continue throughout the year, including programs during Community Law Week, which will be held in early May, 2005. The event on October 20 featured a panel of speakers, including **ABA President, Robert Grey, Chief Justice Wallace P. Carson Jr., Judge Janice Wilson** and former juror **Michael Collins**. The panel addressed national, statewide and local initiatives that support the jury system, ways to improve jurors' experience and how to increase the ability of all citizens to perform this service. Attendees participated in a discussion with the panel that identified possible solutions for removing barriers to jury service.

Judge Koch reported that if the Multnomah County temporary income tax (the ITAX) is repealed by Multnomah County Measure 26-64, it won't have a big impact directly on the courts, but it will result in a $32 million dollar reduction in the county's general fund resources for the last six months of the 2004-05 fiscal year, and again in 2005-06. This loss of funding will impact all county agencies including the Office of the District Attorney and the Sheriff's funding of jail beds. In addition, the county's annual support for Multnomah CourtCare is in jeopardy. So, there will definitely be an indirect impact on the courts. The biggest impact of the repeal of the ITAX, however, will fall on local school districts, which will lose $90 million dollars in funding for 2004-05 and 2005-06.

Judicial Profiles update: **Justice Kistler** appears in the November *Multnomah Lawyer*, **Judge Deits** in December and **Judge Dailey** in January.

The committee was asked to help implement the MBA Public Outreach plan. One possible way to do that is sponsoring a public forum on topics such as wills, estates and advance directives. **Jennifer Oetter** suggested a workshop with the theme of what it means to change the state constitution.

Profile – Rives Kistler, Associate Justice, Oregon Supreme Court

By Marc Abrams, Oregon Department of Justice and Court Liaison Committee.

Justice Rives Kistler won't answer my admittedly Barbara Walters type question: if you could be a movie star, which one would you be?

"I'm happy with the person I am," says Justice Kistler.

The person Justice Kistler is didn't start out to be a lawyer, let alone a member of Oregon's highest court. Instead, this native Californian whose family moved to a small town in North Carolina when he was four years old started out studying English, first at Williams College and then in the Masters program at the University of North Carolina. To pay for his legal education, he worked as a gardener and a nursery laborer. It was a summer job getting dirt under his fingernails that brought him first to the Pacific Northwest and, when he turned to law, a summer clerkship at Stoel Rives that brought him to Portland.

But Kistler did not immediately return to Oregon. While at Georgetown Law School, he served as an extern to Judge Harry Edwards of the US Court of Appeals for the District of Columbia, though "they didn't call it an extern back then," he notes. Edwards started Kistler on internal memos, but moved him up to drafting opinions. After graduating from Georgetown, he served as a clerk for Charles Clark, the Chief Judge of the Fifth Circuit, and for Justice Lewis Powell before returning to Portland and Stoel Rives. Kistler respects all three jurists for whom he worked. "They worked to figure out what the law said and give the right answer in each case."

Although Kistler enjoyed the work of a litigator in private practice, the desire to do appellate work remained, and he moved from Stoel Rives to the Department of Justice (DOJ) Appellate Division in 1987. "My stronger suit was appellate work," he said, "and the advantage to working at DOJ is that you're working in the public interest." When Kistler was appointed to the Court of Appeals in 1999 by Governor Kitzhaber, it drew no more attention than any other appointment, even though Kistler is openly gay and has been in a committed relationship for 20 years. Nor did his elevation by Governor Kulongoski to the Supreme Court in August 2003. But in March 2004, the Multnomah County Commission triggered a raging debate about gay marriage when it began issuing marriage licenses to same sex couples. Kistler, who needed to run a retention election in the May 2004 primary, found himself a potential proxy for the culture wars in Oregon and faced an openly conservative challenge to retain his seat on the court.

Kistler did not believe that was what the election was about. As he told *Newsweek* magazine, "I didn't want to be known as the gay judge. I would hope to be known as the good judge." It is important to Kistler that he be evaluated on his merits as a jurist. So why is it important - or unimportant - that he is gay? To Kistler, it's less about who he is and more about who the entire court is. "Your background is important to help you see and understand things about the nature of a case. When justices share their perspectives, it makes the court richer. There are many types of diversity. Trial lawyers and defense counsel. Gender diversity. Geographic diversity. Each is a piece of the puzzle."

The pieces of the puzzle are what helps the court function, a function that is not always well understood by non-lawyers. Kistler does not see his role as making the decisions assigned to other branches of government, but as ensuring that those decisions have been done within the authority the decision-maker has been granted. As Kistler noted, "In a criminal case, a jury may come to a different decision than I would. A trial judge might use his discretion differently and reach a result I would not reach. A workers' compensation administrative law judge might make a fact finding I would not make. But I'm not the policy maker, and those are not things we judges can generally change." Nor does Kistler see that function changing much as he transitions from the Court of Appeals to the Supreme Court. He sees the two benches as "having more similarities than differences, with judges who care deeply about what they're doing and are careful about what they're writing." The main differences are that the Supreme Court sees "more open, unresolved cases" and that with all decisions made by the entire seven-person court rather than the three-judge panels utilized by the Court of Appeals, it takes "more work to bring together a majority - perhaps by design."

Justice Rives Kistler

Kistler believes that, because he had already been on the bench for several years before this year's election, he had a track record and that, without regard to his orientation, people "could look at the record and say 'I think he's a good judge or a bad judge.'" Kistler won the election by a comfortable margin, and now has time to show that he is, indeed, a "good judge."

MBA Court Liaison Committee Survey and Responses

As part of its annual charge, the MBA's Court Liaison Committee surveys MBA members and responds to their suggestions and areas of concern regarding the Multnomah County Circuit Court operations.

The questions below were received from a survey conducted last spring by the committee, and Judges Wilson and Koch have responded.

Please let the MBA Court Liaison Committee know if you have any other issues you would like to have addressed.

The regular monthly meetings of the Multnomah County Civil Motion Panel have come to serve as a general roundtable for judges of the court who are interested to discuss issues on the civil side of the court's docket. At the meeting on October 5, the judges discussed those responses to the MBA Court Liaison Committee's survey that related to civil motion and trial matters. The judges are all appreciative of the thoughtfulness of the bar in making these suggestions.

Many of the suggestions would require amendment to the Oregon Rules of Civil Procedure (ORCP) or at least the Uniform Trial Court Rules (UTCR). Supplementary Local Rules (SLRs) that cause too much variation in practice from county to county are discouraged by the Oregon Supreme Court and are unlikely to be approved.

Here is a brief summary of some of the discussion concerning specific suggestions:

Question 1. "My hope is that Multnomah will adopt an SLR requiring the exchange of witness and exhibit lists at least one week before trial in civil matters. This would help to resolve matters prior to trial by requiring both sides to assess their case (including witnesses and exhibits) before the last moment. It would also allow the opposing side to assess the merits of the other's case."

Answer 1. All of the judges agreed with the sentiment that exchanging as much information as possible well before trial is a good idea. It streamlines the issues, reduces morning-of-trial delays for hearings on motions *in limine*, and increases the prospects for settlement. As noted above, however, this probably could not be accomplished by an SLR. Some judges are now imposing similar requirements in specially-assigned cases. It would be difficult to define such a requirement in Multnomah County, where the vast majority of cases are assigned to a judge the day before trial.

For example, would the week be counted from the first trial setting? Or only from a setting that is "date certain?" At least as to expert witnesses, the court clearly cannot order the pretrial disclosure suggested under the current ORCP. *Stevens v. Czerniak*, 336 OR 392, 84 P3d 140 (2004).

Question 2. "I think Multnomah County should not refuse to change venue when the case arises in Washington or Clackamas counties. I believe Multnomah County has kept those cases as a courtesy to the bar, on the theory that most lawyers are in downtown Portland, and it is more convenient to the attorneys to keep those cases in Portland. That view, I believe, is both naive and outdated. In fact, most plaintiffs' lawyers would prefer to have a Multnomah County jury decide their case, on the belief that such juries tend to be more liberal and generous. I have had cases where lawyers in Beaverton or Hillsboro file a lawsuit from a Washington County accident involving a Washington County plaintiff in Multnomah County. That's certainly not done for the convenience of anyone. It's done to get a more favorable jury. Why should Multnomah County incur the expense of handling these cases, which really belong elsewhere? If we need a new courthouse, and need more judges, there is no reason for a Multnomah County court system to go out of its way to take on more work, especially when the case would be more appropriately belong in another jurisdiction. Anyway, thanks for listening..."

Answer 2. (The judges assumed that we are talking here about motions for change of venue on convenience grounds. The existing consensus statement does not deal with motions alleging that venue is not proper in Multnomah County.) The judges would all like to have the docket lightened a little, but concluded that the workload would actually increase if we returned to the days of routine motions for change of venue (on convenience grounds) to Washington and Clackamas Counties. This is so because so few civil cases are actually tried that the trial time saved would be more than outweighed by the additional motion time required.

Question 3. "I have no feedback on the requested subjects. I would like to bring up another issue, though. There is a tendency for attorneys to respond to requests for production by filing a response in a timely manner with objections to some requests and a statement that "responsive documents will be provided" to the others. I would like to see a supplemental local rule address this practice. I think it should be discouraged because by not providing the requested documents in the appropriate timeframe, one does not truly respond to the requests. Furthermore, it does not tell the requesting party what it can expect or when. If documents are not quickly forthcoming, it then becomes the requesting party's job to remind the party that has 'responded' to provide the documents. This is best done by letter to create a record, so in essence the requesting party has to keep on making written requests until the requested documents are finally provided. It could all be avoided if the responding party would provide a response that actually includes the requested documents within the timeframe requested. If in the rare case additional time is needed to locate documents, that fact can be communicated to the requesting party who can decide to wait or move to compel. It should not be the norm, however, to file 'responses' that contain no responsive documents. I have seen this practice grow more common the past few years."

Answer 3. ORCP 43B already appears to require what is suggested (that is, objection or actual production of the requested documents within the time specified). What the writer may be suggesting is some sanction for the untimely production of documents, even though the production did occur without a motion to compel. Any such rule would have to be part of the ORCP.

Cont. on p. 11

New Lawyers Value Mentor Program

By Tamara Russell, Miller Nash and YLS Board Member.

Willamette Law School graduate Ashlee Munson felt confident opening her own law office in December 2003, a little over a year after graduating from law school, and representing a client in a significant shareholder oppression case. She knew, however, that her acceptance of a potentially difficult case would benefit from advice from an experienced practitioner, so Munson sought a mentor through the MBA's Mentor-Mentee Program. "My hope was to meet a seasoned attorney with experience litigating shareholder oppression and derivative suits for closely held corporations and who was viewed by our legal community as an ethically conscientious member of the Bar," Munson said. "The MBA made a phenomenal match" by pairing her with Frank H. Lagesen, a partner at Cosgrave Vergeer Kester.

Munson was one of 55 individuals who participated in the MBA's mentor-mentee program last year. The MBA mentor-mentee program matches new lawyers with experienced lawyers, based on the young lawyer's interests, practice area, needs and other issues. The program provides young lawyers with, among other things, assistance in traversing some of the professional and ethical challenges a young lawyer faces, and an opportunity for immediate networking with an established practitioner.

The MBA Mentor program is open to all YLS Members. Sign up for the MBA Mentor program – a six-month program that runs from January through June. Go to www.mbabar.org for a mentor sign-up sheet or call the MBA at 503.222.3275 and request a form be sent to you.

Preference will be given to newest lawyers if the number of mentees exceeds the available mentors.

Mentor Frank Lagesen with mentee Ashlee Munson

Sheila Potter, an associate at Bullivant Houser Bailey and chair of the MBA Professionalism Committee (which spearheads the MBA mentoring program with the MBA YLS), said the mentoring program is a way for experienced lawyers to teach younger lawyers "ongoing lessons in how to practice with courtesy and respect. Sometimes, young lawyers learn those lessons on the job, but not enough of them do, and many of them work for smaller firms where the more experienced attorneys don't have time to mentor them in professionalism on top of everything else. By offering the MBA mentor-mentee program, we hope to foster professionalism and collegiality among our newer colleagues right from the start."

During Munson's participation with the MBA mentor-mentee program, she and Lagesen went to lunch on several occasions and Lagesen made himself available to answer any questions Munson may have had on other occasions. They also attended the social events the YLS hosts specifically for the mentors and mentees. An "unanticipated benefit" from working with Lagesen, according to Munson, was learning about some of the malpractice pitfalls young lawyers unknowingly fall into. One of the most valuable experiences, however, was when Lagesen invited Munson to observe him take a deposition. "My experience watching other attorneys handle depositions has been limited," Munson explained. "It was very helpful to see how a senior lawyer handled a paper-intensive deposition, the legal and ethical issues that arose, and then to be able to discuss with Frank afterwards some of the strategy he used."

Munson's experiences are like what some other mentees in the mentor-mentee program from previous years have experienced. The MBA mentor program is available to all members of the YLS, not just first-year lawyers. Applications for the MBA mentor program will be disseminated in November, and the mentoring matches will be made in December. Soon thereafter, the YLS will sponsor a mentor "kick off" reception where mentees will meet their mentors for the first time and learn about the program. Additional social and educational programs will be scheduled throughout the year for the mentors and mentees as well.

Although Munson and Lagesen's formal involvement with the 2003-2004 MBA Mentor Program concluded several months ago, Lagesen encouraged Munson to remain in contact with him and to ask any questions that might arise in her practice.

"All of the senior members of the MBA that I have approached with questions about my practice or specific areas of the law have been extremely generous with their time and knowledge," Munson said. "Their generosity is especially valuable to new solo attorneys like me. But I was truly impressed with my mentor, Frank, and the time and consideration spent by the MBA making that match. This is such a terrific opportunity for young lawyers."

YLS Drop-In Social

By Julia Waco, Multnomah Defenders Inc. and YLS Membership Committee member.

Bill Miner, Rebekah Stiles, Ken Stafford and Jennifer Robins at the September YLS Drop-in Social

The MBA YLS kicked off what should be another terrific year at its September 23rd drop-in social. Attorneys from several firms and from the courthouse mingled that evening overlooking the lovely blue Willamette River at the River Place Hotel. We finished off several platters of fries and calamari, enjoyed the company and shared ideas and experiences of being new to the practice. We hope you will join us for our future events, which are fabulous opportunities to make new friends and to network.

It is important to wander beyond the office now and then to meet people, because unless you are planning to have a memorial plaque cemented under your desk, reaching out to the larger community will stimulate career growth and personal discovery. In life it is not always what you know, but "who" you know, so get out there and have some fun!

young lawyers section

Lawyers without Borders

By Marc Jolin, Oregon Law Center and YLS Service to the Public Committee chair.

The Service to the Public (STP) Committee of the MBA Young Lawyers Section is taking on a new project this year: Lawyers Without Borders (LWOB).

The organization is a Connecticut-based nonprofit formed in 2000. It offers attorneys with an interest in international affairs an opportunity to donate time and expertise toward the resolution of a variety of legal issues faced by lawyers in developing countries.

Lawyers Without Borders' mission is: "To engage lawyers from around the world to create a global network of lawyers and clearinghouse for the delivery of quality pro bono services to nonprofit, quasi governmental and governmental organizations, worldwide."

Among the core projects of LWOB is Lawyer to Lawyer (L2L). In a recent article, the project was described as "link[ing] attorneys in North America with attorneys in other countries emerging from conflict – or anywhere there are few legal resources and considerable problems. L2L lawyers provide work product and legal materials, research, and guidance on specific points of law. They communicate with other lawyers, almost exclusively through the channels of email, fax and phone."

The organization also has a number of other active projects. It maintains a Web site as a clearinghouse for international legal opportunities: lawyerswithoutborders.org.

Lawyers Without Borders is currently organizing a "neutral observer" project, which will, for example, send teams of lawyers to observe elections. The goal is to create an observer program that is viewed as entirely unbiased, unlike many of the other organizations that currently do monitoring work.

The organization is also creating a "Lawyers at Risk" program, which will allow attorneys from this country to provide support to lawyers in other countries whose personal safety is at risk because of their advocacy on human rights and justice issues.

Starting in the coming year, the STP committee will coordinate the dissemination of information about specific opportunities within LWOB to MBA members, at the MBA Web site, through email and through the *Multnomah Lawyer*.

Service to the Public Committee member Carmel Bender will be coordinating the project for the committee. She will be working with MBA members to connect them to LWOB and to evaluate lawyers' experiences with this project. For more information about LWOB, please contact her at carmelbender@comcast.net.

save the date!

On December 8, the MBA YLS Membership Committee will hold its annual drop-in social and toy drive. More information will be available soon – go to www.mbabar.org and click on YLS events. If you would like to donate a toy but are unable to go to the social, you may drop off your donation at the MBA office, 620 SW 5th Ave Ste 1220, Portland.

Billing Basics: Associates Need to Learn Nuances of Billing Before Starting Big Projects

By Stephanie Francis Ward. Reprinted with permission from the ABA Journal, October 2004 issue.

If your billables for a document project amount to $30,000 – which is about the same price as a C-Class Mercedes – it's probably too much.

"I don't know of any client willing to pay that amount," says Cordell M. Parvin, a partner at Dallas' Jenkins & Gilchrist in charge of attorney development and training. That is why associates should ask the supervising attorney how much time the project requires, he says, before they start to do any work.

"These kinds of discussions need to take place on the front end, not the tail end," Parvin adds. Although the firm has a process to write off excess time spent on a matter, "It's not thought to be a good thing."

But sometimes the question is not an easy one. Associates who want to look like they know what they're doing may even underestimate their billable hours on a project, to give the appearance of being efficient.

"That's not the way young associates ought to handle the situation," says Michael A. Vercher, a fifth-year associate at Christian & Small in Birmingham, AL. "Each research project is different, and I think partners realize that each one is individualized and has nuances."

A lot of clients refuse to pay for certain kinds of work, Vercher adds. Some won't pay for research, for instance, or for travel time. Consequently, at his law firm associates write down all time spent on a matter, knowing the supervising lawyer will probably edit it.

Ideally, Vercher says, partners should review bills with new associates each month, so they can see how the law firm billed for their work. At the same time, partners can point out where associates' work is inefficient, and tell them what the client would and would not pay for.

"That is a perfect-world scenario," Vercher says. "I think everybody is so busy that what ends up happening is the associate learns over time about those things."

The Real Article

Robert B. Hubbell, the firm-wide managing shareholder at San Francisco-based Heller Ehrman White and McAuliffe, says showing client bills to associates is a good learning tool. "Typically, young lawyers don't have many questions about billing, in terms of substance," says Hubbell, who practices in the firm's Los Angeles office. "That's because early in their careers I don't think they understand how the bill is presented in the context of the client relationship."

Hubbell's firm also teaches new lawyers each year how to write clear, concise billing memos. "You could be describing what you're doing in so much detail that it would become meaningless and opaque to the client," Hubbell says. "Also, it can be so brief that it's cryptic."

Others invite clients to speak with associates. Parvin's firm does this quarterly. Inevitably, clients will talk about the types of billing that are bound to cause irritation. Some examples are billing associate time for making copies, or charging for the time of three lawyers discussing something, with each billing different amounts.

And don't even think – or ask – about billing for that brilliant idea you came up with at the gym, in the shower or on the drive home. "I think our associates know better than to ask such a question," Parvin says.

"I told our summer associates yesterday that any lawyer worth his or her salt is going to spend 2,500-plus hours on his or her work, and part of that is at the gym when it's not billable," he adds.

Index cards, with billing tips, are handed out to young lawyers, and more-senior associates lead an orientation session on the topic.

"For lack of a better title, we tend to call it 'Mistakes I've Made in Billing,'" Parvin says. "We give real-life examples of entries. More than anything else, if clients reach the [entries] they would never pay for it."

PRO BONO VOLUNTEERS

Thanks to the following lawyers, who recently donated their Pro Bono services via the Volunteer Lawyers Project, the Senior Law Project, Community Development Law Center, law firm clinics and the Oregon Law Center. To volunteer, please call Maya Crawford at 503.224.4086.

David E. Atkin
Kurt Barker
Stephanie Barrie
Dick Biggs
Dady Blake
Brad Brown
Caroline Cantrell
Donato Capobianco
Brett Carson
Paul Conable
Betty Crofoot
Lorne Dauenhauer
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Aaron Wigod
Karen M. Williams
Mark Williams
Terry Wright

MBA Court Liaison Committee Survey and Responses (continued)

Question 4. "Given the current budget constraints, here are a few suggestions:
a. Limit oral argument on motions to 10 minutes per side (Washington rule).
b. Limit page memorandum lengths (federal rule).
c. Implement some Summary Judgment rules from federal court.
d. Create incentives for counsel to agree to use six-person juries."

Answer 4. The judges in Multnomah County greatly value brevity and succinctness. With respect to suggestions "a" and "b," however, we concluded that such blanket limitations would probably not be workable, given the varying complexity of the cases. The ancillary motion practice requesting exceptions to the limitations would probably take more time than would be saved by the limitations. In any event, the changes would have to be accomplished by an amendment to at least the UTCR, and not the SLR.

With respect to suggestion "c," that would have to be taken up by the Council on Court Procedures for an amendment to the ORCP.

With respect to suggestion "d," we weren't sure what kind of "incentives" the writer had in mind. The trial fee is already lower for a six-person jury trial ($130 per day) versus a 12-person jury ($228 per day).

We would be interested in discussing more concrete suggestions.

Employer's Burden to Prove Undue Hardship

By Elizabeth A. Semler, Sussman Shank et al.

A recent case from the Oregon Court of Appeals clarifies that an employer's obligation to prove that an accommodation for a disabled employee creates an undue hardship does not arise if the employee cannot first establish that a reasonable accommodation of their disability exists.

In *Honstein v. Metro Ambulance*, 2004 Or. App. LEXIS 594 (Ct. App. 2004), the employee, a paramedic, alleged that his employer unlawfully fired him because of his disability and because he filed a claim for workers' compensation benefits. The employee, who was subject to a 50-pound weight-lifting restriction as a result of an injury, was assigned to a job within his lifting restriction at a shipyard. When the shipyard began having financial problems, the employee was laid off. The employee argued that instead of laying him off, his employer should have found appropriate "stand-by" assignments until the employee was needed again at the shipyard.

In response, the employer asserted that, at the time the employee was laid off, it believed the shipyard would never resume full operation and was on the verge of bankruptcy. The employer also argued that the request for stand-by employment was not a reasonable accommodation because there was not enough appropriate standby work to constitute a full-time position, and the employer did not employ workers part-time.

The jury returned a verdict for the employer. On appeal, the employee argued that the trial court's instructions were improper because the trial court refused to instruct the jury that, in order to prevail, the employer had to prove that accommodating the plaintiff would impose an undue hardship. As framed by the Court of Appeals, the question on appeal was what role "undue hardship" plays in a wrongful termination case under ORS 659A.112(2)(e). (The employee also challenged the trial court's admission of certain evidence. The court's discussion on this issue is not relevant to this article.)

Section 659A.112(2)(e) provides that an employer commits an unlawful employment practice if:

"the employer does not make reasonable accommodation to the known physical or mental limitations of an otherwise qualified disabled person who is a job applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer."

The employee argued that once an employee proposes an accommodation, the employer in every case has the burden of proving that the proposed accommodation is not reasonable, and to do so it must prove that making the accommodation would impose an undue hardship. The employer responded that accommodation and undue hardship are distinct concepts and that an accommodation may be unreasonable even if it does not impose an undue hardship.

The Court of Appeals agreed with the employer. Initially, the Court explained that the prior version of ORS 659.425(1)(a) (1995), on which the employee's argument was based, improperly "conflated the concepts of reasonableness and hardship by defining the reasonableness of an accommodation in terms of the impact it would have on the employer."

The Court explained that the current statute explicitly refers to both reasonable accommodation and undue hardship explaining: "Generally … an employer must make a reasonable accommodation; however, an exception to the rule exists where the employer can demonstrate that the reasonable accommodation imposes an undue hardship." The Court also pointed out that the distinct nature of these concepts is established by the fact that "reasonable accommodation" and "undue hardship" have different statutory definitions. ("Reasonable accommodation" is defined in terms of actions an employer might be required to take: altering facilities or equipment, restructuring work schedules, or providing interpreters. "Undue hardship," on the other hand, is defined in terms of the impact that the reasonable accommodations will have on the employer. *See*, ORS 659A.118, ORS659A.121(2).)

Based on the distinction between the concept of accommodation versus undue hardship, the Court found that the jury instruction given by the trial court properly incorporated the definition of reasonable accommodation in ORS 659A.112(2)(e) without confusing the issue of the employer's action with the issue of the impact of that action upon the employer.

The Court concluded that although an employer has the burden of establishing undue hardship, the employer need not meet this burden unless the employee can first establish that a reasonable accommodation exists. Since the employee failed to prove that a reasonable accommodation existed, the employer could rest its case on the employee's failure to meet its burden, and did not need to prove that accommodating the employee would impose an undue hardship.

Honstein thus clarifies the two-step process involved when analyzing employer action after an employee requests an accommodation for a disability. Step one involves a determination of whether a reasonable accommodation exists. If a reasonable accommodation exists, step two involves a determination of whether providing the accommodation creates an undue hardship for the employer. From an employer's perspective, the importance of *Honstein* is that step two is only reached if the employee clears step one.

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Why Advertise with the MBA?

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

Circulation

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

Interested in Writing Articles?

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

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Several companies offer MBA members discounts and benefits on the services they provide. The following is a summary of the member benefits from each affinity partner, as well as the contact at each company.

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Discounts on a wide range LexisNexis services. For more information, call Katy Leitch at 503.579.9331.

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MBA members have access to a wide range of discounted and premier services for law firms, attorneys and non-attorney staff. To learn more, call Michael Giavanti at 503.886.1446.

Legislators Focus on Juvenile Court

On October 7, legislators and candidates for the Portland metro area were invited to attend a program at the Multnomah County Juvenile Court Facility. Speakers at the annual event for legislators included Multnomah County Presiding Judge Dale Koch, Oregon Supreme Court Justice Wallace P. Carson Jr., Judge Elizabeth Welch, Judge Doug Van Dyk of Clackamas County, Judge Kirsten Thompson of Washington County, Martha Strawn Morris of the Family Involvement Team and Joanne Fuller from Detention Reform. Special thanks are due to Judge Nan Waller, who coordinated this event. The MBA was honored to participate and to provide support.

In all, 50 legislators, legislative staff, candidates, judges, courthouse and MBA officers and staff attended to learn about the juvenile court system in Multnomah County. Two of the more innovative programs used in the county were discussed. Legislators and candidates were given the opportunity to ask questions and then to tour the facility.

Multnomah County judges are to be commended for their ongoing efforts to reach out to the legislature and to the community at large. The MBA thanks all who were involved to make this program a success.