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Oregon eCourt update: Better access, better information, and better outcomes

By Lisa J. Norris-Lampe, Attorney at Law, and David Factor, Attorney at Law

Oregon eCourt "went live" in the first Oregon state trial court in June, the beginning of an historic transition to electronic case processing in the state trial courts.

What is Oregon eCourt?

Oregon eCourt is a technology-based, business transformation process for Oregon's state courts. Its goal is to provide better access, better information, and better outcomes for Oregonians. Access will be improved by allowing electronic filing of case documents via the Internet and remote access to case documents, as allowed by rule. Oregon eCourt will provide better information by easier access to documents and by moving to a person-based system, so judges can see all the cases involving a party throughout the state, instead of being aware of only the case before them. These improvements will produce better outcomes, by streamlining court processes, and will make it easier for Oregonians to obtain court information and pay court-imposed financial obligations. Courts will have more information for judicial decision-making.

Pilot courts: what to expect

The new Oregon eCourt software system—known as Odyssey —began operating in Yamhill County Circuit Court on June 4, 2012. The software is already in use in six states and many major metropolitan courts, including Dallas, Miami, and Las Vegas.

Attorneys and other litigants will see changes in the months ahead as eFiling and other services become available. When fully implemented, Odyssey will allow Oregonians to file and serve documents electronically, obtain online access to many court documents, and pay fees, fines, and other court-imposed financial obligations online.

The initial Yamhill County installation focused on implementing the internal case management and content management components, to allow electronic case processing by the court. In the near future, parties will be able to eFile pleadings and documents and serve most eFiled pleadings electronically. Ultimately, they will be able to obtain online access to many court documents. Self-guided online registration and training opportunities for eFiling will installed with Odyssey in each trial court. These will include user guides, frequently asked questions (FAQs), and a help system.

Oregon eCourt rollout

The Odyssey system now is being evaluated and adjusted as needed, preparing for installations in Crook, Jefferson, and Linn Counties in December 2012 and in Jackson County in

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Lisa J. Norris-Lampe is a staff attorney for the Oregon Supreme Court and chairs the Oregon eCourt Law & Policy Work Group.

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March 2013. After those "early adopter" courts have used the Odyssey system and additional necessary adjustments are made, the system will be implemented in phases in the rest of the state courts, including anticipated installation in Multnomah County in June 2014. The approved rollout schedule proposes completion statewide in 2016, but depends on funding decisions yet to be made by the legislature.

Court rule development

To accommodate immediate or impending Oregon eCourt changes, three sets of court rules have been changed by chief justice orders (CJOs) issued in June and July 2012. The CJOs all are in effect but cover different types of rule changes.

The first CJO approved a standardized set of supplementary local rules (SLRs) for the Yamhill County Circuit Court. These are intended to be adopted by each circuit court as the Odyssey system is installed in that court. The new SLR chapter will be available at each local court's website as that court adopts the SLRs, all of which are available at **http://courts.oregon.gov/OJD**. The SLRs cover a variety of subjects, including electronic court notifications, electronic signatures, elimination of paper-copy and stamped-envelope requirements, and timing for ex parte submissions.

The second CJO updates a variety of uniform trial court rules (UTCRs) to avoid exclusive application of current rules to a paper-based environment. For example, references to "piece of paper" and "letter" have been changed to "document." These changes generally are considered to be conforming amendments and not substantive changes in process. The changes in this second CJO have been incorporated into the August 1, 2012, version of the UTCRs, available at **http://courts.oregon.gov/OJD/programs/utcr/utcrrules**.page?. The CJO is available at **http://courts.oregon.gov/OJD/programs/utcr/PriorUTCRRules.page?**.

The third CJO adopted comprehensive amendments to UTCR Chapter 21 (filing and service by electronic means), to ensure that the provisions of that chapter are consistent with Oregon eCourt system functionality. Like the second CJO, the Chapter 21 amendments have been incorporated into the August 1, 2012, version of the UTCRs, available online.

Another new court rule, UTCR Chapter 22, is being developed to facilitate future remote electronic access to certain case file documents, as discussed in the next section of this article.

Future remote electronic access to case file documents

Remote electronic access to case file documents is not part of the initial Yamhill County deployment, due to several planning and policy issues. The Oregon eCourt Program created the Law and Policy Work Group in 2008. For several years, it has been making recommendations and has drafted a proposed UTCR Chapter 22, with companion amendments to other UTCRs, which would govern future remote access. The work group is comprised of judges and staff from throughout the Judicial Department, as well as outside attorneys. The new rules would be effective upon adoption and would apply when remote access becomes available as part of the Oregon eCourt system.

The proposed rules — consisting of a new Chapter 22 and amendments to UTCR 2.100 and 2.110 relating to segregation of protected personal information — would affect only remote access. They would not affect in-person records access. The rules would establish a system of registered users and graduated access rights depending on whether the user is a lawyer of record, other Oregon State Bar member, an employee of a designated governmental partner agency, or a general public user.

The proposed rules strive to balance competing policy choices that are inherent in any electronic court environment: providing broad public access to case information and court documents, while also protecting against unauthorized or inappropriate disclosure of certain identifying information—to protect against identity theft, fraud, and other crimes —and to prevent unnecessarily broad disclosure of sensitive information. The proposed rules unquestionably recognize the "public" nature of most court documents, but also recognize risks in providing unlimited remote access to every document in a "public" case file.

Draft UTCR Chapter 22 incorporates a number of concepts. First, remote access to any document or case that is confidential should be available only to registered users who are permitted by law to view the document. Second, remote access rights would be graduated and based on a user's relationship to a case, to the Bar, or to the Oregon Judicial Department (OJD). Third, most public documents currently available in the courthouse should be available

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to any registered system user through remote access, subject to specified exceptions.

The first and most significant exception for practitioners in civil and criminal law cases would require that a filer in those case types protect any "protected information" about another person (e.g., Social Security number, active bank account numbers, names of minors, etc.), by segregating that information from the primary document and filing a separate "Chapter 22 Segregated Document." Alternatively, the protected information may be redacted. Then, the document containing the Chapter 22-protected information would be available through remote access to limited registered system users (including lawyers of record and other Bar members), but not to all registered public users. In criminal cases, additional information would be required to be redacted.

Second, significant limits would be imposed on remote access to protective orders and related case information that are subject to restrictions under the federal Violence Against Women Act (VAWA), 18 USC § 2265(d)(3). Cases filed under the Elderly Persons and Persons with Disabilities Abuse Prevention Act, ORS 124.005 to 124.040, are subject to the restrictions set out in VAWA.

The third exception relates to documents in domestic relations, probate (including guardianship and conservatorship), and tax cases. The Law and Policy Work Group originally recommended that the future remote-access system should limit the availability of party and third-party-filed documents to certain registered system users—again including lawyers of record and Bar members, but not registered public users. Although the current draft of UTCR Chapter 22 includes provisions consistent with that recommendation, the work group is developing an alternative recommendation, if the future system cannot accommodate the original recommendation. The policy issues surrounding those three case types involve the following factors:

- A significant amount of "protected information" appears in documents in those case types, which in turn would impose a substantial segregation or redaction burden on filers and possibly the courts.
- A significant number of self-represented litigants who may not successfully comply with court rules on segregation and redaction appear in those case types.
- A significant amount of the documents in those case types include information that—although not necessarily qualifying as confidential or protected information—is sensitive and often considered private and intimate, such as allegations of domestic wrongdoing or abuse, information about children, information about mental and physical health, and detailed financial information.

The fourth exception identifies particular documents in certain case types (largely criminal and domestic relations) that would be available only to certain registered system users, based on the nature of the document.

In 2010 and 2011, a joint OJD-Oregon State Bar eCourt task force reviewed the proposed Chapter 22 and companion amendments and sought feedback from various Bar sections. Also in 2011, the proposals were submitted to the OJD UTCR Committee, with the opportunity for public comment. In early 2012, the Oregon eCourt vendor reviewed the recommendations in a feasibility review and responded that some recommendations required simplification or other updating, in light of current system abilities. In response to that feasibility review, the Law and Policy Work Group is reconsidering some of its earlier recommendations and making updated recommendations to the Oregon eCourt steering committee and program sponsors.

The draft Chapter 22 based on the original Law and Policy Recommendations is available for review at **www.osbar.org/_docs/judicial/eCourt/eCourtProposedUTCRAmendments091611.doc**. However, that draft should be considered a work in progress, because policy and system feasibility issues continue to be resolved. The timeline for remote access to case file documents is being developed consistently with the adoption of the UTCR Chapter 22 and companion amendments, which will occur out of cycle.

Other eCourt progress

ePay. People who owe fines or must make monthly payments to Oregon circuit courts can now do so online. OJD has installed an ePay system in every circuit court except Yamhill County. Yamhill County ePay is anticipated to be installed sometime in fall 2012. As of August 29, 2012, the system had responded to 115,914 look-ups, and processed 40,709 payments for a total value of $3,813,334. Each online look-up and payment represents a phone inquiry, counter visit, payment processing, or other activity that did not have to be handled by a staff person. In addition, online payers are not affected by increasing wait times for phone calls or assistance at court counters. For more information, go to **http://courts.oregon.gov/OJD/OnlineServices/ePay/index.page?**.

eCitation. Circuit courts and the Oregon State Police are saving significant amounts of time by processing citations electronically. OSP troopers in all 36 counties currently transmit violations to circuit courts electronically. The electronic processing saves court staff time from data entry, eliminates the opportunity for data entry errors in these matters, and allows state troopers to spend more time on patrol and less time doing paperwork. Oregon's trial courts have processed more than 35,000 eCitations in the last 13 months.

The Oregon eCourt Program has been years in the conception and planning stages. OJD appreciates the support and assistance from Oregon State Bar members and is pleased to be implementing the Odyssey system, which will deliver the promise of Oregon eCourt: better access, better information, and better outcomes. ■

A judge's perspective on court visitors

By Hon. Claudia M. Burton, Marion County Circuit Court Judge

Claudia M. Burton is a trial court judge in the Marion County Circuit Court in Salem, Oregon. She hears a variety of cases, including criminal matters, divorce and child custody, personal injury, business disputes, and guardianships.

Visitors are a critical bulwark against misuse of protective proceedings, especially because, unlike other states, Oregon does not require a hearing or appointment of counsel for the respondent in every protective proceeding. The courts rely heavily on visitors as a source of neutral and unbiased information, particularly in cases where there are conflicting "camps" with radically different versions of events. In this article, I will address some of the issues the court commonly sees related to court visitors.

When does the court need/want a visitor?

Of course, a visitor is required in any adult guardianship, but a visitor may also be appointed by the court in any other protective proceeding. ORS 125.150(1). The most likely situations where a judge will want a visitor in addition to the requirement in an adult guardianship are contested conservatorships, almost all minor guardianships, and uncontested conservatorships that just don't "smell right." (For example, the proposed conservator wants bond waived because he or she isn't bondable, or the proposed conservator appears to have a conflict such as being indebted to the respondent.)

Once a fiduciary has been appointed, I generally want a further visitor's report if there is an issue or concern about the welfare of the protected person. Some common examples: family disagreement about placement of the protected person, questions about whether particular persons should be permitted to have contact with the protected person, and any number of issues about whether the fiduciary is appropriate. See ORS 125.160 regarding subsequent appointment of a visitor.

How is a visitor appointed?

Practices for appointing visitors vary by judicial district. In Marion County, for example, the court provides a list of approved visitors which is posted on the court's website at: **http://courts.oregon.gov/Marion/docs/Services/VisitorList.pdf**. Judges expect counsel to select a visitor from the list, contact the visitor to ensure availability and make fee arrangements, and submit the order appointing the visitor. The court will email the visitor to confirm that he or she has been appointed after the order is signed. Please note that judges will strike language that purports to override the respondent's physician-patient privilege and allow the visitor to examine medical records. Judges are aware of no authority that permits the court to waive physician-patient privilege merely by appointing a visitor.

In other counties, the petitioner pays the visitor's fee directly to the court and the court selects and appoints the visitor. If you are unsure about the procedure in a particular county, I would encourage you to first check that judicial district's website. (Links to each judicial district's website can be found at **http://courts.oregon.gov/OJD/courts/index.page**.) Given the budget situation, court staff is increasingly stretched thin, so anytime they don't have to answer a question over the phone, it's appreciated. If you don't find an answer that way, the probate staff in that judicial district should be able to direct you.

What kind of training and experience should the visitor have?

ORS 125.165(1) requires the presiding judge in each judicial district to establish by court order the qualifications for persons to serve as court visitors, and standards and procedures to be used by visitors in the performance of their duties. The order entered by the presiding judge in Marion County may be found at the court's website: **http://courts.oregon.gov/Marion/docs/Services/PJVisitorOrder.pdf**. All the visitors on the Marion County court's approved-visitors list meet the requirements of the presiding judge's order. All the visitors on the Marion County list have also completed a required training program. Information about the training program can be found at **http://courts.oregon.gov/Marion/Services/Visitors.page?**. In addition, the Marion County handbook for court visitors is available as a free PDF download from the same URL.

Because the qualifications are established by the presiding judge, they will vary by judicial district. Again, you shoud check the court's website first, and contact the court's probate staff if you aren't able to find an answer on the website.

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How do you get information to the visitor?

You or your client may have information that you feel is important for the visitor to know, such as names of witnesses to whom the visitor should speak or background documents such as police reports or medical records. In Marion County, there is no prohibition against counsel or the parties contacting the visitor to provide information. Obviously, this should be done in a manner that is appropriate and respectful of the visitor's time, and generally should be directed through counsel rather than by the parties. In other counties (Lane, Washington, and perhaps others), the visitor is regarded as an extension of the court, and contact with the visitor is akin to ex parte contact with the court. In Lane County, the attorney may contact the court or file a supplemental petition with the additional information. The court will relay the information to the court visitor. Again, this is an area where practices vary by county. Please check the court's website first. If you don't see an answer, contact the probate department.

What information will be in the visitor's report?

ORS 125.155 sets forth the matters that the visitor's report must address. In addition to providing an opinion as to whether the allegations of the petition are substantially correct and the nominated fiduciary is appropriate, the visitor is also required to report whether the respondent objects to the petition and wishes to be represented by counsel.

In Marion County, the visitors are required to use a specific report form adopted in our presiding judge's order regarding standards and practices for the performance of the visitor's duties. That form is also available on the court's website. In judicial districts that have not adopted a form that meets its minimum standards, UTCR 9.400 now requires use of UTCR form 9.400.1. The adoption of a minimum form by the UTCR was intended to ensure that all visitors' reports at least meet the minimum statutory requirements. If you nevertheless receive a visitor's report that does not provide the statutorily required information, I would suggest that you alert both the court visitor and the court.

The visitor's testimony at hearing

If you are the proponent of the visitor's testimony, I recommend that you always begin by establishing the qualifications and experience of the visitor on the record, even if you know the court is very familiar with the particular visitor. Having the visitor established as an expert is extremely helpful, and I am surprised by how many attorneys do not seem to know how to do this. In Oregon you are not required to ask that the court find that you have established the qualifications of your expert; you ask the foundational questions and it is up to the other side to object if they do not feel that a foundation for expert testimony has been laid.

The written report itself is hearsay—an out-of-court statement offered for the truth of the matter asserted. Although the report is required by statute, there is no specific hearsay exception for it. If you are offering the report and are confronted with a hearsay objection, you could argue that the report meets the "business records" hearsay exception (ORS 40.460(6)) or the "catchall" exception found in ORS 40.460(28). As a practical matter, the statute requires that the visitor report to the court, not just to the parties. Moreover, the visitor's report is required to include information that the court needs to know, such as whether the protected person objects or wants counsel. And, as noted above, because Oregon does not require a hearing or appointment of counsel in every case, it is essential that the court read the visitor's report because it may be the only way for the court to obtain critical information. Therefore, in all likelihood the judge who is the trier of fact will have read the visitor's report before the hearing. It certainly appears that the overall statutory scheme contemplates that the judge will read the report.

In my experience, the parties stipulate in most hearings to admit the visitor's report into evidence. I encourage you to do this, even if your client's position is adverse to the visitor's recommendation, because it is unlikely that you will successfully prevent the information from coming out. These cases are not like criminal jury trials where if you successfully suppress evidence the state must try the case without it. The more likely result is simply increasing the cost and length of the hearing or perhaps even requiring a continuance. This rarely serves any of the parties' interests. These cases are ultimately about the best interests of the respondent, and the court is going to be very interested in obtaining as much information that bears on that issue as it can, and is correspondingly unsympathetic to evidentiary objections that appear to be designed to hide information from the court. Of course the judge is going to follow the rules of evidence, but we do have substantial discretion in deciding, for example, whether to allow a witness to testify by phone or to allow a continuance if a certain witness becomes necessary due to the exclusion of all or part of the visitor's report.

Ultimately, though, whatever position you decide to take with regard to the visitor's report, please discuss it with opposing counsel and parties ahead of time. If there are going to be objections to the report coming in, it is much better for all sides to be prepared for this and to be able to present the issue to the court in an organized fashion—most often at the beginning of the hearing.

Hearsay objections may also arise with regard to certain content in the visitor's report or the visitor's testimony—that being the visitor's reports as to what various persons said to her. Note that if a witness is qualified as an expert, he or she may explain the basis for his or her opinion even if the basis is hearsay. ORS 40.415.

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Court visitors are trained professionals who serve an important role in protective proceedings.

You should also keep in mind, though, that this only gets the hearsay admitted as the basis of the expert's opinion, not as the truth of the matter. If it is critical to the visitor's opinion that the Adult Protective Services worker reported that the respondent was living in a filthy, urine-soaked apartment, but the respondent has been placed in another situation by the time the visitor sees him, it would be wise to call the APS worker as a witness and not just rely on the visitor's report of what the worker told the visitor. Needless to say, a visitor's report that relies heavily on reports of certain family members will lose credibility if their statements to the visitor are proven to be untrue or they are shown to be unreliable reporters. A visitor's report that includes the visitor's own direct observation of the respondent will be more helpful than one that relies only on what family members reported to the visitor.

As mentioned above, there is nothing magical about the fact that a petition for guardianship has been filed that somehow dissolves the physician-patient privilege. If the respondent refuses to sign releases, the visitor may not be able to obtain medical information. At this point you need to consider how critical the medical information is to your case. If the respondent performs poorly on cognition testing by the visitor, and shows the visitor a prescription bottle of a medication that is supposed to be taken daily and is still mostly full despite being dated three weeks ago, the visitor probably really doesn't need to see the physician's chart notes. In other cases, the medical information may be much more critical. If you really need the medical information and the respondent is unwilling to release it, file a motion under ORCP 44 for an examination. If you represent a respondent who is unwilling to release medical information, you should probably advise that person that there is a good chance the court will order an ORCP 44 evaluation, which may be more intrusive than just releasing existing records.

Do not ask questions that do not address the statutory criteria; e.g .,"Do you think the respondent needs a guardian?" or even "Do you think the respondent could use some help?" The court recognizes that some attorneys are sensitive to the risk of hurting or offending the respondent, and of course the court does not like to see that either. But if you represent the petitioner, your burden of proof is clear and convincing evidence of a specific statutory standard. ORS 125.305(1); ORS 125.400; ORS 125.005(3) and (5). Do ask questions that address this; e.g., "In your opinion, is the respondent's ability to receive and evaluate information effectively or to communicate decisions impaired to such an extent that the respondent presently lacks the capacity to meet the essential requirements for the respondent's physical health or safety?"

Assuming the answer is yes, ask further questions about why and show that the respondent is unable to take those actions necessary to provide health care, food, shelter, clothing, personal hygiene, and other care without which serious physical injury or illness is likely to occur. Although the court needs to hear the visitor's opinion, the court also needs to understand the facts behind it, because the court has to make its own legal judgment as to whether the statutory standard is in fact met. For example, the visitor might think that failing to take high blood pressure medication regularly meets the statutory standard; the judge might not agree.

If the visitor's opinion is adverse to your client's position, look carefully at the basis for the visitor's opinion. If the visitor relies heavily on reports from family members, can you show that those reports are untrue or impeach the credibility of those family members? Also consider whether the visitor has spoken to all the relevant witnesses. I recently had a hearing on a petition filed by the respondent's daughter in which the visitor had not interviewed the respondent's husband, with whom respondent had been living until removed from the home by the daughter.

Most of all, even if you disagree with the visitor's conclusions and manner of investigation, at all times treat him or her with professional courtesy and respect. Visitors are trained professionals who serve an important role in protective proceedings. As with any group of professionals, you will find some who are more gifted or whose methods are more to your liking. But if you continue to practice elder law, you are unlikely to encounter any given court visitor only once. Burning bridges or creating resentment will not help your practice or your future clients. ■

A litigator's perspective on conservatorship hearings

James R. Cartwright has extensive trial experience with protective proceedings, will contests, removal actions, trust litigation, elder financial abuse cases, and a broad range of property and tort actions.

In a recent interview with Elder Law Newsletter editor Carole Barkley, Portland attorney James R. Cartwright shared some observations. This article is a general summary of the conversation.

What brings a litigator like you into a protective proceeding?

The short answer is a fight about money. I am not usually contacted unless there are significant assets at issue. More and more frequently it seems protective proceedings are being used to challenge an individual's estate plan during their lifetime. On occasion, a conservatorship is pursued to put someone in place with the legal authority to recover assets that were misappropriated from a vulnerable adult.

Aren't protective proceedings about protecting the respondent's interests?

They should be, but sometimes they are not. Often, particularly where large estates are involved, the proceeding can be more about obtaining power and control over a person and his or her assets.

What are the issues in a typical litigation over a conservatorship?

There are three legal issues to be addressed in a conservatorship:

1. Is the person capable of managing his or her financial affairs? A respondent in a conservatorship case typically has some cognitive impairment—usually dementia. The issue to be determined is whether the respondent's actions are the result of cognitive impairment or just bad decision-making that he or she has likely displayed throughout his or her lifetime. In addition, there are situations where an individual may be capable of managing personal finances but is susceptible to financial exploitation. Therefore, a conservator may be necessary to protect assets from exploitation rather than mismanagement.
2. Does the respondent have assets that require a conservator? If all the respondent's assets are owned by a trust, a conservator is not necessary. Oregon case law provides for the appointment of a conservator if a trustee is mismanaging trust assets of a financially incapable beneficiary. However, the Uniform Trust Code also provides for the appointment of a special representative on behalf of a financially incapable beneficiary. A special representative has the legal authority to monitor a trustee and initiate litigation, if necessary, against a trustee, on behalf of the beneficiary. For reasons that are unclear to me, the appointment of a special representative is underutilized by attorneys. In my professional opinion, it is more appropriate to appoint a special representative than a conservator when the management, or mismanagement, of a trust is at issue. Finally, if an individual has executed a power of attorney and nominated an individual to manage his or her finances, a conservator is not necessary. However, if the power of attorney is misused or if the respondent revokes the power of attorney, appointment of a conservator may become necessary.
3. Once the court determines an individual is financially incapable and has assets in need of management, the final issue is identification of the most appropriate person to serve as conservator. Ideally, the court should look to the family member the respondent relied on or nominated in his or her estate plan to take on that type of role. However, if the individual is unwilling to serve, or if the family dynamics are contentious, as they frequently are, it may be most appropriate to nominate an unrelated third-party professional fiduciary.

What types of evidence are persuasive in conservatorship proceedings?

Evidence of financial incapacity can include unpaid bills, a house going into foreclosure, utilities being turned off—anything that indicates the person is not in control of his or her finances. Witnesses can include social workers, neighbors, friends—anyone with personal

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knowledge of the situation. Specific and concrete examples of an individual's inability to manage finances are often the most persuasive evidence of financial incapacity.

What factors do you consider when deciding whether to call the respondent as a witness?

The most important factor is how the respondent will present in court. Testifying in court is difficult for everyone; it is particularly difficult for someone suffering from dementia. Sometimes a respondent will seem fine at home or in the attorney's office but then becomes overwhelmed when in a courtroom. If I represent the petitioner, it is my strong preference to prove my case without calling the respondent as a witness. Sometimes it is unavoidable, however, and a respondent has to testify because they either want to or you need that testimony to prove your case. Depending on the situation and the attorneys involved, arrangements can be made for the respondent to simply speak to the judge in chambers in the presence of counsel. Of course, this is not on the record, which could raise appellate issues down the road. It is also generally an opportunity for the respondent to "talk to the judge," not a time to conduct direct or cross examinations.

If you represent the respondent, it is good practice to have a dress rehearsal where you question the person as he or she would be questioned in court. Deposition can also be a useful tool for evaluation. Depositions provide you with an opportunity to assess the respondent's functioning by asking questions such as, "Do you see the people in the room here? Who is the person sitting next to you? What is his name? What is his job? What year is it?" If the answers are "Yes," "I don't know," and "1940," it is a clear indication that the person will not present as a persuasive witness.

How do you approach cross-examining a court visitor when you disagree with his or her conclusions?

Approach cross-examination with great care. Court visitors are very capable experts who are used to being witnesses; never confront them head on. If you decide to ask questions (and not asking any questions may be the right choice) then the best technique is to ask questions that suggest they have not been as thorough as they might have been in their investigation. Ask if he or she talked to specific people or investigated specific facts. It is not easy to cast doubt on the court visitor's recommendations. They tend to be thorough.

How do you prepare for mediation?

I prepare a statement for the mediator. This is not a one-sided brief; rather, it is an objective summary of the strong and weak points of my case and my perception of the strengths and weaknesses on the other side. I also confer with my client before the mediation so that we are ready to go to work when the mediation starts. Too many attorneys seem to be briefing their clients for the first time during the mediation itself, which is a waste of everyone else's time.

What should a lawyer expect from the mediator?

The mediator's role is to assist the parties in reaching a settlement. His or her personal opinion about the dispute should be beside the point. In my opinion the mediator should act as a facilitator.

What are some of the common strategic or procedural errors that other lawyers make in these cases?

A common problem is failure to consider a respondent's existing estate plan (trust, power of attorney, advance directive) and subsequent evaluation of the most appropriate litigation vehicle to achieve your desired result.

In cases where there is significant family dysfunction, there is a tendency among attorneys to "believe" their side over another or paint one family member as the "good" person and the other family member as the "bad" person. This is a big mistake and can result in profoundly impaired judgment on the part of the attorney. It is important to keep in mind that there is always another side to the story, the family dysfunction likely goes back decades, and there is rarely one person who is "all good" and another who is "all bad."

Finally, it is always important to remember that no matter how strong your case, there is always risk in going to trial. In addition to the enormous costs associated with litigation, there can be further significant, if not irreparable, damage done to family relationships. In general, a negotiated settlement is preferable to going to trial. ■

Evaluating competencies: Forensic Assessments and Instruments, Second Edition
By Thomas Grisso
Perspectives in Law and Psychology, Volume 16

This book offers a conceptual model for understanding the nature of legal competencies. The model is interpreted to assist mental health professionals in designing and performing assessments for legal competencies defined in criminal and civil law, and to guide research that will improve the practice of evaluations for legal competencies. A special feature is the book's evaluative review of specialized forensic assessment instruments for each of several legal competencies.

Rcommended by forensic psychologist Brooke K. Howard, Ph.D.

Elder law Section sponsors annual CLE program

The Elder Law Section sponsored a CLE program in Portland on October 5, 2012. Topics included *The Ten Commandments of Communicating with People with Disabilities, Financial Abuse by a Fiduciary, Litigating Capacity for Contested Guardianships, SSI, Medicaid, and VA: Transfers and Trusts, When Family Law Meets Elder Law,* and a legislative update.

Planners for the program were Don B. Dickman (Chair), Geoff Bernhardt, Victoria Blachly, Penny L. Davis, Steven A. Heinrich, S. Jane Patterson, Kay Hyde-Patton, Sylvia Sycamore, and Mark M. Williams. ■

Section Chair Geoff Bernhardt (right) introduces Denise Gorrell (left) and Victoria Blachly (center) who spoke on Contested Guardianship Proceedings

(Left to right) Section Chair-Elect Whitney Yazzolino discusses the CLE program with Eric Kearney, Maddy Sheehan, Steve Owen, and Julie Lohuis.

Important elder law numbers

as of
October 1, 2012

Supplemental Security Income (SSI) Benefit Standards	Eligible individual.....$698/month Eligible couple $1,048/month
Medicaid (Oregon)	Long term care income cap.....$2,094/month Community spouse minimum resource standard ..... $22,728 Community spouse maximum resource standard .....$113,640 Community spouse minimum and maximum monthly allowance standards.....$1,892/month; $2,841/month Excess shelter allowance ..... Amount above $567/month Food stamp utility allowance used to figure excess shelter allowance .....$401/month Personal needs allowance in nursing home.....$30/month Personal needs allowance in community-based care .....$155.30/month Room & board rate for community-based care facilities ..... $542.70/month OSIP maintenance standard for person receiving in-home services .....$698 Average private pay rate for calculating ineligibility for applications made on or after sOctober 1, 2010.....$7,663/month
Medicare	Part B premium ..... $99.90/month* Part B deductible..... $140/year Part A hospital deductible per spell of illness .....$1,156 Part D premium .....Varies according to plan chosen Skilled nursing facility co-insurance for days 21-100.....$144.50/day

* *Premiums are higher if annual income is more than $85,000 (single filer) or $170,000 (married couple filing jointly).*

Resources for elder law attorneys

Websites

Elder Law Section website
www.osbar.org/sections/elder/elderlaw.html
The website provides useful links for elder law practitioners, past issues of *Elder Law Newsletter,* and current elder law numbers.

OregonLawHelp
www.oregonlawhelp.org
This website, operated by legal aid offices in Oregon, provides helpful information for low-income Oregonians and their lawyers. Much of the information is useful for clients in any income bracket.

Administration on Aging
www.aoa.gov
Provides information about resources that connect older persons, caregivers, and professionals to important federal, national, and local programs.

alzheimers.gov
http://alzheimers.gov
The federal government's free information resource about Alzheimer's disease and related dementias.

Seniors and People with Disabilities
Rates for home and community-based care and nursing facility services
www.dhs.state.or.us/spd/tools/program/osip/rateschedule.pdf

Oregon Legal Research blog
http://oregonlegalresearch.blogspot.com
Written by Oregon public law librarians. Legal research tips, advice to the legal blogger, commentary on reading material, etc..

BigCharts
http://bigcharts.marketwatch.com/historical
Provides the price of a stock on a specific date.

National Clearinghouse for Long Term Care Information
www.longtermcare.gov/LTC/Main_Site/Index.aspx
Information and resources to help plan for future long term care needs.

Social Security administration Spanish-language website
www.segurosocial.gov
This website provides online application for retirement and Medicare benefits. Information and publications are written in Spanish. ■

CLE seminars

Oregon State Bar Programs
http://osbarcle.org

2012 Americans with Disability Act Update
October 25, 2012
Quick Call program

Attorney Ethics in Digital Communications—Remote Networks, Smartphones, the Cloud, and More
November 6, 2012
Quick Call program

Administering Oregon Estates: 2012 Edition
November 16, 2012
Oregon Convention Center • Portland

Discretionary Distributions: A Practical Guide to Planning, Drafting, and Administering
November 27, 2012
Quick Call program

Oregon Law Institute Programs
http://law.lclark.edu/continuing_education

Probate Litigation: Key Issues for Lawyers Who Work with Wills and Trusts
November 15, 2012
Oregon Convention Center • Portland

NAELA Programs
www.naela.org

2013 UnProgram
May 2–4, 2013
Atlanta, Georgia

Annual Conference
January 18–20, 2013
Dallas, Texas ■

Elder Law Section electronic discussion list

All members of the Elder Law Section are automatically signed up on the list, but your participation is not mandatory.

How to use the discussion list

Send a message to all members of the Elder Law Section distribution list by addressing it to: **eldlaw@lists.osbar.org**. Replies are directed by default to the sender of the message *only*. If you wish to send a reply to the entire list, you must change the address to: **eldlaw@lists.osbar.org**—or you can choose "Reply to all."

- Include a subject line in messages to the list.
- Try to avoid re-sending the entire message to which you are replying. Cut and paste the relevant parts when replying.
- Sign your messages with your full name, firm name, and appropriate contact information.
- In the interest of virus prevention, do not try to send graphics or attachments. ■

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Oregon State Bar

Elder Law Section

Newsletter Board

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Statements of fact are the responsibility of the authors, and the opinions expressed do not imply endorsement by the Section.