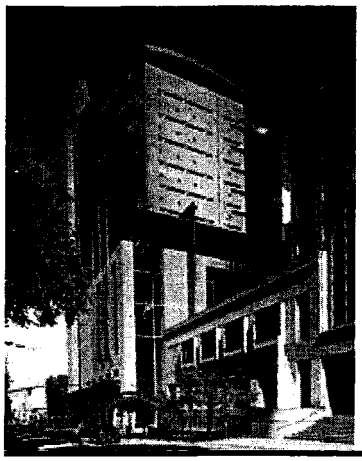

*A Quarterly Newsletter of the Oregon Chapter of the Federal Bar Association*

# FOR THE DISTRICT OF OREGON

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## IN THIS ISSUE



## TIPS FROM THE BENCH OF JUDGE ANN AIKEN

I am honored to write the inaugural "Tips from the Bench" column. This column will be a regular feature in the Federal Bar Association newsletter, authored by a different federal judge in each issue. The column is intended to provide practitioners with helpful hints for appearing in federal court before a particular judge or submitting written work to a judge.

I have only a few reminders that are intended to make both of our jobs easier.

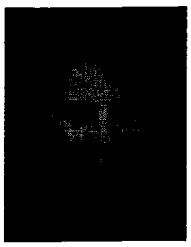
First, be nice to staff, particularly my judicial assistant, law clerks, courtroom deputy, and courtroom reporter. These people are part of my team, and we work very hard together every day. They are entitled to professional behavior and respect. I rely on them and their observations, perceptions, and insights about lawyers' work and behavior.

Second, resist the temptation to write a treatise to the court. Write less, not more. Be concise, sparse, and efficient with your writing. The Local Rules dictate a maximum limit of 35 pages per brief. Unless the case is exceedingly complex, that is more than enough pages to explain your case to the court, and more often, half that number is sufficient. Remember, judges are only human and are prone to boredom if a brief focuses on minutiae or simply restates a concept or argument many times.

Third, get to the point. This applies when writing a brief, participating in a telephone conference, or arguing your motion in court. We do read everything you submit, I promise. No need to repeat yourself in court if you've said it adequately in your brief. It is fine to take a moment to underscore or further explain your argument, but it quickly becomes tedious to listen to a rehash of your brief.

Fourth, we work on many cases at the same time. These cases include a broad variety of subjects, ranging from criminal cases to civil cases that are here on diversity jurisdiction, Social Security appeals, habeas and prisoner cases, bankruptcy appeals, civil rights cases, patent and trademark cases, and environmental cases. The more streamlined and efficient you can be in litigating your case, the better we are able to do our jobs. Remember, if you haven't told us, we don't know. And if you have told us, we know and you don't have to tell us again.

Fifth, we are assigned cases in three cities—Portland, Eugene, and Medford—and travel between those cities frequently. If you file a document at the last minute, it is very helpful if you call chambers to notify us of the filing.



# THE PRESIDENT'S COLUMN

By Katherine Heekin, Board President of Federal Bar Association Oregon Chapter

The war on terror, the culture wars, and the presidential campaign have me thinking about the role of lawyers and judges in our society. As lawyers and judges, we are sworn to uphold the Constitution. I haven't made an argument based on the Constitution in over 10 years, but I remain deeply conscious of the Constitution's importance in my everyday life, particularly the Bill of Rights and the separation of powers. There are others in Oregon, however, who have been keeping watch over our government's separation of powers and the Bill of Rights, as told by Molly Ivins and Lou Dubose in *Bill of Wrongs: The Executive Branch's Assault on America's Fundamental Rights.* I recommend that book to you.

Whether or not you stand up and cheer for the work of our federal district judges described in that book, and whether or not you agree that Americans' fundamental rights have been under attack, the book makes you appreciate how important the role of lawyers and judges is to our way of life and our national security. On a national level, Justice Sandra Day O'Connor said it best, as quoted in Jeffrey Toobin's book *The Nine: Inside the Secret World of the Supreme Court*: "Judicial independence allows judges to make decisions that may be contrary to the interests of other branches of government. Presidents, ministers, and legislators at times rush to find convenient solutions to the exigencies of the day. An independent judiciary is uniquely positioned to reflect on the impact of those solutions on rights and liberty, and must act to ensure that those values are not subverted." Justice O'Connor was speaking at the Arab Judicial Forum in Bahrain in 2003, encouraging emerging democracies in the Arab world to adopt judicial independence.

Nonetheless, as the political divide in our country has calcified and our fear of terrorism has grown, death threats against federal judges have become more common, and an increase in federal judicial pay remains uncertain. In this climate, it is easy to wonder what, if anything, you can do. At least one answer came to me while I attended the U.S. District Court Conference in Eugene in November. There, we were encouraged in working with decision makers and opinion leaders to say "thank you" more often. On behalf of the Federal Bar Association of Oregon, I say thank you to our federal district court judges. Your service is vital to all of us.

For those of you who missed the conference in Eugene, it was a blockbuster, melding business, law, politics, social service, history, psychology, human relations, communication, and state and federal public servants into a white-hot learning experience. Over 300 people attended from across the state. Thank you to Judge Aiken and her staff and countless others who put that conference together. We look forward to next year's conference. And for those of you still wondering what you can do, give Judge Aiken's chambers a call and offer to help put together next year's event.

One final thank you to all of the federal district court judges for agreeing to a "Tips from the Bench" column, and especially to Judge Aiken for setting the standard by writing this issue's inaugural column.

# TIPS FROM THE BENCH OF JUDGE ANN AIKEN

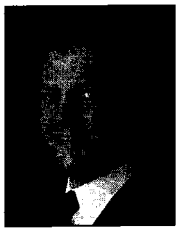
*Continued from page 1*

Sixth, we are committed to the legal externship program. Since my appointment, we have had a total of 85 externs work for us in our Eugene and Portland chambers. We firmly believe in our duty to train the next generation of lawyers. This is accomplished, in part, by using your briefs and submissions and your behavior toward one another and to the court as training for our externs.

Seventh, I appreciate that my job is a public service. I come to work every day to make a difference and to solve problems. As a lawyer, remembering to be authentic and appreciating the reality of the work you do for your clients is critical. The ability to maintain a sense of humor is also priceless!

Finally, beginning with my years on the state court bench, and continuing with my federal court experience, I am an avid proponent of alternative dispute resolution and work hard to help parties reach a fair settlement. Keep the possibility of settlement on the table before you go too far down the litigation road when positions are entrenched and costs are high.

As a postscript, I believe this topic is a two-way street, so if you have suggestions or questions about federal practice and specifically my federal practice, please email my Portland law clerk, Jolie Russo, at Jolie_Russo@ord.uscourts.gov.



# DOCUMENT DESTRUCTION POLICIES— LESSONS LEARNED FROM MISTAKES MADE

By Matthew A. Levin, Markowitz, Glade & Mehlhaf, PC

If you think your stress level is high, imagine being Arthur Andersen partner David Duncan in late 2001. With the collapse of his client Enron unfolding and an SEC investigation looming, Duncan met with a company forensic investigator. Duncan picked up a document with the words "smoking gun" written on it, said "we don't need this," and began to destroy it. Duncan was not alone. Arthur Andersen management issued several reminders to "ensure team members were complying with the document policy" that "were followed by substantial destruction of paper and electronic documents." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 125 S. Ct. 2129, 2133 n.6 (2005).

Andersen's frenzied shredding may forever symbolize the nadir of American corporate responsibility. The firm was convicted by a Texas jury of violating former 18 U.S.C. § 1512(b)(2)(A) and (B) by "knowingly, intentionally and corruptly persuad(ing) * * * other persons, to wit: petitioner's employees, with intent to cause them to withhold documents from, and alter documents for use in, official proceedings, namely: regulatory and criminal proceedings and investigations." *Andersen*, 125 S. Ct. at 2134 (internal quotation marks, brackets, and citation omitted). The conviction helped to ensure the demise of Andersen.

Although too late to resurrect the firm, on May 31, 2005, the U.S. Supreme Court reversed the conviction because "the jury instructions were flawed in important respects." *Id.* at 2137. The Court held that merely reminding employees to follow the firm's document retention policy was not necessarily criminal, and that the "the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing." *Id.* at 2136. The jury had been instructed to convict merely if it found Andersen intended to "subvert, undermine, or impede" governmental fact finding. No intent to commit a wrongdoing was required. In fact, the instructions provided that "'even if [Andersen] honestly and sincerely believed that its conduct was lawful, you may find [Andersen] guilty.'" *Id.* at 2136 (citation omitted). The Court also found that the instructions should have required the jury to find a nexus between the "persuasion" to destroy documents and the intent to interfere with a particular proceeding. *Id.*

The *Andersen* decision has more prurient than precedential value. It does not redefine the criminal boundaries of appropriate document destruction; it is still safe to advise your clients to call you before shredding "the smoking gun." Moreover, in response to the Enron collapse, Congress enacted the Sarbanes-Oxley Act, which directly addresses the destruction of records in connection with federal investigations. The Sarbanes-Oxley Act now provides for the following criminal liability:

"Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both." 18 U.S.C. § 1519.

The practical effect of the Sarbanes-Oxley Act with respect to the previous statute interpreted by the Supreme Court in *Andersen* is twofold: The word "corruptly," which the Court fixated on in analyzing the intent requirement under the previous statute is not found in the Sarbanes-Oxley Act. In addition, the required nexus between the act of obstruction and the actual or contemplated government matter is now clear.

Although the Sarbanes-Oxley Act likely relegates the *Andersen* decision to the status of historical footnote, the Supreme Court's decision in *Andersen* is a reminder of the importance of appropriate, ethical document retention policies, and presents an opportunity to evaluate such policies both internally and for our clients.

**Meeting the Challenges of Appropriate Document Retention**

The Supreme Court specifically highlighted the importance of appropriate document retention policies in *Andersen*, noting that such policies are common in business and that routine adherence to such policies will occasionally lead to destruction of information that would otherwise

be available to the government. *Andersen*, 125 S. Ct. at 2135. The Supreme Court noted that "[i]t is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances." *Id.*

Andersen's situation also shows that an appropriate document retention policy needs to be a "policy" and not just a document to be dusted off during emergencies. Andersen's document policy appropriately required, for example, that an engagement file "'should contain only that information which is relevant to supporting our work [and that] in cases of threatened litigation, * * * no related information will be destroyed.'" *Id.* at 2132 n.4. The rub was in the implementation, not the drafting of the policy.

**Reduce, Retain, and Remove**

Whether evaluating a document retention policy for internal use or for a client, there are common objectives to be addressed. A document retention policy can reduce storage costs and increase efficiency. It can ensure compliance with legal requirements. It can also provide some control over information. As the Supreme Court acknowledged in *Andersen*, document retention policies can also appropriately "keep certain information from getting into the hands of others, including the Government . . . ." *Id.* at 2135. Importantly, a policy can also keep vital information accessible.

Like the familiar recycling theme, a policy should show how and when to "reduce, retain, and remove."

**Reduce:** Generate only professional communications. We have all either salivated or sweated when discovery turned up emails with sexual references, off-color jokes, and insults. Don't assume your status as a lawyer will keep your firm's internal documents from ever seeing the light of day.

**Retain:** If information is still important, have a mechanism for retrieving it efficiently.

**Remove:** Once that information is no longer useful, destroy it.

The following are ideas for implementing an effective policy:

- Reduce. Consider prohibiting personal email on the company server. Impart commonsense advice to employees to consider how a misdirected (or maliciously directed) written communication would look to a client, a competitor, or opposing counsel. Sarcasm and jokes are not very funny during cross-examination.
- Comply. Myriad laws and regulations impact the availability and timing of document destruction. A policy should simplify compliance.
- Tailor. An ethical policy should eliminate documents, good and bad, only when they have outlived their importance. Few companies will benefit from a mechanistic policy based only on vintage and not on the type of document.
- Write. Put the policy in writing. Ambiguity and inconsistency ensure failure.
- Retain. If information is worth retaining, it needs to be accessible. The cost of producing documents for litigation can be staggering, especially if the information is contained on old backup tapes for obsolete software applications.
- Execute. Establish regular intervals for destroying types of records, and specifically task enforcement and oversight responsibilities. Without centralized oversight, an inconsistently implemented policy can be as bad as no policy at all. Imagine where Andersen might be today if it had simply been consistent.
- Educate. Teach employees how the company expects them to manage documents. Inform clients how their documents will be retained.

**The Sedona Guidelines**

In 2004, and then again 2005 and 2007, an organization called the Sedona Conference, made up of lawyers, judges, and scholars, published "The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age." The Sedona Guidelines serve as a companion to the Sedona Principles on electronic document production, which were published by the Sedona Conference in January 2004. Copies of both of these documents can be found at http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110.

The Sedona Guidelines provide a framework for organizations to assess and amend their existing policies and training programs in order to create a culture of compliance. Although the statements and conclusions of the Sedona Conference have not been expressly adopted by any court, they have received widespread approval. As a result, following these standards can provide strong

evidence of a company's good-faith efforts to act properly with regard to document retention and destruction.

The five essential guidelines from the Sedona Conference regarding management of electronic information are as follows:

1. An organization should have reasonable policies and procedures for managing its information records.
2. An organization's information and records management policies and procedures should be realistic, practical, and tailored to the circumstances of the organization.
3. An organization need not retain all electronic information that is generated or received.
4. An organization adopting an information and records management policy should consider including procedures that address the creation, identification, retention, retrieval, and ultimate disposition or destruction of information and records.
5. An organization's policies and procedures must mandate the suspension of ordinary destruction practices and procedures (the "litigation hold") as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, governmental investigation, or audit.

The best practice in analyzing the statements and suggestions made by the Sedona Conference is to have counsel work with the individual company to carefully consider these guidelines and tailor a document management policy that meets the client's goals.

**When Trouble Arises, Stop the Destruction**

One issue the *Andersen* case highlights is that different standards apply to document destruction once litigation or a governmental investigation is anticipated.

A judge has broad discretionary power to punish the spoliation of evidence. For example, federal district courts may impose sanctions as part of their inherent power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991); *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992). The court's inherent power to sanction may be invoked in response to destruction of evidence. *Unigard*, 982 F.2d at 365; *Advantacare Health Partners, LP v. Access IV*, No. C03-04496JF, 2004 WL 1837997 at *4 (N.D. Cal. Aug. 17, 2004).

There are a number of legal theories under which a party may pursue a spoliation claim. A body of case law addresses the situation in which a company destroys documents during litigation or because it suspects it is about to be sued. Under these circumstances, some courts impose sanctions under Fed. R. Civ. P. 37, while others impose sanctions under the district court's inherent authority to remedy discovery abuses. *See Unigard*, 982 F.2d at 368. Many jurisdictions also recognize spoliation as a separate tort. *See, e.g,. Burge v. St. Tammany Parish*, 336 F.3d 363 (5th Cir. 2003); *RSC the Quality Measurement Co. v. IPSOS-ASI, Inc.*, 196 F. Supp. 2d 609 (S.D. Ohio 2002); *Silhan v. Allstate Ins. Co.*, 236 F. Supp. 2d 1303 (N.D. Fla. 2002); *Smith v. Salish Kootenai Coll.*, 378 F.3d 1048 (9th Cir. 2004); *Hannah v. Heeter*, 584 S.E.2d 560 (W. Va. 2003).

One remedy for the spoliation of evidence is an adverse evidentiary inference. For example, the destruction of evidence can create a "presumption" or "inference" that the spoliator must overcome, and the inference is that if evidence had been produced it would have been unfavorable to the spoliator. *Booher v. Brown*, 146 P.2d 71, 75 (Or. 1944) ("willful" destruction of evidence raises a presumption against the spoliator, which cannot be overcome unless "the evidence was destroyed under circumstances which free the party from suspicion of intentional fraud[] and * * * he was without neglect or fault in the premises"); *In re Kelly's Estate*, 46 P.2d 84, 95 (Or. 1935) ("The destruction of evidence, when unsatisfactorily explained, warrants an inference that the documents were unfavorable to the person who destroyed them * * * .").

Another remedy used by courts to punish a party for the spoliation of evidence is the drastic remedy of entering a default judgment against the party found to have destroyed documents. For example, in *Diamond Claims & Investigation Services, Inc. v. Farmers Insurance Exchange*, Civ No 84-1063-BE (D. Or. 1986), *aff'd in part, rev'd in part, and remanded*, 849 F.2d 1475 (9th Cir. 1988), the defendants destroyed documents before the litigation began and improperly withheld others during discovery. As a result, Judge Belloni, relying on Fed. R. Civ. P. 37 and the court's inherent powers, struck defendants' answer and counterclaims and entered a default judgment.

Courts also have not been afraid to dole out massive monetary fines as a sanction for spoliation of evidence and destruction of documents, even in cases in which the destruction of documents was not found to have been for the purpose of intentionally thwarting discovery. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598 (D.N.J. 1997). In the Prudential case, the District Court of New Jersey found that even though Prudential had not "intended to thwart discovery through the purposeful destruction of documents, its haphazard and uncoordinated approach to document retention indisputably denie[d] its party opponents potential evidence to establish facts in dispute." *Id.* at 615. Among the sanctions in the *Prudential* case: a $1 million fine, which the court described as a sanction recognizing the unnecessary consumption of the court's time and resources with regard to the issue of document destruction.

When trouble looms, do not send out an email, as Andersen did, to "make sure to follow the [document] policy." 125 S. Ct. at 2133. A well-implemented policy has already done all it can do. Your client cannot wait to be served with papers. Instead, meet with your client early to ensure evidence is preserved. Even routine housekeeping tasks, such as writing over backup tapes, could subject a party to spoliation sanctions.

**"Shred" Is Not a Four-Letter Word**

Selecting documents for destruction is only half the battle. The other half is making sure that the documents are actually destroyed. Because of the proliferation of dumpster-diving identity thieves, not even trash is sacred. Throwing documents away is no longer good enough.

As of June 1, 2005, anyone who uses a consumer report for a business purpose is subject to rules of the Fair and Accurate Credit Transactions Act of 2003 (FACTA). These rules require destruction policies that reduce the risk of consumer fraud and identity theft.

Covered entities must dispose of paper and electronic documents with personal information "by taking reasonable measures to protect against unauthorized access to or use of the information." The rule suggests "burning, pulverizing, or shredding of papers" or entering into "a contract with another party engaged in the business of record destruction." For more information, refer to the FTC publication that describes whom the act applies to and how documents should be destroyed: http://www.ftc.gov/bcp/conline/pubs/alerts/disposalalrt.shtm.

Noncompliance invites enforcement actions by the government and suits from victims, including class actions, for actual damages and statutory damages of up to $1,000 per violation.

Regardless of whether FACTA or common sense applies, it makes good business sense, after implementing a document retention policy, to protect the confidences contained in discarded information.

*This article is an update of the article that appeared in the April 2006 issue of the Oregon State Bar Bulletin:* http://www.osbar.org/publications/bulletin/06apr/deadmen.html.

# THE AMERICAN JEWISH COMMITTEE HONORS BARNES H. ELLIS WITH THE 2007 LEARNED HAND AWARD

On November 14, 2007, the American Jewish Committee (AJC) honored Barnes H. Ellis with the 2007 Learned Hand Award. The award honors leaders in the legal field for professional excellence and contributions to the legal community. Award recipients are people who embody much of what Judge Hand represented: the rights of the individual and the importance of democratic values in an orderly society. In his remarks accepting the award, Mr. Ellis paid tribute to Multnomah County Senior Judge John C. Beatty, Jr., former Chief Justice Wallace P. Carson, and James Henning, among others. Portions of Mr. Ellis's remarks are reprinted here.

"There's another individual here that I particularly want to recognize, because he was truly the guiding force behind the 1981 legislation sponsored by the Commission on the Judicial Branch that changed the old county court system, which was really a collection of some 36 fiefdoms around the state, into a true state judicial system. I want to say a few words about the Honorable John C. Beatty, Jr. Along with then Chief Justice Arno Denecke, Jack was the instigator in 1979 of creating the Commission on the Judicial Branch. We had some wonderful members on that commission, such as the Chief Judge of the Oregon Court of Appeals, George Joseph; great citizens from around the state, like George Corey of Pendleton and Sam Johnson from Redmond; State Representative Joyce Cohen, and several others. They let me be Chair, but the driving

forces were Chief Justice Denecke and Judge Beatty. In the 1981 session, it looked like the sun, the moon, and the stars were in alignment. The restructuring of the court system that we recommended was the centerpiece of Governor Atiyeh's legislative program. This was still in the era of those great legislatures of the 1970s which did so much for Oregon. And although some of the judges around the state were reluctant to see a strong central court management under the Chief Justice, no organized opposition emerged. Near the end of the 1981 session, most of our major proposals had passed, including state assumption of indigent defense funding and the court restructuring bill. But the legislature made one change: instead of having the Governor appoint the Chief Justice, as we had recommended, their bill continued the old system of having the court select the Chief. While we thought a gubernatorial appointment was more likely to assure a strong administrator, since we were getting everything else, this did not seem like too bad a setback. But to our shock, Governor Atiyeh believed that the change was critical, and shortly after the session concluded, he reluctantly vetoed the whole bill. But while the rest of us were bemoaning the situation, Jack Beatty proposed a compromise under which the Governor would call a one-day special session to reenact the bill, but let the issue of selection of the Chief go to the voters. The Governor agreed, the special session occurred, and the revised bill was passed. Without Jack Beatty's persistence and wisdom, that might never have happened. Jack—please stand and be recognized. Ladies and gentlemen, one of Oregon's truly great public servants.

"We have been fortunate to have a number of very strong Chief Justices, and no one was stronger or served longer than our speaker today, former Chief Justice Wally Carson. The importance of the 1981 restructuring, and the importance of having a strong Chief Justice was never more apparent than in the budget crisis of 2003. I know many in this room recall the series of five special sessions, each cutting more funding than the last, to the point that there simply was not sufficient funding to maintain a proper level of defense services. Chief Justice Carson refused to try to force defenders to further subsidize the system, and took the extraordinary and difficult step of closing the courts altogether one day a week, and simply not processing most misdemeanors and nonpersonal felonies. The state has since recovered, but without a strong Chief possessed of strong administrative power, the system would simply have broken down. Throughout his tenure, Chief Justice Carson was a very hands-on supporter of adequate defense services, and for all of that we owe him a great debt of gratitude.

"My friend Jim Hennings has been a powerful voice for indigent defense representation for over 35 years. The real heroes in this area are not people like me, but those several hundred lawyers around the state who long ago decided that their personal financial well-being was far less important to them than the satisfaction of representing the loneliest people of all—those who face the awesome power of the state when it accuses a citizen of criminal conduct. Our state has been most fortunate in having so many dedicated lawyers willing to sacrifice their own interests to see that the system works. And although much progress has been made, our justice system continues to be subsidized by them. Jim is one of those, and I see several other lawyers and Board members from Metropolitan Public Defenders, and we are all grateful for his—and their—service."

# CIRCUIT JUDGE SUSAN P. GRABER AND DISTRICT JUDGE ANN AIKEN SPEAK TO THE FBA

The FBA was pleased to host two monthly luncheons this quarter with two of our excellent federal judges. The Honorable Susan P. Graber, judge for the Ninth Circuit Court of Appeals, was the FBA's guest speaker for November, and she related her "Ten Commandments" for effective appellate advocacy, along with her top 10 "pet peeves." Judge Graber's commandments included the following five keys to effective brief writing: (1) prepare *before* you begin to write; (2) organize and tell a narrative (a witness-by-witness recitation is "deadly"); (3) be selective and weed out "scraggly" arguments; (4) use and apply the appropriate standard of review; and (5) don't write like a lawyer or police officer—use short words and short sentences. Effective oral advocacy involved similar recommendations: (1) prepare; (2) simplify; (3) be yourself and try to engage the judges in a conversation; (4) speak up; and (5) be sure to actually answer the question asked. For respondents and rebuttal, Judge Graber recommended that we answer questions posed to our opponent.

As for her pet peeves in legal writing, they include (1) failure to follow the rules (*see Sekiya v. Gates*, 508 F.3d 1198 (9th Cir. 2007) (dismissing appeal for multiple rule

violations)); (2) nasty or mean-spirited comments about your opponent; (3) overuse of unfamiliar acronyms and abbreviations; (4) overemphasis, with too many **bold** words, CAPITALS, or underlines; and (5) poor grammar, punctuation, and word usage (she highly recommends *Eats, Shoots & Leaves* by Lynne Truss). Oral arguments can be damaged by the following: (1) using more than one lawyer when it isn't absolutely required; (2) refusing to concede even a minor point, so the argument never moves along; (3) failing to stop when the red light flashes; (4) distractions such as arriving late, pen clicking, and wearing inappropriate attire (a memorable tie was mentioned); and (5) improper rebuttal, *i.e.*, using rebuttal to raise new arguments.

Judge Graber also graciously responded to several questions from the audience regarding appellate practice and the new Ninth Circuit Chief, Judge Alex Kozinski.

Judge Aiken was the FBA's guest speaker at the January luncheon. She discussed "drug court," an exciting new program begun in the District of Oregon that seeks to reduce recidivism in the federal prison system. The program is the product of a collaborative effort between members of the judiciary, the U.S. Attorney's Office, probation officers, and the Bureau of Prisons. The program seeks to provide holistic assistance to persons seeking to reenter society after serving time in prison, through group sessions focused on problem solving, rather than relying solely on the traditional supervised release system. Early outcomes demonstrate that drug court greatly reduces recidivism in persons participating in the program, and there are plans to export the model to other federal districts.

# A REPORT ON THE 2007 DISTRICT OF OREGON CONFERENCE

The 2007 District of Oregon Conference was a great success. Held at the U.S. Federal Courthouse in Eugene on November 29-30, 2007, the conference was entitled "The Only Easy Day Was Yesterday: The Challenges of Legal Communication in the 21st Century." The conference attracted over 260 participants from all over the state. Federal Magistrate Judge Donald Ashmanskas chaired an informative panel discussing effective legal writing. Moderator Kelly Beckley led a lively, rapid-fire panel addressing effective oral advocacy. The first day wrapped up with a fascinating presentation on scientific research about how people process information and make decisions. On the second day, Professor Ana Maria Merico spoke on "Changing the Doctrinal Discourse on Diversity and Affirmative Action with All Deliberate Speed." A panel of business professionals discussed what companies need from their lawyers and other business law issues, with an emphasis on practical and real-world application. There were also panel discussions about effecting change through the political process, cultural communication, and communicating in the fast-moving digital age. All conference materials, including CLE materials, are available on the court's Web site at http://ord.uscourts.gov. The conference is pending OSB authorization for nine CLE credits. The court is also preparing a DVD of the presentations. For more information, contact Jolie Russo at Jolie_Russo@ord.uscourts.gov.

# ANNOUNCEMENTS

SAVE THE DATE! The 2008 Annual Judges Appreciation Dinner is scheduled for April 10, 2008, in the Grand Ballroom of the Governor Hotel in Portland. We will pay tribute to the Honorable Mary M. Schroeder, for her previous service as the Chief Judge of the Ninth Circuit Court of Appeals. And we will welcome the Honorable John Acosta on his appointment as Magistrate Judge in Portland. Look for the invitations to be delivered in mid-February.

# 2007-2008 FBA OREGON CHAPTER OFFICERS AND DIRECTORS



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# Missing Electronic Notices?

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

# Call for Submissions/Publication Schedule

***For the District of Oregon*** **welcomes submissions from everyone as well as our regular contributors. The deadlines are March 15, 2008; June 15, 2008; September 15, 2008; and December 15, 2008. 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

Please join the FBA Oregon Chapter for our monthly luncheons on February 21, 2008 with Judge Michael W. Mosman, on March 20, 2008 with Judge Ancer L. Haggerty, and on April 17, 2008 with Phil Margolin.

The luncheons are held at the University Club, 1225 SW Sixth Avenue, Portland, starting at noon.

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 by 5 p.m. on the Tuesday before the luncheon, so that we can ensure having enough lunches. The cost is $15 for FBA 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.

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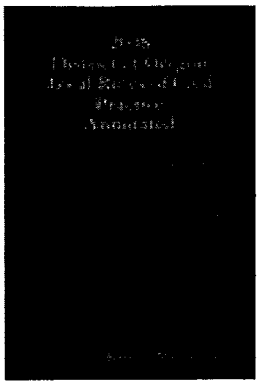

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About the Author—Kathryn Mary Pratt has been a member of the United States District Court's Local Rules Advisory Committee for nine years. She has given numerous lectures on the Local Rules, the FRCP, electronic discovery and federal practice. She has also served on the Board of the Oregon Chapter of the Federal Bar Association and on the Oregon State Bar's Federal Practice and Procedure Committee. Her contributions to the Federal Bar and Federal Judiciary in Oregon were recognized by the Federal Bar Association in 2001 when she was awarded the Oregon Chapter's Federal Practice Award.

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