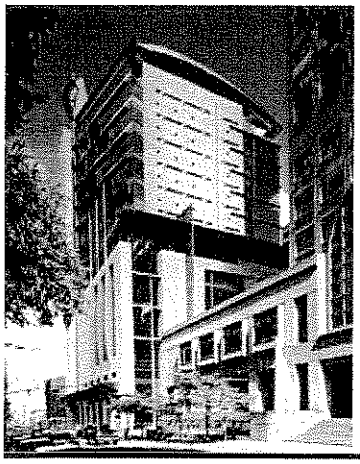

A Quarterly Newsletter of the Oregon Chapter of the Federal Bar Association

FOR THE DISTRICT OF OREGON

Volume XII, No. 2 *Summer 2007*

IN THIS ISSUE

Practice Tips for Effective Jury Instructions
By Anna J. Brown 1-3

Four Things Oregon Lawyers Should Know About Contention Interrogatories
By Kathryn Mary Pratt 3-6

Judges Appreciation Dinner 6

Update to the District of Oregon Local Rules of Civil Practice Annotated
By Kathryn Mary Pratt 7-8

Announcements 8

Monthly FBA Luncheon 10

PRACTICE TIPS FOR EFFECTIVE JURY INSTRUCTIONS

By Hon. Anna J. Brown, U.S. District Judge District of Oregon

Despite the best efforts of court and counsel, the task of formulating legally correct and accurately understood jury instructions often takes a back seat to other trial demands and defaults until the end of trial when the jury is waiting and the judge and counsel are least able to give thoughtful consideration to instructions. We can do better! I've been a trial judge for 15 years, tried dozens of civil cases as a lawyer, served on and chaired the Oregon State Bar Civil and Criminal Jury Instruction Committees, and now serve as Chair for the Ninth Circuit Jury Instruction Committee. From this perspective, I offer these observations and suggestions to help prepare effective jury instructions *before* the end of the case.

1. Begin at the end with a verdict form.

Early in the case, even when drafting a complaint or an answer, identify the fact questions the jury will have to resolve at the end of the case. The formulation of such questions depends on the legal standards the jury will have to follow. Correctly identifying the elements of your claim or defense at the beginning of the case will provide a road map for discovery, dispositive-motion practice, the pretrial order, and, of course, the key instructions the jury will follow when deciding the case. Ultimately, a well-structured and straightforward verdict form provides a method to organize the presentation of evidence, assists the jury in logically sorting through multiple issues and parties, and results in clear findings for appellate review. In any event, early discussion of instructions focuses the court and counsel and maximizes their capacity to anticipate problems before they arise, to avoid or to correct errors, and to ease pressures at the end of trial. Ultimately, the trial process will be more meaningful to jurors who receive substantive instructions concerning the issues to be resolved and the legal standards they must apply *before* they hear the evidence.

2. Use model instructions to develop "elements" instructions.

An "elements" instruction should state concisely and in plain language what must be proved, by whom, and the applicable standard of proof. In other words, an "elements" instruction guides the jury in deciding how to complete the verdict form when deciding whether a plaintiff has established a claim for relief or whether a defendant has proven an affirmative defense. Existing model jury instructions may already define the substantive elements at issue and, therefore, are the de facto starting point for writing "elements" instructions. Indeed, Local Rule (LR) 51.1(b) of the District of Oregon Local Rules for Civil Practice provides: "In diversity cases, the Oregon State Bar Uniform Civil Jury Instructions should be used. In other cases, and unless otherwise directed by the Court, the Ninth Circuit Model Jury Instructions should be used." When local model instructions do not suffice, other

FROM THE BOARD

By Helle Rode, Board President of Federal Bar Association Oregon Chapter

My year of service as President of the Oregon Chapter has been an amazing experience. I am deeply grateful for the support and assistance of our federal judges, who were always willing to speak or appear whenever we asked, and our great Board of Directors. Undoubtedly most of those in attendance at our annual Judges Appreciation Dinner in May were moved, as I was, by the feelings of friendship, support, and camaraderie that permeated the remarks in favor of our honorees: Judge Cooney, Judge Clarke, and Donnal Mixon. This personifies our federal bar and its relationships with the federal judiciary around Oregon.

Thank you to the members of the Oregon Chapter for the opportunity to serve as President and to our terrific Board members who worked hard on many projects and programs for our members. Special thanks to Hon. Anna Brown for her significant contributions to the Board and for serving as our liaison with the judges in our district; Kelly Zusman for her work on the Courtroom 21 CLEs in Portland and Eugene; Susan Pitchford for her work on the very successful Judges Appreciation Dinner; Seth Row for serving as our list master; Clarence Belnavis, Kelly Zusman, Kate Cottrell, and Hwa Go for their work on the Hon. Ancer Haggerty High School Essay Contest; Kristin Olson for planning the events of our Young Lawyers Division; Edward Tylicki for his work on our award applications; Todd Hanchett for keeping on top of luncheon reservations with the help of his assistant, Ann Fallihee; Richard Vangelisti, Katherine Heekin, and Jackie Tommas for their work on our new Constitution and By-Laws; Jackie Tommas for her tireless work as our Treasurer; and Peter Richter for serving as our membership Chair. Also, thank you to our newsletter editor, Tim Snider, and to the many members who contributed to the newsletter. Our Oregon Chapter newsletter *For the District of Oregon* wins awards annually from the National Federal Bar Association!

Thank you to the many judges and others who have spoken at our monthly luncheons this past year: Federal Defender Steven Wax, Assistant U.S. Attorney Leslie Westphal, Judge Stewart, Katherine Heekin, Clerk of the Court Sheryl McConnell, Judge Graber, Judge Haggerty, U.S. Attorney Karin Immergut, Judge Brown, Judge Coffin, and Judge Leavy. We appreciate the time and effort you put into these very helpful presentations!

Please join us for these upcoming summer events: our Annual Meeting and Luncheon on June 28 at the University Club (starts at noon, lunch is free for members) with Judge Leavy as our speaker, and the Judge Thelton Henderson movie and discussion at the courthouse on August 6 at noon (refreshments provided and one Elimination of Bias CLE credit pending). Don't miss the United States District Court of Oregon Historical Society's annual picnic at Judge Leavy's hop farm on August 19 starting at 1 p.m. This will be a great event for the whole family! Save October 12 for the Young Lawyer's Division CLE, "A Survival Guide to Motion Practice in Federal Court." And plan to attend the FBA Annual Meeting and Convention in Atlanta, Georgia on September 6-8 (www.fedbar.org).

I hope to see you at all of these events. Have a great summer!

PRACTICE TIPS FOR EFFECTIVE JURY INSTRUCTIONS

Continued from page 1

resources, such as the Northern District of California's Model Patent Jury Instructions, can be very helpful. Because model instructions are written by committees, however, they are not binding as correct statements of the law unless and until an appellate court approves their substance. *See Dang v. Cross*, 422 F3d 800, 805 (9th Cir 2005) (notes "'[u]se of a model jury instruction does not preclude a finding of errors.'" (quoting *United States v. Warren*, 984 F2d 325, 328 (9th Cir 1993)). Nonetheless, lawyers who want a trial judge to give an instruction that differs from an existing and ordinarily used model instruction should have a sound, analytical reason for why and how the instruction should be modified.

3. **When model instructions don't suffice, consider these tips to write your own.**

   a. Cover the theories of the case with a correct statement of applicable law.

As the Ninth Circuit recently emphasized, "a party is entitled to an instruction to help it prove its theory of the case, if the instruction is 'supported by law and has foundation in the evidence.'" *U.S. v. Heredia*, 483 F3d 913, 922 (9th Cir 2007) (quoting *Jones v. Williams*, 297 F3d 930, 934 (9th Cir 2002)).

   b. Avoid argumentative or cumulative language.

LR 51.1(d)(4) provides: "Each instruction must be brief, impartial, understandable, and free from argument. The principle stated in one instruction must not be repeated in any other instruction." Indeed, a "'court is not required to accept a proposed instruction which is manifestly intended to influence the jury towards accepting the evidence of the defendant as against that of the prosecution.'" *U.S. v. Sarno*, 73 F3d 1470, 1485 (9th Cir 1995) (quoting *United States v. Hall*, 552 F2d 273, 275 (9th Cir 1977)).

   c. Avoid permissive-inference instructions.

The Ninth Circuit discourages permissive-inference instructions. For example, when considering a jury instruction about inferring intent to distribute drugs from evidence about the quantity of drugs possessed by a defendant, the Ninth Circuit cautioned: "Although the

instructions in this case were not delivered in error, we do not hesitate to point out the 'dangers and inutility of permissive inference instructions.'" *U.S. v. Beltran-Garcia*, 179 F3d 1200, 1207 (9th Cir 1999) (citation omitted), *cert den*, 528 US 1097 (2000); *see also U.S. v. Rubio-Villareal*, 967 F2d 294, 300 (9th Cir 1992) (en banc) (court disapproved of instructing jury that defendant's knowledge of presence of drugs in vehicle may be inferred when defendant is driver). Instead, a model instruction on circumstantial evidence generally eliminates the need to explain the same legal principle in terms of inferences and leaves to argument of counsel the inferences a jury might draw from the evidence.

d. Confer with opposing counsel.

When proposing to change a model jury instruction, confer with opposing counsel and attempt to agree on language that is more appropriate to the case. A judge is more likely to alter model language if the parties agree and the judge does not see any fundamental error in law. In any event, give the judge your proposal formatted in a way that shows how the proposal differs from the model instruction together with a succinct statement explaining why your version is better.

e. Clarity is the goal.

Whenever possible, use plain language, active voice, present tense, and concise and declarative statements while avoiding "legalese," compound concepts, and negative statements about what the law does not permit. Using plain language also avoids unnecessary definitions. "Jury instructions need not define common terms that are readily understandable by the jury." *See, e.g., U.S. v. Dixon*, 201 F3d 1223, 1231 (9th Cir 2000) ("[T]he court did not err by failing to define 'commercial advantage' and 'private financial gain' because these are common terms, whose meanings are within the comprehension of the average juror."); *U.S. v. Young*, 458 F3d 998, 1010 (9th Cir 2006); *Zhang v. American Gem Seafoods, Inc.*, 339 F3d 1020, 1029-30 (9th Cir 2003) (in Title VII claim, term "motivating factor" may not require definition because of its common usage).

4. Consider ways to improve juror comprehension of the law and evidence.

In October 2006, the Ninth Circuit Jury Trial Improvement Committee issued its "Second Report: Recommendations and Suggested Best Practices" for "improving courtroom procedures that will result in better jury trials and improved experiences for our jurors." In addition to recommending the obvious (to "permit" juror note-taking, to encourage attorneys to use technology for the presentation of trial exhibits to improve juror comprehension, and to provide individual juror trial books in appropriate cases), the Committee's advice included the following:

a. Provide all jurors with substantive preliminary and final jury instructions in written form.

b. Inform jurors at the beginning of the trial that alternate juror(s) will be randomly selected after closing arguments and instructions.

c. Permit written questions from jurors during civil trials.

d. Permit juror discussion of evidence as civil trials progress.

Although all of these suggestions may not be appropriate or welcome in every case, they are worth considering before every trial.

FOUR THINGS OREGON LAWYERS SHOULD KNOW ABOUT CONTENTION INTERROGATORIES

By Kathryn Mary Pratt

Contention interrogatories seek out the factual basis for the allegations raised in the pleadings. They are often directed toward specific allegations in a pleading, including vague and general allegations. In *In re Convergent Technologies Securities Lit.*, 108 FRD 328, 332 (ND Cal 1985), the Court identified four types of contention interrogatories:

1. Those that begin, "Do you contend that . . . . .";
2. Those that ask for all the facts on which a contention is based;
3. Those that ask a party to take a position and then explain or defend that position, with respect to how the law applies to the facts; and
4. Those that ask a party to explain the legal position behind a contention.

There are many misconceptions about contention interrogatories. Many lawyers in this District believe that they are not permissible. As a result, such lawyers file interrogatory responses that contain knee-jerk objections to such interrogatories, arguing that these interrogatories are not permitted because they "seek a legal conclusion" or "call for the application of law to fact." In support of these objections, lawyers often cite Local Rule (LR) 33.1(d). It is a misconception that LR 33.1(d) generally prohibits contention interrogatories or that every interrogatory that calls for the application of law to fact is prohibited under that rule. This article addresses these misconceptions, and clarifies several other issues concerning the use of contention interrogatories.

1. Contention Interrogatories Are Permitted Under the Federal Rules.

An interrogatory is not necessarily infirm because it seeks a legal conclusion or seeks an application of law to fact. Federal Rule of Civil Procedure (FRCP) 33(c) expressly provides that "[a]n interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact * * *." The Advisory Committee Notes to the 1970 Amendments to Rule 33 state that "requests for opinions or contentions that call for the application of law to fact * * * can be most useful in narrowing and sharpening the issues, which is

a major purpose of discovery." However, the notes do provide that interrogatories are improper when they "extend to issues of 'pure law,' *i.e.*, legal issues unrelated to the facts of the case."

Numerous courts uphold the use of contention interrogatories, so long as such interrogatories are related to the facts of the case. *See, e.g., Nestle Foods Corp. v. Aetna Cas. and Sur. Co.*, 135 FRD 101, 110 (DNJ 1990) (objective of contention interrogatories is to "ferret out and narrow the issues"); *Leksi, Inc. v. Federal Ins. Co.*, 129 FRD 99, 107 (DNJ 1989) ("Interrogatories seeking to elicit what a party's contentions will be at the time of trial are not objectionable, as responses to these questions will help narrow the issues to be tried."); *Hockley v. Zent, Inc.*, 89 FRD 26, 31 (MD Pa 1980) ("[T]here is no doubt that the federal rules allow a litigant to require an opponent to answer interrogatories asking for a delineation of legal theories so long as the question is calculated to serve a 'substantial purpose' in prosecution of the suit, such as a narrowing of issues."); *McClain v. Mack Trucks, Inc.*, 85 FRD 53, 59 (ED Pa 1979) (if contention interrogatory "eliminates unnecessary testimony, avoids wasteful preparation, narrows the issues, leads to relevant evidence or generally expedites fair disposition of the lawsuit and serves any other substantial purpose sanctioned by discovery, the court should require response"); *Scovill Manufacturing Co. v. Sunbeam Corporation*, 357 F Supp 943, 948 (D Del 1973) (interrogatory is proper if it "might refine the actual issue of fact" (internal quotation marks and citation omitted)).

Based on these standards, routine blanket objections such as "seeks a legal conclusion" or "seeks application of law to fact" should not be leveled against contention interrogatories. The District Court is unlikely to uphold such general objections in light of the clear authority that allows contention interrogatories as a discovery tool.

2. The Court Has Discretion to Determine the Scope of Contention Interrogatories.

District Courts have some discretion concerning the scope and timing of contention interrogatories. There is no "'hard and fast rule as to the exact amount of detail a party has to supply in response to a contention interrogatory. The answer to this question can only be determined on a case-by-case basis by attempting to find a reasonable solution as specific problems arise.'" *Woods v. Kraft Foods, Inc.*, No. CV F 05-1587 LJO, 2006 US Dist LEXIS 73126, 2006 WL 2724096 at *4 (ED Cal Sept. 22, 2006) (quoting *Roberts v. Heim*, 130 FRD 424, 427 (ND Cal 1989)). "'[E]ach interrogatory has to be judged in terms of its scope and in terms of the overall context of the case at the time it is asked.'" *Id.*, (quoting *Roberts*, 130 FRD at 427).

However, it is well settled that any interrogatory that is too general and all-inclusive need not be answered. *Stovall v. Gulf & S. Am. S.S. Co.*, 30 FRD 152, 154 (SD Tex 1961). Generally, either by decision or by local rule, many jurisdictions have limitations on contention interrogatories that are too broad. The District of Oregon's LR 33.1(d) is just such a limitation on the scope of contention interrogatories. LR 33.1(d) states:

> "Broad general interrogatories, such as those which ask an opposing party to 'state all facts on which a contention is based' or to 'apply law to facts,' are not permitted."

At least one party has argued that LR 33.1(d) was inconsistent with FRCP 33(c). However, Judge Haggerty rejected that argument in *EEOC v. U.S. Bakery*, No. CV 03-64-HA, 2003 US Dist LEXIS 25529, 2003 WL 23538023 at *2 (D Or Nov. 20, 2003), noting that LR 33.1(d) was a "prohibition against overly broad interrogatories that ask for the general application of law to fact." In the *U.S. Bakery* case, Judge Haggerty held that an interrogatory asking the defendant to "[d]escribe the factual and legal basis for the third affirmative defense identified in defendant's February 17, 2003 Answer to Plaintiff's Complaint that 'the claims are barred in part or fully by applicable statute of limitations'" was sufficiently narrow and specific to avoid violating LR 33.1(d). *Id.*

On the other hand, in *Huson v. City of Forest Grove*, No. Civ. 01-817-FR, 2002 US Dist LEXIS 476, 2002 WL 31435690 (D Or Jan. 2, 2002), Judge Frye found that interrogatories that essentially asked for counsel for the defendants to elaborate on the statements she made in a letter responding to a BOLI complaint were excessively broad and refused to grant a motion to compel answers to those interrogatories at that "stage in the proceedings," citing LR 33.1(d).

U.S. Bakery and *Huson* are the only two published cases in this District interpreting LR 33.1(d). Thus there is not a lot of guidance on where the line is between a permissible contention interrogatory and an overbroad interrogatory. But it is clear from *U.S. Bakery* that a party can be required to state the legal and factual basis on which it makes certain contentions. Thus, in objecting to an interrogatory pursuant to LR 33.1(d), a lawyer must carefully evaluate whether the interrogatory truly is overbroad, and avoid simply objecting to the interrogatory merely because it seeks an application of law to fact on a particular claim or defense.

3. The Court Has Discretion to Determine the Timing of Answers to Interrogatories.

The rules do provide some relief to those confronting premature contention interrogatories. FRCP 33(c) provides that the court may issue and order that a contention interrogatory "need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time." The 1970 Advisory Committee Notes provide some clarification as to timing:

> "Since interrogatories involving mixed questions of law and fact may create disputes between the parties which are best resolved after much or all of the other discovery has been completed, the court is expressly authorized to defer an answer. Likewise, the court may delay determination until pretrial conference, if it believes that the dispute is best resolved in the presence of the judge."

FRCP 33(c) Advisory Committee Notes (1970 Amendments). In other words, FRCP 33(c) gives a court the discretion to delay responses to contention interrogatories until after substantial discovery has taken place or, at the latest, at the final pretrial conference.

Generally, when there is an objection as to the early timing of contention interrogatories, courts have required a party moving to compel to present "specific, plausible grounds" as to why the party requires early answers to such interrogatories. *See In re Convergent Technologies*, 108 FRD at 339 ("A party seeking early answers to contention interrogatories cannot meet its burden of justification by vague or speculative statements about what might happen if the interrogatories were answered. Rather, the propounding party must present specific, plausible grounds for believing that securing early answers to its contention questions will materially advance the goals of the Federal Rules of Civil Procedure.").

Courts routinely delay compelling responses to contention interrogatories until after "considerable discovery." *See Auto Meter Prods., Inc. v. Maxima Technologies & Sys., LLC*, No. 05 C 4587, 2006 US Dist LEXIS 81687, 2006 WL 3253636, at *2 (ND Ill Nov. 6, 2006) ("When one party poses contention interrogatories after considerable discovery, and the opposing party refuses to answer the interrogatories, courts routinely compel the resisting party to answer the interrogatories." (internal quotation marks and citation omitted)); *see also Calobrace v. American Nat'l Can Co.*, No. 93 C 0999, 1995 US Dist LEXIS 1371, 1995 WL 51575 at *3 (ND Ill Feb. 6, 1995) (same); *Rusty Jones, Inc. v. Beatrice Co.*, No. 89 C 7381, 1990 US Dist LEXIS 12116, 1990 WL 139145 at *2 (ND Ill Sept. 14, 1990) (same); *S.S. White Burs, Inc. v. Neo-Flo, Inc.*, No. Civ. A. 02-3656, 2003 US Dist LEXIS 7718, 2003 WL 21250553 at *1 (ED Pa 2003) ("At times, courts will postpone to the end of discovery the responses of 'contention interrogatories,' which ask a party to state all facts and theories upon which it bases a contention, so that the party does not have to articulate theories of its case which are not yet fully developed.").

At the other end of the spectrum, some courts consider the fact that some interrogatories seek information as to central issues in the case that may be crucial at the summary judgment stage, and order such answers before summary judgment briefing is due. *See, eg., In re H & R Block Mortg. Corp.*, No. 2:06-MD-230 (MDL 1767), 2007 US Dist LEXIS 7104, 2007 WL 325351 (D Ind Jan. 30, 2007); *Fischer and Porter Co. v. Tolson*, 143 FRD 93, 95 (ED Pa 1992) ("[T]he interests of judicial economy and efficiency for the litigants dictate that 'contention interrogatories are more appropriate after a substantial amount of discovery has been conducted.'") (quoting *Nestle*, 135 FRD at 111).

When ruling on the timing issues, many courts have been guided by the opinion in *In re Convergent Technologies*, 108 FRD 328. In that case, the Court traced the history of the use of contention interrogatories and noted that the rules and advisory notes advised caution in permitting the use of contention interrogatories early in the discovery process, on grounds that, at that stage, they are more likely used for harassment than as a useful discovery device. *Id.* at 335-36. The court held:

> "[T]here is substantial reason to believe that the early knee jerk filing of sets of contention interrogatories that systematically track all the allegations in an opposing party's pleadings is a serious form of discovery abuse. Such comprehensive sets of contention interrogatories can be almost mindlessly generated, can be used to impose great burdens on opponents, and can generate a great deal of counterproductive friction between parties and counsel."

Id. at 337. To prevent that abuse, the *In re Convergent Technologies* court held that a party serving early contention interrogatories would bear the burden of justifying their use. Thus that party would have to show that the interrogatories were limited, specifically crafted questions seeking responses that would "contribute meaningfully to clarifying the issues in the case, narrowing the scope of the dispute, or setting up early settlement discussions, or that such answers are likely to expose a substantial basis for a motion under Rule 11 or Rule 56." *Id.* at 338-39 (footnote omitted); *Roberts*, 130 FRD at 427 ("Although courts have generally approved of appropriately timed contention interrogatories because they can narrow issues, avoid wasteful preparation and expedite litigation, courts are reluctant to require a party to 'write basically a portion of their trial' for the other parties.").]

Thus, in preparing and responding to contention interrogatories, lawyers should consider timing issues and be prepared to justify the need for responses to such interrogatories early in the case.

4. A Contention Interrogatory Containing Multiple Subparts Can Often Count as a Single Interrogatory.

We all know that, under FRCP 33(a), a party is limited to 25 interrogatories "including all discrete subparts." However, parties often object and argue about what constitutes a "discrete subpart" under the rule, bringing unnecessary motions before the Court because they do not understand when a single interrogatory contains "discrete subparts" within the meaning of the rule. The Advisory Committee Notes on the 1993 amendments give some clarification on this point. The Notes state:

> "Parties cannot evade this presumptive limitation through the device of joining as 'subparts' questions that seek information about discrete separate subjects. However, a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication."

FRCP 33(a) Advisory Committee Notes (1993 Amendments). When confronted with questions that differ from the example in this Advisory Committee Note, courts

generally consider interrogatory subparts to be counted as part of one interrogatory if they are "logically or factually subsumed within and necessarily related to the primary question." *Kendall v. GES Exposition Services*, 174 FRD 684, 685 (D Nev 1997); *Bell v. Woodward Governor Co.*, No. 03 C 50190, 2005 US Dist LEXIS 12969, 2005 WL 3829134 (ND Ill June 30, 2005) (adopting *Kendall* test); *Banks v. Office of the Senate Sergeant-at-Arms*, 222 FRD 7, 10 (DDC 2004) (one approach is to ask whether one question is subsumed in and related to another or whether each question can stand alone and be answered irrespective of answer to others); *Nyfield v. Virgin Islands Telephone Corp.*, 200 FRD 246, 247 (DVI 2001) (subparts are not counted as separate interrogatories if they ask related questions); *Safeco of America v. Rawstron*, 181 FRD 441, 444-45 (CD Cal 1998) (interrogatory subparts are to be counted as one interrogatory if they are logically or factually subsumed within and necessarily related to primary question); *Larson v. Correct Craft, Inc.*, No. 6:05-cv-686-Orl-31JGG, 2006 US Dist LEXIS 78028, 2007 WL 1231821 (MD Fla Apr. 26, 2007) (adopting *Safeco* test); *Clark v. Burlington Northern R.R.*, 112 FRD 117, 118 (ND Miss 1986) ("[A]n interrogatory is to be counted as but a single question * * *, even though it may call for an answer containing several separate bits of information, if there is a direct relationship between the various bits of information called for." (internal quotation marks omitted)).

It is the practice of some lawyers in this District to stop answering interrogatories when they count the discrete parts to exceed 25. This is a dangerous practice because these lawyers often do not accurately classify the interrogatory subparts under the Advisory Note guidelines and the "logical and factual relation" test. For example, under this test, courts have found that an interrogatory seeking an identification and a description of certain documents does not contain discrete subparts or that an interrogatory seeking both documentary or verbal evidence on particular subject is a single interrogatory. *See Sec. Ins. Co. v. Trustmark Ins. Co.*, No. Civ. 3:00CV1247(PCD), 2003 US Dist LEXIS 18196, 2003 WL 22326574 (D Conn Sept. 20, 2003). Refusing to answer an otherwise permissible interrogatory can be the basis for sanctions. Therefore lawyers, before refusing to answer further, should carefully and objectively try to evaluate interrogatories, particularly contention interrogatories, to determine if the subparts cause the interrogatories to exceed the limit provided by FRCP 33.

JUDGES APPRECIATION DINNER

On May 8, 2007, the Oregon Chapter of the Federal Bar Association held its annual Judges Appreciation Dinner at the Governor Hotel. The dinner was held to honor retiring Magistrate Judge John Cooney of Medford and to welcome incoming Magistrate Judge Mark Clarke, also of Medford. We also honored Donnal Mixon, Assistant Federal Defender, who was awarded the James Burns Federal Practice Award, and the winners of the Honorable Ancer L. Haggerty High School Civil Rights Essay contest, including Jiying Zhang of Lincoln High School.

Judge Cooney is retiring after serving as the only magistrate judge in Medford since 1990. Justice Wally Carson and Judge James Redden spoke warmly of their long-time personal and professional relationships with Judge Cooney, making us all feel a part of a larger community of friendship and support. Federal Defender Steven Wax and Judge Owen Panner spoke in honor of Don Mixon, causing us all to be glad that we at least had this one opportunity to meet Don and learn about his successful career as a federal defender and now as a vintner in Southern Oregon.

The Oregon Chapter appreciates our law firm sponsors and the assistance of Julie Olmstead of Chernoff Vilhauer and Jean Crown of Stoel Rives in the planning and administration of the dinner. The Chapter is also indebted to Board Member Susan Pitchford of Chernoff Vilhauer who took on this project and saw it through with aplomb!

UPDATE TO THE DISTRICT OF OREGON LOCAL RULES OF CIVIL PRACTICE ANNOTATED

By Kathryn Mary Pratt

The *2006 District of Oregon Local Rules of Civil Practice Annotated* provides annotations for the published cases interpreting the District of Oregon Local Rules of Civil Practice between June 1, 1998 and August 2006. This quarterly column provides updates to that publication. This quarter's column includes annotations to published cases for the period from March 2007 to May 2007. A complete copy of the book *2006 District of Oregon Local Rules of Civil Practice Annotated* can be ordered by contacting the author at prattykary@hotmail.com.

LOCAL RULES GENERALLY

Malone v. Malone, Civ. No. 06-1629-AS, 2007 WL 789449 (D Or Mar. 13, 2007)

This case involved the question of whether a motion to remand was filed within a 30-day deadline under 28 USC § 1447(c). The plaintiff had originally electronically filed the motion for remand in a timely manner on November 13, 2006, but had failed to comply with LR 5.5(a)(2), which requires redaction of the names of minor children from pleadings filed with the court. Noticing the error, the filing clerk called the next day and the plaintiff submitted the redacted version of the motion to remand on November 14, 2006. The plaintiff then served the Notice of Removal date-stamped November 14, 2006, and stating "WHEREFORE, State Farm prays that the above-entitled action be removed . . . . DATED this 14th day of November, 2006."

The Court noted that in *Ordonez v. Johnson*, 254 F3d 814, 816 (9th Cir 2001), the Ninth Circuit deemed a complaint "constructively filed" on the date it was first received by the clerk of the court, despite the fact that it failed to comply with a local rule. The Ninth Circuit in *Ordonez* reasoned that "elevat[ing] a local rule . . . to the status of a jurisdictional requirement would conflict with the mandate of [FRCP] 1 to provide a just and speedy determination of every action." *Id.*, (internal quotation marks and citation omitted; ellipsis in original). However, the Court held that FRCP 1 cuts the other way in this case because "[d]eeming State Farm's removal notice constructively filed on November 13, 2006, despite its violation of a local rule, would conflict with the mandate of FRCP 1 to provide a just determination." *Malone*, 2007 WL 789449 at *3. The Court held that, "[u]nder these circumstances, Plaintiff was entitled to rely on the November 14 file-stamp as the date from which the 30-day period for filing her remand motion ran." *Id.*

ANNOTATIONS TO LOCAL RULE 7.1

Jordan v. Echo Rural Fire Prot. Dist. #7-403, No. CV 05-1314-PK, 2007 US Dist LEXIS 25348, Mar. 20, 2007 WL 892971 (D Or Mar. 20, 2007)

The plaintiff argued that the defendants' motion for summary judgment should be denied on all claims, because the defendants had failed to confer with the plaintiff before filing the motion, as required by LR 7.1(a). After the plaintiff's counsel conceded that he received a voice-mail message from defendants' counsel, Judge Redden concluded that the plaintiff's admission was adequate to support a finding that the defendants' counsel had made a good-faith effort to confer and refused to deny summary judgment on that ground.

Atlantic Recording Corp. v. Anderson, No. CV 05-933-AS, 2007 WL 950313 (D Or Mar. 27, 2007)

The plaintiffs filed a renewed motion to dismiss the defendant's counterclaims, which did not contain the certification required by LR 7.1(a)(1). The defendant's response indicated that the failure to include the certification was not merely an oversight, but that counsel did not, in fact, confer about the motion before it was filed. Because the failure to confer caused the plaintiff to file motions against the counterclaims in the First Amended Answer, Affirmative Defenses and Counterclaims, when, had it conferred, it would have discovered the defendant's intent to file a Second Amended Answer, Affirmative Defenses and Counterclaims, the Court denied the plaintiff's motion pursuant to LR 7.1(a)(1).

ANNOTATIONS TO LOCAL RULE 16.4

Bouwman v. RBC Mortg. Co., No. CV 05-1560-AS, 2007 US Dist LEXIS 35174, May 9, 2007 WL 1432024 (D Or May 9, 2007)

In a case concerning a dispute regarding a memorandum of understanding entered into immediately after a mediation, the Court admitted and considered statements made by the parties to the mediator, notwithstanding LR 16.4(g)(1), because the parties agreed at oral argument to allow such statements into the record.

ANNOTATIONS TO LOCAL RULE 38

Jackson & Perkins Wholesale, Inc. v. Smith Rose Nursery, Inc., No. Civ. 03-3091-CO., 2007 US Dist LEXIS 6326, 2007 WL 397103 (D Or Jan. 26, 2007)

In an action that was removed from state court in 2003, the parties disputed whether the defendants had waived their right to a jury trial pursuant to FRCP 81(c) by filing a demand for jury trial in November 2006. The relevant portion of FRCP 81(c) requires that "[i]f state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury." Plaintiff argued that LR 38.1 and/or FRCP 38(d) constituted a directive that a party make a demand for trial by jury "within a specified time." The Court rejected this argument, holding that LR 38.1 describes how to make a jury trial demand, but does not state when the demand must be made and that FRCP 38(d) provides that a party's failure to timely demand a jury trial may waive the right to a jury, but the rule itself sets no deadlines. The Court noted that LR 16.6(b)(1) requires that the proposed pretrial order contain a "concise statement of the nature of the action, including whether trial will be by jury" and that the Court, in interpreting a previous version of LR 16.6(b)(1), has held that a party's failure to include a jury demand in the pretrial order waived the right to a jury trial, citing *Thomas v. Transamerica Occidental Life Ins. Co.*, Civ. No. 90-584-FR, 1991 US Dist LEXIS 3834, 1991 WL 47273 (D Or Mar. 27, 1991) (interpreting former LR 235-2(b)(1)). However, the Court concluded that because defendants made their jury demand before the parties submitted proposed pretrial orders, the reasoning of *Thomas* did not apply.

ANNOTATIONS TO LOCAL RULE 54

Dry Creek Landfill, Inc. v. Waste Solutions Group, Inc., No. CV-04-3029-ST, 2007 US Dist LEXIS 16704, 2007 WL 710214 (D Or Mar. 6, 2007)

In a contract action that required the Court to apply California law, the Court denied an award of attorney fees under FRCP 54 and LR 54 because the party seeking fees submitted a "Statement of Attorney Fees," supported only by a conclusory statement that it prevailed on a core issue, an identification of the lawyers and legal assistants who worked on the case, a brief description of the experience of the Oregon lawyers, their hourly rates and time spent (attaching billing records), and a brief citation to Oregon law. The Court held that, even if it deemed the submission as a motion,

because the party failed to provide any affidavit to authenticate or support the billing records, any information justifying the billing rates, any supporting California law, or any justification for the involvement of California counsel or information as his hourly rate, there was no basis by which the Court could meaningfully determine a reasonable attorney fee award.

Galdamez v. Potter, No. Civ. 00-1768-PK, 2007 US Dist LEXIS 38005, 2007 WL 1541739 (D Or May 23, 2007)

The prevailing attorney filed a motion for attorney fees, but the opposing party did not file any opposition within 11 days after service of the motion pursuant to LR 54.3(b). After the time for filing a response had lapsed, the Court treated the fee petition as unopposed. Nevertheless, despite the absence of specific objections by the opposing party, the Court independently scrutinized the fee petition to determine its reasonableness pursuant to *Gates v. Deukmejian*, 987 F2d 1392, 1400-01 (9th Cir 1992).

ANNOTATIONS TO LOCAL RULE 56.1

Maher v. City of Portland, Civ. No. 03-1102-HA, 2007 US Dist LEXIS 24923, 2007 WL 987454 (D Or Mar. 30, 2007)

When a plaintiff filed an untimely response to the Defendant's Concise Statement of Material Facts, and violated the Court's show-cause orders relating to the filing of that response and the failure to prosecute, the Court construed the defendant's reply to the plaintiff's untimely filing as a Motion to Dismiss pursuant to FRCP 41(b). After analyzing the factors under FRCP 41(b), the Court issued an involuntary dismissal and, in the alternative, deemed the Defendant's Concise Statement of Fact admitted under LR 56, granted defendants' summary judgment motion, and dismissed the action with prejudice.

Assist Servs. v. Pac. Shores, Inc., No. 05-819-AS, 2007 US Dist LEXIS 35850, 2007 WL 1452589 (D Or May 14, 2007)

The defendants moved to strike the plaintiff's Response to its Concise Statement of Material Facts, because the response failed to specify which paragraphs in the supporting affidavit it relied on, pursuant to LR 56.1(c), and because certain paragraphs were inadmissible. The Court held that although it "would not have been inappropriate" for the plaintiff to reference the specific paragraphs in the affidavit it relied on, LR 56.1(c) does not expressly require paragraph references and that the appropriate references are apparent, thus denying the defendants' first reason for striking the response. However, the Court partially granted the Defendants' Motion to Strike the Plaintiff's Concise Statement of Material Facts because the Court held that the sole support for several of the plaintiff's responses in the Concise Statement of Material Facts were paragraphs in the affidavit that the Court had stricken because those paragraphs were either contradicted by deposition testimony or not based on personal knowledge.

ANNOUNCEMENTS

Judge Thelton Henderson to Present His Documentary Film *Soul of Justice* in Portland

The Honorable Thelton Henderson, U.S. District Court Senior Judge, Northern District of California, will be in Portland on August 6, 2007 to speak and answer questions following the presentation of the documentary film, *Soul of Justice: Thelton Henderson's American Journey.* The film is free and will be shown during lunch in the jury assembly room of the Hatfield Courthouse, 1000 SW Third Avenue, Portland.

Judge Henderson is a graduate of Boalt Hall. He was the first black Justice Department lawyer in the South in the early 1960s, and he has had a distinguished career as a lawyer, an academic, and a judge. In the late 1960s, after directing a legal services office in East Palo Alto, California, Judge Henderson moved to Stanford Law School, where he created Stanford's minority admissions program. Judge Henderson spent several years in private practice as a civil rights lawyer before he was appointed to the federal District Court bench by President Carter in 1979.

In this inspiring film, Abby Ginzberg, a lawyer and award-winning producer of documentary films, has captured the highlights of Judge Henderson's life, from his humble beginnings in Watts to his still-active career on the bench. Anyone interested in meeting and talking with a frontline civil rights attorney should not miss this.

U.S. District Court Historical Society Picnic—August 19, 2007

Please mark your calendar for the U.S. District Court of Oregon Historical Society Annual Picnic on August 19, 2007, from 1:00 p.m. to sundown at Judge Leavy's family hop farm in Butteville, Oregon. This annual event is an opportunity for you and your family to interact with members of the legal community, including fellow members of the bar and the judiciary. This year promises to be one of the best events ever. The Society will be honoring the historical contributions of women in the legal profession. The guests of honor will include women who have served as judges in Oregon state and federal courts. Please join us in celebrating the contributions of these honorees. As in past years, the picnic will feature family friendly games and entertainment. Additional details to be provided soon, including directions to the hop farm. We hope to see you there!

Young Lawyers Division CLE: Survival Guide to Motions Practice—October 12, 2007

The Oregon Chapter of the Federal Bar Association is hosting its Young Lawyers' Division CLE called "Surviving Motion Practice in Federal Court" on October 12, 2007, from noon until 4:00 p.m. at the Mark O. Hatfield United States Federal Courthouse, 1000 SW Third Avenue, Portland, Oregon, on the second floor in the juror assembly room. Photo ID is required for admission to the courthouse. The CLE will feature panels that include federal court judges as well as practitioners who will discuss important tips about federal motion practice, including nuts and bolts of writing and oral argument. The CLE includes a lunch and it is $75 for FBA members and $95 for non-members. Checks can be made out to the Oregon Federal Bar Association. Scholarships and reduced fees are available for government and public interest attorneys. 4.0 Practical Skills CLE credits are pending. Please RSVP to Kristin Olson at Bullivant Houser Bailey, 888 SW Fifth Avenue, Suite 300, Portland, OR 97204, 503-499-4404, *kristin.olson@bullivant.com*.

Annual U.S. District of Oregon Conference in Eugene—November 29 and 30, 2007

The OSB Leadership Conference, Lane County Federal Courts Committee, District Court Conference of the District of Oregon, and Oregon Chapter of the Federal Bar Association are sponsoring this year's Annual U.S. District of Oregon Conference in Eugene. The conference topic is "Effective Communication in the Courtroom and the Law Office." Conference attendees will learn strategies to improve their written and oral advocacy. The conference will be presented at the new Wayne L. Morse U.S. Courthouse from Thursday, November 29 at 3 p.m. through Friday, November 30 at 4 p.m., with both Thursday evening and Friday breakfast events scheduled.

Helle Rode Opens Mediation and Arbitration Practice

Helle Rode, current President of the FBA Oregon Chapter, announces the opening of her practice focusing on mediation and arbitration. Helle is available to mediate litigated cases and workplace disputes and to serve as an arbitrator in contested matters. She can be reached at helle.rode@comcast.net or 503-504-4504.

OREGON CHAPTER FBA OFFICERS AND DIRECTORS 2006-2007

President:
Helle Rode
helle.rode@comcast.net

President-Elect:
Katherine Heekin
katherine@heekinlawoffice.com

Vice President:
Courtney Angeli
cwangeli@stoel.com

Secretary:
Seth H. Row
seth.row@hklaw.com

Treasurer:
Jacqueline A. Tommas
503-631-2660

Past President:
Richard J. Vangelisti
richard@vangelisti.com

Directors 2004-2007:
Peter C. Richter
peter.richter@millernash.com

Seth H. Row
seth.row@hklaw.com

Edward T. Tylicki
etylicki@lindsayhart.com

Directors 2005-2008:
Benjamin M. Bloom
bmb@roguelaw.com

Honorable Anna J. Brown
Anna_J_Brown@ord.uscourts.gov

Julie Bolt
julie_bolt@ord.uscourts.gov

Don Cinnamond
donald_cinnamond@ord.uscourts.gov

Chelsea L. Grimmius
chelsea.grimmius@bullivant.com

Todd A. Hanchett
thanchett@barran.com

Timothy W. Snider
twsnider@stoel.com

Kelly Zusman
kelly.zusman@usdoj.gov

Directors 2006-2009
Clarence Belnavis
cbelnavis@laborlawyers.com

Jeff Bowersox
jeffrey@blfpc.com

Kathryn (Kate) Cottrell
kathryn.cottrell@state.or.us

Sivhwa (Hwa) Go
hwa.go@harrang.com

Susan D. Pitchford
sdp@chernofflaw.com

For the District of Oregon *is a quarterly newsletter of the Oregon Chapter of the Federal Bar Association. Editor Timothy W. Snider, 900 SW Fifth Avenue, Suite 2600, Portland, Oregon 97204, 503-294-9557. It is intended only to convey information. The Oregon Chapter of the Federal Bar Association, editors, and contributors to this publication make no warranties, express or implied, regarding the use of any information derived from this publication. Users of this information shall be solely responsible for conducting their own independent research of original sources of authority and should not rely upon any representation in this newsletter. The views published herein do not necessarily imply approval by the Oregon Chapter of the Federal Bar Association or an organization with which the editors or contributors are associated. As a courtesy to the Oregon Chapter of the Federal Bar Association, Stoel Rives LLP provides publication assistance for For the District of Oregon but does not necessarily endorse the content therein.*

PAST PRESIDENTS

C.E. Luckey
Harry J. Hogan
Sidney I. Lezak
Clifford Comisky
John D. Picco
Arno Reifenberg
LaVorn A. Taylor
Ronald E. Sherk
George D. Dysart
George Van Hoomissen
Peter A. Plumridge
Robert R. Carney
Robert B. (Barry) Rutledge
Jack G. Collins
David E. Lofgren
Paul H. Schroy
Peter A. Plumridge
Chester E. McCarty
Larry O'Leary
John D. Picco
James F. Zotter
Elden Gish
Thomas C. Lee
Cecil Reinke
C. Richard Neely
Linda DeVries Grimms
Richard A. Van Hoomissen
Owen L. Schmidt
Jonathan M. Hoffman
Michael C. Dotten
Susan K. Driver
Robert S. Banks, Jr.
Paul R. Gary
Sarah J. Ryan
Robert E. Maloney, Jr.
Paul T. Fortino
David A. Ernst
David A. Bledsoe
James L. Hiller
Gilion Dumas
Gregory J. Miner
Robert E. Barton
Nancy J. Moriarty
Kathleen J. Hansa
Katherine S. Somervell

Missing Electronic Notices?

We have been sending the electronic notices via our listserv. While 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: **Seth Row, Holland & Knight**, 503-517-2931, seth.row@hklaw.com

Call for Submissions/Publication Schedule

For the District of Oregon **welcomes submissions from everyone as well as our regular contributors. The deadlines are: September 15, 2007; and December 1, 2007. We ask only that you advise us in advance if you are preparing a submission. Please direct inquiries to Timothy Snider, 503-294-9557, twsnider@stoel.com.**

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 several 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.

Monthly FBA Luncheon— New Location and Food Options!

Please join the FBA Oregon Chapter for our monthly luncheon on Thursday, September 20, 2007, (speaker to be announced).

The luncheon will be held at the University Club, 1225 SW Sixth Avenue, Portland, starting at noon. *Please note the new location and start time.*

Please RSVP to Ann Fallihee, afallihee@barran.com, or 503-276-2129. Make sure to indicate if the person attending will need a vegetarian lunch. It is *very important* that you RSVP to Ann for the luncheon by 5 p.m. on Tuesday, September 18, 2007, so that we can ensure that we have enough lunches. The luncheon cost is $18 for members and $20 for nonmembers. Please send your check, payable to the FBA Oregon Chapter, c/o Ann Fallihee, Barran Liebman, 601 SW Second Avenue, Portland, Oregon 97204, or pay at the door.

Upcoming FBA Monthly Luncheons:
To be announced.

OREGON CHAPTER
FEDERAL BAR ASSOCIATION
1001 SW 5TH AVENUE, SUITE 1900
PORTLAND, OR 97204

THE HONORABLE ANCER L. HAGGERTY CIVIL RIGHTS ESSAY CONTEST WINNERS

In 2004, the Federal Bar Association established the Honorable Ancer L. Haggerty High School Civil Rights Essay contest to honor the first African-American U.S. District Court Judge for the District of Oregon. This annual contest was designed to inspire students to gain an understanding of civil rights issues and how they impact the society in which we live. In its inaugural year, students were invited to address the legacy of *Brown v. Board of Education*. In 2005, the essay contest turned its attention to another first—Constance Baker Motley—the first African-American woman to argue before the U.S. Supreme Court (as part of Thurgood Marshall's NAACP Legal Defense Fund team) and the very first African-American woman appointed to the federal bench. Students were asked to write about a case that Ms. Motley argued that raised the question of why it is important to have juries that reflect the racial composition of the community. This last year's contest asked students to examine the civil rights of their peers in answering the question raised by a District of Oregon case that ended up in the U.S. Supreme Court, *Acton v. Vernonia*, and whether high school students could or should be subject to random drug testing.

When Judge Haggerty was first approached by the FBA about setting up an award or program in his honor, he suggested the idea of the high school essay contest. The goal of reaching out to high school students reflects a hope and desire that although Judge Haggerty may have been the first African-American appointed to the federal bench, he won't be the last.

High School Drug Testing

By Jiying Zhang, Lincoln High School

Within the last two decades, high school drug usage has reached epidemic proportions. Whether it is recreational or repeated abuse, the use of illegal drugs by teenagers poses grave circumstances. The negative physical, psychological, and addictive effect of drugs are most severe among teenagers. Coincidentally, teenagers are also very vulnerable to this drug culture, and peer pressure is the root cause. Because random drug testing in high schools is constitutional, and has the potential to deter drug usage by giving students an excuse to say "no," I believe that it should remain an available option for all public high schools.

In *Skinner v. Railway Labor Executives' Assn.*, the Supreme Court stated that drug testing constitutes a "search." So, in order to examine the constitutionality of this practice, we must determine whether the fourth amendment is violated with this practice, whether the practice is "reasonable."

The tension lies between a student's privacy rights and the government's interests. Thus, it becomes necessary to look at student rights in public high schools. In the absence of the students' parents, there exists a custodial relationship between the faculty and students, and in order for the faculty to maintain order within the school, students inherently have lesser freedoms and rights; the first amendment is a great example since profanity is not allowed. Under these circumstances, the government's interests in curbing drug use can be justified as a legitimate step taken to assume the role of a concerned parent.

In the case *Acton v. Vernonia*, the methods of drug testing were not intrusive. Urinalysis was used to test for specific substances, and the procedures for conducting the tests were uniform throughout. The results of the tests were confidential and only a few members of the administration and the parents of the student had access to them. Each student was accompanied by a monitor of the same sex and guaranteed a reasonable amount of privacy. For girls, the monitors stand outside the stalls, and for boys the monitors stand 12 to 15 feet behind the student while he/she produces a sample.

Also, before a student is allowed to participate in after school sports, there is usually a fair amount of required tests and clearances that he/she must complete, some of which are just as intrusive as drug testing. Because extracurricular sports are voluntary, and students who partake in them have been willing to fulfill all of the other prerequisites, they should also be willing to accept random drug testing.

I believe that students enter into a kind of social contract with the school when they decide to participate in school sponsored extracurricular activities, similar to the one that we share with our government. In exchange for safety and protection, we must forfeit some of our rights. Drug abuse by students not only causes immediate harm to the users but also to the students around them. Thus, in order for the school to protect us from these dangerous behaviors, we should be willing to give up some of our privacy rights.

One of the greatest objections to the court decision is rooted in the belief that suspicion-less "searches" are counterproductive and unconstitutional. Justice O'Connor stated in her dissent that the founders believed that "individualized suspicion was an inherent quality of reasonable searches and seizures." However, the fourth amendment itself does not make such a requirement, and the enforcement of this amendment should be more lenient in a public school setting, as I have discussed earlier.

In addition, I believe that random drug testing is one of the

most effective and efficient ways to deter drug usage, and certainly more effective than drug testing based on suspicion. Random testing would prevent the leaking of details regarding possible tests to students, and as a result would prevent students from deceiving the administration by temporarily staying sober. It would prevent the placement of immense burden on the shoulders of the administration. Also, when the testing is well structured, and the procedures well defined, it eliminates arbitrary and biased testing. Furthermore, testing based on suspicion would create an intense and insincere atmosphere, where the testing of an individual is comparable to a "shame show." This would be counterproductive to the goals of the practice, because it further distances the students from the teachers, and increases the chances that the student may continue using drugs to alleviate the depression and stress resulting from the public knowledge of the test.

There are many examples of when random searches are conducted without "individualized suspicion." One that I believe is comparable to the random drug testing, is the random searches at airports and other high security public places for explosives and drugs. When people refuse to be searched, they are presented with circumstances, such as losing their right to ride in an airplane or to enter a building. It is important to remember that all of these practices are used to protect us. Referring back to the underlying tension between students rights and the interests of the government, it becomes clear that the government has an inherent responsibility and interest in reducing drug abuse among high school students.

However, these following conditions must be met before random drug testing can be administered: First of all, each school should hold meetings open to its students and their parents to discuss whether the practice is necessary, and unanimously consent to the procedures of the program. Second, counseling and anti-drug promotion programs should be used in conjunction with the drug testing to make the experience more intimate and constructive for the student. Thirdly, all extracurricular activities should be involved to ensure that the testing is truly random. Lastly, but most importantly, everyone must realize that inaccurate results do exist and make the whole process less condemning.

When I asked all of my friends who are partaking in some form of after school program or activity, they all said that "I'm down with it. It'll give people an excuse to say No." Indeed, drug testing can be a powerful tool against the immense amount of peer pressure that is present in high schools. The severest consequence of having a positive drug test is simply not being able to participate in a club or sport, and so, drug testing seems like a very reasonable sacrifice on the part of the students in exchange for their own protection and the protection of their peers.

Student Athletes The Right to Live Above Addiction

By Emily Rietmann, Ione High School

"Student athlete" is a loaded term. Despite what is portrayed in stereotypical 1990s teen movies, the student and athlete can combine to form one, well-rounded person. The student athlete is a person who manages a school life, social life, family life, and extracurricular life. Mornings begin at 6:00 a.m. for the typical high school student athlete when he wakes up to run a few miles. He then goes to school, practices for two hours afterward, goes home, lifts weight, runs a few more miles, does his homework, and finally flops into bed. That is one busy kid, and that's just what his parents had in mind at the beginning of his athletic career. "We'll keep him involved, out of trouble, and out of drugs!" But what if he slips? What if he tries drugs in his precious little free time, and becomes addicted like so many of today's youth? The things that were so important to him in the past begin to fade away; the student athlete is stripped of his promising future, and left with a rolled up dollar bill and a bag of cocaine.

Sure that may be an extreme example of "falling off the wagon," but it is a proven fact that student athletes who become involved with drugs are unable to fully apply themselves to other, more important, parts of their lives. This has become a widespread issue in schools across America. The student athlete dwindles away as the drug addicted teenager takes hold of his life. Drugs are not picky, they do not discriminate against those who value school or athletics, and they will take over any life. As drugs become more common and even more addicting, drug-related problems in schools climb through the roof. Panic-stricken schools search for a way to keep their student athletes off of drugs, in school, and at practice.

Random drug testing is one way schools can help keep today's youth out of trouble. School teachers and administrators spend approximately 40 hours per week surrounded by the student body. These school officials are often the first to notice when behavioral issues arise, and can often pinpoint drugs as the cause of disturbances. When schools determine drugs are affecting their learning environment they have the basis, in my opinion, to conduct random drug testing.

According to the Office of National Drug Control Policy, drug testing of student athletes is a four-step procedure including collection, screening, confirmation, and review. Schools are required to maintain the confidentiality of results and privacy of student athletes when testing. Testing procedures differ in each school district, but all testing must be conducted at random. In most cases drug tests return negative, and student athletes continue to lead their promising lives. On other occasions drug tests are reviewed and confirmed positive for illegal substances. When tests are confirmed positive schools are required to contact the parents of the student athlete. Schools often rely on parents to provide guidance and support for their children, without resolving to anger and accusations. Aside from parental action, schools can refer confirmed drug users to substance-abuse counselors or enroll them into drug education programs. Student athletes are also suspended from extracurricular activities until it can be confirmed their drug use has stopped. Whichever method of retribution is decided upon, schools must regularly test former users to maintain their drug free status.

Those in opposition to random drug testing of student athletes claim it is demeaning, ineffective, and ultimately an invasion of the rights of student athletes. I disagree. Student athletes

are often part of a team. As a part of that team, the student athlete has a responsibility to his teammates. People are relying on him to attend practice, school functions, and games while properly representing his school and team. A drug addicted student athlete puts his addiction above his team, and breaks a promise that was once important to him. Sure a drug addicted student athlete may claim drug tests are demeaning, but his teammates are counting on him, and drug testing is the way to end his unhealthy addiction.

The effectiveness of random drug testing has been a hot topic since its conception. Those in opposition to testing say it has no lasting effect on students, and does nothing to eliminate drug use. It is true that drug testing alone does nothing for an addicted teen, but when coupled with counseling and other repercussions it is one way to keep student athletes clean. There are not many ways to monitor the drug use of student athletes. Random drug testing allows schools to do so, and take actions to promote the health and safety of today's youth.

Americans are proud of their rights and freedoms. Student athletes are a promising part of America's future. They have the right to their privacy, yet I do not believe monitoring their health and safety is an invasion of their rights. Student athletes should have the right to live full and happy lives above the influence, and that is the most important right of all.

Drug Testing for the Health of Our Students

By Abby Arnspiger, Ione High School

Maintaining civil rights may be essential to keeping "the people's" rights, but when health problems are facing our youth, what are the actions necessary to obtain optimal exclusion and/or prevention of illegal substances on school grounds? The problem of drugs among students is a wide ranged setback for administrations across the United States and especially among athletic participants. So the question arises, should we test our student athletes for drug use? In this essay, I will address my opinions and also supporting facts that give me reason to believe that drug testing should be done.

The issue that is facing the government is to figure out what is and what is not constitutional about testing our students for drugs and other harmful matter that may be affecting their safety. We may not be looking at the whole student body, but the athletic participants seem to be leaders in the drug issue.

First, the dispute at hand is why parents and educators are so concerned with why drug testing shouldn't be done. Some people say that it is an invasion of our children's rights. But when you send your children to school or to be in school activities, you put them into the hands of their educators. These adults are responsible for keeping the safety of every student in mind.

Others believe that it will invade the Fourth Amendment, as argued in *Acton vs. Vernonia*, which states "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." Invading constitutional rights may be a true point in other areas, but in school there are other rules and guidelines that go along with your rights. I am aware that the Fourth Amendment does cover public offices, but safety has to be a main concern with our youth becoming the new generation. So, the school board has to take precautions in approaching a minor with suspicions of drug consumption or just for preventative measures.

If someone believes that safety procedures should not be applied for student use of drugs and alcohol, not just our athletes, our youth will be affected by ways of safety problems for them and for other opponents. To keep everyone safe from the effects of illegal substances on a player in the athletic arenas, drug testing should be done and done often.

To me, random urine tests seem like the best option for doing drug testing because of its close to accurate results and more broader prospective of what drugs could have been used more than the blood, saliva, sweat, or hair analysis. But, how do you go about testing all the participants in sports? In my mind, going about random drug testing all athletic participants each time would give a better effect then random drug testing to individuals. That way, it's not unfair to certain athletes if they get picked more than once like in a drawing of several students to take the tests every so many weeks. I believe that all tests should be mandatory, and if the athletes aren't taking drugs they don't have anything to worry about. Most students wouldn't jeopardize their sport for drugs.

Athletes are only the main concentration because at certain schools the "jocks" are the popular people that the other students look up to. So, if we approach the problem at the group of students who are the leaders, hopefully everyone else will follow.

Through this essay, I have expressed my opinion that athletic drug testing should be done. It should be random testing of all athlete participants each time. This testing would help keep kids safe and ensure that the use of drugs will decrease in the school setting. Hopefully, civil rights won't get in the way of our society protecting our athletes in the games they play.