

A portrait of a smiling woman with dark hair pulled back, wearing a white collared shirt under a black blazer. She is wearing red teardrop earrings and a necklace with three small round pendants. The background is a blurred office interior with a window showing a cityscape.

Litigation Skills for Legal Staff: ADR, Trial, and Post-Trial Matters and Appeals

Prepared by:
James F. Marron
Marron Law, LLC

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Alternative Dispute Resolution

A. Mediation

“Mediation” involves the use of a neutral third-party who intervenes between the parties to a dispute in order to assist them in settling their disagreement. As is the case with arbitration, the parties can select their own mediator or a mediation service that can appoint a mediator for them. The parties share the cost of the mediator. The mediator does not make binding decisions and leaves the responsibility of reaching a solution to the dispute upon the parties themselves. Mediation often resolves disputes faster and cheaper than either arbitration or litigation.

Mediators generally prefer to receive written submissions prior to mediation in order to understand what the dispute is about. In this regard, a legal professional can be of great assistance in organizing a mediation notebook and helping prepare relevant materials for timely submission to the mediator.

B. Arbitration

Arbitration is a private trial. Arbitration is available when the parties to a dispute enter into an agreement that complies with Oregon’s arbitration statute; ORS 36.600-.740; under which they agree to submit their dispute to a disinterested person or persons for a final decision. The parties, by agreement, can select the arbitrator(s) directly or pick an arbitration service that will select an arbitrator for

them to resolve the dispute. Such agreements are recognized as valid and enforceable under both Oregon and Federal law. ORS 36.620(1); 9 USCA § 2. An arbitrator must be paid by the parties and the fees for proceeding through an arbitration service like the American Arbitration Association (AAA) or Arbitration Service of Portland (ASP) are usually larger than court filing fees.

Arbitration can resolve disputes faster than a trial due to the absence of formal procedures and limited discovery that enables parties to present their dispute to the ultimate decision maker faster than is the case with a trial. Arbitrator's decisions are also subject to more "restricted" appellate rights than is the case with litigation. See e.g. ORS 36.730. Consequently, the over all expense of arbitration can be less than a state court trial due to the attorney fees and costs saved by avoiding the time state court litigation can take, including appeals.

Finally, arbitration allows the parties to select an arbitrator with appropriate expertise to resolve their dispute. Parties can either agree on an arbitrator or designate an arbitration service which has already pre-qualified its arbitrators based on expertise and experience to hear particular disputes.

Arbitration can require advance submission of a prehearing statement of proof that identifies all exhibits to be offered and witnesses who will testify at the arbitration. Prehearing statements of proof must be filed at least 14 days before date of arbitration hearing. UTCR 13.170(1). Failure to timely file a prehearing statement may preclude use of exhibits and/or witnesses at the hearing.

C. Settlement Conferences

A settlement conference is simply mediation with a judge who attempts to help parties settle their dispute before trial. A court may order a settlement conference at any time at request of any party or on court's own motion. ORCP 54F; UTCR 6.010. Pretrial settlement conferences usually require personal appearances by each trial lawyer and party who has full authority to settle a matter, although telephone appearances may be permitted for good cause. UTCR 6.200(2)(b); SLR 6.012 for each county.

As is the case in mediation, prior to the conference the judge typically receives information about the case. The judge may meet with all parties and their lawyers initially, and then meet with each side in confidence, going back and forth between the sides exchanging offers and counteroffers to assist the parties to resolve their dispute.

Trial

Although the filing fee is nominal², reaching a final decision at trial can be costly and time consuming due to the formal pleadings that are required, discovery that can be taken, pretrial motions that can be filed, delays and postponements that are routinely requested and granted, and the fact that any decision made by the trial court is subject to rights of appeal that can significantly prolong the final outcome and/or result in a new trial. Ultimately, litigation entrusts resolution of disputes to a judge or a jury comprised of people from the area in which the court sits.

² In Oregon the filing fee for a civil complaint ranges from \$170 to \$1,178 depending on the amount claimed. ORS 21.160.

A trial requires advance preparation that enables a litigator to easily find evidence and present witnesses during trial. The earlier a file is organized for trial the better. That being said, one of the challenges of litigation is keeping legal expenses as low as possible while also ensuring that a matter is prepared for trial. One of the best ways to achieve this balance is to ensure that all work on a file go towards preparing for trial to the extent possible. In this regard, check lists identifying litigation tasks can be invaluable to keep the team on track.

A. Trial Notebooks

A trial notebook is an invaluable tool for trial. It is a notebook or set of notebooks that organizes everything a litigator needs for trial. Generally speaking, such a notebook should include marked up copies of relevant pleadings, jury instructions, opening statement, witness outlines with relevant deposition summaries, closing argument outline and copies of cases and/or statutes at issue in the trial.

B. Exhibits

As is the case with a trial notebook, organizing document exhibits into a notebook in an easy to follow manner can help expedite trial and/or arbitration.

C. Witnesses

Preparing witnesses for trial testimony takes a lot of time and should never be put off to the last minute. It is important for the facts to be well established and also to gain a good rapport with a witness so they will be as comfortable as possible with testifying and be well prepared. Legal professionals are usually responsible for initial contact with a witness and preparing witness summaries

that the trial lawyer will then use to prepare a witness outline of the points to be proved with the witness and specific questions to ask. Preparing for cross-examining an adverse witness requires a mastery of the facts of their anticipated testimony and any available information that may be helpful to impeach their testimony.

Post Trial Matters and Appeals

The available post trial matters to be concerned about depend largely upon whether you won or lost at trial.

If victorious, matters to watch out for include:

Judgment. A judgment must be prepared in accordance with ORS 18. Advance copies of proposed forms of judgment are governed by UTCR 5.100.

Cost bill/attorney fees. A cost bill and/or fee petition must be filed within 14 days of entry of judgment. ORCP 68C. UTCR 5.080 requires the statement for attorney fees to be substantially in the form set forth in www.courts.oregon.gov/forms.

Collection. If the judgment is not immediately paid it may be necessary to engage in collection activities including obtaining a writ of execution, issuing garnishments, or conducting a judgment debtor exam.

If defeated, matters to watch out for include:

Motion for JNOV. A party must move for a directed verdict at the close of evidence in order to move for a judgment notwithstanding the verdict. ORCP 63. A motion for JNOV must be filed within 10 days from entry of judgment.

Move for new trial. ORCP 64.

Appeal. The timelines are jurisdictional meaning that the appeal will be dismissed if the timeline is missed. A notice of appeal must be filed within 30 days of entry of the judgment. ORS 19.255(1). If a motion for JNOV or new trial is filed the notice must be filed within 30 days of the date the motion is denied or deemed denied as provided in ORCP 63D or 64F.

Stay of proceedings to enforce judgment. Execution may issue immediately in state court. ORCP 72A. A stay of proceedings is at the discretion of trial court. An automatic stay is obtained upon filing a supersedeas bond.



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📍 2510 Alpine Road Eau Claire, WI 54703

💻 www.lorman.com ☎ 866-352-9539 ✉ customerservice@lorman.com



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