Oregon Chapter
Federal Bar Association
209 SW Oak Street, Suite 500
Portland, OR 97204

New FBA Members Welcome

Membership Eligibility. FBA membership is open to any person admitted to the practice of law before a federal court or a court of record in any of the states, commonwealths, territories, or possessions of the United States or in the District of Columbia, provided you are or have been an officer or employee of the United States or the District of Columbia, or you have a substantial interest or participate in the area of federal law. Foreign Associate Status is open to any person admitted to practice law before a court or administrative tribunal of a country other than the United States. Law Student Associate Status is open to any law student enrolled at an accredited law school. If you wish to join, please visit www.fedbar.org and click on the "Join Now" link.

Call for Submissions/Publication Schedule

***For the District of Oregon* welcomes submissions from everyone. The deadlines are December 15, 2012, March 15, 2013, June 15, 2013 and September 15, 2013. We ask only that you inform us in advance if you are preparing a submission. Please direct inquiries to Nadine Gartner at 503-227-1600 or ngartner@stollberne.com.**

A Quarterly Newsletter of the Oregon Chapter of the Federal Bar Association

For the District of Oregon

Volume XVI, No. 3 *Fall 2012*

IN THIS ISSUE

THINGS THAT I LEARNED DURING MY FIRST YEAR ON THE BENCH THAT I WISH I HAD KNOWN AS A TRIAL LAWYER [1]

By: Michael H. Simon, United States District Judge, District of Oregon

My service as a trial court judge began on June 30, 2011. By the end of August, I completed the first week of a two-week training program for new federal judges, which is sometimes called "baby judge school." The second part of this training is offered only once a year, and I completed that in November. During this past year, I presided over two jury trials (one civil and one criminal), ruled on numerous motions and other matters, and served as a settlement judge in more than a dozen cases. I also learned a few things sitting on this side of the bench that I wish I had known back when I was a trial lawyer.

To be fair, I probably had heard most of these points before taking the bench, but things just look different when one is serving as a neutral decision-maker under the rule of law rather than as an advocate. A trial judge tries to correctly apply principles of law (some of which are clearer than others) to facts that are often in dispute. Depending upon the specifics of a case, there may or may not be much room left for the exercise of discretion. A trial judge, however, may also be called upon expressly to exercise discretion and is afforded a fair amount of latitude when doing so. In the context of civil litigation, examples include resolving discovery disputes (especially those involving the "rule of proportionality" under Fed. R. Civ. P. 26(b)(2)(C)(iii)), disagreements over scheduling and extensions, and requests for temporary, preliminary, or permanent injunctive relief where the judge is often required to balance the hardships and equities facing the parties and also consider the "public interest." In order to be able to persuade a judge or jury, it is helpful and maybe even critical for the advocate to be able to look at the specific dispute from the perspective of the decision-maker and see things as that person will see them. That is the first thing that I wish I had known (or, at least, fully absorbed) back when I was a trial lawyer.

The additional points that I am about to make build on this insight. They are not original or new; in fact, the first three are more than two thousand years old. They go back to Aristotle and his discussion of the three primary modes of persuasion or argument, and they have withstood the test of time. *See* Aristotle, THE ART OF RHETORIC (H.C. Lawson-Tancred trans. 1991). For these three points, the only thing that is new (at least to me) is my first-hand confirmation over the past 12 months that Aristotle's advice works.

The principles that I have seen succeed during the past year can be remembered with a mnemonic device using the acronym P-L-E-A, which, to a lawyer, refers to an allegation

Continued on page 3

THE PRESIDENT'S COLUMN

By: Tom Johnson
Federal Bar Association President

We're looking forward to another great year at the Oregon Chapter of the Federal Bar Association.

At the Ninth Circuit Judicial Conference this past August, I got a better idea for how special this chapter is. A group of chapter presidents sat around a table, and we each described our local chapter's activity over this past year. As each person spoke, I became more thankful for the work of our members and board members. We have one of the most robust, and active, memberships in the Circuit; we accomplish so much. We put together CLEs and programs that are not only well attended, but which receive national recognition for their ingenuity and substance. Our monthly luncheons are informative, and we are constantly thinking about new ideas for future events. Our spring social at the federal courthouse this past May was attended by over 200 lawyers and sitting judges, including **Chief Judge Kozinski** himself.

Each year, we must build our past success, and this year is no different. At our last board meeting, we outlined an ambitious agenda for the year:

First, we will continue to provide informative and interesting speakers at our monthly luncheons. **Judge Graber** delivered a fascinating talk on the history of the women judges of the Court of Appeals for the Ninth Circuit in September. **Judge Papak** (October) and **Chief Judge Aiken** (February) are currently scheduled to speak, and we are working to fill out the calendar.

Second, we will continue to produce quality CLEs and programs. On October 19, we are co-sponsoring a Section 1983 CLE at the federal courthouse. We are also planning a community outreach program for October that will bring local high school students to the federal courthouse to learn about civil and criminal practice, and allow them to watch court proceedings with an opportunity for questions. Additionally, we have plans for at least two CLEs in the winter and spring.

Third, we are working with the Ninth Circuit representatives, and Judge Aiken, to co-sponsor a District of Oregon conference next year. More details about this conference will be forthcoming, and we will try to get a date on the calendar soon, but we are very excited about the prospect of a conference devoted to the issues facing federal practitioners and judges in Oregon. If you have any ideas for what you would like to see at such a conference, please give me a call.

Fourth, we will work to expand our membership. Our membership co-chairs, **Jeff Edelson**, **Laura Salerno Owens**, and **Shannon Armstrong**, have put together a plan to both build our membership base and make sure members realize their annual investment in the chapter. This year, we will be reaching out to current members to find out how we are doing, and what more we can do as an organization.

Finally, we are making efforts to secure the chapter financially for the future. We've always had a solid balance sheet, but we are working on a new budgeting process to make sure we stay this way, and looking at new revenue sources to make sure we are constantly in a position to bring in top talent at CLEs and other events.

Please let me or other board members know if there are things that we can do better. The board members, who are listed in the newsletter, are here to serve our chapter and its members. If there are things that we should be doing, we want to know. If you have ideas about CLEs or speakers, we want to hear them.

THE ASHMANSKAS TRIVIA BOX

An FBA tribute to the memory and humor of Magistrate Judge Donald C. Ashmanskas

Judge Ash was a brilliant writer, and he frequently offered advice on good writing to lawyers. One of his best, tongue-in-cheek expositions on legal writing included the maxim, "A little Latin goes a long way." When describing how much more learned one sounds when recasting simple phrases into Latin, he included as an example:

"Vel caeco apparat."

What does this phrase mean?

Answer on page 8.

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Missing Electronic Notices?

Change of Address? We have been sending the electronic notices via our listserv. Although we have made every effort to obtain our members' email addresses, we need your help to keep our list accurate and current. For those members without email, we are providing the electronic notices by fax. If you have an email address or fax number and have not been receiving electronic notices, or if your email address changes, please contact our listmaster: **Chelsea Grimmius**, chelseagrimmius@yahoo.com. For a change in physical address, please notify **Nadine Gartner**, ngartner@stollberne.com, to ensure you continue to receive mailings from the Oregon Chapter of the Federal Bar Association. All address changes will be forwarded to the national Federal Bar Association.

For the District of Oregon *is a quarterly newsletter of the Oregon Chapter of the Federal Bar Association. Editor Nadine A. Gartner, 209 SW Oak Street, Suite 500, Portland, Oregon, 97204, 503-227-1600.*

ANNOUNCEMENTS

ABA Honors Oregon FBA Young Lawyers' Division

The American Bar Association's Young Lawyers' Division recognized the hard work of the Oregon FBA's Young Lawyers' Division by awarding its programming with the Project of the Year – Service to the Bar Award in both the overall category and bar size category. The Oregon FBA YLD was honored for its Social Security Disability Skills Workshop in February 2012 and Handling a Foreclosure Case Workshop in May 2012, both of which were tremendously successful. Congratulations to the Oregon FBA YLD!

Ninth Circuit Recognizes Excellence in Alternative Dispute Resolution

Awards recognizing individual and institutional achievements in the field of alternative dispute resolution have been announced by the ADR Committee of the Judicial Council of the Ninth Circuit. The **Honorable Susan M. Leeson**, a retired justice of the Oregon Supreme Court now serving as the staff mediator for the United States District Court for the District of Oregon, was selected to receive the 2012 Robert F. Peckham Award for Excellence in ADR. The Willamette University College of Law was chosen to receive the Ninth Circuit ADR Education Award, which recognizes law schools that have significantly advanced ADR scholarship and research. The District of Oregon intends to celebrate these awards with a luncheon scheduled on October 22, 2012 at the Hatfield Courthouse at noon. Please visit http://www.oregonfba.org for additional information.

Attention All Lawyers: Oregon FBA is Creating a Law School Division!

Remember your law school days? Wouldn't it have been grand to have had a resource to familiarize yourself with the federal courts and federal practitioners so you could hit the ground running upon graduation? The Oregon FBA is embarking on a new mission to create a Law School Dvision of the Oregon FBA. The mission of the Law School Division is to promote the interests of law students within the Oregon FBA and to work with interested law schools and students to create student chapters within law schools. If you are interested in assisting with the Law Student Division's mission, please contact Laura Salerno Owens at lsalerno@barran.com or 503-276-2111.

Save the Date—Litigating Section 1983 Civil Rights Cases CLE

October 19, 2012 – The Oregon FBA is co-sponsoring a CLE entitled "Litigating Section 1983 Civil Rights Cases: Current Issues and Trends." This CLE will feature, among other things, a judges' panel, a mental health professionals' panel, a discussion of litigating Section 1983 employement cases, and a review of recent Section 1983 cases. Scheduled speakers include federal **Judges Anna Brown, Michael Mosman, Mark Clark**, and **Thomas Coffin**. For more information, or to register for this CLE, please visit http://www.oregonfba.org/content/litigating-section-1983-civil-rights-cases-current-issues-trends.

Save the Date—Derrick Bell Lecture Series

February 8, 2013 – The Oregon FBA, University of Oregon Law School, and Portland State University are partnering in the first annual Derrick Bell Lecture Series. Derrick Bell (who passed away on October 5, 2011) was the first and (to date) only African-American dean at a non-historically Black institution. Bell was also the first tenured African-American Professor of Law at Harvard Law School. We have invited Professor Ian Haney Lopez from the University of California Berkeley Law School to deliver the keynote address at noon on February 8, 2013 at Portland State University. It will be a public address including questions and answers. Professor Haney Lopez, a former student of Bell's, teaches race and constitutional law at Berkeley Law. In 2011, Professor Haney Lopez was awarded the Alphonse Fletcher Fellowship, given to scholars "for work that contributes to improving racial equality in American society and furthers the broad social goals of *Brown v. Board of Education*." Following the public address, the Oregon FBA will host a CLE with Access to Justice credit at the Hatfield Courthouse from 2:00-4:00 pm. Finally, the day will culminate with a reception at the Hatfield Courthouse beginning at 4:30 pm. Information and registration details to follow. Please join us on this historic occasion!

Upcoming FBA Luncheons

The FBA monthly lunches take place on the third Thursday of each month at the University Club, 1225 SW Sixth Avenue, Portland, Oregon. We are pleased to host two members of our federal bench at upcoming lunches:

October 18 District Court of Oregon **Judge Paul Papak**
November 15 TBA
February 21 District Court of Oregon **Chief Judge Ann Aiken**

Cost is $18 for FBA members and $20 for non-members. Please make reservations for either a vegetarian or meat lunch entrée by emailing Connie.VanCleave@MillerNash.com. The RSVP deadline is the Tuesday before each lunch.

THINGS THAT I LEARNED DURING MY FIRST YEAR ON THE BENCH THAT I WISH I HAD KNOWN AS A TRIAL LAWYER

Continued from page 1

made by a party in support of a cause. To persuade and advocate for a plea is the heart of the work of the trial lawyer, so P-L-E-A should be easy to remember. But I am going to go beyond Aristotle's three ancient principles and add one more from modern learning based on the latest developments in cognitive science, psychology, and behavioral economics. To remember this additional point, it might be easier to remember the word "P-L-E-A-S-E." Every trial lawyer needs to be respectful and polite to his or her audience, whether judge or jury, in order to be persuasive. This requires the use of the word "please" or at least that attitude. Looked at another way, every advocate hopes that his or her argument will "please" the decision-maker; the classic opening for any legal argument is, after all: "May it please the court."

P-L-E-A-S-E it is, then. It stands for: Pathos, Logos, Ethos, and the Alternative Systems [of Thinking] by Everyone.

1. Pathos

Pathos refers to emotion. As used by Aristotle, it means trying to create a certain favorable disposition in the audience. It is a form of argument that appeals to the emotions of the listener or the reader. In a legal case, this can mean different things to different people. Some consider, as I do, *pathos* to be an appeal to one's sense of "justice." It is an argument that seeks to persuade the decision-maker that justice requires, or at least supports, a particular outcome.

Some may think that this is inconsistent with a neutral application of the rule of law. Judge Learned Hand tells the story of when he and Justice Oliver Wendell Holmes, Jr. were riding together in a carriage. As they departed from each other's company, Judge Hand said: "Well, sir, goodbye. Do justice!" Justice Holmes sharply replied, "That is not my job." Learned Hand, "A Personal Confession," in THE SPIRIT OF LIBERTY 302, 306 07 (Irving Dilliard ed., 3d ed. 1960).

There can be no doubt, however, that at least for certain judicial functions, such as deciding a motion for injunctive relief, the judge is authorized and indeed required to "balance equities" and consider the public interest. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Similar factors are also at play when a judge considers other sorts of civil disputes as well, including discovery motions.

Others, however, may consider the *pathos* mode of argument to urge an appeal to the sympathy of the decision-maker. This is a mistake, in my opinion, at least if it refers to trying to appeal to sympathy in order to avoid a fair, neutral, and principled application of the rule of law to the relevant facts fairly determined. A federal judge's oath requires the judge to "administer justice without respect to persons, and do equal right to the poor and to the rich." 28 U.S.C. § 453. Jurors take a similar oath and are similarly instructed. Based on my observations of jurors and my post-trial conversations with them as a trial judge, jurors take their responsibilities and instructions very seriously.

Thus, to the extent that "*pathos*" refers to an appeal to the decision-maker's sense of justice, rather than to sympathy, with "justice" being understood to be a fair and neutral application of the rule of law (including equitable considerations when the rule of law so provides) to specific and relevant facts carefully and impartially determined, it is a powerful tool for persuasion and advocacy.

2. Logos

Logos refers to logic. It means an argument that persuades through appeal to reasoning and logic, whether deductive or inductive. It is an argument, whether written or oral, that flows clearly and understandably, that is well-organized, easy to follow, and contains no logical fallacies (and perhaps even identifies the logical flaws in the opposing argument). The words chosen are clear, free of ambiguity, used with precision and purpose, and logical.

Whether a judge is reading a brief or a judge or jury is listening to oral advocacy, the reader or listener should never have to wonder, "What is the point?" If a fact or a legal proposition is stated, its role and import should be immediately clear. When a lawyer is writing a brief, every sentence should have a purpose and a clear meaning. It should also be clear why that sentence is where it is – and not in some other location (or discarded). All sentences and paragraphs must have a logical and readily-apparent organization and flow. This requires editing and rewriting, which takes time, but if a lawyer wants to be persuasive in written advocacy that time must be invested.

In federal court, at least before trial, most advocacy takes place in writing. The primary role of oral argument, at least for me, is to test whether my initial or tentative conclusions based on reading the briefs and exhibits and analyzing the law are sound, well-developed, and can withstand close scrutiny. Oral argument may also fill in gaps or correct misunderstandings, but the advocate who persuades initially based on the briefs is likely to continue to persuade through the final decision.

3. Ethos

Ethos refers to the ethical character of the advocate. It is a form of persuasion apart from the immediate merits or logic of an argument that relies upon the fact that people generally tend

to believe and give more credit to those whom they trust and respect. And respect is a consequence of ethical character and a reputation that is earned over time. The good character of an advocate cannot alter an adverse legal precedent or change a bad fact, but there are many opportunities where the ethical character of the lawyer may make a difference. Where a judge may have misread or misapplied a precedent, an advocate who has earned a judge's trust may more easily persuade the court that the precedent should be reread or that a conclusion should be reconsidered. If a lawyer has earned the confidence of a judge that the lawyer does not overstate (or misstate) the essential holding or facts of a case, or the contents of certain evidence, or the particulars of a dispute with opposing counsel, that confidence will almost certainly find opportunities where it may make a difference in the outcome of some decision.

Trial lawyers know this in spades when it comes to jury trials, which is why it is so important not to overstate in an opening statement what the evidence will show. If the evidence does not show what the lawyer promised it would, it will not be easy for the jury to believe any other propositions that the lawyer may wish to urge during closing argument.

So how does a lawyer earn that sort of trust from a judge or jury? There are numerous ways. Some that are quite obvious include not doing anything that would cause such trust to be lost, such as making overstatements or misstatements or failing to accurately and completely disclose that which should be disclosed. But there are other more subtle ways to earn trust and inspire confidence.

The law is a noble profession; it is not just a business or a means of earning a living. A lawyer who takes seriously the title "officer of the court" and recognizes that he or she has a duty to the administration of justice as well as a duty of zealous advocacy on behalf of one's client is well on the way toward earning that trust.[2] A lawyer who treats opposing counsel with respect and dignity (at least respecting the role, if not the specific person) is well on his or her way. The lawyer who is courteous to all counsel and staff, parties, witnesses, jurors, court staff, and judges is well on his or her way – and courteousness includes respecting a jury's and a judge's time and attention by not being repetitive, disorganized, or untimely. The lawyer who refrains from arrogance, pomposity, and unnecessary squabbling and disputatiousness is well on his or her way. The lawyer who speaks, stands, and moves with appropriate confidence and presence is well on his or her way. And the lawyer who is well prepared, well organized, and well versed in the applicable rules of procedure (local and otherwise), the applicable substantive rules of law, and the relevant facts of the case is well on his or her way to becoming a lawyer with ethos, who has credibility and is, therefore, more persuasive.

4. ***The Alternative Two Systems of Thinking by Everyone***

As I was preparing for my transition from advocate to trial judge, I came across a law review article with the following startling comment: "As we demonstrate below, judges are predominantly intuitive decision makers, and intuitive judgments are often flawed." Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, "Blinking on the Bench: How Judges Decide Cases," 93 CORNELL L. REV. 1, 5 (2007).

The authors' demonstration persuaded me, and I commend their article to all trial and appellate advocates. I was also persuaded to try to do something to reduce the instances in which my judgments would turn out to be flawed. This is a long-term project, and others are probably in a better position to evaluate how it is proceeding. Nevertheless, my search led to me another resource, one that I also commend to all trial and appellate lawyers. In fact, one outstanding trial lawyer with a national reputation, who has been my mentor since 1986, recently read this book at my recommendation; upon finishing it, he told me, he immediately re read it.

The book is Daniel Kahneman's THINKING, FAST AND SLOW (2011). Dr. Kahneman is professor emeritus of psychology and public affairs at the Woodrow Wilson School of Princeton University. A psychologist by training, in 2002 Dr. Kahneman was awarded the Nobel Prize in *Economics*. His studies include cognition, judgment, and decision-making. Along with his long-time colleague, the late Dr. Amos Tversky, Dr. Kahneman is largely responsible for the creation and development of the field of behavioral economics, which studies the effects of social, cognitive, and emotional factors on the economic decisions of individuals and institutions.

As explained in his book, "[w]e documented systematic errors in the thinking of normal people, and we traced these errors to the design of the machinery of cognition rather than to the corruption of thought by emotion." *Id*. at 8. What trial lawyer (or trial judge) would not want to know about this? The book describes decades' worth of experiments, analyses, and conclusions and explains the two systems of thinking that are found in all normal people (hence, my use of the word "everyone"). These two systems are called "System 1" and "System 2." System 1 thinking works automatically, quickly, and effortlessly; we are not even conscious of it. System 2 thinking requires effort, conscious mental activity, and energy (which, in the form of glucose, rapidly depletes).[3] System 1 leads us astray and to form erroneous conclusions and judgments. System 2, if and when we make the effort to use it, can correct for the errors caused by System 1.

Dr. Kahneman's book describes numerous errors in thinking that occur when System 1 predominates and System 2 takes a rest or at least sits in the backseat and leaves the driving to System 1. Errors can be caused by the "simplifying heuristic" (overusing a rule of thumb) or by the "availability heuristic" (drawing conclusions based only on the most available or accessible

DISTRICT OF OREGON TACKLES PERSONAL JURISDICTION INVOLVING TRADEMARK INFRINGEMENT ON THE INTERNET (AGAIN) IN *L&A DESIGNS, LLC V. XTREME ATVS, INC.*

By: John Rake
Harrang Long Gary Rudnick P.C.

Can a federal court in Oregon exercise personal jurisdiction over an out-of-state defendant who operates an interactive website that allegedly infringes on an Oregon resident's trademark? The District of Oregon answered this question in the negative in *Millennium Enterprises, Inc. v. Millennium Music, LP.* 33 F. Supp. 2d 907 (D. Or. 1999). In that case, **Judge Aiken** analogized the process of applying traditional notions of personal jurisdiction in the "fast-developing world of the Internet" to "trying to board a moving bus." *Id.* at 914. *Millenium Enterprises* counseled that a defendant must do "something more" than operate an interactive website that contains an Oregon plaintiff's trademark and creates a potential for commercial activity with Oregon residents to invite personal jurisdiction. *Id.* at 915. Thirteen years later, in *L&A Designs, LLC v. Xtreme ATVs, Inc.*, the District of Oregon provided an example of "something more," where a defendant uses trademarks in website metatags and marketing slogans. *L&A Designs, LLC v. Xtreme ATVs, Inc*., No. 03:10–CV–627–HZ, 2012 WL 949872 (D. Or. March 20, 2012) (Hernandez, J.). Viewing these cases in tandem offers litigants some guideposts for establishing or defeating personal jurisdiction in trademark infringement cases involving websites.

In *Millennium Enterprises*, Portland music store Music Millenium brought claims of trademark infringement, trademark dilution, and unfair competition against Millenium Music, a South Carolina chain of music stores. 33 F. Supp. 2d at 908. The South Carolina defendant maintained a website where users could buy compact discs, join a discount club, and request franchising information. *Id*. at 913. The court dismissed the case for lack of personal jurisdiction. *Id.* at 924. The court found that the defendant had made no sales through its website to customers in Oregon—with the exception of one sale to an Oregon employee of plaintiff's law firm[1] — and did not target Oregon residents as customers. *Id*. at 920-22. Thus, even though the website was interactive, and it was foreseeable that an Oregon resident could purchase a product from the defendant, the Court found that the defendant did not "purposely avail" itself of the privilege of doing business with Oregon such that it had "fair warning" of being haled into an Oregon court. *Id*. at 923.

In *L&A Designs*, an Oregon-based seller of ATV parts, L&A Designs, and its owner, Wesley Alford, sued Xtreme ATVs, a Connecticut-based seller of ATV parts, and its Connecticut owners, Andrew and Natalie Clunan, alleging trademark infringement, unfair competition and unfair trade practices, for the defendants' use of the trademark "L&A Designs." 2012 WL 949872 at *2.

Ms. Clunan sought dismissal based on the court's lack of personal jurisdiction. In addition to serving as vice-president and secretary of Xtreme ATVs, Ms. Clunan designed the company's interactive websites, including www.ladesigns.com, and used the plaintiffs' trademark in an advertising slogan and in webpage metatags.[2] *Id*. at *2-3. She sold products on eBay to Oregon residents. *Id*. at *5.

The court concluded that Ms. Clunan's actions subjected her to personal jurisdiction in Oregon. *Id*. at *7-11. The court first found Ms. Clunan's contacts with Oregon were not "substantial or continuous and systematic" to confer general jurisdiction. This is a high standard, requiring that contacts in the forum "approximate physical presence." *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1172 (9th Cir. 2006) (considering "[l]ongevity, continuity, volume, economic impact, physical presence, and integration into the state's regulatory or economic markets."). The court noted that Ms. Clunan did not have an office or staff in Oregon, was not registered to do business in the state, did not have a registered agent for service of process, and did not pay state taxes. 2012 WL 949872 at *5.

In applying the Ninth Circuit's three-prong test for specific jurisdiction, however, the court found it could exercise jurisdiction over Ms. Clunan. *Id*. at *5. The Ninth Circuit considered whether (1) the defendant purposefully directed activities with the forum or purposely availed itself of the forum's privileges, (2) the plaintiff's claim bore a relationship to the defendant's forum-related activities, and (3) the exercise of jurisdiction was reasonable. *Brayton Purcell LLP v. Recordon & Recordon*, 575 F.3d 981, 985 (9th Cir. 2009). In applying the first prong, the court found Ms. Clunan "purposely directed" activities against an Oregon company, L&A Designs, by intentionally using plaintiff's trademark in defendant's interactive website to divert customers from plaintiff. *Id*. at *8. For the second prong, the court found the plaintiff's claims of trademark infringement would not exist "but-for" Ms. Clunan's forum-related activities. *Id*. at *9. Finally, the court found the exercise of jurisdiction to be reasonable under the third prong, because, among other things, the burden of having to defend in Oregon was slight (Ms. Clunan already was likely to be a trial witness regardless of whether she was a named defendant), and because the Oregon case, with a trial date set, offered a more expedient resolution than in Connecticut. *Id*. at *9-10.

In sum, although operating an interactive website that contains an Oregon resident's trademark may not be enough to create personal jurisdiction in Oregon, using an Oregon resident's trademarks in website metatags and advertising slogans to divert customers to the defendant should be sufficient.

1. The court cited the rule that unilateral acts taken by plaintiff to "manufacture jurisdiction" should not be considered in establishing personal jurisdiction. 33 F. Supp. 2d at 911.

2. A metatag is a special HTML command in a webpage's source code that provides information and keywords about the webpage that may be used by search engines to compile search indices.

OREGON FBA BOARD MEMBERS ATTEND THE 2012 NINTH CIRCUIT JUDICIAL CONFERENCE[1]

By: Laura Salerno Owens, Barran Liebman

Michael Beaty, Justice Kennedy and Susan Pitchford

I recently had the honor of attending the 2012 Ninth Circuit Judicial Conference. The Conference is an annual event authorized by law "for the purpose of considering the business of the courts and advising means of improving the administration of justice within the circuit." § 28 U.S.C. Sec. 333. Attendees included judges of the U.S. Court of Appeals for the Ninth Circuit and the federal district and bankruptcy courts in the Circuit; representatives of the federal bar practicing in these courts; court staff; and special guest speakers.

The Conference featured a dynamic program. It began with remarks by **Justice Anthony M. Kennedy** and featured a fascinating Supreme Court Review presented by Kathleen M. Sullivan, former dean of Stanford Law School and editor of the classic casebook, *Constitutional Law.*

Day two of the Conference was devoted to technology. Rapid and constant change in communication technology presents enormous challenges to our courts. For example, when we use our email, order something over the Internet, use our mobile phones or communicate over social networks that information is collected and aggregated for various purposes. How should courts treat the use of that information under Fourth Amendment privacy standards? Participants learned about the latest technology and trends from a panel featuring professors of computer science and the former deputy general counsel at Google. The subsequent panels explored the broad range of privacy protection issues that arise in the Internet age.

On day three, the panels, led by Nancy Gertner, a retired district judge and current professor at Harvard law school, discussed disparities in sentencing and incarceration rates, and challenged the participants to consider the role of the legal system in perpetuating those disparities. Breakout sessions also featured updates in *habeus corpus* procedures and appeals, and work groups addressed the challenges and rewards of adopting a re-entry program.

On the last day of the Conference, Professor Arthur Miller, co-author of the Wright & Miller treatise *Federal Practice & Procedure,* led a panel featuring owners and in-house counsel of professional sports teams. The panel provided an opportunity for an inside look at the antitrust, labor, and intellectual property issues that arise in connection with major league sports and often spill over into other industries.

Perhaps even more important, the Conference offered time to talk with lawyers and judges from around the Circuit. The best solutions for problems and positive innovations often arise through interactions not available within the four corners of our own chambers, courthouses or districts. The Conference provided a forum for districts to exchanges ideas about what challenges they face and what solutions have worked in other districts. During the Conference, Oregon was highlighted as an example to the other districts for our range and volume of innovative programs. In his opening remarks, Justice Kennedy also recognized the vital importance of in-person annual meetings to promote improvement of the administration of justice. This year's Conference provided participants with ample opportunities to learn from one another and to use those lessons to improve the functioning of the federal courts in their own districts.

[1.] Note from the author: This article incorporates portions of a letter to conference participants authored by Conference Chair Hon. Laura S. Taylor, Bankruptcy Judge, and Program Chair Hon. Richard A. Jones, District Judge.

The Ashmanskas Trivia Answer

The meaning of "vel caeco apparat" is "it would be apparent even to a blind man."

information and assuming WYSIATI – "what you see is all there is"), among other causes. Dr. Kahneman also describes "hindsight bias" (after an unlikely event occurs, the likelihood of such an event occurring appears to be greater than it did before), "confirmation bias" (one selectively accepts or rejects facts or arguments depending upon whether they confirm already-held beliefs), the "priming effect" (seeing or hearing a particular word can prompt other words and concepts and even actions and emotions), the "anchoring effect" (seeing or hearing an early mention of a particular value for an unknown quantity can influence the later estimate of that quantity), the "halo" effect (similar to *ethos*, discussed previously), the "conjunction fallacy" (erroneously inferring the general from the particular), and the fallacy of not understanding "regression to the mean" (drawing erroneous conclusions from random fluctuations in the quality of a performance). In addition, Dr. Kahneman discusses the relationship between "cognitive ease" and the "illusion of truth" (where, for example, the use of repetition can make people believe something that is false simply because familiarity is not easily distinguished from the intuition of truth).

Although the book is not written specifically for the legal profession, a trial lawyer can learn many lessons about persuasion and decision-making from Dr. Kahneman. These insights will apply to arguing motions before a trial judge, presenting cases in jury or bench trials, handling appeals, and even negotiating settlements. Dr. Kahneman also discusses another valuable tool, which is already in use by some businesses but not yet widely adopted by trial lawyers. It is the "premortem." Lawyers and others know that after a project has ended, especially if it has ended poorly, a "post-mortem" analysis may be useful to learn how things can be improved for the next time. Dr. Kahneman's book discusses the idea of engaging in a "premortem" early in a project as a remedy for the cognitive problem of "overconfidence." *Id.* at 264-65.

Most trial lawyers are confident; some may even say "overconfident." And overconfidence may make it more difficult to see and anticipate potential problem areas. The concept of a "premortem" suggests that reasonably early in the litigation process the trial lawyer should attempt to visualize various negative outcomes and then analyze the likely causes of these negative results. Such a premortem may be useful in identifying potential problem areas that would not otherwise be seen during the course of more traditional preparation. After these problems are identified, potential solutions might be developed or alternative courses of action could be taken. The idea of doing a premortem is certainly worth considering.

Dr. Kahneman also explains the circumstances that lead to the development of generally sound and good intuitions, such as those held by grandmasters at chess and by experienced firefighters. He explains, "[w]hether professionals have a chance to develop intuitive expertise depends essentially on the quality and speed of feedback, as well as on sufficient opportunity to practice." Id. at 241. Given how few decisions of a trial judge are actually appealed and how long the appellate process often takes, this is not particularly comforting news for a trial judge.

There are likely many more good books and articles of which I am not yet aware.[4] I recognize that there is a lot more to learn. Perhaps in 25 years I might even write an essay entitled: "Things that I Wish I Had Known as a New Trial Judge." In the meantime, I will try to avoid the errors that Dr. Kahneman describes.

[1.] Note from the author: In the spirit of neutrality and evenhandedness, this essay has been submitted to the Oregon Trial Lawyers Association, the Oregon Association of Defense Counsel, the Oregon State Bar, and the Oregon Chapter of the Federal Bar Association.

2. It is interesting to note that the word "zeal" and the phrase "zealous advocacy" do not appear in the Oregon Rules of Professional Conduct. See Sylvia Stevens, Whither Zeal? Defining 'zealous representation'" OREGON STATE BAR BULLETIN July 2005, also available at http://www.osbar.org/publications/bulletin/05jul/barcounsel.html.

[3.] This may explain, at least in part, the results seen in the study of parole judges in Israel. More paroles were granted shortly after each meal with the approval rate dropping until the next judicial "feeding." According to Dr. Kahneman, "[t]he best possible account of the data provides bad news: tired and hungry judges tend to fall back on the easier default position of denying requests for parole. Both fatigue and hunger probably play a role." Id. at 44. Thus, the old "realist school" adage that a judge's decision depends on what the judge had for breakfast may now need to be modified with the addition of "and when he or she ate it."

[4.] Two other works of which I am aware and highly recommend are: Hon. Richard A. Posner, HOW JUDGES THINK (2008); and Brian Z. Tamanaha, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010).

CONGRESS SEEKS TO SIMPLIFY REMOVAL AND VENUE RULES WITH NEW JURISDICTION AND VENUE CLARIFICATION ACT

By: Elizabeth Tedesco Milesnick

Miller Nash LLP

Effective January 6, 2012, the *Federal Courts Jurisdiction and Venue Clarification Act of 2011* (the "Act") makes the first changes in almost a decade to federal court jurisdiction and general removal procedures not involving class actions. The new law contains significant changes to the removal statute, 28 U.S.C. § 1441, and will affect nearly every new case filed or removed invoking the courts' diversity jurisdiction.

According to the Judiciary Committee Report on the Act, the United States Judicial Conference recommended these changes to address the belief, expressed by judges, that "the current rules force them to waste time determining jurisdictional issues at the expense of adjudicating underlying litigation." Report 112-10, p. 2. With the Act, Congress intends to bring more clarity to the operation of federal jurisdictional statutes and to help parties quickly identify the appropriate state or federal court in which to bring actions.

Here are the key components:

REMOVAL

1. The Act addresses a longstanding conflict over the statutory 30-day period for "the defendant" to remove an action to federal court. Circuits have disagreed over how to interpret the law in cases with multiple defendants served at different times. *Compare Bailey v. Janssen Pharms., Inc.*, 536 F.3d 1202 (11th Cir. 2008) (30-day period runs from the date of service on the last-served defendant) with *Marano Enters. v. Z-Teca Rests.*, LP, 254 F.3d 753 (8th Cir. 2001) (30 days to effect removal for each defendant, regardless of when others had sought to remove) with *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254 (5th Cir. 1988) (30 days after service upon the first-served defendant). The new law provides that each defendant will have 30 days from his or her own date of service to seek removal. Earlier-served defendants would also be allowed to join in or consent to removal by another defendant. *See* 28 U.S.C. § 1446(b)(2)(B).

2. To avoid further confusion, the law also codifies the "rule of unanimity," set forth over a century ago by the Supreme Court, requiring all defendants to consent to removal. *See* 28 U.S.C. § 1446(b)(2)(A).

3. New Section 1446(c) provides that "the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy," except where the "initial pleading seeks (i) nonmonetary relief; or (ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded." In these cases, a defendant's notice of removal may establish the amount in controversy. Also, information collected during state court discovery may be used to support removal even if removal is not appropriate based on the initial pleading, and even after the 30-day period expires. See 28 U.S.C. § 1446(c)(3)(A) (providing that "[i]f the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an 'other paper' under subsection (b)(3).").

4. The Act adopts the majority view requiring that the amount in controversy be shown by "the preponderance of the evidence," rejecting other conflicting standards. *See* 28 U.S.C. § 1446 (c)(2)(B).

5. The Act retains the requirement that a notice of removal based on traditional diversity jurisdiction be filed no later than one year after an action is commenced, *but* it allows a defendant to avoid the one-year bar by demonstrating that the "plaintiff has acted in bad faith in order to prevent a defendant from removing the action." *See* 28 U.S.C. § 1446(c)(1). Giving an example of bad faith, the Act expressly allows a defendant to remove a case after one year if "the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal." *Id*. at (c)(3)(B).

SUPPLEMENTAL JURISDICTION

6. The Act eliminates a federal court's discretion to hear state law claims asserted in a case removed to federal court on the basis of federal question jurisdiction. For a state-court action that includes (1) claims based on a federal question and (2) non-removable state-law claims, the act provides that only the federal question claims will proceed in federal court, while the non-removable state-law claims will be remanded to state court. *See* 28 U.S.C. § 1441(c) (providing that while a case involving a federal question and state law claims may be removed to federal court, upon removal, the district court "shall sever from the action all [state law] claims . . . and shall remand the severed claims to the State court from which the action was removed").

CITIZENSHIP

7. Section 101 of the Act attempts to apply the complete diversity requirement to certain claims involving resident aliens. Under the revised version of 28 U.S.C. § 1332(a)(2), while federal courts retain jurisdiction over state law claims between a citizen of a State and citizens of a foreign state, federal courts cannot exercise jurisdiction over such claims if they are asserted between a citizen of a State and "citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State."

8. Under 28 U.S.C. § 1332(c)(1), corporations are now considered citizens of both the state by which they are incorporated and any other state, including any foreign state, where it maintains its principal place of business.

VENUE

9. The Act completely revises the general federal venue statute, 28 U. S. C. §§ 1390 et seq., mostly by reorganizing and clarifying existing law, including that residency is a natural person's state of domicile, the same standard used in the determination of citizenship for diversity jurisdiction.

10. The Act provides a new procedure for transferring venue to a forum where the parties consent that the case be heard. It amends Section 1404 to allow for transfer "to any district or division to which all parties have consented." This new procedure allows for transfer to a district chosen by the parties even if venue would not otherwise be proper in that district. *See* Report 112-10, pp. 23-24.

FROM UNEMPLOYED TO ASSOCIATE: TIPS FOR NAVIGATING PORTLAND'S JOB MARKET

By: Alyssa Engelberg

Fisher & Phillips

The job market for recent law school graduates is difficult. In fact, difficult might be an understatement. In June 2012, the Wall Street Journal reported that attorneys from the class of 2011 had about a 50-50 shot of landing a job as a lawyer within nine months of graduation.[1]

I graduated law school in 2011 without a job. After nine months, I was lucky enough to land my dream job as an associate at Fisher & Phillips. I was asked to write a short article about my experience, and I decided to share the six "rules" that I lived by during my job search:

1) *Network.* For better or worse, the maxim, "It's not what you know, it's who you know," is true. Informational interviews, often over coffee or lunch, were my primary way to get to know the attorneys practicing in my field of interest. Portland has a very collegial legal community, so don't be afraid to utilize it. Most every attorney and judge I asked agreed to meet with me. Remember, they all needed to find their first job, too. Make sure to follow up after that first meeting and actually try to build a relationship. A network full of people that you've only spoken with once probably won't be that helpful.

2) *Utilize mentor programs.* Recent members of the Oregon bar are required to participate in a mentor program. The Multnomah Bar Association also has a mentor program. You can either be assigned a mentor or you can ask a qualified attorney to be your mentor. I chose my own mentor as I wanted someone that I knew would teach me about the realities of practicing labor and employment law in Oregon. My mentor, **Jennifer Nelson** of Littler Mendelson, went above and beyond her "official tasks" and played a significant role in getting me to where I am today.

3) *Proactively address your weaknesses*. Most of us are aware of areas where we might need some improvement. Use your job search as an opportunity to address those weaknesses rather than just sitting back and hoping that prospective employers won't notice them. For example, I knew that I had graduated law school with relatively meager knowledge of Oregon law. I addressed that weakness by reaching out to various Multnomah County Circuit Court judges regarding volunteer opportunities. **Judge Janice Wilson** generously allowed me to volunteer for her and the experience helped me to familiarize myself with Oregon law.

4) *Make yourself stand out*. Demand for jobs exceeds supply, which means prospective employers have a lot of options. Make it easy for them to see what is unique and valuable about you. For example, I began a blog chronicling developments in labor and employment law. The blog gave me something concrete to show to the attorneys I met with and, most importantly, allowed prospective employers to see that I was actually passionate about the field. After all, someone probably wouldn't voluntarily write about Title VII's ministerial exception unless he or she truly had an interest in employment law.

5) *Recognize your value*. Keep the attitude that you have value and are worth hiring. No one wants to hire someone who is desperate. Getting a job is a two-way street.

6) *Don't take anything personally.* This is self-explanatory but is too important not to mention. Attorneys and judges are extremely busy. Don't view a canceled informational interview or an ignored email as a personal offense.

None of these "rules" change the fact that searching for a job in this legal market is a relatively miserable process. It's all too easy to become disheartened. But don't give up. Things will come together eventually and, with a little bit of luck, you might even be fortunate enough to land your dream job.

[1] See Joe Palazzolo, Law Grads Face a Brutal Job Market, Online.WSJ.com, June 25, 2012, at http://online.wsj.com/article/SB10001424052702304458604577486623469958142.html.