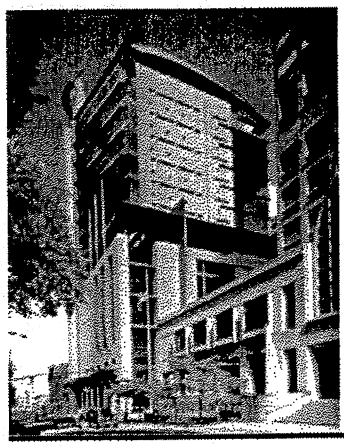

A Quarterly Newsletter of the Oregon Chapter of the Federal Bar Association

FOR THE DISTRICT OF OREGON

Volume XI, No. 1 *Spring 2006*

THE BENEFITS AND LIMITATIONS OF COURT-ROOM TECHNOLOGY IN PRESENTING THE COMPLEX CASE

By David H. Angeli, Stoel Rives LLP

In May 2003, the United States Department of Justice's Enron Task Force convinced a grand jury to indict seven former executives of Enron Broadband Services for conspiracy, securities fraud, wire fraud, insider trading, and money laundering. The indictment alleged that the defendants, over the course of a two-year conspiracy, (1) lied to investors about the technical capabilities of a complex nationwide telecommunications network, (2) employed a complicated accounting scheme to mislead investors with regard to the company's revenues, and (3) engaged in numerous illegal "insider" sales of Enron stock. Discovery from the government and third parties yielded over 100 million pages of documents, hundreds of hours of transcribed video, hours of audio recordings, hundreds of photographs, and thousands of electronic documents created with many different software applications. Ultimately, five defendants were tried on a total of 176 counts beginning in April 2005. Three months later, the jury acquitted the defendants on 24 of those counts and deadlocked on the remainder.

This case obviously presented a number of challenges to us as counsel for one of the defendants. Chief among those challenges was how to sort through the mountain of discovery and present our case to the jury in a clear and compelling way, notwithstanding the complexities and technical nature of the subject matter. We realized quickly that tried-and-true case preparation methods—physically reviewing all (or at least most) of the materials produced in discovery, compiling physical "issue" binders and witness binders, etc.—were not practical. Assuming that a lawyer could review 50 pages per hour, a team of 20 lawyers working 40 hours per week would take approximately 50 years to review 100 million pages!

We turned to technology to help us. Discovery management software (Concordance® and CaseMap®) allowed us to store all of the discovery materials in a single database and to organize and sort it by a number of criteria, including issue, witness, date, etc. At trial, we relied on Sanction® software for instant access to documents, videos, and other materials during witness examinations, and to enlarge and highlight key portions of those materials for emphasis. We used PowerPoint® software during our opening statement and closing argument to create slideshows with timelines, video clips, and animations to explain difficult concepts and convey key themes. Along the way, we learned lessons that should be valuable to counsel in virtually every case, not just those as complex as Enron.

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FROM THE BOARD

By Todd A. Hanchett, Board Member of Federal Bar Association Oregon Chapter, Barran Liebman LLP

2005 was a great year for the Oregon Chapter of the Federal Bar Association. Already in 2006, we have built on that success and look forward to continuing it through the rest of the year.

We have received excellent feedback on our new location for the monthly Chapter luncheons (the Jury Assembly Room in the federal courthouse). Even better than the location have been several outstanding speakers, including Magistrate Judge Paul Papak. We are pleased to report that we have seen record attendance at our last two luncheons.

In addition, last month's Advanced Federal Practice and Procedure seminar, jointly sponsored by the Oregon Chapter of the FBA and the Oregon Law Institute, was very well attended. The quality of the program was evidenced not only by great attendance, but perhaps more by the number of attendees who remained for the entire program—on a Friday! This program, of course, would not be possible without the tremendous support of our federal judges, and we thank them for their commitment to the FBA.

We have the opportunity to show our appreciation at the upcoming Annual Judges Appreciation Dinner on April 25. This year we will introduce our new Magistrate Judges Paul Papak and Patricia Sullivan. We will also present the Senior Judge James Burns Professionalism Award. We hope you will make it a priority to attend, and we look forward to seeing you there.

THE BENEFITS AND LIMITATIONS OF COURTROOM TECHNOLOGY IN PRESENTING THE COMPLEX CASE

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I. THE BENEFITS OF COURTROOM TECHNOLOGY

Technology is no silver bullet. Thorough preparation, a well-thought-out strategy, and compelling advocacy remain the key ingredients of an effective trial presentation. Nevertheless, when used properly, courtroom technology can make the difference between an "effective" presentation and a great one.

The lawyer who uses a well-orchestrated electronic presentation ensures that jurors literally "see" the evidence just as counsel does. We have all heard about gripping oral presentations that "paint a picture" for jurors, but the reality is that those mental pictures vary widely depending on the jurors' individual experiences, education, etc. Visual presentations, on the other hand, allow counsel to dictate the content of the images that will be left in jurors' minds. As a result, according to the Federal Judicial Center's study of the issue, "jurors who have seen electronic displays work better as a group because they all experienced the trial 'together' and are more likely to have a common understanding of the evidence."

Psychological research confirms that "bimodal" forms of communication (i.e., those that include both an auditory and a visual component) are far superior to mere oral presentations in terms of maximizing the likelihood that the audience will retain the information presented. That is particularly true in complex trials involving numerous fact and expert witnesses, hundreds of exhibits, and complex subject matters. Technology allows counsel to electronically store and instantly search and organize the entire universe of evidence in a case. Documents, photographs, videos, and other evidence may be displayed instantly on large screens or flat-panel monitors, with key portions annotated, enlarged, or highlighted. Animated graphics allow jurors to visualize complicated concepts that are difficult or impossible to explain verbally, including the specifics of various financial transactions, the operation of complex technology (like a telecommunications network), and the unfolding of temporal events.

Using an electronic presentation with a variety of media also helps to break the monotony of a long trial that in-

volves less-than-compelling issues. By presenting graphics as an integrated part of a witness's testimony or counsel's argument, the lawyer maximizes the chances that jurors will remain attentive and participate actively in the learning process.

II. THE JURY'S PERSPECTIVE

Although the benefits of courtroom technology may be widely accepted in theory, there remains a certain mystique attached to such technology. Many trial lawyers fear the possibility of looking too "slick" in front of the jury. Perhaps that is why, according to a 2004 survey conducted by the ABA's Legal Technology Resource Center, only one in four litigators uses litigation support software regularly.

Study after study has demonstrated that those misgivings are misplaced, and that jurors actually appreciate it when counsel effectively incorporates technology into his or her trial presentation. The Federal Judicial Center concluded recently that "[j]urors become more involved in the proceedings when they can see the exhibits clearly and follow the lawyers' presentations more easily. . . . Jurors also appreciate the generally faster pace of trials using technology. They become impatient when lawyers spend time digging through piles of paper looking for exhibits." Reinforcing that view, the trial consulting and research firm DecisionQuest recently conducted a survey asking respondents to consider a case where one side used computer technology to present its case and the other side did not. Thirty-eight percent of respondents said that they "would feel more positively" toward the side that used technology, 62 percent said that it would make no difference either way, and no respondents said that they would feel more positive toward the side that did not use technology.

In today's world of computers, flat-screen televisions, cell phones, handheld organizers, and other devices, "[j]urors who come into a technology-equipped courtroom are usually comfortable with the surroundings and do not find the environment unusual at all." Many jurors have also seen courtroom technology used in highly publicized trials. For these reasons, "the equipment for visual displays makes it appear to jurors that what is about to go on in the courtroom will be informative and easy to understand."

In short, jurors expect and appreciate it when trial lawyers incorporate technology into their trial presentations. Counsel who refuse to do so will find themselves at a competitive disadvantage as technology becomes more and more of a fixture in our courtrooms.

III. PRACTICE POINTERS

There are a number of critical considerations to keep in mind when deciding how best to incorporate technology into a courtroom presentation:

1) Plan Early.

Particularly in a complex case, the seeds of a compelling courtroom presentation are sown long before trial. When it comes to electronic databases, the quality of the output is only as good as the quality of the input. All the bells and whistles in the world cannot make up for poor coding and organization of documents, audio and video materials, and other forms of media during the discovery phase. Discovery management software (e.g., Concordance® and CaseMap®) offers a robust set of organizational and search tools that allow counsel to store, sort, and instantly access documents, photographs, video clips, and other media during trial.

2) Choose the Right Technology and Account for Murphy's Law.

Counsel should choose courtroom presentation software that is (1) compatible with the discovery management software discussed above, (2) simple to use in the "heat of battle," and (3) enabled with the basic features that counsel will need to make a compelling presentation (e.g., the ability to enlarge and highlight key passages of documents, to project side-by-side comparisons of various pieces of evidence, to play back video synchronized with the accompanying transcript, etc.). Sanction® trial presentation software by Verdict Systems satisfies all of those criteria and is very useful during witness examinations. With Sanction, counsel has every piece of evidence in the case available at his or her fingertips. Documents can be displayed with key passages expanded and highlighted as witnesses refer to those passages, and videotape segments can be accessed "on the fly" to impeach witnesses. For more "scripted" presentations (e.g., opening statements and closing arguments), Microsoft PowerPoint® allows users to create slide shows containing graphics, animations, video clips, and other multimedia content.

In terms of hardware, counsel should ensure that (1) projectors have a lumens or brightness of at least 2,000, (2) laptops (and/or external drives) have enough memory to store all of the key evidence and access it instantly, and (3) a portable audio system is available, as many courtroom audio systems are lacking.

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Anticipating the impact of Murphy's Law, counsel should also have available a "non-tech" alternative to his or her presentation (e.g., "anchor boards" of PowerPoint slides, etc.).

3) Understand the Limitations of Technology.

Standing alone, a flashy presentation is unlikely to carry the day. Communicating a message effectively requires a careful review of the evidence, an understanding of the opponent's case, the development of understandable case themes, and a great deal of thought as to how those themes can best be communicated to the jury. Only then should counsel begin to prepare a presentation that conveys those themes as simply and effectively as possible.

There is no substitute for the lawyer's ability to connect with jurors by looking into their eyes and conveying an absolute belief in the client's position. During key moments in the argument (e.g., when the jury is being asked to conclude that the government's star witness is a liar), the jurors' attention should be focused on the lawyer, not on the screen.

4) Reveal the Information in an Orderly and Effective Way.

Facts should be revealed on the screen slowly and systematically. With this type of presentation, jurors anticipate the revelation of additional facts with increased interest and curiosity. This technique also allows the lawyer to maintain the jury's attention, because there is congruency between what is being presented visually and what is being presented orally.

Including too much information on a chart or slide can be counterproductive. Accordingly, charts and slides should be clear and contain only the information that will be necessary to assist jurors in recalling key information during deliberations.

5) Get the Most Out of the Technology.

Electronic presentations should not be viewed simply as surrogates for blow-up boards. Asking the jury to view a full-page document—whether in hard copy or as an image on a screen—is not conducive to learning. The more effective technique is to enlarge and highlight the key text in the document, while dimming or minimizing the background, so the jury focuses on and remembers the key information from the document.

Use a variety of tools—including sound, animation, video, and other special effects—to hold the jury's interest.

Today's technology offers counsel limitless options for creativity in presentations. For example, Sanction® trial presentation software allows for "split screen" presentations that allow one type of media (e.g., videotaped testimony) to be displayed on one side of a screen and a document (e.g., the document that is the subject of the witness's testimony) to be displayed on the other side.

6) Use Technology to Most Effectively Complement Your Own Style.

Ultimately, technology is just one more weapon in the trial lawyer's arsenal. As such, the best use of technology will vary from lawyer to lawyer, based on the lawyer's individual style and skill set. Everything about the technical presentation—from content to where the equipment is situated in the courtroom—should be tailored to the lawyer's individual style.

IV. CONCLUSION

The Enron litigation may be an extreme example of the challenges that trial lawyers face in the typical case in the 21st century. Nevertheless, the technological lessons learned from that case—relating to the processing, organization, and presentation of information—can assist lawyers in their trial presentations in any case, regardless of its relative complexity. The powers of courtroom technology can be fully harnessed only by lawyers who recognize the advantages, as well as the limitations and risks, involved in choosing and using that technology.

ANNOUNCEMENTS

Annual Judges Appreciation Dinner on April 25
Please join the Oregon Chapter of the Federal Bar Association at this year's Annual Judges Appreciation Dinner, on April 25, at the Portland Hilton Pavilion Ballroom, 921 SW Fifth Avenue. Tickets are $75 per person, or $750 for a Sponsorship and 10 tickets. The event will serve to welcome the new United States Magistrate Judges for the District of Oregon, the Honorable Paul Papak and the Honorable Patricia Sullivan, and to honor Judge Owen Panner. This year's recipient of the Senior Judge James Burns Professionalism Award will also be announced. The reception begins at 5:15 p.m., and the dinner and program begin at 6:30 p.m. To reserve tickets or to cosponsor the event, please contact Courtney Angeli at 503-294-9358.

FBA Membership Approves Constitutional Amendment to FBA Governance Structure
In January 2006, the FBA National Counsel sent ballots to its membership on the proposed constitutional amendment to the FBA's governance structure. 2,127 ballots were returned, with an overwhelming majority of the membership (85 percent) voting to approve the change.

New Civil Chief for U.S. Attorney's Office, District of Oregon
James L. Sutherland was recently named as the new Chief for the Civil Division of the U.S. Attorney's Office for the District of Oregon. Sutherland has served as the office's Senior Litigation Counsel since January 16, 2000. In assuming the role as Civil Chief, Sutherland relocated from Eugene to Portland and began his new duties January 9, 2006. All civil litigation claims will now be handled by the Portland office.

Filing Fee Increase
Pursuant to the Deficit Reduction Act of 2005, which was passed by Congress and signed by the President on February 8, 2006, the following fee increases will become effective April 9, 2006. The court of appeals filing fee will increase from $250 to $450. The civil action filing fee in district court will increase from $250 to $350. Bankruptcy court filing fees will also increase: Chapter 7 filing fees will increase from $220 to $245, Chapter 13 filing fees will increase from $150 to $235, and Chapter 11 filing fees will increase from $1,000 to $2,750. It should be noted that there was a drafting error in changing the Chapter 11 filing fee revisions, in which the act incorrectly referenced the statutory subsection for Chapter 9, instead of Chapter 11. Until corrected, the $1,000 Chapter 11 filing fee remains in effect.

Upcoming Events

April 2006

April 20 (3rd Thursday): Luncheon in Jury Assembly Room, Mark O. Hatfield Courthouse (Judge Anna Brown)

April 25: Annual Judges Appreciation Dinner honoring the District of Oregon's new Magistrate Judges Paul Papak and Patricia Sullivan. (Contact event Co-chairs Helle Rode (503-947-4465) or Courtney Angeli (503-294-9358))

May 2006

May 18 (3rd Thursday): Luncheon in Jury Assembly Room, Mark O. Hatfield Courthouse (Federal Public Defender Steven Wax)

June 2006

June 15 (3rd Thursday): Annual Meeting of Oregon Chapter—Free Luncheon for FBA Members in Jury Assembly Room, Mark O. Hatfield Courthouse (speaker to be announced)

June 15: Deadline for submissions to *For the District of Oregon*

INADVERTENT PRODUCTION REVISITED

By Mark J. Fucile, Fucile & Reising LLP

Two years ago this month, I wrote a column on inadvertent production. I noted at the time that for a variety of reasons the pendulum had swung from one that essentially rewarded the recipient of inadvertently produced confidential material to one that posed a disqualification risk to the recipient if the material involved wasn't returned and the potential privilege waiver wasn't litigated promptly. With the new Oregon Rules of Professional Conduct that were adopted last year, there has been a slight swing back of the pendulum—but the risk of disqualification still remains if inadvertently produced material isn't handled with care.

When inadvertent production occurs, four key questions usually follow for the recipient: (1) do I need to notify my opponent? (2) do I need to return the document involved? (3) has privilege been waived? and (4) if I don't litigate the privilege waiver before I use the document, will bad things happen to me?

Notice. Before the RPCs were adopted last year, the principal guidance in Oregon on these questions was Oregon State Bar Formal Ethics Opinion 1998-150. That opinion, in turn, drew heavily from an American Bar Association ethics opinion on the same subject—Formal Opinion 92-368. 1998-150 counseled that a recipient of inadvertently produced confidential material had to both notify his or her opponent and follow the opponent's instructions pending a decision by the court on whether privilege had been waived.

This past year saw the adoption of a new Oregon rule specifically addressing inadvertent production, a new accompanying Oregon ethics opinion, and the withdrawal of ABA Formal Opinion 92-368. Oregon RPC 4.4(b) specifically creates a duty to notify an opponent: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

Return. At the same time, RPC 4.4(b) does not create a rule of ethics on whether a recipient must return inadvertently produced confidential information. Rather, the new ethics opinion, 2005-150, casts that decision as turning on the substantive law of evidence: "By its express terms, Oregon RPC 4.4(b) does not require the recipient of the document to return the original nor does it prohibit the recipient from openly claiming and litigating the right to retain the document if there is a nonfrivolous basis on which to do so. The purpose of the rule is to permit the sender to take protective measures; whether the recipient lawyer is required to return the documents or take other measures is a matter of law beyond the scope of the Oregon RPC, as is the question of whether the privileged status of such documents has been waived."

Waiver. On the question of privilege waiver, Goldsborough v. Eagle Crest Partners, 314 Or 336, 838 P2d 1069 (1992), and In re Sause Brothers Ocean Towing, 144 FRD 111 (D Or 1991), are the leading cases in Oregon. Although the state and federal formulations vary somewhat, they generally look at the following case-specific factors to determine whether privilege has been waived through inadvertence: the reasonableness of the precautions taken against disclosure, the time taken to raise the error, the overall scope of discovery, the extent of the inadvertent production, and fairness to both sides.

Recipient Risk. Are there risks if you conclude on your own that the privilege has been waived and then use the documents without either telling your opponent or first litigating privilege waiver? The short answer is "yes." Formal Ethics Opinion 2005-150 cites a federal case from Seattle that illustrates the risk. Richards v. Jain, 168 F Supp 2d 1195 (WD Wash 2001), was not a true "inadvertent" production case, because the plaintiff's law firm received the privileged documents directly from its client, who had secretly taken them with him when he left his job with the defendants. Rather than notify its opponents and litigate the waiver issue up front, the law firm simply used the documents in formulating its case strategy. When the defendants found out, they moved to disqualify the plaintiff's firm. The court agreed, holding that because there was no other way to "unring the bell" to erase the law firm's knowledge of the confidential information, disqualification was an appropriate sanction. Although disqualification is only one possible remedy, Richards drives home the risk of what can happen if a recipient of inadvertently produced confidential information uses the material involved without first litigating privilege waiver and obtaining a ruling from the court.

2005-2006 FBA OREGON CHAPTER OFFICERS AND DIRECTORS

For the District of Oregon *is a quarterly newsletter of the Oregon Chapter of the Federal Bar Association. Co-editors Timothy W. Snider and Erin Lagesen, 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.*

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Missing Electronic Notices?

We have been sending the electronic notices via our listserv. While we have made every effort to obtain our members' e-mail addresses, we need your help to keep our list accurate and current. For those members without e-mail, we are providing the electronic notices by fax. If you have an e-mail address or fax number and have *not* been receiving electronic notices, or if your e-mail address changes, please contact our listmaster: **Seth Row, Bullivant Houser Bailey**, 503-499-4465, seth.row@bullivant.com

Call for Submissions/Publication Schedule

For the District of Oregon welcomes submissions from everyone as well as our regular contributors. The **deadlines** are: **June 15** (Summer edition), **September 15** (Fall edition), and **December 1** (Winter edition), **March 16, 2007** (Spring edition). 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 lunch on the third Thursday of each month, at noon in a NEW LOCATION: the Jury Assembly Room in the Mark O. Hatfield U.S. Courthouse, 1000 SW Third Avenue, in Portland. The luncheon cost is $15 for members and $20 for nonmembers. You may bring your check, payable to the FBA, to the luncheon. The lunch will be catered by Fete Catering.
On the menu: sliced grilled mesquite chicken breast with confetti rice salad and roasted vegetables; a vegetarian dish will also be available. Please RSVP to Jamie Barenchi at 503-595-4132 or jamie@vangelisti.com.

FBA members are also welcome to bring their own lunch and attend free of charge so long as they RSVP to Jamie Barenchi. It is VERY IMPORTANT that you RSVP for the luncheon by NOON on the Tuesday before the luncheon so that we can ensure enough tables and lunches for those who purchase a lunch.

Upcoming Speakers:

April 20—Judge Anna Brown

May 18—Federal Public Defender Steven Wax

June 15—Annual Meeting of Oregon Chapter with Free Lunch for Members (Speaker to Be Announced)

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