

THE MARK O. HATFIELD
COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the
U.S. District Court for the District of Oregon
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Programs

Electronic Evidence Seminar

A day-long seminar outlining the use of electronic evidence from the discovery stage through trial will be presented by the Federal Bar Association at the Mark O. Hatfield U.S. Courthouse on Friday, September 12, 2003. Presenters include The Honorable Ann Aiken, the Honorable Anna J. Brown and Professor Joe Metcalfe from the University of Oregon School of Law. Six CLE credits pending. Inquiries and registration: Katherine.Somervell@bullivant.com

Famous Federal Cases

Thursday, September 25, 2003, from 4:00-6:00 p.m. in the U.S. Courthouse, the U.S. District Court Historical Society will present a **free** program about the Foreign Intelligence Surveillance Act and Court. Guest speakers include Judge Harold Baker, the Honorable Edward Leavy, and Assistant United States Attorney Charles Gorder. CLE credit is pending. Seating will be limited, so RSVPs are required: 503-326-

8009 or e-mail:

Linda.Sherry@ord.uscourts.gov

*NOTE: Photo identification is required for entry into the U.S. Courthouse.

Discovery

The parties in an anti-trust action agreed to a protective order. Each party could designate discovery materials as highly confidential and not to be publicly disclosed. After the jury returned its verdict, the prevailing Plaintiff moved to unseal the record. Two newspapers joined in that request.

Judge Panner discussed the applicable legal standards, and concluded that almost all of the exhibits received into evidence, shown to a witness, or otherwise actually used at trial, must be disclosed. With few exceptions, the public interest in disclosure outweighed potential harm to the defendant. Confederated Tribes of Siletz Indians v. Weyerhaeuser, CV 00-1693-PA (Opinion, July 31, 2003).
Plaintiffs' Counsel:

Mike Haglund
Defense Counsel:
Michael Simon

Jurisdiction

Plaintiff sought a preliminary injunction barring the defendant from distributing a power inverter that allegedly infringed the plaintiff's trade dress. The defendant did not directly conduct business in Oregon, but it did supply a variety of products to mass-retailers, such as Wal-Mart and Home Depot, for re-sale in Oregon. Judge Panner concluded that the court would have specific jurisdiction over a trade dress claim against the defendant premised upon the re-sale of the infringing product in Oregon, since that is the place where the alleged consumer confusion would occur. However, because defendant had no immediate plans to market the challenged product, the court dismissed the action as unripe. Team Products Int'l v. Test Rite Products, CV 03-774-PA (Order, Aug. 5, 2003).
Plaintiff's Counsel:
Mike Haglund, Michael Neff
Defense Counsel:

Owen Dukelow (local)

Criminal Law

A former salesman for Capital Consultants has been charged with numerous violations of Federal Racketeering Laws. Prior to his indictment, the defendant and his attorney met with federal prosecutors for a proffer session. During that proffer session, the defendant claimed that he had sought and obtained the advice of counsel about gifts he had given to pension plan trustees who were investors in Capital Consultants. Defendant named several different attorneys that had represented him during the relevant time period. Prosecutors asked defendant to execute a written waiver of the attorney-client privilege; defendant agreed. The written waiver was very broad and included a waiver of "any attorney, including but not limited to" a list provided by the defendant. Defendant specifically referenced one attorney during the proffer who was not included on the list; defendant specifically disclaimed that he ever sought advice about gifts from that particular attorney. Following the proffer session and defendant's written waiver, prosecutors followed up with defendant's attorneys, including the attorney named but not specifically listed in the waiver. Defendant then moved

to dismiss all counts of the indictment traceable, at least in part, to information provided by that attorney. Defendant claimed that the prosecution had violated the spirit of his proffer agreement and, effectively violated his Sixth Amendment right to counsel.

Judge Anna J. Brown examined the text of the waiver agreement and the factual circumstances surrounding its execution. She concluded that the defendant's waiver of his attorney-client privilege was knowing and voluntary and broad enough to encompass the unnamed attorney. The court found no government misconduct and denied the motion to dismiss. United States v. Kirkland, CR 02-350-BR (Opinion, Aug. 12, 2003).
AUSA: Neil J. Evans
Defense: Lisa Maxfield

Civil Procedure

An environmental group challenged the Forest Service's decision to approve Plans of Operations for seven mining operations and a water diversion project without undertaking the environmental studies required by NEPA. Judge Jelderks vacated some of the challenged Plans after the Forest Service conceded it had erred. The

Forest Service then formally notified the mine operators of the court's action, and of the resulting legal consequences.

The mine operators then filed a second action, seeking a declaration that the judgment in the first action was not binding upon them and they could continue mining under the vacated Plans. Judge Jelderks denied the request, construing it as an impermissible collateral attack upon the judgment in the first action. The court noted the practical problems that would result if a Forest Plan or other agency actions subject to NEPA were deemed valid as to one person but invalid as to another. Once the United States has litigated such matters, the result necessarily must be binding upon all persons, not just upon the United States. The court also noted that the mine operators had known about the original action, yet had made no effort to intervene in that case or to appeal the adverse decision. Aylward v. United States Forest Service, CV 02-214-JE (F&R July 7, 2003; adopted by Judge King on August 3, 2003).
Plaintiffs: Richard Stephens
Defendant: Jeffrey Handy
Defendant-Intervenor:
Elizabeth Mitchell