

## **Choosing the Proper Court: Considerations Affecting a Plaintiff's Choice Between State and Federal Court in Oregon Civil Cases**

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If a plaintiff has a choice of whether to file a civil case in federal court or state court, there are many important factors to consider. This article will cover the more important factors in determining whether to file in the United States District Court for the District of Oregon (federal court) or any of the Circuit Courts of the State of Oregon (state court).

Although the factors tip in favor of filing in state court, practitioners should at least consider the court-system choice when faced with an option.

### **Jurors and Verdict**

In federal court, unless the parties otherwise stipulate, the verdict shall be unanimous. FRCP 48. In state court, three-fourths of the jury may render a verdict. ORCP 59G(2). In effect, the probability of a plaintiff's verdict is greater in state court.

The high hurdle of an unanimous verdict in federal court may be pushed even higher by the federal court practice of limiting plaintiff's counsel's involvement in jury selection. In federal court, counsel are usually limited in the amount of time they can spend questioning individual jurors as compared to state court practice.

In federal court, the pool of jurors is drawn from a larger geographical area than the pool drawn from within a single county in state court. See federal court Local Rule 3.3 for the Oregon counties within each of the Portland, Pendleton, Eugene and Medford Divisions.

### **Expert Discovery**

Oregon state court procedure does not allow for expert discovery. Federal court, however, requires extensive expert discovery. This expert discovery requires the disclosure of a written report of the expert, including opinions and bases, data considered, exhibits, expert qualifications, any publications within the preceding 10 years, compensation paid to the expert, and a listing of other cases in which the expert has testified in the last four years. FRCP 26(a)(2)(B).

FRCP 26(b)(4) also allows for depositions of experts and interrogatories to seek facts and opinions held by the experts. The expert discovery in federal court is costly and time-consuming. Moreover, with the disclosure of experts in federal court, a real risk exists that a defendant may attempt to pressure the plaintiff's expert not to testify, particularly in a medical malpractice action.

## Pleading a Claim

The federal rules require only notice pleading—“short and plain statement of the claim showing that the pleader is entitled to relief.” FRCP 8(a). The state court rules on the other hand require the stricter code pleading—“[a] plain and concise statement of ultimate facts constituting a claim for relief.” ORCP 18A.

In federal court, the plaintiff does *not* have to make the showing under ORS 31.725 (formerly 18.535) to plead a claim for punitive damages. ORS 31.725 conflicts with the Federal Rules of Civil Procedure and therefore does not apply in diversity cases in federal court. *Pruett v. Erickson Air-Crane Co.*, 183 F.R.D. 248, 252 (D.Or. 1998) (Aiken, J.).

Defendants continuously challenge the federal court’s ruling in *Pruett*, but the court has been steadfast in rejecting those challenges. *See, e.g., Eastwood v. American Family Mut. Ins. Co.*, 2006 WL 2934260 at \*5 (D.Or. Oct 12, 2006) (Haggerty, J.) (following *Pruett*); *King v. Deutsche Bank Ag*, 2005 WL 611954 at \*36 (D.Or. Mar. 8, 2005) (Hubel, J.) (same); *Burkhart v. L.M. Becker & Co.*, 2004 WL 1920196 (D.Or. Aug. 26, 2004) (Stewart, J.) (same).

Federal court practice seems to have far less delay with respect to motivating a defendant to file an answer and fewer motions on the pleadings as compared to state court practice.

## Case Management

In federal court, a single judge is assigned for all pre-trial and trial matters, unless all parties do not consent to have the case tried by the Magistrate Judge if assigned. When a case is filed in federal court, a case management scheduling order is issued. This initial scheduling order is often modified after the conference of parties under FRCP 26(f) and then a scheduling conference with the court under FRCP 16(b).

Some of the federal court judges will issue a jury trial management order, which governs the exchange and submission of trial documents. In some instances, the type and scope of trial documents required by federal court is more extensive than state court. The federal court may require these trial documents: joint pretrial order to frame the issues for trial (LR 16.6), lay witness statements with the substance of their trial testimony, expert narratives/disclosures, joint statement of material facts, list of special damages, and proposed joint voir dire questions. Some federal judges have been known to offer to have the parties waive some of these trial documents to bring the practice more in line with state court practice.

The trial documents described above that can be required in federal court are greater in number than the trial documents normally submitted for a state court trial: trial memorandum (UTCR 6.050), motion in limine, exhibit list (UTCR 6.080), and proposed jury instruction and verdict form (UTCR 6.060). The cost and time involved in preparing trial documents for a state court trial can be substantially less than federal court.

Unless a case is assigned to a specific judge as a “complex case” (UTCR 7.030) or the parties submit to a conference with the court (UTCR 6.010), state court procedure usually does not involve court intervention in scheduling discovery.

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## **Accidents Occurring on Navigable Waters**

If a case arises out of an accident on water, the plaintiff may have a choice of forum between state court and federal court. An exemplary resource on this issue is *Maritime Law or Oregon Law: Differences in Casualty Cases* by Carl Neil published in *Trial Lawyer*, Winter 2005.

## **Evidence**

Consult and compare the Federal Rules of Evidence and Oregon Evidence Code if the case may involve critical evidentiary issues.

## **Venue—Courthouse Location**

Filing in state court will put a case in a circuit court in a particular county, but the locations for federal court business will be in Portland, Pendleton, Eugene or Medford. For example, a case arising in Clatsop County may be filed in state court in Astoria or federal court in the Portland Division. The location of parties, witnesses and counsel may bear on the decision to have the case in state court in Astoria or in federal court in Portland.

## **Appellate Systems**

An appeal from federal district court may be heard by any judge in the vast United States Court of Appeals for the Ninth Circuit. A consultation with an appellate lawyer may be beneficial if there is a strong likelihood of an appeal from any judgment.

## **Relative Experience of Counsel**

If the identity of the defense firm is known, the plaintiff's lawyer may want to consider his or her own experience level in federal court vis-à-vis state court as compared to defense counsel. Most defense counsel from out-of-state would feel far more comfortable in federal court than state court.

## **Electronic Filing**

Federal court has electronic filing while the state court does not. This technological difference may be important depending on geographical proximity to the courthouse.

## **Earthquake Consideration**

At least in Portland, the federal courthouse is far less likely to collapse in an earthquake than the Multnomah County courthouse.

## **Conclusion**

The differences between federal court and state court are many. If a practitioner were to find the preference of one over the other to be a close call, the *Federal Civil Procedure Before Trial* (published by Rutter Group Practice Guide), at 1-75, is a valuable resource for additional considerations. In every case where state and federal court options are available, plaintiff's counsel should evaluate how each of the many differences could affect the case and make an informed choice of forum.

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## **About the Author**

Richard Vangelisti is a trial lawyer representing individuals and families in personal injury, wrongful death and other plaintiff-side civil matters in Oregon, Washington and across the country. After graduating with high honors from law school in 1995, Mr. Vangelisti served as a law clerk to a federal chief trial judge for two years. Thereafter he worked for an international law firm and a national law firm for more than five years. More recently, he served as President of the Federal Bar Association of Oregon. In 2007 he was selected by federal judges to serve as Representative to the Ninth Circuit Judicial Conference. Mr. Vangelisti has been awarded an AV Peer Review Rating by LexisNexis Martindale-Hubbell, the highest rating awarded in the peer survey of expertise, experience, integrity and overall professional excellence. He is a partner in Vangelisti Kocher LLP, 9755 SW Barnes Road, Ste. 450, Portland, Oregon 97225. Mr. Vangelisti can be reached on the internet at [www.vangelisti.com](http://www.vangelisti.com) or by telephone at 503-595-4131.

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