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WCBA Newsletter

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President's Note

Lawyers associated for justice, service, professionalism, education, mentoring, social interaction and leadership for our members and our community

Happy Holidays!
By Nick Heydenrych

I would like to cordially all remind you of the upcoming Washington County Bar Association Winter Social this December 9th at the Glenn and Viola Walters Cultural Arts Center. I would also like to give a special thanks to Amy Velazquez for spear-heading this event.

Likewise I would like to thank all of our WCBA board members and general membership for their participation this year. Thanks to your generous support our organization is well-funded to meet expenses for the remainder of my term, which will end August 2016.

On a more serious note, I recently had the pleasure of representing Washington County in the 2015 House of Delegates annual meeting. This year's agenda was relatively modest and the main change coming in 2016 will be a marginal increase in State Bar dues. The Bar's justification for this increase was to address diminishing reserves.

The meeting also featured a lengthy and heated conversation about how technology may impact the future of the practice of law. The Bar executives opened this discussion by presenting a 15 minute video featuring several Silicon Valley and Wall Street style executives opining that the delivery of legal services was "antiquated" needing "modernization" and "new service delivery models." Many of these comments were couched in language of delivering better service to underrepresented parties, but also notably silent on the growing technology gap between those with means and those without.

While most members of the House of Dele-

gates conceded that there is a continuing need for our profession to adapt to technological changes, many also voiced concerns about the intentions of these out-of-state business interests and the prospect of them lobbying the state government to perhaps permanently alter the nature of our profession.

Speaking solely on my own behalf, I expressed concern that technology cannot replace the human element of practicing law, and that what we do is not so much of a science as an art. I expressed skepticism that Silicon Valley was moving in our practice out of benevolent intentions. For the most part these comments were well-received.

The Bar's response suggested that Silicon Valley's attempts to inter-meddle in the legal profession were a foregone conclusion, and they noted that several prominent firms have already spent several years lobbying the American Bar Association on potential policy changes that would facilitate opening up the legal profession to non-lawyers. For example, a rule recently passed in Washington State allows non lawyers to hold a controlling interest in law firms.

Regardless of your point of view on these issues, I urge you to contact State Bar leadership and communicate your views with them. My feeling is that the Bar leadership benefits from this type of feedback. Likewise, I will close as always by encouraging all members of the WCBA to contact me at any time with any feedback - your input matters!

Washington County Bar Association 2015 Winter Social

Wednesday December 9, 2015

Appetizers and Cocktails at 6pm

Dinner at 6:30pm

Glenn & Viola Walters Cultural Arts Center

527 E Main Street, Hillsboro OR 97123

Catered by Claeys Catering

Details on page 6

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LAW LIBRARY NEWS

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Your Local Tech Hub - the Law Library!

By Paula Simon, Law Library Assistant

Stymied by older technology? The Washington County Law Library is here to help!

Does your laptop lack a CD/DVD drive, but you received discovery materials on CD? We have a portable CD/DVD drive you can use with a USB port. You supply the discs - we won't judge what you watch. (Just don't leave the disc in the drive!)

Embarrassed about that stack of 3 1/2 inch floppy disks hidden in your desk drawer? Here's how to get the files off of them and onto your laptop. Just use the Law Library's USB-powered Floppy Disk Drive, plug it in, and you're ready to copy.

Need to scan a whole stack of documents, but don't want to do it one page at a time? Our copiers can scan them quickly, and send the resulting file to you or a client via email.

Still have Windows 7 or (gasp!) Windows XP and you can't decide whether to upgrade to Windows 8 or 10? We have a netbook with Windows 10 installed and a touchscreen laptop with Windows 8. You can play with them the next time you are in the Law Library to see which operating system you like better.

At the Washington County Courthouse and need to Shepardize something or look up a citation in Westlaw? We have both Lexis Advance and Westlaw Next, and we're right across the street. You can print out information for 10 cents a page, or email the information to yourself at no charge.

CLE Reminder

It's that time of year again! If it's your reporting year, remember that we have CLE book and CD sets you can check out and use for credit. Visit the CLE information page on the Law Library website for lists of CLEs in our collection: <http://bit.ly/wc11-cle>.

Give us a call before you make the trip out to make sure the CLE you want is on the shelf, or just stop by and browse the available titles. We can also put holds on popular titles. Items check out for 10 days, but due to high demand in November and December, we are unable to renew current CLEs.

Also, don't forget our Red Bag service! Return materials to any Washington County Public Library using our Red Bag. You can even drop the bag in the book drop. Ask for one at the front desk when you check out any of our materials.

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\$1,500 & \$1,300/Monthly: Class A office space, 18th floor of Umpqua Bank Building, at One SW Columbia. Both exterior office's with panoramic view of mountains, riverfront and downtown. AV family law practice will share two conference rooms, receptionist services, and kitchen. Copier, fax, telephones and email provided at cost. Building amenities include conference rooms, private gym and bank in building. Approximate room sizes 17 x 14 and 10 x 15. Call Cecelia Connolly 503.224.7077.



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Oh No You Didn't! I'm Calling the Judge!

Or how to get from here to there when a dispute arises during a deposition in a state court civil case.

By Hon. Henry Kantor

It's happened to most of you. You're taking the deposition of a low-level corporate witness. Or your client's spouse's deposition is being taken by opposing counsel. The basics have gone smoothly enough, even though the other lawyer is driving you crazy with irrelevant questions or impertinent objections. Then, suddenly, things go off track.

It's no longer just a waste of time - *it's* personal. The other lawyer has really done it this time. She has asked your client's spouse about their sexual relationship . . . *in a breach of contract case*. Or he has objected on the ground that your question invades the attorney-client privilege . . . *because he has just decided that he represents the witness as well as the corporation*.

You ask opposing counsel to please stop that. It continues. There are threats to stop the deposition. Given how difficult it was to schedule the deposition in the first place, you really don't want to do that. You need a better solution.

One of you decides it is necessary to get a judge involved. Can you do that? How do you do that? Should you do that?

Over my 20+ years on the bench, I have handled a lot of pretrial disputes in civil cases. My default is to ask myself and often the lawyers, *What Does The Rule Say?* When there is a controlling provision in the Oregon Rules of Civil Procedure, the Uniform Trial Court Rules or the Oregon Evidence Code, I look for answers there.

While there is no written rule specifically authorizing or governing calling a judge in the middle of a deposition for a formal or informal ruling, we do have ORCP 39 E, which certainly supports the concept:

(1) **Motion for court assistance.** *At any time during the taking of a deposition, upon motion and a showing by a party or a deponent that the deposition is being conducted or hindered in bad faith, or in a manner not consistent with these rules, or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in section C of Rule 36. The motion shall be presented to the court in which the action is pending, except that non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination.* If the order terminates the examination, it shall be resumed thereafter only on order of the court in which the action is pending. Upon demand of the moving party or deponent, the parties shall suspend the taking of the deposition for the time necessary to make a motion under this subsection.

(2) **Allowance of expenses.** Subsection A(4) of Rule 46 shall apply to the award of expenses incurred in relation to a motion under this section. [Emphasis added]

The basic framework for this rule predates the adoption of the ORCP in 1978. There have been a few changes over the years, none of which focus on the Fundamentals other than to which county the motion should be presented. So, along with the general authorization provided by the rule, we rely on principles of tradition, courtesy, convenience, availability and common sense.

Can you do it? In Oregon's state courts, the answer is usually yes. Nearly every county's circuit court is open to this practice. (I actually asked around.) One county reported back that they simply don't have the judicial resources and so instruct the lawyers to place the dispute on the deposition record and then file a motion if necessary, with a further report that almost no such motions are ever filed. There could be a few other counties that take that position. But the clear majority is willing and able. If any judge wonders if it can be done, just show this article.

How do you do it? The rule says you have to make a motion but it doesn't say the motion to be filed. So judges regularly accept oral motions for assistance. The most common way for this to happen is for the lawyers to call a judge and present the dispute over the telephone. While it is certainly permissible to walk over to the courthouse and present the oral motion there, that would subvert the purpose of keeping the deposition going as smoothly as possible.

What judge do you call? You should call the court in which the action is pending, although a non-party deponent may call the court in the county in which the deposition is being taken. If the latter, call the court's Trial Court Administrator and ask to find an available judge. If the former, there are some differing answers.

In Multnomah County, while a complex case is specially assigned to a particular judge for most or all purposes, most civil cases are not specially assigned except possibly for pretrial motions. If there is a specially assigned judge, you should try to reach that judge first. If that judge is not available, call Presiding Court and that judge's staff will help you find an available judge. If there is not an assigned judge but there is a motion judge, call the Presiding Court and ask for the motion judge or, if she or he is not available, for an available judge. For counties with Multnomah County's assignment practices, follow these procedures.

For counties where each civil case is assigned to a particular judge, call the assigned judge. If that judge is not available, ask that judge's staff to help find another judge.

Are you on the record? Most depositions are taken with a court reporter or otherwise on some type of record. The lawyers and the judge need to decide whether you should be on the record for the discussion and ruling. Some judges require that it be on the record, because there is an actual motion and ruling. Some judges refuse to do it on the record, because the whole point is to keep things informal. Generally, I simply ask if we are on the record and proceed accordingly.

Which disputes work best and worst? Simple disputes over the scope of discovery, specificity and the like work best. Complicated disputes over arcane privileges work worst. The key is to present a simple enough dispute so that the judge can rule quickly and confidently. If briefing is required, it is better to agree to preserve the dispute on the deposition record and present the motion in normal course.

The most challenging dispute is when one lawyer thinks that the other lawyer is acting unprofessionally or unethically. Often, the acting-up lawyer sounds perfectly reasonable when the judge is on the telephone so you need to be able to prove inappropriate conduct in other ways, such as the actual transcribed language in questions or "comments." Otherwise, you may have to tough it out.

Should you? Remember that this motion, even if oral and off the record, is still a motion and the judge's ruling is still a ruling. You will be bound by the ruling. So, unless you are confident that you can get your point across in a relatively quick telephone conversation or the issue really doesn't matter that much in the long run, you might want to reserve your opportunity to present more formal arguments and allow the judge to think about it.

Bottom line. Calling a judge to get a deposition dispute resolved quickly and informally generally is a fair, efficient and acceptable practice. Always try to resolve things with opposing counsel first but, unless a written motion is required, be ready to present a concise and simple argument with a practical solution. That approach usually wins the day - and you get to finish your deposition.

About the Author: Before taking the bench, Henry Kantor was a Portland lawyer handling complex civil trials and appeals. While a lawyer, he served on the Oregon Council on Court Procedures for six years. Starting in 1995, he has been a district and circuit court judge in Multnomah County, presiding over all types of civil and criminal cases. While a judge, he served on the Oregon Commission on Judicial Fitness and Disability for eight years. You can send interesting questions or comments to henry.kantor@state.or.us.

i_This article has also been published by the Oregon Trial Lawyers Association.

ii_The legislative history regarding the rewriting of this rule in 1998 explains:

Section E is reorganized in subsections for greater clarity and its title is changed from "Motion to terminate or limit examination" to "Motion for court assistance" to reflect its being expanded to authorize a motion for appropriate judicial relief when an oral deposition is being "hindered in bad faith," or in a manner not consistent with these rules [emphasis added {in original}]. The court has broad discretion in fashioning appropriate relief.

Council on Court Procedures, Staff Comment, 1998, http://www.counciloncourtprocedures.org/Content/Promulgations/1998_promulgations.pdf (last visited 3/30/15).

iii_If that doesn't do the job, you can cite such august authorities as the Manual for Complex Litigation, Fourth, § 11.424 (Federal Judicial Center 2004); Civil Discovery Standards, § 1.2 and comments (American Bar Association 2004), <http://webcache.googleusercontent.com/search?q=cache:oFmBHLN2X7gJ:www.americanbar.org/content/dam/aba/administrative/litigation/litigation-aba-2004-civil-discovery-standards.authcheckdam.pdf+&cd=1&hl=en&ct=clnk&gl=us> (last visited 3/31/15); and Resource Guide for Managing Complex Litigation, § 3.5 (The National Judicial College 2010), available to download at <http://www.judges.org/downloads> (last visited on 3/31/15).

iv_I know the rule doesn't quite allow this but, if the court in which the action is pending simply doesn't have an available judge, and both sides completely agree, you can call me. I will help if I am available. My guess is that other judges around the state feel the same.

November CLE Recap Valuing a Business

By Arthur K. Saito
WCBA Treasurer

Our November CLE was presented by Daniel Gilbert. Mr. Gilbert is an experienced business valuator, who has provided litigation support and forensic accounting since 2002. He is a certified public accountant accredited in business valuation and certified in valuation analysis and financial forensics.

Every small business is unique in nature. The fundamentals for valuing a business include 1) understanding the business and its owners; 2) understanding the current economy as it relates to the business; 3) thoroughly studying the business' financial information; 4) comparing the business within the industry and amongst its peers; 5) applying appropriate discounts for certain aspects of the business when necessary; and 6) weighing the three different valuation approaches for a business: asset, market, and income.

The asset approach for valuing a small business is the fair market value of all assets, minus any outstanding liabilities and debts. The asset approach is the minimum a business is worth according to Mr. Gilbert.

Under the market approach, a valuator looks to sales of similar businesses and 1) examines factors such as the price-to-sales and price-to-earnings and 2) applies these factors and adjusts for differences (such as growth rate, economic environment, reliance on owner, etc.). Certain difficulties exist in applying the market approach arise, mainly from the lack of available information on comparable business sales. Unlike residential real estate sales, information related to the sale of a business can remain private and unpublished.

The income approach is the primary indicator of most small businesses according to Mr. Gilbert. This approach focuses on the assumption that, "*Value today always equals future cash flow, discounted at the op-*

portunity cost of capital." Here, the valuator determines the future cash flow for the business and applies a discount rate for any perceived risks.

Special circumstances in valuing a business can arise, which include 1) the existence of non-essential assets associated with the business; 2) real estate used by the business that is either owned by the business or by the business owner(s) (then rented to the business); and 3) the personal goodwill associated with the owner(s).

Because of the cost associated with any business valuation, it is important to 1) weigh the pros and cons of performing a valuation jointly; 2) assess the state of record keeping for the business; 3) determine the extent to which the owner's personal expenses are run through the business; 4) clearly identify the scope of the valuation and any budgetary concerns; 5) appraise the value of any land or buildings owned by the business; 6) determine the fair market rent for any real property owned by the business owners and rented to the business; and 7) provide all information requested by the valuator in a timely manner.

We wish to thank Mr. Gilbert for his presenting this CLE. For more information, Mr. Gilbert can be contacted at:

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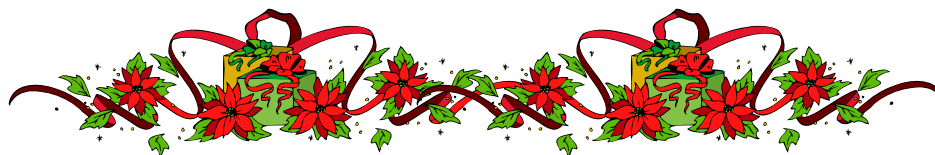
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Washington County Bar Association 2015 Winter Social

Wednesday, December 9th
Appetizers and Cocktails at 6pm
Dinner at 6:30pm

Glenn and Viola Walters Cultural Arts Center
527 E Main Street, Hillsboro, OR. 97123
Catered by Claeys Catering

Dinner includes one drink ticket, dessert,
coffee and non-alcoholic beverages
\$40 per person
Bring that special guest! We'll have presents!

PLEASE CONTACT US VIA EMAIL TO RSVP
wcbabar.association@frontier.com

Please send your reservation and prepayment by
Friday, December 4, 2015 to:

WCBA, PO Box 912, Hillsboro OR 97123
We will also accept check/credit card payments at the door!
Please make checks payable to WCBA



WASHINGTON COUNTY BAR ASSOCIATION 2016 DUES

The WCBA is a local association of lawyers serving Washington County practitioners. It provides a forum for the exchange of ideas and for local bar members to voice their views on matters of importance to their everyday practice. Consider the benefits of low-cost membership. You will receive the WCBA Newsletter which keeps you informed (and sometimes entertained) on updated information from Washington County Judges, various bar committees, monthly CLE Programs, social dinners & activities, the law library, etc. The Newsletter is also an excellent and inexpensive place for advertising and classifieds.

- Discount on monthly CLE programs and materials
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Membership Dues: \$75 per year (September 2015 to August 2016)

(Note: New members have this fee waived for the first year!)

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