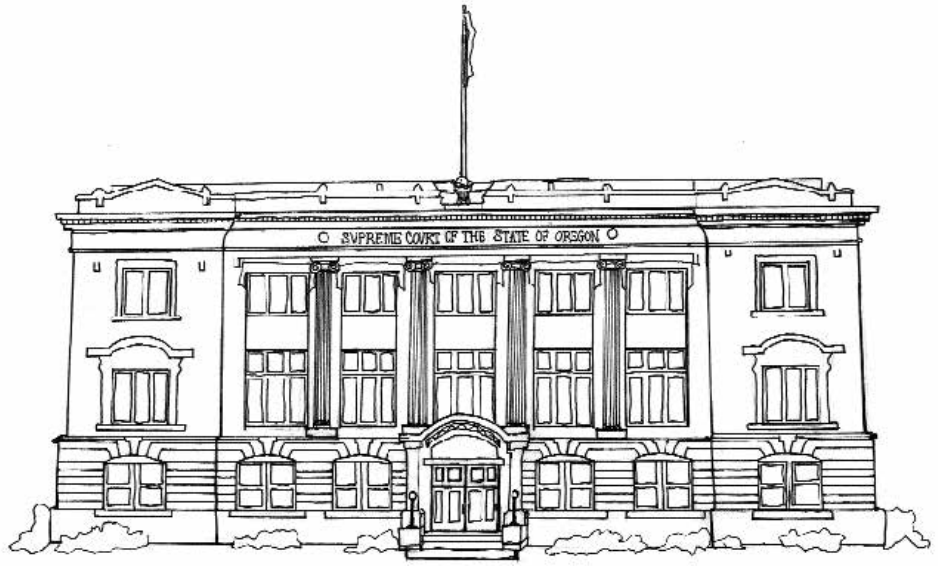
OREGON APPELLATE ALMANAC

Volume 1
2006



A Publication of the Appellate Practice Section of the Oregon State Bar

Keith M. Garza and Lora E. Keenan, Editors

OREGON APPELLATE ALMANAC Volume 1 – 2006

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Volume I
2006
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All illustrations in the volume by Carrie Poust
(unless otherwise indicated)

Disclaimer

CASES GET DISTINGUISHED AND DISTINGUISHED TILL THEY PROVOKE THE APHORISM THAT A DISTINGUISHED CASE IS A CASE THAT IS NO LONGER DISTINGUISHED.

Thomas Reed Powell, "Some Aspects of American Constitutional Law," 53 Harvard Law Review 529, 537 (1940).

"[W]E ARE NOT FINAL BECAUSE WE ARE INFALLIBLE, BUT WE ARE INFALLIBLE ONLY BECAUSE WE ARE FINAL."

Brown v. Allen, 344 US 443, 540, 73 S Ct 397, 97 L ED 1801 (1953) (Jackson, J., concurring).

WELCOME & SUCH

WELCOME

On behalf of the Executive Committee of the Appellate Practice Section of the Oregon State Bar, the editors of Volume I of your Oregon Appellate Almanac extend to each of you a hearty WELCOME!

We aim to enlighten and entertain without the ponderous trappings of academic publishing. Given that goal, the title—"Almanac"—seemed particularly apt, and we thank Paul Conable for suggesting it.

Of course, "almanac" implies "annual." Make no mistake about it, this is only Volume I. The Executive Committee intends this endeavor to be an annual event and one of the continuing benefits of membership in the Appellate Practice Section.

We hope that you will enjoy and make much use out of the outstanding articles and other material contained in the pages that follow. Suffice it to say, we consider ourselves extremely lucky to have obtained insightful and witty submissions from some of Oregon's most distinguished lawyers and judges. And we are particularly honored by the dedication from the Honorable Wallace P. Carson, Jr., Oregon's longest serving Chief Justice (and, for those who know him, one of the best eggs ever hatched).

So, read on and, again, welcome.

AND SUCH

As handsome an addition as this cardstock bound edition will make to your most cherished bookshelf, like fine wine, its value will only improve over time and become all the more impressive when sitting—hopefully dog-eared, torn, and coffee-stained—next

to future volumes (which we promise to bind in equally garish colors). For that highest value to be realized, however, we need your help. In the 165 years since Ewing Young died intestate in 1841 in what was then known as the Oregon Country, thereby necessitating the establishment of some form of law and judicial power, Oregon's legal tradition has been a rich one indeed. And, if today's headlines are any indication, Oregon's appellate courts will continue to play a vital role in the development of our state's law and jurisprudence.

It is our intent through the Almanac to capture some of that richness, and we need you to write about those things from Oregon's legal past, its present, and its future that you find most interesting. Hopefully, at least some of your colleagues will share your taste. Irreverence, provocative submissions, and ephemera (it is an almanac, after all) are encouraged. Footnotes and articles measured by the pound are not.

Expect only limited editorial involvement and control (but remember that, ultimately, the Oregon State Bar is publishing these things). Typesetting is our business. Little or no effort, however, will be made by your volunteer editors to check citations, verify facts, or clean up prose. And no effort will be made to provide either defense or indemnity. These are your submissions and, for the most part, you are on your own.

If these words or the writings that follow pique your own interest to the point that you are interested in contributing to Volume II, then by all means do so! Next year's editor will be Walter J. Ledesma, chair elect of the Appellate Practice Section's Executive Committee. With the exception of compliments, kudos, or other good tidings (please send those to either or both of us directly), please present any questions, concerns, criticisms, or anything that will require actual effort to Walter at (503) 981-0101 or walter@kleinhand.com. Our work here, a labor of love though it has been, is done.

Keith & Lora

"GREAT CASES LIKE HARD CASES MAKE BAD LAW. FOR GREAT CASES ARE CALLED GREAT, NOT BY REASON OF THEIR REAL IMPORTANCE IN SHAPING THE LAW OF THE FUTURE, BUT BECAUSE OF SOME ACCIDENT OF IMMEDIATE OVERWHELMING INTEREST WHICH APPEALS TO THE FEELINGS AND DISTORTS THE JUDGMENT."

Northern Securities Co. v. United States, 193 US 197, 400, 24 S Ct 436, 48 L Ed 679 (1904) (Holmes, J., dissenting).

"METAPHORS IN THE LAW ARE TO BE NARROWLY WATCHED, FOR STARTING AS DEVICES TO LIBERATE THOUGHT, THEY END OFTEN BY ENSLAVING IT."

Berkey v. Third Avenue Railway, 244 NY 84, 94, 155 NE 58 (1926).

DEDICATION

"IN THE SOULS OF ITS CITIZENS WILL BE FOUND THE LIKENESS OF THE STATE WHICH IF THEY BE UNJUST AND TYRANNICAL THEN WILL IT REFLECT THEIR VICES BUT IF THEY BE LOVERS OF RIGHTEOUSNESS CONFIDENT IN THEIR LIBERTIES SO WILL IT BE CLEAN IN JUSTICE BOLD IN FREEDOM"

These words, translated from Plato's Republic, are inscribed on the wall of the rotunda in Oregon's Capitol. Plato had his critics then and still does more than 2,000 years after his death. Nonetheless, the words set out above ring with particular clarity. The state is the sum of its people; the people together constitute

the state. That principle, both hopeful and cautionary, provides a fitting message to those who come to Salem either to witness or participate in the functioning of Oregon's government.

It has been my distinct personal privilege to spend most of my over 40 years in government service working on behalf of Oregonians. And, during that time, I have had the opportunity to serve the people of Oregon in each of its governmental departments. Whether as a legislator, a lawyer in private practice, a member of the Oregon National Guard, or a judge, it has been impressed upon me consistently that ours is a government of *laws*. Unlike Plato, we do not search out philosopher kings; instead, we rely on the rule of law to provide both the backbone of our government and the skin out of which we cannot grow. And with the same certainty that a state reflects the soul of its citizenry, so too is the state the sum of its laws and, by extension, its people. As Professor Friedman eloquently put it:

> "As long as the country [or a state] endures, so will its system of law, coextensive with society itself, reflecting its wishes and needs, in all their irrationality, ambiguity, and inconsistency. It will follow every twist and turn of development. * * * The law, after all, is a mirror held up against life." Lawrence M. Friedman, *A History of American Law* 695 (2d ed 1985).

The image that Oregon law returns in Friedman's metaphorical mirror is a remarkable one. Clear in some aspects, less focused in others, always changing. More importantly for our purposes, however, the "least dangerous" branch of Oregon's government (to borrow Alexander Hamilton's words (*The Federalist* No. 78)), the Judicial Department, perhaps best reflects the true substance of our laws. In saying that, and notwithstanding the variety of public troughs from which I have fed, let me declare my personal bias in this regard in favor of the judiciary.

But think about it. The Legislative Assembly—or the people through the initiative process—enacts the laws, and the executive and administrative departments enforce those enactments. It is in the convergence of those independent functions of enactment and enforcement that Oregon's judges do, and have done, most of their work. Although impartial in its adjudications, the judiciary

necessarily brings together all aspects of the constitutional, legislative, and regulatory actions that govern the lives of Oregonians. And, although they comprise but a small percentage of all the justice meted out in this state, the published decisions of Oregon's appellate courts provide the most public and accessible record of the judicial branch's activities. Without such decisions from Oregon and elsewhere, it would be nearly impossible for academics such as Friedman to do the work they have done. And, even if much of the functioning of the appellate courts takes place in private deliberation, the end product always has—and most certainly always will be—very public and very transparent.

It is the system of appellate adjudication in this state that the Appellate Practice Section of the Oregon State Bar, through the Oregon Appellate Almanac, intends to celebrate. It promises to look both forward and back—and sideways as well. It will be written and read by those who not only practice in and around the law, but those who cherish the law for what it was, is, and could be. Expect few footnotes and approachable (read: short) submissions, and informative and entertaining writing. An entirely worthwhile endeavor, I have every reason to believe that it will both sharpen and embellish the reflection in the mirror that is Oregon's law.

Let me close by noting that the east and west entrances to the Capitol also bear excerpts reportedly from Plato's *Republic*. Those excerpts state, respectively:

> "A FREE STATE IS FORMED AND IS MAINTAINED BY THE VOLUNTARY UNION OF THE WHOLE PEOPLE JOINED TOGETHER UNDER THE SAME BODY OF LAWS FOR THE COMMON WELFARE AND THE SHARING OF BENEFITS JUSTLY APPORTIONED"
>
> "THE MIND OF MAN KNOWS NO EMPLOYMENT MORE WORTHY OF ITS POWERS THAN THE QUEST OF RIGHTEOUSNESS IN HUMAN AFFAIRS"
>
> "NO GOAL OF ITS LABOURS THAT IS SUPERIOR TO THE DISCOVERY OF THE GOOD IN THE GUIDANCE OF LIFE"

As Plato's pupil Aristotle wrote, "[e]ven when laws have

been written down, they ought not always to remain unaltered." Aristotle, *Politica*, Book II, ch. 8 (Benjamin Jowett transl.) Whether ultimately substantive, historical, irreverent, or otherwise, the Oregon Appellate Almanac cannot help but advance all three propositions set out above.

With these words, I hereby and wholeheartedly dedicate this first volume of the Oregon Appellate Almanac.

The Honorable Wallace P. Carson, Jr.
Salem, Oregon
April 2006

"WHO'S A GREAT LAWYER?
HE, WHO AIMS TO SAY
THE LEAST HIS CAUSE REQUIRES,
NOT ALL HE MAY."

Joseph Story, Memorandum-book of argument before the Supreme Court, 1831-32, in Life and Letters of William Story 2:90 (William W. Story ed. 1851).

"THE JUDGE WEIGHS THE ARGUMENTS AND PUTS A BRAVE FACE ON THE MATTER, AND, SINCE THERE MUST BE A DECISION, DECIDES AS HE CAN, AND HOPES HE HAS DONE JUSTICE."

Ralph Waldo Emerson, "Considerations by the Way," The Conduct of Life, 1860, in Complete Works of Ralph Waldo Emerson 6:243, 245-46 (1904).

2005—THE YEAR IN REVIEW

NINTH CIRCUIT YEAR IN REVIEW

by Tom Sondag

This review of decisions by the country's largest circuit court of appeals focuses more on matters of procedure than on substantive legal developments—a round-up geared to the appellate wonk, if you will. If I missed one of your favorites, please blame the editors.

Settlement and Mootness. In *Gator.com Corp. v. L. L. Bean*, 398 F.3d 1125 (9th Cir. 2005) (en banc), the court held that an appeal was moot due to settlement even though the parties had made a "side bet" on the outcome of the appeal. The underlying action was one for a declaration that the plaintiff had the right to place pop-up advertisements on the defendant's web site. The district court dismissed for lack of personal jurisdiction, and plaintiff appealed. After briefing and oral argument, the court learned that the parties had reached a settlement that did not provide for dismissal of the appeal. The agreement provided that the plaintiff would discontinue all advertising on defendant's website; in addition, the parties agreed that if the appealed decision was affirmed, the plaintiff would pay the defendant $10,000.

The court held that regardless of the provision concerning the appeal, the case was moot, because the plaintiff no longer wished to engage in the activity for which it had sought declaratory relief. Although similar agreements in other cases had been found to preserve a controversy and support the exercise of appellate jurisdiction, the court explained that the plaintiffs in those cases had sought monetary damages. In that context, the court explained, a contingent settlement agreement preserves the plaintiffs' opportunity to obtain such damages. In contrast,

the *Gator.com* plaintiff had brought its action solely to obtain declaratory relief, which a court no longer could provide.

The dissent pointed out that the parties continued to dispute the issue of personal jurisdiction that was at the heart of the appeal, and retained an interest in the court's resolution of that dispute. "Nothing more," said the dissent, "is required for our continuing jurisdiction."

Appellate Jurisdiction and the FAA. Under the Federal Arbitration Act, an order compelling arbitration is not appealable, 9 U.S.C. § 16(b)(2), but a few years ago, the Supreme Court held that where the district court compelled arbitration and dismissed an action with prejudice, its order was appealable. In *Dees v. Billy*, 394 F.3d 1290 (9th Cir. 2005), the Ninth Circuit considered whether a party can appeal if, after compelling arbitration, the district court orders a case administratively closed. The court joined other circuits in holding that such an order is not appealable: "An order administratively closing a case is a docket management tool that has no jurisdictional effect."

Class Certification Appeals. For several years now, Federal Rule of Civil Procedure 23(f) has permitted appeals from orders granting or denying class certification. Such appeals are expressly discretionary with the appellate court, however, and until this past year, the Ninth Circuit had not set forth the criteria that would guide that discretion. The court finally did so in *Chamberlan v. Ford Motor Company*, 402 F.3d 952 (2005), stating that review will be most appropriate in the following situations:

1) where the certification ruling is both "questionable" and sounds a "death knell" for one of the parties—that is, where certification is denied and the plaintiff's individual claim is worth far less than the cost of litigating it, or where certification is granted and the defendant is faced with settling or risking "potentially ruinous liability";

2) where the decision turns on a novel or unsettled question of law; or

3) where the decision is manifestly erroneous.

402 F.3d at 959. The court said that the foregoing criteria are not exhaustive and do not "circumscribe the broad discretion" Rule 23(f) grants the court. At the same time, however, the court

announced its "view that petitions for Rule 23(f) review should be granted sparingly."

Citation of Unpublished Decisions. With the Judicial Conference's September 2005 approval of proposed Federal Rule of Appellate Procedure 32.1, the Ninth Circuit's long-running battle against the citation of unpublished decisions may soon be over. If the Supreme Court approves the rule and Congress does not intervene, the rule will become effective by the end of 2006, to apply to unpublished decisions issued after January 1, 2007. If a party cites an unpublished decision "that is not available on a publicly accessible electronic database," the party will be required to provide a copy of the decision with the brief or other paper in which the citation appears. Note that while the rule does permit parties to cite unpublished decisions, it does not expressly require a court to *follow* those decisions as binding precedent.

And speaking of precedent . . . In *Barapind v. Enomoto*, 400 F.3d 744 (9th Cir. 2005) (en banc), the court considered a habeas corpus petition challenging the petitioner's extradition to India. In the course of deciding the issue, the court engaged in an interesting discussion of what constitutes dicta, holding that any time the court decides an issue "presented for review," the decision is binding whether or not it is necessary to the case's ultimate disposition.

The issue on appeal in *Barapind* was whether some of the crimes on which the petitioner's extradition was based were, under the applicable treaty, non-extraditable political offenses. Whether an offense is "of a political character" depends on whether (a) at the time of the charged offense, there was an on-going uprising or violent political disturbance, and (b) the charged offense was "incidental to" or "in furtherance of" that uprising. Here, there was no question as to the existence of an uprising at the time of the offense, so the court turned to the second prong of the analysis.

In *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986), the court had stated that in deciding whether a criminal act is "incidental to" an uprising, the focus is not on the *type* of act, but on the *motivation* for it. But the decision in *Quinn* did not depend on that reasoning; the court found extradition appropriate because the petitioner failed to satisfy the first prong of the test by showing that an uprising had existed. Accordingly, both the extradition court and the Ninth Circuit panel that first determined *Barapind* concluded that *Quinn*'s discussion of the "incidental to" prong was non-binding dicta. The

en banc court disagreed.

> In *Quinn*, the proper scope of "incidental to" was an issue presented for review. We addressed the issue and decided it in an opinion joined in relevant part by a majority of the panel. Consequently, our articulation of "incidental to" became law of the circuit, *regardless of whether it was in some technical sense, "necessary" to our disposition of the case.* * * *

400 F.3d at 750-51 (emphasis added; footnotes omitted).

The dissenting opinion suggested a different approach. In the first place, the dissent said, it did not even matter whether *Quinn*'s "incidental to" discussion was dicta: since the court was now deciding the issue en banc, it should either "adhere to *Quinn*'s standard or overrule it." For that reason, the dissent said, the majority's "discussion about dicta is dicta." 400 F.3d at 758.

In any case, the dissent said, the majority got it wrong, and should have stuck with "the traditional understanding of dictum as a statement that is not necessary to the decision." The dissent viewed such an approach to be "far more benign" than the majority's:

> It is one thing for a court of last resort to announce that whatever it says in a published opinion is binding, for a court of last resort regularly sits en banc, has ultimate responsibility for the efficient administration of justice within its province, and may not have enough cases to flesh out the rule being articulated. It is another for an intermediate court such as ours to make every reasoned discussion in a published opinion binding whether it is necessary or not. We speak through panels of three, and as Article III judges have authority only to decide cases and controversies. Everything that ends up in F.3d cannot possibly be the law of the circuit. Views of two or three judges in an opinion on matters that are not necessarily dispositive of the case are no different from the same views expressed in a law review article; neither should be treated as a judicial act that is entitled to binding effect.

400 F.3d at 759.

En banc Decisions. Did you know that the Ninth Circuit

maintains a log of pending and decided en banc cases? You can find it on the court's web site: www.ca9.uscourts.gov. Of course, when the Ninth Circuit hears a case "en banc," the *entire* court does not hear it, but beginning in 2006, at least a majority will do so. In 2005, the court approved a rule amendment to increase the size of en banc courts from 11 to 15 of the court's 28 authorized judges. The rule will take effect on January 1, 2006, and will be evaluated after two years.

Discovery. And now for a word on procedure in the trial court: In *Burlington Northern & Santa Fe Ry. Co. v. U.S. District Court*, 408 F.3d 1142 (9th Cir. 2005), the court held that "boilerplate objections" or "blanket refusals" in response to Rule 34 requests for production of documents are insufficient to assert a privilege under that rule or Rule 26(b)(5). At the same time, the court rejected a per se rule that would deem a privilege waived if a privilege log is not produced within the 30-day period prescribed by Rule 34. Instead, the court explained, the 30-day period is "a default guideline," and a district court should determine waiver on a case-by-case basis, based on the following factors:

1) the relative specificity of the objection or assertion of privilege;

2) the timeliness of the objection and information provided about withheld documents;

3) the magnitude of the document production; and

4) other circumstances that make responding to discovery unusually easy or hard.

408 F.3d at 1149.

In response to the decision, the District of Oregon has proposed a new Local Rule 26.7, which provides that a party will waive any objection to a discovery request if the objection is not made within the time permitted by the rules or separate agreement between the parties. In making a timely objection, a party need not simultaneously provide a privilege log, but must do so "within a reasonable time" after serving the objection.

Certifying Judgments. In *Wood v. GCC Bend*, LLC, 422 F.3d 873 (9th Cir. 2005), the court reminded litigants and the district courts of the requirements for certifying a judgment pursuant to Federal Rule of Civil Procedure 54(b). More significantly, the opinion suggests that in light of the court's growing docket, it may look

at such appeals with a more critical eye than it has in the past. In holding that certification should not have been granted in *Wood*, the court emphasized that the facts, claims, and issues in the case overlapped, and the case was "routine":

> "The greater the overlap, the greater the chance that this court will have revisit the same facts—spun only slightly differently—in a successive appeal. The caseload of this court is already huge. More than fifteen thousand appeals were filed in the last year. We cannot afford the luxury of reviewing the same set of facts in a routine case more than once without a seriously important reason."

422 F.3d at 882.

Excusable Neglect. *Pincay v. Andrews*, 389 F.3d 853 (9th Cir. 2004) (en banc) was decided in 2004, but late in the year, so it is included it here. As the opinion states, the filing of the appeal in that case "represents a lawyer's nightmare," as a "sophisticated law firm" missed the deadline for filing the notice of appeal. The nightmare had a happy ending, however, as the district court found the attorney neglect excusable, and the Ninth Circuit affirmed.

The facts are straightforward: after the district court entered judgment for the plaintiffs, the paralegal responsible for calendaring filing deadlines for the defendants' attorney "misread the applicable rule" and told the attorney that a notice of appeal was due not in 30 days, but in 60, the time allowed when the government is a party. But the government was not a party, and the attorney did not discover the error until the plaintiffs relied on the finality of the judgment in a related bankruptcy proceeding. Although more than 30 days had passed since entry of judgment, defendants were still within the additional 30-day period granted by Federal Rule of Appellate Procedure 4(a)(5)(A) for seeking an extension of time to file a notice of appeal based on "excusable neglect or good cause." The defendants requested the extension, and, finding the neglect excusable, the district court granted the motion and permitted the appeal.

Now it was plaintiffs' turn to appeal, and they did so (timely). The panel that originally heard the case determined that the defendants' attorney's reliance on a paralegal for calendaring the appeal deadline was inexcusable as a matter of law, and ordered

defendants' appeal dismissed. The court then heard the matter en banc and concluded that such a per se rule could not be reconciled with *Pioneer Investment Services Co. v. Brunswick Associated Ltd. Partnership*, 507 U.S. 380 (1993). Instead, the court held, the district court had not abused its discretion in permitting the late notice of appeal.

While acknowledging that its decisions construing "excusable neglect" under *Pioneer* lacked a uniform analysis, the court identified one consistency: the abuse of discretion standard applied to review the district court's decision. That standard made all the difference in this case. While acknowledging "that a lawyer's failure to read an applicable rule is one of the least compelling excuses that can be offered," the court also noted that Pioneer entrusted the issue to the district court's discretion because that court "is in a better position than we are to evaluate factors such as whether the lawyer had otherwise been diligent, the propensity of the other side to capitalize on petty mistakes, the quality of representation of the lawyers * * *, and the likelihood of injustice if the appeal was not allowed." 389 F.3d at 859. In that light, the court conceded that had the district court found the neglect inexcusable and denied the defendants' motion, "we would be hard pressed to find any rationale requiring us to reverse."

The dissent argued that neglect cannot be excusable absent an excuse, and here there was none. All the defendants pointed to was a "carefully designed" calendaring system, but the dissent pointed out that that system had not failed, for "[t]he wrong date was calendared with meticulous efficiency and accuracy." Rather, the dissent reasoned that it was the lawyer who had failed, "by abdicating his basic duty-to determine the applicable appeal deadline based on a clear-as-day rule."

> At bottom, what the sophisticated-calendaring-system excuse comes down to is that the lawyer didn't bother to read the rule; instead, he relied on what a calendaring clerk told him. While delegation may be a necessity in modern law practice, it can't be a lever for ratcheting down the standard for professional competence. If it's inexcusable for a competent lawyer to misread the rule, it can't become excusable because the lawyer turned the task over to a non-lawyer. Errors made by clerks performing lawyerly functions are less

> excusable than those made by the lawyer himself; they certainly can't be more so.

389 F.3d at 862-63.

Review of Arbitration Agreements. An interesting case that was argued to the en banc court in 2005 but not yet decided is *Nagrampa v. Mailcoups, Inc.* The case asks who should decide whether an agreement containing an arbitration clause is unconscionable: a judge or an arbitrator. In a decision reported at 401 F.3d 1024 (9th Cir. 2005), the panel that heard the case chose the arbitrator. The panel relied on *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), which held that where a party claims fraud in the inducement of an arbitration clause, the matter is for the court, but where the claim for fraud in the inducement of the entire agreement, the matter is for the arbitrator. Since the *Nagrampa* plaintiff argued that the entire contract, including the arbitration provision, was unenforceable as a contract of adhesion, the panel held that *Prima Paint* required the issue to be decided by an arbitrator. We can look for the en banc court's take on things in 2006.

Pro Bono. A closing question: Are you aware of the Ninth Circuit's pro bono program? The program attempts to provide pro bono counsel for pro se parties in all civil and habeas corpus appeals in which briefing and argument would benefit the court. Appeals are pre-screened, and cases selected to the program are limited to those presenting issues of first impression or complexity, or otherwise warranting further briefing and oral argument. More details are available on the court's website, including a form for adding yourself to the e-mail list for cases arising in the Northwest.

THE OREGON SUPREME COURT: 2005 OVERVIEW

by Keith Garza

By almost any measure, 2005 was a significant year for the Oregon Supreme Court. The Court issued a respectable 78 opinions touching on subjects as variant as roving pharmacists, conception by bath or shower, alcoholism, Mormon meeting houses, donated food, "toy shows" not of the poodle variety, and the Vienna Convention. Common law principles, state and federal statutory

law, natural law, the Oregon and United States Constitutions, administrative rules, municipal ordinances, and the Militia Act of 1662 all had roles to play in the Court's 2005 decision making.

Perhaps more importantly than all that, however, the end of 2005 also saw the Honorable Wallace P. Carson, Jr., step down as Oregon's longest serving Chief Justice. The Honorable Paul J. De Muniz took the reins as the Supreme Court's 37th Chief Justice effective January 1, 2006, stating that "[t]o follow Judge Carson is both challenging and humbling." Although anyone who knows "Wally" will agree with that remark, Chief Justice Carson was quick to point out that "Justice De Muniz has a work ethic that is unmatched," and that "I am confident that his integrity and his common sense will serve this state and this court well for many years."

But this submission is not about years to come; it is about the year that has passed. Somewhere in the pages that follow are citations to each of the Court's 78 reported decisions last year and to a few others as well. There was a lot of material to go through, so please forgive any errors or omissions. In the end, the Court's opinions speak for themselves, and the careful practitioner will not read too much (if anything) into what I have written about them.

And the Oscar Goes to ....

Of course, only time will tell which of 2005's decisions proves to be the most significant. The Court's PERS decision, in terms of the sums at issue, public interest, and the sheer volume of paper consumed, has to be the odds-on favorite. But that may be like betting on The Aviator for best picture in 2004. Much, I submit, can be learned of the subtle art of "best picking" from esteemed appellate jurist and serious amateur movie critic Judge Darleen Ortega, who backed the longshot Kiss Kiss Bang Bang to impress the Academy this year. (With dialogue like the following, how could it have lost?: [one guy]: "You're an idiot. You know that. You know if you looked in the dictionary next to the word 'idiot' you know what you'll find? [other guy]: A picture of me? [first guy]: No! The definition of the word 'idiot,' which you are.")

Emboldened by her daring, but perhaps simply only wanting to back a sleeper as Judge Ortega did, let me humbly suggest that the Supreme Court's six and one-half page and otherwise seemingly innocuous workers' compensation decision in *Morales v. SAIF*,

339 Or 574, 124 P3d 1233 (2005), could prove to be the most-cited case of 2005. To set the context for my surmise, consider the following statement from the Supreme Court with respect to constitutional decisions:

> "In *Stranahan [v. Fred Meyer, Inc.*, 331 Or 38, 54, 11 P3d 228 (2000)], this court summarized the circumstances under which, in spite of the salutary doctrine of *stare decisis*, it will reconsider rules arising out of earlier decisions respecting the Oregon Constitution:
>
> > '[W]e remain willing to reconsider a previous ruling under the Oregon Constitution whenever a party presents to us a principled argument suggesting that, in an earlier decision, this court wrongly considered or wrongly decided the issue in question. We will give particular attention to arguments that either present new information as to the meaning of the constitutional provision at issue or that demonstrate some failure on the part of this court at the time of the earlier decisions to follow its usual paradigm for considering and construing the meaning of the provision in question.'"

State v. Ciancanelli, 339 Or 282, 289, 121 P3d 613 (2005). In other words, constitutional interpretations that predate *Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992), which sets out the methodology for interpreting original provisions of the Oregon Constitution, may be subject to revisitation.

But that is not, or at least was not, the case with respect to statutory constructions that were handed down before the Court's decision in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993) (setting out framework for interpreting statutes). In the statutory context, "[w]hen this court interprets a statute, the interpretation becomes a part of the statute, subject only to a revision by the legislature." *State v. King*, 316 Or 437, 445, 852 P2d 190 (1993). *See also League of Oregon Cities v. State*, 334 Or 645, 688-89, 56 P3d 892 (2002) (Durham, J., dissenting; explaining past disagreement with that principle). In *Morales*, however, the Court may have come around to Justice Durham's way of thinking: "[In the prior case], this court did not analyze [the statute at

issue] under the now-familiar methodology for construing statutes that this court summarized in *PGE* * * *. This case presents the opportunity to do so." *Morales*, 339 Or at 578-79. And do so it did. Without belaboring the point, if pre-*PGE* statutory interpretations now are fair game, expect a run on shotguns. Again, however, only time will tell.

Big Money, No Whammy—*STOP!*

A lot of money, most of it public in some respect, was put before the Court in 2005. The bigger ticket items are set out below. The question marks reflect the inherent difficulty in calculating large sums, particularly over time. What Chief Justice Carson (which I will refer to him as forever and with no disrespect intended toward Chief Justice De Muniz) is fond of saying about statistics applies with somewhat (I hope) the same force here: "Most folks have heard of the statistician who drowned in a river the average depth of which was 18 inches." With that caveat in mind, here are 2005's blow-outs:

PERS—$12,700,000,000??

Not only the "biggest"—*see discussion supra*—case of the year, but probably the biggest case of at least this and the past decade was the Court's ruling on the legislature's 2003 public pension reforms. In a humongous opinion working from an equally substantial special master's report filed by then-Judge, now Chief Judge, David Brewer, the Court sifted through multiple enactments and over 800 pages of briefing to strike down in part and uphold in part various legislative changes to the Public Employees Retirement System (PERS) made during the 2003 legislative session. *Strunk v. PERB*, 338 Or 145, 108 P3d 1058 (2005). In a nutshell, the amendments (1) created what in essence are 401(k) accounts for all PERS members on a going-forward basis, (2) changed the crediting process for accounts of employees hired before January 1, 1996 (Tier One members), (3) discontinued future contributions into a variable annuity program, (4) temporarily suspended certain cost-of-living adjustments (COLAs), (5) permitted the recovery of erroneously paid benefits, and (6) provided for the use of new actuarial factors.

A majority of the Court (with Justices Durham, Riggs, and Kistler dissenting) held that the new 401(k) type accounts were consistent with the PERS contract, held that the change to the crediting of

Tier One member accounts impaired the PERS contract (the Court was unanimous in that respect), upheld the prohibition of future contributions to the variable annuity program (over dissent), and unanimously held that the COLA changes breached the PERS contract and that the legislature did not act inappropriately in directing the application of new actuarial factors to reflect the fact that retirees now live longer. In a concurring opinion, Justice Balmer wrote that, although he disagreed with one of the Court's earlier PERS decisions that drove one of the majority's holdings in *Strunk*, he agreed that principles of stare decisis supported the majority's reliance on that case.

Finally, in follow-up litigation, the Court held, over a two-justice dissent (Durham and Riggs, JJ.), that a settlement between the Public Employees Retirement Board and employers that had challenged certain contribution rates and crediting decisions of the board mooted the issues presented in that judicial review. *City of Eugene v. State*, 339 Or 113, 117 P3d 1001 (2005). The fight, however, continues on in circuit court with more, assuredly, to follow.

The Kicker—$113,249,821??

In 2001, the legislature retroactively redirected some $113 million received from Medicaid from the general fund to a separate and distinct account. That action resulted in a reduction in the state's kicker refund and, no surprise, a lawsuit. In rejecting the challenge, the Court ruled that the legislation was not a bill for raising revenue, which would have to originate in the House (the bill at issue was introduced in the Senate), because it did not collect or bring money into the treasury. The Court also held that the legislation did not violate the single subject provision of Article IV, section 20. *Bobo v. Kulongoski*, 338 Or 111, 107 P3d 18 (2005). The decision, which the Court released early into the 2005 legislative session and with budget shortfalls looming, met with mixed reaction. According to the *Statesman Journal*, a restrained Governor Ted Kulongoski could muster no more than to state that he was "pleased" with the Court's decision while Senator George "really felt there was no such thing as justice or law" after he read the opinion (George was one of the parties litigant). It goes to show that there seldom is the opportunity to impose Solomonic justice and that the Court essentially is the business of disappointing at least fifty percent of those who come before it.

Portland Public School Custodians—$15,000,000??

In a four-to-three decision, the Court held that the Portland Public School District had violated the Custodians Civil Service Law when it terminated its existing custodial workforce in 2002 and contracted that work out, saving the district an estimated five million dollars annually. *Walter v. Scherzinger*, 339 Or 408, 121 P3d 644 (2005). In a dissent joined by Chief Justice Carson and Justice Gillette, Justice Balmer would have upheld the district's action because, in his view, the statute protecting custodians applies only to "employees" who perform custodial work and not to persons who do that type of work for a private contractor.

That's Original

The Court issued four decisions in proceedings arising under its discretionary original jurisdiction: three in mandamus; the other in habeas corpus. (Quo warranto, the third leg of the Court's original jurisdiction stool, came up empty again; the closest the Court has come to taking one of those proceedings as an original matter in at least the last 40 years was *State ex rel. Lincoln Loan Co. v. Court of Appeals*, 336 Or 9, 76 P3d 109 (2003) (denying petition), a case involving a challenge to the validity of the Court of Appeals.)

In *Nibler v. Oregon Dept. of Transportation*, 338 Or 19, 105 P3d 360 (2005), the Court mandamused a Multnomah County judge for allowing a case against the state that arose in Washington County to go forward in Multnomah County. (Before you write to complain, the usage has at least some judicial sanction. *See State ex rel. Ricco v. Biggs*, 198 Or 413, 436, 255 P2d 1055 (1953) ("It was my experience, while sitting as a circuit judge, to have been mandamused in the above case." (Latourette, C.J., specially concurring).) Under ORS 14.060, the Court ruled, although such actions "may" be brought, when they are, they must be brought in the county in which the cause of action, or some part of it, arose. And, as two of its final batch of decisions issued in 2005, the Court issued a peremptory writ of mandamus directing a trial judge to submit aggravating factors for sentencing purposes to the jury. *State v. Upton*, 339 Or 673, 125 P3d 713 (2005), which is discussed more fully in the *Apprendi / Blakely* section below. The Court also dismissed an alternative writ of mandamus, concluding that empanelling a jury on remand to consider aggravating sentencing

factors does not violate double jeopardy. *State v. Sawatzky*, 339 Or 689, 125 P3d 722 (2005) (also discussed further below).

Finally, in *Rico-Villalobos v. Guisto*, 339 Or 197, 118 P3d 246 (2005), the Court dismissed a habeas writ, holding that the state may rely upon inadmissible evidence in proceedings to determine whether an accused person is entitled to pretrial release.

Let's Get Criminal

The Court's criminal decisions for 2005 are set out below.

First Bite at the Apple (Direct Appeal)

The Court decided a respectable number of cases involving direct appeals of criminal convictions last year including a number that involved substantial issues of federal, state, and even international law.

International Law

In *State v. Sanchez-Llamas*, 338 Or 267, 108 P3d 573 (2005), the Court held that the Vienna Convention on Consular Relations, which includes a provision requiring authorities of signatory states to inform the relevant consulate when a foreign national is arrested (and to inform the arrestee without delay of the arrestee's right to consult with the consulate) creates rights that belong only to the signatory states rather than rights enforceable in American courts by private individuals. Although the Oregon Supreme Court has the final word as to the interpretation of state law, that of course is not so with respect to federal law. And, in this instance, the United States Supreme Court has taken the case up on certiorari. *Sanchez-Llamas v. Oregon*, 126 S Ct 823 (2005). Expect a decision by June of this year (and, I predict, an affirmance).

State and Federal Constitutional Law

In a monster of an opinion by Justice Durham, the Supreme Court unanimously (Justice Kistler not participating) upheld Oregon's statutory offense of possession of a firearm by a felon. *State v. Hirsch*, 338 Or 622, 114 P3d 1104 (2005). As an initial and interesting preliminary matter, the Court permitted the review to go forward despite the fact that the defendants (two cases were consolidated on review) did not raise a facial challenge

per se, arguing instead that the statute was overbroad, and notwithstanding that neither defendant attempted to argue that the particular circumstances of his case would result in the application of the statute in a constitutionally impermissible manner. *Hirsch*, 338 Or at 626-30. Next, the Court held that Article I, section 27, limits the legislature from infringing on the right to bear arms only for purposes of "defence"; other bases for prohibiting persons from owning or possessing firearms fall outside the ambit of constitutional protection. 338 Or at 632-33. And, finally, after an exhaustive inquiry into the wording, context, and history (back to 17th century England), the Court concluded—with some qualification—that the legislature constitutionally may proscribe certain groups of persons (those who pose identifiable threats to public safety of the community) from possessing arms and that the statute at issue was not overbroad.

In *State v. Hall*, 339 Or 7, 115 P3d 908 (2005), and in another heavyweight opinion—this time by Chief Justice Carson—the Court revisited the vexing question of consents to search after an unconstitutional stop. In so doing, the Court overruled its prior decision in *State v. Quinn*, 290 Or 383, 623 P32d 630 (1981). Concluding that the encounter at issue between the defendant and police rose to the level of a stop, and an impermissible one at that, the Court proceeded to consider whether the subsequent consent search—which the defendant did not challenge as involuntary—was exploitative of the illegal stop or, put differently, fruit of the poisonous tree. In that respect, the Court held that the state had failed to meet its burden to prove that the defendant's consent to search was either independent of or only tenuously related to the preceding constitutional violation. Accordingly, the Court reversed the conviction. Justice Durham, joined by Justice Gillette, dissented in part. They would have held that the defendant's voluntary consent to search had only a "but for" relationship to the illegal stop and, because the defendant had agreed to the search that resulted in his arrest, the contraband that the police discovered should not have been suppressed. 339 Or 50-52.

In a case with truly nasty factual underpinnings—involving a father's repeated sexual abuse of his 35-year-old developmentally delayed daughter, the Court concluded that the state had failed to introduce sufficient evidence at trial to permit a rational juror to conclude that the victim was incapable of consent by reason of mental defect. *State v. Reed*, 339 Or 239, 118 P3d 791 (2005).

Accordingly, the Court held, the trial court should have granted defendant a judgment of acquittal. Justice Kistler, joined by Justice Balmer, dissented: "Not only does this record not compel the conclusion that the victim had the requisite capability to consent to defendant's advances, but it permitted a reasonable juror to conclude that she lacked that capability: [T]he victim functions socially at the level of a preadolescent[;] * * * her favorite book is *Snow White*; she cannot manage her own money; and * * * she needs some adult who can 'direct her and care for her to assure her safety.'" 339 Or at 251.

And, last but certainly not least with respect to the Court's 2005 constitutional criminal cases (one of which admittedly involved only the violation of a municipal ordinance), the Court reaffirmed right of Oregonians to express themselves sans clothing and then some. *State v. Ciancanelli*, 339 Or 282, 121 P3d 613 (2005); *City of Nyssa v. Dufloth*, 339 Or 330, 121 P3d 639 (2005). The former involved live sex shows; the latter an ordinance keeping nude dancers at least four feet away. To say only that the opinions make for titillating reading would be a gross understatement, with most erogenous parts and orifices of the female form being implicated in the discussions.

Let us not dwell, however, on pornographic considerations but, instead, on juristic ones. The Court began its analysis in the lead opinion, *Ciancanelli*, by entertaining the state's argument that the Court should abandon the methodology for considering expression challenges under Article I, section 8, of the Oregon Constitution set out in *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982). With yet another probing (no pun intended) look into matters historical predating the adoption of the Oregon Constitution in 1857—an inquiry characteristic of a number of the Court's decisions last year—the Court ultimately rejected the state's argument. Robertson retains its "vitality." As for how the Court reached that conclusion, it can be argued that it did so by default, as the following passage suggests:

> "In short, no unassailably correct answer, based entirely on the provision's wording, case law, history, or any other objective evidence, is possible. The question then presents itself: In the face of the foregoing impasse about the framers' intent, can the state meet its burden of showing that the Roberston framework is contrary to the framers' intent with

respect to Article I, section 8?

* * *

> "* * * [A]fter applying the methodology set out in Priest to Article I, section 8, we are satisfied that the Robertson framework is justified."

Ciancanelli, 339 Or 313-15. With that said, the Court had little difficulty in concluding that the statute at issue in *Ciancanelli* and the ordinance at issue in *Nyssa* were directed at expression rather than the harmful effects of expression and did not fall within any well-established historical exception to free expression. That ended the discussion in *Nyssa*, but, in *Ciancanelli*, there was an additional consideration. In that case, the defendant was convicted of promoting prostitution (which should give the reader some idea of what a live sex show involves). In an interesting twist, the Court affirmed those convictions on the basis that the statutory offense is not directed at expression at all; rather, it is directed at "directing and profiting from a prostitution enterprise [that] is subject to regulation and punishment." *Ciancanelli*, 339 Or at 324.

In pithy dissents to both cases, a lone Justice De Muniz would have upheld both enactments against the constitutional challenges: "[U]nlike the majority, I cannot conclude that masturbation and sexual intercourse in a 'live public show' * * * is a form of speech that the drafters of the Oregon Constitution sought to protect in Article I, section 8." *Ciancanelli*, 339 Or at 325 (De Muniz, J., dissenting).

Those 2005 criminal cases that this author has determined are less sweeping in their scope are as follows:

State v. Jones, 339 Or 438, 121 P3d 657 (2005) (state's interlocutory appeal of suppression rulings; videotape evidence made without notifying the tapee properly was suppressed, but testimony from officers about the interviews that were videotaped was admissible).

State v. Smith, 339 Or 515, 123 P3d 261 (2005) (fact-specific holding that defendant's complaints about appointed counsel did not require trial court to inquire independently and make factual assessment about counsel's adequacy and stating, further, that courts should exercise discretion in ruling on motions for appointment of substitute counsel by engaging in such inquiry as

nature of complaints requires).

State v. Connally, 339 Or 583, 125 P3d 1254 (2005) (Portland ordinance permitted inventory of contents of fanny pack left in impounded automobile because defendant possessed item at time of arrest).

State v. Probst, 339 Or 612, 124 P3d 1237 (2005) (defendant bears burden of persuasion respecting alleged invalidity of prior conviction on collateral challenge).

State v. Wolleat, 338 Or 469, 111 P3d 1131 (2005) (on record presented, defendant's movement of victim from one room to another did not, as a matter of law, support kidnapping offense).

State v. Munro, 339 Or 545, 124 P3d 1221 (2005) (defendant had no privacy interest in videotape seized pursuant to valid warrant relating to separate prosecution when police later retrieved images that supported charge of encouraging child sex abuse).

Finally, in a trifecta of speedy trial decisions, authored by Justice Gillette, the Court held that delays of nearly a year, nearly two years, and 21 months, respectively, violated the defendants' statutory speedy trial rights. *State v. Davids*, 339 Or 96, 116 P3d 894 (2005); *State v. Adams*, 339 Or 104, 116 P3d 898 (2005); and *State v. Johnson*, 339 Or 69, 116 P3d 879 (2005).

Second Bite at the Apple (Post-Conviction and the Like)

Perhaps reflective of Oregon's incarceration rate, the Supreme Court decided a staggering eight cases involving the civil aspects of criminal procedure (twice the number of ballot title cases!). Walter Ledesma, in his piece in this volume "2005 Criminal Case Roundup," ably has described two of those decisions, *V.L.Y. v. Board of Parole*, 338 Or 44, 106 P3d 145 (2005), and *Richards v. Board of Parole*, 339 Or 176, 118 P3d 261 (2005), the latter of which Walter argued. In any event, the reader is commended to Walter's article to find out what those cases were about. As for the other criminally civil cases, they were as follows:

Ryan v. Palmateer, 338 Or 278, 108 P3d 278 (2005) (post-conviction relief: lawyer who, among other things, sought JNOV in criminal case and orally moved for new trial was not ineffective);

Burdge v. Palmateer, 338 Or 490, 112 P2d 320 (2005) (post-conviction relief: failure to assert statutory interpretation later adopted by Court of Appeals not ineffective assistance; De Muniz, J., joined by Durham, J., dissenting);

Peiffer v. Hoyt, 339 Or 649, 125 P3d 734 (2005) (post-conviction relief: party in civil case with burden of persuasion does not need to move for judgment as matter of law if case is tried to court, but petitioner lost on the merits of search-related claim);

Roy v. [Hat Trick] Palmateer, 339 Or 533, 124 P3d 603 (2005) (trial court habeas / mandamus: under *Norris v. Board of Parole*, 331 Or 194, 13 P3d 104 (2000), determination that petitioner is "capable of rehabilitation" does not mandate release, only possibility of parole or work-release);

Tharp v. PSRB, 338 Or 413, 110 P3d 103 (2005) (Psychiatric Security Review Board: substance dependency is "personality disorder" rather than "mental disease or defect"); and

Ashcroft v. PSRB, 338 Or 448, 111 P3d 1117 (2005) (Psychiatric Security Review Board: alcohol dependence, likewise, is "personality disorder").

Apprendi / Blakely Continued

Like most courts across the country, both state and federal, Oregon's appellate courts have been asked to define the contours of the right to jury in criminal cases following the United States Supreme Court's 2000 decision in *Apprendi* and that decision's progeny. In Oregon, the issues yielded four decisions, three of which the Court handed down on December 30th:

State v. Harris, 339 Or 157, 118 P3d 236 (2005). The Court concluded that the defendant, by pleading guilty to certain offenses and, in the course thereof, listing a prior juvenile adjudication, did not waive by judicial admission his ability to challenge the use of the adjudication to enhance his sentence. The Court then went on to hold that use of prior juvenile adjudications for enhancement purposes does not violate the Sixth Amendment, but that the adjudication either must be proved to a trier of fact or be admitted after an informed and knowing wavier.

State v. Heilman, 339 Or 661, 125 P3d 728 (2005). A defendant who waived a jury trial without qualification had not preserved as error his later claim that the trial court acted contrary to Apprendi in enhancing his sentence as a dangerous offender. Moreover, the Court concluded that the state need not plead or provide notice of enhancement in the indictment:

> "We think that [notice] is a matter for cautious legal advice. In counseling a client on the advisability of seeking a finding of guilty except for insanity, and providing facts to the trier of fact that might support such a determination, defense counsel would be wise to explain to the client the possibility that the state might seek to use the admitted facts against the defendant." 339 Or at 672.

State v. Sawatzky, 339 Or 689, 125 P3d 722 (2005). In dismissing an alternative writ of mandamus in a case remanded to the trial court for an *Apprendi / Blakely* violation, the Court rejected the relator's argument that to empanel a jury to consider sentencing factors on remand would violate double jeopardy considerations: "[T]his is not a second prosecution. Rather it is a sentencing proceeding on remand—a continuation of a single prosecution." *Sawatzky*, 339 Or at 696-97. Moreover, the Court reiterated that, as a matter of state criminal procedure, enhancement factors need not be set out in the indictment.

State v. Upton, 339 Or 673, 125 P3d 713 (2005). Issuing a peremptory writ of mandamus, the Supreme Court upheld Oregon's statutory sentencing scheme, as amended in 2005, which permits a court to determine whether substantial and compelling reasons justify a sentence beyond the presumptive range and yet still allows a jury to make the factual findings necessary to support the imposition of an enhanced sentence. In so doing, the Court rejected a number of challenges that the defendant made to Senate Bill 528, Or Laws 2005, ch 463, the legislature's response to a prior United States Supreme Court's decision calling Oregon's sentencing guidelines into question.

LETS BE CIVIL

Set out below are brief discussions of the Court's 2005 decisions in civil cases not dealt with in other parts of this overview.

It is a Constitution We are Expounding

In addition to some of the big ticket items discussed above, the Supreme Court digested a hearty helping of civil constitutional issues last year. In no particular order of significance, they were as follows:

Coast Range Conifers, LLC v. State, 339 Or 136, 117 P3d 990 (2005). The Court held that a state prohibition against logging nine acres of a 40-acre parcel (because bald eagles were present) did not constitute a regulatory taking. In doing so, the Court rejected the state's argument that the Oregon Constitution applies only to physical rather than regulatory takings and also rejected the plaintiff's argument that courts should look to only the area affected by the regulation rather than the whole parcel in determining whether the regulation leaves any economically viable use (noting that "determining what constitutes the relevant parcel may present a close question in some cases," 339 Or at 150). Were it otherwise, the Court explained, regulatory takings would occur every time a set-back limit is imposed or a landowner was required to keep one of four trees standing to curb soil erosion. 339

Or at 150, 151. The Court also rejected the plaintiff's federal takings claim.

Lawson v. Hoke, 339 Or 253, 119 P3d 210 (2005). In a four-to-three decision, the Court upheld under the remedies clause a statute prohibiting the recovery of noneconomic damages to plaintiffs who drive without insurance. Analogizing to Sunday laws and livestock fencing cases, the majority concluded that no absolute common-law right to recovery of such damages under the circumstances presented existed in 1857. The dissent (De Muniz, J., joined by Durham and Riggs, JJ.), invoking natural law among other things, took issue with the majority defending its decision "by referring to a few scattered examples of nineteenth-century laws."

Corp. of the Presiding Bishop v. City of West Linn, 338 Or 453, 111 P3d 1123 (2005). Although technically interpreting a federal statute, the Court applied a standard of constitutional provenance—the substantial burden test of *Sherbert v. Verner*, 374 US 398, 83 S Ct 1790, 10 L Ed 2d 965 (1963), which the federal statute intended to restore—and concluded that the city's denial of the church's application to build a meeting house did force the church to choose between following religious precepts and foregoing certain benefits or abandoning one or more religious precepts to obtain the benefits.

Li v. State, 338 Or 376, 110 P3d 91 (2005). In a highly publicized case of national interest, the Court invalidated approximately 3,000 marriage licenses issued to same-sex couples in Multnomah County. The legal points, however, were rather narrow. First, the Court concluded that Oregon's statutory law restricts marriage to opposite-sex couples. Second, the Court held that an intervening constitutional amendment, Measure 36 (2004), elevated to constitutional status that statutory standard in an operational, rather than merely hortatory, manner. Third, and dispositively, the Court held that Multnomah County exceeded its authority in determining to issue the licenses based on the county's determination that to apply the statute

would violate the privileges and immunities clause of the Oregon Constitution.

McFadden v. Dryvit Systems, Inc., 338 Or 528, 112 P3d 1191 (2005). Answering a certified question from the United States District Court for the District of Oregon, the Court held that the legislature's response to an earlier Supreme Court decision holding that the products liability statute of limitations does not contain a discovery rule—the response was to add such a rule and to provide a one-year window to refile dismissed claims—did not violate the separation of powers provisions of Article VII (Amended) or Article III of the Oregon Constitution.

American Trucking Assn's, Inc. v. State, 339 Or 554, 124 P3d 1210 (2005). The Court held that Oregon's "flat fee" highway tax alternative did not violate the Commerce Clause of the United States Constitution. The Court concluded that the tax was fairly apportioned and not discriminatory. As to the latter determination, the Court declined to accept the plaintiffs' hypothetical arguments about discriminatory effect: "plaintiffs cannot rely on hypothetical assertions to establish the existence of discriminatory economic effects; plaintiffs must demonstrate actual discrimination."

Civil Miscellany

In chronological order:

Walsh v. Mutual of Enumclaw, 338 Or 1, 104 P3d 1146 (2005) (statutory prohibition against construction agreements requiring indemnity for indemnitee's negligence applies to additional insured endorsements);

Barackman v. Anderson, 338 Or 365, 109 P3d 370 (2005) (in case of almost no precedential significance due to manner of litigation below, Court held that trial court should have applied issue preclusion in civil action following PIP arbitration);

Kaib's Roving R. PH. Agency, Inc. v. Employment

Dept., 338 Or 433, 111 P3d 739 (2005) (whacking Employment Department with attorney fees award for unreasonably concluding that director, who was party to contested case, could sign final order);

Marshall's Towing v. Dept. of State Police, 339 Or 54, 116 P3d 873 (2005) (state police incorrectly concluded that towing company had violated administrative rules);

McCall v. Kulongoski, 339 Or 186, 118 P3d 256 (2005) (state's notice of appeal challenging attorney fees award in Measure 7 case properly dismissed because state sent notice of appeal to wrong address and it was actually received on 32nd day);

WaterWatch of Oregon v. Water Resources Comm'n, 339 Or 275, 119 P3d 221 (2005) (essentially dismissing as improvidently allowed review in water appropriation case based on enactment of intervening statute);

Burden v. Copco Refrigeration, Inc., 339 Or 388, 121 P3d 1133 (2005) (plaintiff may rely on facts recited in certificate of service to meet burden of production as to sufficiency of service of process);

Bloomfield v. Weakland, 339 Or 504, 123 P3d 275 (2005) (claim preclusion in easement case involving privity element of claim preclusion test); and

Springfield Utility Board v. Emerald People's Utility District, 339 Or 631, 125 P3d 740 (2005) (city cannot exclude public utility district from providing service to newly annexed city property).

Workin' It

It would be a rare year indeed if the Court did not take up at least a smattering of workers' compensation cases (but still leave room on the docket for a sizeable number of auto insurance cases), and 2005 proved to be no exception. Claimants who elect not to show up for their insurer medical examinations are subject only to suspension, not denial, of their claims, *Lewis v. CIGNA Ins. Co.*, 339 Or 342, 121 P3d 1128 (2005) (reversing and remanding —but see also Or Laws 2005, ch 675—the legislative response to that decision; the case, which involves claims filed in 1997, is on

the road to becoming Oregon's *Jarndyce and Jarndyce*); the board's own-motion decisions are not subject to statutory appellate review (unless you are the claimant and your former award is terminated or diminished, or you are the employer and the board increases the claimant's award), *Dugan v. SAIF Corp.*, 339 Or 1, 115 P3d 242 (2005); and, a claimant whose physician has approved him or her for modified work that would have been available if the claimant had not gone and got him or herself fired in the interim is pretty much screwed, *Morales v. SAIF Corp.*, 339 Or 574, 124 P3d 1233 (2005) (employer entitled to cease paying temporary total disability benefits and commence paying temporary partial disability benefits—and see above regarding statutory construction). Finally, in *Managed Healthcare Northwest, Inc. v. DCBS,* 338 Or 92, 106 P3d 624 (2005), the Court upheld an administrative rule prohibiting workers' compensation managed care organizations from using past practices as a basis for denying authorization for treatment by nonmember primary care physicians—snore.

PATTER *FAMILIAS*

The Court decided three family law cases last year. One was a marital dissolution proceeding; the two others were termination of parental rights cases. In the dissolution case, the Court rejected a husband's attempt to enforce a post-nuptial marital settlement into which the couple had entered 10 years before their final break-up. *Grossman and Grossman*, 338 Or 99, 106 P3d 618 (2005). Although the Court discussed the parties' arguments concerning the circumstances under which a court should undertake to make a "just and proper" division of marital assets when the parties have entered into a marital settlement agreement, the Court ultimately decided against the husband on the theory that the agreement simply did not apply: "[T]he parties intended the agreement to apply to a dissolution that they contemplated at the time that they executed the agreement in 1988, a dissolution that never occurred." *Id.* at 108.

In a lengthy opinion critical at times of the manner in which the Department of Human Services had comported itself, the Court reversed the termination of parental rights of a mentally deficient mother of two children. *State ex rel. Dept. of Human Services v. Smith*, 338 Or 58, 106 P3d 627 (2005) (describing DHS's demand that mother move out of parents' house as "unreasonable" and stating that "[g]iven mother's limitations, perfection in parenting is not attainable (if it is for anyone), but neither is it required").

The mother, who was a high-school graduate with good grades despite a below-average IQ, initially had denied being pregnant and, later, had contended that "she must have become pregnant by taking a bath or shower in the same bath or shower in which either her 14-year-old foster brother or other men that her parents had permitted to shower at their house earlier had masturbated." *Id.* at 63. Justice Riggs dissented: "Sadly, and with as much clarity as can be mustered in these circumstances, mother is profoundly incapable of understanding reality, making it impossible for her to make appropriate decisions regarding the nurture and safety of her children." *Id.* at 91.

And, in *State ex rel. Dept. of Human Services v. Rardin*, 338 Or 399, 110 P3d 580 (2005), the Court reversed the decision of the Court of Appeals denying a father leave to file a late notice of appeal challenging the termination of his parental rights. The Court of Appeals had concluded that father had failed to present a colorable claim of error to justify the late appeal. Construing the requirement to "describe a claim that a party reasonably may assert under current law and that is plausible given the facts and the current law (or a reasonable extension or modification of current law)," *id.* at 408, the Court concluded that father's argument that the trial court impermissibly had terminated his parental rights based on a nonstatutory consideration—presentation of a viable plan by the parent to integrate the child into the parent's home—rather than on his fitness to parent was a colorable claim warranting remand to the Court of Appeals for further consideration, *id.* at 410-12.

We're Not Gonna Take It

Although the Court's mandatory review docket has stabilized over the last few years—at least insofar as the number of opinions issued in such cases, that part of the Court's workload still consumes a significant amount of the Court's resources. 2005 was no exception. Set out below are the Court's 2005 mandatory (also called "direct") review cases by category. (Add to that the tome that

Justice Balmer produced in *Save Our Rural Oregon v. EFSC*, 339 Or 353, 121 P3d 1141 (2005), which upheld a site certificate to build a privately owned energy facility in Klamath County. If you are into that kind of stuff, then I hope it suffices for me to direct you to the decision.)

Taxation with Representation

Assuming that it can be otherwise, 2005 was not a particularly interesting year from the standpoint of the Supreme Court's direct appeal tax docket. There were a couple of tax protester cases, *Buras v. DOR*, 338 Or 12, 104 P3d 1145 (2005) (retiree devoted income from his out-of-state "'Movie Industry Pension Fund'" for ministerial objectives of church for which he was lay minister: on the hook); *Curtis v. DOR*, 338 Or 579, 112 P3d 330 (2005) (landlord kept no records for rental properties, arguing rents not subject to state or federal taxation: on the hook), and a case involving a Washington trucker for the Oregon Food Bank who argued that his wages were exempt from Oregon income tax, *Julian v. DOR*, 339 Or 232, 118 P3d 798 (2005) (trucker argued that food bank "sold" food for purposes of federal statute because the food bank charged 14-cent-per- pound delivery charge to defray shipping costs: off the hook ("That transfer qualifies as the passing of title from seller to buyer for a price; in other words, it is a sale.")). There also was the Court's decision that the transit payroll tax is an all-or-nothing proposition. *Lane Transit District v. PeaceHealth*, 339 Or 398, 121 P3d 1138 (2005) (hospitals must pay tax; employer not limited to taxation for those employees who work in employer's hospital facilities: on the hook). Finally, there was the Court's short, yet still mind-numbing decision in *Wilsonville Heights Ass'n, Ltd. v. DOR*, 339 Or 462, 122 P3d 499 (2005), in which the Court upheld Judge Breithaupt's valuation of low-income property for ad valorem tax purposes using the well-known "VPWR – VGI = VTI" approach (doesn't everyone?).

What's in a Name?

The Court issued only a handful of ballot title review decisions during 1995, which, many will submit, is a good thing. Three of the Court's four opinions came on the same day and all involved initiative petitions dealing with use of money for political purposes. In each of the cases, the Court determined that the Attorney General's certified ballot title failed to comply substantially with

statutory standards and referred the ballot titles back to Attorney General Myers for modification. *See Towers v. Myers*, 338 Or 542, 112 P3d 1184 (2005), *Towers v. Myers*, 338 Or 550, 112 P3d 1190 (2005), and *Terhune v. Myers*, 338 Or 554, 112 P3d 1188 (2005).

The Court's final ballot title case of the year saw a challenge on the ground that the Attorney General should not have referred to an initiative petition as one that would amend the Oregon Constitution. The petition's sponsors seemingly intended to amend the constitution; they checked a box to that effect when filing the prospective petition. Unfortunately, however, the words of the proposed measure referred to the proposal only as an "act." The Court rejected the Attorney General's argument that he was bound by sponsor's box-checking: "[T]he Attorney General must recognize that his or her statutory obligation includes a certain amount of basic interpretation including, in this case, an independent assessment of what the proposed initiative measure in this case *is*—statutory enactment or constitutional amendment." *Christ v. Myers*, 339 Or 494, 500, 123 P3d 271 (2005). What the Attorney General will do with this new-found interpretive power—and how the Court will respond if he chooses to exercise it—remains to be seen.

Raising the Bar

The Court decided nine cases during 2005 as part of its statutory obligation to regulate lawyers (on both the front (admissions) and back (discipline) ends) and judges. None of the reported lawyer discipline cases involved application of the newly adopted Model Rules of Professional Conduct, which became effective January 1, 2005, and which apply to conduct occurring on or after that date. The cases included:

> the Court's refusal to impose reciprocal discipline for a lawyer whom the Tenth Circuit had reprimanded for failing to respond to notices from that court, *In re Coggins*, 338 Or 480, 111 P3d 1119 (2005) (accused had good faith belief that partner was handling matter);
>
> a 30-day suspension for failing to comply with a child support order, *In re Chase*, 339 Or 452, 121 P3d 1160 (2005) (accused stipulated to violation);
>
> an 18-month suspension for writing NSF checks, *In*

re Leisure, 338 Or 508, 113 P3d 412 (2005) (rejecting trial panel's decision to stay all but three months of suspension);

a three-year suspension for a lawyer involved in sending insurance agents to review clients' trusts without disclosing that the lawyer and his firm had a financial interest in the sale of any insurance products, *In re Phillips*, 338 Or 125, 107 P3d 615 (2005) (accused "effectively sold his client list to insurance agents for a cut of the commission");

a 180-day suspension for a lawyer who attempted to collect twice for a client's injuries, *In re Summer*, 338 Or 29, 105 P3d 848 (2005) (accused received criminal conviction in Idaho for that conduct);

a 120-day suspension for a former-client conflict and communicating with represented parties, *In re Knappenberger*, 338 Or 341, 108 P3d 1161 (2005) (represented parties were accused's employees who had filed employment-related claims in federal court against accused!); and

a truly bizarre proceeding in which the Court suspended a lawyer for one year following the lawyer's conviction on improper use of the emergency reporting system, initiating a false report, and disorderly conduct, *In re Strickland*, 339 Or 595, 124 P3d 1225 (2005) ("When the accused called the 9-1-1 operator, he described himself as being 'surrounded' by construction vehicles. He said that the construction workers were 'threatening' him, and he conveyed the impression that they were about to use physical violence against him. None of those things was true.").

Finally, in a contested admission proceeding, the Court admitted an applicant who had participated in substantial past illicit drug activity, *In re Beers*, 339 Or 215, 118 P3d 784 (2005) ("Viewing the record as a whole, we are convinced that applicant has reformed."), and the Court approved the consent to censure of a justice of the peace and pro tem judge who made an inappropriate remark in the course of a termination of parental rights proceeding, *In re Lemery*, 339 Or 432, 120 P3d 1221 (2005).

The Ultimate Sanction

The Court affirmed the convictions and death sentences of two aggravated murderers, *State v. Acremant*, 338 Or 302, 108 P3d 1139, *cert den*, 126 S Ct 150 (2005), and *State v. Gibson*, 338 Or 560, 113 P3d 423, *cert den*, 126 S Ct 760 (2005). In both cases, however, the Court remanded to the trial court for entry of a single judgment of conviction and sentence of death for each victim, relying on *State v. Barrett*, 331 Or 27, 10 P3d 901 (2000). Also, the Court entertained two interlocutory appeals by the state following the dismissal of separate aggravated murder proceedings. In *State v. Shaw*, 338 Or 586, 113 P3d 898 (2005), the Court first determined that it had statutory appellate jurisdiction over a state's appeal for a dismissal of an indictment with prejudice—after reaching the second level of the *PGE* analysis, 338 Or at 605-06—and ultimately concluded that the trial court had erred in dismissing the indictment with prejudice. The Court also clarified the circumstances under which it would consider issues on cross-appeal raised by the defendant: only when the assignments of error "are inextricably linked, either factually or legally, to the state's assignments of error on appeal. [Read: almost never.]" *Shaw*, 338 Or at 618-19. In *State v. James*, 339 Or 476, 123 P3d 251 (2005), however, and following an exhaustive discussion of the burdens of proof, persuasion, and production, the Court affirmed the dismissal, holding that the state had failed to meet its burden of persuasion as to whether the police had continued to question defendant consistent with his right to counsel. 339 Or at 491-92.

Missed It By *That* Much

Each year, a handful of cases discombobulate for one reason or another without the Court issuing a written opinion. Most involve petitions for review that the Court dismisses as improvidently allowed. Less frequently, the Court will affirm the decision below by an equally divided court or a case will become moot. Finally, in the habeas corpus and mandamus contexts, the lower court may

comply with the initial writ and obviate the need for additional proceedings and a written decision (or the proceeding may go away for some other reason). These shortfall cases provide at least some insight into the issues that the Court has indicated warrant its further attention, and, for that reason, I have listed what hopefully are all of 2005's below.

State v. Hughes, 192 Or App 8, 83 P3d 951 (2004) (whether trial court violated Due Process Clause by denying subpoena request of person subject to civil commitment proceeding: dismissed as improvidently allowed).

Perrin v. Kitzhaber, 191 Or App 439, 83 P3d 368 (2004) (whether trial court abused its discretion in denying attorney fees because case presented "special circumstances" rendering award unjust: dismissed as improvidently allowed).

Gillette v. Basinger, 338 Or 489, 113 P3d 435 (2005) (whether county of marital dissolution, or county where children present, has jurisdiction to issue temporary guardianship: dismissing alternative writ of mandamus as moot).

Oregonian Publishing Co. v. Catholic Charities Pregnancy and Adoption Services, 338 Or 682, 115 P3d 246 (2005) (whether trial court required to make public letter opinion in consolidated adoption and filiation proceedings when only adoption records are exempt from public records law and whether the statutory exemption is constitutional: alternative writ of mandamus dismissed following compliance).

State ex rel. Galton v. Oregon Commission on Judicial Fitness and Disability, 339 Or 68, 118 P3d 803 (2005) (Court issued peremptory writ postponing judicial fitness proceedings for 90 days based on concerns respecting judge's health).

Umemoto v. Eastmoreland Radiology, P.C., 196 Or App 81, 101 P3d 370 (2004) (whether trial court properly dismissed malpractice action under ORCP 54 B(1) after finding that plaintiff had not been appointed as personal representative of decedent's estate at time action was refiled: dismissed as improvidently allowed after case settled).

Facts are not collateral, for purposes of collateral matter rule on impeachment, if the facts are logically relevant to the historical, material facts at issue under OEC 401. *Gibson*, 338 Or at 573.

There is a difference between a court's refusal to make a finding of fact and a court's determination that conflicting evidence on an issue is in equipoise, and such a determination is binding as a finding of fact on appellate review. *James*, 339 Or at 482-83.

Burden of proof and standard of proof are analytically distinct concepts; the term "burden of proof" is outdated but consonant with the newer term "burden of persuasion." *James*, 339 Or at 485.

The term "characteristic" is not generally used to describe a single incident in a person's life. V.L.Y., 338 Or at 51.

Structural error is not a useful analytical tool to determine whether legal error in a proceeding should result in reversal. *Ryan*, 338 Or at 297.

"[I]ssues do not recognize themselves; the task of identifying and evaluating potential issues rests on the skills of the lawyer." *Burdge*, 338 Or at 497.

A lawyer's failure to present an unsettled question of law may constitute ineffective assistance of counsel. *Burdge*, 338 Or at 499.

Mandamus is appropriate to consider issues of former / double jeopardy. *Sawatzky*, 339 Or at 693 n 4.

The framers of the Oregon Constitution did not include any express announcement of "inalienable" natural rights. *Ciancanelli,* 339 Or at 310.

The fact that docket congestion ultimately arises out of a legislative policy neither expands nor contracts the period of time that otherwise would be considered reasonable within which to bring a defendant to trial. *Adams*, 339 Or at 111.

The branch of government closest to the people will be the most watchful and cautious in the imposition of taxes. *Bobo*, 338 Or at120-21.

The Supreme Court best fulfills its obligation to interpret the laws of Oregon after a trial court and the Court of Appeals have

had an opportunity to consider and refine the legal issues. *Strunk*, 338 Or at 155.

The Special Master in the PERS litigation, now Chief Judge Brewer, "completed [his] assignment in commendable fashion, and his efforts warrant this Court's grateful acknowledgment." *Strunk*, 338 Or at 155.

When presented with multiple bases for disposition, the Supreme Court generally considers the issues hierarchically. *Strunk*, 338 Or at 171.

Absent leave to file surreply, appellants have final word as to their cases-in-chief. *Strunk*, 338 Or at 173 n 27.

"'The function of the court is to declare the law as it is and not what it thinks it ought to be.' * * * We offer that nearly 70-year-old statement from our predecessors on this bench neither in apology nor as commentary on the various legislative and executive policy choices—both past and present—that these cases have brought before us. Instead, we reiterate that pronouncement here because we think that it is both correct and reflective of our efforts to resolve these compelling issues—efforts that counsel and the parties themselves advanced considerably through their diligent and capable conduct of this litigation." *Strunk*, 338 Or at 238.

Even assuming that amici are in a position to raise an issue, court will consider case within the scope that the parties to the case have presented it. *Walsh Construction Co.*, 338 Or at 11.

"[T]he Court of Appeals correctly assessed the statute's meaning. Further, we perceive no benefit in attempting to reshape that analysis for purposes of our own disposition. Accordingly, we adopt the following excerpt from the Court of Appeals decision, which Presiding Judge Haselton authored: * * *. [Read: Attaboy!]" *Walsh Construction Co.*, 338 Or at 6.

Text and context clear; nevertheless, court noted that legislative history did not change court's position. *Kaib's Roving R.Ph. Agency, Inc.*, 338 Or at 443 n 5 (but what about *PGE* ?).

"[A]dministrative rules, once made, must be followed, in order for the public to have a reliable road map as to the actions that its government claims to be entitled to take." *Marshall's Towing*, 339 Or at 58 n 5.

Legal analysis can remain correct notwithstanding "quaint (or even offensive)" statements when set in historical context (there, an antiquated discussion of gender roles). *Grossman*, 338 Or at 106 n 3.

Habeas may lie even when the specific relief sought would not yield an immediate release from confinement. *Rico-Villalobos*, 339 Or at 201-02.

To declare what the law is or has been is a judicial function; to declare what the law shall be is a legislative function. *McFadden*, 338 Or at 539.

"Aside from the difference in horsepower—one, two, or possibly four versus two or three hundred—we see no difference in principle between vehicles negligently driven in the nineteenth century and vehicles negligently driven today." *Lawson*, 339 Or at 259 n 5.

There is no such thing as a "*de minimis*" violation of lawyer ethics rules. *In re Knappenberger*, 338 Or at 345 n 5.

Good reputation for purposes of mitigation in a lawyer disciplinary proceeding focuses on reputation as a lawyer and not as a citizen, parent, etc. *In re Chase*, 339 Or at 459.

Membership in the bars of multiple states does not bear on question whether accused lawyer has "substantial experience" in the practice of law, at least absent evidence as to the lawyer's experience working on legal matters. *In re Strickland*, 339 Or at 606.

An Overview of the 2005 Civil Decisions of the Oregon Court of Appeals

Robert Udziela

Do We Really Have a Court of Appeals?

Before you peruse the following, you might consider at least a look at *Carey v. Lincoln Loan Co.*, 203 Or App 399, 125 P3d 814 (2005). It may save you some time, because if the defendant in *Carey* is ever proved correct, the decisions parsed below are merely exercises in legal writing, expostulations (obs.) by pretenders to the throne of a court that does not legally exist. They can thus be safely ignored. Here is what I mean.

In *Carey*, a relatively small land sale dispute found its way the Court of Appeals twice. The first time, the court held that the prepayment restriction in the contract at issue did not violate ORS 82.170, nor did it violate common-law rules regarding the restraints on the alienation of lands. *Carey v. Lincoln Loan Co.*, 165 Or App 657, 998 P2d 724 (2000). However, the court remanded the case for a determination by the trial court whether the contract was unconscionable. The trial court held it was not. On a second appeal, the Court of Appeals reversed.

So, what does that have to do with the existence of the Court of Appeals? Well—the second time around, the defendant contended there was no jurisdiction in that court because that court did not legally exist. The argument went thusly:

According to defendant, the only legitimate courts are those named in Article VII (Original), section 1, of the Oregon Constitution. Those courts are the Supreme Court, circuit courts, county courts, municipal courts, and justices of the peace. Because the legislature does not have the constitutional authority to create any additional court, including an intermediate court of appeals, defendant argued, the Court of Appeals has no legal existence.

But what of Article VII (Amended), section 1, of the Oregon Constitution, you say? That provision, passed by the voters in 1910, provides that the judicial power of the state shall be vested in one supreme court *and in such other courts as may from time to time be created by law.* (Emphasis added.) The legislature created

the Court of Appeals in 1969 pursuant to Article VII (Amended), section 1, so what's the problem?

Well, according to defendant—and defendant makes a pretty good argument—Article VII (Amended) was enacted improperly because the procedures that led to its purported adoption did not comply with constitutional standards. As a result, Article VII (Original), section 1, is the only valid constitutional authority for courts in Oregon, and it does not include a Court of Appeals. Defendant's argument was stated by the court:

> "Defendant argues that the adoption of Article VII (Amended) was procedurally flawed in three separate ways, each of which involved a failure to comply with one of the requirements for amending the constitution, and that any one of those defects is sufficient to invalidate the entire amended article. Defendant asserts, first, that F.W. Benson, who was the elected Secretary of State and who, in 1910, acted in both that capacity and as Governor in canvassing the votes and proclaiming the adoption of Article VII (Amended), was legally neither the Governor nor the Secretary of State. Thus, according to defendant, there never was a legal proclamation of the adoption of Article VII (Amended). Or Const, Art XVII, § 1. Second, defendant asserts that the petitions that voters signed to place Article VII (Amended) on the ballot did not contain 'the full text of the proposed * * * amendment to the Constitution.' Or Const, Art IV, § 1(2)(d). Finally, defendant asserts that the ballot presented Article VII (Amended) to the people in a way that required voters to vote for or against the article in its entirety, thereby violating the requirement that voters be able to vote separately on separate amendments. Or Const, Art XVII, § 1; *see, e.g., Armatta v. Kitzhaber,* 327 Or. 250, 959 P.2d 49 (1998)."

203 Or App at 403.

Now, the court rejected all three of these arguments, and held that it really does exist, and is not an illusory entity. However, as you wind through the court's explication of why defendant is wrong-especially its agreement that the aforementioned Mr. Benson was simultaneously (and probably illegally) trying to be

Governor and Secretary of State when the amendment was adopted (I was unaware that you could be a Governor or Secretary of State *de facto* even if you weren't Governor or Secretary of State *de jure*), and that, even if Article VII (Amended), section 1, might not have been quite up to snuff constitutionally at the time it was adopted, at least it was *impliedly validated* in 1962 by the adoption of Article VII (Amended), section 2b-well, you see that defendant had a serious point.

Anyway, it is not known whether the Supreme Court will look at this, but, in the words of Justice Gillette, "stay tuned."

The following is but a smattering of decisions, randomly selected by me with help from Keith Garza and Lora Keenan.

Asbestos cases and summary judgment

A. Sufficiency of the evidence, and What's in an Affidavit?

The Oregon Court of Appeals continues to follow the rule stated in *Purcell v. Asbestos Corp. Ltd.*, 153 Or App 415, 423, 959 P2d 89 (1998): once it is established that asbestos was present in the workplace, "it is the jury's task to determine if the presence of that asbestos played a role in the occurrence of the plaintiff's injuries."

In *West v. Allied Signal, Inc.*, 200 Or App 182, 113 P3d 983 (2005), plaintiff claimed her decedent contracted mesothelioma from asbestos found in work gloves supplied by defendant to plaintiff's decedent's employer. The trial court granted defendant's motion for summary judgment on the grounds that there was no evidence that defendant supplied asbestos-containing work gloves to this employer. The Court of Appeals reversed.

The critical issue in the case appeared to be whether the affidavit of plaintiff's co-worker that did not contain the statement that it was "made on personal knowledge," as required by ORCP 47 D, should be considered as part of the summary judgment record. The court agreed with plaintiff that the rule did not require that the affiant *state* that he or she had personal knowledge, and held that "the rule's requirements are satisfied if, from the content of the affidavit read as a whole, an objectively reasonable person would understand that statements in the affidavit are made from the affiant's personal knowledge and are otherwise within the affiant's competence." 200 Or App at 190. Once the court stated the rule in

West, however, it avoided applying it to see if the affidavit in that case was sufficient. Rather, looking at the other evidence in the summary judgment record, the court held that under the *Purcell* standard, a material issue of fact existed on whether defendant supplied asbestos-containing gloves to the employer.

West was decided just six months after *Austin v. A. J. Zinda Company*, 196 Or App 262, 101 P3d 819 (2004), another asbestos case where the court relied on *Purcell* to reverse a summary judgment.

B. The discovery rule, or, How Much More Does He Have to Know?

In *Keller v. Armstrong World Industries, Inc*., 197 Or App 450, 107 P3d 29, *adhered to as modified on reconsideration*, 200 Or App 406, 115 P3d 247, *rev pending* (2005), the *en banc* court, in a case of first impression, parsed ORS 30.907 (relating to the statute of limitations in asbestos disease claims) under P*GE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). In *Keller*, plaintiff filed claims for asbestos-related disease in October, 2000. The court thus reviewed the summary judgment record to decide if issues of fact existed on whether plaintiff discovered, or in the exercise of reasonable care should have discovered, that his lung symptoms were related to asbestos. In doing so, the majority considered Supreme Court decisions construing ORS 12.110(4) [*Gaston v. Parsons*, 318 Or 247, 864 P2d 1319 (1994), *Doe v. American Red Cross*, 322 Or 502, 910 P2d 364 (1996), and *Greene v. Legacy Emanuel Hospital*, 335 Or 115, 60 P3d 535 (2002)], and adopted the standard of "discovery" in those cases: the statute of limitations begins to run when a plaintiff has knowledge of facts "that would make a reasonable person aware of a *substantial possibility* that each of the * * * elements * * * exists." *Keller*, 197 Or App at 460-461, *quoting Gaston*, 318 Or at 256, emphasis in *Keller*. "Substantial possibility," according to the majority, connotes something "less than a preponderance, but still a high level of certainty, and certainly more than a suspicion." 197 Or App at 462.

The majority in *Keller* held that a factual dispute existed in the record about whether plaintiff actually discovered the cause of his disease before 1998 and whether a person exercising reasonable care would have discovered that cause before 1998. Summary judgment was thus reversed.

Judge Edmonds dissented, and was joined by Judge Ortega. The dissent disagreed with the majority's consideration of ORS

12.110(4), and opined that, under *Gaston v. Parsons*, *supra*, one of the cases cited by the majority, plaintiff had an affirmative obligation to make inquiry about his illness and potential causes, and when the facts presented in the summary judgment record were considered in light of that objective, plaintiff should have had sufficient knowledge of the potential connection long before 1998.

Going further, even giving the majority the benefit of its rule that something more than a "mere suspicion" of causal connection was required, the dissent contended that summary judgment was proper. That was so because the undisputed facts showed at least the following:

1. By the 1970s, plaintiff knew "without a doubt" that he had been exposed to asbestos in the 1960s.
2. By the mid-1980s, when plaintiff was experiencing breathing problems, he consulted Dr. Patterson. Plaintiff testified that he first learned that asbestos might be hazardous to his health from Dr. Patterson.
3. Dr. Patterson told him to get out of his business because his exposure to asbestos there was contributing to his breathing problems.
4. Plaintiff sold his business a year later.
5. In 1991, plaintiff saw Dr. Kintz, who diagnosed pulmonary fibrosis, possibly related to asbestos exposure. In December 1991 plaintiff applied for Social Security benefits, relying on the opinions of Drs. Kintz and Patterson. He stated in his application that his lung condition was blamed on his exposure to asbestos.
6. In December 1993 plaintiff told an emergency physician that he was being treated for asbestosis.

197 Or App at 471-472.

Given those facts, Judge Edmonds said that "no reasonable trier of fact could find based on the ordinary meaning of the phrase that plaintiff had only a 'mere suspicion' that defendants' products caused his disease…" 197 Or App at 492. A petition for review of this case has been filed with the Supreme Court.

Statutory construction

1. A Road is a Road is a Road

In *Liberty v. State*, 200 Or App 607, 116 P2d 902, *adhered to as modified on reconsideration*, 202 Or App 355, 122 P3d 95 (2005), the court held that the provisions of ORS 105.682, which provides immunity to owners of land opened to the public for recreational purposes, apply to owners of land used by persons to *access* recreational lands. In Liberty, plaintiffs went to the "Fisherman's Bridge" area of the Wilson river to recreate. They parked next to the road near the stairs leading to the bridge. In order to reach the stairs, they had to walk on the roadway between a guardrail and the edge of a cliff. When they were leaving the area, they were standing on the roadway when it collapsed, causing them to fall 40 feet and be seriously injured.

Plaintiffs sued the state, which claimed immunity under ORS 105.682. Plaintiffs countered that they were not engaging in "recreation" on defendant's land as required by the statute, they were merely using defendant's land for ingress and egress to the recreational property, which defendant did not own. The trial court granted summary judgment, and the Court of Appeals affirmed.

Plaintiff argued that it was "absurd" to extend statutory immunity to public highways that are used for access to recreational areas. The court was unimpressed, and noted that despite the broad scope of immunity generally conferred by ORS 105.682, the legislature has more specifically provided that, where state highways are concerned, the Department of Transportation remains accountable for negligent performance of its statutory obligations to maintain and repair roadways, citing ORS 390.010 and *Bobo v. Kulongoski*, 338 Or 111, 107 P3d 18 (2005). Finding plaintiffs were not injured on the highway, the court said, "When plaintiffs used the state's asphaltic concrete path for the purpose of gaining access to the private recreational area located on the opposite side of the Wilson River, they used the state's land for 'recreational purposes' within the meaning of [ORS 105.682]". 200 Or App 619.

Plaintiffs petitioned for reconsideration, contending that the court had the facts wrong, that is, they claimed that their injuries did not occur on a "path," as stated by the court, but on a state highway. The court rejected the contention, stating that it was plaintiffs' burden to demonstrate where their injuries occurred, and as they offered no evidence that the asphaltic concrete path

was itself a part of the state highway system, summary judgment was affirmed.

Custody and parenting plans

1. A Very Difficult Case

The significant issue in *McArthur v. Paradis*, 201 Or App 530, 120 P3d 904 (2005), revolved around the clash between the religious observances of the custodial mother (and her now-13-year old child) and the desire of the non-custodial father to enjoy full weekend parenting activities with him and his family during parenting time. The court held, on the facts presented in that case, that the best interests of the child would better be met by accommodating the religious observances of the mother.

Mother's religious observations require strict adherence to a Sabbath beginning at sundown Friday and ending at sundown Saturday. Little secular activity is allowed on the Sabbath, and its observance includes participation in worship services. Father asked the court to grant him parenting time that would allow normal weekend visits, because, as he testified, "'[We] can't go anywhere, or do anything as a family unit. We're not able to go away for the weekend or do anything as such, or vacations.'" 201 Or App at 534. The trial court granted father's request, and ordered alternate weekend parenting time starting Friday at noon, concluding that the mother's Sabbath request was not in the best interests of the child.

The Court of Appeals reversed. In doing so, the court recognized the difficulty of the issue for both itself and the trial court. Nonetheless, it answered the difficult question as follows:

> "The evidence indicates that consistency is important for child. Child has practiced mother's Sabbath observance her entire life. She expressed to her therapist her preference for being allowed to continue her practices. Both the custody evaluator and child's therapist recommended that father's parenting time conform to the Sabbath observance period because that was in the best interests of child. We recognize the persuasiveness of father's argument that to permit child to continue her Sabbath practice could prevent her from developing a 'typical traditional relationship with her father and his family' because

> she would not be available for weekend activities that occur on Saturdays. On these facts, given the policy adopted by the legislature in ORS 107.105(1)(b), the infringement on father's opportunity to develop what he has termed a traditional family relationship with child must yield to the stability and continuity afforded to child by mother's position."

201 Or App at 537.

I had the good fortune to be present for oral argument of this case. Both counsel presented compelling, persuasive arguments, and responded well to the difficult and probing questions of the court.

Review allowed

The following cases were a few that were interesting enough to warrant Supreme Court review.

1. *Value of a Chance, or not, in Wrongful Death Cases*

Joshi v. Providence Health System of Oregon Corp., 198 Or App 535, 108 P3d 1195, rev allowed 339 Or 475 (2005).

In *Joshi*, plaintiff brought a wrongful death claim in medical negligence. Plaintiff's decedent, Satyapriy Joshi, died of a stroke after two doctors failed to diagnose his condition. Plaintiff offered proof that a timely diagnosis and proper treatment would have improved Joshi's chance of survival by approximately 30 percent but that he probably would have died anyway. The trial court directed a verdict for defendants. The Court of Appeals affirmed, holding that plaintiff was required to prove that there was a reasonable medical probability that defendants' conduct caused Joshi's death.

On review, the Supreme Court media release states that the issues are (1) whether the "substantial factor" standard of causality can be used to show cause-in-fact in Oregon wrongful death cases, and (2) whether petitioner's expert in this case presented sufficient evidence of causality to present a question for the jury to decide.

2. *Medical Marijuana Meets the Drug Free Workplace*

Washburn v. Columbia Forest Products, Inc., 197 Or App 104, 104

P3d 609, *rev allowed* 339 Or 156 (2005).

In *Washburn*, plaintiff suffered muscle spasms that interfered with his ability to sleep. He used marijuana prescribed under Oregon's Medical Marijuana Act and it completely resolved his sleeping problems. Employer has a workplace policy that prohibits employees from reporting for work with the presence of a controlled substance in their system. On several occasions, plaintiff tested positive for marijuana. Employer's testing procedures could not reveal whether plaintiff was under the influence of marijuana, only that he had used it sometime within the previous two or three weeks. Employer refused plaintiff's request to allow him to take a different test that would indicate whether he was impaired by marijuana while at work. He was eventually fired.

Plaintiff brought an action under Oregon disability law, contending that defendant failed to meet its obligation to reasonably accommodate his disability under ORS 659A.112. Defendant moved for summary judgment, contending plaintiff was not a "qualified individual with a disability," and that the Oregon Medical Marijuana Act does not require employers to accommodate medical marijuana users. The trial court granted summary judgment, agreeing with both of defendant's arguments.

The Court of Appeals reversed. In doing so, the court first held that it was not bound to follow federal precedents that hold that an otherwise disabled person whose disability is improved by "mitigating measures" is not "disabled" for purposes of protection of the ADA. Rather, under Oregon's disability law, "The proper issue is whether plaintiff's sleep, a major life activity, is substantially limited without mitigating measures." 197 Or App at 111. Because the parties agreed there was a genuine issue of fact on that ground, summary judgment was wrong on that ground.

Next, the court rejected defendant's argument that the OMMA provided a defense. Parsing ORS 475.340(2), which states that the OMMA shall not require an "employer to accommodate the medical use of marijuana in the workplace," the court agreed with plaintiff that having marijuana in his system did not mean that he "used" marijuana in the workplace.

Finally, the court rejected defendant's arguments that the actions it took against plaintiff were required by the Federal Drug

Free Work Place Act of 1998. According to the court, that law only prohibits "unlawful" acts by employees, and plaintiff, legally participating in OMMA, was not engaged in an unlawful act.

On review, the Supreme Court media release says the issues are:

(1) Whether Oregon disability law follows federal ADA precedent and takes into account mitigating measures in determining whether an employee is limited in a major life activity.

(2) Whether the exemption in ORS 475.340(2) of the OMMA for employer accommodation of medical marijuana applies only to employee use of medical marijuana on the actual work site, or also to off-site use.

(3) Whether the obligation to accommodate extends to accommodations that will improve the employee's quality of life but are not necessary to perform the essential functions of the job.

(4) Whether an employer must offer an accommodation preferred by the employee if an alternative accommodation is available.

3. "On My Honor, I Swear to Uphold…"

Mabon v. Wilson, 198 Or App 340, 108 P3d 598, *rev allowed* 338 Or 680 (2005).

In *Mabon*, plaintiff filed an action under ORS 30.510 in which he challenged the authority of the defendant to hold the office of Multnomah County Circuit Judge. Plaintiff based his challenge on the contention that defendant had failed to subscribe to the correct oath of office and therefore was not qualified to hold the office. The trial court granted summary judgment, and the Court of Appeals affirmed.

The Court of Appeals did not reach the merits of plaintiff's claims, because it held, after lengthy discussion, that the statute under which plaintiff brought his claim was a legislative substitute for the common-law *quo warranto*. As such, only the district attorney can prosecute the action. Here, the district attorney had declined to proceed, thus the trial court lacked jurisdiction to hear the case.

On review, the Supreme Court media release states that the issue

is whether a trial court lacks jurisdiction to hear an action under ORS 30.510 challenging a public official's right to hold office if the action is commenced and prosecuted by a private party and not a district attorney.

4. Where Do Juries Come From, and Can I Look?

Jury Service Resource Center v. Carson, 199 Or App 106, 110 P3d 33, *rev allowed* 339 Or 405 (2005).

Plaintiffs sought access to jury pool lists in Lincoln County and Marion County. They were denied access, and appealed to the Attorney General. He denied their requests, claiming the requested records were protected from disclosure under the Oregon Public Records Law (PRL). Plaintiffs sought judicial review. Concluding the defendants' denials did not violate the PRL or any state or federal constitutional provision, the trial court granted defendants summary judgment. The Court of Appeals reversed and remanded.

First, the court held that the PRL does not require disclosure of jury pool information except in very limited circumstances not present in the case. Next, the court held that the provisions of the PRL denying access to jury pool information did not violate any State Constitutional provision, specifically Article 1, sections 8, 10, and 20.

Finally, however, the court held that under a system like Oregon's,

> "in which the particular jury ultimately empaneled in any given trial is drawn randomly from a pool that is itself selected before a jury term, adequate protection of the public's right (as well as the defendant's and potential jurors' rights) must begin at the source of the process itself, at the aptly named 'source lists.' ORS 10.215. Opening voir dire does not alone suffice to guarantee that a jury is untainted, because taint at the source could flow forward at each subsequent step. Thus, to protect the values guaranteed by the First Amendment right of access to the jury selection process, that process must be open from the first step. We therefore conclude that the source lists, master lists, and jury term lists used in criminal trials are presumptively open to the public. Because Oregon

> does not use different lists for criminal and civil juries, all the lists are presumptively open."

199 Or App at 122-123, footnote omitted.

The court's conclusion, however, does not mean that plaintiffs will prevail. Rather, the court stated that defendants may overcome the presumption in favor of openness by establishing that closure serves an overriding interest and that it will be carried out by narrowly tailored means.

On review, the Supreme Court media release states that the issue is whether the state's refusal to disclose source, master, and term lists of jurors to nonlitigants violates ORS 10.215, the PRL, or any provision of the state or federal constitution.

In another PRL case, *City of Portland v. Oregonian Pub. Co.*, 200 Or App 120, 112 P3d 457 (2005), the county district attorney ordered the city to produce certain documents relevant to the investigation and discipline of a police officer who shot and killed a civilian during a traffic stop. The city filed an action seeking a declaration that it was not required to disclose the documents. The Circuit Court, Multnomah County, Michael C. Zusman, Judge Pro Tempore, affirmed the district attorney's order. City appealed. The Court of Appeals, Schuman, J., held that the requested documents were not exempt from disclosure under the Oregon Public Records Law.

SHORTS ON OTHER CASES OF INTEREST

1. The Devil, You Say

Jamshidnejad v. Central Curry School Dist., 198 Or App 513, 108 P3d 671 (2005).

An eighth-grade student was suspended for participating in creation and circulation of a petition that claimed a teacher was the devil. The student contended that he did not create the petition, nor circulate it, but merely gave the author of the petition a list of synonyms for the word "devil." The trial court granted the school district's motion for summary judgment. The Court of Appeals reversed, and held that there was an issue of fact whether the student's First Amendment free speech rights were violated by the suspension.

In doing so, the court said that the trial court and the parties

were wrong in their analysis that the First Amendment protects speech regarding matters of public concern and nothing more. Rather, all lawful speech is protected, although in a school setting, students' speech is not protected to the same extent that the expression would be protected if made by an adult in a non-school setting.

In *Jamshidnejad*, the court said that summary judgment was proper only if undisputed facts show that plaintiff actually contributed to the devil petition *and* that his contribution was disruptive or capable of causing disruption to the school's mission of fostering a learning environment and "teaching students the boundaries of socially appropriate behavior." Because the facts surrounding the nature of the petition, its authorship, and its dissemination are in dispute, summary judgment was inappropriate.

2. *Perpetual Cows*

Mallorie and Mallorie, 200 Or App 204, 113 P3d 924, *rev denied* 340 Or 18 (2005).

Husband and wife were married for about 20 years. Husband brought to the marriage 362 dairy cows that were leased to a dairy and replaced on a cycle or rotation approximately every three years. The court held that the "current" cows were marital assets, and not "pre-marital assets." The court did so by noting and rejecting husband's reasoning:

> "Husband reasons that what he brought into the marriage was not 362 specific cows, but was, instead, 362 income-producing items that were to be replaced regularly by the dairy pursuant to the lease. In essence, husband argues that he brought to the marriage 362 perpetual cows rather than 362 mortal cows."

200 Or App at 212.

3. *The Eagles Must Fly Together*

In Lahmann v. Grand Aerie of Fraternal Order of Eagles, 202 Or App 123, 121 P3d 671, *rev pending* (2005), the court held that the Eagles had to admit women applicants to its membership under Oregon Public Accommodations Act. The court held that the organization was not exempt from the anti-discrimination provisions of the act, that the act did not violate members' state

constitutional right of free assembly, and that the act did not violate members' First Amendment right of expressive association.

4. SAIF is a Person

In *Johnson v. SAIF Corp.*, 202 Or App 264, 122 P3d 66 (2005), plaintiff sued defendant under §1983 of the Civil Rights Act for terminating his permanent total disability award without a pre-termination hearing. The trial court granted SAIF's motion for summary judgment. The Court of Appeals reversed, holding that SAIF is not entitled to Eleventh Amendment immunity, and thus it and its officials are "persons" subject to suit under federal civil rights statute, and that defendants were acting under color of state law when they terminated plaintiff's disability benefits. Specific to *Johnson's* particular appeal (he was ultimately given a "full-blown hearing" and determined not to be permanently and totally disabled), the court held his action was not barred by issue preclusion, but that his claim for injunctive relief was moot.

2005 Criminal Case Roundup

Walter Ledesma

Oregon appellate courts were busy in 2005 with several cases that changed the practice of criminal law. Some of the changes were great, while others were more modest. The following outline covers only a few of the highlights through October 2005. This article is not a comprehensive discussion of Oregon criminal law. As always, a prudent practitioner will refrain from rendering a legal opinion without performing independent professional legal investigation. With that said, the cases that were selected for this roundup are criminal decisions that every practitioner in Oregon should be familiar with.

PAROLE

It might seems backward to begin with parole in a case roundup of criminal cases; however, after the client has lost at trial, the majority of the decisions that have an impact on the liberty of the defendant are made by the Board of Parole and Post-Prison Supervision (hereinafter "board"). Although parole was abolished in November 1989 with the adoption of the sentencing guidelines,

the courts continue to monitor this administrative agency. As the following cases amply demonstrate, when the board acts in its administrative capacity, the results are serious.

Richards v. Board of Parole, 339 Or 176 (2005). The Oregon Supreme Court was called on to decide whether petitioner, an inmate, was "adversely affected or aggrieved" by a board order, and thus, entitled to judicial review in the appellate courts. Petitioner initially sought administrative review of a board order that delayed his release date for two years and required that he undergo a psychological evaluation before release. In response, the board entered a new order that changed petitioner's projected release date to one year, but retained the requirement that petitioner undergo a psychological evaluation. Petitioner again sought administrative review, arguing that he should not have to undergo a psychological evaluation and that the board should release him in a year without such an evaluation. The board rejected that argument. Petitioner then sought judicial review in the Court of Appeals. The board moved to dismiss, arguing that the board's order did not adversely affect or aggrieve petitioner in the manner necessary to establish appellate jurisdiction. The Court of Appeals agreed with the board and dismissed the petition for judicial review by order for lack of jurisdiction. The Oregon Supreme Court reversed, holding that the Court of Appeals erred in dismissing petitioner's petition. The court ruled that when a petitioner does not receive all the relief sought, that petitioner is "adversely affected or aggrieved" for purposes of ORS 144.335(1)(a).

V.L.Y. v. Board of Parole, 338 Or 44 (2005). The board designated petitioner as a "predatory sex offender" for purposes of Oregon's sex offender community notification law. Petitioner argued that the designation was flawed based on statutory and constitutional grounds. The court ruled that the designation arose out of a statutorily impermissible decisional process.

SUPPRESSION CASES

The courts decided a number of important cases that altered suppression practice in Oregon. In *State v. Hall*, the court changed the law of exploitation analysis. The courts also dealt with the recurring issue of the violation of the Vienna Convention Treaty violation.

State v. Hall, 339 Or 7 (2005). The court ruled that an encounter with citizens are constitute an unlawful stop under ORS 131.615(1)

(1995) is also an unlawful "seizure" under Article I, section 9, that may vitiate a defendant's otherwise voluntary consent to a search.

State v. Sanchez Llamas, 338 Or 267 (2005). The court decided that when the police violate a right to consular notification and communication, as guaranteed by Article 36 of the Vienna Convention on Consular Relations, suppression as a remedy for post arrest statements is not available for individual foreign nationals.

State v. Galloway, 198 Or App 585 (2005). Article I, section 9, of the Oregon Constitution protects an individual's rights in garbage left in garbage cans outside their homes for curbside collection.

KIDNAPPING

The court waded into the thorny issue of how much movement is necessary for the asportation element of the kidnapping statute.

State v. Wolleat, 338 Or 469 (2005). Moving a complainant from one room to another while committing a crime does not constitute moving the victim a substantial distance and thus, does not constitute kidnapping.

GUN RIGHTS

The Oregon Supreme Court wrestled with the issue of whether a convicted felon forfeits the right to bear arms under the Oregon Constitution. Going back to common law, the court ruled that the felon in possession of a firearm statute is not overbroad.

State v. Hirsch/Friend, 338 Or 622 (2005). In two consolidated cases, the court ruled that the felon in possession of a firearm statute, ORS 166.270(1), is not unconstitutionally overbroad on its face.

SENTENCING

The courts were busy in the sentencing area. For the most part, the courts continued to struggle with the fallout from the United States Supreme Court cases, *Apprendi v. New Jersey,* 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000), and *Blakely v. Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004).

State v. Harris, 339 Or 157 (2005). Under *Apprendi*, using juvenile adjudications to increase a sentence violates the Sixth Amendment.

SEX CRIMES

In one of the most controversial opinions of the term, the Oregon Supreme Court ruled that a live public show where the participants engage in sexual conduct is protected expression. In other cases, the courts dealt with difficult issues of statutory interpretation and constitutional issues.

State v. Ciancanelli, 339 Or 282 (2005). ORS 167.062, which makes it a crime to, among other things," direct, manage, finance or present" a "live public show" in which the participants engage in "sexual conduct" violates the free expression rights guaranteed by Article I, section 8, of the Oregon Constitution because it is directed at a form of expression and does not fall within a well established "historical exception" to the constitutional prohibition on enactment of such laws.

State v. Stamper, 197 Or App 413 (2005). The phrase, "and the victim does not consent thereto," in the sexual abuse in the second degree statute, ORS 163.425, is satisfied if there is proof that the victim was under the age of 18 and therefore incapable of consenting, regardless of whether the victim actually consented.

State v. Reed, 339 Or 239 (2005). The "incapable of consenting" to certain sexual acts by reason of mental defect under ORS 163.427(1)(a)(C) (first degree sexual abuse), ORS 163.411(1)(c) (first degree unlawful sexual penetration), ORS 163.375(1)(d) (first degree rape), and ORS 163.315(1)(b) ("incapacity" statute) is not satisfied merely because a complainant possess a mental defect.

COURT OF APPEALS CRIMINAL CASES

The following are excerpts from the media releases of the Court of Appeals in cases deemed significant by the author.

State v. Cunningham, 197 Or App 264 (2005). The Oregon Court of Appeals affirmed the conviction of Bradly Cunningham for the murder of his wife, Cheryl Keeton, that occurred in 1986. Defendant was tried for the crime in 1994. In late 2004, the Oregon Supreme Court resolved an evidentiary issue in the state's favor in *State v. Cunningham*, 337 Or 528, 99 P3d 271 (2004), and remanded the case to the Oregon Court of Appeals for resolution of other issues raised on appeal. On remand, the Court of Appeals considered whether defendant's conviction should be reversed

based on three alleged errors. First, defendant asserted that the trial court should not have admitted DNA evidence concerning a hair found on the victim's body. Second, defendant argued that the trial court erred in excluding testimony from defendant's expert witness concerning DNA evidence due to a discovery violation. Third, defendant alleged that the trial court denied defendant due process in determining that defendant was competent to stand trial.The Court of Appeals rejected each of defendant's arguments. It held that an adequate foundation was laid for the state's DNA evidence, based on the Oregon Supreme Court's holding in *State v. Lyons*, 324 Or 256, 924 P2d 802 (1996). The court further held that defendant failed to preserve the issue of whether the trial court should have imposed a less onerous sanction for the discovery violation, as required by *State v. Wyatt*, 331 Or 335, 15 P3d 22 (2000). Finally, the court held that defendant's due process rights were not violated by the procedures followed by the trial court in holding a midtrial competency hearing to determine if defendant was competent to continue to stand trial. Defendant, who represented himself at trial with the assistance of attorney-advisors, examined a number of witnesses in a manner that caused his attorney-advisors to question his competence. The attorney-advisors alerted the court to their concerns, and the court appointed a psychologist to examine defendant and held a competency hearing pursuant to ORS 161.360 through 161.370. At that hearing, defendant maintained that he was competent to stand trial. The psychologist appointed by the court opined that defendant was not competent to stand trial. A psychologist for the state opined that defendant was competent to stand trial. The court ultimately agreed with the state's psychologist. During the course of the hearing, defendant asked the court to appoint him an additional attorney-advisor in light of his disagreement with his current attorney-advisors about his competency. The court denied defendant's request. On appeal, defendant maintained that the denial of an additional advisor violated his right to due process. The court rejected defendant's argument, noting that, while a defendant does have a due process right not to be tried while incompetent, defendant already had attorney-advisors that were advocating that he was incompetent: The appointment of an advisor to advocate that he was competent would do nothing to protect his constitutional right not to be tried while incompetent. The court therefore affirmed defendant's murder conviction.

State v. Lane, 198 Or App 173 (2005). Defendant appealed a judgment of conviction for escape in the second degree. ORS 162.155. Defendant contends that the trial court erred in denying his motion for judgment of acquittal because there was insufficient evidence that he knowingly escaped from a correctional facility. *Held:* Under ORS 162.155(1)(c), escape from a correctional facility is an aspect of the nature of the conduct described by the statute; the trial court erred in denying defendant's motion for a judgment of acquittal because the state presented no evidence that defendant knew, or circumstances existed under which defendant can be held to have known, that he was escaping from a correctional facility. Conviction for second-degree escape reversed; remanded for entry of judgment of conviction for third-degree escape.

State v. Porter, 198 Or App 274 (2005). Defendant appealed from a judgment of conviction on eight counts of identity theft and one count of unlawful use of a computer. Defendant argues that the trial court erred when it disallowed his demurrer to the indictment under the identity theft statute, ORS 165.800, and when it denied his motion to suppress evidence discovered during a search of his apartment. *Held:* The identity theft statute, ORS 165.800, focuses on the attempt to cause deceit and, under a narrowing construction (the term "deceit" denotes an attempt to obtain some benefit to which the deceiver is not lawfully entitled), it is not unconstitutional. The search of defendant's apartment was justified because the officers reasonably believed that evidence could have been being destroyed. Affirmed.

State v. Culver, 198 Or App 267 (2005). Defendant appealed from a judgment of conviction for several felonies stemming from an alleged assault, arguing that his waiver of right to counsel was not made knowingly. *Held:* The record does not indicate that defendant's waiver of right to counsel was made knowingly, and the invalid waiver resulted in prejudice that warrants a new trial. Conviction vacated; remanded for new trial.

State v. Johnson, 199 Or App 305 (2005). Defendant appealed from a judgment of conviction for felony murder, ORS 163.115(1)(b); for manufacture of controlled substances, ORS 475.992; and for possession of a firearm by a felon, ORS 166.270. Defendant assigns error to the trial court's denial of his motion for a mistrial, based on the admission of a redacted confession of a nontestifying codefendant that implicated defendant, and to the trial court's denial of defendant's motion to sever the drug manufacturing charge from

the other charges. *Held:* The trial court abused its discretion in denying defendant's motion for a mistrial, where the introduction of the redacted confession of a nontestifying codefendant, which did not eliminate all references to defendant, violated defendant's confrontation rights under the Oregon and federal constitutions, and, moreover, was so prejudicial as to warrant a new trial. Joinder of the manufacture of controlled substances charge under ORS 132.560(1)(b)(C) was error. Reversed and remanded for new trial.

State v. King, 199 Or App 278 (2005). Defendant appealed after being found guilty of violating *former* ORS 811.123 (2001), *repealed* by Or Laws 2003, ch 819, ‘’ 19, 21, for operating a motor vehicle 52 miles per hour in a 40 mile per hour designated zone. His vehicle's speed was clocked by a photo radar device. Defendant argues that the mode of service of the citation did not afford him due process. He also argues that the citation should have been dismissed pursuant to ORS 153.045(5), which requires an officer to certify that the officer believes that the person named in the complaint committed the violation. His final assignments of error concern the denial of his motion for a judgment of acquittal based on a purported failure of proof by the state. *Held:* ORS 810.439, as applied to defendant, satisfies due process concerns. ORS 153.045(5) does not apply to defendant's case. *Former* ORS 811.123 (2001) defines the only elements that the state must prove at trial. Affirmed.

State v. Jones, 199 Or App 424 (2005). Defendant was charged in Lane County with felony driving while suspended. Before trial, defendant moved to exclude evidence of a prior suspension of defendant's driver's license by the Driver and Motor Vehicle Services Division of the Department of Transportation (DMV) on the basis that the suspension was unlawful. DMV's suspension was based on convictions in Coos County Circuit Court for driving under the influence of intoxicants and assault in the fourth degree. The trial court granted defendant's motion, and the state appeals that ruling. *Held:* (1) The state failed to preserve the issue of whether defendant is barred from making a collateral attack against the suspension order in the trial court, and the issued raised by that claim of error is not plain error. (2) The trial court's ruling that DMV lacked authority to suspend defendant's driving privileges on the basis of the Coos County Circuit Court's action of striking the allegation in the charging instrument about defendant's use of

a motor vehicle was error. Reversed and remanded.

State v. Warner, 200 Or App 65 (2005). The state appealed from an order dismissing two counts of a three-count indictment against defendant. After an automobile accident, defendant was issued a traffic citation for three infractions, including careless driving. In a separate citation, he was cited for the crime of driving under the influence of intoxicants (DUII). The district attorney later charged defendant by information with the crimes of reckless driving and DUII. After defendant had failed to appear at a hearing, the district attorney amended the information to add a count of failure to appear. Defendant pleaded no contest to the traffic infractions and was convicted of careless driving, a traffic infraction. When the state then proceeded with the prosecution on the criminal information, defendant filed a motion to dismiss the charges of reckless driving and DUII, arguing that statutory and constitutional former jeopardy bars prevented the state from prosecuting him on those charges. The trial court granted defendant's motion. *Held:* Defendant's conviction for careless driving did not bar a subsequent prosecution for reckless driving and DUII under either ORS 131.515 or Article I, section 12, of the Oregon Constitution. Under ORS 153.108, defendant's conviction of a violation could not bar his subsequent prosecution for crimes committed as part of the same criminal episode. Furthermore, for constitutional purposes, defendant's prosecution for careless driving was not criminal in nature. Reversed and remanded.

State v. Carter, 200 Or App 262 (2005). The state appealed from the trial court's order granting defendant's motion to suppress evidence on the basis of an invalid warrant. The warrant at issue properly authorized police to search defendant's residence for a detailed list of items, but failed to authorize the seizure of those items. The state argued that the warrant gave police authority to search for the list of items and that police properly seized the items pursuant to the "plain view" exception to the warrant requirement. The trial court declared the warrant invalid on its face, holding that it did not contain all of the required elements set forth in ORS 133.565(2) and Article I, section 9, of the Oregon Constitution. *Held:* The warrant was not invalid on its face. A warrant may validly authorize police to search for items without authorizing the seizure of anything at all. Here, the warrant validly authorized police to search for the items described in the warrant, and the police could seize those items if justified by the "plain view" exception to the

warrant requirement. Order of suppression vacated; remanded for further proceedings.

State v. Henderson, 200 Or App 225 (2005). Defendant challenged the denial of her motion to suppress evidence seized pursuant to a search of her house. *Held:* The warrant authorizing the search of defendant's house was not supported by probable cause. The officer's "knowledge and experience" averments did not, by themselves, establish the requisite probability that the stolen goods would be found at defendant's house and were not accompanied by any factual showing demonstrating the likelihood that the stolen property would be found at defendant's house. The search was therefore illegal. Reversed and remanded.

State v. Torres, 201 Or App 275 (2005). The state seeks reconsideration of the opinion of the Court of Appeals in *State v. Torres*, 198 Or App 218, 108 P3d 69 (2005), in which the court reversed the trial court's denial of defendant's motion to suppress evidence. The state argues that the court's prior opinion failed to accord proper deference to permissible factual inferences drawn by the trial court. It maintains that, after proper deference is given to these permissible inferences, circumstances justified a warrantless search of defendant's home by police based on probable cause accompanied by exigent circumstances and a warrantless search of defendant's garage under the emergency aid doctrine. *Held:* The court's prior opinion failed to defer to permissible inferences mad by the trial court. After giving deference to these inferences, the court concludes that the trial court did not err in denying defendant's motion to suppress evidence. The circumstances justified the warrantless search of defendant's home based on probable cause accompanied by exigent circumstances and the search of defendant's garage under the emergency aid doctrine. Reconsideration allowed; former opinion withdrawn; affirmed.

State v. Smalls, 201 Or App 652 (2005). Defendant appeals his conviction for driving under the influence of intoxicants (DUII). Defendant argues that, if a driver arrested for DUII cannot afford a lawyer, the state must provide one to that person before requiring him or her to decide whether to take a breath test to determine blood alcohol content. *Held:* Defendant's argument is based on a false premise—that, under *State v. Spencer*, 305 Or 59, 750 P2d 147 (1988), and *State v. Durbin*, 335 Or 183, 63 P3d 576 (2003), arrested drivers have a right to consult with an attorney before

deciding whether to take a breath test. Contrary to defendant's position in this case, neither *Spencer* nor *Durbin* declares that a nonindigent driver arrested for DUII has a right to consult with a lawyer before deciding whether to take a breath test. Rather, under state constitutional law, a driver arrested for DUII is entitled only to a *reasonable opportunity* to obtain legal advice before deciding whether to submit to the breath test. Accordingly, providing a lawyer to indigent drivers at state expense would not equalize an indigent driver's right to counsel with the right enjoyed by a nonindigent driver. Indigent arrested drivers instead would enjoy a more expansive right—that of a guaranteed consultation with a lawyer. All that is required for both individuals is that they be given an opportunity to contact a lawyer and that the opportunity be a reasonable one. Affirmed.

State v. Holcomb, 202 Or App 73, *adhered to as modified on recons,* 203 Or App 35 (2005). Defendant appealed from her conviction of possession of a controlled substance. A corporal with the Douglas County Sheriff's Department approached defendant because she was "turning around dancing" on the side of the road. Defendant's jacket was only covering one of her arms, and her exposed arm showed track marks indicative of intravenous drug use. Her appearance was such that it appeared she had been up all night. The officer testified that, in his training and experience, drug users often stay up all night. However, he concluded that defendant was not under the influence of drugs during their encounter. He asked defendant for her identification, and used that identification to conduct a background check. After the check revealed that defendant was on probation for a drug offense, he asked her if she had any drugs, at which point, defendant gave him three syringes. Later, when defendant asked to go to the bathroom, the officer asked her to give him any drugs she had on her, and she reluctantly did so. Before trial, defendant moved to suppress the syringes, the drugs, and her statements, claiming that she had been unlawfully stopped. *Held:* Taking defendant's identification constituted a stop. That stop was not based on a reasonable suspicion that defendant possessed drugs at the time of the stop. The evidence presented at trial showed that defendant was likely a drug user, and had likely used drugs the night before. However, nothing in the record showed a likelihood that defendant possessed drugs at the time of the encounter in question. Reversed and remanded.

State v. Robison, 202 Or App 237 (2005). Defendant appealed a judgment of conviction for criminal obstruction as a nuisance, a misdemeanor under the Portland City Code. PCC 14A.50.030 (2003). She assigns error to the denial of her motion for a judgment of acquittal based on the unconstitutionality of the ordinance. *Held:* PCC 14A.50.030 (2003) is preempted by state statute, ORS 166.025(1)(d), because the ordinance prohibits precisely what the legislature intended to permit when it enacted ORS 166.025. In drafting ORS 166.025 the legislature consciously avoided creating a strict liability offense out of concern for constitutionally protected rights of freedom of expression. PCC 14A.50.030 (2003) is therefore unconstitutional; the trial court erred in denying defendant's motion for a judgment of acquittal. Reversed.

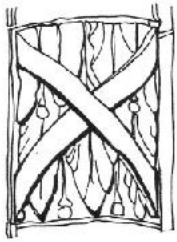
"WRITE AN OPINION, AND READ IT A FEW YEARS LATER WHEN IT IS DISSECTED IN THE BRIEFS OF COUNSEL. YOU WILL LEARN FOR THE FIRST TIME THE LIMITATIONS OF THE POWER OF SPEECH, OR, IF NOT THOSE OF SPEECH IN GENERAL, AT ALL EVENTS YOUR OWN."

Benjamin N. Cardozo, Law and Literature 8 (1931).

"I FOUGHT THE LAW
AND THE LAW WON."

Sonny Curtis, I Fought the Law (song) (1961).

2005 JUDICIAL PROFILES



THE SUPREME COURT
(reprinted from the *Multnomah Lawyer*)

THE HONORABLE WALLACE P. CARSON, JR.
Chief Justice of the Oregon Supreme Court

By William Savage, Savage Bowersox Supperstein and Court Liaison Committee Chair.

"You gotta know the territory." Words of wisdom from the Hon. Wallace P. Carson Jr., Oregon's Chief Justice. These words encapsulate the breadth of his life in law, politics and with family. It is also his advice to others. Throughout his profound career, the Chief Justice (who is ready to say, "Just call me Wally" to those he meets and talks to) has demonstrated a professional and personal commitment to both "know the territory" and to help others.

Born and raised in Salem, Oregon, Chief Justice Carson came from a family well known in Oregon politics and legal circles. His father and uncle were attorneys. His father, grandfather and two uncles also served in the Oregon State Senate. Wally followed this family tradition by graduating from Stanford University with a degree in political science, and then from law school at Willamette University. Before Wally's career continued, however, it flew off in a different direction with the US Air Force.

The Air Force taught him to fly jets and took him from Oregon to Texas, then to Florida, and on to Korea. Wally got to "know the territory" in a variety of aircraft by flying jets in training (where he was a distinguished Jet Pilot Training graduate), C-47's and DC-3's in Korea, and modern fighter jets later. During much of his term in Korea, USAF Col. Carson was chosen and served as the regular pilot for Korea's President. The Korean leader entrusted himself to the skills of pilot Carson and the integrity of US aircraft over that of his own military at the controls of Korean planes. After Korea, Chief Justice Carson returned home and served in the Oregon Air National Guard until 1990 when he retired from the Air Force as a Brigadier General.

Close family relationships have been highly valued throughout the Chief Justice's life. Professing to not have any heroes ("just people I admire"), the Chief Justice holds his father in high esteem. Wally's relationship with his wife, Gloria, has grown over the last 51 years, four years of which were spent "getting to know the territory" before they were married in 1956 just before flight training started. Three children, Scott, Steven and Carol, would follow during active service and law school. Today, the Chief Justice and Gloria honor the memories of Scott and Steven, and visit their two grandchildren with Carol and her husband in Alaska.

Political service for lawyer Wallace P. Carson Jr. began in earnest five years after law school. Getting to know the territory of the Oregon legislature began with service as an Oregon State Representative (1967-71), and led to the Oregon State Senate (1971-77). Leadership positions included Majority Leader in the House, and Minority Floor Leader in the Senate. When not present in the Capitol Building, lawyer Carson practiced law in Salem with his father and uncle, from 1962 through 1977, in the firm founded by his father.

Judicial service for the Chief Justice began in 1977 with appointment to the Marion County Circuit Court by Governor Straub. In 1982, Gov. Atiyeh urged Judge Carson to run for the Supreme Court. The future member of the Oregon Supreme Court had to learn the "territory" of conducting a nominating convention in Oregon, and skillfully did so. In August 1982, at the racetrack fairgrounds in Salem, 3,000 electors attended to nominate Wally for the Supreme Court. Observers later said this was the largest nominating convention in Oregon since 1914. Today in Wally's scrapbook are photos from the racetrack, showing several of

his electors with their faces profiled in the paramutual betting windows.

The Hon. Wallace P. Carson Jr. was elected to the Oregon Supreme Court in 1982. Service as Chief Justice began in 1991. The Chief Justice readily acknowledges his position is "held at the pleasure of the other members of the Supreme Court."

Years of experience now translate into words of wisdom for lawyers. On the subject of advocacy before the Oregon Supreme Court, he cautions, "This is not a third jury trial." "Forget everything you learned from moot court in law school," the Chief Justice says with a wry smile. "Too many lawyers instinctively feel as if they must concede nothing, no matter how insignificant the point. It's really perfectly acceptable to simply have a discussion about what the rule of law should be." On the business of practicing law, the Chief Justice admits that it's tough, but exciting and multi-faceted nevertheless. "Commitment" is the key to success. One can be "invested," but not "committed." Speaking as a former country lawyer, the Chief Justice observes that, "In ham and eggs, the chicken is 'invested,' but the pig is 'committed.'"

"Commitment" has been the watchword for the Chief Justice. Taking justifiable pride in the progress of the Oregon courts to identify and expand their commitment to service to our citizens, the Chief Justice also states, "It is readily apparent and is still true that there remain many who are under-served in our State. Racial, ethnic, gender and political issues represent distinct challenges and distinct implementation strategies for both litigants and members of the bar." On a personal basis, "commitment" also leaves little time for reading recreationally, although the Chief Justice is fascinated by some of the works of Dean Koontz (a former A-6 Navy pilot himself) and goes "flying with him" when there is time to read outside the court.

Throughout his life, Wally's commitment to all he does has assured that he has "gotten to know the territory" of the State of Oregon and its citizens, which he has served with distinction and pride, and earned him the title of the Honorable Wallace P. Carson Jr.

Last month, we profiled Wallace P. Carson Jr., Oregon's Chief Justice. Certain facts in the original profile were only confirmed after the deadline for February's *Multnomah Lawyer*. I therefore continue the judicial profile of Wallace P. Carson Jr. this month in

the interest of completeness and accuracy regarding the career of this distinguished Oregon jurist.

It is in one of the early scores in Meredith Willson's musical *The Music Man* where a group of traveling salesmen in a rail passenger car voice the refrain, "You got to know the territory." This scene and this advice is frequently used by Wallace P. Carson Jr., Oregon's Chief Justice, to punctuate his belief that lawyers need to know the structural and functional difference between trial courts, the Court of Appeals, and the Supreme Court. As described in last month's column, Chief Justice Carson's own career has evidenced his vast knowledge of the "territory" of Oregon law and politics.

The heritage of legal talent in Carson's family included his father, as well as two uncles and one aunt, who were all Oregon lawyers. His grandfather and two uncles served in the Oregon State Senate. His grandfather also founded the law firm in which lawyer Wallace P. Carson Jr. worked from 1962-1977.

It was after college at Stanford University that the Air Force taught Wally Carson to fly jets. Pilot training and service took him to more locations than reported last month—from Oregon to Texas, then to Arizona, then to Florida, and on to post-war duty in South Korea. In training, Wally was *the* distinguished Jet Pilot Training graduate. He also distinguished himself in active duty as a regular pilot for the President of South Korea, Syngman Rhee, who entrusted himself to the security of US aircraft and the skill of First Lieutenant Carson. After South Korea, Chief Justice Carson returned home and entered Willamette College of Law. In 1959, he started service in the Air Force Reserve and later in the Oregon Air National Guard until 1990, when he retired from the Air Force with the rank of Brigadier General. The Air Force and fighter jets have led the Chief Justice to enjoy the writings of author Stephen Coonts (not to be confused with mystery writer Dean Koontz), whose works include *The Night of the Intruder*, a story based upon Coonts' own experience as a veteran Navy A-6 Intruder pilot.

Judicial service for the Chief Justice began in 1977 with appointment to the Marion County Circuit Court by Governor Straub. In 1982, Governor Atiyeh appointed Judge Carson to the Oregon Supreme Court. After his appointment to the Supreme Court, Justice Carson held his historic nominating convention at the Salem fairgrounds racetrack attended by 3,000 electors in order to get on the ballot that year. Election to the Oregon Supreme

Court took place in 1982. The Hon. Wallace P. Carson Jr. began service as Chief Justice in 1991, following his election by members of the court and two subsequent reelections.

We thank the Chief Justice for his dedication and service to our State, and for the sound advice he gives others about "getting to know the territory."

W. Michael Gillette

Associate Justice of the Oregon Supreme Court

By Per Ramfjord, Court Liaison Committee member and Stoel Rives

A fourth-generation Oregonian, Justice W. Michael "Mick" Gillette was raised in Milton Freewater, where he played forward on the 1959 state high-school basketball championship team. Moving on to Whitman College, his interest in the law ignited when he studied the Supreme Court's Japanese-American exclusion cases in an undergraduate constitutional law class. What the Supreme Court had done not only seemed unfair to him, but it engendered a more general fascination for the rules that a society lives by and what is "right" and "wrong." Fueled by this interest, Gillette left Eastern Oregon for Harvard Law School, where he graduated in 1966.

Upon graduation, Gillette accepted a job as an associate with the 16-lawyer firm of Rives & Rogers, one of the predecessor firms of what is today Stoel Rives. The urge to get into the courtroom was too strong for Gillette to remain in private practice for long, however. After only eight months he moved to the Multnomah County District Attorney's Office, where he worked under George Van Hoomissen. The trial experience he gained was rewarding, but after less than two years, Gillette received a visit from a local attorney, Charles Habernigg, who offered him a position as an Assistant Attorney General in American Samoa. Having something of an adventurous streak, Gillette could not resist the chance and soon found himself in the middle of the Pacific Ocean on a chain of islands inhabited by a total of 15,000 people. He and one other Assistant AG shared an extraordinary range of responsibilities that

not only included trying civil and criminal cases, but running the local police, fire and immigration authorities. For a lawyer who was still in his mid-twenties, the challenges—many of which were not purely legal in nature—were enormous. But it was also a tremendous opportunity to develop new skills that could have taken years to accumulate.

Gillette remained in American Samoa for two years, after which he returned to Oregon to take a position in the Attorney General's office assisting local District Attorneys on trial and appellate matters throughout the state. He only had this position for a matter of months before he was chosen to become Chief Counsel of the newly formed Consumer Protection Division within the Department of Justice. After two more years, he moved on to become Chief Trial Counsel and then Solicitor General. At this point, Gillette was still only seven years out of law school.

Gillette remained Solicitor General for four years, until 1977, when Governor Straub appointed him to the Oregon Court of Appeals. He served there for nine years before Governor Atiyeh appointed him to the Supreme Court. Having been appointed to court positions by both republican and democratic governors is a striking measure of the respect in which Gillette was held.

For Gillette, being an appellate judge has brought all of the rewards he could have hoped for. He remains fascinated with the novel ways in which creative attorneys are able to frame new arguments from the same basic constitutional text. It's a job, as he put it, that "never loses its charm or sense of challenge." Working with the other justices and his clerks also provides a uniquely satisfying intellectual environment.

Having been on the bench for nearly 27 years, Gillette has witnessed enormous changes. The trial bench is, in Gillette's view, far more professional and unified in its vision of the law than when he started on the Court of Appeals. At the same time, the reinstatement of the death penalty has put significant burdens on the court system that were not present before. As Gillette put it, the time and resources consumed by such cases at both the trial and appellate level has essentially "skewed" the entire judicial process. Regardless of one's own individual opinion on the death penalty, its impact on the system—particularly in light of the recent budgetary cuts—cannot be ignored.

In the courtroom, Justice Gillette has the reputation of being an aggressive questioner, but he firmly believes that lawyers make a mistake when they view his questions—or the questions of other judges—as hostile. "Most questions are neutral, if not helpful." Gillette said. Ordinarily, they reflect the judge's "attempt to synthesize the lawyer's argument" and to draw out its logical consequences. Assuming the lawyer has thought things out, questions should provide a welcome opportunity to expand and explain the basic argument. Too often, however, attorneys assume that the questions are hostile and fail to take advantage of this opportunity.

The qualities Justice Gillette most appreciates in an oral advocate are candor and preparation. "Lawyers who are able to say, 'if that's the law, I lose,' really impress me," Gillette said. He also appreciates lawyers who have thoroughly considered the consequences of their arguments and the questions that they are likely to be asked. More and more attorneys demonstrate this level of preparation, according to Gillette, in part because more attorneys today appear to practice their arguments with other lawyers before appearing in court. Nonetheless, there are always some exceptions.

On the personal side, Gillette has been fortunate enough to meet one of the former Japanese internees who inspired him to go to law school, Gordon Hirabayashi. Hirabayashi, who resisted the government's attempts to impose an 8 p.m. to 6 a.m. curfew on all Japanese-Americans living in certain areas and took his case to the United States Supreme Court, is one of Gillette's personal heroes. Gillette had the opportunity to meet Hirabayashi while participating in a PBS special on the internment of Japanese Americans and has remained friends with him ever since.

In his spare time, Justice Gillette has a passion for reading. "I'm typically reading five to six books at a time," dipping into one or another for at least part of every day, he said. His favorites include military history, stylized mysteries by authors such as Rex Stout and Robert Parker, and historical fiction, such as the Patrick O'Brian novels and Michael Shaara's *The Killer Angels*. He's also a lover of poetry, particularly Kipling, whom he acknowledged is no longer as admired as he once was, but whose poetry rings with the "steel of truth," Gillette said.

Justice Gillette has also kept his love of high-school basketball

alive by refereeing 30-35 boys and girls basketball games a year. "Refereeing and judging aren't really that far apart," Gillette observed. "They both involve living with and playing by the rules."

All in all, Justice Gillette combines precisely the kind of devotion to the law, intellectual rigor, curiosity and human compassion that one would hope for in a supreme court justice.

Robert D. Durham

Associate Justice of the Oregon Supreme Court

By David Riewald, Bullard Smith et al and Court Liaison Committee Member.

Justice Robert D. Durham's rise from humble beginnings to one of Oregon's most important positions is the direct result of hard work and a passion to ensure that justice is available to all.

Durham was born and raised in Whittier, California, a suburb of Los Angeles, in what he describes as a very blue-collar family. "In the vernacular of that area, my family was referred to as being from 'below the boulevard.'"

His father owned an auto and truck repair business. When asked to describe the worst job he ever had, Durham says it was the work his father made him do at the auto shop. "My father gave me the dirtiest, worst jobs in the shop—like using the steam cleaner on 100 degree days—but he did it so I would stay in school and appreciate an education."

After graduating from high school in 1965, Durham entered Whittier College. He was the first person in his family ever to attend college.

During his junior year of college, Durham first began thinking about becoming a lawyer. He was encouraged to apply to law school by several of his professors and by friends who were attending law school at the time.

Outside of the classroom, Durham coached several high school sports teams, having played football and baseball growing up. In the summers during several of his college years, he lived and worked in Hawaii. He also trained with several of the football

players with whom he lived and attempted to perfect his surfing skills. After taking the LSAT's and graduating from Whittier College in 1969 with a bachelor's degree in political science, Durham sold his surfboard and went off to law school at the University of Santa Clara.

Law school was an exciting and enjoyable time for Durham, and he was stimulated by the school's excellent professors. During his second year of law school, Durham also married his wife Linda, whom he credits for "all the good things that have happened in my life."

After graduating from law school in 1972, Durham migrated north and accepted a clerking job with Justice Dean Bryson of the Oregon Supreme Court. Durham fondly describes his time at the court as extremely rewarding both in terms of the work he handled and in the friendships he made with the justices and court employees.

While clerking at the court, Durham met Ted Kulongoski. Kulongoski was counsel to the Oregon House Committee on Labor, and he had been instrumental in the passage of Oregon's first public sector collective bargaining law in 1973. As Durham's clerkship was nearing its end, Kulongoski convinced him to join in forming a new four-lawyer law firm, even though Kulongoski was the only one of the four who knew the others! In August 1974, they opened the firm Kulongoski, Heid, Durham & Drummonds in an old house that still stands at the intersection of 12th and Pearl in Eugene. The house had four bedrooms, and each lawyer took one of the bedrooms as his office.

The firm focused its practice on labor law and civil rights work, with a special emphasis on representing public sector employees and unions. Durham's firm was the first boutique firm in Oregon to jump into this new area of the law. Besides his labor law and civil rights work, Durham also handled some criminal cases and did some general practice work. In 1983, the firm moved its office to Portland.

Durham stated that he found his law practice to be very enriching - the aspect he enjoyed most was "helping people right wrongs and accomplish justice." The worst parts of the practice were the administrative hassles, especially having to track his days in six-minute increments.

In 1991, Governor Barbara Roberts appointed Durham to a seat

on the Oregon Court of Appeals. He later was elected to that seat.

In 1994, Durham was appointed to the Oregon Supreme Court, and subsequently was elected to that same seat. In 1996 and 1997, during what otherwise would have been a vacation from the court, Durham attended the University of Virginia Law School and earned an LL.M. degree in judicial process.

When asked if any one case or opinion stands out among the many he has heard and decided during his 13 years on Oregon's appellate courts, Durham modestly stated that he has had the good fortune to work on many cases of importance to the people of Oregon. He also takes pride in the fact that the court's opinions often are a "group product," and he is continually impressed with the high quality of the work product put out by the court.

According to Justice Durham, one of the best parts of serving on the Supreme Court has been the ability to meet and interact with the many current and former Supreme Court justices, including such outstanding jurists as Hans Linde, Ed Peterson and Richard Unis.

When asked if there is anything he would change about his current position on the state's highest court, Durham lamented only his commute to work (he lives in the Portland area). "Growing up in Los Angeles and seeing people make three-hour commutes to work, I said I never wanted to make a long commute to work."

Justice Durham also offered some tips for attorneys who appear for oral argument before the court. "Be ready to concede obvious weaknesses." The justices use oral argument to narrow arguments and achieve a better understanding of the case by "trimming away the underbrush." Lawyers need to be conscious of doing everything they can to simplify, rather than complicate, the issues at every opportunity. Also, "complete candor is a must at all times."

Justice Durham acknowledged that sitting on the Oregon Supreme Court is an "awesome responsibility" and he is "very grateful" to the Oregon people and bar for entrusting him with that position.

R. William Riggs

Associate Justice of the Oregon Supreme Court

By Julia M. Hagan, Gevurtz Menashe et al and MBA Court Liaison Committee member.

Justice R. William Riggs' natural temperament, methodical approach, and overriding professionalism have heavily influenced the contributions he has made to the bench and bar of Oregon during the past 36 years. Raised in a Chicago suburb, Riggs' summers were spent with his grandmother on Lake Mercer, Wisconsin. Of his early years, he recalls spending a great deal of time in the company of adult women: his grandmother, Aunt Bess, mother, and sister. Their influence can be seen to this day in his meticulous dress, gentlemanly manner, and enjoyment and ease with all whom he meets.

When Riggs was 12 years old, his family moved to Hillsboro, where his father managed both a Portland business and a Hillsboro farm. Riggs graduated from Hillsboro Union High School and enrolled at Willamette University. College costs led to his decision to finish his degree at Portland State University. While Riggs came from a family of businessmen and entrepreneurs, he set his sights on law school. In order to meet that expense, Riggs joined the military, serving with the Navy for three years overseas. At times his family accompanied him. Riggs' two children were born in Trinidad, West Indies while he was stationed there. As a Navy supply officer, Riggs supervised the general mess and the clothing store, as well as operated a supply depot responsible for resupply of aircraft and ships in the Southern Caribbean. Riggs, now retired from military service, is a Captain, US Naval Reserve. After active duty, Riggs enrolled at the University of Oregon School of Law. Money was tight then, but with Riggs' focused, methodical approach he excelled in the classroom, was an editor on the Oregon Law Review alongside classmate Laird Kirkpatrick, and supported his family by working in a local warehouse. Riggs marvels at those times, when his family of four was able to survive on less than $250 a month.

Riggs' focus and hard work paid off. Upon graduation, he received a scholarship to attend an LLM program at NYU, an offer to clerk on the Tax Court, and an offer from the Willner Bennett Law Firm in Portland. The realities of supporting his family dictated his path. In 1968, he entered the practice of law. As an

associate and a partner at Willner Bennett, Riggs litigated plaintiff tort actions, family law cases, and contributed pro bono work on behalf of farm workers. Thoroughly enjoying the practice, Riggs found family law most rewarding, given the great import to the outcome and its intriguing issues which touched on corporate, tax, debtor/creditor and business law. Riggs found himself challenged in another aspect of family law as well.

Newly divorced, with custody of his two young children, Riggs had limited experience in the kitchen. Determined to succeed, Riggs studied cookbooks, undertook three Chinese cooking courses, and at one point considered publishing a book of recipes for the single father. Riggs became a master of efficiencies: taking something simple and making it a whole lot better. To this day, friends and family wonder about his secret ingredients, often requesting their favorites, including his famed Caesar salad.

Riggs has made notable contributions to the bar, having served as President of the OTLA (1973-74), Chair of the OSB Family Law Section (1979), and chair of several OSB committees on the practice of law and organization of the bar. In addition, Riggs founded the Oregon Academy of Family Law Practitioners, where his leadership raised family law from "stepchild" status to a recognized professional practice. In 1978, experience and preparation met with opportunity when Riggs was appointed to the Multnomah County Circuit Court. His service to the Multnomah County Bench spanned 10 years. Besides hearing criminal, family, probate, and complex civil litigation cases, as Chief Judge of the Family Law Department, Judge Riggs developed the "four page order," a foundation to current day parenting plans. On the bench, Judge Riggs actively analyzed cases, promptly rendering his decision at the conclusion of argument. Even after a complex, six-month civil bench trial, Judge Riggs provided the litigants his 41-page opinion in only three days.

In addition to his methodical nature and efficiency, Judge Riggs was well known for his innate judicial temperament. He tolerated both difficult attorneys and unreasonable litigants. His ability to accept people and abide their quirks and foibles was apparent. To those around him, Judge Riggs' capacity to forgive and be tolerant of the human condition made appearing before him and working around him a pleasure.

In 1988, Judge Riggs ran unopposed for a seat on the Oregon

Court of Appeals, where he served until September 1998. Judge Riggs enjoyed work on the appellate bench, and his diligence and focus to the task at hand led to another opportunity. In 1998 he ran in a contested election for a seat on the Oregon Supreme Court. When his opponent dropped out of the race before the general election, Governor Kitzhaber appointed him to the position he later assumed when he won the election in November.

Justice Riggs is well suited to the role of shaping law in Oregon and working on the diverse cases to which he is assigned. His natural collegial approach and management style have been a benefit to the court, judicial staff, and attorneys who appear before him. With Justice Riggs' legacy and professionalism, the bar has a jurist who, in a marked way, has elevated the standards of practice and civility for us all.

Paul J. De Muniz,
Associate Justice of the Oregon Supreme Court

By Susan E. Watts, Kennedy, Watts et al and Court Liaison Committee member.

When Justice Paul J. De Muniz enrolled in law school over 30 years ago, he had no specific plans for practicing law and was not sure how he would use a law degree. Even today, he admits he is "surprised" he became a lawyer.

De Muniz grew up in Portland, graduating from Madison High School in 1965. He enlisted in the Air Force after graduation with the goal of using the benefits of the GI Bill to attend college. De Muniz was raised without a father, and no one from his family had ever attended college. He saw the Air Force and college as a way to create a better life for himself.

De Muniz spent three and a half years in the Air Force, including a tour of duty in Vietnam in 1968 and 1969. After he was discharged from the Air Force in December 1969, De Muniz wasted no time in taking the next step toward his goal of a college education. He enrolled at Portland State University in January 1970. He took a heavy load of classes and graduated with a bachelor's degree in just two and a half years in June 1972. Although De Muniz did not have a definite idea of what he might want to do with a law degree, he took advantage of remaining GI Bill benefits and enrolled in

Willamette University School of Law in the fall of 1972.

After graduating from Willamette in May 1975, De Muniz began his legal career with the state public defender's office in Salem. It was there that he handled his first appeals in both the Court of Appeals and the Supreme Court.

De Muniz left the public defender's office after two years for private practice in Salem, where he focused on trial and appellate litigation in both state and federal courts. However, he still took the time to handle at least one death penalty case each year.

Before he joined the bench, De Muniz was perhaps best known for his efforts on behalf of Santiago Ventura Morales, a migrant farm worker wrongfully convicted of murder in a trial tainted with evidentiary and translator errors. Recognizing an injustice, De Muniz took the case pro bono and traveled to California and Mexico to obtain evidence of Morales' innocence. These efforts were instrumental in ultimately securing an overturn of the conviction and Morales' release from prison. Morales went on to graduate from the University of Portland.

De Muniz was happy and successful in private practice and assumed he would remain there for the rest of his legal career. However, in May 1990 the Governor surprised him with an offer to appoint him to an empty seat on the Court of Appeals. De Muniz accepted the Governor's offer and thoroughly enjoyed his 10 years on that court.

In 2000, De Muniz decided to run for an open, contested seat on the Supreme Court. In making that decision, he knew he needed to define and articulate his judicial philosophy as he campaigned and spoke with voters in all 36 Oregon counties. By this time, he had been a lawyer for nearly 25 years and had written 850 appellate opinions, but the election required him to focus on his view of the role of the courts in our democratic society. As he explained in numerous speeches to small groups of voters, De Muniz has a profound respect for the separate role of each branch of the government and believes in taking a restrained approach in exercising the power of the judiciary. Above all, he believes in judicial impartiality.

Because the public in general is uninformed about the judiciary, De Muniz continues to speak about the importance of an impartial judiciary. He has also written three law review articles on the topic, one of which was quoted favorably by Justice John Paul Stevens in

his dissenting opinion in *Republican Party of Minnesota v. White*, 536 US 765 (2002).

De Muniz also finds time to devote to his role as chairman of the Sakhalin/Oregon Rule of Law Partnership, where he is working with lawyers, judges and prosecutors in Russia implementing an adversarial system now mandated by a new Russian constitution. In this position, De Muniz has traveled to Russia. In May 2003 the partnership founded the Sakhalin Justice College, dedicated to training Russian judges and lawyers in trial advocacy. Oregon judges and lawyers have devoted a great deal of time to the trial advocacy project which now is a training model throughout Russia. In May 2004 the *Willamette Journal of International Law and Dispute Resolution* published DeMuniz's article on the new Russian criminal procedure code, the first English language article to analyze the new code.

Although his extensive work for the legal profession would seem to allow little time for personal life, De Muniz is a dedicated husband and father. De Muniz has always made it a priority to actively participate in his children's lives and coached all three in various sports over the years.

Justice De Muniz is an impressive man who has risen from humble beginnings to serve this state with distinction. As with the other members of the Supreme Court, we are fortunate that he chose to devote his energy and intellectual capacity to the service of the court and the legal profession.

THOMAS A. BALMER,
Associate Justice of the Oregon Supreme Court

By Chris McCracken, Davis Wright Tremaine and Court Liaison Committee member

> "The practice of law could—not necessarily would, but could—be a starting point for the lawyer to seek to understand the larger forces of society and history."

So wrote Thomas Balmer in 1992. Balmer is now an Associate Justice on the Oregon Supreme Court. When he wrote that line, Balmer was a partner with Ater Wynne—and on sabbatical. Most

lawyers on sabbatical take a dream vacation and get far away from the practice of law. Tom Balmer did escape to Scotland and Europe with his wife, Mary Louise McClintock, and their two children, but his mind continued to wrestle with what it means to be a lawyer.

Balmer spent part of his sabbatical studying Oliver Wendell Holmes Jr., and writing a law review article, *Holmes on Law as a Business and as a Profession*, 42 J. of Legal Educ. 591 (1992). The article discusses Holmes' views on the tension between the law as a *business*—timesheets, marketing, and billing—and the law as a *profession* where hopefully, wrote Balmer, a lawyer "might strive for something greater than oneself."

Holmes believed that the law as a profession offered the opportunity to "live greatly," to connect with the bigger questions of life. And—given that he spent part of his sabbatical writing about the legal profession—so does Justice Balmer.

Balmer grew up in Portland and graduated from Jackson High. He graduated from Oberlin College in 1974 and from the University of Chicago Law School in 1977. Since law school, Justice Balmer's career has involved both private practice and public sector practice.

In 1977, Balmer began his career in private practice with Choate, Hall & Stewart in Boston. In 1979, Balmer left Boston for Washington D.C. and spent a year as a trial attorney for the US Department of Justice, in the Antitrust Division. At DOJ he focused on energy policy and began his career-long interest in antitrust law.

In 1980, Justice Balmer returned to private practice in D.C. with Wald, Harkrader & Ross, continuing to focus on antitrust issues. Balmer began writing articles on antitrust law, perhaps seeking what Holmes would describe as the *profession* of law—something more meaningful than the daily *business* of law offered to an associate at a D.C. law firm.

In 1982, Justice Balmer returned to Portland and joined Lindsay, Hart, Neil & Wagner, becoming a partner in 1986. In 1990, with the split in the Lindsay Hart firm, Balmer became a partner with Ater Wynne. In private practice in Portland, Justice Balmer emphasized public and government law. He litigated employment, antitrust and energy cases, including several energy cases before FERC. He also continued to publish on antitrust law and related topics.

In 1993, Balmer returned to the public sector to serve as the

Oregon Deputy Attorney General, the number two position in the Oregon Department of Justice. There, Balmer supervised legal advice and litigation for the State, advised agency heads and elected officials, and represented Oregon in trial and appellate court proceedings.

While at Oregon DOJ, Justice Balmer argued before the US Supreme Court in a commerce clause case, *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93 (1994). As for the outcome, Justice Balmer is quick to point out that the two most ideologically divergent members of the Court, Justices Rehnquist and Blackmun, both agreed with him. Unfortunately, the majority did not.

Balmer achieved better success for Oregon arguing before the Ninth Circuit in the initial constitutional challenge to Oregon's Death with Dignity Act in *Lee v. State of Oregon*, 107 F.3d 1382 (9th Cir. 1997). Regardless of one's personal views on physician assisted suicide, the Lee case undeniably presented Balmer—and all who worked on the case—an opportunity Holmes would have cherished, an opportunity to "live greatly," to connect the practice of law with the bigger questions of life.

In 1997 Justice Balmer returned to private practice at Ater Wynne. He became Ater Wynne's managing partner in 1998. As managing partner Balmer took satisfaction in the business of the law and enjoyed helping Ater Wynne define and achieve its business goals.

Balmer also found time for the profession. While at Ater Wynne he was a board member, and later the chair, of Multnomah County Legal Service, Inc. He was and remains a board member of the Classroom Law Project and Chamber Music Northwest. Justice Balmer also serves on the Advisory Committee of the Campaign for Equal Justice.

In 2001, Governor Kitzhaber appointed Balmer to the Oregon Supreme Court.

Justice Balmer is a good addition to the Court. He brings geographic diversity to the Court, having practiced in Washington D.C. and on both the East and West Coasts. Justice Balmer's background as a civil litigator in private practice compliments the experiences of the other Justices, such as the trial judge experiences of Chief Justice Carson and Justice Riggs, the extensive criminal law practice of Justice De Muniz, and the background of several

members of the Court as former Court of Appeals judges. Justice Balmer considers himself "very fortunate" to be on the Court. The position reaffirms his belief in the value of an independent judiciary, the rule of law, and the judicial system as a "public good."

Were he alive, Oliver Wendell Holmes would add that the job of Associate Justice also provides ample opportunity to "live greatly" or, as Justice Balmer would say, the opportunity to strive "for something greater than oneself."

Given his track record to date, Justice Balmer seems up to the task.

Rives Kistler
Associate Justice of the Oregon Supreme Court

By Marc Abrams, Oregon Department of Justice and Court Liaison Committee

Justice Rives Kistler won't answer my admittedly Barbara Walters type question: if you could be a movie star, which one would you be?

"I'm happy with the person I am," says Justice Kistler.

The person Justice Kistler is didn't start out to be a lawyer, let alone a member of Oregon's highest court. Instead, this native Californian whose family moved to a small town in North Carolina when he was four years old started out studying English, first at Williams College and then in the Masters program at the University of North Carolina. To pay for his legal education, he worked as a gardener and a nursery laborer. It was a summer job getting dirt under his fingernails that brought him first to the Pacific Northwest and, when he turned to law, a summer clerkship at Stoel Rives that brought him to Portland.

But Kistler did not immediately return to Oregon. While at Georgetown Law School, he served as an extern to Judge Harry Edwards of the US Court of Appeals for the District of Columbia, though "they didn't call it an extern back then," he notes. Edwards started Kistler on internal memos, but moved him up to drafting

opinions. After graduating from Georgetown, he served as a clerk for Charles Clark, the Chief Judge of the Fifth Circuit, and for Justice Lewis Powell before returning to Portland and Stoel Rives. Kistler respects all three jurists for whom he worked. "They worked to figure out what the law said and give the right answer in each case."

Although Kistler enjoyed the work of a litigator in private practice, the desire to do appellate work remained, and he moved from Stoel Rives to the Department of Justice (DOJ) Appellate Division in 1987. "My stronger suit was appellate work," he said, "and the advantage to working at DOJ is that you're working in the public interest."

When Kistler was appointed to the Court of Appeals in 1999 by Governor Kitzhaber, it drew no more attention than any other appointment, even though Kistler is openly gay and has been in a committed relationship for 20 years. Nor did his elevation by Governor Kulongoski to the Supreme Court in August 2003. But in March 2004, the Multnomah County Commission triggered a raging debate about gay marriage when it began issuing marriage licenses to same sex couples. Kistler, who needed to run a retention election in the May 2004 primary, found himself a potential proxy for the culture wars in Oregon and faced an openly conservative challenge to retain his seat on the court.

Kistler did not believe that was what the election was about. As he told *Newsweek* magazine, "I didn't want to be known as the gay judge. I would hope to be known as the good judge." It is important to Kistler that he be evaluated on his merits as a jurist. So why is it important—or unimportant—that he is gay? To Kistler, it's less about who he is and more about who the entire court is. "Your background is important to help you see and understand things about the nature of a case. When justices share their perspectives, it makes the court richer. There are many types of diversity. Trial lawyers and defense counsel. Gender diversity. Geographic diversity. Each is a piece of the puzzle."

The pieces of the puzzle are what helps the court function, a function that is not always well understood by non-lawyers. Kistler does not see his role as making the decisions assigned to other branches of government, but as ensuring that those decisions have been done within the authority the decision-maker has been

granted. As Kistler noted, "In a criminal case, a jury may come to a different decision than I would. A trial judge might use his discretion differently and reach a result I would not reach. A workers' compensation administrative law judge might make a fact finding I would not make. But I'm not the policy maker, and those are not things we judges can generally change."

Nor does Kistler see that function changing much as he transitions from the Court of Appeals to the Supreme Court. He sees the two benches as "having more similarities than differences, with judges who care deeply about what they're doing and are careful about what they're writing." The main differences are that the Supreme Court sees "more open, unresolved cases" and that with all decisions made by the entire seven-person court rather than the three-judge panels utilized by the Court of Appeals, it takes "more work to bring together a majority—perhaps by design."

Kistler believes that, because he had already been on the bench for several years before this year's election, he had a track record and that, without regard to his orientation, people "could look at the record and say 'I think he's a good judge or a bad judge." Kistler won the election by a comfortable margin, and now has time to show that he is, indeed, a "good judge."

"THERE IS NO SURER WAY TO MISREAD A DOCUMENT THAN TO READ IT LITERALLY."

Guiseppi v. Walling, 144 F2d 608, 624 (2d Cir 1944) (Hand, J., dissenting).

OR

"WORDS ARE SUCH TEMPERAMENTAL BEINGS THAT THE SUREST WAY TO LOSE THEIR ESSENCE IS TO TAKE THEM AT THEIR FACE."

Learned Hand, "The Contribution of an Independent Judiciary to Civilization," 1942, in The Spirit of Liberty 155, 157 (Irving Dillard ed., 2d ed 1953).

"[A]LL THE ERRORS WERE HARMLESS. WRONG DIRECTIONS WHICH DO NOT PUT THE TRAVELER OUT OF HIS WAY, FURNISH NO REASONS FOR REPEATING THE JOURNEY."

Cherry v. Davis, 59 Ga 454, 456 (1877).

ENACTMENTS AND PROMULGATIONS

2005 Legislation of Interest to Appellate Practitioners

By James Nass, Legal Counsel to the Oregon Appellate Courts

In 2003, the bill that had the greatest impact on the practice of appellate law was the mammoth Judgments Bill (House Bill 2646) that substantially revised the law relating to the creation and enforcement of judgments. In 2005, again the bill with the greatest impact on appellate law, at least for civil cases, was the legislature's revisit of the topic of judgments. House Bill 2359 resolved problems relating to creation and enforcement of judgments not addressed by the 2003 legislation or revealed in the course of implementing HB 2646. This article addresses HB 2359 is some detail.

The legislature also enacted a number of bills that niche practitioners should be aware of, including Senate Bill 330, relating to court reporters and preparation of transcripts on appeal; Senate Bill 231, relating to taking judicial notice of "social file" information in juvenile cases (with implications for more general application to civil and criminal cases generally); and SB 2224, relating to the scope of remands for resentencing in criminal cases, and several

bills addressing administrative law cases.

At the end of the article are listed other bills that have no particular appellate impact, but may be of general interest to practitioners.

JUDGMENTS BILL REVISITED
HB 2359, OR LAWS 2005, CH 568

Effective date: January 1, 2006.

REQUIREMENTS FOR JUDGMENTS THAT ARE JURISDICTIONAL FOR PURPOSES OF APPEAL

ORS 18.038 and ORS 18.058 contain various requirements for judgment documents. Section 2 of HB 2359 clarifies which of those requirements are jurisdictional for purposes of appeal:

- The judgment document must be plainly titled as a judgment;
- The judgment document must contain the name of the court rendering the judgment and the file number or other identifier for the case;
- The judgment document must identify the names of the parties in whose favor and against whom the judgment is given;
- The judgment document must be signed by a judge (or the trial court administrator for those judgments that the administrator is authorized by law to sign) and must show the date of signature;
- The judgment document must be entered in the court's register as a judgment.

HB 2646 (2003) required that a judgment in a civil case be titled as either a limited, general, supplemental, or corrected judgment, and contemplated that a judgment would be accurately described in the trial court register. The effect of section 2 is to provide that a judgment document that is mislabeled, or misdescribed in the register, nevertheless is appealable, provided that the judgment document is titled "judgment" (or the title includes "judgment") and described in the trial court register as a "judgment". Section 2 is consistent with *Garcia v. ODMV*, 195 Or App 604 (2004),

in which the court held that a general judgment was appealable notwithstanding that the trial court clerk described it in the register as a limited judgment. Likewise, in *Galfano v. KTVL-TV*, 196 Or App 425 (2004), the Court of Appeals held that a post-general judgment decision deciding a request for attorney fees was appealable notwithstanding that it was titled "Supplemental General Judgment" instead of "supplemental judgment" as required by ORCP 68.

"Request for Relief" and "Legal Authority"

The definitions of general, limited, and supplemental judgments in HB 2646 (2003) assumed that the judgment disposed of one or more "claims." That presented a problem because the bill did not define the term "claim" as applied to civil cases and because HB 2646 contemplated disposition of some matters by either limited or supplemental judgment that historically the appellate courts had not considered to be "claims." For instance, consistent with HB 2646 (2003), ORCP 68 provided that if a trial court disposed of matters relating to costs and attorney fees after entry of a general judgment, those decisions were to be made by a "supplemental judgment." However, in 1992, the Supreme Court had decided that a request for attorney fees was not a "claim." *Propp v. Long*, 313 Or 218, 224, 831 P2d 685 (1992).

Notwithstanding *Propp*, the Court of Appeals in *Galfano v. KTVL-TV*, 196 Or App 425 (2004), held that, under HB 2646, a request for attorney fees was a "claim" for the purpose of rendering the trial court's decision on attorney fees by way of a supplemental judgment.

Strawn v. Farmers Insurance Company, 195 Or App 604 (2004), was a multiple claim, class action suit in which the trial court entered what purported to be a limited judgment under ORCP 67—disposing of some claims and determining the limit of the defendants' liability, but did not determine the amount that any one class member would recover. The Court of Appeals held that, because the limited judgment did not determine the amount any one class member would recover, the trial court's action did not conclusively determine the claim for monetary damages and therefore was not suitable for disposition by a limited judgment under ORCP 67 B.

Section 4 of HB 2359 addressed these problems by keying the

definitions of general, limited, and supplemental judgments to "requests for relief" rather than "claims" and by defining a request for relief as

> "a claim, a charge in a criminal action or any other request for a determination of the rights and liabilities by one or more parties in an action that a legal authority allows the court to decide by a judgment."

Thus, although a "request for relief" includes a "claim" (whatever that is), a "request for relief" is broader than that and includes any request for a determination of the rights and liabilities by a party *in an action that a legal authority allows the court to decide by a judgment*. The idea was to include such things as a petition for attorney fees or statement of costs and disbursements, because ORCP 68 specifically authorizes disposition of attorney fees and cost matters by general or supplemental judgment, and to exclude such things as discovery disputes, for which there is no authority to decide by judgment.

Essential to the definition of "request for relief" is the term "legal authority," which was defined as

> (a) A statute;
>
> (b) An Oregon Rule of Civil Procedure;
>
> (c) A rule or order of the Chief Justice of the Supreme Court adopted under section 3 of this 2005 Act; and
>
> (d) All controlling appellate court decisions in effect December 31, 2003."

A party seeking to reduce a claim or other request for relief to judgment, then, must be able to identify some legal authority to do so. It appears that, as to most actions, ORCP 67, relating to judgments generally, would be a sufficient source of legal authority to decide an action by judgment. Moreover, some actions created by statute also contemplate disposition of the action by judgment and, likewise, there are some older appellate cases that work group members believe authorize disposition of particular kinds of relief by judgment.

Chief Justice's Authority to Designate Requests for

Relief to be Decided by Judgment

The members of the work group that proposed making the ability to get a judgment dependent on the existence of specific legal authority to decide a "request for relief" by judgment were generally satisfied that specific legal authority existed to decide by judgment the kinds of requests for relief they commonly encountered in their practices. However, work group members were concerned that there might be extant, but obscure, requests for relief, or future requests for relief of a kind that practitioners generally agreed should be susceptible to being reduced to judgment, but no specific legal authority existed authorizing it. To address that potential problem, HB 2359 includes section 3:

> The Chief Justice of the Supreme Court by rule or order may:
>
> (1) Authorize or require that specific requests for relief that are not governed by other legal authority be decided by judgment; and
>
> "(2) Authorize or require the use of a limited or supplemental judgment for specified requests for relief that are not governed by other legal authority."

Section 3, then, provides a failsafe mechanism in the event that there is no current legal authority for disposition of a particular matter by judgment.

Matters that May Be Concluded by "Order" Rather than by "Judgment"

Section 6 clarifies that, if a legal authority provides for disposition of a request for relief in some other way (for instance, by an "order"), nothing in ORS chapter 18 requires disposition by judgment. The anti-stalking statutes and the Family Abuse Prevention Act are examples of statutes that provide for concluding actions under those statutory schemes by way of an "order" rather than a "judgment."

Miscellaneous Provisions

HB 2359 contains various provisions relating to judgment liens, writs of execution, and support awards not addressed in this summary of legislation.

Section 12 amends ORS 18.042 to clarify when Social Security

numbers must be included in a judgment and contains provisions reflecting the availability of the process (under UTCR 2.100) for preventing public disclosure of Social Security numbers and other protected personal information.

Sections 16 and 38 amend ORS 19.038 and 18.078 to clarify that two provisions do not apply to judgments in juvenile cases under ORS chapter 419A: the requirement to indicate whether the judgment is a limited, general, or supplemental judgment; and the trial court administrator's duty to send notice of entry of judgment.

Section 21 amends ORS 18.165 to clarify the priority between an unrecorded conveyance of real property and a judgment lien. As such, it addresses severe tension that existed between ORS 18.165 as written and as interpreted by the Supreme Court in *Chaffin v. Solomon*, 255 Or 141 (1970); *Wilson v. Willamette Industries,* 280 Or 45 (1977); and B*edortha v. Sundridge Land Company, Inc.*, 312 Or 307 (1991). Section 21 attempts to balance the interests of persons who, in good faith, take title to real property but fail promptly to record their interests, and judgment creditors, who may have sought a judgment against a debtor in reliance on the judgment debtor having an interest in real property that could be sold to satisfy the judgment.

Section 29 amends ORS 107.105(1)(j) to restore a provision that a judgment in a domestic relations case may include costs and expenses incurred in the action.

Trial Court's Retention of Jurisdiction When Appeal Taken From Limited or Supplemental Judgment

Section 25 amends ORS 19.270 to clarify that, on appeal from a limited or supplemental judgment, appellate jurisdiction is limited to matters decided by the limited or supplemental judgment and that the trial court retains jurisdiction of all other matters in the proceeding. This section appears to codify the holding of *SER Gattman v. Abraham*, 302 Or 301 (1986) (when appeal taken from judgment under ORCP 67 B, trial court retains jurisdiction of remainder of case).

Scope of Review in Equity Cases

HB 2646 (2003) created an unintended ambiguity that arguably threatened the availability of *de novo* review for equitable

proceedings that did not exist at common law. Section 27 addresses that ambiguity by amending ORS 19.415, relating to the scope of appellate review in equity cases, to delete the reference to "a case that constituted a suit in equity at common law" and replaced it with a reference to "an equitable proceeding."

Limited and Supplemental Judgments in Contempt Cases

Section 28 amends ORS 33.215 so that, in a contempt proceeding, the trial court is not limited to entering a general judgment, but can enter a limited judgment or a supplemental judgment when the contempt proceeding takes place either before or after entry of the general judgment. Section 28 also removes the apparent limitation that only the defendant could appeal from a judgment in a contempt proceeding.

Post-Limited Judgment Disposition of Costs and Attorney Fees Matters

Section 31 amends ORCP 68 to clarify that a limited judgment under ORCP 67 may include disposition of costs and attorney fees matters if the trial court has determined those matters before entry of the limited judgment. Otherwise, the award of costs and/or attorney fees must be in the general judgment or a supplemental judgment.

> Caveat: If a party successfully seeks a limited judgment to dispose of a request for relief ahead of disposition of the remainder of the case and does not take care to resolve any associated cost and attorney fees matters for inclusion in the limited judgment, that party will have to wait until entry of the general judgment (or until entry of a post-general judgment supplemental judgment) to recover costs and attorney fees.

Judgments in Probate and Protective Proceedings

The 2003 work group that proposed HB 2346 deliberately omitted addressing whether and to what extent the new regime for judgments should be applicable to probate and protective proceedings. In the interim between legislative sessions, the work group turned its attention to those issues in HB 2359 and determined

that there were appropriate times for use of general, limited, and supplemental judgments in those kinds of proceedings.

Section 33 identifies the kinds of decisions in probate proceedings that the trial court *may* cast in the form of limited judgment, which decisions thereby would become immediately appealable:

- The decision on a petition to appoint or remove a personal representative;
- The decision on a will contest filed in the probate proceeding;
- The decision on a request for declaratory relief under ORS 111.095, and
- Any decision that the Chief Justice pursuant to Section 3 of this bill has designated for decision by limited judgment.

Section 33 appears to codify the holdings of *Roley v. Sammon*s, 197 Or App 349 (2005), *Smith v. Caldwell*, 188 Or App 456 (2003), and *Decker v. Wiman*, 288 Or 687 (1980), to the effect that, if a party wishes to appeal from the trial court's disposition of a will contest or other matter suitable for disposition by declaratory relief, the party must initiate a will contest or declaratory relief proceeding as provided by statute and appeal from the limited judgment disposing of the matter.

Similarly, with respect to protective proceedings, section 36 identifies the kinds of decisions that the trial court may cast in the form of a limited judgment, which decisions thereby would become immediately appealable:

- Appointment of a fiduciary;
- Disposition of an objection to an accounting;
- Placement of the protected person;
- Decision on the sale of the protected person's residence; and
- Any decision that the Chief Justice pursuant to Section 3 of this bill has designated for decision by limited judgment.

Unlike probate proceedings, however, section 36 identifies one kind of decision in a protective proceeding that *must* be made by limited judgment: appointment of a fiduciary. That way, any dispute over who will serve as fiduciary can and must be resolved at the front end of a protective proceeding and cannot be appealed

at some later date.

Where sections 33 and 37 give the trial court discretion to enter a limited judgment for specific kinds of decisions, those sections also require the trial court to determine that there is no just reason for delay, but does not require that the determination be in the judgment document.

Section 34 amends ORS 116.113 to clarify that the concluding disposition in a probate proceeding is a general judgment of final distribution. Likewise, section 37 amends ORS 125.090 to clarify that the termination of a protective proceeding is by a general judgment.

APRIVATEA COURT REPORTERS/TRANSCRIPT
SSB 330, OR LAWS 2005, CH 164

Effective date: January 1, 2006

Senate Bill 330 amends ORS 21.470 to provide that, except as to a public body, when a party employs a court reporter to report the oral court proceedings, the reporter may charge a fee as agreed to, before the proceeding begins, between the party and all parties to the proceeding for preparing transcripts on appeal. Further, if any party joins the proceeding after commencement of the proceeding and appeals, that party must pay the court reporter's transcript preparation fees as previously agreed to by the other parties.

With respect to public bodies, SB 330 provides that a court reporter employed by a party may not charge in excess of the existing statutory fees for preparation of a transcript.

The bill also requires transcripts to be prepared in the manner prescribed by rule of the Supreme Court; in effect, ORAP 3.35.

SB 331 was a companion bill to Senate Bill 330 and would have amended ORS 8.340 relating to official reporters for circuit courts. However, SB 331 did not pass. Thus, ORS 8.340(7) appears to continue to bar use of private court reporters in the Ninth and Tenth Judicial Districts altogether. Also, ORS 8.340(7) continues to provide that, notwithstanding that a party arranges for stenographic reporting by a private court reporter, the record of the proceeding produced by the reporting technique regularly used by the court remains the official record unless the court orders otherwise.

Practice tip: For parties considering employing a

private court reporter to report a hearing or trial, be sure to obtain an order up-front making that stenographic record the official record of the proceeding; otherwise, on appeal, the official record will be the audio or video recording regularly used in the courtroom.

Also, neither SB 330 nor SB 331(had it passed) addresses whether a party who employs a private court reporter is absolved from paying the hearing fee under ORS 21.275. That could be important because, if a party fails to get a court order making the private reporter's stenographic record the official record, some trial courts decline to provide copies of the audio recording for transcript preparation purposes if the hearing fee has not been paid. Lastly, SB 330 did not address what happens to the private stenographic reporters notes. Under ORS 8.340, if a proceeding is reported by an official court employee reporter, the reporter's notes would remain with the court. Likewise, the trial court retains possession of audio records. It is not clear under SB 330 whether the reporter or the trial court would retain possession of the court reporter's stenographic notes.

APPELLATE COURT FILING FEES
HB 3124 Or Laws 2005, ch 702

Effective date: August 3, 2005

The net effect of House Bill 3124 is to restore the filing fees in effect through most of the 2003-2005 biennium, but to lower filing fees effective January 1, 2007. Current appellate court filing fees are posted on the Judicial Department's web site (www.ojd.state.or.us).

JUVENILE COURT CASES: "SOCIAL FILE" EVIDENCE
SB 231, Or Laws 2005, ch 451

Effective date: July 7, 2005

In the course of a juvenile court proceeding, if the trial judge considers any material from the "social file" for which no party offers the material as an exhibit or asks the court to take judicial notice of it, Senate Bill 231 requires the court to identify on the record the material that the court has considered and, subject to any objection by the parties, either mark and receive the material

as an exhibit or take judicial notice of it.

SB 231 also:

- Requires the court to make a list that reasonably identifies information judicially noticed under this statute and to include that list in or attached to the order or judgment that resulted from the proceeding.
- Requires, if an appeal is taken from the order or judgment and exhibits are designated as part of the record on appeal, that the court or trial court administrator cause the exhibits and any material judicially noticed to be transmitted to the appellate court as part of the record on appeal.

Those aspects of SB 231 were a response to and largely codified *State ex rel DHS v. Lewis*, 193 Or App 264 (2004).

SB 231 also goes on to provide that, once prepared and filed, a transcript of a juvenile court proceeding becomes part of the record of the case maintained by the trial court. Section 3. SB 231 also (1) clarifies that the record of juvenile court proceedings is not subject to public inspection, but is subject to inspection by parties, court appointed special advocates, surrogates, and their attorneys, and (2) provides that district attorneys and attorneys for the juvenile department, the Department of Human Services and Oregon Youth Authority may inspect and obtain copies of the "social file" the same as parties and their attorneys generally, and to disclose that information to each other as reasonably necessary to perform official duties. Section 4.

Although the practice of a trial court considering materials not marked and received as an exhibit is more common in juvenile court proceedings, trial courts do occasionally take judicial notice of materials in civil and criminal cases generally. The practice required by SB 231 of preparing a list of materials so noticed and putting that list in or attaching it to the order or judgment emanating from the proceeding is a sound one and SB 231 does not bar judges from employing the same technique in other kinds of cases.

REMANDS FOR RESENTENCING
HB 2224, OR LAWS 2005, CH 563

Effective date: January 1, 2006

Amends ORS 183.222 to provide that, on appeal in a criminal case involving multiple counts at least one of which is a felony, if the appellate court reverses at least one count and affirms any other count, the appellate court must remand for re-sentencing on all affirmed counts. This bill appears largely to codify *State v. Rodvelt*, 187 Or App 128 (2003).

VIOLATIONS: SCOPE OF REVIEW ON APPEAL
HB 2225, OR LAWS 2005, CH 266

Effective date: January 1, 2006

Amends ORS 153.121 and ORS 138.057 to clarify that, on appeal of a conviction for a violation, the Court of Appeals' scope of review is the same as for criminal cases generally (errors of law and substantial evidence).

WORKERS' COMPENSATION BOARD
HB 2294, OR LAWS 2005, CH 188

OWN MOTION ORDERS

Effective date: January 1, 2006

Amends ORS 656.278 and 656.298 to make orders issued by the Workers' Compensation Board on its own motion subject to judicial review, without regard to whether the order diminishes, terminates, or increases a former award.

PUBLIC UTILITY COMMISSION CASES
SB 489, OR LAWS 2005, CH 638

Effective date: January 1, 2006

Amends ORS 183.315 and amends and repeals various other statutes, the net effect of which is to confer jurisdiction on the Court of Appeals rather than on Marion County Circuit Court to entertain judicial review of Public Utility Commission orders.

ARMED FORCES COURT OF APPEALS
HB 2136, OR LAWS 2005, CH 512

Effective date: July 15, 2005

Creates the Armed Forces Court of Appeals within the Oregon Military Department to hear appeals arising from prosecutions of offenses under the Code of Military Justice and regulations adopted by the Adjutant General (‘ 29).

NOTARIES PUBLIC
HB 2461, OR LAWS 2005, CH 733

Effective date: January 1, 2006

Requires the Secretary of State to offer a public education course that includes instruction on the laws, rules, practices and procedures relating to notaries public and authorizes the Secretary of State to certify providers of a notary public education course that meets the standards prescribed by the Secretary of State. Section 2. The bill also amends ORS 184.022 to require an applicant to have completed a three-hour notary public education course that includes instruction on the laws, rules, practices and procedures relating to notaries public. Section 3.

The section 3 amendments also authorize a notary public education course offered by an employer to include instruction on the laws, rules, practices and procedures relating to the notary public functions to be performed by a notary public in the course of employment. HB 2461 amends ORS 194.063 to exempt existing notaries public from the public education requirement when renewing their commissions, but if a notary public allows his or her commission to lapse and reapplies for a commission, the person will need to complete the Secretary of State’s training program.

Provides that the amendments become operative June 1, 2006.

PUBLIC RECORD REQUESTS
HB 2545, OR LAWS 2005, CH 272

Effective date: January 1, 2006

Amends ORS 192.440, part of the Public Records Law, to authorize a public body that has been asked to provide a public record to charge for the cost of an attorney’s time to review the public record, to segregate exempt from non-exempt records, and to redact exempt records, but bars charging for attorney time “in determining the application of the [the Public Records Law].” The bill limits the fee that may be charged to $25 unless the public

body first provides the requestor with the estimated amount of the fee and the requestor confirms that the requestor wants the public body to proceed with making the public record available.

MISCELLANEOUS BILLS

Other bills that may be of interest to practitioners include:

- ***Anti-Harassment of Public Servants*** (SB 218, Or Laws 2005, ch 158). Authorizes a public servant or the employer of a public servant to obtain injunctive relief against a person who engages in conduct that is directed at the public servant, relates to the public servant's employment or the public servant's status as an elected or appointed public servant; and constitutes obstructing governmental or judicial administration, assault, menacing, criminal trespass, disorderly conduct, harassment, or telephonic harassment. Effective date: January 1,2006.
- ***"Supersize Me" Actions*** (HB 2591, Or Laws 2005, ch 658). Bars maintaining an action for a claim of injury or death caused by a "food-related condition" against a person involved in the selling of food. Defines "food-related condition" to mean weight gain, obesity, a health condition associated with weight gain or obesity, or a "generally recognized health condition alleged to be caused by, or alleged to likely result from, long-term consumption of food rather than a single instance of consumption of food." Bar is not applicable to claims based on allegations of adulterated food, misbranded food, food sold in violation of state or federal law, but requires exceptions to be pleaded with particularity. Applies to actions filed after the effective date of the bill. Effective date: January 1, 2006.
- ***Action for Invasion of Personal Privacy*** (SB 965, Or Laws 2005, ch 544). Creates a cause of action for invasion of personal privacy of a person for the following conduct where the plaintiff engaged in the conduct without the consent of the person and under circumstances that the person had a reasonable expectation of personal privacy: (1) knowingly making a visual recording of the person in a state of nudity or of an intimate area of the person; (2) observing the person in a state of nudity or observing an intimate area of the person for the purpose of arousing or gratifying the sexual desire

of the defendant; or (3) disseminating a visual recording of the plaintiff in a state of nudity. Contains emergency clause; effective date: July 15, 2005.

- ***Uniform Trust Code*** (SB 275, Or Laws 2005, ch 348). Adopts the Uniform Trust Code. Effective date: January 1, 2006.
- ***Death of Attorney*** (SB 284, Or Laws 2005, ch 457). Amends ORS chapter 12 to extend the statute of limitations by 180 days when the plaintiff's attorney dies before the statute of limitations expires. Effective date: January 1, 2006.
- ***Dentist-Patient Privilege*** (SB 332, Or Laws 2005, ch 353). Amends ORS 40.235 to extend the physician-patient privilege to dentists. Effective date: January 1, 2006.
- ***Transfer of Structured Settlements*** (SB 645, Or Laws 2005, ch 173). Enacts new provisions regulating the transfer of structured settlement rights. Requires the transferee to file an application for approval of the transfer with the court or administrative authority that approved the settlement (section 2) and requires prior approval by a final order of the court or administrative authority (section 4). Effective date: January 1, 2006.
- ***Criminal and Civil Forfeiture*** (HB 3457, Or Laws 2005, ch 830). Comprehensive bill that addresses both civil and criminal forfeitures. Provides that if a challenge to Ballot Measure 3 (2000), currently pending in the Oregon Supreme Court, is rejected, provisions of the bill that are inconsistent with Ballot Measure 3 will be unenforceable. Contains emergency clause. Effective date: September 2, 2005 (except sections 1-18, reenacting criminal forfeiture provisions, which apply to property seized on or after January 1, 2002).
- ***Blakely v. Washington Fix*** (SB 528, Or Laws 2005, ch 463). Responds to *Blakely v. Washington*, U.S. Supreme Court case, by adopting a process for pleading and trial by jury of sentencing enhancement facts. Provides that a waiver of the right to a jury trial on the issue of guilt is a waiver of the right to a jury trial on all enhancement facts, regardless of whether the enhancement fact relates to the offense or to the defendant. Sunsets all amendments effective January

2, 2008. Contains emergency clause; effective date: July 7, 2005.

- ***Suspension of Driver License for Stealing Gasoline*** (HB 2937, Or Laws 2005, ch 403). Amends ORS 809.411 to require the Oregon Department of Transportation to suspend the driving privileges of a person for six months upon receipt of a record of conviction of theft of gasoline. Effective date: January 1, 2006.
- ***Suspension of Driver License for Excessive Speeding*** (SB 568, Or Laws 2005, ch 491). Amends ORS 811.809 to authorize a court to suspend a defendant's driving privileges for up to 30 days for exceeding the speed limit by 30 miles per hour and to require a driving privileges suspension of 30 to 90 days for exceeding the speed limit by 100 miles per hour or more. Applies to offenses committed after the effective date of the bill. Effective date: January 1, 2006.
- ***Judicial Review of DCBS Orders: No Hearing—No Judicial Review*** (SB 120, Or Laws 2005, ch 338). Amends various statutes relating to the enforcement powers of the Director of the Department of Consumer and Business Services in transactions involving financial service providers that do not receive insured deposits. Provides that a person who does not request a contested case hearing on a DCBS order is precluded from seeking judicial review of that order. Effective date: January 1, 2006.
- ***Independent Contractors*** (SB 323, Or Laws 2005, ch 533). Attempts to adopt a uniform definition of "independent contractor" (as distinguished from an "employee") applicable to the Landscape Contractors Board, Department of Revenue, Workers' Compensation Board, Department of Consumer and Business Services, Employment Department, and Construction Contractors Board. Effective date: January 1, 2006.
- ***Energy Facility Siting*** (SB 736, Or Laws 2005, ch 768). Amends ORS 469.320 to allow exemption to energy facility site certificate requirement for energy facilities using oil seeds, waste vegetable oil, or cellulosic biomass (grass straw and forest waste) as sources of material for conversion to liquid fuel (statute currently allows exemption for facilities using grain, whey, or potatoes). The casual practitioner

might think "no whey"; but, dude, whey. Effective date: August 23, 2005.

- ***Dangerous/Potentially Dangerous Dogs*** (SB 844, Or Laws 2005, ch 840) Comprehensive bill addressing civil and criminal consequences for maintaining dangerous or potentially dangerous dogs. Effective date: January 1, 2006.

2006 ORAP COMMITTEE

By Lora E. Keenan and Keith Garza

Much about state government follows the ebb and flow of the legislative cycle, and appellate rulemaking is no exception. Sitting at the beginning of every even-numbered year—to permit the Judicial Department to devote itself to issues legislative during the odd-numbered years in which legislative sessions are held—the Oregon Rules of Appellate Procedure Committee has been drafting, amending, repealing and otherwise tinkering with what have become nearly 100 pages of rules governing appellate practice in Oregon.

As appellate advocates well know, mastery of the Oregon Rules of Appellate Procedure (ORAP) is a must for navigating clients through matters on appeal or review. Cases often are won or lost based on the interpretation and application of the rules of procedure. But those are the aftereffects. For the Committee itself, and as set out below, the debates are often intense.

Although many of those involved want to, few can forget the knock-down drag-out fight six years ago over selecting the color for combined answering and cross-opening briefs on appeal. All the outside world ever knew was that the color is "violet" and a seemingly consensus choice it was at that. *See* ORAP 5.05(4)(a)(iii) and 23 Oregon Appellate Courts Advance Sheets A-25 (2000) (setting out amendment). Not so. First, vigorous argument and mild expletives surrounded the decision as to what part of the color palette the Committee should be focusing on. Black was quickly dispatched for obvious reasons. But what about something in the teal range?; or how about salmon; even the olive drabs were looking to become fashionable again.

Ultimately, and due largely to the fact that almost every

other part of the rainbow had been spoken for (blue, red, gray, green, yellow, white, and tan), purple it would be. But not just any purple. We did not want to become like Missouri: "Second briefs of appellants in cross appeals; light purple." Mo S Ct Rule 84.06(f)(2)8. That's not exciting at all. Then, however, the debate really began, with the exchange of not-so-mild expletives, table pounding, and the like. One member (unfortunately for him, a non-voting member) wanted to plug his alma mater and argued strenuously for maroon. Another member got stuck on magenta. Eggplant was offered, and, for some reason, the Committee decided to break for lunch. Returning sated in the afternoon, cooler heads prevailed and, after being assured that violet cardstock was readily available at most office supply stores, it became the unanimous choice of the committee.

The same kinds of momentous struggles are going on right now with the 2006 ORAP Committee. This is a year of transitions. New chiefs, three new attorney members, and the graceful exit of the King-of-the-ORAP—Appellate Legal Counsel Jim Nass. His two-decades' long presence as the Committee's de facto administrator can be seen in almost every rule and, in fact, in almost every statute in Chapter 19 of the ORS. The Oregon appellate system owes him a tremendous debt of gratitude for his hard work, thoughtfulness, and humor. (We expect that, notwithstanding his turning over of the reins to appellate staff attorney Lora Keenan, he still will be moving and shaking behind the scenes.

In any event, the Committee welcomes the suggestions to make the rules better and has indicated that it will accept proposals for consideration through at least May of this year. So, if you are unhappy that the courts eliminated intervention in ballot title proceedings in favor of appearance as amici, ORAP 11.30(8), or you are ticked-off about the demise of the abstract (now excerpt) of record, ORAP 5.50, then by all means write in. And, like most institutions, the ORAP Committee has its own rich traditions, one of which is to direct all inquiries to first-time attorney members (the Committee's version of freshman hazing). Set out below are the members of the 2006 ORAP Committee. Those appearing in bold-face type are newbies, and they would be happy to spend hours talking with you either in person or on the phone about the subtle points of assignments of error, service on the Attorney General, and all other matters procedural.

Chief Justice Paul J. De Muniz (ex officio)

Chief Judge David V. Brewer (ex officio)

Justice Thomas A. Balmer (the Chief Justice's designee)

Judge Virginia L. Linder (the Chief Judge's designee)

Solicitor General Mary Williams (ex officio)

Chief Defender Peter Gartlan (ex officio)

Marion Trial Court Administrator James A. Murchison (by Chief Justice designation)

Timothy Volpert (the Appellate Practice Section's designee)

Tom Sondag (member at large)

J. Michael Alexander (member at large—CALL HIM!)

Keith Garza (member at large)

George Kelly (member at large—MIGHT EVEN COME TO YOUR HOUSE!)

Cecil Reniche-Smith (member at large—ACCEPTING COMPLAINTS NOW!)

Sarah Troutt (member at large—DROP HER A LINE!)

Lora Keenan (staff attorney to the Court of Appeal and Committee Counsel—non voting)

Scott Crampton (director of Appellate Court Services Division—non voting)

Melanie Hagan (staff attorney to the Oregon Supreme Court—non voting)

"THERE COMES A POINT WHERE THE COURT SHOULD NOT BE IGNORANT AS JUDGES OF WHAT WE KNOW AS MEN."

Watts v. Indiana, 338 US 49, 54, 69 S Ct 1347, 1350, 93 L Ed 1801 (1949) (Frankfurter, J.).

HEAVY LIFTING

THE OREGON COURT OF APPEALS 2005 REPORT

By David Brewer, Chief Judge, Oregon Court of Appeals

I. INTRODUCTION

The business of the courts is conflict resolution. We approach our work with a clear understanding that we cannot expect everyone to agree with all of our decisions. However, this report is intended to help make the work and people of the Court of Appeals more visible and understandable to the Bar and the public. Our goals are to perform the vital work with which we are entrusted in a way that inspires public confidence and understanding, and to work collegially and respectfully with all persons and entities who are affected by our work.

II. STRUCTURE AND FUNCTIONS

The Oregon Court of Appeals is a 10-judge court whose members are elected statewide. With the exception of a limited number of appeals that go directly to the Supreme Court, most notably, death penalty cases, ballot title cases, lawyer discipline matters and tax court cases, the Court of Appeals receives every appeal or judicial review taken from Oregon's trial courts and administrative agencies. Litigants in Oregon have a general right

to appeal decisions from those bodies to our court, and our doors are open to them. If a party is unhappy with a decision made by our court, he or she may seek review of that decision before the Supreme Court, which has discretion whether to accept the case for review. On average, the Supreme Court reviews approximately six percent of our decisions from year to year.

Thirty-nine states have intermediate appellate courts, and we generally rank first or second among those courts in terms of workload. Over the past 10 years, the range of appeals filed per year in our court has been between 3,200 and 4,600. The appendix to this report shows the number of filings in 2005 and gives an idea of the mix of cases that come before the court.[1]

Over the years, our case mix and volume have been fairly steady, subject to three notable exceptions. First, we often have an increase in appeals after the end of a legislative session, when the meaning of new statutes is at issue. In 2003, for example, the Oregon Judgments Bill, HB 2646, comprehensively overhauled the form and content of trial court judgments. We had several clusters of appeals in the aftermath of its passage that presented substantial legal issues of first impression regarding its meaning. We had to decide those cases quickly so that the trial bench and bar would have a better understanding of how to structure their judgments.

Second, our workload can be affected by decisions of the federal courts. Over the past three years, the United States Supreme Court has greatly complicated sentencing in Oregon's felony criminal cases with its *Apprendi*, *Blakely*, and, most recently, *Booker* decisions. In addition, in its *Crawford* decision, the United States Supreme Court substantially limited the permitted uses of hearsay evidence in criminal cases. Those decisions arise under the United States Constitution, and Oregon's courts are required to follow them. In those cases, as it often does, the United States Supreme Court spoke in a broad outline but left many issues undecided. As a result, there has been an increased volume of criminal appeals in Oregon that have presented numerous sentencing and evidentiary issues, requiring prompt responses from both of Oregon's appellate courts. When cases like *Blakely* and *Crawford* and are decided, we have no choice but to divert state court resources to decide those related sentencing and evidentiary issues to assure the integrity of our criminal justice system.

Third, our workload was affected by the indigent defense budget shortfall during the last part of the 2001-03 biennium. Because

the trial courts lacked funding necessary to appoint counsel in criminal cases during that period, our criminal appeals fell in 2003. As those cases were processed in 2004 and 2005, however, our criminal appeal numbers have increased. Thus, funding issues also can create volatility in appellate case volumes.

To meet the demands of its workload, our court sits in regular panels of three judges. Each panel has a presiding judge and two additional members. Each panel hears cases on average three days per month. Between 12 and 30 cases are argued or submitted to a panel for decision without argument each sitting day. Generally, we also schedule an additional oral argument day each month to hear fast track cases—that is, those cases that statutes, appellate rules, or the court's internal practices require us to expedite. Primary among those case types are juvenile dependency, termination of parental rights, land use, workers' compensation, and certain felony appeals. Cases are assigned at random to each panel for argument and decision.

Our judges come from many different backgrounds. Some of us were trial judges, some were government lawyers, and others came from private practice. However, we each regularly sit on all of the varied types of cases that fall within the Court of Appeals's jurisdiction. Before oral argument, each judge on the panel reads all the legal briefs that have been filed in the cases, and each panel member participates in the argument. At the beginning and end of each argument session, the judges meet to discuss the issues in the cases. After argument, the judges decide whether the case requires a written opinion. If any or all of the judges believe that the case requires a written opinion, the presiding judge of the panel assigns that case among the three judges for the preparation of a written opinion. If all three judges decide that a written opinion would not be helpful to the trial bench or the Bar or that, in light of the workload demands facing the court, it would unduly delay the disposition of that case or other cases that have been assigned for written opinion, the case is affirmed without a written opinion. At any given time, each of our judges is working on approximately 25 to 30 cases that have been assigned to him or her for a written opinion.

After an opinion is drafted, the judges on the panel meet in conference and vote on the opinion. Generally, each department holds a conference twice each month to consider opinion drafts. At least two judges must agree with the opinion for the department

to adopt it. A judge who disagrees may file a dissenting opinion. If a majority of the entire court believes that a panel decision is incorrect, the full court can take the case for decision. We meet in full court conferences once per month and, over the course of a year, we consider about three percent of our published opinions in full court. The full court conference model helps assure that our decisions are internally consistent, which is critical to the operation of a large and busy appellate court. It also helps reduce the Supreme Court's need to review our panel decisions for consistency, since that function is part of our own full court review process. In certain other states, by contrast, the intermediate appellate courts sit in separate geographical districts and may decide the same legal question differently from each other. In those states, the supreme courts must review and harmonize conflicting regional court decisions and, unless and until they do so, the decisional law in one region of the state may differ from the decisional law in other regions of the state.

Since the mid-1980s, our court has steadily and substantially reduced its backlog of cases. Today, once a case is submitted for decision, a written decision generally is published within three to four months. In addition, it usually takes no more than 90 days or so to schedule a case for oral argument after it is fully briefed. There are exceptions, though, especially when the court has a large number of pending appeals that are entitled to priority processing. When that happens, other important types of cases, usually civil cases, may lag somewhat behind. As the appendix to this report shows, for the past three years, the court has steadily increased its volume of written opinions.

Our greatest concern for timeliness relates to an extensive motion practice in our pending cases. Our court decides about 1,500 motions per month. Although many of those motions are routine, some are very complex and take a considerable amount of time to resolve. For example, motions frequently involve important constitutional issues, questions of statutory construction, and, particularly, with requests for stays of the decisions of trial courts or agencies, substantial records. To address them properly, and keep our docket moving, the court has created a separate Motions Department in which three of our judges serve in addition to performing their other duties. The Motions Department meets once a month to decide complex motions; further, throughout each month, the members of the Motions Department individually review and decide stacks of less complex motions.

III. SPECIAL PROGRAMS

In 2005, the court continued and inaugurated several programs to carry forward our mission. First, we continued our highly successful appellate settlement conference program. Each year, the Court of Appeals is able to settle 100 to 150 civil, domestic relations, and workers' compensation appeals through the use of this unique mediation program. Cases are carefully screened for the program. Our settlement rate in those case—approximately 67 percent—is among the highest in the nation. The feedback from participants in this program is positive. We are convinced that an effective case settlement program reduces costs to the parties, engenders public trust and confidence, and helps us decide our remaining cases more expeditiously.

Second, we have continued our program of holding court sessions in schools throughout Oregon. We recognize our role as a statewide court, and we believe that the courts' work should be accessible and understandable to the public. To that end, since 1998, our court has regularly heard oral arguments at Oregon schools and then gone into the classroom to talk to students and other citizens about the importance of the rule of law and how our government works. During 2005, we held court sessions in public schools in McMinnville, Roseburg, Bend, Hood River, Canby, Pendleton, and Sweet Home. Please let us know if you would like to schedule a court session in your own communities.

Third, we have developed and implemented a "trading benches" program with the Oregon trial courts that consists of judges from our court periodically sitting as trial court judges in the circuit courts, and trial court judges periodically sitting as judges with our court. This program promotes better understanding between the courts, and, we believe, through better communication about our respective decision making processes, ultimately will reduce the incidence of reversible error on appeal from trial court judgments.

Fourth, the court held meetings with and orientation sessions for legislators during the 2005 legislative session, in an effort to promote better communication and understanding between the branches. Members of both the House and Senate Judiciary Committees and their counsel also attended oral arguments in several cases so as to better acquaint them with the court's practices and work model.

Finally, all of our judges, and many of our staff attorneys and law

clerks, continued the time-honored tradition of orally presenting continuing legal education programs and writing articles for continuing legal education publications on a wide range of subjects that fall within the court's jurisdiction.

IV. A YEAR OF CHANGE

2005 was a year of change for the Oregon Court of Appeals. Some of those changes involved our members and staff. After our stalwart Chief Judge Mary Deits retired in November 2004, the Oregon State Bar fulfilled its function of providing public input into the appointment process by investigating the 18 candidates who applied for the vacancy. In May, the Governor appointed Judge Deits's replacement to the court, Judge Ellen Rosenblum, an outstanding trial judge from the Multnomah County Circuit Court. Judge Rosenblum has joined Department 1 and already has made significant contributions to the court's work. In addition, our long time Department 3 staff attorney, Bob Bulkley, retired and was replaced by Jeff Schick, a fine lawyer who previously practiced with the Portland firm of Davis Wright Tremaine.

Finally, and sadly, two of our senior judges passed away in 2005. Judge Kurt Rossman died on April 7. Before he joined the Court of Appeals, Judge Rossman served as a trial judge in Yamhill County. He was elected to the district court in 1965, and, in 1966, Governor Hatfield appointed him to the circuit court bench where he served for 16 years. In 1982, Governor Atiyeh appointed him to the Court of Appeals. Judge Rossman served on our court for more than 12 years, retiring at the end of his term on December 31, 1994. Kurt was one of the most prolific writers in our court's history. He authored 909 opinions, more than 800 of them majority opinions. But, if you knew Kurt well, those are mere statistics. Despite his elevation to the appellate bench, Kurt was and always remained, a trial judge at heart. He was an unpretentious and humble person, a champion of the underdog whose spirited opinions spoke straight from his heart and always managed to capture the common sense of the case. On June 17, our court held a memorial service for Judge Rossman, at which many of his friends and colleagues shared memories with each other and Judge Rossman's family.

Then, on October 18, Herbert Schwab, the first Chief Judge of the Court of Appeals, died at age 89. Chief Judge Schwab ably served the court from its inception in 1969 until his retirement in 1981. Judge Schwab's entire career was devoted to public service,

including membership on the Portland School Board, service on the Multnomah County Circuit Court bench, service, at varying times, as mayor and municipal judge of Cannon Beach, and many community activities. The judges of our court attended a memorial service for Judge Schwab in Portland on November 2.

V. THE HORIZON: COURT OF APPEALS PROJECTS AND GOALS

Every busy and complex institution must take time to engage in strategic planning activities. That is especially true for our court, which must work efficiently to take advantage of modern technology and business practices, despite overarching funding limitations. To that end, our court has adopted a significant number of projects and goals for the upcoming year and beyond. Some of these projects and goals can be achieved in the short term; others are more ambitious and will require more time to accomplish. We want to share our broad vision with you so that we can work together to serve the public and the Bar in performing the functions that have been entrusted to us. With that preface, here is a current snapshot of our strategic plan.

(1) Our offices in the Justice Building in Salem are currently undergoing a major renovation. The planning process began in 2004, and the renovation itself will not be completed until late 2006. This complicated process involves our court making three partial moves and working on two different floors of the building for approximately 18 months. Our goal is to ensure a safe and smooth renovation process for our staff, the court, and the public; the extra-budgetary costs will include a substantial time and resource commitment by the office manager, information technology specialist, Chief Judge, and every member of our staff.

(2) We are in the process of developing and implementing a modern Appellate Court Management System (ACMS) that will enable us to create and utilize standardized and ad hoc statistical reports relating to court performance. This will allow us to better serve the public by improving our ability to troubleshoot and resolve inefficiencies, to respond quickly to external reporting needs, to streamline our decision-making process for motions, and to automate the creation of court documents. It will also create the potential for future system add-ons that we currently cannot afford, such as e-filing and document management.

The court's personnel investment for this project includes the full-time commitment of one staff attorney for the next fifteen months and a significant time commitment from the Chief Judge and other court members and staff.

(3) In conjunction with our case management project, we have undertaken to develop and apply meaningful appellate court performance measures in consultation with specialists from the National Center for State Courts. That process begins with a strategic planning process during which we will identify key court goals and values, including the creation of better communication, understanding and accountability with external stake holders, and better internal problem solving processes and more efficient allocation of scarce resources.

(4) We are also performing a court-wide internal process analysis to improve the distribution of work among judges and court staff. That analysis includes the following:

(a) To assess internal practices among intermediate appellate courts across the nation, we have undertaken a partnership with Willamette University Law School to perform a national intermediate court staffing/workload/decision model study to aid in our long-term strategic planning.

(b) We have undertaken to analyze and reform our internal processes to more efficiently utilize staff attorney resources in the opinion production process.

(c) We are implementing a judicial assistants' satisfaction and work flow improvement project that is intended to modernize our staff processes, eliminate workload redundancies, and optimally utilize our judicial assistants' talents.

(d) We are reexamining and documenting our court's internal processes in conjunction with the foregoing initiatives and plan to publish those processes in 2006.

(5) We plan to optimize our court's use of retired judges. Former Chief Judge William Richardson and Senior Judge Joe Ceniceros, formerly of Multnomah County Circuit Court, along with former Chief Judge Mary Deits, have performed valuable service for the court since the beginning of 2005 in a landmark project that has leveraged our overall court productivity to a new level. Those judges hear oral arguments with regular court panels on an average of two days per month in alternating months in order

to provide relief for regular judges. The retired judges participate in the decisions of cases that are affirmed without opinion on the day of argument, but they do not remain on the panel in cases that are taken under advisement after argument. The regular judge who obtained relief is substituted for the decision on those cases in which an opinion will be written. The periodic relief allows each regular judge who is replaced on a panel an extra one and one-half to two days beyond the sitting day to devote to opinion writing. We believe that this project, among other innovations, has helped increase the court's number of published opinions in 2005 above previous years, despite the existence of a vacant judicial position for more than half of 2005.

The project has been very successful for the following reasons: (a) it takes advantage of the institutional memories, wisdom, and talents of our senior judges, so as to maintain and promote long-term court values among our current judges; (b) it leverages substantial additional time for opinion writing for our extremely busy regular judges; (c) court-wide continuity in decision-making is maintained in those cases for which a published opinion is issued, because the regular judges return to participate in all cases taken under advisement; and (d) only experienced senior judges have been used in the project so as to ensure consistent decision-making in those cases in which no published opinion is issued.

(6) We are vitally concerned with the decision-making process for juvenile appeals. To that end, we are in the process of setting up a committee of external and internal stakeholders to analyze our work in this critical area of our jurisdiction.

(7) We are also concerned with the length of time that it currently takes to process criminal appeals. Most of that time is taken by extensions in the briefing process by the parties to those cases. Our long term goal is to shorten the average cumulative length of motions for extension of briefing time by helping publicize the crisis in resource shortages that plague the Attorney General and Public Defender offices, and the private bar, which, in turn, drive these unacceptable delays in brief filing in criminal appeals. In addition, we are using a collaborative approach in addressing the problem of delay by (a) designating lead cases on recurring legal issues so as to reduce the need for extended briefing in related cases; (b) holding continuing legal education programs for criminal law practitioners to improve briefing practices; and (c) adopting innovative briefing practices that will allow the parties to

file more streamlined briefs without losing quality.

(8) Our goals must always include fostering public understanding of our work. To that end, we will continue to:

a. maintain and improve the court's school sitting program;

b. maintain and improve our appellate court settlement conference program;

c. maintain and improve Bench-Bar relationships through committee outreach;

d. further develop our "trading benches" program with the Oregon trial courts;

e. continue and improve legislative orientation sessions, including lunch visits and oral argument observation; establish regular communication with legislators and legislative counsel; work on task forces in matters of mutual concern, such as the juvenile appeals process; and invite local legislators to school sittings.

(9) Although, by national standards, our court operates at a high degree of efficiency, we must be open to change that will, without sacrificing decisional quality, make us even more efficient in the performance of our work. We must openly address the institutional and resource-driven barriers to more timely and transparent decision-making, by (a) reexamining the court's decision-making model, including the effectiveness of the full court conference process, the use of oral argument, and other conventions that may affect productivity; (b) studying the adequacy of the court's performance of its error- correcting function, including whether we are providing a proper mix of published opinions; and (c) establishing more regular communication with the Bar and other stake holders to seek their input regarding the effectiveness of the court's decision-making model.

VI. CONCLUSION

As explained in the introduction to this report, the Court of Appeals is committed to performing its work in a way that inspires public confidence and understanding, and to working collegially and respectfully with all persons and entities who are affected by our decisions. This report is part of that commitment. The court intends to issue periodic reports on its work and to periodically

provide the Bar and public with other information that will keep our lines of communication open and clear.

[1]The statistics referred to in this report can be found in "Statistically Speaking" at page 234 of this Almanac.

A *PRECIS* OF THE STATE'S APPELLATE COURT PRACTICE

*By Hardy Myers, Oregon Attorney General**

pre-cis \pra-`se, `pra-(,)se \n. pl **pre-cis** \-`sez, -(,)sez\ [F, fr. précis precise]: a concise summary of essential points, statements, or facts

The Appellate Division of the Oregon Department of Justice has had a long-standing practice of using what it terms the "*précis* process" for making case assignments. That process involves drafting a brief statement of essential points of each case to aid discussion and understanding when the cases are assigned and discussed at staff meetings. In the hope that a summary of basic points about the state's role in the appellate courts will help understanding of that role, I offer the following *précis* of the state's appellate court practice.

ORS Chapter 180 sets out some of the bedrock principles fundamental to understanding the state's role in legal matters. ORS 180.010 establishes the office of Attorney General and ORS 180.060(6) provides that: "The Attorney General shall have all the power and authority usually appertaining to such office and shall perform the duties otherwise required of the Attorney General by law." ORS 180.060(1)(c) explicitly states that the Attorney General shall "Appear, commence, prosecute or defend for the state all causes or proceedings in the Supreme Court or the Court of Appeals in which the state is a party or interested." ORS 180.210 states that the Attorney General "shall be head of [the Department of Justice] and the chief law officer for the state and all its departments." Under ORS 180.220, the Department is given general control and supervisory authority over all civil actions and legal proceedings in which the State of Oregon may be a party or may be interested. And ORS 180.220 (2) provides: "No state officer, board, commission or

the head of a department or institution of the state shall employ or be represented by any other counsel or attorney at law."

There are a number of corollaries that flow from these fundamental principles. The Attorney General and the Department of Justice represent the sovereign interest of the state and the public interest of the people of the State of Oregon. Consequently, litigation positions asserted by the Department must take into account the long-term interests of the state as a whole. The Department does not speak solely as the legal representative for any individual state agency, any particularized interest group, or any individual. The goal of the Department, therefore, is to set out the state's legal position and to do so with one unitary voice.

The state's appellate court practice manifests this in numerous ways. In the offices of many attorneys general around the country, attorneys handle matters from their inception up through the highest level of appellate court review. The Oregon Department of Justice is organized on a different model. In Oregon, nearly all appellate court cases (whether in state or federal court) are handled by attorneys assigned to the Appellate Division under the leadership of the Solicitor General. This organizational model means that Appellate Division attorneys handle a wide variety of cases. But this model also facilitates the presentation of a consistent, unified legal position on issues before the appellate courts.

One of the initial reasons for organizing the state's legal representation in this way was to foster the development of appellate practice expertise within the Department. An offshoot of this practice has been the development of an ongoing institutional relationship between the attorneys in the Appellate Division and the members of Oregon's appellate courts. The ongoing nature of this relationship allows the attorneys to gain a level of familiarity with the practices of Oregon's appellate courts, but it also carries with it the necessity and responsibility to remain as forthright and professional as possible in all the state's dealings with the appellate courts. It would be both detrimental to the state's interests and uncomfortable, to say the least, for an individual attorney to lose the respect of any of the members of a court before whom that attorney appears on a frequent and continuing basis.

The longer range perspective that attorneys for the Department should keep in mind in their practice before the state's appellate courts leads to some actions that may be unique to state representation.

For example, in some cases the state's attorneys may acknowledge trial court errors that have occurred by filing a brief that contains a concession of error. In appropriate circumstances, state attorneys may set out and attempt to meet arguments that have not been presented by the appealing party. In some state agency review proceedings, the Department's attorneys may advise the agency to withdraw an order that contains errors. Such actions are driven in substantial part by the belief that the long-term interests of the state as a whole are best served by correct interpretation and application of the law and not by particular outcomes in particular cases.

The fact that the Department is essentially a monopolistic provider of legal services to the state also has significant impacts on how a state attorney represents a state actor. As noted above, there may well be cases in which an individual state agency's particularized interest in the outcome of a legal proceeding may come into conflict with the legal interests of the state as a whole. Indeed, there are some circumstances when the Attorney General may determine either to appoint a Special Assistant Attorney General to protect the interests of the state under ORS 180.140(5) or to authorize the employment of outside counsel under ORS 180.235 when the Attorney General determines it necessary or appropriate because of potential conflicts. In most circumstances, however, substantial efforts are made to ensure that the state speaks with one legal voice—in common parlance this position sometimes is referred to as "the state is the state is the state." As to legal determinations, the Attorney General is the chief law officer for the state and all its departments. As to policy matters, ORS 180.070(9) states clearly that "The responsibility of establishing policies for each agency, department, board or commission shall rest upon the chief administrator thereof." The line of demarcation between law and policy is not always clear, but the Department strives to provide strong legal representation for the state while leaving policy choices to agency decision-makers.

There are some statutory and regulatory provisions that recognize the unique responsibilities of the legal representatives of the state. For example, ORS 28.110 requires that "if the constitution, statute, charter, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall . . . be served with a copy of the proceeding and be entitled to be heard." Rule 5.12 of the Oregon Rules of Appellate Procedure (ORAP) requires a party filing a brief that challenges an Oregon statute or constitutional

provision to serve a copy on the Attorney General and to identify on the cover of the brief that statute or constitutional provision being challenged. ORAP 8.15(9) provides that the State of Oregon may appear as *amicus curiae* in any case in the Supreme Court and Court of Appeals without permission of the court. The Federal Rules of Appellate Procedure similarly provide in FRAP 29 that a state may file an *amicus* brief without the consent of the parties or leave of the court. Finally, the United States Supreme Court also allows states to file *amicus* briefs in pending cases without seeking leave of the court. *See* United States Supreme Court Rule 37(4). The Department gives serious consideration to these opportunities and appears in cases often to support what it considers to be the correct interpretation and application of the law. In state court that most often occurs through the drafting and filing of an *amicus* brief. In federal court that most often occurs through the action of signing on to an *amicus* brief drafted by another state attorney general's office. The National Association of Attorneys General office facilitates circulation and sign-on efforts for the states in the federal circuit courts and in the United States Supreme Court.

Of course, the primary and by far the most voluminous part of the state's appellate court practice is handling the appellate court cases in which the state or a department or agency of the state is directly involved as a party. Those cases come before the appellate courts in a variety of forms, including direct appeals of criminal convictions, appeals in post-conviction and *habeas corpus* proceedings, death penalty appeals, civil case appeals and judicial review of agency actions. Currently, there are twelve support staff, two paralegals, five law clerks and 31 line attorneys in the Department's Appellate Division. That staff handles over 1200 appellate court cases per year. The number of attorneys in the Appellate Division and the volume and variety of appellate court cases that come through the Appellate Division have necessitated a number of organizational responses. For example, the work of the Appellate Division has been sorted into three primary categories—the Civil/Administrative Appeals unit, the Criminal Appeals unit, and the Collateral Remedies and Capital Appeals unit. Each of these units works under the supervision of an Attorney in Charge.

Civil appeals include state and federal litigation involving tort, civil rights, contract and labor relations issues. The civil caseload also includes civil commitments, juvenile court wardship cases and termination of parental rights proceedings based on child abuse

or neglect. Administrative appeals arise out of the full range of decisions made by executive branch agencies, *e.g.*, driver's license revocations, discipline of professionals engaged in regulated occupations, welfare entitlement, unemployment and workers' compensation, environmental regulation and prison parole and disciplinary proceedings.

County district attorneys are responsible for trial-level prosecution of criminals in Oregon circuit courts. Following conviction, criminal defendants are entitled to appeal to the Oregon Court of Appeals, with discretionary review by the Oregon Supreme Court. In these direct appeals, defendants seek to have their convictions reversed or their sentences changed. These cases range from minor misdemeanors to very serious felonies punishable by mandatory Measure 11 prison sentences, such as rape, kidnapping and robbery, and homicide cases including murder and aggravated murder. Many involve complex and sensitive constitutional and criminal-law questions that affect all aspects of the criminal justice system. The state also takes some appeals in criminal cases, usually from pretrial orders suppressing evidence or dismissing indictments.

Collateral-remedies appeals generally involve challenges by criminal defendants to the validity of criminal judgments or to the legality or conditions of their confinement. Those cases include appeals in post-conviction proceedings in state court and appeals in *habeas corpus* proceedings in state and federal courts. Many of the cases involve claims of a denial of the constitutional right to the assistance of counsel based on allegations that the defendant's lawyer at the criminal trial or on appeal performed deficiently. In addition, Appellate Division attorneys represent the state in capital cases on automatic and direct review in the Oregon Supreme Court. Finally, the Division's attorneys represent the state in original-jurisdiction *mandamus* proceedings in the Oregon Supreme Court.

While the vast majority of the cases handled by the Appellate Division are cases in which the state is the responding party on appeal, there are some circumstances in which the state party is interested in pursuing an appeal. The Civil Appeals Committee and the Criminal Appeals Committee have been developed to aid consideration of those cases. These committees provide a forum in which the merits of pursuing an appeal can be discussed among members of the Appellate Division, members of the Trial Division

and the General Counsel Division or other division where the case may have originated, and representatives of the involved or affected state agencies.

As noted earlier, the Appellate Division convenes on a weekly basis for a *précis*/staff meeting. Each attorney in the Division receives a packet of the case summaries or *précis* for each case assigned for briefing and oral argument. At the weekly meeting, the most significant cases that have been assigned are discussed by all the attorneys in the Division. This discussion helps to ensure that institutional knowledge possessed by other members of the Division can be brought to bear on the legal issues presented in the case and that the state will take consistent and considered positions on legal issues that may well cross over different areas of practice. The drafting of the *précis* and the assignment of the case to the individual attorney generally do not occur until after the opening brief has been filed, except in state's appeals where the *précis*/case assignment process must occur before the state's opening brief is filed. Pre-briefing motion practice generally is handled by the Appellate Division's managing attorneys. Case assignments take into consideration the number of cases and complexity of those cases on each attorney's docket and the subject area expertise and experience of the attorney. In more complex matters, a team of attorneys may be assigned to a case.

All these mechanisms and processes have been designed and developed to try to ensure that the legal representation provided the state by the Department is the best it can be. The goal is perhaps best stated by the Mission Statement of the Appellate Division set out below. Whether the Department has been able to achieve that goal, I leave to the judgment of others. But the Department is striving to do so every day in every case.

Mission Statement

The Appellate Division strives to effectively represent the state's interests and to advance the rule of law in all cases in state and federal courts in which the State is either a party or determines that it is interested. The Division in performing its work must seek to accommodate the appellate courts' dual role of deciding cases before them and announcing "the law" in a way that becomes binding

precedent for the State and its citizens. In its work in the appellate courts, therefore, the Appellate Division strives not simply to advance a position that best represents the state's interests. The Division also must take great care to ensure that it presents its legal arguments in a manner that takes full advantage of the opportunity each case presents to influence the court's law-announcing function.

**The author wishes to acknowledge and thank Solicitor General Mary Williams and Special Counsel to the Attorney General Philip Schradle for their contributions to this article.*

End of the "We Can't Tell" Rule Makes Life Much More Challenging for Appellants

By George Pitcher and David Campbell

In *Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 61 P3d 928 (2003), the Oregon Supreme Court abandoned Oregon's so-called "we can't tell" rule and held that where two or more specifications of negligence are submitted to a jury and one of those specifications is either invalid or unsupported by the evidence, the court may not reverse or modify the judgment unless it determines that the error in submitting the improper specification "substantially affect[ed]" the rights of a party. This article discusses the origin of the "we can't tell rule" and the reasons why *Shoup* overruled it. The article further discusses how *Shoup* has been applied by the appellate courts and offers practical advice for appellate practitioners and trial counsel on dealing with *Shoup*. The bottom line is that *Shoup* makes a multitude of trial court errors meaningless and places an extremely high burden on any appellant attempting to challenge a judgment based on the submission to the jury of an improper specification of negligence.

A. THE "WE CAN'T TELL" RULE

The "we can't tell" rule was first announced in *Whinston v. Kaiser Foundation Hospital*, 309 Or 350, 788 P2d 428 (1990). There, plaintiff brought a medical malpractice action against his gastroenterologist for negligently treating his liver ailment. Plaintiff alleged that defendant: (1) failed to perform or to obtain a liver biopsy; (2) failed to diagnose plaintiff's cirrhosis; and (3) failed

to diagnose plaintiff's vitamin A toxicity. After the jury returned a general verdict in plaintiff's favor, the trial court determined there was no evidence that defendant's conduct fell below the standard of care on any of the allegations and entered judgment notwithstanding the verdict. Plaintiff appealed, and the Court of Appeals reversed holding that there was sufficient evidence that the doctor negligently failed to diagnose plaintiff's cirrhosis. In reaching its decision, the court concluded that because there was evidence to support one of the three specifications (but not the other two), there was sufficient evidence to support the verdict.

The Oregon Supreme Court disagreed. Although the court agreed there was sufficient evidence of failure to diagnose cirrhosis, the court remanded for a new trial because the jury may have based its decision on one of the other two unsupported specifications of negligence. The court explained:

> "This case involves the relatively common circumstance where multiple allegations of negligence are submitted to the jury, some without supporting evidence but some with supporting evidence, and a general verdict form is used. In this situation, it usually is impossible to determine whether the jury returned a verdict on an allegation supported by the evidence or one unsupported by the evidence. In this case, we cannot determine whether the jury returned its verdict based upon the first or third allegations at issue herein (which are unsupported by the evidence) or the second allegation (which is supported by the evidence).
>
> "In such cases, where (1) more than one allegation of negligence is submitted to the jury; (2) one or more of, but not all, the allegations are unsupported by the evidence; and (3) it cannot be determined upon which allegation the jury based its verdict, this court has held that a new trial must be granted."

Id. at 357 (emphasis in original). In other words, if the appellate court cannot determine whether the verdict was based on an allegation supported by the evidence or on one unsupported by the evidence, the result is a new trial under the "we can't tell" rule.

After *Whinston*, the Court of Appeals frequently used the "we can't tell" rule to reverse and remand cases for new trials or for

reconsideration when it was uncertain whether an erroneously submitted specification affected the outcome. *See, e.g.*, *State v. Ramsey*, 184 Or App 468, 56 P3d 484 (2002); *Cruz Development, Inc. v. Yamalova*, 174 Or App 494, 26 P3d 174 (2001); *Brown v. Washington County*, 163 Or App 362, 987 P2d 1254 (1999); *Eslamizar v. American States Ins. Co.*, 134 Or App 138, 894 P2d 1195 (1995); *Burns v. General Motors Corp.*, 133 Or App 555, 891 P2d 1354 (1995); *Simons v. City of Portland*, 132 Or App 74, 887 P2d 824 (1994); *Henderson v. Nielsen*, 127 Or App 109, 871 P2d 495 (1994); *Smith v. Nygaard*, 114 Or App 123, 834 P2d 487 (1992); *Alexander v. U.S. Tank & Const. Co., Inc.*, 114 Or App 266, 834 P2d 532 (1992); *U.S. Nat. Bank of Oregon v. Boge*, 311 Or 550, 814 P2d 1082 (1991).

B. *SHOUP* AND ITS AFTERMATH

In *Shoup*, plaintiff brought a negligence action against Wal-Mart after one of the store's employees injured her by knocking her to the floor. The trial court allowed three specifications of negligence to go to the jury: (1) whether defendant was negligent in instructing its employee to stand in the aisle; (2) whether the employee was negligent in failing to use reasonable care; and (3) whether the employee was negligent in failing to keep a proper lookout. The jury returned a general verdict in plaintiff's favor.

On appeal, defendant argued that the specification of negligence based on its instructions to its employee did not state a claim for negligence under Oregon law and, alternatively, that the specification was unsupported by the evidence. The Court of Appeals agreed that the specification did not state a claim for negligence and held that the trial court had erred in submitting it to the jury. The court then held under Whinston, that, because it could not tell on which specification of negligence the jury had based its verdict, the defendant was entitled to a new trial. The court explained:

> "[T]he prevailing plaintiff bears the burden of developing a record (most often through a special verdict) sufficient to establish the harmlessness of the error of submitting a defective specification to the jury. That is the plaintiff's obligation; the defendant need not do anything."

Shoup v. Wal-Mart Stores, Inc., 171 Or App 357, 373, 15 P3d 588 (2000) (emphasis in original).

On review, the plaintiff did not challenge the Court of Appeals' decision that one of her liability specifications did not state a claim for negligence. She also did not dispute that under the "we can't tell" rule, the defendant would be entitled to a new trial because the reviewing court could not determine whether the jury based its verdict on the defective specification of negligence or one (or both) of the two valid specifications. "Instead, plaintiff argues that this court should abandon the 'we can't tell' rule. She contends that because there were two other, valid specifications of negligence and ample evidence to support them, an appellate court cannot conclude that the trial court's error in submitting the defective specification of negligence to the jury substantially affected defendant's rights." *Shoup*, 335 Or at 168. Plaintiff argued that to reverse the trial court's judgment and to order a new trial would violate ORS 19.415(2), which provides "No judgment shall be reversed or modified except for error substantially affecting the rights of a party."

Defendant argued that application of the "we can't tell" rule does not violate ORS 19.415(2) and that when the reviewing court cannot tell whether the jury based its verdict on a valid or defective specification, the trial court's error in submitting the defective specification to the jury was an error that *per se* substantially affected the appellant's rights. *Id.* at 168.

The Oregon Supreme Court agreed with plaintiff, explaining:

> "Under defendant's standard, if there were *any* possibility that the error affected the outcome of the case, then the court must order a new trial. Because it is almost always *possible* that an error at trial affected the outcome, defendant's proposed standard would lead to retrial of most, if not all, cases in which there was trial court error in submitting claims to the jury, among other possible trial errors.
>
> "That result is the opposite of the policy determination that ORS 19.415(2) embodies. Under the statute, 'no judgment shall be reversed * * * except for error substantially affecting the rights of a party.' (Emphasis added.) The words of ORS 19.415(2) demonstrate that an error must cause something more than the 'possibility' of a different result before the appellate court may reverse a judgment.

* * *

> "The possibility that an error might have resulted in a different jury verdict is insufficient under the statute. Instead, the court must be able to conclude, from the record, that the error 'substantially affect[ed]' the rights of the losing party."

Shoup, 335 Or at 173 (emphasis in original).

The Court concluded:

> "The 'we can't tell' rule, which this court relied upon in some earlier cases and synthesized in Whinston, is inconsistent with ORS 19.415(2). Because that court-made standard conflicts with the standard that the legislature determined for reversal by an appellate court of a trial court judgment, it must give way. In every case, the appellate courts must adhere to the limitation of ORS 19.415(2) and reverse or modify a judgment only if it can be determined from the record that the error "substantially affect[ed] the rights of a party."

Id. at 174.

Since *Shoup*, the handful of appellate opinions applying the new rule in civil cases have universally gone against the appealing party. In six applications of the *Shoup* rule in civil cases, Oregon's appellate courts have never found that a civil appellant met its burden of showing that the submission of an improper, or unsupported, specification of negligence substantially affected the rights of the appellant. In fact, the only example of an appellant prevailing in a case citing the *Shoup* rule comes in the criminal context where the court held that the *Shoup* rule did not apply. A brief examination of the appellate courts' application of the *Shoup* rule shows that it is not easy to meet the "substantially affected" burden based on most trial court records.

In *Woodbury v. CH2M Hill, Inc.*, 189 Or App 375, 76 P3d 131 (2003), plaintiff was injured after falling while disassembling a temporary scaffold at a construction site. He filed suit against the defendant general contractor on claims of negligence and violation of the Oregon Employer Liability Law. The jury returned a general verdict in favor of plaintiff. Defendant appealed, arguing, among other things, that the trial court erred in failing to order a new

trial because some of plaintiff's specifications of negligence were based on violations of the Oregon Occupational Safety and Health Administration rules, which, as a matter of law, did not apply to the case.[1] Defendant moved to strike the allegations, and the motion was denied. At the close of evidence, defendant renewed the motion, and it was again denied.

On appeal, defendant argued that the trial court erred in denying its motion for a directed verdict and that it was entitled to a new trial. According to defendant, because the challenged specifications were submitted to the jury, and because the verdict form did not specify the basis for the jury's negligence verdict, under the "we can't tell" rule it was entitled to a new trial. *Id.* at 380. The court quickly rejected the argument indicating that "since the briefing in this case, the Oregon Supreme Court has abandoned the 'we can't tell' rule and overruled *Whinston*." *Id.*

In *Cook v. Gillen Logging, Inc.*, 190 Or App 68, 77 P3d 1171 (2003), defendant logging company appealed from a judgment and supplemental judgment for damages resulting from a collision between plaintiff's car and a log truck driven by defendant's employee. Defendant raised seven assignments of error, four of which challenged rulings pertaining to plaintiff's specifications of statutory negligence.[2] The court held that those assignments of error failed because defendant could not demonstrate that it was "materially prejudiced" by any of the alleged errors. *Id.* at 70. The court explained:

> "Here, as noted, the trial court submitted all specifications of defendant's alleged negligence, including various specifications of common-law negligence, to the jury; defendant did not object to the jury's consideration of those nonstatutory specifications; and the jury returned a general verdict as to defendant's negligence. In those circumstances, given *Shoup*'s repudiation of the 'we can't tell' rule, defendant cannot prevail."

Id. at 70-71 (citation and footnote omitted).[3]

In *Jackson v. Robbins*, 192 Or App 372, 86 P3d 67 (2004), the plaintiff motorcycle driver brought a negligence action against the defendant automobile driver for personal injuries sustained

in a collision. Defendant pled comparative fault as an affirmative defense. Specifically, defendant alleged that plaintiff was negligent in: (1) driving his motorcycle too fast; (2) failing to keep a proper lookout; and (3) failing to maintain proper control. The jury returned a verdict for defendant, finding plaintiff 90 percent negligent and defendant 10 percent negligent.

On appeal, plaintiff argued that the trial court erred in giving defendant's requested instruction concerning negligence *per se* (number 1, above) because defendant did not plead "negligence *per* se" as an affirmative defense and did not mention a statute at trial. *Id.* at 375. The court found that even if the instruction was improper any error was harmless under ORS 19.415(2). The court explained:

> "As we have stated, defendant asserted three allegations of negligence in his affirmative defense. Plaintiff did not request that the jury return special verdicts on each allegation. Even without considering the basic [speed] rule, the jury could have found plaintiff negligent for failing to keep a proper lookout or for failing to maintain proper control. We cannot tell on which basis the jury based its decision that plaintiff was 90 percent at fault. Under Shoup, plaintiff has not demonstrated an error that substantially affected his rights."

Id. at 376. The court also rejected on those same grounds the plaintiff's argument that the trial court erred in giving defendant's instruction to disregard evidence that plaintiff complied with the designated speed limit. *Id.* at 376-77.

In *Lyons v. Walsh & Sons Trucking Co., Ltd.*, 337 Or 319, 96 P3d 1215 (2004), the parents and co-personal representatives of a deceased Oregon State Police officer brought a wrongful death action against the defendant trucking company after the officer died in a motor vehicle accident. The jury returned a verdict for defendant and plaintiffs appealed. Plaintiffs argued that the trial court erred in admitting certain evidence of, and improperly instructing the jury regarding, the decedent's partner's fault in causing the accident. The plaintiffs did not argue that the trial court erred in admitting evidence of or instructing the jury regarding the defendant's negligence. The Court of Appeals affirmed, and the Oregon Supreme Court accepted review.

The first question on the trial court's special verdict form was a compound question:

> "Was defendant WALSH & SONS TRUCKING CO., LTD. negligent in one or more of the ways claimed by the plaintiffs and, if so, was such negligence a cause of damage to the plaintiffs?"

Id. at 325 (capitalization in original). The jury answered "no," which, the court noted, begged the question: "did the jury decide that the defendant was not negligent or, instead, did the jury decide that the defendant, although negligent, did not cause damage to the plaintiffs?" *Id.* The court said that, "[t]he answer is that we cannot tell; either decision would have been permissible on the evidence presented." *Id.*

After reviewing *Shoup*, the court held:

> "The jury verdict could have been based on one of two different rationales that the jury verdict form identified [negligence or causation]; it is impossible to tell which the jury used. Plaintiffs' claims of error may or may not be well taken, but they depend on an assumption that the jury's verdict was based on one rationale only. The present record does not support plaintiffs' assumption, and, because they are asserting error, the consequences of the inadequacy of the record in that respect fall on plaintiffs. That is, plaintiffs cannot show, on this record, that any of the alleged errors about which they complain 'substantially affect[ed]' their rights. Plaintiffs thus cannot prevail here."

Id. at 326.

The *Shoup* decision has even been raised in the criminal context. *See State v. Pine*, 336 Or 194, 82 P3d 130 (2003). In *Pine*, defendant was convicted of third-degree assault for providing on-the-scene aid to another person committing an assault. Defendant appealed, arguing that his conviction resulted from the trial court's erroneous jury instruction that a person can commit the crime of third-degree assault even though that person did not personally cause physical injury to the victim, as required by ORS 163.165(1)(e). It was undisputed that the defendant did not physically injure the victim.

After the appellate briefs were submitted, but before oral argument, the state submitted a memorandum of additional authorities citing *Shoup* for the proposition that, because the state's version of the evidence supported defendant's conviction, defendant had not established prejudice by way of any arguably erroneous jury instruction. *Id.* at 199. Defendant responded by emphasizing the differences between civil and criminal proceedings, including the civil courts' use of special verdict forms and interrogatories as opposed to the statutorily required general verdict forms used in criminal cases, and that *Shoup* specifically concerned civil negligence and ORS 19.415(2). *Id.*

The court agreed with defendant regarding the significance of the procedural differences between civil and criminal proceedings. However, the court relied upon a more "fundamental" reason why *Shoup* was not controlling in that case: the jury instruction was an incorrect statement of the law and, therefore, the jury's guilty verdict erroneously convicted the defendant of a crime that the legislature did not enact. *Id.* at 200.

The most recent decision discussing *Shoup* is *Moe v. Eugene Zurbrugg Construction Co.*, 202 Or App 577, 123 P3d 338 (2005). There, the plaintiff was severely injured after falling from a scaffold while installing ceiling tiles during the construction of a bowling alley. Using a special verdict form, the jury found in favor of the plaintiff and against the defendant construction company on both his Oregon Employer Liability Law and negligence claims. The defendant appealed arguing, among other things, that the trial court erred when it improperly instructed the jury on the plaintiff's third ELL count which was based on a violation of the Oregon Safe Employment Act. The defendant argued that the instruction was not proper because it was an "indirect" employer and the OSEA does not apply to indirect employers.

The court did not reach the merits of that claim, however, and, instead, affirmed the judgment under *Shoup*.

> "Here there was a special verdict and the jury found [the defendant] liable under all three counts of the ELL claim. Because the jury found against [the defendant] under the first and second ELL counts, and [the defendant], in this assignment of error, challenges only the third count, under ORS 19.415(2) and *Shoup* we need not reach the merits

> of [the defendant's] assignment because, even if [the defendant] was correct, any error did not substantially affect its rights."

Id. at 588.

C. ADVICE FOR TRIAL COUNSEL AND APPELLATE PRACTITIONERS

1. It's More Important Than Ever to Win at Trial

In the days of the "We Can't Tell Rule," the appellate lawyer's job was to scour the trial record in search of *any* specification of negligence or claim that was improper or not supported by the evidence. Even in cases involving multiple specifications of negligence, as most do, if the appellate lawyer could find a *single* improper or unsupported specification, then there was a realistic chance of obtaining relief from the appellate courts. With *Shoup*, the burden on the appellate lawyer is dramatically shifted and increased: now the appellate lawyer must show that the foundation for all or part of the judgment rests solely on an improper or unsupported specification of negligence. An the respondent need only find in the record some rationale for which the court could have entered judgment absent the improper or unsupported specification of negligence. Judging from the cases published since *Shoup*, this is an easy task for respondents on most trial court records.

2. Trial Counsel Must Object and Take Action to Remove Unsupported Specifications of Negligence from the Jury's Consideration

While necessary both before and after *Shoup*, it is now critical for trial counsel to have identified and isolated the improper or unsupported specification of negligence, and also to have made appropriate objections to preserve the error. Potential ways to preserve the error include motions to dismiss, motions to strike, evidentiary objections, motions in limine, objections to jury instructions, and motions for directed verdict. Given the extensive and diverse jurisprudence on preservation of error issues in Oregon law, an appellate lawyer many times can find legal support on both sides of a preservation of error issue. Trial counsel fighting against an improper specification of negligence are well-advised to object

early and object often.

3. Find a Way to Isolate the Error in the Record

The biggest challenge created by *Shoup* is that, in order to obtain relief, the appellant must now show that the improper specification was the only basis for all or a portion of the judgment. The only way to accomplish this will often be through painfully detailed special verdict forms and interrogatories. Trial counsel will have to weigh the potential benefits of submitting detailed questions to the jury against the risks of using overly complicated verdict forms and of giving the opponent too many chances to win. For example, a defendant in a negligence case might, for strategic reasons, prefer a verdict form that simply asks one time whether the defendant was negligent, as opposed to a verdict that asks eight different times whether the defendant was negligent in eight different ways. Furthermore, the lesson of the *Walsh* case is that an appellant seeking relief should not combine the negligence and causation questions in a verdict form. *Walsh*, 337 Or at 325. The simpler the verdict form, the less likely that an appellate court "can tell" the basis for the verdict.

4. Make a Realistic Appraisal at the Appellate Level

In some of the early cases interpreting *Shoup*, trial counsel were at the extreme disadvantage of having tried the case under the "we can't tell" rule prior to *Shoup*. These cases all led to rather cursory rejection of certain assignments of error based on a mechanical application of *Shoup*. But even in the cases tried since *Shoup*, it has become clear that the appellate courts will strictly apply the rule. There are now enough published opinions for appellate practitioners to know that the courts will not interpret "substantially affected" to mean "might have affected." While it may be hard for the appellate lawyer to ignore clear error in a trial court record on a claim or specification of negligence that was probably a basis for a jury's award, it is now a waste of time to pursue an assignment of error where multiple specifications of negligence (including one that was improper) could have been the basis for the award.

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1 Specifically, defendant argued that the following specifications were based on OSHA and should not have been submitted to

the jury: (1) failing to require through its day-to-day supervision that the work platform or scaffold from which plaintiff fell conform to the detailed safety plan and that the workers involved with it be adequately trained about fall protection; (2) failing to conduct regular contractor meetings providing plaintiff with clear procedures for identifying fall hazards and avoiding injuries from falls; and (3) failing to properly train and supervise its own workers regarding the necessity for fall protection during installation, use, and disassembly of a temporary work platform or scaffold. *Woodbury*, 189 Or App at 379-80.

2 Specifically, defendant challenged the trial court's: (1) denial of defendant's motion to exclude evidence of alleged statutory negligence; (2) denial of defendant's motion for a partial directed verdict against those specifications; (3) giving of various instructions concerning those specifications; and (4) refusal to give two of defendant's proposed instructions relating to those specifications. *Cook*, 190 Or App at 70.

3 The court also rejected, under *Shoup*, defendant's fifth assignment of error which challenged the trial court's exclusion of testimony that defendant sought to adduce pertaining to one of plaintiff's several common-law based specifications of negligence. The court said "[t]hat assignment also fails under *Shoup* B again, the trial court, without objection, submitted several other specifications of common-law negligence, which are not the subject of any assignment of error, to the jury." Id. at 71.

EXPANDING DECRETAL NOTATION ON PETITIONS FOR REVIEW: A PROPOSAL

By Jana Toran

Now that I either have, or have lost, your attention, let me be at least a little more specific: I want the Oregon Supreme Court to announce more law. Litigants (actual and prospective), lawyers, and lower court judges all would benefit from the additional clarification of what the law is, even if they may not always be happy with the particulars of the announcement. But the Supreme Court has limited resources, is forced to decide a substantial number of cases—regardless of their legal significance—that the legislature has assigned to the court's docket (ballot titles, bar discipline, death penalty, etc.), and, I think we all would agree,

always must ensure that quality, rather than quantity, is paramount. *See, e.g., McIntire v. Forbes*, 322 Or 426, 430 n 3, 909 P2d 846 (1996) (drawing distinction between cases decided expeditedly rather than expediently). The latter consideration—quality—is especially important given the court's reluctance to change prior statutory, constitutional, or common law interpretations.

Still, with a hard-working and talented set of judges on the Oregon Court of Appeals, which provides the Supreme Court with an average of 800 or so cases a year that the losing party wants the high court to take on review, cannot some precedent be made in disposing of some of those petitions for review—particularly, those cases that the court elects *not* to take because the court concludes that the Court of Appeals decided the case correctly? The Texas Supreme Court has done so for a long time, and I respectfully suggest that the Oregon Supreme Court consider doing something along the same lines: If, in considering a petition for review, the court is of a mind that the Court of Appeals decision both correctly states the law and decides the case, then the Supreme Court should say so and thereby incorporate the intermediate decision as its own. (More on the specifics of the Texas approach later, and, by way of full disclosure, although I am a proud graduate of the University of Houston Law Center, I am not now, and have never been, a supporter of the Texas independence movement.)

Perhaps the best place to start the discussion is with the Oregon Supreme Court's *per curiam* decision in *1000 Friends of Oregon v. Bd. of Co. Comm.*, 284 Or 41, 584 P2d 1371 (1978), in which the court stated:

> "Almost 30 years ago, Justice Felix Frankfurter spelled out the identical points about the denial of a writ of certiorari in the Supreme Court of the United States. 'A variety of considerations underlie denials of the writ,' he wrote, 'and as to the same petition different reasons may lead different Justices to the same result.' By the same token, it is impractical to publish explanations for actions on petitions for certiorari, or review.
>
> > "The time that would be required is prohibitive, apart from the fact as already indicated that different reasons not infrequently move different members of the Court in concluding that a particular case at a particular

> time makes review undesirable. It becomes relevant here to note that failure to record a dissent from a denial of a petition for writ of certiorari in nowise implies that only the member of the Court who notes his dissent thought the petition should be granted.
>
> "Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. . . ."

"Maryland v. Baltimore Radio Show, 338 US 912, 917-919, 70 S Ct 252, 255, 94 L Ed 562 (1950). It is equally true in this court that the statement of one member of the court on denial of a petition for review shows nothing of whether some or even all other members of the court agreed or disagreed with his views, beyond the single question whether the review should be allowed. *Cf. State v. Garza*, 283 Or 1, 580 P2d 1030 (1978) (opinion of Lent, J.). 'The one thing that can be said with certainty about the Court's denial of (the) petition in this case' (to adapt Justice Frankfurter's sentence) 'is that it does not remotely imply approval or disapproval of what was said by the Court of Appeals . . . .' 338 US at 919, 70 S Ct at 255. One necessary consequence of this recognition is that counsel will sometimes have to impose on the patience of trial courts to renew a contention that has previously been rejected by the Court of Appeals, even though this court denied review in the earlier case or cases, so that the contention is not waived and the issue foreclosed from review. An issue that may appear to be settled by one or more opinions of the Court of Appeals may in fact not be settled when a later petition presenting the issue demonstrates that it deserves review in this court. While this fact can introduce temporary uncertainties in the law, that is a concomitant of discretionary review of which this

court is mindful in acting on petitions for review.

> "As for the present case, we repeat that denial of review at this stage implies neither approval nor disapproval of the opinions of the Court of Appeals."

1000 Friends of Oregon, 284 Or at 46-47.

As I read that passage, at least the bulk of it is descriptive rather than either prescriptive or proscriptive. It is largely a restatement of what the Oregon Supreme Court (and apparently the United States Supreme Court) does and not what it should or properly may not do. To be sure, the court offers some reasoning why it believes the practice is a good thing, which essentially is that the time involved would be "prohibitive." But, at least to me, it seems that that statement was directed to performing extended analysis on *all* petitions for review that the court decides to deny. That, however, is not my proposal (and it is not what Texas does).

Having abandoned my trial lawyer instincts and led the discussion with what would appear to be authority contrary to my position, let me continue to wade deeper into that pool. And this gets back to the preference for quality over quantity. One scholar has aptly noted one of the benefits of deciding cases by opinion:

> "[T]he necessity for preparing a formal opinion assures some measure of thoughtful review of the facts in a case and of the law's bearing upon them. Snap judgments and lazy preferences for armchair theorizing as against library research and time-consuming cerebral effort are somewhat minimized. The checking of holdings in cases cited, the setting down of reasons in a context of comparison with competing reasons, the answering of arguments seriously urged, the announcement of a conclusion that purportedly follows from the analysis set out in the opinion, are antidotes to casualness and carelessness in decision. They compel thought. It is even necessary that the thought have some quality of rigorousness in it. This does not assure that any particular opinion will be a good one, but it does increase the likelihood that it will be fairly good."

Robert Leflar, *Some Observations Concerning Judicial Opinions*, 61 Colum L Rev 810 (1961).

Well, it is hard to argue with that. At the same time, to accept the conclusion as an absolute proposition strikes me as overbroad. First, in the context of Supreme Court review, it is not so much the advocacy of the parties that is at issue—which was the case in the Court of Appeals litigation where there often is not (and properly so) extensive analysis from the trial court as to the basis for its rulings—but instead the reasoning and decision of the Court of Appeals. There is, I submit, a difference. Although the Court of Appeals is no stranger to reversal, its decisions do not represent partisan argument. And, notwithstanding that everyone has heard that the Court of Appeals is primarily an error-correcting rather than law-announcing institution, even a casual reader of the Oregon Court of Appeals Reports will have difficulty maintaining an argument that that court sacrifices analysis for dispositions—its heavy workload notwithstanding. That court is known and properly respected for its thorough written expositions in those cases on which it has decided to write.

Moreover, not only would over-reliance on Leflar's comments be disrespectful of the Court of Appeals judges, it likewise would fail to give proper credit to the justices. For most of them, the study and application of Oregon law has been their life's work. One would have to assume that they know and understand Oregon's jurisprudence at least fairly well right out of the gate. It cannot be that there are no cases that come up for potential review that are dead-bang losers for just the reason(s) that the Court of Appeals said so.

Having waded deeper into the pool of adverse authority, let me finally dive in. When the court decided *1000 Friends of Oregon*, a petition for review also served as a petition for reconsideration in the Court of Appeals and, generally, the brief on review if the petition were allowed. See ORAP 10.10 (1977) (so stating). Thus, under that regime, it behooved the disappointed lawyer to argue in the petition for review (1) to the Court of Appeals why it got it wrong and (2) to the Supreme Court why the case is proper one for review *and* why the petitioner should win. Today, however, the petition for reconsideration and the petition for review are different animals. When the Supreme Court receives a petition for review, presumably the advocacy is more about why the court should take the case then how the court should decide it when taken. *See, e.g.,* ORAP 9.07 (listing 16 considerations that could support review) *and* ORAP 9.17 (expressly permitting merits briefing if review

allowed). That would seem to militate against the court deciding whether the Court of Appeals correctly decided a case based on the advocacy presented in the petition for review.

Still, there is also the briefing from the Court of Appeals that is available to the justices together with the petition for review materials and, as well, the decision of the Court of Appeals itself. To those considerations, let me re-emphasize that, under my proposal, it would not be every case that would be eligible for what loosely could be described as a summary disposition. It would apply to only those cases that, in the justices' estimation, appear very clearly to have been decided correctly. And, it is not as though the practice of accepting the Court of Appeals analysis as the Supreme Court's never happens (even if it does not happen all that often). *See, e.g., Walsh v. Mutual of Enumclaw*, 338 Or 1, 104 P3d 1146 (2005) (stating that "the Court of Appeals correctly assessed the statute's meaning. Further, we perceive no benefit in attempting to reshape that analysis for purposes of our own disposition. Accordingly, we adopt the following excerpt from the Court of Appeals decision * * * ."") More commonly, the court with less fanfare simply will adopt in a footnote or equally summarily an aspect or two of the Court of Appeals decision below. *See, e.g., Griffith v. Blatt*, 334 Or 456, 463, 51 P3d 1256 (2002) (affirming part of Court of Appeals decision "without further discussion").

With that said, the court in *1000 Friends of Oregon* recognized the inherent weakness of a system that encourages repeated attacks on "uncertain" areas of law when that uncertainty has been caused by silent denials of petitions for review. The practical effect of such a system is that any rule of law, clarified, or God forbid, announced, by the Court of Appeals has little real effect on a party's decision to pursue further appeals. As a trial lawyer for the past fifteen years, I know this to be true: *it ain't the law until the Supreme Court says it's the law.* It is precisely that sentiment that leads the Court of Appeals to revisit the same issues, over and over again, until someone presents a petition for review that the Supreme Court actually takes.

Which takes us, finally, to Texas: A state known for its love of football and barbeque, and an equal affinity for executions. As a native Oregonian, I can confirm without reservation that Oregon is not Texas, nor should it be. Yet, at the same time, Texas, a state with nearly 800,000 civil cases pulsing though its trial courts each year (Office of Court Administration, *Annual Report of the Texas*

Judicial System: Fiscal Years 1996 through 2005 (2005)),[1] may offer some solution to the "temporary uncertainties" and concomitant chaos addressed in *1000 Friends of Oregon* and reduce the number of challenges that are made simply because the Supreme Court has not yet spoken.

Unlike Oregon, the Texas judiciary uses a notation system on review to its supreme court that indicates those petitions that the high court denied because the petitions did not fit the criteria for review[2] and, as well, those cases that were denied because the decision of the Court of Appeals was correct. Formally called a "writ history," Texas' highest civil appeals court, the Supreme Court,[3] denotes its action with one of the following indications:

> *Petition Granted* - Three justices are convinced that the Court of Appeals erred in its judgment.
>
> *Petition Refused* - Six justices refuse the petition for review. The Court of Appeals judgment is a correct one and the principles of law declared in the opinion are correctly determined.
>
> *Petition Denied* - The appeal presents no error of law that requires reversal or which is of such importance to the jurisprudence of the state as to require correction.
>
> *Petition Dismissed for Want of Jurisdiction*

Tex. R. App. Pro. 56.1(b).

As in Oregon, in Texas a petition for review seeks to convince the court that the court should exercise its discretionary jurisdiction to hear the case. As the process works in Texas, each of the nine justices receives all petitions for review, accompanied by a voting sheet. Working individually, and within 28 days, the justices must cast their votes to grant or deny the petition. (The Texas Supreme Court follows strict timelines that reduce the amount of time that a petition for review or a case under advisement spends in the court.) To make the job easier, the petitions are limited to fifteen pages.

In addition to granting or denying the petition, an additional option for the voting justice is to indicate that s/he "refuses the petition" meaning that the judgment of the Court of Appeals is correct and the rule of law sound. If five other justices agree, a super-majority, then the refused petition elevates the decision of

the Court of Appeals to the status of a Supreme Court decision.

The result is that the number of petitions for discretionary review in Texas are astonishingly lower than those in Oregon. In comparison to Texas, the Oregon Supreme Court receives far too many petitions for review. The Texas Supreme Court, in 2004, received only 810 petitions for review, funneled from the state's fourteen Courts of Appeals that decided 5,220 civil cases that same year. (Office of Court Administration, *Annual Report of Texas Judicial System: Fiscal Years 1996 Through 2005* (2005).[4] In 2004, Oregon's highest court received 753 petitions for review from roughly 2,200 civil cases filed in the Court of Appeals.

Why does a state with a fraction of the civil cases of Texas produce nearly as many petitions for review? To my mind, those numbers provide anecdotal support for the notion that adopting an expanded decretal notation to include the possibility of approving a Court of Appeals decision would reduce the number of appeals both at the Court of Appeals and the Supreme Court levels because more of the "temporary uncertainties" of the law would be removed. I would argue that the strength of the system is in the refused writ. Acknowledging that a Court of Appeals case is, as to the general principals of law, correct and sound in application, would discourage future appeals and end run petitions for review filed just waiting for the day that the Supreme Court finally will take review.

Another way to look at it might be this: If one supposes that, out of the 700-plus cases seeking review in the Supreme Court, 10% were correctly decided by the Court of Appeals both in principle and in judgment, then the Court could double its law-announcing capacity by refusing the petition instead of denying it, thus indicating that the lower appellate court's decision is both correct in the outcome and the applied principle(s) of law.

I started this off by emphasizing quality over quantity, and I will not back down from that. But let us be sure that when we talk about doubling pronouncements I am not talking about sacrificing the quality that is important to the jurisprudence of our state. On the contrary, over time, less uncertainty in the law would serve to reduce both appellate courts' workload. But the obvious cannot be overlooked. Oregon is a small state with a even smaller body of decisional law. Expanding the law and removing the "uncertainties" will benefit litigants and the courts alike.

1 Texas' various trial courts also process 800,000 criminal cases each year.

2 Texas Rules of Appellate Procedure 56.1(a) sets forth the considerations in granting review:

"(a) Considerations in Granting Review. Whether to grant review is a matter of judicial discretion. Among the factors the Supreme Court considers in deciding whether to grant a petition for review are the following: whether the justices of the court of appeals disagree on an important point of law; whether there is a conflict between the courts of appeals on an important point of law; whether a case involves the construction or validity of a statute; whether a case involves constitutional issues; whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected; and whether the court of appeals has decided an important question of state law that should be, but has not been, resolved by the Supreme Court."

3 The Texas Court of Criminal Appeals is the "supreme court" for criminal appeals.

4 There are 80 appellate judges, and, in addition, the court disposes of 6,000 criminal cases annually.

"I THINK IT USELESS AND UNDESIRABLE, AS A RULE, TO EXPRESS DISSENT."

Northern Securities Co. v. United States, 193 US 197, 400 (1904) (Holmes, J., dissenting).

"THE RIGHT TO DISSENT IS THE ONLY THING THAT MAKES LIFE TOLERABLE FOR A JUDGE OF AN APPELLATE COURT."

William O. Douglas, America Challenged 4 (1960).

HISTORY MATTERS

THE OREGON REPORTS, 1862-1900: A BRIEF HISTORY

By Thomas A. Balmer, Associate Justice, Oregon Supreme Court

Judicial opinions document the life of a society. They are a window into not only a society's laws, but also into its customs and pathologies, its commerce, its hopes and fears. A volume of 18th century English decisions tells much about the life of those times, although men of property, criminals, and the Crown are, of course, overrepresented. Similarly, the Oregon Reports, presently reaching 340 volumes (and now supplemented by 200 volumes of Court of Appeals reports and 17 volumes of Tax Court reports), provide a social history of the Territory and State of Oregon. In their pages one can trace the development of Oregon's political and economic institutions; its family structures, murders, and real estate deals; acts of discrimination and oppression as well instances of redress and remedy. This essay briefly reviews the origins of the Oregon Reports and their development from 1862 to 1900 in an

effort to shed some light on the early history of these remarkable documents of social history.

The Constitutional Requirement

The Oregon Constitution of 1857 provided that "at the close of each term [of the Supreme Court] the judges shall file with the Secretary of State, Concise written Statements of the decisions made at that term." Or Const, Art VII (Original), § 7. (The same provision now appears in Article VII (Amended), section 4.) The origins of the requirement of filing written statements are obscure. Article VII was derived primarily from the Wisconsin Constitution, but neither that document, nor the Indiana Constitution which provided the basis for much of the rest of the Oregon Constitution, contained a similar provision. Historians of the Oregon Constitution have been unable to identify another source for the provision; it appears to have been the original idea of the Committee on the Judicial Department that drafted Article VII. Although I cannot prove it, I sense in the background the presence of Matthew Deady, who chaired the Constitutional Convention. Deady's hand is virtually everywhere in the Constitution, he was soon to be elected to the Supreme Court (although he resigned almost immediately to take a federal judgeship), and his interest in (and skill at) self-promotion led him later to shower copies of his opinions on judges, friends, and others whom he hoped might advance his career. What better excuse to allow one's ego to run rampant in thoughtful, scholarly opinions than to put such a requirement in the constitution one happens to be drafting?

In 1859, of course, Oregon becomes a state. The Oregon Supreme Court holds its first term in December. The Supreme Court, as required by the Constitution, files "concise statements" of its decisions with the Secretary of State. But none of those are published.

Beginnings: The Wilson Years (Volumes 1 to 3)

The first volume of the Oregon Reports does not appear until 1862, and 1 Or appears to be to be primarily the work of one man, Joseph G. Wilson, who deserves a short digression at this point. Wilson was born in New Hampshire in 1826, graduated from Marietta College in Ohio in 1846, and taught school and practiced law in Ohio. He came to Oregon and began practicing law in 1852. He was appointed clerk of the Territorial Supreme Court that year

and, with the organization of the new state Supreme Court after statehood in 1859, he was appointed clerk of that court. Wilson became a district attorney in 1860, but apparently still continued to serve as clerk of the Supreme Court. In 1862, the Supreme Court was expanded from its initial four judges to five, and Wilson was appointed to a new fifth judicial district, which included all of the state east of the Cascade mountains. Wilson held his Supreme Court seat in an election in 1864 and served on the court until 1870, when he ran unsuccessfully for Congress. He ran again and was elected in 1872. Unfortunately, after moving his family to Washington, D.C., he returned to Marietta, Ohio to give a speech and died there in July 1873, at the age of 46. Wilson was said by his contemporaries to be a "very bright man" and "unusually jovial and pleasant as a companion."

In 1862, Wilson gathered, edited, and published the existing written opinions of the territorial Supreme Court and the state Supreme Court. It is unclear to what extent Wilson was directed in this endeavor by the court and to what extent it was his own idea, although the fact that he apparently arranged for (and took the financial risk of) publication himself indicates that this was, in important part, his personal project. In volume 1, Wilson identifies himself as "attorney at law, and clerk of the Supreme Court of Oregon," and it appears that the Court did not have a formal "reporter" until it appointed Wilson in 1867. See 2 Or at 4. Wilson copyrighted volume 1 in his own name in 1862 by filing a copy with the U.S. District Court for the District of Oregon.

Wilson arranged for volume 1 to be printed by Banks & Brothers, Law Publishers, of New York, which had been founded by David Banks in 1804. (Banks & Brothers later became Banks Baldwin Law Publishing Co. and was acquired by West Publishing Co. in 1993.) Many of Wilson's (or Banks's) original choices are still visible in the current Oregon reports—the size of the volumes, the law books' traditional red/orange and black spine plates, the selection of Century Schoolbook as the typeface. The 1862 legislature appropriated $800 for the state to purchase 100 copies of "the first volume of the reports of the decisions of the supreme court of Oregon, for the use of the state," and directed the Secretary of State to pay that amount to Wilson upon his deposit of the books with the state library. 1862 Oregon Laws at 68.

Volume 1 is a fascinating mix of cases, including what Wilson

presumably thought to be all the opinions from the territorial Supreme Court (1853-58) and the state Supreme Court (through the end of 1861), as well as several long opinions written by Matthew Deady as a federal district judge. As to the territorial Supreme Court, which had been organized when Oregon became a United States Territory in 1848, Wilson notes that "No written opinions were given previous to the December term, A.D. 1853." He would have been in a position to know, of course, having served as clerk of that court beginning in 1852. As noted, the State Supreme court sat for the first time at a December 1859 term, and Wilson included in volume 1 the first opinion issued by that court, *Howell v. State of Oregon*, 1 Or 241 (1859), and subsequent opinions from the court's terms through December 1861.

Although Wilson may have included all the written opinions of the territorial Supreme Court, he missed at least one important earlier opinion, a June 1847 decision issued by the Supreme Court of the provisional government of Oregon. That court, which had its origins in the 1841 appointment of Dr. Ira Babcock as "supreme judge with probate powers," had become a trial and appellate court consisting of a supreme judge and two justices of the peace. The 1847 opinion, *Knighton v. Burns*, by Chief Justice J. Quinn Thornton, would have been of great interest to Oregonians at the time, as it involved a debtor's effort to pay with "Oregon scrip" authorized by an 1845 statute an obligation that had been incurred before the statute was passed. In a careful exposition of the prohibition on the impairment of contracts, with citations to the *Dartmouth College* case and Kent's Commentaries, among other state and federal authorities, the court rejected the debtor's argument, holding that he must pay in currency that was legal tender at the time the debt was incurred. The opinion was apparently located by a later reporter, T.B. Odeneal, who published it in 1883 as an appendix to volume 10 of the Oregon reports, and it can now be found at 10 Or 548. Odeneal states in a note that the opinion was published in the *Spectator*, Oregon's only newspaper in 1847, and he asserts that it was "the first [court decision] ever printed west of the Rocky Mountains." In any event, *Knighton* did not make it into Wilson's volume 1.

Many aspects of the cases that were reported in volume 1 would not be out of place in volume 340. Dissent was not unusual. In *Howell*, the first reported Supreme Court case, the court held that the sentence imposed by the trial court was not authorized by law

and reversed for a new trial. The opinion was written Chief Justice Wait, and Justice Stratton is identified as "not concurring," although Stratton wrote no opinion explaining why. In a later case written by Justice Stratton, *Zachary v. Chambers*, 1 Or 321 (1860), Wait dissented, but wrote no opinion. Separate opinions also appear. In *United States v. Tom*, 1 Or 26 (1853), the issue was whether Oregon was "Indian country" for purposes of an 1834 statute regarding sale of liquor to Indians; each of the three members of the territorial Supreme Court wrote separately.

We now come to an interesting detour in the publication of Supreme Court decisions, for the next volume containing those decisions is not volume 2 of the Oregon Reports, as one might expect, but instead is the Oregon session laws for 1866. "1866 Oregon Laws" contains not only the statutes enacted by the1866 Legislature, but also all decisions of the Supreme Court "as filed in the office of the secretary of state since the publication of 1862," that is, since volume 1 of the Oregon reports. (The opinions reported in 1866 Oregon Laws later appeared in volume 2 of the Oregon reports, published in 1869.) No judicial opinions appeared in the biennial session laws in 1868, but they are included in the 1870, 1872, and 1874 laws. By 1874, supreme court opinions accounted for more than 600 of the approximately 1,000 pages of the volume of session laws, with another 50 pages taken up by findings of the ubiquitous Judge Deady, then sitting as a "referee" in a Marion County Circuit Court case, presumably because state judges likely to hear the case would have had a conflict of interest. (The case was a suit by the state against the Secretary of State and his sureties for financial misconduct, including selling copies of Oregon statutes and keeping the proceeds for himself.)

In 1869, seven years after he had published volume 1, Wilson, now a member of the court, finally came out with volume 2 of the Oregon reports, again published by Banks & Brothers of New York, and including cases decided between 1862 and 1869. In a short preface, Wilson explained some of the reasons for the delay, as well as for the appearance of five opinions from cases decided in 1860 and 1861 that should have been in volume 1. He noted that the Supreme Court justices sat as trial judges except during the brief Supreme Court terms, and because those terms were mostly taken up with "hearing the arguments and deciding the cases," the Supreme Court terms "afforded no leisure for the preparation of written opinions." The judges were required to write and file

them later, sometimes more than two years after the decision was rendered.

Wilson's preface to volume 2 made two other noteworthy points. First, he observed that before 1865 there was no rule as to the filing of briefs, which explained why, in contrast to other court reports of the time, early Oregon cases contained no summaries of the parties' arguments. Even with access to the briefs, however, Wilson wanted to make sure that references to the briefs were limited "to the real points in issue" and the "particular authorities bearing upon the same." As he put it, "The aim is to make the volumes books of *decisions* rather than of *briefs*, otherwise the Oregon Reports might have been respectable in *number*, containing only occasional pages of what is of real value." 2 Or at 4 (emphasis in original).

Second, Wilson, who, as noted, had been named the official court reporter in 1867, took it upon himself to report some decided cases which ruled on "questions of practice," but in which no opinion had been written. 2 Or at 4. Those included decisions on topics of perennial interest to appellate lawyers, such as proper service of a notice of appeal and the deadline for filing an extension of time to file a transcript. See 2 Or at 202, 204.

Wilson's final compilation, volume 3, was published in 1872, the year he was elected to Congress. He now was, as he identified himself in the book, "Ex-Justice of the Supreme Court, and Official Reporter." Volume 3 has its own idiosyncrasies. Unlike earlier and later volumes of the Oregon reports, volume 3 contains many decisions of the judges sitting as circuit judges. (The volume includes circuit decisions issued between 1867 and 1872 and Supreme Court opinions from 1869 to 1870.) Indeed, the circuit court decisions, which include jury instructions and rulings in equity cases and on motions, take up more than two-thirds of the book. By volume three, Wilson had changed publishers, and the copyright holder and publisher was A.L. Bancroft & Co., of San Francisco, which had been founded in 1856 and had begun publishing law books in 1857. (In 1886, Bancroft merged with another San Francisco law publisher, Sumner Whitney, to become Bancroft-Whitney. Bancroft-Whitney became a subsidiary of Lawyers Cooperative Publishing in 1919, which was acquired by Thomson Corporation in 1989.)

Steps Towards Stability: 1872 to 1889 (Volumes 4 to 18)

With Wilson's departure to Washington, C.B. Bellinger was appointed reporter, beginning with volume 4. Bellinger again used A.L. Bancroft as the publisher, and volume 4, covering the years 1870 to 1873, appeared in 1875. (It contained one case from 1869 with a note that the case "was probably overlooked.") With volume 5, regularity seems to have been established. The volume includes decisions from 1873 (picking up where volume 4 ended) to 1875 and was published in 1876. Interestingly, volume 5 includes of list of more than 80 "cases not reported," 5 Or xiii-xiv, mostly "judgment affirmed"—foreshadowing the AWOP—but some modifications and reversals. Bellinger reported, and Bancroft published, volumes 4 through 8. (As demand for the reports grew, Bancroft Whitney reprinted the entire set in 1887, again, with added notes and tables of cases cited, in 1911, and several more times; many extant copies of the early volumes are from those reprint series, rather than the originals.)

T.B. Odeneal, who had been appointed clerk of the court in 1880, succeeded Bellinger as reporter with volume 9 (1881). Odeneal appears to have had difficulty settling on a printer. For volume 9, he used George H. Himes of Portland; volume 10 (1883) identifies E.M. Waite and W.H. Byars as the copyright holders, Waite (of Salem) as the printer, and Sumner Whitney & Co. of San Francisco as publisher; volume 11 (1885) is similar to volume 10, but shows Waite and Byars, of Salem, as the publishers rather than Whitney. J.A. Stratton served as clerk from 1884 to 1887 and reported volumes 12 through 14. With volume 12 (1886), Waite and Byars disappear, and the copyright, printing, and publishing was returned to Sumner Whitney. Whitney merged with Bancroft in 1887, and that firm published volumes 13 (1886) and 14 (1887). W.H. Holmes, appointed clerk and reporter in 1888, continued the same practice with volumes 15, 16, and 17 (1888-89).

"Radical Change" and Rebalance: 1889 to 1900

The press of other business has prevented the writer from doing the archival research necessary to determine exactly what happened to cause the 1889 legislature to seize control of the reporting of Oregon Supreme Court decisions. In part, the complaint was the "present inefficient and costly system of reporting." Act of February 15, 1889, § 9, 1889 Or Laws at 6. The legislature may also have been aroused by Bancroft Whitney's 1887 reprinting and sale of volumes 1 through 17, and the profits the company presumably

made by selling the public writings of state officials. In any event the 1889 Legislature decisively inserted the state into the business of publishing and selling Oregon Reports. By act of February 15, 1889, the legislature provided that it was the "duty of the Judges of the Supreme Court to prepare or cause to be prepared their opinions in duplicate," with one copy to be delivered by the clerk to the Secretary of State, as required by the Constitution, and one to the State Printer; that the printer was to "print and bind the same in the best style of law book binding, reporting and binding [sic]," and transmit them to the Secretary of State for distribution and sale; that the printing plates "shall become the property of the state and may be used in printing further editions of said books, when necessary, for all of which the State shall pay [the State Printer] four dollars per copy." 1889 Or Laws at 5. Recall that the state had paid Wilson $8 per volume in 1862. (The 1889 act also required the justices the "prepare a concise syllabus of the points decided, to be printed with the opinion," and provided them additional compensation of $1,500 for the "duties required by this Act.")

Pursuant to that legislation, the State Printer, Frank C. Baker, published volume 18, although an identical volume was published by Bancroft Whitney. With the responsibility for publishing the reports now resting squarely on the shoulders of the court, the court designated the Chief Justice as the court's reporter. Volumes 18 and 19 therefore (in most editions) identify Chief Justice Thayer as the reporter of those volumes, and his successor, Chief Justice Strahan, reported volume 20.

The court seems not to have been entirely happy with the legislature's action. In a preface to volume 19 (1890), which appears in the state printer's editions, but not in the Bancroft Whitney edition, Chief Justice Strahan describes the 1889 legislation as a "radical change in the method of reporting and printing the opinions of this court." 19 Or at iii. And the number of errors seems to have increased dramatically. Volume 19, as published by the state printer, for example, lists almost 40 errors in the volume, although the printer pointedly states that "[b]y far the larger number of errors noted below were made by copyists; not by the printer." The Bancroft Whitney edition of volume 19 does not include those errors, either because it appeared later or because the publisher caught them before printing.

Perhaps it was the discontent of the court that led to a slight modification of the reporting statute at the next legislative session.

The 1891 legislature established the office of "supreme court reporter," to be appointed by the court and to have responsibility for "faithfully report[ing] all the decisions of the court as rapidly as they are published [sic] and sufficient to accumulate to make a volume of six hundred pages." Act of February 21, 1891, 1891 Laws at 165-66. The reporter was to deliver the manuscript to the State Printer and to "read and correct the proof of the work of the printer" and "superintend and direct" the work of publishing the reports. Following that statutory change, the court appointed George Burnett as reporter. Burnett reported volumes 21 and 22 (1891 to 1892) and was succeeded by Robert Morrow, who reported volumes 23 through 49 (1894 to 1908).

In 1899, the legislature, perhaps believing it was not getting a fair deal from the state printer, again took action, directing the state printer to print 800 copies of the reports and deliver them to the Secretary of State, for which the printer would be paid $2.50 per copy (down from $4 per copy in the 1889 legislation). The Secretary of State was authorized to sell "said reports, and any others he may now have on hand, to the public at $3 per copy." 1899 Laws at 233, 234.

As the century came to a close, reporter Robert Morrow was supervising the publication of the Oregon Reports. By directing the State Printer to publish Supreme Court opinions, the legislature had broken the Bancroft Whitney monopoly and, presumably, reduced the cost of purchasing reports for judicial and other government use. Responsibility for editing and publishing the decisions had, after a few rocky years, been returned from the judges themselves to a reporter appointed by the court. Bancroft Whitney was continuing to publish its own editions of the reports, virtually identical to those of the state printer, and private publishing houses, including Bancroft Whitney and George Bateson, of Portland, were busy reprinting and selling earlier volumes of the reports to the state's growing legal community.

LORD'S OREGON OAK CHEST

By Keith Garza

At the east end of the Oregon Law Library's foyer, on the second floor of the Supreme Court Building, sits a massive carved chest made from native Oregon oak. The chest appropriately rests beneath an oil portrait of William Paine Lord, who for a time owned the chest. Lord served on the Oregon Supreme Court for fourteen years, from 1880 to 1894, including three two-year terms as Chief Justice. Following his service on the court, Lord was elected governor, which office he held through 1899.

An accounting of the chest's early provenance has not survived. Certain details of its later history, however, were recounted to Justice Arno Denecke when the chest was presented to the Supreme Court as a gift in the early 1970's. It seems that, while Lord was governor, an inmate at the Oregon Penitentiary was set to be released upon the completion of his sentence. The inmate, however, did not want to leave the prison, and he petitioned Governor Lord for permission to remain. Lord granted the unusual request, and, some time later, the inmate expressed his gratitude for the governor's act by presenting him with the chest as a gift.

According to Governor Lord's daughter, Elizabeth Lord, the chest then became both a functional and decorative part of Lord's home at High and Mission streets in Salem, and later his daughter's house. Shortly before her death in 1976, Elizabeth Lord told Justice Denecke that she wanted to leave the chest to the Supreme Court as a remembrance of her father's service on the court.

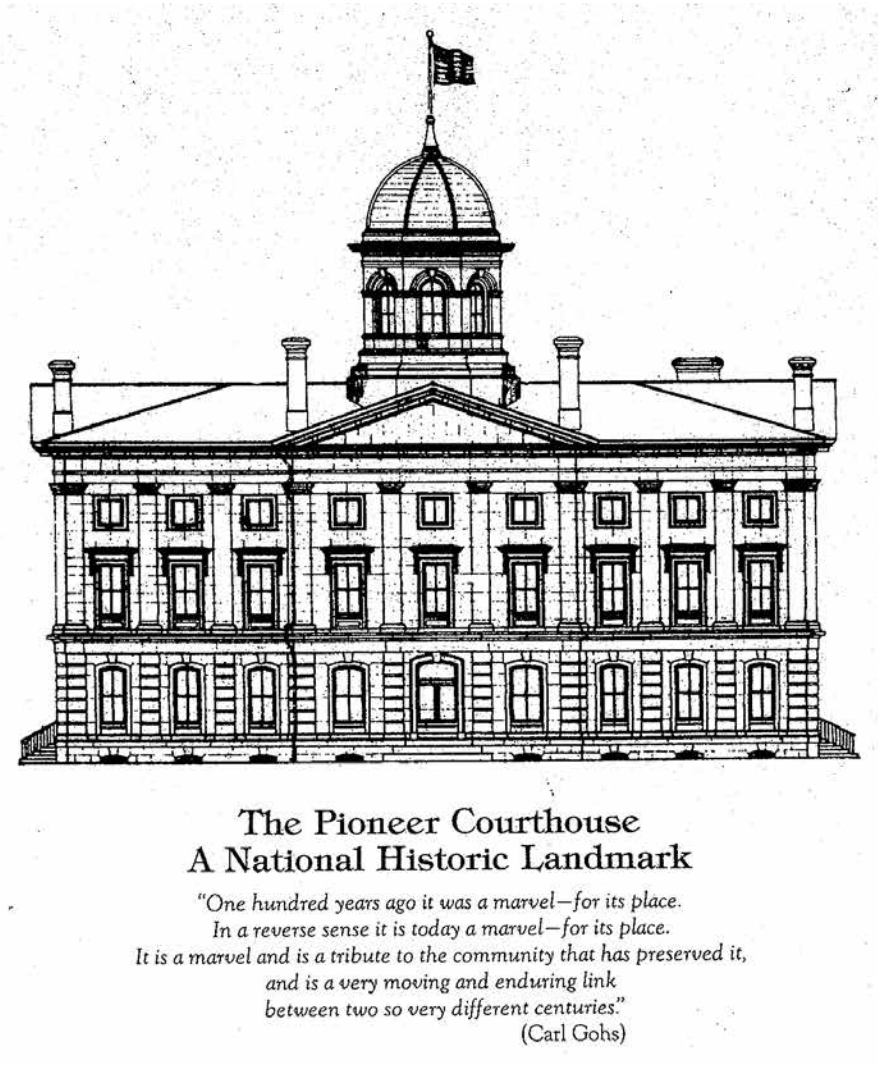
Following his service as governor, President McKinley appointed

Lord, a Civil War veteran, to be minister to Argentina. He also served as a code commissioner, compiling Lords's Oregon Laws in 1910. An anonymous biographical sketch of Lord describes him this way:

> "The discharge of artillery during the Civil War impaired Governor Lord's hearing, and the infirmity grew on him with age. Notwithstanding this handicap, he loved the companionship of his fellow-men and he was so delightful a talker that any one thrown with him was amply repaid for the exertion necessary to make him hear.
>
> "As an advocate at the bar, Governor Lord was always gentlemanly in his deportment, patient and diligent in his research, able, forceful and eloquent in his presentation of his cases, loyal to his clients and fair to his opponents.
>
> "As a soldier, and as a civilian, Governor Lord was courageous, manly and faithful in the discharge of every duty. As a public official he was courteous, conscientious, independent and capable.
>
> "His fame will rest chiefly on his career as Justice of the Oregon Supreme Court. He brought to the performance of his duties in this exalted office, a scholarly knowledge of the law, a mind receptive to the truth and remarkably free from prejudice, a clarity of mental vision, which enabled him to grasp the salient points of every controversy, a knowledge of his fellow-men and a catholicity of sympathy which made him accurate and discriminating in weighing testimony, and a judicial eloquence which enabled him to clothe his decisions in apt and precise language, which has done much to clarify the law and make it certain in this jurisdiction.
>
> "Governor Lord believed in the genius of hard work. He realized that as judge he could not afford to do any man injustice, and he spared no effort to understand and correctly decide every case."

Portland's Pioneer Courthouse: a Brief Look at its History as it Reopens to the Public

By Scott Shorr



The second oldest courthouse west of the Mississippi and oldest courthouse on the west coast formally reopened its front doors and intimate courtroom to Ninth Circuit judges, lawyers, and the public in December 2005. Portland's Pioneer Courthouse was built

between 1869 and 1875 under the guidance of the federal architect Alfred Bult ("A.B.") Mullett[i]. Mullet was a prominent architect who designed many well known federal buildings. Mullet designed the Old Executive Office Building next to the White House and much of the Treasury Building in Washington, D.C.[ii] He also oversaw the design and building of many significant federal and non-federal building throughout the West, including the Old San Francisco Mint.[1]

The History of the Site and Building

The City of Portland originally purchased the property for $2,750.[iii] The City then "flipped" the property by selling it to the federal government in 1869 for $15,000.[iv] The Pioneer Courthouse was specifically designed by Mullet as a federal building and originally held a post office (first floor), some smaller office space for Customs and federal tax offices (also on the first floor), and the courtroom (on the second floor). The 1869 cost of construction was $396,000.[v] At the top of the building, there is a wood and glass cupola from which the Customs officers used to be able to survey ships on the Willamette River as they entered the city. The cupola still stands and is open to the public for a view of downtown. (The views of the Willamette have long since been destroyed by the surrounding downtown highrises.)

The recent construction that had kept the building closed for nearly two years is just the most recent of several remodels, reuses and re-reuses of the original structure throughout its history. In 1902, Congress approved a major expansion and interior remodel that cost $200,000.[vi] The remodel expanded the basement and first floors and added the wings to the second and third floors. The enlarged space primarily housed the United States District Court and a United States Post Office until 1933 when the federal trial court and post office moved to what is now known as the Gus Solomon Courthouse. (Now, of course, the Solomom Courthouse is no longer in use as a federal trial court since the construction of the Mark Hatfield Courthouse.) The post office reopened a large branch office in 1937 and the building was renamed the Pioneer Post Office.[vii] Its primary function as a courthouse was later restored when the Ninth Circuit Federal Court of Appeals began using the space in 1973 after more rehabilitation work.[viii] Following the latest construction, the post office once again hit the road and, to repeat history, the post office returned again to open

a branch in the Solomon Courthouse, which as noted above is no longer a courthouse at all.[2]

The Famous Trials, Lawyers and Jurists

The original courtroom on the second floor began as a federal trial court. Through the past 130 years, it has been host to famous trials, crooked political figures on trial, and esteemed trial lawyers and judges. The most famous trials involved Oregon's greatest wave of political corruption that dwarfed political scandals of today. At the turn of the twentieth century, the State of Oregon was busy divesting itself of large blocks of state land that it had received from the federal government. A State Land Board was giving out land grants to private citizens and timber barons for $1.25 an acre. There were similar land grants by the federal government to private citizens in Oregon and throughout the West. Even at these bargain prices, the land grant system became rife with fraud as large areas of land, which were unsurveyed and poorly documented by the government, were given out to timber barons and hopeful industrialists in exchange for kickbacks.

The corruption was ultimately investigated and resulted in the "land fraud" trials which began in the Pioneer Courthouse in 1904.[ix] These trials led to many convictions of state and federal government officials, most famously the conviction of Oregon's longtime United States Senator John Mitchell. Mitchell died while pursuing an appeal of his conviction.

The Courtroom has also been hosts to famous jurists, Presidents, and well known oral advocates. The courtroom's first famous jurist, Matthew Deady, was its primary resident as Oregon's first federal judge in the late nineteenth century. This was after Judge Deady had served on Oregon's territorial Supreme Court and presided over Oregon's constitutional convention. The legend is that Judge Deady traveled in the early 1860's to Washington, D.C. to meet with the Lincoln Administration to press for a federal courthouse in Portland, which resulted in the Pioneer Courthouse[x] Presidents Grant in 1879 and President Hayes later both trudged up the steps to view Portland from the courthouse's famous cupola.[xi]

The Recent History, Renovation and Reopening

The latest construction caused some controversy between the federal and local government as well as among historic preservationists. The United States General Services Administration (GSA) contended that seismic upgrades were needed and that security for the judges required the installation of a parking garage under the building. The City briefly threatened to block the federal government from creating a curb cut to allow car access under the building. The City eventually backed down. The judges will now have to cut across the public light rail lines to enter under the building. Historic preservationists and some local citizens also were upset that the old post office would be removed and questioned the need for a seismic upgrade or a special parking garage for judges. The controversy has died down with the successful retrofit that appears to have kept the building's historic value intact.

The Ninth Circuit heard the first arguments to be heard in during the first full week of December 2005 before the formal public opening ceremony on December 12th. For appellate practitioners, it should be a treat to appear in the intimate original pioneer courtroom that retains its charm with a fireplace,[3] extensive woodwork and moldings, and antique furniture. For those that want to feel some of the last history left in central downtown, the building will be open to the public to see the courtroom or the old cupola with its downtown views.[4]

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1 This author could not find any pictures of Mullett or his hair. However, due to the slight difference in spelling, it is fairly certain that Mullett was not responsible for the late-twentieth century male hairstyle known as "the Mullet."

2 This conflicted history between the federal courts and post offices raises the question of why the federal government apparently used to believe that citizens would decide, as part of their daily routine, to buy a stamp and, as long as they were there, file a federal habeas petition on the same day. Or perhaps it was the reverse belief that federal inmates might decide, as long as they were there for their sentencing hearing, to pick up a few stamps on the way.

3 The fireplace practically calls people over as if to say, "Judge, counsel, if you would just pull up a chair and a cup of tea and talk about this issue for an hour over a cozy fire, I think we could all come to a nice decision here."

4 The author would like to thank Scott McCurdy, librarian for the

Federal District Court of Oregon, who shared research materials, including Ninth Circuit Judge Kilkenny's original files, for this article. The article's text, particularly any footnotes that any reader finds to be either objectionable or just not very funny, are the responsibility of the author alone and not anyone else, including his wife, his colleagues at Stoll Stoll, his elementary school writing tutor, or his dog (in no particular order).

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i *See* Pioneer Courthouse, Portland Oregon, Pamphlet from the General Services Administration. For a condensed history of the Pioneer Courthouse and some of the other federal buildings designed by A.B. Mullett, see the General Services Administration ("GSA") website at www.gsa.gov and go to the subsections for public buildings, historic buildings, and historic preservation for a database of historic federal buildings listed by location or architect.

ii *See* Portland Pioneer Courthouse Gets a Facelifting, American Bar Association Journal, July 1973, Vol. 59, pp. 744-755.

iii *See* Portland Pioneer Courthouse Gets a Facelifting, American Bar Association Journal, July 1973, Vol. 59, pp. 744-755.

iv *See The Pioneer Courthouse: A National Historic Landmark*, GSA Program from the October 18, 1977 National Historic Landmark Dedication Ceremony.

v www.gsa.gov

vi *Id.*

vii *See* Pioneer Courthouse, Portland Oregon, Pamphlet from the General Services Administration.

viii *The Pioneer Courthouse: A National Historic Landmark*, GSA Program from the October 18, 1977 National Historic Landmark Dedication Ceremony.

ix www.gsa.gov

x *See* Transcript. pp. 6-7 of Judge John F. Kilkenny's dedication speech at the Ninth Circuit Dedication Ceremony for the Pioneer Courthouse, May 1, 1973. See also History of the Pioneer Courthouse of Portland, Oregon by the Honorable John F. Kilkenny. Judge Kilkenny, who was on the Ninth Circuit from 1971 to 1975, was instrumental in leading the effort to have the Ninth Circuit take over the building in the early 1970's. The building had fallen into substantial disrepair and, after the Oregon Historical Society did not obtain funding to save it, there

did not appear much interest in preserving it.

xi See Transcript. pp. 5-6.

SOME COMMENTS ON A FEW OLD LAW BOOKS

By Joe Stephens, Law Librarian, State of Oregon Law Library

The State of Oregon Law Library (the former Supreme Court Library) traces its beginnings to the Organic Act of 1848, establishing the Territory of Oregon. This Act also provided for a territorial library, the ancestor of the State Law Library, which hence has a claim to be regarded as the oldest public library in the State. Old libraries tend to be quirky institutions, and we fill that bill pretty well, especially in our book collection.[1] Back in the 19th century, the Librarian petitioned the Legislature for more money on the grounds that "The usefulness of the library depends upon its completeness," and the Legislature apparently agreed, since the library was able to embark on a policy of collecting the primary law of all common law jurisdictions. This included not just the states and territories of the United States, but the whole of the far-flung British Empire. For many years, the library purchased the statutes and case law of England, Wales, Scotland, Ireland and Canada and all of its provinces, and Australia and New Zealand and their provinces, India and its subdivisions, and African colonies that no longer exist.

The library was ultimately unable to maintain what was called the Commonwealth Collection, but much of this material is still available. If you should happen to need an old Tasmanian case, we can probably provide it. And if you need to figure out how panhandling was dealt with in the reign of Henry the Eighth, we can provide the full text of the statute, which provides in part "That if any person being whole and mightie in bodie and able to labour, at any time after the feast of Saint John, be taken in begging in any part of this realme...and can give no reckoning how he doth lawfully get his living, then it shall be lawfull to the constables, and all other the King's officers...to arrest the said...idle persons... and every such justice of the peace....shall cause every such idle person...to be had to the next market towne...there to be tied to the end of a cart naked, and be beaten with whippes throughout

the same market towne, till his bodie be bloudy; and after such punishment...shall be enjoyned upon his oath to return forthwith to the place where he was born...and there to put himself to labour like as a true man ought to doe..."

Although the Commonwealth Collection was not maintained, the long-time librarian here, Ray Stringham, was an ardent Anglophile, and he kept our extensive collection of English case law intact. In fact, we still buy new volumes of the English Reports to keep our English case law up to date. Of course, John B. West did not sell the English Bar on the notion that every appellate case must be published, so instead of receiving forty volumes a year from just one court system (West's Federal Reporter), we receive one volume per year from each of the major English courts.

But Mr. Stringham's interest in English law did not stop at continuing the English Reports. He was himself a scholar of some repute, with a book on the Magna Carta to his credit. And he collected rare law books, mostly English, for the library. Library legend has it that he spent his vacation each summer in London, poking around in bookshops in search of antique law books. This was before collecting old law books became a fashionable hobby, and he was able to acquire many first editions of the classics of English law for the library. Our records indicate that these treasures were usually purchased for under $10.

Among these treasures is Bracton's *De Legibus et Consuetudinibus Angliae*, recently available on the web site of the Antiquarian Bookseller's Association of America (ABAA) for a mere $25,000. Bracton (pronounced "Bratton" or "Britten" according to various scholars) was a "justiciary" (judge) during the 13th Century who traveled on circuit all over England. *De Legibus* is a treatise on the laws and customs of England—in Latin, of course. It considers a variety of topics, including the meaning of law, public and private rights, and forms of legal proceedings to enforce rights, questions of domestic relations, especially property rights between husband and wife, and even rights concerning "great fish" (whales and sturgeon). Bracton apparently studied civil law in Italy, but *De Legibus* has a claim to be regarded as an early work on the common law of England, since it was based on transcripts of pleadings in English courts and decisions of English judges. It was regarded by Maitland as "the crown and flower of English medieval jurisprudence." It was first printed in 1569, and the library copy is of this first edition.

Another major classic is Sir Edward Coke's *Institutes of the Laws of England*, a four volume work published in its first edition 1628-1644, the edition held by the library. Only one volume from this edition is currently available from ABAA, and its asking price is $10,000. Coke (pronounced "Cook") is regarded by many as the greatest lawyer in English history. He became Attorney General in 1594, and is said to have entertained Elizabeth I at his home with great magnificence. He became Chief Justice of the King's Bench in 1613, and in that position was a great protagonist of Parliament in its struggle against the King. He entered Parliament in 1621 and became the leader of the parliamentary opposition to the King, for which he was imprisoned for a term in the Tower. Parliament ultimately prevailed when Charles I was forced to give his assent to a Petition of Right drafted by Coke.

Although Blackstone praised the analyses of Coke, he found the *Institutes* "...unfortunately as deficient in method as they are rich in Matter...thrown together in loose desultory order." Nevertheless, Coke's commentary on the Magna Charta is still frequently cited, as it was in *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 94 (2001). The Court cites to the 1797 edition, also part of the library's collection, because this version includes an English translation of the statutes and documents discussed by Coke.

Coke on the Magna Charta continues to be of interest in other quarters also. The library has had requests from an anti-government group to photocopy the whole of the Second Institute, commenting on the Magna Carta. Since this would be highly detrimental to a fragile 16th century book, we refused to allow it. The library has a 20th century reprint of the 1797 edition, and we offered this for photocopying. However, these groups believe that a 20th century reprint has likely been politically bowdlerized by judges and lawyers, and they refused to consider this alternative. They stalked out of the library, convinced that we were part of the conspiracy to hide the real Common Law from the People.

The *Smothers* opinion also cites to Blackstone's *Commentaries on the Law of England* (4 volumes, first edition 1765-1769, held by the library). This is sometimes said to be the first comprehensive treatise on English law in the five hundred years since Bracton. Blackstone entered Oxford at the age of 15, where he took the usual curriculum of ancient languages and the classics, along with a little mathematics and logic, then moved on to the study of law for practical reasons. He was called to the bar in 1746, but he did

not thrive as a practitioner. His first biographer, also his brother-in-law, blamed his failure as a lawyer to his lack of powerful friends, but other sources note his indifferent abilities in court, and Blackstone himself acknowledged that his inclinations were at odds with active life, "and have assured me that I am not made to rise in it."

Blackstone nevertheless managed to get himself appointed to an endowed chair at Oxford, and as the first Vinerian Professor of Law, he launched the academic study of law there, where he reports that it had "previously been reputed [to be] of a dry and unfruitful nature." His Vinerian lectures were a great success, and they were the foundation for the *Commentaries*. The *Commentaries* were an even greater success, and are said to have earned Blackstone 14,000 lbs. in his lifetime, a fortune in 18 century England. Its success may have been due to the fact that it was addressed to educated laymen rather than lawyers, and it is written in a highly readable style. It also develops the classification of law in a highly logical form that looks much more like a modern understanding of the subject:

Book I deals with "rights of persons," including civil rights;
Book II deals with "rights of things," or property rights;
Book III deals with "private wrongs" or torts;
Book IV covers "public wrongs," or criminal law.

An American edition of the *Commentaries* was published in 1771 in Philadelphia, and it was sold out in a short time. Other editions quickly followed. Daniel Boorstin, the former Librarian of Congress, has claimed that no other book except the Bible has played a greater role in the history of American institutions. Blackstone was cited many times in the course of the Constitutional Convention, and the terms and phrases of the Framers often are derived from Blackstone. The *Commentaries* are cited in 354 cases of the United States Supreme Court. Surprisingly (or maybe not), 91 of those cases are fairly recent, and the citations are to be found in Scalia opinions.

Another book influential in determining the Founders' view of the law was Henry Care's *English Liberties*, or the *Free-Born Subject's Inheritance*, first published in England in 1680, and in the Colonies in 171. It was thus among the first law books published in the Colonies. This edition was printed by James Franklin, older brother of Benjamin, who was at that time apprenticed to James to learn the printer's trade. The library edition is the 1719 English

4th edition.

Care was a radical pamphleteer and agitator for "liberty of conscience." His writings gained him celebrity, though his origins were obscure, he was well-known in the 1680's as "the Ingenious Mr. Henry Care," and he is described in a recent biography as "the first spin doctor." Care intended his book to provide practical advice to dissidents, and it is a kind of compilation of the documents he regards as the historical sources of freedom, including Magna Charta and the Habeas Corpus Act, with his commentary. He remarks in his Preface that "...in other Nations, the meer Will of the Prince is Law; his Word takes off any Man's Head, imposes Taxes, seizes any Man's Estate...But in England...each Man [has] a fixed fundamental Right born with him, as to Freedom of his Person, and Property in his Estate, which he cannot be deprived of..." Jefferson is said to have owned two copies of Care, and to have relied on it in drafting the Declaration of Independence.

The library collection includes several early law dictionaries. Lawyers seem to have felt it necessary to "define their terms" before it was generally a problem, since the first law dictionary appeared before there were general dictionaries. One of these was Rastell's *Les Termes de la Ley: or, Certain difficult and obscure Words and Termes of the Common Lawes and Statutes of the Realme now in use expounded and explained*. This is a 1641 edition of a work that first appeared in 1527, notable for its attention to terms in "Law French,"the archaic amalgam of Norman French and English used in the courts for several centuries after the Norman Conquest. In this version, there are parallel columns of English and Law French. By the 17th Century, the use of Law French became increasingly artificial, since it was used only by English lawyers, who generally did not speak French. However, many traces of Law French remain in our legal jargon, *voir dire*, for example, or the inverted noun phrase, as in attorney general.

A more controversial dictionary from the same period is John Cowell's *The Interpreter: or Booke, containing the Signification of Words, Wherein is set forth the true meaning of all, or the most part of such words and Termes, as are mentioned in the Law Writers, or Statutes of this victorious and renowned Kingdone, requiring any Exposition or Interpretation*, first published in 1607 The library holds the 1637 edition. Cowell was a professor of civil law at Cambridge, and a personal and political enemy of Coke. In an earlier book, Cowell had attempted to codify English law under the rubric of Roman

civil law, an enterprise which incensed Coke, who maintained that the common law was "ancient and immemorial," and not to be trifled with. In *The Interpreter*, Cowell openly maintained the theory of absolute monarchy. "King," for example, is defined to be "above the law by his absolute power; he may alter or suspend any particular law...." This was not welcomed in Parliament at the very time when the struggle for supremacy was intensifying, and he was prosecuted by Coke for his views. Parliament ordered the book suppressed and burned, and Cowell was saved from the Tower only by the intervention of James I.

No tour of the library's old books would be complete without mention of our collection of historical Oregon material. We have, for example, both the "Little Blue Book" *(Statute Laws of the Territory of Iowa...1838-39)*, and the "Big Blue Book" *(Revised Statutes of the Territory of Iowa....1842-43)*. The 1838 Iowa statutes were adopted by the Provisional Government of Oregon (1844-48), though it was unclear whether whole or in part. Since the Territorial Act provided that laws in force prior to territorial status remained in force unless rescinded, the Iowa statutes were still law in the Territory of Oregon, or at least some of them were, no one knew for sure, since the enactments of the Provisional Government had not been published.

The territorial governor urged an "examination and remedy of the loose and defective condition of the statute laws declared to be operative in the Territory." The legislature responded by drafting a code based on the 1843 Iowa statutes and requiring that it be published. Unfortunately, it was not published due to a dispute between the secretary of the Territory and the territorial printer, and because its validity was questioned as contravening the one-subject rule of the Territorial Act. Since laws on a variety of subjects from the Iowa statutes of 1843 had been adopted in one act, it was claimed that the act was unconstitutional, and that the 1839 Iowa Code was still in effect. The Territorial Court split on this issue, and in their roles as circuit judges in their districts, two of the three judges relied on the 1839 Code, ("the Little Blue Book"), while the third judge held that the adoption of the 1843 code was valid, since it dealt with one subject, the enactment of a code of laws, and on his circuit, relied on the 1843 Code ("the Big Blue Book"). Of this inconvenient situation, Matthew Deady remarked many years later "...the Big-Bookers and Little-Bookers grew almost as fierce as between the Big-Endians and the Little-

Endians of Lilliput, over the momentous question, at which end should an egg be broken."

But several years after the Territorial Act, Oregon still had no code, and it was very unclear what laws were in effect. This was finally to be remedied by the appointment of the Kelly Commission (after J.K. Kelly, its chair) to draft a code. The Commission agreed to accept the New York Code of Practice as the basis for their code, and they drafted an entirely new code of statutory laws for Oregon, which was duly enacted by the Legislative Assembly in 1853. However, facilities for printing such a large project did not exist in Oregon at the time, and the Kelly Code was printed in New York and shipped by sea to Oregon. Unfortunately, the ship was lost at sea, and only the few copies that came overland made it to Oregon. The library possesses one of these few copies of the 1854 Kelly Code. Because of the loss of most copies of the 1854 Code, the Legislative Assembly simply re-enacted it in 1855. This time, the shipment arrived safely from New York, and most extant copies are from this 1855 printing.

The library holds one of the richest collections of early Oregon legal material in the state. I will mention here only one more document, which should be of great interest to members of the Bar. This is unique, a petition in manuscript, directed to "the Justices of the Supreme Court of the State of Oregon," dated July 9, 1861, and signed by 15 lawyers, most of whom have streets or bridges named after them in Portland. It reads:

> The undersigned members of the Bar of the Said Court, would respectfully represent that there is no law or well settled practice for determining the qualifications or rights of an Applicant for Admission as an attorney either in this, or in the Circuit Courts over which you preside respectively-and believing that the interests of clients, the systematic working of the Courts, and dignity of the profession of law, require some more stringent rule of admission of applicants as attorneys, than the partiality or whims of committees, reporting on individual cases, we therefore pray that a rule may be established by this Court, which shall prevail here as in the Circuit Courts, that there be a same day in each term of this Court set apart as a special time when one, desirous of applying for admission as an attorney, may appear and in open Court, in

presence of your Honors, andther Bar, and having passed an examination by your Honors conducted, he may be admitted or his application denied, and that his admission in this Court then entitle him to practice in all the Courts of this stateBand that there shall be no other manner of admission to our Courts, And for this we will pray.

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1 I should probably mention that we have new books as well as old. The library maintains current legal research material, including federal and state statutes and cases, treatises, and law reviews. We also have a cutting edge computer system with public access online systems, and we have a web site at http://egov.oregon.gov/SOLL/shtml.index.

The U.S. Supreme Court's Review of Oregon State Court Decisions in the First Half-Century of Statehood, 1859-1909

By Jeff Dobbins

It was not until 1833, nearly thirty years after Lewis and Clark's Corps of Discovery wintered at Fort Clatsop, that the U.S. Reports first mention Oregon. Appropriately enough, given President Jefferson's role as promoter of Lewis and Clark's expedition, it was Jefferson's first appointee, Justice William Johnson, who wrote the decision in which "Oregon" first appeared. Nichols v. Fearson, 32 US 103, 111 (1833).

Justice Johnson's reference did not come in a discussion of any legal rulings from the state. After all, the area's first provisional European-American government was not formed until ten years later at Champoeg, with territorial courts to come only after creation of the Oregon Territory in 1848, and the State Supreme Court only after statehood in 1859. Instead, it came in a hypothetical reference to a debtor on a note who "absconds, or removes to the Arkansas, or the Oregon." To Johnson, "Oregon"—"*the* Oregon"—was shorthand for "a great distance away from anything else."

His use of the term suggests how far Oregon still had to come at that time before playing a substantial role in the nation's legal

community. Reasonably so, since estimates are that even eight years after *Nichols*, not many more than 1,000 European and American settlers then occupied the states that we now know as Oregon and Washington (and about 750 of those were at the Hudson Bay Company's Fort Vancouver). See Caroline E. Stoel, "Oregon's First Federal Courts," in *The First Duty: A History of the U.S. District Court for Oregon* 2-3 (1993).

Oregon's legal community, of course, did develop, and like the early travelers to Oregon who could come either over land or by boat to the new territory,[1] there were two routes by which Oregon cases would later find their way to the U.S. Supreme Court and the pages of the U.S. Reports: Through the lower federal courts with jurisdiction over Oregon, and through U.S. Supreme Court review of the decisions of the Supreme Court of the State of Oregon.

Substantial reviews of the cases originating in federal court have already been published. Except for brief mentions, this essay does not address the U.S. Supreme Court's review of the decisions of the federal court for the District of Oregon. *See The First Duty: A History of the U.S. District Court for Oregon* (1993) (discussing significant territorial cases and U.S. District Court cases in the years surrounding Oregon's statehood, and in the years that followed). *See* also *id.* at Appx. A (summarizing the structure of the Federal Court system from its creation in 1789 through the development of the Circuit Courts of Appeals); S. Wasby, *The District of Oregon in the U.S. Supreme Court*, 39 Willamette L. Rev. 851 (2003) (reviewing the management of D. Oregon decisions between 1969 and 1998).

In addition to U.S. Supreme Court cases arising out of Oregon's federal courts, however, the U.S. Reports include decisions that arose from the state courts. This essay examines the most significant of those cases that were decided in the first half-century of Oregon's existence. The historical perspective provided by those cases offers some insight into the economic and political development of the State during those years, and the U.S. Supreme Court's management of the cases sheds some light onto the development of our legal community and its relationship to the legal debates and figures on a national level. It may also provide useful background for a later analysis (like that in Stephen Wasby's article) of the U.S. Supreme Court's management and review of the decisions from states new to the Union.

A Summary of U.S. Supreme Court Review of Oregon Supreme Court Decisions

At the time of Oregon's admission to the Union, U.S. Supreme Court review of state court decisions was governed by section 25 of the Judiciary Act of 1789 and Justice Story's famous opinion for the U.S. Supreme Court in *Martin v. Hunter's Lessee*, 14 U.S. 304, 1 Wheat. 304 (1816) (supporting the constitutionality of § 25 and U.S. Supreme Court review of final decisions by state courts in certain circumstances). Under section 25, the U.S. Supreme Court had jurisdiction to re-examine, reverse, or affirm in cases where writs of error were taken to "final judgment[s] or decree[s] in any suit, in the highest court of law or equity of a State"

> where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission…

1 Stat. 73, 85-86 (1789).

During the period from 1859 to the 50-year anniversary of Oregon's admission on February 14, 1909, the U.S. Supreme Court exercised this authority over Oregon's state courts through 29 opinions published in the U.S. Reports or in the well-recognized unofficial reporters (S. Ct. or L. Ed.). Four decisions—three dismissals, and one short affirmance—appear only in those unofficial reporters[2], for a total of 25 dispositions in the U.S. Reports. Of those in the official reporter, three are dismissals[3] and one a denial of a motion to dismiss.[4] There are, therefore 21 decisions on the merits during this period. Of those, three are "tag-along" cases with facts nearly identical to companion cases, and they were decided summarily in reliance on the lead case's more

substantial opinion.[5] In the end, for the period from 1859-1909, the U.S. Supreme Court issued 18 lead opinions reviewing, on the merits, decisions of the Oregon Supreme Court.

For those keeping track, Oregon's record in Washington, D.C. on the merits in those years was 14 affirmances and 4 reversals. This is a fine record by today's standards, although one must remember that the Supreme Court's appellate jurisdiction at the time was largely non-discretionary, leading to a higher percentage of affirmances than under current practice. See Appx. A, The First Duty at 300 (noting Supreme Court case load at the time).

The Territorial Period and U.S. Supreme Court Review of Territorial Court Decisions

Before taking a closer look at those 18 decisions, one earlier case—the only case in the U.S. reports arising out of the Oregon Territorial Supreme Court—is worth examining.

While some judicial bodies existed prior to the creation of the Oregon Territory,[6] it was not until 1848 and the Oregon Territorial Act (9 Stat. 323) that Congress established the first entities that could be deemed uniquely "Oregon" courts, including the Supreme Court for the Territory of Oregon. The U.S. Supreme Court's jurisdiction over decisions from the Oregon Territory was set forth in section 9 of the Act, which permitted appeals from the Supreme Court of the Territory of Oregon to be taken to the U.S. Supreme Court in the same manner as appeals from other federal circuits.

One of the conditions for U.S. Supreme Court jurisdiction was that the amount in controversy in the case was over $2000. See 9 Stat. 323, § 9; *see also* 1 Stat. 73, 76-77, § 9 (1789) (establishing U.S. Supreme Court jurisdiction over Circuit Court decisions). That "amount in controversy" jurisdictional limit tripped up counsel for the plaintiff in the first (and only) reported U.S. Supreme Court case reviewing a decision of Oregon's Territorial Court, *Lownsdale v. Parrish*, 62 U.S. 290 (1858). Lownsdale is one of the earliest of many reported opinions involving land disputes in the City of Portland; litigation involving transfers of land in Portland seems to have dominated the time of more than a few judges in the Territory, and later the State, of Oregon.[7]

Lownsdale came to the U.S. Supreme Court after the Territorial Supreme Court had granted plaintiff Parrish an injunction preventing Daniel Lownsdale and other defendants from blocking

off Water Street, which lay between Parrish's property (deeded to him before 1848) and the "Wallamette" River in Portland. See 62 U.S. at 291-92.[8] Rather than address the merits, however, the U.S. Supreme Court began by asking whether it had jurisdiction over the appeal at all. It noted that its appellate jurisdiction under the Territorial Act was limited to cases over $2000. The amount of damage suffered by Parrish, however, did not "appear from the allegations in the bill," and at the time the bill was filed (in July 1950), the Court noted, Congress had not made any laws regarding land title in Oregon Territory to replace those that had been voided by the Territorial Act. *See id.* at 293. "[W]hen the litigation commenced," therefore, "neither party to the suit had any title to or interest in the land whatever; and therefore the respondents and appellees could not sustain injury by being enjoined not to erect buildings on lands belonging to the Government in which they had no interest." *Id.* The appeal was, therefore, dismissed.

The Court's suggestion that pre-territorial property transactions had no legal effect would echo throughout the multitude of later decisions involving the transfer of property in Portland, and particularly those decided in the District of Oregon. In Judge Deady's decision for the Circuit Court of the District of Oregon in *Lownsdale v. City of Portland*, 15 F. Cas. 1030, 1 Or. 381 (1861), for instance, Deady cited the above language from the U.S. Supreme Court in rejecting the City's argument that the 1844 Townsite Act served to void Lownsdale's claims. (The Townsite Act barred "private claims within towns and cities." Mooney, "The Deady Years," *The First Duty* at 70).[9] As shall be seen below, decisions involving land transfers, title ownership, and other real property disputes played a substantial role in the U.S. Supreme Court's post-statehood Oregon docket.

Statehood and Real Property Disputes

Statehood in Oregon did not get off to a quick start; it took three failed attempts (in 1854, 1855, and 1856) before a majority of the Territory's voters approved, in late 1857, a measure adopting a state constitution and electing statehood. *See* Charles H. Carey, *General History of Oregon Through Early Statehood* 504-05 (3rd ed. 1971). On February 14, 1859, Congress approved the proposed constitution and admitted Oregon to the Union. *See* 11 Stat. 383 (1859). Article VII, section 1 of that Constitution established the Oregon Supreme Court. Under § 25 of the 1789 Judiciary Act, the U.S. Supreme Court had jurisdiction (in appropriate circumstances)

to consider writs of error to the Oregon Supreme Court.

Continuing the dominant theme of Oregon cases in these early years and the question presented in *Lownsdale*, the first U.S. Supreme Court case involving an Oregon Supreme Court decision also involved a dispute over property ownership in Portland, and the legal effect given to property transfers prior to the enactment of the 1950 Oregon Donation Act. In *Stark v. Starr*, 73 U.S. 402 (1867), the U.S. Supreme Court reversed the Oregon Supreme Court's decision in favor of Starr,[10] who held title to Portland property as a legal matter through a 1960 patent from the City under the Townsite Act. Following its decision in *Lownsdale*, 62 U.S. at 293, the U.S. Supreme Court again took a technical view of the relevant statutes, finding that the Townsite Act did not apply to Oregon until formally extended to the State, and that once it was extended, Stark's right to a patent had already vested. *See* 73 U.S. at 417-19. As Professor Mooney notes, while Starr also argued that he had equitable title to the property based on pre-Donative Act transactions with Stark, Starr had abandoned these equitable title arguments based on pressure from the circuit court, see Mooney, *The First Duty* at 76, so the U.S. Supreme Court did not address whether equitable title might give Starr the rights he sought.[11]

In *Silver v. Ladd*, 74 U.S. 219 (1868), the third Oregon State case reviewed on the merits, the U.S. Supreme Court again reversed the Oregon Supreme Court's view of property disputes arising out of the enactment of the Oregon Donation Act. At issue in *Silver* was the validity of a land patent issued to one Mrs. Thomas, an "aged widow"[12] who came with her son to Oregon, where they both received patents to adjoining acreage under the Donative Act. The Act, however, permitted only "white male citizens" to patent 160 acres; its only mention of women was to permit the wife of such a married "white male" to own one-half of 320 acres. According to the U.S. Supreme Court, *see* 74 U.S. at 221, the Oregon Supreme Court had ruled (in what appears to be an unreported decision) that because Mrs. Thomas was an "unmarried female," she was not entitled to a patent under the Donative Act, and that the patent was therefore void. The Oregon Supreme Court's decision, though not particularly enlightened, was consistent with this era's notoriously poor treatment of women in the legal system.[13]

Surprisingly, however, the U.S. Supreme Court did not follow the "plain meaning" approach of the Oregon Supreme Court. Instead, it offered a construction of the Donation Act that was explicitly

"liberal." The Court noted that the Donative Act "was passed for the purpose of rewarding in a liberal manner a meritorious class of persons, who had taken possession of that country and held it for the United States, under circumstances of great danger and discouragement." *Id.* at 225. The U.S. Supreme Court believed that Mrs. Thomas fit into that class of entrepreneurial pioneers, so it found that the Oregon Supreme Court's decision was "at variance with the manifest purpose of Congress," *id.* at 226, and the judgment was reversed.

As these two early decisions suggest, it was in this area of real property that the U.S. Supreme Court was the most active reviewer of Oregon Supreme Court decisions. And although those first two decisions were reversals, each of the following decisions affirmed the Oregon Supreme Court's position. In *Barney v. Dolph*, 97 U.S. 652 (1878), the U.S. Supreme Court reiterated that once a right vested under the Oregon Donation Act of 1850, it was as good as the patent having been issued, and that post-vesting transfers had legal effect, even if the patent itself had not yet issued.

In *Mead v. City of Portland*, 200 U.S. 148 (1906), Charles H. Carey (Oregon Bar member and the author of the herein-cited history of early Oregon) represented the plaintiffs in error in yet another lawsuit arising out of the uncertainties in the early sales of Portland property. Mead argued that he owned a right to access the river and the accompanying warehouses, wharves, and docks as a result of his purchase of property from Lownsdale and certain agreements and ordinances entered into or enacted by the City. Upon construction of the Morrison Bridge, the parties initially agreed to maintain Mead's access, but eventually the agreement fell apart, and the city moved to prevent Mead's access in order to improve the public use and access to the bridge. The Supreme Court of Oregon rejected Mead's request for an injunction, and despite Carey's efforts to constitutionalize the case (he argued that this closure amounted to both a deprivation of property without compensation, and an impairment of the obligation of contract) the U.S. Supreme Court affirmed the decision below primarily on the ground that there was no underlying implied property right.

Other decisions involving property in the state include *Andrews v. E. Oregon Land Company*, 203 U.S. 127 (1906). There, the Circuit Court for Sherman County had found for Andrews, concluding that he held title to certain lands adjoining the Dalles Military Road. The Oregon Supreme Court reversed in favor of the land company,

finding that Andrews had failed to meet his evidentiary burden of impeaching a certified Department of Interior diagram showing the property to be the Land Company's. *See* 45 Or. 203. Andrews filed a writ in error, but the U.S. Supreme Court dispatched his pleading in a wordy three pages that said (basically) that the U.S. Supreme Court does not review state court findings of fact.

Another east side land dispute arose in *French-Glenn Live Stock Co. v. Springer*, 185 U.S. 47 (1902). There, the Court considered a dispute between two adjoining Harney County property owners arising out of the variability in the level of of Malheur Lake. The plaintiff (and, in the U.S. Supreme Court, plaintiff in error) livestock company argued that property claimed and possessed by Springer should actually belong to it, because the presence of the lake at relevant times terminated the extent of Springer's property, while the lake's subsequent recession (and plaintiff's claim to the property up to the meander line of the lake) meant that the livestock company gained control over the property exposed by the recession of the lake. Springer argued that the lake had never been there, and that his property lines extended straight across land which had always been (effectively) dry. The U.S. Supreme Court decided that there was a federal question regarding whether maps and patents supporting plaintiff could be trumped by a factual proffer by Springer (that the land had always been dry). *See id.* at 54. It ultimately concluded, however, that Springer's victory on the questions of fact at the state trial court and Supreme Court won out, and it affirmed the Oregon Supreme Court's decision in Springer's favor.

On similar grounds, the U.S. Supreme Court also affirmed the Oregon Supreme Court's decision in *Adams v. Church*. *See* 193 U.S. 510 (1904). There, the Oregon Supreme Court had held that an interest that Adams had intended to include in the assets of a partnership a certain tract of land that Adams had acquired under the Timber Culture Act, 20 Stat. 113 (1878). The U.S. Supreme Court concluded that it would not disrupt that factual finding, and it therefore affirmed, after also concluding that nothing in the Timber Culture Act prohibited the transfer or assignment of the interest.[14]

Public Control over Land and Property

The importance of the Columbia and Willamette to the State and its population centers is apparent in several of these early U.S.

Supreme Court reviews of Oregon Supreme Court decisions. Of all 18 decisions examined for this essay, the longest was *Shively v. Bowlby*, 152 U.S. 1 (1894). Although the opinion presents a detailed discussion of the law, the proposition of the case is easily stated: The State, and not private claimants under federal law or otherwise, owns lands below the high-water mark of a navigable river. This decision from Oregon is the leading case for this proposition, and is still cited today. *See, e.g., Idaho v. U.S.*, 533 U.S. 262, 272 (2001).

Navigable waters played a role in *Montgomery v. City of Portland* as well, although in that case, the only question was whether authorization by the Secretary of War to extend a wharf into the waters of the Willamette preempted any challenge by the state to such interference with navigable waterways. 190 U.S. 89 (1903). Multnomah County Circuit Court had held in favor of James B. Montgomery (who died before the U.S. Supreme Court heard the case, which was prosecuted by his wife), concluding that because Montgomery had received authorization from the Secretary, the City and State could not object to his construction of the wharf in question. The Oregon Supreme Court reversed, however, *see* 38 Or. 215, and the U.S. Supreme Court affirmed. It held that while the River and Harbor Act of 1890 (25 Stat. 400) gave the Secretary some control over impediments in navigable waters, it did not give him exclusive control. In a decision that is very solicitous of State's rights, the Court recognized as "long established that the authority of a state over navigable waters entirely within its limits was plenary" and subject only to Congress' explicit control of particular matters. The River and Harbor Act was not sufficiently explicit to give all rights to a river over to the Secretary, however, so the "plenary authority" of the state won out, and Montgomery was required to give way to the State and City's objections to his wharves. Both this case and *Shively* presage Oregon's well-known dedication to control over public lands for the benefit of the public.

A foreshadowing of state control over private lands came in two other early versions of "takings" cases, in which the U.S. Supreme Court agreed with the Oregon Supreme Court's approval of the City of Portland's use of local assessments. In *King v. City of Portland*, 184 U.S. 61 (1902) (upholding street improvement assessments) and *Paulsen v. City of Portland*, 149 U.S. 30 (1893) (upholding sewer assessments), the U.S. Supreme Court rejected the argument

that such assessments amounted to deprivation of the plaintiffs' property without due process of law. The state policies reflected in these assessments, and the support given them by these early decisions supported—or at least did nothing to hinder—a use of police power over private property that came of age with the comprehensive zoning regulations that have shaped the State's built environment since the 1970s.

Inter- and Intra-state Relationships

Consistent with what one might expect of a new State finding examining the bounds of its authority, the U.S. Supreme Court cases also reflect several issues involving both interstate and intra-state relationships. Some of these cases are anachronistic, while others continue to have weight today.

In the second Oregon state case ever decided by the U.S. Supreme Court, *Lane County v. State of Oregon*, 74 U.S. 71 (1868), the Court was presented with what seems (from today's perspective) to be a simple legal proposition on which the U.S. Supreme Court would be particularly sympathetic to federal interests: Whether U.S. Currency, which was by Act of Congress "lawful money and legal tender in payment of all debts," 74 U.S. at 75, could be used to pay to the state those taxes collected by the County. Oregon's Supreme Court had taken the position that it could not because, under Oregon Law, those taxes were to be given in "gold and silver coin," and Congress had no authority to interfere with the State's collection of taxes. *Whiteaker v. Haley*, 2 Or. 128, 135 (1865). The U.S. Supreme Court affirmed pointing out the still-tenuous role that paper currency played in the nation's economy at the time. The Court concluded, quite simply, that because the payment of these amounts was not the payment of a "debt" (shades of *Nichols v. Fearson*), but rather the exercise of a fundamental power of the states, U.S. Currency was not legal tender.

Curiously enough, although *Lane County* has been superseded by statute—Oregon's legislature decided, apparently, that U.S. Currency was acceptable after all—it has never been overruled. As recently as 1981, defendants in the Oregon Tax Court relied on Lane County in order to support their argument that their income in U.S. Currency was taxable only to the degree that it is backed by gold or silver coin. The Tax Court rejected the argument. *See Leitch v. Department of Revenue*, 9 Or. Tax 256, 257, 1982 WL 2142, *1 (1982). And with the relatively recent reemphasis of the Rehnquist

Court on federalism issues, it has enjoyed something of a revival, with the U.S. Supreme Court still citing it as an example of a case involving "whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment." *New York v. U.S*, 505 U.S. 144, 155-156 (1992) (citing *Lane Co.*); *see also Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 548 (1985) (same).[15]

Also in this category of cases are those involving the State's relationship with, and management of, Native Americans and Native American lands. In *McKay v. Kalyton*, 204 U.S. 458 (1907), for instance, the U.S. Supreme Court reversed the Oregon Supreme Court's decision taking jurisdiction over a determination of the title to Indian lands, and emphasizing that jurisdiction over those lands was a federal question.

In an early removal case with only marginal bearing on modern-day removal practice, the U.S. Supreme Court examined whether litigation against a railroad operating and managed in Oregon was a citizen of another state, thereby making removal to the federal District of Oregon court proper, or whether the Oregon courts properly retained jurisdiction. *Oregon Short Line & Utah Northern Ry. Co. v. Skottowe*, 162 U.S. 490 (1896). Despite the railroad's argument that it had been created under Congressional authority out of a consolidation of railway corporations in other states, that argument had not been presented in the complaint, and the Court concluded that the Oregon courts properly held that removal to federal court would be improper. According to the Court "we think that the present case comes within the rule that the federal question, or the federal character of the defendant company, must appear from the complaint in the action, in order to justify a removal, and that such federal question or character does not so appear." *Id.* at 494.

Business and Banking

In 1904, we see one of the first cases in the U.S. Supreme Court suggesting the degree to which the financial services in Oregon had developed far beyond land disputes (though the state was certainly not beyond that). *See Commercial National Bank of Portland v. Weinhard*, 192 U.S. 243 (1904), *aff'g Weinhard v. Commercial Nat. Bank*, 41 Or. 359, 68 P. 806 (1902). At issue was an assessment imposed against the Bank by the U.S. Comptroller of the Treasury when the Bank's capital stock became impaired. Relying on the

Comptroller's notice of the assessment, the Board of Directors simply imposed a per-share assessment on the shareholders. When Weinhard and other shareholders refused to pay the assessment, their shares were sold at public auction. Weinhard argued that the Bank could not simply impose an assessment without shareholder approval. The Oregon Supreme Court, and then the U.S. Supreme Court, agreed. At issue was U.S. Revised Stat. § 5205, governing the Comptroller's authority in the case of impairment. Under the statute, both Courts concluded, the bank association—and, therefore, all the shareholders—had an option between liquidating or paying an assessment to cover the impairment. That option was one that the shareholders needed to exercise; the directors could not choose for them.

One Final Case: Joining the National Debate

Some 40 years after Mrs. Thomas received her land patent in Silver, the U.S. Supreme Court again examined a decision explicitly involving Oregon women. *Muller v. State of Oregon*, 208 U.S. 412 (1908). In *Mueller*—the last decision from Oregon decided by the U.S. Supreme Court before the 50-year anniversary of the state's admission—the U.S. Supreme Court was asked to overturn Oregon's statute prohibiting employers from making women work more than 10 hours a day. (Mueller had been convicted in Multnomah County Circuit Court of a misdemeanor as a result of violating the law.) Except for its application solely to women, the Oregon law did not vary significantly from the law that the U.S. Supreme Court had recently struck down in *Lochner v. New York*, 198 U.S. 45 (1905) (limiting, on substantive due process grounds, the ability of states to regulate economic behavior), and Mueller argued that the result in the cases should be the same. Oregon's Supreme Court rejected Mueller's argument and upheld the statute, and Mueller assigned error in the U.S. Supreme Court.

Oregon hired Louis D. Brandeis to defend the law. See 208 U.S. at 419. Under the sway of one of Brandeis' namesake briefs, the U.S. Supreme Court concluded that *Lochner* did not apply given the "widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil." *Id.* at 420. (The authority for this "widespread belief" was the Brandeis brief, which collected "not only similar state and international laws limiting the work hours of women, but "extracts from over ninety reports … to the effect

that long hours of labor are dangerous for women." 208 U.S. at 219 at n.*.)

The remainder of the opinion's language is irredeemably patronizing by today's standards. If one puts aside that historical flaw, however, it is interesting to note for purposes of this essay how central the decision in *Mueller* is to a core national legal debate of the time—he scope of substantive due process and its limits on the developing administrative state. It is also remarkable that that Oregon's counsel in the case included probably one of the preeminent appellate lawyers of his time.

Conclusion

In 1833, "the Oregon" was on the margins of the nation, and its legal community (to the degree it existed at all) was on the margins as well. In the years between 1833 and Oregon's semicentennial in 1909, the U.S. Supreme Court reviewed decisions with ever-increasing precedential scope. To be sure, there were significant, nationally important early cases; *Pennoyer v. Neff*, of course, is a classic early decision on personal jurisdiction arising out of the District of Oregon. See 95 U.S. 714 (1877). On average, however, the earlier cases focus on Oregon-specific concerns, while later cases expand in precedential scope. (The Oregon Donative Act cases, for instance, were of only marginal precedential value outside of Oregon.)

As Oregon grew into statehood and as the condition of its economy and legal community developed a sophistication approximating that of the economy and legal community in the East, the nature of the Oregon state cases considered by the U.S. Supreme Court expanded. By 1909, Oregon Courts and lawyers were well integrated into the ebb and flow of the nation's legal community, and the decisions of its courts were just as likely as those of any other state to play a role in the nation's critical legal debates. As a state, and as a legal community, Oregon had come a long way from Justice Johnson's passing reference in *Nichols* to "the Oregon."

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1 *See* C. H. Carey, *General History of Oregon Through Early Statehood* 247-48, 273-74 (3rd ed. 1971) (overland trips could take anywhere from 100 to 180 days, even if all went well).

2 *See Quinn v. Ladd*, 22 S.Ct. 931 (1902); *Dowell v. Applegate*, 17

S.Ct. 993 (1897) (on appeal from remand after the decision on the merits at 152 U.S. 327 (1894)); *Marshall v. Knott*, 1868 WL 10950, 76 L.Ed. 1344 (1868) (dismissing the appeal on motion because the appellant had not raised below the issues that issues gave the Court jurisdiction under section 25 of the Judiciary Act of 1789); *Marshall v. Ladd*, 1869 WL 11347, 19 L. Ed. 153 (1869) (affirming in an ejectment action).

3 *Shorey v. State of Oregon*, 212 U.S. 585 (1908); *McClure v. U.S. Mortg. & Trust Co.*, 197 U.S. 624 (1905); *McClane v. Boon*, 73 U.S. 244 (1867) (dismissing in case where the defendant in error had died, but plaintiff in error had failed to property substitute parties below).

4 *Silver v. Ladd*, 73 U.S. 440 (1867) (rejecting a motion to dismiss for failure to have the proper bond for prosecution approved by the Court below, inferring approval from the Oregon Chief Justice's signature on the citation in error). This case was subsequently decided on the merits at 74 U.S. 219 (1868) (see infra).

5 The Supreme Court affirmed in *French-Glenn Livestock Co. v. Colwell*, 185 U.S. 54 (1902), based on the accompanying opinion in *French-Glenn Livestock Co. v. Springer*, 185 U.S. 47 (1902). The Supreme Court affirmed in *Oregon Short Line & U.N. Rwy. Co. v. Conlin*, 162 U.S. 498 (1896), and *Oregon Short Line & U.N. Rwy. Co. v. Mullan*, 162 U.S. 498 (1896), based on the accompanying opinion in *Oregon Short Line & U.N. Rwy. Co. v. Skottowe*, 162 U.S. 490 (1896).

6 *See* Caroline E. Stoel, "Oregon's First Federal Courts," in *The First Duty : A History of the U.S. District Court for Oregon* 3-5 (1993); C. H. Carey, *General History of Oregon Through Early Statehood* 315-21 (3rd ed. 1971).

7 Some of these proceedings are discussed below; a more complete description of these disputes can be found in Professor Mooney's chapter "The Deady Years, 1859-93" of *The First Duty* (see pages 66-78).

8 The use of the leading "a" (rather than today's "Willamette") was, according to Carey, the spelling "preferred in pioneer times." *Id.* at 143. The Oregon Territorial Court's decision is at *Parrish v. Stevens*, 1 Or. 59 (1853).

9 As Professor Mooney notes, the Supreme Court later backed away from the fair implication of its holding in Lownsdale, and instead placed a greater emphasis on the equitable outcome of

the case than the technical niceties of property transfers. *See* R. J. Mooney, "The Deady Years, 1859-93," *The First Duty* 66-78 (1993). According to Mooney, *see id.* at 74, the U.S. Supreme Court's decision in *Lamb v. Davenport*, 85 U.S. (18 Wall.) 307 (1873), effectively eviscerated the decision in Lownsdale as well as those decisions in which Deady followed its implicit and explicit rulings. A further example of this kind of about-face by the U.S. Supreme Court (despite Deady's reliance) is noted below in the discussion of *Stark v. Starr*.

10 *Starr v. Stark*, 2 Or. 185 (1865).

11 Judge Deady reasonably concluded, in light of the U.S. Supreme Court's decisions in Lownsdale and Stark, that Starr's equitable claims based on pre-Donation Act transfers would fail as well. As Professor Mooney notes, however, see The First Duty at 76-78, Deady's effort to follow the U.S. Supreme Court's lead in Stark was (like his effort to follow Lownsdale) undermined by a subsequent decision on appeal from the District of Oregon. *See Stark v. Starr*, 94 U.S. 477 (1875) (concluding that land transactions preceding the federal transfer of title in 1850 had legal effect). In the face of these reversals, at least, and the lack of similar shifts in fortune in the decisions arising out of the State courts, one might reasonably argue that the U.S. Supreme Court treated the Oregon Supreme Court rather more respectfully - or at least more consistently - than it did D. Oregon in the early years of the State's existence.

12 According to the reporter, attorneys for the parties seeking to void Thomas's land claims noted to the Court that "Mrs. Thomas was an old woman when she went to Oregon, how old don't clearly appear, but certainly aged." 74 U.S. at 224 (sic).

13 *See, e.g., Bradwell v. Illinois*, 84 U.S. (16 Wall.) 130 (1873); In re Lockwood, 154 U.S. 116 (1893) (both refusing to order State courts, under the U.S. Constitution, to admit women attorneys to the bar). *See* also the discussion in *Mueller v. State of Oregon*, 208 U.S. 412 (1908), discussed infra.

Notably, however, Oregon's "plain language" approach to the Donative Act could also work in favor of minorities. *See Vandolf v. Otis*, 1 Or. 153 (Or. Terr. 1854) (finding that the Donative Act's provision for patents in the name of a "wife" of an eligible male settler applied perfectly well to Native American wives, not merely to those of Caucasian descent).

14 Not further discussed, but among the 18 decisions on the merits, are also *Dowell v. Applegate*, 152 U.S. 327 (1894) (reversing an Oregon Supreme Court decision in a quiet title action regarding property in Douglas county. This is the only case of these 18 in which there is a recorded dissent (albeit without opinion) in the U.S. Supreme Court), and *Sanford v. Sanford*, 139 U.S. 642 (1891) (affirming the Oregon Supreme Court's decision rejecting the validity of a patent issued to one brother over the adjoining land occupied and improved upon by brother No. 2 where brother No. 1 had already claimed a patent to his own land and acted without the knowledge of brother No. 2).

15 The opening to Justice Wilson's decision for the Oregon Supreme Court in the case provides solid ground for modern federalist decisions:

> Admitting the proper supremacy of the Constitution and laws of the United States over and upon all proper subjects of legislation, does it follow that Congress can, in any way, interfere with State taxations, either as to measure of assessment or as to the manner or means in which collection thereof may be made? It is now too late to question the rule of construction of the rights and powers of the general government or to establish a different one. That government acts alone by delegated authority, and can exercise no other than such as may be necessary to carry fully into effect some granted power.
>
> *Whiteaker v. Haley*, 2 Or. 128, 135 (1865).

Substantial Merit-Based Opinions of the U.S. Supreme Court in Review of Oregon Supreme Court Decisions, 1848-1909

Caption	Citation	Oregon Decision	Topic area	Disposition
Lownsdale v. Parrish (territorial court)	62 U.S. 290 (1858)	1 Or. 59 (1853)	Real Property / Federal Jurisdiction / Donative Act	Dismissed
Stark v. Starr	73 U.S. 402 (1867)	2 Or. 185 (1865)	Real Property / Donative Act	Reversed
Lane County v. State of Oregon	74 U.S. 71 (1868)	2 Or. 128 (1865)	U.S. Currency as payment for state taxes	Affirmed
Silver v. Ladd	74 U.S. 219 (1868)	Unreported?	Donative Act	Reversed
Barney v. Dolph	97 U.S. 652 (1878)	5 Or. 191 (1874)	Real Property / Donative Act	Affirmed
Sanford v. Sanford	139 U.S. 642 (1891)	19 Or. 3 (1887)	Land patent validity	Affirmed
Paulsen v. City of Portland	149 U.S. 30 (1893)	16 Or. 450 (1888)	Due Process (Amend. V) / sewer exactions	Affirmed
Shively v. Bowlby	152 U.S. 1 (1894)	22 Or. 410 (1892)	Public vs. Private title to land below high water mark	Affirmed
Dowell v. Applegate	152 U.S. 327 (1894)	17 Or. 299 (1889)	Quiet title action	Reversed
Oregon Short Line & Utah N. Ry. Co. v. Skottowe	162 U.S. 490 (1896)	22 Or. 430 (1892)	Removal / Well-pleaded complaint	Affirmed
King v. City of Portland	184 U.S. 61 (1902)	38 Or. 402 (1900)	Due Process (Amend. V) / sewer exactions	Affirmed
French-Glenn Livestock Co. v. Springer	185 U.S. 47 (1902)	35 Or. 312 (1899)	Real property / recission of lake	Affirmed
Montgomery v. City of Portland	190 U.S. 89 (1903)	38 Or. 215 (1900)	Public waterway / River & Harbor Act	Affirmed
Comm'l Nat'l Bank of Portland v. Weinhard	192 U.S. 243 (1904)	41 Or. 359 (1902)	Comptroller assessment against bank shareholders	Affirmed
Adams v. Church	193 U.S. 510 (1904)	42 Or. 270 (1902)	Timber Culture Act / Partnership	Affirmed
Mead v. City of Portland	200 U.S. 148 (1906)	45 Or. 1 (1904)	Real Property / River access	Affirmed
Andrews v. E. Oregon Land Company	203 U.S. 127 (1906)	45 Or. 203 (1904)	Real Property	Affirmed
McKay v. Kalyton	204 U.S. 458 (1907)	45 Or. 116 (1903)	Jurisdiction over scope of Indian Lands	Reversed
Mueller v. State of Oregon	208 U.S. 412 (1908)	48 Or. 252 (1906)	Commerce clause / substantive due process	Affirmed

"THERE ARE ONLY TWO CURES FOR THE LONG SENTENCE:

(1) SAY LESS;
(2) PUT A PERIOD IN THE MIDDLE.

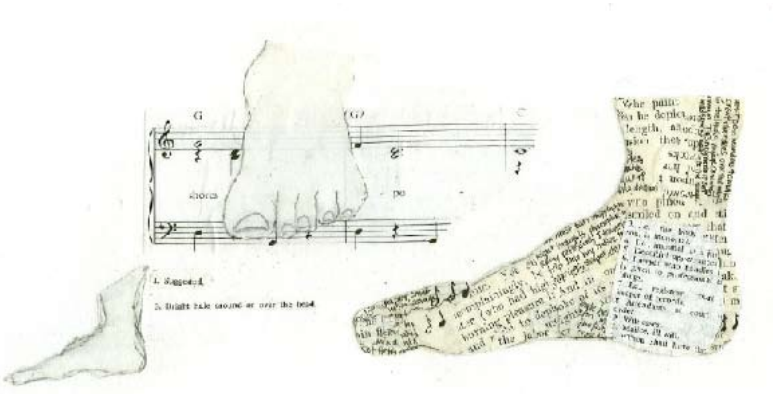
NEITHER EXPEDIENT HAS TAKEN HOLD IN THE LAW."

David Mellinkoff, The Language of the Law 366 (1963).

"JUDGES ARE NOT LIKE PIGS, HUNTING FOR TRUFFLES BURIED IN BRIEFS."

United States v. Dunkel,
927 F2d 955, 956 (7th Cir 1991).

THE WRITE STUFF



FOOTNOTE FOLLY

By Jack L. Landau, Judge, Oregon Court of Appeals

In this inaugural edition of the Appellate Almanac, I wanted very much to focus my article on something that pertains to our shared experiences as appellate practitioners. For a while, I toyed with the idea of offering my thoughts about legal writing. But writing about writing tends to belabor either the obvious ("take care that your verb and subject is in agreement") or the obscure (does anyone really want to know about how an understanding of epistemic and deontic modalities can improve writing?).

In the end, I decided to maintain some focus on writing, but I set my sights somewhat lower. Literally. I decided to write of the footnote.

Let me say at the outset, I am not a footnote abolitionist.[1] There are such people. Professor Fred Rodell, in his classic article, *Goodbye to Law Reviews*, called footnotes "phony excresences" that "breed[] nothing but sloppy thinking, clumsy writing, and bad eyes." More recently, former DC Circuit Judge Abner Mikva declared that footnotes are "an abomination" and that, "if footnotes were a rational form of communication, Darwinian selection would have

1 Sorry. I just wanted to prove the point.

resulted in the eyes being set vertically rather than on an inefficient horizontal plane." I take no such hard line. I do, however, think we are getting carried away. Footnoting increasingly is running amok and is becoming a threat to legal writing.

It has not always been so. For millennia, the legal profession—indeed, the world—existed blissfully without footnotes. The Romans managed to develop a sophisticated system of legal citation to prior authorities without the use of footnotes. Justinian's *Corpus Iuris Civilis*, compiled in the sixth century, contains a remarkably modern citation format that referred in its text to prior authority by title, volume, and page. Eleventh and twelfth century scholars at the University of Bologna tried to make Justinian's work more accessible by adding cross references and inserting "glosses" in the margins. In a sense, their handwritten annotations in the margins were the progenitors of the modern footnote. But even then, the practice of these scholars was sufficiently unusual that a special name—"Glossators"—was concocted to describe them. Judicial opinions at early common law contained no footnotes—indeed, few citations to prior cases at all, as the doctrine of *stare decisis* was not recognized until later.

The advent of printing made the footnote as we know it possible. It is an Elizabethan printer—one Richard Jugge—who is now credited with the publication of the first footnote in 1568. According to Chuck Zerby, author of *The Devil's Details: A History of Footnotes*, Jugge had been confronted with the vexing problem of finding space for several marginal notes concerning a passage from the book of Job, the space problem being occasioned by a series of titles and an exceedingly large illustration of a half-naked Job receiving advice from his splendidly adorned friends. Jugge's solution was to move two of the notes—"(f)" and "(g)"—to the bottom of the page.

In the years that followed, Jugge's idea caught on. As Anthony Grafton comments in his erudite and critically acclaimed (the *New York Times* reviewed it *twice*) *The Footnote: A Curious History*, "footnotes burgeoned and propagated like branches and leaves in a William Morris wallpaper." By the eighteenth century, the crafting of footnotes was elevated—metaphorically, not typographically, of course—into an art form unto itself. Authors such as Edward Gibbon became known as much for the cheerful sarcasm lurking in their notes as for the learning paraded in their texts. As Grafton recounts, footnotes proliferated to such an extent that

they soon became the object of satire, as in the case of Gottlieb Willhelm Rabener's 1743 mock-dissertation, *Hinkmars von Repkow Noten ohne Text*, which consisted entirely of footnotes. (Rabener reportedly performed the feat in an attempt to win "fame and fortune." Obviously, his efforts met with something less than complete success.)

In the legal profession, commentators seem to be the first to have picked up the practice. At first, they employed footnotes only rarely. William Blackstone used them occasionally to provide citations to cases or to statutes in his *Commentaries on the Laws of England*. But he used few enough that he numbered them by use of the letters "a" through "z" in each chapter. American commentators did likewise. E. Fitch Smith's 1848 *Commentaries on Statute and Constitutional Law* indulges in an occasional footnote. Joseph Story's 1858 *Commentaries on the Constitution* similarly contains a relatively few notes.

The practice seems to have picked up after the Civil War. In large part, this seems to reflect the function of the legal treatise in nineteenth-century American law practice. Particularly in the West, few lawyers had whole sets of case books, and digests were still in their infancy; the way to find a relevant authority for many lawyers was by reference to a legal treatise. Thus, by the 1890s, it was common for legal treatises such as J.B. Sutherland's *Statutory Construction*, Theodore Sedgwick's *Damages*, or John Norton Pomeroy's *Equity Jurisprudence* to include lengthy lists of cases in long footnotes.

The practice, however, seems not to have infected academic journals until later. Entire articles of the first volume of the Harvard Law Review were published without a single footnote (although there were a few articles that contained them, so few that the numbering began anew with each page). As late as the Second World War, the lead article in the Harvard Law Review could be published with as few as 62 footnotes. In fact, according to legend, William Prosser's classic article on product liability, *Assaulting the Citadel*, was rejected because it had too many footnotes (100!).

Soon, footnote creep began to appear. Alexander Bickel's famous 65-page article on *Brown v. Board of Education* in 1956 clocked in with an astounding 121 footnotes. By the 1980s, articles of the same length routinely included 3-400. And, with the proliferation of computer word processing, all previous impediments to the

practice disappeared. Now, law reviews publish articles with literally thousands of footnotes. Yes, I said "thousands." The record is widely reported to be an article containing over 4,824 footnotes (an article about section 16 of the Securities Exchange Act, for crying out loud). According to several academic commentators, an article's footnote count has come to be a sure indicator of its respectability, with the current goal being 4-500 per article. Law reviews apparently buy into the mania, routinely requiring authors to footnote virtually any assertion. As a result, authors resort to the equivalent of "footnote steroids" to bulk up their footnote count. Favorites include "*supra*," "*infra*," and the all-time favorite, "*id.*" One 1988 article, for example, included 574 footnotes, 444 of which were "*id.*"

Quantity is not the only problem. Footnotes are getting longer and longer, exhibiting what one commentator has called a sort of "footnote elephantiasis." As humorist Frank Sullivan once wryly noted, "[g]ive a note an inch and it'll take a foot." Footnote length, in fact, has become a goal in and of itself. Academic commentators speak of a footnote "density" factor, which is arrived at by dividing the number of total lines of footnotes by the total number of lines in an article. Northwestern University Law School even includes footnote density as a relevant factor in its annual ranking of law schools—density apparently being a good thing. The record seems to be an article containing a single footnote that is five pages long. The author reportedly originally wrote it as an appendix, but the editors thought it looked better as a footnote.

Appellate court opinions seem only recently to have climbed on the footnote bandwagon, but the trend is ominous. While, earlier in this century, Justices Holmes and Cardozo could write entire opinions without a single footnote, today U.S. Supreme Court opinions routinely include 30-50 often very long footnotes to supplement their already very long opinions. The lower federal courts can be much, much worse. A federal district court for the district of Delaware apparently holds the current record, at 1,715 footnotes. A federal district court decision from the Southern District of Alabama also is noteworthy (excuse the pun) for its 415 footnotes, 112 of which consist of the abbreviation "*id.*"

In the Oregon courts, footnoting is a fad that has been relatively slow to catch on. For the better part of a century, most opinions did not contain a single footnote. The first footnote in the Oregon Reports appears in volume 3, in an 1869 reported decision of

the Multnomah County Court. It is one of two footnotes—denominated "a" and "b"—in the court's opinion and is one of a mere handful in the entire volume. Even today, the footnote density factor is relatively low. Still, it is not uncommon for Oregon appellate court opinions to include dozens of notes. In *Strunk v. PERB*, for example, the Supreme Court resorted to footnotes a total of 69 times. Similarly, in *State v. Hirsch/Friend*, concerning the constitutionality of the state's felon-in-possession statute, the court's opinion contained a four dozen footnotes, including a 200-word quote from eighteenth-century Italian philosopher Cesare Beccaria.

Moreover, some of those notes are real whoppers. Among the longest appear in the Oregon Reports is one penned by Judge Kurt Rossman, whose opinion in *State v. Howe* contains a 1,300 word footnote that runs the better part of three pages, longer than the text of the opinion itself. (Apparently, that ratio between text and footnote was not unprecedented for Judge Rossman, particularly when he got his dander up. Consider, for example, his dissent in *Weyerhauser Co. v. Kepford*, which consisted of 26 words of text and ten times as many words in footnotes.) Running a close second Justice Richard Unis, whose 1,200-plus-word footnote 17 in his dissent in *State v. Rodriguez* is two and one-half pages long.

What's wrong with all of this footnote foolishness? The first problem is that it is distracting. It interferes with the readability of an article, a brief, or an opinion. As Noel Coward (who credits the story to a slightly more ribald version from John Barrymore) once complained, reading footnotes is like having to go downstairs and answer the door bell while you are upstairs making love. If you are writing to inform—or, even more important, to persuade—it seems to me that you would want to maximize the readability of your work and minimize any distractions from the point that you are trying to make. An excess of footnotes doesn't help you accomplish that goal.

The second problem with excessive footnoting is that, although there may be legitimate documentary functions for footnotes, in altogether too many cases, they serve no legitimate purpose. Frequently, they serve merely as an opportunity for an author, lawyer, or judge to make a gratuitous display of erudition. We judges, for example, love to cite literature in our opinions, generally for no apparent purpose other than to show the parties and posterity that we are well-read. A review of recent Oregon

appellate decisions reveals that William Shakespeare, Rudyard Kipling, Charles Dickens, and Lewis Carroll are particular favorites among Oregon judges.

An especially good example is the Oregon Supreme Court's opinion in *Riley Hill General Contractor, Inc. v. Tandy Corp.*, in which the issue was the meaning of the term "clear and convincing evidence." The opinion includes a virtual history of the English language, with two lengthy, footnoted, poetic interludes from Kipling on the Roman withdrawal from Britain in 407 A.D. and on the attitude of Saxons toward the Normans following the conquest in 1066 A.D., all justified by the fact that they were "picturesque."

For another example, a number of the footnotes in my own opinion in *State v. Ciancanelli* probably weren't necessary. It didn't add anything to our constitutional analysis to note that the Puritans exhibited an extraordinary zeal for regulating bestiality or that one of their punishments for fornication was, of all things, marriage.

Sometimes, judges insert footnotes into their opinions out of apparent boredom. Consider the opinion of the Oregon Court of Appeals in City of Oregon City v. Clackamas County, which begins with the sentence, "Oregon City seeks review of LUBA's affirmance of Clackamas County's design review approval for Phase II of the Country Village Mobile Home Park." There follows this footnote: "Those of you who feel that you will not be able to stay for the entire discussion are asked to leave the room at this time." I kid you not.

And sometimes, courts insert footnotes to insult their colleagues, apparently in the belief that matter lacking sufficient dignity to be included in the text itself somehow is appropriate if reduced to a mere footnote. My favorite example is a footnote in *People v. Arno*, a California Court of Appeals decision in which the majority responded to a strongly worded dissent by "spell[ing] out a response" in a seven-line acrostic, the first letters of each line comprising a Yiddish obscenity.

The third problem with runaway footnoting is that, sometimes, footnotes are not merely annoying, they're dangerous. Particularly in judicial opinions, they can cause much mischief. There is, for example, what I call the "stealth footnote." By means of this device, a court will float in a footnote an idea that is pure *dictum*. Several cases down the line, however, the *dictum* is cited by the court

and, as if by magic, is transformed into precedent. Think *Carolene Products*. Or, if the court later decides that the idea was unsound, the court rejects it as, after all, having been expressed in a mere footnote. In *United States v. Dixon*, for example, the Court declared that repeatedly quoting suspect *dictum* from a footnote "cannot convert it into case law." Except, of course, when it does.

There is, to take another example, what is known as a "hedge" note. In the text of the opinion, the court will make a broad pronouncement, followed by a footnote that substantially qualifies the broad pronouncement. The practice allows judges and lawyers in future cases to quote the text without the hedge or, conversely, the hedge without the text, as circumstances may require. The result is potential confusion as to precisely what the court's opinion stands for.

The United States Supreme Court's decision in *Bowers v. Hardwick* nicely illustrates the problem. At issue was the constitutionality of a consensual sodomy statute. The majority declared that the statute was constitutional, largely in light of the fact that homosexuality is not a fundamental right. In footnote 2 of the opinion, however, the Court hedged, saying that it was *not* deciding the constitutionality of consensual *heterosexual* sodomy statutes. As many commentators have noted, that's awfully difficult to understand, given that the statute itself drew no distinctions on the basis of the sexual orientation of the consenting participants.

Finally, footnotes can create uncertainty. There is, for instance, the question whether material consigned to a footnote is authoritative. No less a light than Chief Justice Charles Evans Hughes is reported to have declared that "I will not be bound by a footnote." I know of a judge who once served on my court who thought nothing of adding footnotes to an opinion *after* it had been approved by other members of the court, because he thought that such material had no precedential value and wasn't really part of the court's opinion. On the other hand, an unfortunate Indiana lawyer found that not everyone holds the same view. The lawyer infamously saw fit to disrespect an intermediate court in a footnote to a petition for review to the Indiana Supreme Court. The petition was denied, and the lawyer was publicly reprimanded.

Some courts have joined the debate over the authority of judicial pronouncements placed in "mere" footnotes. Most seem to think that the precedential force of their pronouncements does not

vary with the size of the typeface with which they are expressed. In *Communications Workers of America v. American Tel. & Tel. Co.*, however, the Court of Appeals for the Second Circuit suggested that "footnotes and other marginalia" in United States Supreme Court opinions need to be read with caution. And, in *Breedon v. Sprague National Bank*, a Bankruptcy Appellate Panel construed that case to mean that "federal courts are not to consider the footnotes to an opinion as authority." Of course, the panel's sentiment that footnotes lack authority was itself expressed—you guessed it—in a footnote.

In a related vein, there is the question whether courts should take seriously footnoted material in appellate briefs. Although most courts appear to regard their own footnotes as authoritative, they do not seem as sanguine about arguments of counsel nestled in the same part of a page. I am aware of at least one decision of the Oregon Supreme Court, *Vannatta v. Keisling*, in which the court categorically declared that "[w]e decline to address a constitutional challenge raised only by way of a footnote." We said precisely the same thing in *Smith v. DMV*. On the other hand, in *Crocker and Crocker*, the Oregon Supreme Court entertained a constitutional argument that had been asserted in a footnote in an amicus brief. Go figure.

But enough. I close with these suggestions.

First, I would like to suggest that all of us—judges and appellate advocates—should think twice before we clutter up a piece of legal writing with excessive footnotes. If a writing makes reference to the law of gravity, it does not require a citation to Newton's *Principia*. Let's lighten up a bit. We should ask ourselves what purpose is being served by including a footnote, particularly ones that go beyond mere documentation. If the message is so important, shouldn't it be worked into the text? And, if it is not important enough to put in the text, why say it at all?

Second, in a more metaphysical sense, we should think of the use footnotes as an opportunity to question why things are done the way they are. I hope that, throughout our legal careers, we will not engage in practices merely because that's the way things always have been done. Law is a profession deeply entrenched in traditions, some of which don't make much sense if you think about them. Let's not go through our lives and careers accepting such traditions simply as more things to add to the list of life's many

imponderables—like why the word "phonetic" isn't spelled the way it sounds. Ask questions, and demand answers that make sense. The law's increasing obsession with footnoting is as good a place as any to start.

Oregon Appellate Courts Style Manual

by Mary Bauman, Editor of the Oregon Reports

Due to the scrutiny to which a published appellate opinion is subjected, it is important that not only the court's discussion, analysis, and holding are set out clearly, succinctly, and carefully, but also that standard citation conventions and formatting practices are used. In that endeavor to promote clarity and consistency within their opinions, the Oregon Appellate Courts have established their own style manual, last modified in 2002. The manual is used not to dictate writing style, nor to reinvent the wheel. Instead, as one becomes familiar using the Style Manual, not only is consistency in usage achieved, but a great deal of time is saved as well.

Pursuant to ORAP 5.20(4), this Style Manual can also be used as guideline for style and citations when preparing a brief for a case on appeal. Although not mandated by the court, it is a useful tool when preparing materials for filing in the appellate court. The manual details citation and formatting practices unique to the appellate courts in Oregon; sets out examples of the most commonly used formats; specifies which method to use when there are competing methods to choose from; and therefore functions as a handy reference guide.

The Style Manual is compiled into four main sections: Formatting, Citation, Quotation, and a Style Guide. Other information contained in the manual includes a glossary of terms, flowcharts depicting the process of producing written opinions, an Appendix of standard proofreader's marks, and an order form.

While the Formatting Section contains information more specific to appellate court opinions, the material located within the "Structural Tools" subsection relating to outlining is especially helpful when organizing complex material. The "Writing Tools" subsection is general enough to pertain to other types of material.

The Citation Section may be of particular interest and perhaps most helpful to appellate practitioners. Many examples of the most

common types of citation are conveniently set out and the formats were chosen to promote consistency of use. Because the range of authorities cited is always increasing, and it is not possible to include an example of everything that a practitioner may want to cite, a wide range of examples are given so that even if a specific source isn't included with the manual, something similar probably is. It is important to keep in mind the caveat that the purpose of citations is to enable readers to easily locate the source. The Oregon Appellate Courts still defer to the Harvard Blue Book for anything not included in their own Style Manual, even though The ALD (Association of Legal Writing Directors) Manual, which is a society of law professors, is preferred by some law schools.

To highlight some important general points to remember when citing to cases:

(1) Cite to the official reporter first and *always* use the shortened case name (sometimes referred to as the running head) as found in the official reporter. For Oregon cases, the official reporter is the Oregon Reports, and for United States Supreme Court cases the official reporter is the United States Reports. Do NOT, for example, use those as found on Westlaw and Lexis as their shortened case names may differ.

(2) Include a parallel citation, citing to the regional reporter and eliminating periods after abbreviations, *e.g.*, P3d (not P.3d), and using spaces to separate longer abbreviations, *e.g.*, L Ed 2d (not L.Ed.2d), but not between adjacent single capitals, or numerals and ordinals that are treated as single capitals, *e.g.*, P3d, NE2d, but So 2d.

NOTE: The appellate courts *accept* practitioners' submissions jump citing only to regional reporters *except* when citing to Oregon appellate decisions.

(3) Set out first reference to any source by using its full citation: *e.g.*, for cases, that would be the case name, official citation, parallel regional citation, and the year. After that, remember to include all subsequent history, such as *rev den*, *cert den*, *aff'd*, etc., setting it off with commas. If the decisions span more than one year, then place all years in the appropriate places. Also, omit the parallel citation with "cert den" and "rev den," but include it with other subsequent history

(4) Cite to subsequent references using the shortened case name with a pinpoint citation. The shortened case name is the first nongovernmental party appearing in the official case name citation. For example, *State v. Bauman*, becomes *Bauman* at 10.

(5) Indicate the level of support for your argument with the use of an introductory signal, if appropriate, as different authorities can have different weight. They can directly or indirectly support the case or merely provide background. Introductory signals, such as *cf.*, *accord, see, e.g.*, *compare/with*, and *see generally*, are italicized, and when used it is very helpful to include a brief parenthetical statement describing the relevance of the authority cited.

The Quotation Section sets out examples of how and when quoted text should be set out separately from the main text. The key is that when including a quotation from another source it should be separately set out if over 50 words, formatted to duplicate to the extent possible the original material, double indented, and placed within quotation marks. It is also important for the author to indicate whether emphasis is added or was already contained within the original material, by including a parenthetical statement stating such and placing it at the end of the quoted material set out separately at the left margin.

The Style Guide addresses issues of word treatment, punctuation, usage, and grammar that often arise in opinion drafting. Those topics are general enough to be relevant when crafting other legal materials as well. For example, under the "Word Usage and Conventions" heading, the definition for when to use That/This; Those/These is worth the price of the Style Manual alone!

The Style Manual is not a static document, but is in a continuous state of revision. Much like a photograph, it is but a snapshot of particular areas of special interest and importance at a given point in time.

A little grammar goes a long way: One practitioner's comments on three rules relevant to legal writing

By Linda (Alix) Wicks

Appellate practitioners communicate with the courts almost exclusively through written submissions. Clear, concise, and persuasive writing is essential. In searching for ways to improve their written work, many practitioners have sought out the advice of writing gurus. Usually the gurus have undertaken two separate projects: (1) teaching "rules of thumb" to people who do not necessarily want or need to know the full intricacies of the rules of English grammar and usage; and (2) advocating the elimination of some arcane rules and stilted or wordy conventions in favor of some new rule. This article examines three issues of current usage: one a rule of thumb that has come unmoored from the anchor of increased clarity and brevity; one an arcane rule that writers should feel free to ignore; and one a perhaps newly-coined rule that decreases precision in the interest of eliminating a two-letter word.

I am compelled to furnish a caveat before I go any further: Although I have a degree in English, I am not, nor have I ever been, a grammar expert. I do not have the Chicago Manual of Style (or any other manual for that matter) memorized. But, I do have an appreciation for both elegance and utility in language, and a certain impatience—even dismay—when either is lacking. I do not guarantee the accuracy of any statement contained in this article, and any resemblance to actual scholarship is purely coincidental.

1. Passive Voice: Caution is warranted, but don't develop a phobia.

The rule against using passive voice is one that legal writers seeking to improve their writing often take as a hard-and-fast proscription, rather than a rule of thumb. In reality, the best writers generally avoid passive voice *unless the circumstances specifically call for it*. That is, passive voice has a particular effect: it obscures or deemphasizes the actor in a sentence. Conversely, it emphasizes the action or the object acted upon. Often, good writers want to emphasize the actor, and convey action using lively prose that keeps the reader engaged. Eliminating the passive voice aids in

achieving that end. At times, however, circumstances actually call for the use of passive voice.

The first reason to use passive voice is if the actor is unknown and unimportant. For example, if the issue in a case concerns a question of timely filing, the important information is that the document "was stamped 'filed' the day after the deadline" not that "someone at the court stamped the document 'filed' the day after the deadline." Note, too, that the second construction carries a connotation of doubt—because it emphasizes that the actor is an unknown "someone" it conveys a slight suggestion that there is reason to doubt the veracity of the statement. If the actor were unknown, and that fact was important, then the second example would be better.

Another reason to use passive voice is if the writer wants to obscure the actor. This is a principle more of rhetoric than of grammar. If your client, for example, did something that could sound bad, you might want to deemphasize that fact when you present it. For example, "the settlement offer was rejected"; "plaintiff's benefits were cut off"; or "the maintenance schedule was never completed."

So, while avoiding the passive voice is a good rule-of-thumb, it ultimately harms the effectiveness of your prose to slavishly adhere to it. Think about what you are attempting to convey in the sentence, then assess whether it serves your purpose to obscure or deemphasize the actor in that particular instance.

2. The Split Infinitive: Try to forget this rule.

You remember the split infinitive rule, right? "To boldly go" vs. "To go, boldly." The infinitive is the form of a verb that expresses the action without a time reference (hence "infinitive"): To go, to fetch, to swim, to plead, to flee, to strive, to seek, to find, and (not) to yield. The rule that one must not split an infinitive—that is, to place a word (specifically an adverb) between "to" and the verb—is one that was made up whole cloth in an attempt to apply the rules of Latin grammar to English. Even if that were a worthwhile exercise, coining the split infinitive rule was not. In Latin, the infinitive form of a verb is a single word, not a two word phrase. So, the reason one does not split an infinitive in Latin is that it is un-splittable.

And continued adherence to the rule serves no purpose. It is often awkward to avoid splitting the infinitive, and doing so does not usually increase clarity, or brevity, or lead to any particular positive result in your prose. Is it really more problematic to write "he failed to timely file the motion" rather than "he failed timely to file the motion"? The latter construction actually contains more ambiguity and is more awkward. (And the temptation to write "he failed to file the motion in a timely manner" moves away from brevity, and toward the kind of wordy and stilted legal writing that we should all be trying to avoid.) Ultimately, adherence to the split infinitive rule yields needless toiling over a purposeless rule. A good writer's time is better spent editing for clarity or brevity—two worthy and practical objectives.

3. The Question of "of"

This last one is, perhaps, not that important one way or the other. But, as someone who cares how writing sounds, as well as whether it is clear and concise, I have become distressed by the increasing use of the construction "the question whether" rather than "the question of whether." I remember a time when the difference between those two constructions reflected whether the word "question" was being used as a verb or a noun. That is, "I question whether we should go forward" vs. "We now turn to the question of whether we have jurisdiction."

I have, quite unsupported by anything other than my own anecdotal sense, noticed that writers are increasingly dropping "of" from the second construction. Thus, "We now turn to the question whether we have jurisdiction." My objection to that construction is two-fold: it sounds horrible, and it decreases clarity. Some might argue that the construction serves the purpose of brevity, but dropping a two-letter word is surely not worth the sacrifice here.[1]

I cannot really elaborate on my sense that the construction sounds bad. It is simply so. It offends the ear. It is possible that with the increasing frequency of its use, I will cease to notice it, but I cannot view that as a positive development. Desensitization is not justification.

I can elaborate on the argument that the "of"-less construction decreases clarity. First, as already noted, there is a useful difference between the constructions when "question" is used as a verb rather than a noun. Second, there is a difference when the word

"question" is followed by an appositive phrase, rather than an adjectival prepositional phrase. Consider:

> *We now turn to the question,* "*how do you solve a problem like Maria?*"
>
> *We now turn to the question of how to solve a problem like Maria.*
>
> *We now turn to the question of whether to solve a problem like Maria.*

In the first sentence, the clause enclosed in quotes is an appositive—it is the question itself. In the second sentence, the portion after "question" is an adjectival prepositional phrase modifying "question." It is not the question itself, rather it explains what the question is about. Note that if you remove "of" from the second sentence, it essentially becomes a slightly ungrammatical version of the first, because "How to solve a problem like Maria?" is not, strictly speaking, a grammatically correct question.

The key to understanding why "question whether" both hurts my ears and is less clear (and, in my opinion, ungrammatical), is that the word "whether" in the third sentence serves as a conjunction, and "whether" generally is not used to form a stand-alone question. In other words, "whether to solve a problem like Maria" is not, by itself, a grammatically complete sentence. It cannot, therefore, serve as an appositive for the word "question." It isn't a question. It describes a question. Therefore, it requires a preposition.

4. A FINAL NOTE

Of course, not everyone will agree with my reasoning regarding these rules. But I hope that disagreement still prompts some consideration of the reasons for following or not following these rules. Good writing is usually the product of good editing. And the editing process is often where a writer makes the most crucial decisions about how individual sentences and individual words serve the purposes of the entire document. Blindly following rules of grammar or style, without consideration of the purposes behind them, can undercut that effort, and ultimately make your writing weaker rather than stronger.

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1 *See, e.g.*, Bryan Garner, A Dictionary of Modern American Usage, 690.

"THE FUNCTIONS OF AN APPELLATE OPINION ARE TO STATE THE LAW, TO NOTIFY THE LITIGANTS, AND TO MAKE THE JUDGES THINK."

Moses Lasky, Observing Appellate Opinions from Below the Bench, 49 Cal L Rev 831, 832 (1961).

FOUR ALMANACIA

OREGON SUPREME COURT'S 2006 PUBLIC CALENDAR

Introduction by Keith Garza

Each winter, the justices of the Oregon Supreme Court agree upon a tentative calendar for the coming year. Emphasis is on the word "tentative." Although a matter of public record, the calendar is subject to change; as a matter of practice, that often proves to be the case. In the main, however, the changes usually are not many in number, and the Court's conferences, arguments, and public meetings normally take place as set out in the calendar.

The Court's calendar for 2006 and the first few months of 2007 is reproduced below. To aid the appellate practitioner in using the calendar, you also may wish to consider the following:

ORAL ARGUMENT: The dates set for oral argument almost never change, although it sometimes is the case that there are not enough cases at issue to fill a particular sitting. Consistent with its past practice, the Court hears oral argument every other month between September and May. Accordingly, expect four or five days devoted to argument in January, March, May, September, and November. (Note that, as part of its outreach program, the Court will be entertaining oral arguments in Baker City and Ontario in May 2006.) Also, for the second year in a row, the Court has set

a short calendar (three days) for June, to hasten the submission of those cases that come at issue during the spring. The Supreme Court's oral argument calendar also is posted on the Court's website.

Finally, be aware that the Court almost invariably will provide special settings for certain expedited or otherwise significant cases. For those practitioners who have been on the business end of the tight briefing schedules that usually accompany such cases, this bit of information will come as no surprise.

PUBLIC MEETINGS: Although the Supreme Court functions primarily as Oregon's highest adjudicatory body, the Court by statute also has a number of administrative and regulatory functions that it must fulfill. Included among those are its regulatory responsibilities over lawyers and, to a lesser extent, judges. Accordingly, the Court is called upon to approve various rules (rules of professional conduct, Bar rules of procedure, MCLE rules, the Code of Judicial Conduct, etc.); to approve pro tempore, reference, and senior judges; and to sit as policy makers in various other contexts as well. Consistent with Oregon's strong preference for open government, the Court has elected to perform its non-adjudicatory functions through public meetings rather than during the Court's otherwise private conferences. The Court's public meetings usually are held at 1:30 p.m. in the Supreme Court's conference room on the second floor of the Supreme Court building as part of its first Court conference of each month. As with oral arguments, circumstances may require the Court to set public meetings outside the regular course. In doing so, the Court strives to provide the public with as much notice as possible, with the goal being to give at least one week's warning. (Minutes of the public meetings are kept and approved, and the minutes are public records.)

If the Court has scheduled a matter on its public meeting agenda that is of particular interest to you, the Court encourages you to attend. As an aside, those meetings offer a unique opportunity to see the justices interacting with one another, and they do so in a way that is not much, if at all, different from when they are in conference privately. Be aware, however, that it is a public *meeting* and not a public *hearing*. Although the Court in the past has been very accommodating to those persons who wish not only to attend a public meeting but also to provide input, that is a matter left entirely to the Court's discretion. The better practice if you want

to provide commentary is to do so by letter (address it to the Chief Justice with copies to any other known interested persons) and make yourself available to the Court in the event that it wants to inquire further about your submission.

CONFERENCE: The Court conducts almost all its adjudicatory business at regularly scheduled, private conferences. The Court's adjudicatory business includes considering draft opinions, as well as those motions not decided by the Chief Justice or his designee, and petitions for review and original jurisdiction matters. The conferences normally take place on Tuesdays—or Wednesdays in weeks with holidays or other scheduling complications—with the morning of the following day reserved for any unresolved matters. As before, the Court is free to schedule "*rump*" conferences to consider emergency or other time-sensitive matters (and it often does so).

More than any other aspect of the Court's calendar, the conference schedule can be of particular value to appellate practitioners. The Court follows a fairly rigorous series of deadlines both before and after conference that can provide parties with a good idea as to when they can expect a ruling on certain types of matters. Those deadlines, which are subject to waiver ("special dispensation") by the Chief Justice, are as follows:

> For a petition for review, original jurisdiction matter, or motion to be placed on a Tuesday conference agenda, the assigned justice must provide his or her colleagues with a memorandum stating that justice's recommended disposition no later than the preceding Thursday. That deadline allows time to include the matter on the agenda, copy and circulate the supporting material to the other justices, and consider and review the materials before conference. With respect to original matters and motions, the practice of the Court's staff attorneys (who provide the assigned justice with advisory memoranda on the submissions) is to have the item ready for consideration at the first regularly scheduled conference after the petition or motion is at issue. (Hypothetically, therefore, if you are the petitioner seeking issuance of a writ of mandamus, and the memorandum in opposition is filed on May 5, 2006, it is likely that the full Court will be considering the petition at its May 16, 2006, conference.)

The same Thursday deadline applies to the submission of draft opinions (be it a first or subsequent draft).

For original matters and motions decided at a Tuesday (or overflow Wednesday conference), the order on the matter will issue in the regular course over the Chief Justice's signature the following Tuesday. (So, assuming the same hypothetical above and no glitches, the parties reasonably could expect to receive an order in the mail on Wednesday May 24, 2006.)

For opinions "voted down" at a Tuesday conference (that is those opinions that garner the agreement of at least a majority of the participating justices), there is a different schedule. First, if there are to be any concurring or dissenting opinions, then the case is passed for the other justice or justices to write separately. If not, then the case undergoes a final review by the justice and his or her law clerk for the production of a "down draft," which is due by Friday. After the down draft is reviewed, and assuming no problems requiring the case to be held for further consideration, the opinion is released the following Thursday. For the past five years or so, the Court has made a practice of providing one day's advance notice of its intent to release an opinion to provide the parties and their counsel an opportunity to prepare for the decision in the case. The advance notice is posted on the Court's opinion website early Wednesday morning (and the notice appears even if the Court does not intend to release any decisions that week). As always, the Court is free to alter the schedule as circumstances require.

Finally, for those weeks in which a holiday intervenes, the Court simply adds an additional day to the projected scheduling.

At long last, then, here is the Court's tentative, subject-to-change calendar for 2006 and early 2007:

JANUARY 2006

2 —New Year's Day Holiday

4, 5, 6, 9, 10 —Oral Argument

16—Martin Luther King, Jr. Holiday

18, 19 a.m.—Conference

24—Public Meeting

24, 25 a.m—Conference

FEBRUARY 2006

7—Public Meeting

7, 8 a.m.—Conference

14, 15 a.m.—Conference

20—Presidents' Day Holiday

28—Conference

MARCH 2006

1 a.m.—Conference

2, 6, 7, 9, 10—Oral Argument

14—Public Meeting

14, 15 a.m.—Conference

28, 29 a.m.—Conference

APRIL 2006

4—Public Meeting

4, 5 a.m.—Conference

13—Bar Exam Results Released

18, 19 a.m.—Conference

28—New Attorneys Admitted

MAY 2006

3—Oral Argument (Baker City)

4—Oral Argument (Ontario)

8, 9—Oral Argument

16 —Public Meeting

16, 17 a.m.—Conference

MAY *(cont'd)*

23, 24 a.m.—Conference

29—Memorial Day Holiday

JUNE 2006

6—Public Meeting

6, 7 a.m.—Conference

14, 15 a.m.—Conference

19, 20, 21—Oral Argument

JULY 2006

4—Independence Day Holiday

11—Public Meeting

11, 12 a.m.—Conference

25, 26 a.m.-Conference

AUGUST 2006

8—Public Meeting

8, 9 a.m.—Conference

SEPTEMBER 2006

4—Labor Day Holiday

6—Oral Argument

7—Oral Argument; Bar Exam Results Released

8, 11, 12—Oral Argument

19—Public Meeting

19, 20 a.m.—Conference

22—New Attorneys Admitted

26, 27 a.m.—Conference

OCTOBER 2006

10—Public Meeting

10, 11—Conference

16, 17, 18—Oregon Judicial Conference

25, 26 a.m.—Conference

NOVEMBER

1, 2, 3, 6, 7—Oral Argument

10—Veterans' Day Holiday

14—Public Meeting

14, 15 a.m.—Conference

23—Thanksgiving Holiday

28, 29 a.m.—Conference

DECEMBER

12—Public Meeting

12, 13 a.m.—Conference

19, 20 a.m.—Conference

25—Christmas Holiday

JANUARY 2007

1—New Year's Day Holiday

3, 4, 5, 8, 9—Oral Argument

15—Martin Luther King, Jr. Holiday

17—Public Meeting

17, 18 a.m.—Conference

30, 31 a.m.—Conference

FEBRUARY 2007

4, 5, 6— Court's Administrative Conference

13—Public Meeting

13, 14 a.m.—Conference

19—Presidents' Day Holiday

27, 28 a.m.—Conference

MARCH 2007

1, 2, 5, 6, 7—Oral Argument

13—Public Meeting

13, 14 a.m.—Conference

27, 28 a.m.—Conference

THE OREGON COURT OF APPEALS

"A JUDGE INEVITABLY PREOCCUPIED WITH THE FAR-REACHING EFFECT OF AN IMMEDIATE SOLUTION AS A PRECEDENT, OFTEN DISCOVERS THAT HIS TENTATIVE VIEWS WILL NOT JELL IN THE WRITING. HE WRESTLES WITH THE DEVIL MORE THAN ONCE TO SET FORTH A SOUND OPINION THAT WILL BE SUFFICIENT UNTO MORE THAN THE DAY. "

Roger Traynor, Some Open Questions on the Work of State Appellate Courts, 24 U Chi L Rev 211, 218 (1957).

CALENDAR

By Lora Keenan

Unlike the Oregon Supreme Court, the Oregon Court of Appeals does not set an annual calendar in advance. Instead, the Chief Judge and the four Presiding Judges meet early each month to set the oral argument and internal conference schedule for the month three months in the future. (For example, March dates are set in December, April dates are set in January, and so on.)

ORAL ARGUMENT: The Court of Appeals generally hears oral argument nine days per month, typically with each of its three departments sitting three times. The court usually sits in Salem, most often in the Supreme Court courtroom, but—when that courtroom is not available—sometimes in the Tax Court courtroom or a hearing room at the Capitol. The court travels about once a month, hearing oral arguments at a law school, college, or high school. The court presently has the following "road dates" scheduled in 2006: February 6, University of Oregon, Eugene; April 20, Franklin High School, Portland; May 17, La Grande; May 18, Enterprise; September or October, Malheur County; November, Astoria.

Oral argument for a particular case is generally scheduled approximately eight weeks after the last brief has been filed. Certain types of cases (for example, land use review and termination of parental rights) are expedited and will be heard sooner after they are "at issue." The calendar clerk in the Appellate Court Records Section prepares a preliminary calendar for a month of arguments and sends it to the Chief Judge. The clerk will typically assign between 10 and 15 cases for argument each day, depending upon the type of case and the maximum amount of argument time the Oregon Rules of Appellate Procedure allow for the type of case. The actual dates and panels for arguments are set at the monthly meeting of the Chief Judge and the Presiding Judges.

Once the calendar has been approved, the Appellate Court Records Section sends notice to counsel. That notice does not identify the panel of judges who will hear arguments; however, that information is available on the court's website before the beginning of the month in which oral argument is set to occur. The court is divided into three "departments" of three judges each, and most often those judges hear arguments together. However, sometimes

a panel will consist of a different group of Court of Appeals judges or two Court of Appeals judges and a senior judge or judge pro tempore, such as the Tax Court Judge or a Circuit Court Judge.

A party generally will be allowed to reset an oral argument date one time; additional requests are subject to the approval of the Presiding Judge of the department to which the case has been assigned. All requests to reset oral argument must be submitted in writing to the Appellate Court Records Section, with a copy to opposing counsel. The request should indicate whether any other party opposes the request. Last minute requests are not encouraged. If necessary, however, they may be made by phone to the Appellate Court Records Section, who will consult with the Presiding Judge. Again, the party making the request must advise whether any other party opposes it.

Parties wishing to waive oral argument should advise the Appellate Court Records Section in writing as early as possible, with a copy to opposing counsel. The court regards nonappearance at oral argument as waiver of argument. If one party chooses not to appear, the other side may still argue the case.

CONFERENCES: Like the Supreme Court, the Court of Appeals conducts its adjudicatory business at regularly scheduled private conferences. The primary purpose of these conferences is to consider draft opinions that have been circulated to the participating judges by a set deadline preceding each conference date.

All ten judges meet once a month at "full court conference." The purpose of this conference is to discuss draft opinions in cases that have been taken *en banc*, to consider whether to take new cases *en banc*, and to act on administrative issues requiring the attention of the full court. Full court conference is typically, although by no means always, held during the first week of the month.

Each of the three "merits departments" usually meets twice a month. Attending this conference are the Chief Judge, the three regular members of the department, any judges who are participating in a case that has a draft opinion before the department, and the department's staff attorneys. The Chief Judge chairs the conference. Generally, draft opinions are considered in order of seniority of the author of the majority. The department will also consider at conference petitions for reconsideration of opinions that issued from that department.

The court's motions department meets once a month. Certain motions are required by statute to be heard by a three-judge panel and other motions are sent to the motions department by the Chief Judge, often in consultation with the office of Appellate Legal Counsel. Attending this conference are the Chief Judge, the three members of the department, the department's staff attorney, Appellate Legal Counsel, and Assistant Appellate Legal Counsel. The department usually acts on motions by order, but occasionally by written opinion.

Every opinion approved to "go down" (or be published) is put in a regular queue for publication. Barring referral of an opinion for consideration by the full court, the opinion will be released on a Wednesday either two or three weeks later, depending on the day of the week when the department conference was held. In cases having special statutory timelines or in weeks in which a holiday falls, the release date of an opinion may be on a day of the week other than Wednesday. Notice of all case dispositions on the merits, as well as summaries of all authored opinions, are available on the court's website at 8:00 a.m. on the release date.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
2006 Court Session

(Taken from the Ninth Circuit's Website)

January:	9th through 13th	Portland, Seattle, Pasadena, San Francisco
	23rd through 27th	Portland, Seattle
February	6th through 10th	Seattle, Pasadena
	13th through 17th	San Francisco
March	6th through 10th	Portland, Seattle,
Pasadena		
	13th through 17th	San Francisco
April	3rd through 7th	Seattle, Pasadena, San Francisco
May	1st through 5th	Portland, Seattle, Pasadena
	15th through 19th	San Francisco
June	5th through 9th	Seattle, Pasadena
	12th through 16th	Honolulu, San Francisco
July	24th through 28th	Anchorage, Portland, Seattle, Pasadena, San Francisco
August	14th through 18th	Seattle, Pasadena, San Francisco
September	11th through 15th	Portland, Seattle, Pasadena, San Francisco
October	16th through 20th	Seattle, Pasadena, San Francisco
November	13th through 17th	Honolulu, Portland, Seattle, Pasadena, San Francisco
December	4th through 8th	Seattle, Portland, Pasadena, San Francisco

OJIN
Abbreviations Used in Appellate Cases

by Carrie Poust

The Oregon Judicial Information Network (OJIN) has stored appellate case information since the late 1980s. As much as public access to case information has been a boon to a lawyer's practice and to a lawyer's staff, trying to decipher the abbreviations used has been a boondoggle. Finally, information you can put to immediate use:

AFF	Affirmed
ALL	Allowed
ALNO	Notice of Appeal
ANMO	Answer Motion
AUAD	Additional Authorities
BD	Bond
BR	Brief
BRAC	Amicus Brief
BRCA	Cross Answering Brief
BRCO	Cross Opening Brief
BRCR	Cross Reply Brief
BRMP	Brief on the Merits of Petitioner
BRMR	Brief on the Merits of Respondent
BROP	Opening Brief
BRPD	Opening Brief Past Due
BRRS	Respondent Brief
BRRP	Reply Brief
BRSP	Supplemental Brief
CAN	Cancelled
CLSD	Closed
CNS	Consolidated

CUR	Per Curiam Opinion
DA	Days
DEN	Denied
DS	Dismissed
DWL	Denied With Leave
FI	File
FLD	Filed
GV LEV	Give Leave
HDIA	Held in Abeyance
IS	Issue/At Issue
JG	Judgment
JGAL	Appellate Judgment
JRF	Jurisdictionally Filed
LT	Letter
LTCA	Letter of Court of Appeals
LTSC	Letter of Supreme Court
MISC	Miscellaneous
MM	Memorandum
MMOP	Memo Opposing Original Proceeding
MO	Motion
MOAA	Motion to Appear Amicus Curiae
MOAD	Motion to Amend Designation of Record
MOBE	Motion for Extended/Overlength Brief
MOCS	Motion to Consolidate Cases
MOCT	Motion to Correct Transcript
MOET	Motion for Extension of Time
MOHA	Motion to Hold in Abeyance
MORA	Motion to Reinstate Appeal
MORC	Motion to Reconsider

MORD	Motion for Relief from Default
NAC	No Action
NO	Notice
NOAM	Amended Notice of Appeal
NOCA	Notice of Cross Appeal
OB	Objections
OP	Opinion
ORAK	Order of the Court of Appeals
ORST	Order Settling Transcript
OTH	Other
OVR	Overruled
PMFF	Payment of Filing Fee
PRMA	Proof of Mailing
PRSV	Proof of Service
PTJF	Petition for Judicial Review
PTRC	Petition for Reconsideration
PTRV	Petition for Review
RCCD	Record - Trial Court/Agency
REM	Remanded
REV	Reversed
RI	Reinstated
RQCP	Request Copy
RN	Response
RQ	Request
RQRC	Record for Record
TRPR	Transcript of Proceedings
TRAP	Transcript on Appeal
TRPF	Proof of Filing Transcript
UN	Undertaking

VAC	Vacated
WDN	Withdrawn
WVD	Waived
WVAP	Waiver of Appearance
WVOA	Waiver of Oral Argument

CAVEAT: The Oregon appellate courts will move to a new computer application for managing cases sometime in 2006. The Appellate Court Management System (ACMS) will be taking the place of OJIN, so enjoy this list of abbreviations while you can.

"TO BE CLEARLY ERRONEOUS, A DECISION MUST STRIKE US AS MORE THAN JUST MAYBE OR PROBABLY WRONG; IT MUST, AS ONE MEMBER OF THIS COURT RECENTLY STATED DURING ORAL ARGUMENT, STRIKE US AS WRONG WITH THE FORCE OF A FIVE-WEEK-OLD, UNREFRIGERATED DEAD FISH."

Parts and Elec. Motors, Inc. v. Sterling Elec., 866 F2d 228, 233 (7th Cir 1988).

"A DRUNKEN MAN IS AS MUCH ENTITLED TO A SAFE STREET AS A SOBER ONE, AND MUCH MORE IN NEED OF IT."

Robinson v. Pioche, Bayerque & Co.,
5 Cal 460, 461 (Ca 1855).

STATISTICALLY SPEAKING

OREGON SUPREME COURT

Cases Filed 2005

(includes discretionary, direct, and original jurisdiction cases)

TOTAL 1,062

SELECTED CASE TYPES (NOT ALL CASE TYPES INCLUDED)

Criminal (including appeals, habeas corpus, post-conviction relief, and parole)—640

General Civil—106

Mandamus—104

Domestic Relations—20

Agency Review (not including workers' compensation or land use)—17

Workers' Compensation—20

Land Use—4

Juvenile (including dependency, delinquency, and termination of parental rights)—38

Ballot Title—34

Lawyer Discipline—16

Tax—9

Mental Commitment—4

FED—2

Probate—2

OPINIONS ISSUED 2003 - 2005

2003	2004	2005
54	58	78

OREGON COURT OF APPEALS

Cases Filed 2005

TOTAL 3,801

SELECTED CASE TYPES (NOT ALL CASE TYPES INCLUDED)

Criminal (including appeals, habeas corpus, post-conviction relief, and parole)—2,401

General Civil—418

Domestic Relations (including adoption)—179

Agency Review (not including workers' compensation or land use)—200

Workers' Compensation—120

Land Use—36

Juvenile (including dependency, delinquency, and termination of parental rights)—182

Mental Commitment—126

FED—35

Probate—23

OPINIONS ISSUED 2003 - 2005

2003	2004	2005
344	351	400

"ON APRIL 14, 1988, ANTHONY W. VAUGHAN AND GREGORY SCOTT BIGELOW WERE WALKING AROUND THE WHOLESALE MEAT DEALERS' BUSINESS DISTRICT, DRUMMING UP BUSINESS FOR THEIR NEW ENTERPRISE: 'CRASH COURSE COLLECTIONS, INC.' VAUGHAN, WHO STANDS BETWEEN 6'6" AND 6'8" FEET TALL AND IS RELATIVELY HUSKY, AND BIGELOW, TWO INCHES SHORTER AND SLIGHTLY THINNER, WERE VISITING DISTRIBUTORS AND HANDING OUT BUSINESS CARDS. THE CARDS STATED SIMPLY, 'WE GUARANTEE RESULTS.' IT GAVE JUST THEIR FIRST NAMES, 'TONY' AND 'SCOTT,' AND A BEEPER NUMBER. IN A FINAL BURST OF SUBTLETY, VAUGHAN AND BIGELOW ADDED A DRAWING OF A FUNERAL WREATH."

United States v. Bigelow,
914 F2d 966, 968 (7th Cir 1990).

"[A] HUSBAND HAS A RIGHT TO GO FISHING. AND WE WILL GO FURTHER AND SAY THAT THIS RIGHT EXTENDS TO FISHING WITHOUT THE CONSTANT AND EVER-PRESENT IMPEDIMENT OF FEMALE PRESENCE AND PARTICIPATION, IF SUCH BE AGAINST THE WILL OF THE HUSBAND."

Moore v. Moore, 337 SW2d 781, 787 (Mo App 1960).

LEGAL LORE

OREGON LEGAL LORE:
TWO "FISHY" CASES

CASE #1: DICKENS V. DEBOLT,
288 OR 3, 602 P2D 246 (1979) (TONGUE, J.)

This is an action for conversion by a fisherman against a state police officer who seized a sturgeon which he mistakenly believed to have been caught illegally and may have then eaten most of the "evidence." The case was tried before a jury, which returned a verdict of $250 in general damages and $750 punitive damages. The Attorney General appealed from the resulting judgment on behalf of the state police officer. The Court of Appeals reversed the judgment upon the ground that Oregon statutes confer complete and absolute immunity upon a state police officer in such a case. 39 Or App 575, 592 P2d 1082 (1979).[1] We allowed plaintiff's petition for review.

The facts are bizarre. On September 12, 1977, plaintiff with his wife, an uncle and an aunt, drove over 150 miles from their home to fish for sturgeon in the Columbia River below the John Day Dam. He had fished for sturgeon during the past two or three years, but had previously caught only one sturgeon. Upon arrival there plaintiff fished from a platform on the river below the dam. There he met two other sturgeon fishermen, Rans Golden and Gregory

Elliot.

At about sundown plaintiff hooked a fish. After a good fight lasting about 30 minutes he landed his prize, a sturgeon a "royal fish" 43 inches in length and weighing between 40 and 45 pounds.[2] Being concerned over the fish spoiling and it being too late to drive home, plaintiff put the end of a rope through the gills of the sturgeon and tied the other end of the rope to a cable under the platform, leaving the fish alive and in the river.

Because Golden and Elliot were still fishing and had a mobile home parked nearby, plaintiff asked them to "keep an eye" on his sturgeon. Plaintiff and his party then went to a motel about one mile away in Rufus, where they had dinner and spent the night.

On returning to the river the next morning to get his sturgeon, plaintiff found the rope cut and the fish gone. He was then told by Rans Golden that a state police officer had taken the fish and had said that if plaintiff wanted it he "would have to call." Plaintiff testified that he then called the desk sergeant of the state police at Arlington, told him what had happened and asked for his fish, but was told that he would not get it back. Plaintiff also testified that he told the desk sergeant that he had witnesses who had seen him catch the fish, and was told that "if we went to court all seven of us could go to jail for perjury."

Plaintiff never saw his sturgeon again. He testified that the "going price" for the 40 to 45 pounds of meat, which he had planned to eat, was $5.65 per pound and that the rope was a ski rope worth from $10 to $15. He was never "interviewed" by the state police, much less arrested or charged with catching the sturgeon illegally.

Defendant was the state police officer who took plaintiff's sturgeon. He testified that on the evening of that day he observed two persons fishing on the platform below the dam and saw one of them catch a sturgeon at about 10:00 p. m., it then being illegal to fish for sturgeon. He also saw them tie a rope through its gills and tie the rope to a cable under the platform.

Defendant arrested the two fishermen, Rans Golden and Gregory Elliot, for angling after hours. He then looked over the platform and saw one sturgeon tied to a cable. He testified that he took the fish "as evidence" in the case against Golden and Elliot. He admitted, however, that they told him that the sturgeon "belonged

to some people that were in a motel in Rufus," but that he did not "check (that) out," apparently because he did not believe Golden and Elliot, who had not told him that there were two sturgeon tied to cables under the platform, including the one that he had seen them catch and which he believed to be the fish that he took "as evidence."

Defendant then took plaintiff's sturgeon to Arlington, where he lived. He testified that because the state police "didn't have any deep freeze facilities there," it "seemed like a reasonable thing to do" for him to put the sturgeon in the freezer at his home.

Before doing so, however, defendant skinned and fileted the sturgeon, and "packaged it up." He testified that he also put a state police evidence tag "on the package," with his name and number and also the names of Elliot and Golden and the charge against them. At the trial defendant produced a package of frozen fish with such a tag on it.

Defendant testified that after the fish was fileted, the meat weighed 8 pounds. He also testified that he had not eaten any of the sturgeon. A professional fish buyer called as a witness by the defense to testify to a market value of $.85 per pound for the sturgeon, if dressed, also testified that a 40 pound sturgeon, after dressing by removal of head and entrails, would "lose at least 15 percent," depending on the size of the head (or at least 6 pounds, with up to 34 pounds of the 40 pound fish remaining).

The answer filed by the Attorney General on behalf of defendant, in addition to denying most of the facts alleged in plaintiff's complaint for conversion, alleged the following affirmative defenses:

"At all times material herein, defendant was acting in his official capacity as a trooper of the Oregon State Police, and seized said sturgeon and water ski rope as the fruits of a crime and at the time of and pursuant to a valid arrest." (ORS 496.620), and

"At all times material herein, defendant, a trooper of the Oregon State Police, was performing a discretionary function." (ORS 30.265(3)(c)).

At the conclusion of the testimony defendant moved for a directed verdict upon the ground, among others, that ORS 496.620 conferred complete and absolute immunity upon defendant. Later, after the jury verdict in favor of plaintiff, defendant moved for a

judgment notwithstanding the verdict on the same grounds. In the order denying that motion the trial judge held as follows:

"It appearing to this court, that there was evidence at the trial of the case from which the jury could have inferred that the defendant took the sturgeon in question, stored it in his private freezer and then ate part of it. The storage of the fish in the private freezer might have been within the defendant's scope of employment, but there is no way a State Policeman's duties include the eating of filet of sturgeon."

We agree with the trial judge.

In holding that the trial judge erred in denying defendant's motion for directed verdict, the Court of Appeals recognized that the jury could have properly inferred from the fact that "there was an unexplained shrinkage in the amount of sturgeon still available at the time of trial," not only that "the officer had eaten a portion of the fish," but also that "the officer intended to do so when he seized the fish." (39 Or App at 580, 592 P2d at 1085).

The Court of Appeals reasoned, however, that ORS 496.620 was "designed to prevent civil actions from having a chilling effect on the vigorous enforcement of the game laws"; that this statutory "exemption from liability does not mention 'good faith' " as urged by the plaintiff; that "(a) fuller grant of immunity can hardly be imagined"; that "good faith" is irrelevant in determining whether a state officer is immune for discretionary acts under ORS 30.265(3)(c) the state Tort Claims Act and that "the legislature is presumed to mean something different by the language of ORS 496.620, or there would be no reason to enact it." The Court of Appeals then concluded that:

"Something different in this context must involve greater protection to the officer whose acts are later called into question. 'Bad faith,' therefore, cannot be permitted to defeat immunity under ORS 496.620 when it would not defeat immunity under ORS 30.265(3)(c)." (39 Or App at 580 81, 592 P2d at 1085 86.)

We disagree.

First of all, it cannot properly be "presumed" that the legislature, in enacting ORS 496.620, intended it to mean "something different" than the immunity provided by ORS 30.265(3)(c). The statute which now appears as 496.620 was enacted in 1921 (1921 Or Laws Ch 153 ' 58). This was 46 years before adoption of the Oregon Tort

Claims Act in 1967, including ORS 30.265(3) (c) (1967 Or Laws Ch 627 ' 3).

It may be assumed, however, that ORS 496.620 was designed to prevent civil actions from having a "chilling effect on the vigorous enforcement of the game laws." It may or may not also be true that in determining whether a state officer is immune for a "discretionary act" under ORS 30.265(3)(c) his "good faith" is irrelevant. In addition, it may or may not be true that "bad faith" does not defeat immunity under ORS 496.620.

As we analyze the problem presented by this case, however, the issue to be decided in determining whether ORS 496.620 provides immunity to the defendant is not whether he acted in good faith or in bad faith, but whether he was engaged in "the enforcement or attempted enforcement of * * * the wild life laws" or in "the exercise or attempted exercise of any of the duties or privileges granted to or imposed by law upon" the defendant when he "ate most of the evidence," as the jury was entitled to find.

We may agree that when a state police officer seizes a fish that he believes to have been caught illegally he is entitled to immunity under ORS 496.620. We do not believe, however, that this statute can properly be construed to mean when a state police officer "eats the evidence" he is then engaged in either the "enforcement or attempted enforcement" of the game laws or the "exercise or attempted exercise" of any of his "duties or privileges" as an officer. It follows, in our opinion, that the reasoning on which the Court of Appeals based its decision of this case is faulty and that it was in error in holding that ORS 496.620 granted an immunity to the defendant as a complete defense to this case.

For similar reasons, we hold that ORS 30.265(3)(c) of the Oregon Tort Claims Act does not confer immunity upon defendant as for the performance of a discretionary function or duty. Thus, we hold that when defendant ate most of the sturgeon, as the jury could properly find, he was not then acting "within the scope of (his) employment or duties," within the meaning of that statute.

In oral argument before this court on plaintiff's petition for review, it was contended, among other things, by the Assistant Attorney General who argued the case on behalf of defendant that the Court of Appeals was correct in its holding because the conversion alleged by plaintiff's complaint was not that defendant "ate the evidence," but that he "took and carried away"

the sturgeon (*i.e.*, the initial seizure of the fish) and that ORS 496.680(1) specifically authorizes game enforcement officers to seize fish caught in violation of wildlife laws.

First of all, it is to be noted that plaintiff's complaint not only alleges that defendant "took and carried away" the sturgeon, but also alleges that defendant "converted the same to defendant's own use." In any event, it is important to distinguish between the question whether a conversion was properly alleged and proved and the separate question whether, assuming that there was a conversion, ORS 496.620 provides an immunity to an officer who engages in such a conversion.

Both in instructions requested at the time of trial on behalf of the defendant and in the brief filed on his behalf in the Court of Appeals, it is contended by the Attorney General that a conversion in such a case is to be defined as held by this court in *Mustola v. Toddy*, 253 Or 658, 456 P2d 1004 (1969) (also an action for conversion against a state police officer) in which this court (at 663 64, 456 P2d 1004) adopted *Restatement (Second) of Torts* ' 222A (1965) as a definition of conversion for application in such a case and which reads as follows:

"' 222A. What Constitutes Conversion

"(1) Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.

"(2) In determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important:

"(a) the extent and duration of the actor's exercise of dominion or control;

"(b) the actor's intent to assert a right in fact inconsistent with the other's right of control;

"(c) the actor's good faith;

"(d) the extent and duration of the resulting interference with the other's right of control;

"(e) the harm done to the chattel;

"(f) the inconvenience and expense caused to the other."

It may or may not be true that under the allegation of plaintiff's complaint, the defendant could have objected to any evidence of defendant's conduct after the original seizure and "carrying away" of the sturgeon. No such objection was made, however, and the instruction defining the term "conversion" for the purposes of this case as requested by the Attorney General on behalf of the defendant (and given by the trial judge) was in the exact terms of Restatement § 222A. No contention was made by the Attorney General that under the terms of § 222A the only possible conversion under the facts of this case was the original seizure of the sturgeon or that if the original seizure was not a conversion the subsequent eating of the fish could not have been a conversion. Accordingly, we need not decide that question in this case.[3]

Whether defendant converted the fish at the time he took it from the river or whether he converted it at the time it was eaten, however, is immaterial. ORS 496.620 would protect the officer from the legal consequences of that conversion only as long as he held the fish for the purpose which the statute protects; *i.e.*, attempted enforcement of the wild life laws. The same is also true of ORS 30.265(3)(c). For reasons previously stated, we hold that those statutes do not confer such an immunity.[4] It follows, in our opinion, that the trial court properly denied defendant's motion for a directed verdict and that the Court of Appeals erred in holding to the contrary.

However, additional assignments of error relating to three requested instructions to the jury are also set forth in the brief of the Attorney General as appellant on behalf of the defendant. Those assignments of error were not considered by the Court of Appeals. They were also not discussed in plaintiff's brief as respondent in the Court of Appeals.

One of the requested instructions would have told the jury of a "factor" which this court in *Mustola v. Toddy, supra*, held to be one which should be considered in an action for conversion against a police officer. It should have been given.

In *Mustola v. Toddy*, 253 Or 658, 666, 456 P2d 1004 (1969), also an action for conversion against a state police officer, this court said, after adopting the definition of conversion as stated in *Restatement (Second) of Torts*, § 222A for application in such cases, that:

"* * * This formulation of the definition of conversion limits the

tort to those cases in which the defendant may justly be required to pay full value. In determining the justness of the imposition of this burden on a defendant we are to consider the factors enumerated in subsection (2) of Section 222A, *Restatement (Second) of Torts*. And we are informed by comment d to this section that the factors listed in subsection (2) 'are not intended to be exclusive.' There is a factor not listed in subsection (2) which, we think, is controlling in the present case. That factor is The desirability of permitting police officers acting in emergency situations to have sufficient leeway in dealing with property coming under their control as an incident to law enforcement that they are not unduly inhibited in carrying out their duties * * *." (Emphasis added) 253 Or at 666, 456 P2d at 1008.

The trial court instructed the jury in the terms of Restatement § 22A, including the "factors" as stated in that definition of conversion. The court did not, however, tell the jury of the additional "factor" as set forth in *Mustola v. Toddy, supra*.

The second requested instruction would have told the jury that:

"One is privileged to commit an act which would otherwise be a conversion if he is acting in discharge of duty created by law to preserve the public safety, health, peace or other interest, and his act is reasonably necessary to the performance of his duty or the exercise of his authority. If you find that the defendant was so acting in this case, then you must return your verdict in favor of the defendant."

It might have been preferable to state such an instruction in the express terms of the statutes. This requested instruction, however, was also a correct statement of the law and the defendant was entitled to such an instruction.

We cannot properly say that the failure to give either of these requested instructions was not prejudicial to the defendant. The rule as stated in either instruction would not have provided a defense in this case if the jury found, as it was entitled to find, that defendant ate most of the sturgeon.[5] We cannot be certain, however, that this was the basis of the jury verdict. For all we know, the jury may have found that defendant did not eat the fish, but that the original taking of the fish was a conversion. In such an event these two requested instructions might well have caused the jury to arrive at a different result.

The third requested instruction was that:

"If you find that, At the time the fish was taken by the defendant, the defendant was a State Police Officer acting within the course and scope of his employment, then you must not award any punitive damages to the plaintiff." (Emphasis added)

This requested instruction, as applied to the facts of this case, was misleading and confusing at the least, if not an incorrect statement of the law as applied to such facts. The jury was entitled to find from the evidence in this case that even if the defendant acted "within the (course and) scope of (his) employment" when "the fish was taken," he later ate most of the sturgeon and that he was not "acting within the course and scope of his employment" when he did so.

It is contended by the Attorney General, on behalf of the defendant, that defendant was entitled to such an instruction under the Oregon Tort Claims Act. It is true that a police officer who acts "within the scope of (his) employment or duties" is not subject to liability under the Oregon Tort Claims Act for punitive damages by reason of ORS 30.270(2), at least when engaged in the performance of a "discretionary function or duty."[6]

If, however, this defendant ate most of the sturgeon and at that time was not acting within the course and scope of his employment, as the jury was entitled to find from the evidence of this case, he would then be subject to punitive damages on the same basis as any other person who commits an act of conversion. This court has held that punitive damages may properly be awarded by a jury in actions for conversion when the circumstances are sufficiently aggravated. *See, e. g., Allen v. Allen*, 275 Or 471, 481 82, 551 P2d 459 (1976); *Lee v. Wood Products Credit Union*, 275 Or 445, 449 50, 551 P2d 446 (1976); *Lewis v. Devils Lake Rock Crushing Co.*, 274 Or 293, 300 301, 545 P2d 1374 (1976).

Because the trial court erred in failing to give two of defendant's requested instructions, this case must be remanded to it for a new trial.

Reversed and remanded.

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1 ORS 496.620, relied upon by the Court of Appeals, provides: "No person authorized to enforce the wildlife laws shall suffer any civil liability for the enforcement or attempted enforcement

of any provisions of the wildlife laws or for the exercise or attempted exercise of any of the duties or privileges granted to or imposed by law upon the commission or such persons."

ORS 30.265(3)(c), also referred to by the Court of Appeals, provides: "(3) Every public body and its officers, employes and agents acting within the scope of their employment or duties are immune from liability for * * * (c) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused."

2 Under English common law, a sturgeon was a "royal fish" which belonged to the king and no subject could take such a fish without a royal grant. *Arnold v. Mundy*, 6 NJL 1, 76 (1821).

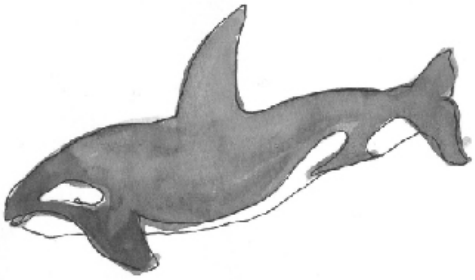
3 *But see Restatement (Second) of Torts* § 223 and 226, comment b.

4 Because of the basis on which we decide this case we need not consider plaintiff's contention that ORS 496.620 and 30.265(3)(c) only provide immunity to an officer who acts in "good faith" and that if those statutes were construed as held by the Court of Appeals they would be unconstitutional, in reliance upon *Butz v. Economou*, 438 US 478, 498, 98 S Ct 2894, 2906, 57 L Ed 2d 895, 910 11 (1978).

5 The substance of the rule as stated in the first requested instruction was also urged by defendant as a further ground in support of his motion for a directed verdict.

6 ORS 30.270(2) provides:

"No award for damages on any (claim within the scope of ORS 30.260 to 30.300) shall include punitive damages * * *."



CASE #2: *STATE V. LESSARD*, 146 OR 9, 29 P2D 509 (1946) (BEAN, J.).

This is an action for the possession of personal property. The plaintiff alleges in its complaint and amended complaint, in substance, in addition to the formal allegations, that the state of Oregon, between and including the 12th and 24th days of October, 1931, was the owner of a certain cetacean known as a whale of the classification Orca Gladiator, during which time it took its abode in the Oregon slough in Multnomah county, Or.; that without authority of said state, express or implied, said creature was killed by defendants in said slough on October 24, 1931; that the plaintiff is the owner and entitled to the immediate possession of the body of said whale; that the same is of the value of $1,000; that on January 6, 1932, the defendants wrongfully and unlawfully seized and took possession of the body of said whale, and at the time of the commencement of this action wrongfully and unlawfully withheld possession thereof from the plaintiff within Multnomah county, Or., and do now wrongfully and unlawfully withhold possession thereof from the plaintiff, to plaintiff's damage in the sum of $1,000.

The trial court sustained a demurrer to the original complaint. Plaintiff moved the court for judgment as prayed for in the complaint, for the reason that defendants failed to answer. The defendants moved the court for an order striking the amended complaint. The court denied plaintiff's motion and granted defendants' motion to strike the amended complaint. Both parties standing on the record, the action was dismissed.

We think the complaint is sufficient. It plainly alleges ownership by the plaintiff and other facts sufficient to constitute a cause of action for the possession of the body of the whale. There is no

denial of the ownership, or the wrongful taking, or any part of the complaint. The cause was argued upon its merits, as though there had been an issue raised.

The plaintiff claims that under the law the state is owner of all "royal fish." Whales within coastal and inland waters have always been a part of the King's own revenue and are denominated "royal fish." 1 Blackstone, 290. The rights and prerogatives of the crown under the common law were vested in the state by the Revolution. 4 Enc U S Rep p 84. The state now has all the prerogatives of sovereignty. Public grants are to be construed strictly. Nothing passes by implication, and all doubts are resolved in favor of the state. *La Plaisance Bay Harbor Co. v. Council of City of Monroe*, Walk Ch (Mich) 155.

We take the quotation from *State v. Hume*, 52 Or 1, 6, 95 P 808, 810, as follows: "'The individual,' says Mr. Justice Hadley in *Smith v. State*, 155 Ind 611, 58 NE 1044, 51 LRA 404, 'has no natural right to take game, or to acquire property in it, and all the right he possesses or can possess in this respect is granted him by the state.' The state being thus invested with the title to animals feræ naturæ, they cannot be lawfully captured by any person without the express or implied permission of the state."

It is stated in the brief of the plaintiff, and is not challenged by the defendants, that the spectacle of a real whale at play a hundred miles inland from the sea created interest at home and abroad, and was the source of much inquiry from the press and educational institutions in other parts of the world; that similar events in other countries, as recorded throughout the ages, were cited, and for a time Portland harbor was the object of unusual reference and great publicity; that after the killing the body of the whale was placed in a tank especially built and donated to the state and preserved by means of donations and placed on exhibit for its educational value.

We quote from 1 Bracton de Legibus Angliae, p. 111: "There are also other things which appertain to the crown on account of the king's privilege, and so do not regard the common interests, so as to forbid their being given and transferred to another, because if they are transferred, the transfer will do harm to no one, neither to the king himself nor to the prince, and if things of that kind are granted to any one, as wreck of the sea, treasure trove, and a great fish, such as a whale, a sturgeon, and other royal fishes, it would be requisite, if a question thereupon arose, that he who claims for

himself a liberty of this kind, should show that (a liberty) of this kind belongs to him, for if he have not a special warrant, he will not be able to maintain himself in that liberty, although he holds out in his own behalf a prescription of length of time; for great length of time in this case does not diminish, but increases the wrong."

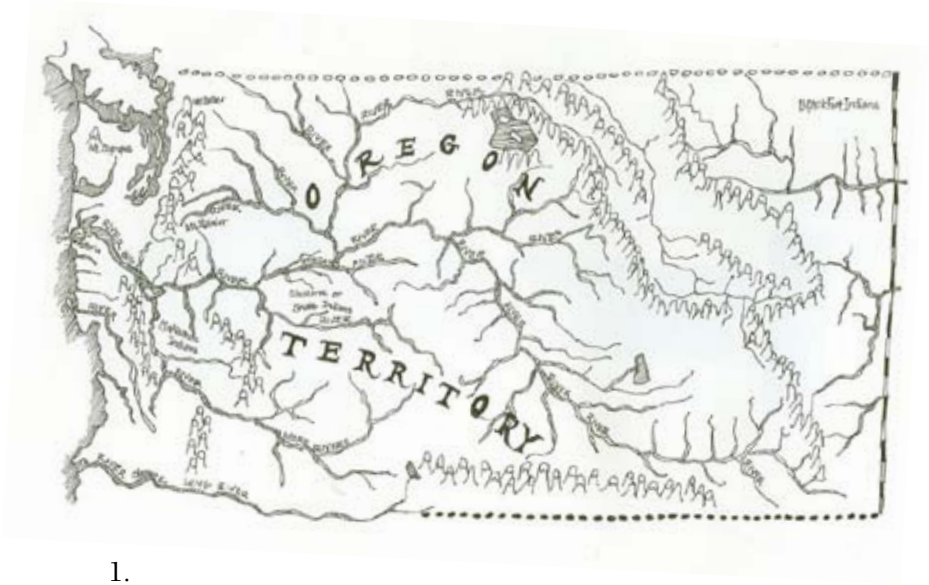
The distinction between royal fish and other fish and game is clearly set forth in *Parker v. People*, 111 Ill 581, 611, 53 Am Rep 643: "This right, so far as concerned royal fish (whales, porpoises and sturgeon), was held by the sovereign for his own revenues, and so far as concerned all fish not royal, and in tide waters, was said to be in the king, in trust for all his subjects. So royal fish, when taken, were the property of the crown, by whomsoever taken; but fish not royal, taken in tide waters, became the property of the takers."

A different rule prevails in regard to a whale or royal fish from that which pertains to ordinary food fish which are regulated by statute. Defendants seek to apply the latter rule. We find no statutory law enacted in this state governing a whale.

We think it was error to sustain the demurrer to plaintiff's complaint and to strike out the amended complaint.

The judgment of the circuit court will be reversed and the cause remanded with directions to overrule the demurrer and motion to strike plaintiff's complaint and for such further proceedings as may be deemed proper not inconsistent herewith.

Rules Adopted at the Supreme Court of Oregon Territory, at the December Term, 1852



1.
Attorneys and counsellors at law, and solicitors in chancery, of the several District Courts of this territory, shall on notice in open court, be admitted to practice in the Supreme Court; but all the preliminary steps necessary to bring a cause to this court, and prepare the same for trial, may be taken by any attorney, solicitor or counsellor of any of the District Court.

2. The attorneys and guardians *ad litem* of the several parties in the court below, shall be deemed the attorneys and guardians of the same parties in this court until others shall be retained, or appointed, and the appointments placed on file, and notice thereof served on the adverse party, or his attorney.

3. No private agreement, or consent, between the parties, or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered with the clerk; or, unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel.

4. If the party applying for the writ of error or appeal is a minor, and no next friend or guardian has been appointed for him

in the court below, the court, or any of the justices of this court in vacation, shall, upon a petition duly verified appoint some suitable person as a next friend for such minor, who shall be liable for the costs in this court; which said petition and appointment shall be filed with the clerk of this court.

5. The clerk of this court may, upon application and payment of his fees, issue blank writs of error under the seal of the court; which writs, when suitably filled up and subscribed by an attorney of this, or of a District Court, shall be effectual to bring up all causes properly removable to this court; and it shall be the duty of the clerk of any District Court, immediately upon being served with a writ of error, and upon being paid his legal charges, to note upon the back of said writ the date of its receipt, and to make up a complete transcript of his record of the process, pleadings, orders, proceedings and judgment in the cause, in the order in which they occurred; and after certifying the same, under his hand and seal of office, to return the same to the clerk of this court, by mail, postage paid, or by some other safe mode of conveyance.

6. The clerk of a District Court, returning the transcript of a record to this court, pursuant to an appeal, or in obedience to a writ of error, shall distinctly number and mark each folio in the margin thereof. Each folio shall be deemed to consist of one hundred words. Such transcript shall be fairly and legibly written; otherwise, the clerk of this court shall not file the same, but shall return it to the clerk transmitting it, with a statement of the reason why it is not received and filed.

7. A printed or legibly written copy of Rules Nos. 5 and 6 shall be attached to, and accompany each writ of error issued by the clerk of the Supreme Court; for which he shall be allowed the sum of fifty cents.

8. In all cases where the defendant in error resides out of the territory, and has no attorney therein, the plaintiff in error shall cause publication of the cause to be made in some weekly newspaper, printed in the territory, for four consecutive weeks; the last insertion of which notice shall be at least four months prior to the first day of the term of the Supreme Court at which said cause is set for trial; and in all cases where it shall be practicable so to do, it shall be the duty of the said plaintiff to ascertain the residence of the said defendant; and, immediately after the first publication of the notice, send by mail a certified copy of said notice, directed to

him at said place of residence, postage paid. If sufficient time shall not have elapsed for the publication, as aforesaid, of said notice, prior to the first day of the term, and subsequent to the filing of the writ of error with the clerk of the District Court, then such cause shall stand continued until the next term of the Supreme Court, unless the defendant shall voluntarily enter his appearance at said first term. *Provided*, It shall be discretionary with either of the justices of the Supreme Court, upon application, to direct in writing, to be placed upon the files of this court, such other mode of publication as may to them seem proper in the particular case.

9. In all causes coming up on a writ of error, errors shall be assigned, and a copy thereof furnished to the adverse party, or his attorney, if in attendance upon the court, by twelve o'clock on the first day of the term; and if the party shall fail to comply with this rule, the judgment of the court below shall be affirmed, or the cause continued at the costs of the plaintiff in error, or his attorney, as the court shall direct.

10. The defendant shall file his pleadings by four o'clock in the afternoon of the first day of the term, and furnish a copy thereof to the adverse party, or his attorney, if in attendance upon the court; and, in case he shall fail to comply with this rule, the judgment of the court below shall be reversed, or the cause continued, at the costs of the defendant, or his attorney, as the court shall direct. Provided, The plaintiff shall have complied with Rule No. 9.

11. Assignments of error shall be specific, and no error will be noticed by the court that is not specifically assigned, unless, for good and sufficient reasons, the court shall otherwise determine.

12. Whenever error in fact shall be assigned, the pleadings shall be accompanied by an affidavit of the party, or of some person cognizant of the matters therein set forth, that it is true in substance and in fact; otherwise the court, on motion of the opposite party, will strike the pleadings from the files of the court. Whenever an issue of fact is made up, the court may send the case down for trial to the District Court, in which the judgment was rendered, unless it shall otherwise direct.

13. Before the cause is called on for trial, the counsel for the affirmative shall furnish the opposite counsel a note of the points made and authorities cited, with an abstract of the argument; after receiving which, a like note of points and authorities, with

an abstract of the argument in answer, shall be furnished to the affirmative counsel; and in all cases before the argument is commenced, the counsel, holding the affirmative, shall furnish each of the judges with an abstract of the case, and a brief of the points and authorities relied upon, printed or written in a legible hand; and the opposing counsel shall furnish a like brief of the points and authorities relied upon on the negative; for which the sum of twenty-five cents per folio shall be allowed to the respective parties, to be taxed in the bill of costs.

14. Within twenty days of the commencement of any term of the court, the clerk shall make up a docket of the causes brought up to this court by appeal or writ of error, and shall arrange the causes thereon in the order of time in which the appeal was completed, or writ of error filed with the clerk of the court below, and he shall specify in said docket the respective counties from which the causes were removed. He shall also make out a copy of the docket for each of the justices of the court.

15. In all cases where, under the law or rules of court, a written notice required to be served on the adverse party, such notice may be served by some sheriff or deputy sheriff; or, if the case shall belong to the United States side of this court, then by the marshal or his deputy; and the return of such officer, that he has served an attested copy of such notice, shall be sufficient proof of such service. The party himself, or any other competent person, may make service of a copy of said notice, and the affidavit of the party making the service shall be sufficient *prima facie* evidence of the same. In all cases such proof shall be filed with the clerk on the first day of the term; *provided*, that in all cases not otherwise specially provided for by law, the agreement of the parties, or their attorneys, in writing, shall answer in the place of notice.

16. Motions shall be noted for the second day of the term or sitting of the court, accompanied with copies of the affidavits and papers on which the same shall be made, and the notice shall not be for a later day, except when otherwise allowed by law, unless sufficient cause be shown and contained in the affidavits, or papers served, for not giving notice for the second day. The moving party shall give at least one day's notice of all motions, except when, from absence or other cause, service of such notice cannot be made, when depositing the papers with the clerk of the court shall be sufficient.

17. In all causes where the judgment of the District Court is affirmed, interest at the rate of six per cent. per annum shall be computed on said judgment up to the time of the rendition of judgment in this court, and shall be included therein, and the party shall be authorized to collect interest at the same rate on the judgment of this court until the same is satisfied, and this shall in all cases be exclusive of the statutory damages, if any, for the delay.

18. In all cases, not otherwise specially provided for, where judgment may have been, or shall be rendered in this court, a full and correct transcript of such judgment shall be made by the clerk, and a mandate shall issue from this court to the District Court from which the cause came, commanding the District Court to cause the same to be entered upon the record of the proceedings of said court, and to proceed to the enforcement of the same in like manner as if the said judgment had been rendered therein; which said transcript, and the mandate, the said clerk shall make out under the seal of the Supreme Court, and deliver to the party interested upon demand, and the payment of the costs which have accrued in this court; and the party advancing such costs shall have the same remedy for the collection thereof against the party condemned in costs, as in other cases where costs are advanced.

19. All causes upon the docket which shall not otherwise be disposed of at any term of this court, shall stand continued until the next term of this court.

20. Whenever a justice, or other officer, approves of the security to be given in any case, it shall be the duty of said justice, or other officer, to require each of the sureties to justify; and unless the sureties shall together justify that they are worth, over and above all debts and responsibilities they may owe or have incurred, a sum equal to twice the amount named in the penalty of the bond, such security shall not be deemed sufficient; *provided*, that, if such justice or other officer, shall then be of opinion that such security is insufficient, he may require other and additional security.

21. No papers or records filed in court, or in the clerk's office, shall be taken therefrom, unless by leave of the court, or upon the written order of one of the justices thereof.

22. No attorney of this court, or the clerk, shall be received as bail or security in any case in court.

23. All chancery cases, brought upon on appeal, shall stand for hearing upon the same pleadings and evidence as in the District Court,

"JUDGES, IN FACT, ARE JUST LIKE YOU OR ME OR OUR FRIENDS—ALL DIFFERENT, AND ALL APT TO GO OFF THE RAILS EVERY NOW AND AGAIN."

C.P. Harvey, The Advocate's Devil 35 (1958).

"WHAT, OH HELL I WAS GONNA SAY,
WHATSACALLIT, WANTED ME TO GO DO A
DAMN BURN A HOUSE."

United States v. Howard,
770 F2d 57, 58 n 3 (6th Cir 1985)
(excerpt of recorded statement of defendant).

unless the court shall otherwise direct.

MISCELLANY

REFLECTIONS

By Walter Edmonds, Judge, Oregon Court of Appeals

Author's note: Webster's Dictionary defines a "mentor" as a "close, trusted and experienced counselor or guide." It occurs to me that as the membership of the bar has increased, there are fewer younger lawyers who have had the benefit of a mentor; an experience that many of us older lawyers enjoyed in the early years of our

practice. There are a number of judges, lawyers, and legal secretaries who invested their time and energy in me throughout my career. To honor their memory, what follows is a fictionalized effort to pass down to younger lawyers some of the lessons that I didn't learn in law school about the practice of law.

Casey sat in his office, looking out the window as the late afternoon sun poured through the window blinds. He was seated in his favorite position with his feet up on his desk. He mused how in his 30 years of law practice, he had learned that he was at his "intellectual" best when his feet were on his desk or he was in the shower. "Must be due to additional blood flow to the brain, " he thought. "Although that didn't explain the bit about the shower—Oh well." With a sigh, he returned his thoughts to the 15-page construction contract that he had to review for a local contractor before he could escape to the Deschutes River and continue his quest for the elusive Dolly Vardon trout that inhabited a deep pool at Casey's favorite fishing spot. Casey smiled to himself as he visualized the large fish feeding on the early evening insects that congregated there.

Everyone's thoughts are worthy of consideration.

But before he could re-immerse himself in the sea of black print staring at him, Delores stuck her head in his office. Delores had been a legal secretary and the office manager for Casey's law firm for as long as Casey could remember. Now "retired," she only worked three days a week at the firm. When Casey had first come to the firm as a young lawyer, it had been Delores who had coached him on how to handle clients and how to negotiate the twists and turns of a private practice. Loyal and energetic, she handled the firm's clients and its younger lawyers with the exquisite care of a mother hen. For a moment, Casey saw himself in his mind's eye when he had first come to the firm: a youthful, almost cocky, full of himself, young lawyer with a full head of hair. Casey looked at Delores and thought, "I owe a lot to that lady; she taught me how to listen and to value what is being said, no matter who it is that is talking; even it is the cleaning lady, Everyone's thoughts are worthy of consideration."

Casey's musing was interrupted by Delores' voice. "Mr. Bryant, don't forget that the young lawyer who opened up an office down

the street is coming to see you at 4:30" Delores always referred to Casey as *Mr.* Bryant. In her view, communications were more clearly understood if they were preceded by an expression of respect for the intended listener. Delores deplored rudeness and crudity. In her view, the root cause of all evils that found their way into a law office was a failure to communicate with respect, and the secretaries who worked under her supervision could attest to how careful she was with words she chose to employ.

Casey muttered under his breath, "*This* is going to interfere with my scheduled return match with the German Brown." He glanced at the clock: 4:25 p.m. Not enough time to even finish reviewing the work that lay before him. At age 55, Casey was becoming increasingly intolerant of interruptions in his life. In the midst of his internal mental rant, he heard a voice from outside his office. "Hi, my name is Mollie Chandler. I'm the new lawyer down the street, and Mr. Bryant told me, 'If you ever need any help, come and see me.'" Casey thought to himself, "But why now?" In Casey's imagination, the Dolly Vardon was lurking in the shadow of a submerged log, swimming in slow circles, feeding on the flies on the water—taunting him. But on the top of that vision bombarded another memory, and then another, and then another. In those memories were the lawyers and judges who down through the years of Casey's career had taken the time to listen and talk to a young Casey. Now, Casey decided, this was the time for him to give them a return on their investment in him.

Casey took his feet off his desk and turned his head toward the open doorway leading into his office, as Delores appeared with Mollie in tow. Mollie sat down in a chair opposite Casey's desk. She was in her twenties, and a recent graduate of the University of Oregon Law School. She, along with a friend who had passed the bar three years ago, had opened up a law office down the street. Casey had met her at a local bar association function for new lawyers in the community. It was at that meeting that Casey had volunteered to be a mentor, and now Mollie was taking him up on his offer.

The root cause of all evils that found their way into a law office was a failure to communicate with respect.

THE 24-HOUR RULE

Mollie asked, "Mr. Bryant, what do you think are some of the most important things to remember about the practice of law?" Casey sat back in his chair and put his hands behind his head. He thought for a moment. He could see himself the way he was then; a younger advocate, a bit of an alley fighter, always ready to vigorously champion his clients' causes. There he was, in the chambers of Judge Franklin. He had just finished a contentious domestic relations hearing in which the opposing lawyer had, in Casey's view, unfairly cross-examined Casey's client. Casey's client was a constantly-weeping, middle-aged woman, left by her husband for a younger woman. When the opposing lawyer began asking questions that purported to impugn Casey's client's veracity, Casey objected. Judge Franklin overruled the objection, and the barrage of questions continued until finally Casey's client, dazed and exhausted, was permitted to escape the witness chair. Casey was incensed. He had been visibly upset with the Judge's ruling, and as the hearing had ended, he mouthed a threat of physical retaliation to his opposing counsel if such conduct by counsel repeated itself in the future. As Casey had turned to attend to his devastated client, he heard Judge Franklin say emphatically, "Mr. Bryant, I want to see you in chambers as soon as you are through," and that command had led to where he now found himself.

You have 24 hours to be mad at me and opposing counsel. Then get over it! It's water under the bridge.

In chambers, a calmer Casey faced Judge Franklin across the desk. Franklin was an able and experienced jurist in handling the emotional outbursts that routinely occur in a courtroom. It was said that he was the only jurist in the history of the state of Oregon who had to sentence the same defendant to the death penalty on three different occasions after the Supreme Court had reversed her convictions on appeal. That case, in which the defendant had thrown her lover's children off a bridge over a deep canyon, had earned for Judge Franklin an abiding respect among the members of the local bar who knew of the personal torment that the judge

had suffered throughout those proceedings. As Casey sat there, he wondered what fate would befall him in light of his conduct in the courtroom. Judge Franklin looked at Casey with a slight smile. He was about to impart a speech that he had made many times before to lawyers who practiced in his court. "Casey," Judge Franklin said, "Remember this as long as you practice law: We judges and lawyers all have to work together to accomplish justice through the exercise of our respective roles in courtroom. Sometime soon, you'll have to appear before me and against opposing counsel again. You have 24 hours to be mad at me and opposing counsel. Then get over it! It's water under the bridge." Casey turned to Mollie as he recounted the story, and said, "You know, Judge Franklin was right. Harboring what happened in the past only hurts you and all your future clients."

READ THE STATUTE!

Mollie remarked, "Everything I encounter seems brand new. All the case law principles I learned in law school seem like they have very little application to what I am doing now." Casey smiled as his thoughts took him on another journey to the past. He saw himself in that new suit he had bought after graduation from law school; the newest associate in the firm, walking into Joe's office, the senior partner of the firm. He had been assigned the task of writing a memorandum by the senior partner involving a complex case, and he had spent the last two days poring over all countless court cases on the subject. He explained to Joe that despite his efforts, he had been unable to find a case on point. Casey asked the question that up until now his pride had prevented from asking: "Do you have any suggestions about where to find a case on point?" Joe looked at him suspiciously. "Casey, have you discovered *Jones v. Simpson Chevrolet*, 135 Or 277, during your

A good legal analysis always begins with legislative intent and proceeds from that source; always look for an applicable statute before you go pouring through a bunch of cases with varying facts.

research?" Joe was famous in the firm for his photographic memory regarding case law and their cites. Casey was euphoric despite his disappointment that he hadn't found *the* case. He jumped up and headed out Joe's office, eager to pull it off the shelf and read it. "Just a minute Casey," Joe barked, "Have you looked for any applicable statutes?" Casey paused. Statutes? It hadn't occurred to him that there might be a statute on the subject. Joe continued, "These days, there is very little common law left. Most subjects of case law are embodied in statute. Casey, a good legal analysis always begins with legislative intent and proceeds from that source; always look for an applicable statute before you go pouring through a bunch of cases with varying facts. Lawyers are 'word smiths;' the words of statutes are the primary tools of our trade just like the anvil is the tool of the blacksmith."

OBJECTION, YOUR HONOR!

Mollie said to Casey, "Next week, I have a trial in circuit court before Judge Kranky. Can you give me any hints about practicing before him?" Again, Casey thought about the lessons Joe had taught him. Joe had always taken Casey to trial with him. As time went on, Joe allowed Casey to participate in the trying of the case. It became legend in the local bar association about how Joe always "spitting" in Casey's ear as they sat together at counsel table during a trial. Once, while in trial, Casey heard Joe whisper, "Object! Object!" Casey stood up and roared, "Objection, your honor!" Judge Kranky peered over his glasses at Casey. "And what might be the grounds for your objection, Mr. Bryant?" Casey looked at Joe. Joe smiled back without a word. It was a set-up. Without hesitation, Judge Kranky performed the *coup de grace*.

Part of the role of an advocate is to communicate information that will inform as well as persuade.

> "Mr. Bryant,' he admonished, 'What you say you in a courtroom may eventually cause your client more harm than good because once expressed, the words you speak take on a life of their own. Be careful about snatching defeat from the jaws of victory. And by the way, don't make an argument in my court unless that you have a pre-conceived reason in mind that will produce a good result for your client.'"

Casey turned back to Mollie. "Rule number 1: when in court, think before you speak!"

THE EDUCATOR!

Mollie continued, "I watched you in court the other day. Judge Kranky excluded testimony that you offered, and you insisted on making an offer of proof by eliciting the testimony that he excluded. It required the jury to be excused, it interrupted the flow of the trial and besides that, you irritated Judge Kranky. Was that wise? Casey explained,

A successful advocate always gives the bench the opportunity to become informed about both the law and the evidence.

> "Making the record in the trial court is essential to any successful appeal. Appellate courts affirm more appeals on the basis of a lack of preservation of issues in trial courts and administrative tribunals than for any other reason. My mentor in the practice of law taught me that part of the role of an advocate is to be an educator in the courtroom, whether it be to educate the jury or the court."

Mollie interjected, "What do you mean acting as an educator? I thought that being a trial lawyer meant being an advocate for your client!" "You're right," Casey replied, "But your audience, the judge and the jury, or an appellate court panel, is not as informed about the facts and the law as you should be as the result of your pre-hearing preparation." Casey continued,

> "Part of the role of an advocate is to communicate information that will inform as well as persuade. Judges make rulings based on their understanding of the law and the evidence. A successful advocate always gives the bench the opportunity to become informed about both. That process is the educational part of being an advocate."

Casey gestured with a closed fist, as if to punctuate his emphasis,

> "Mollie, always, always do what it takes to make your record even if a court is resistant to that

suggestion. Be respectful, but make your record. As you prepare for a trial, you should anticipate adverse rulings. Think about and prepare the groundwork for an appeal in your pretrial preparation and while you are conducting the trial just as much as you prepare for the trial itself. In the unfortunate event that you receive an adverse ruling from the court, then you are prepared to make your record for purposes of appeal. And remember, whatever it is that you are offering to the court, a proffer of evidence, a requested jury instruction, a motion for a legal ruling, your task is to educate the court on why it should rule in your favor. Education of the court only occurs when you state your grounds clearly. And never forget, what you say in the trial court is what you have to live with on appeal."

What you say in the trial court is what you have to live with on appeal.

CANDOR

"Speaking of appeals," Mollie said, "Next month, I am scheduled to go to Salem and argue before the Court of Appeals. What can you tell me about practice before them?" Casey continued,

> "Mollie, what I am going to tell you now is the most important thing that I have said to you so far, and it is applicable to any court you practice in. The practice of law is a noble profession, and because our duty as lawyers is to promote the rule of law, the profession of law is entitled to be honored by those who practice it. Without our court system, without the rule of law, we would live in anarchy. Under the constitutions, an independent judiciary functions as a check and balance on the exercise of power by other branches of government. The people who serve as judges take their responsibility seriously—to see that justice is done in their courts. Because they hold in their hands the trust that the public has bestowed on them, they take a dim view of any chicanery. They

are like elephants. They have long memories. Often during oral presentations, that they have to accept what you represent to them as the facts and the law. Remember, you are an officer of the court as well as an advocate for your client. The building a relationship of trust with judges is essential to the representation of your clients in a professional and competent manner. If you ever breach that relationship, or if a court perceives that you have misled them, a court will always view everything you present in the future with suspicion and doubt. Be candid! If you don't know the answer to the court's questions, say so! Always resist the temptation to bluff through or circumvent an inquiry from the bench. Think of it in these terms. The integrity of the judicial process depends on the accuracy of the representations about the facts and the law made to the bench, and you, as a lawyer, along with your fellow members of the bar, are the guardians of that process."

THE END GAME!

The grandfather clock in the office entryway was striking five o'clock. Delores was scurrying about in the outer office doing the things needed to bring another business day to an end and to prepare for the onslaught of the next morning. Mollie looked at Casey. "Any final words of wisdom?" she asked. "Just remember," Casey said, "The practice of law is a means to an end. The end game is not how many toys you acquire, wealth or prominence in the community. Those things have little lasting value. All the rewards of successes and agony of disappointments will disappear amid the blur of the passing years. What will remain and will have lasting value are the intangibles, the changes in the lives of the people that you have helped and the relationships that you make through the practice of your profession."

What will remain and will have lasting value are the intangibles, the changes in the lives of the people that you have helped and the relationships that you make through the practice of your profession.

"And now," Casey concluded," If you will excuse me, I have an appointment to keep with an old adversary."

GETTING TO KNOW US: JUDICIAL OUTREACH IN OREGON

By Mary J. Deits and Lora E. Keenan

This article was originally published in the Journal of Appellate Practice and Process, 6 J App Prac & Process 237 (2004), and is reprinted with permission of the William H. Bowen School of Law, University of Arkansas at Little Rock.

I. THE CASE FOR OUTREACH

With a combined twenty-seven years of experience in state appellate courts, we have come to realize there is a bit of truth to the idea that appellate judges live in ivory towers. Our isolation is a result, at least in part, of the quantity and nature of our work. With between 3,000 and 4,000 new cases each year, our workload is unrelentingly overwhelming—we are always behind. To encourage the frank and open exchange of ideas, our deliberative process is confidential and shared only among our judges and staff. Except for oral arguments, our jobs present few opportunities for contact with lawyers or members of the public. As a result of this isolation, even though our decisions have dramatic effects on citizens of our state, few members of the public, except for a small group of lawyers, know who we are or understand what we do.

Despite the limited time available to the members of our court, it is critical that our judges take the time to interact with citizens of our state in order to help them to understand who we are and what we do. Such interaction also gives us, as judges and court staff, the opportunity to gain a better understanding of other parts of the judicial system and legal community, and of the larger community that we live in and serve.

Our court, like many courts today, is subject to increasing criticism from various sources. On the one hand, the media typically does not give our opinions much attention, except when the decision is controversial or the case involves some sort of celebrity. The day-to-day work of the court and the vast majority of our decisions—many of which have tremendous effects on the citizens of our state—are given little notice. On the other hand, courts in general and our court in particular are the objects of

increasing criticism. We are criticized because decisions are not made fast enough, because we did not reach the "right" or the "fair" decision, and because some believe that our decisions are driven by political or personal motives.

Some of this criticism is unavoidable: When you are deciding cases, someone loses, so there will always be someone unhappy with any decision that our court or any court makes. When you are a member of an appellate court, you will sometimes reverse the decisions of trial court judges. There certainly is no way to avoid some dissatisfaction with our court and the judicial system as a whole.

Nonetheless, we should not ignore the apparently growing dissatisfaction with the courts. We must do something to address this problem. There is no question that the erosion of respect for and support of our legal system is seriously undermining, and will continue to undermine, the effectiveness of the courts in this country. We cannot simply hope that the situation will change on its own; we need to persuade our legal and broader communities that the appellate courts play a significant role in our democracy, and that respect and support for the court system is vital to its continued effectiveness.

Some of the criticism the courts receive is unfounded and based on misconceptions about how appellate courts function and the role of law and courts in our society. In our view, education about who we are and what we do is among the most effective tools for overcoming this sort of criticism. Over the last several years, it has been a priority of the Oregon Court of Appeals to provide that education firsthand, both by inviting "outsiders" into our court and also by taking some proceedings of our court outside its usual venue.

II. TRADING BENCHES

In assessing how we might develop some sort of outreach program to address this problem, the members of our court decided that we should consider non-traditional means of getting our message out. One of the first places that we found to begin enhancing the understanding of the role of our appellate court was in our own backyard. From casual conversations with trial judges throughout the state, it became clear that some of our own state trial judges had complaints about our court and sometimes

misunderstood its function. One trial judge half-jokingly suggested that appellate and trial judges ought to occasionally change places. That almost-joke turned out to be an excellent suggestion and, about five years ago, we began a program for the trial and appellate bench to do just that.

The first judge whom we invited to sit with our court was the trial judge who had made the suggestion. He readily accepted our invitation. His participation proved to be a great success from both our perspectives. Since that time, about four to six times each year, we have invited trial judges from throughout the state to sit with our court. Some of the judges have sat with us a number of times and others have sat for one day. Typically, our visiting judges hear a docket of ten to fifteen cases, and a visiting judge typically will be assigned one or more cases for preparation of a written decision.

We have also kept our end of the deal. Although logistics have prevented us from doing direct exchanges with the trial judges who come to sit with us, a number of the ten judges on our court (only two of whom are former trial judges) have sat throughout the state as trial judges. Our appellate judges have had the chance to preside over civil and criminal trials and to hear the full range of motions and other procedural matters that a trial court must deal with on a daily basis—a completely new experience for most of them.

The benefits of our program, to both trial and appellate judges, have been significant, often in unexpected ways. Although Oregon has a fairly small legal community and our appellate courts traditionally have had a reasonably good relationship with the 169 trial judges of the state, nevertheless, we often hear the same criticism from the trial bench that all appellate courts frequently do—that we don't write decisions on enough cases (we have the option of affirming cases without opinion), that we are too slow in issuing opinions, that our opinions are not sufficiently clear, and that we don't have a sufficient understanding of how the "real world" works.

The time that our visiting trial judges have spent with us has given them a new, enhanced understanding of the appellate process. Many of the trial judges who have participated in appellate decisionmaking have expressed a new understanding of how difficult it can be at times to issue the sort of quick, clear opinions that reach results likely to work best in the real world. Our visiting judges have indicated that they have gained a new understanding

of many aspects of our work: the necessity that issues be preserved in the trial court before we address them, the importance of the proper development of the record, the need to issue decisions affirming the trial court without an opinion in order to manage our workload, and the challenges that we sometimes face in trying to reach the result that makes the most practical sense, given the way in which the parties have presented the issues, and the restraints in the statutes and case law.

The trial judges have also expressed a new appreciation of the very real differences between their decisionmaking as trial judges and the decisionmaking process of an appellate court. Some of the judges who have sat with us said that one of the things they learned was that they loved their jobs as trial judges, and that the experience made them realize that they would not want to be appellate judges on a permanent basis. As one longtime trial judge commented:

> Although trial judges do discuss issues with other judges, it is not the same. The appellate panel attempts to reach agreement on what the issues are and how they should be decided. It is a shared decision whereas the trial judge makes a decision by her or himself. That process is different and takes some rethinking to take part in it. Along this line, when I started reading briefs, I stopped and reminded myself that I was looking at cases and issues through a different set of eyes and that my approach had to be different. During conference, I had to remind myself a couple of times that I was not to look at how I would have decided the case, but whether issues were properly raised or discretion appropriately exercised. The experience was similar, although not to the same degree, as becoming a trial judge in the first place. Someone gave me a robe and said go on the bench. The change from being a lawyer to a judge was a rather big one and a learning process that took quite awhile to have a comfort level. I can see that it would also take some time to get a comfort level to sit on the appellate bench.

Another experienced trial judge said:

> The conferences to decide whether to hold an opinion or have it go out lead to interesting discussions and can lead to a reassessment of a position or how a

> decision should be made. I do not get that normally at the trial level because of the time. It is nice to reflect and take the time necessary to make the best decision possible. I also learned to appreciate the necessity of analysis of issues that will help me do my job. I analyzed issues, but did not in the same way I will now. I have a better appreciation of following a specific method of analyzing issues. The Court of Appeals has an excellent method of going about its work and although not all of it can be done in the trial court, some can.

As helpful as it has been for trial judges to sit with us, perhaps it has been even more helpful for the members of our court who were not trial judges to experience life as a trial judge. Judge Deits's experience as a visiting trial judge was, for example, a real eye opener:

> I have worked as an appellate judge now for nineteen years, and I am used to our fairly predictable and orderly life. I had forgotten, or to be more accurate, I never really knew, how free-flowing and sometimes chaotic proceedings in a trial court can be. In my work as a trial judge, I had to handle constant schedule changes and new developments of all kinds. New issues were continuously arising in circumstances in which I did not have the chance to look up the answer! I definitely had new insight into how much work it is and the different skills it takes for a trial judge to manage a case and the courtroom.

All of the appellate judges from our court who have sat as trial judges have come back with new respect and insights. As one of our judges stated about his experience working on the trial bench of one of our state's larger counties:

> Before becoming an appellate judge, I respected trial court judges because I knew that the docket demanded speed. Once I sat on the trial bench, my respect only grew. After observing the trial court judges in action, I am truly amazed at the speed they work at and how much justice is achieved as a result. Different "things" came up that just had to be dealt with on the spot.

Another observed:

> My respect for trial court judges deepened. Being on the trial bench is very hard work. It requires a broad range of skills. Not just an ability to cite and apply a relevant rule of evidence, but also an ability to work with people who are in very stressful situations, an ability to listen at several levels at once, and an ability to make a decision quickly. I remember during the first case that I tried when one of the lawyers said the words, "I object." My first instinct was to think to myself, "That's an interesting question. I should get my law clerk to do a memo on that." Of course, I didn't have that luxury. Trial judges rarely do.

One aspect of the work of a trial judge that made an impression on all of our judges is how much more emotionally challenging and difficult the decisionmaking process can be at that level. Although many of our decisions can be emotionally challenging at times, it is much different from having to deal directly with the parties affected by a decision. As one of our appellate judges stated:

> It's one thing to read a transcript in a child custody case to determine whether the trial court erred in awarding custody to one parent or the other. It's another matter entirely to sit in court, listen to the parties explain how much each loves the child, and then look them in the eye and tell them your decision. I found that very difficult.

Both the trial and appellate judges who have participated in our program have expressed great anxiety in leaving what might be referred to as their comfort zones. Without exception, however, each has found the experience to be rewarding and enjoyable and believes that he or she is a better judge for the experience. The judges and staff of trial courts that we have visited have been incredibly supportive and appreciative of our efforts.

III. A COURT OF APPEALS ON WHEELS

At about the same time that our judge-exchange program began, we also started looking for additional ways to interact with the various communities in Oregon with the objective of familiarizing them with our judges and the role of our court. All of the judges

on our court spend considerable time speaking at continuing education programs and participating in various bar activities. However, we wanted to increase the exposure of our court's operations throughout our state. We hoped that such interaction would help to restore support and respect for our judicial system in general and for our state's appellate courts in particular.

Oregon is a geographically large state—96,002 square miles—but sixty percent of its population is located in five of its geographically smallest counties in the northwest corner of the state. Much of the state's population is clustered around Portland, which is by far the most populous city in the state, with about twenty percent of the state's population, and Salem, the capital. Although the jurisdiction of the Court of Appeals is statewide, all ten of our judges have their chambers in Salem. Except once a year, when the court sits in a small town in the eastern part of the state—a local legislator many years ago got a law passed that requires the court to hear certain cases there once a year—our court never left the capital. We wanted to close the gap between us and many of the places our cases come from. In addition, we wanted more people to see what we do. Typically, our courtroom is sparsely populated: the lawyers arguing the cases before us that day, a few of the parties in the cases, and members of our court staff. Although our courtroom is open to the public, few members of the public attend arguments.

In order to increase the visibility of our court and promote understanding of how the court really works, we decided that we needed to move out of our courtroom and out of the capital. We thought that an appropriate place for the court to hear cases throughout the state might be in schools. Consequently, we began our experiment by setting arguments in a few high schools in different parts of the state.

Our statewide school program has proved to be a huge success. We have now heard cases in about forty high schools, junior high schools, and colleges in all parts of our state. As a group, the court has logged over 9,000 miles of travel, including destinations where statewide elected officials rarely appear. Not only has the program allowed citizens to see firsthand how the court operates, to ask questions, and to interact with and get to know the judges of our court, it has provided us with the chance to observe and interact with the diverse communities and individuals of our state and gain a better understanding of their perspectives.

Since the beginning of the program, our court has held oral arguments outside our Salem courtroom about six times a year. Immediately after we began the program and publicized our willingness to travel, we received numerous invitations from schools throughout the state. To date, we have visited only schools that have invited us to come to their campuses. Although we have found these visits worthwhile, we have noticed that the schools that have invited us to tend to be ones that have an excellent program on government already in place. More recently, we have made an effort to not only respond to the invitations that we receive, but to invite ourselves to schools that do not have such programs in place.

The majority of our visits have been outside of the state's largest population centers. Typically, the process begins when the Chief Judge is contacted by a trial judge from one of our state's thirty-six judicial districts or by a representative of the school where the arguments are to be held. We identify a date for the arguments—usually about six months ahead, and the planning begins.

On the court's end, one of our staff members coordinates all of the logistics of the visit. She works with the presiding judge of the local trial court and the representative of the school on the details of the visit. As soon as possible, the presiding judge of our panel that will be hearing the cases selects cases that will be set for argument. We attempt to choose cases that involve local lawyers as often as we can. We also try to select cases that will be interesting to the students. Among many other issues, we have heard cases about searches of student lockers, arson in school settings, cattle rustling, an auto accident involving twelve teenagers in a Volvo, free-speech issues, and students suspended from school. Our court provides the briefs and case summaries to the schools well in advance of our visit so that teachers have the opportunity to present and discuss in class the issues the students will be hearing.

Students also learn about the general operation of the court before our visit. The discussion of the cases and court operation sometimes is led by a teacher, but often local lawyers or judges volunteer to talk with the students, so the program has the additional benefit of introducing students to the local court and legal community.

Schools hosting the visits and local lawyers and judges engage

in substantial preparation for our visits. The schools must adapt their gym or assembly hall as a courtroom for a day. Teachers and administrators must often alter class schedules to allow students to attend oral arguments for several hours. As mentioned above, teachers or local lawyers and judges often brief the students in advance on the cases they will hear.

Also, in most communities, the local bar association arranges a social event that gives our judges the opportunity for informal interaction with the bar. Because Salem is so distant from many of these communities, this is a valuable opportunity for us to get to know one another. Local bar leaders also often arrange for our judges and staff to attend and speak at community organizations, such as service clubs. As time permits, our judges also visit classrooms at other schools and colleges in the area. The judges also meet with local newspapers and other media.

The schedule for hearing oral arguments is coordinated as much as possible with the school schedule. We usually start oral arguments around 8:30 in the morning. We always invite legislators from the area, who occasionally attend and sometimes introduce the court. We also invite members of the local bench, and the court is often introduced by the local presiding judge. It always makes the appellate argument more interesting when the trial judge who decided the case is in the audience! More recently, we have also been inviting one of the local trial judges to sit on the panel for one or more of the cases. The arguments are well attended by students (often from other schools as well as from the host school), by teachers and administrators, and by community members. Following the arguments, our judges answer questions from the audience.

We have been amazed at the incredibly good behavior of the students. With very few exceptions, the students have quietly listened to the arguments and acted completely respectfully and appreciatively toward the court. We have also been impressed with the extent of the welcome we receive at many schools. Often we are treated to lunches prepared by school cooking classes, and once we dined while being serenaded by a school's string quartet! The care taken by the staff and students of these schools shows how honored they feel by our visits.

As time permits, our judges often visit individual classrooms

after the arguments to discuss the role of appellate courts and to answer students' questions. For the judges, at least, this is the most rewarding part of the visit. We usually get a few questions that might be characterized as "interesting," such as, "How much do you make?" or "What's the worst thing you ever did?" and "Have you ever been in jail?" However, most of the questions are extremely thoughtful and insightful, and sometimes surprisingly sophisticated; the amount of preparation by students and teachers is often shown in these question-and-answer sessions.

Comments we receive by way of thank-you notes from students, teachers, and administrators are the best evidence of the impact of our visits. Students learn that real courtrooms are not what they see in the media. One eighth-grade student wrote:

> My first impression as I walked in was that it would be just like TV. When the hearing began, my thoughts quickly changed, as yelling, angry and arguing people were replaced by calm and friendly ones. The hearing was almost a conversation between attorneys and judges.

They also learn that we are real people striving to do good work. Another student wrote:

> I suppose that many young people view judges of all kinds with awe and mysticism. Yesterday I learned that judges are indeed human, but the awe I feel has only grown. I have an even greater admiration for judges who serve our state with such diligence.

Even school administrators have been pleasantly surprised by our approachability. One principal wrote to tell us that "[t]o be honest, I was expecting your visit to be very formal and somewhat removed from the lives of our students. The exact opposite was true."

Perhaps most surprisingly, even the youngest students have shown a remarkable grasp of the heart of the judicial process and the importance of keeping an open mind. One student commented about a case we heard in her school by saying, "As to the other defendant, I am not quite sure. I used to think she was guilty, but after hearing the case yesterday I don't know anymore."

Our visits are extraordinarily well received in the larger community as well. Local newspapers often send reporters and

photographers to our school visits and publish extensive stories on the events. Without exception, these stories include extremely positive comments about the court and the judges. The articles often include comments from students, teachers, and community members about what a valuable learning experience it has been. One member of the public at a visit to a small eastern Oregon town was quoted in the local paper:

> Earl Tarbell of Elgin, who will be 90 next week, also was enthusiastic about the opportunity to watch the appeal of a case in which he was involved heard in Baker City. "'It's a lot better than Salem—that's a long ways away," he said .... Tarbell said he wasn't opposed to having his case argued before a large audience of high school students. "I think it's a good idea," he said. "It gives them an idea of how things work." And he was impressed with the attention the students gave the court session. "I've never seen kids so quiet in all my life," he said afterward.[1]

Through our community outreach program in the schools, we have been able to reach thousands of students and community members with a positive message about our court and the judicial system in general. The personal interaction during these visits has allowed us to convey not only that judges are hardworking individuals dedicated to our jobs, but also that we are very real human beings, capable of making mistakes, but trying our best to carry out the law. Many citizens have told us that, after meeting the members of our court and learning about our work and observing us, they view the court and the individual judges in a much more positive light, and that they view our decisions as based more on what the law required us to decide rather than on personal agendas of the judges.

As this summary shows, the costs of the program are minimal, but the rewards are many. Not only does the program slowly but surely increase public respect and support for the courts of our state, it provides each member of our court with a very enjoyable and valuable opportunity to learn and improve as judges.

IV. THE BENEFITS OF OUTREACH

Despite a heavy workload and a lack of time, members of the appellate judiciary simply cannot put their heads in the sand and ignore increasing problems of lack of respect and support for the

judicial system. Working hard to issue quality, timely decisions simply is not enough. Judges must take the time to address the growing misperception of the role of the courts and of the judges who serve on our courts. Our court's experience with its outreach programs demonstrates that taking a proactive approach and educating our communities can be an important means of addressing misunderstandings about the role of the courts. In addition, we have found that these programs have had unexpected benefits for us as judges and individuals, enriching our appreciation of our state and the communities we serve.

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1 Chris Collins, Students See Court in Action: Three Appeals Heard in BHS Auditorium, Baker City Herald 1, 3 (Sept 25, 2002).

SUPREME SMACKDOWN: EXTREME ORAL ARGUMENT

By James Nass

Extreme Makeover: Home Edition. Extreme sports. Extreme oral argument—an idea whose time has come. Appellate court procedures are particularly arcane. Trial court proceedings frequently are featured in movies, television shows, and novels, but appellate court proceedings seldom are. It has become clear that appellate oral argument needs more production value. The following suggestions merit serious consideration. (The author readily acknowledges that none of the ideas are new and that he has borrowed heavily from other competitive arenas.)

Oral argument should be called "smackdown" (if professional wrestling has not copyrighted the name). Oral argument in the Oregon Supreme Court would become known as "Supreme Court Smackdown" or, even better, "Supreme Smackdown".

Instead of referring to "cases", we should refer to "bouts".

As an alternative to the traditional black robes, justices should consider wearing robes in a variety of colors and fabrics. The colors would have to be tasteful, of course, like burgundy or forest green; for the less conservative, a creme- colored robe might work; and, for the daring, a teal or turquoise robe would add a little color to

the proceedings. For the truly adventurous, a robe could feature a little fringe here, a boa there, and so on. It has been suggested that the robes could feature advertising much like the jackets worn by professional race car drivers, with the revenue generated by such advertising used to support, for instance, public defenders or legal aid. However, even with revenue devoted to such causes, acceptance of advertising on judicial robes might come perilously close to violating one or more provisions of the Code of Judicial Conduct; therefore, the author cannot endorse that idea.

Procedurally, before each oral argument bout begins, the lights in the courtroom should be dimmed, accompanied by appropriate music played over the sound system. Appropriate music might include "Chariots of Fire" or the theme song from "Rocky I". Tunes like "YMCA" by the Village People, although popular, should not be used because of their political overtones and because they might detract from the solemnity of the proceedings. Laser and spot lights flashed about the courtroom would be useful in highlighting two outstanding features of the Oregon Supreme Court courtroom: the bench and the stained glass ceiling.

Entry of the justices into the court room could be greatly improved. A carbon dioxide machine could be installed near the door where the justices enter so that each judge could enter amidst what would appear to be a cloud, suggestive of the gods some might image themselves to be. The services of a professional announcer, such as the announcers who do professional basketball games, should be retained. As the justices entered the courtroom, a spotlight would focus on the justice, the justice would pause a moment while the announcer would identify the justice, the law school from which the justice graduated, and the justice's years on the bench, the justice's position number, and the justice's record of majority, concurring, and dissenting opinions. As each justice was introduced, the justice would take his or her place at the end of the line behind the bench, giving high-fives to each of the other justices. The Chief Justice would be introduced last with something like, "And, now, ladies and gentlemen, I give you your Chief Justice, on the Supreme Court bench since 1982, occupying Position No. 6, out of Willamette University College of Law, with a record of 185 majority opinions, 10 concurring opinions, and six dissents, the right Honorable Wallace P. Carson, Junior-rr-r-r-r-r.!!!"

After the Chief Justice was introduced, the justices would huddle

briefly while the Chief said a few encouraging words (no prayers, of course), and then the justices would break, shouting something like "Team Supreme!" or "Justice for All!" before jogging to their respective chairs and sitting down.

At that point, the Chief Justice would direct the assembly's attention to the main door of the courtroom where persons attending as observers would line the entry way from the door to the counsel seating area. The spotlight would focus on the front door, the bailiff would fling the front door open and the contestants' attorneys would be introduced. Counsel for the undercard bouts would be introduced first, followed by counsel for the main event. The script for the main event could be something like, "For today's main event, *Stranahan v. Fred Meyer*, representing the appellant, out of Harvard University, with a record of six reversals, three remands for further proceedings, four affirms, two dismissals of review as improvidently allowed, and one dismissal as moot, Charles "Sugar" Hinkle!" The attorney then would jog between the line of observers, giving them high (or low) fives, and take his or her place next to the appropriate counsel's table. Then, "Representing the respondent, out of the University of Oregon, with a record of five reversals, four affirms, and three dismissals of review as improvidently allowed, Greg "Da Bomb" Kafoury", and so on.

After all the attorneys and parties appearing *pro se* were introduced, the bailiff would shout "Let's get ready to ru-u-m-m-m-b-l-e!". The Chief Justice would announce each bout as the bailiff walked around the courtroom holding up a poster with the name of the next bout on it.[1] During oral argument itself, Supreme Court staff attorneys could provide in-courtroom analysis and color commentary. Such a commentator would need to affect the sotto voce characteristic of commentators at golf tournaments, making comments like, "Counsel will be driving by Woodburn before she thinks of a good answer to that question!" "Whoa, with zingers like that, who needs incisive analysis."

Because the format so-described might occasionally result in attorneys or parties coming to blows, the chairs in the courtroom should be replaced with lightweight, fold-up metal chairs that are easily picked up and appear to hurt when used to strike another person, but do little actual damage. Also, a state trooper should be stationed in the courtroom, in full uniform. As scuffles break out in the courtroom, the state trooper should pretend to be breaking

"I WILL NOT DO THAT WHICH MY CONSCIENCE TELLS ME IS WRONG, UPON THIS OCCASION, TO GAIN THE HUZZAS OF THOUSANDS, OR THE DAILY PRAISE OF ALL THE PAPERS WHICH COME FROM THE PRESS; I WILL NOT AVOID DOING WHAT I THINK IS RIGHT; THOUGH IT SHOULD DRAW ON ME THE WHOLE ARTILLERY OF LIBELS; ALL THAT FALSEHOOD AND MALICE CAN INVENT, OR THE CREDULITY OF A DELUDED POPULACE CAN SWALLOW * * * ONCE FOR ALL LET IT BE UNDERSTOOD, 'THAT NO ENDEAVORS OF THIS KIND WILL INFLUENCE ANY MAN WHO AT PRESENT SITS HERE."

J.R. v. Wilkes, 4 Burr 2527, 2562-632, 98 Eng Rpts 327, 347 (1770).

"COURTS DO NOT WEARY OF CAUTIONING COUNSEL TO DISTINGUISH DICTUM FROM DECISION. THEY MUST HEED THEIR OWN WARNINGS."

Smith v. Hedges, 223 NY 176, 184 (1918) (Cardozo, J.).

up the least serious incident while total mayhem goes on behind him or her. There are other possible variations of that scenario. For instance, a judge could lecture an attorney on the attorney's failure to comply with the Oregon Rules of Appellate Procedure regarding proper font size for footnotes in the attorney's brief, while the attorney is raining blows on opposing counsel.

Lastly, outside the courtroom, a media personality such as Lars Larson could conduct pre- and post-bout "interviews" with counsel and *pro se* parties. In the course of these interviews, counsel would have the opportunity to critique their opponent's performance and the court's questions, boast, shout insults and threats at each other, and, occasionally, simulate fisticuffs, with the host appearing to try to separate the parties.

If an appellate court were to adopt some or all of these suggestions, oral argument could be a far more interesting experience than it is now, and would attract more media interest and public attention.

Up next for consideration: full contact oral argument, winner take all, in locked steel cages.....

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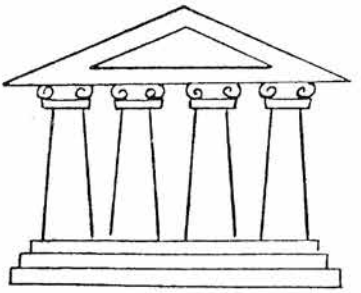
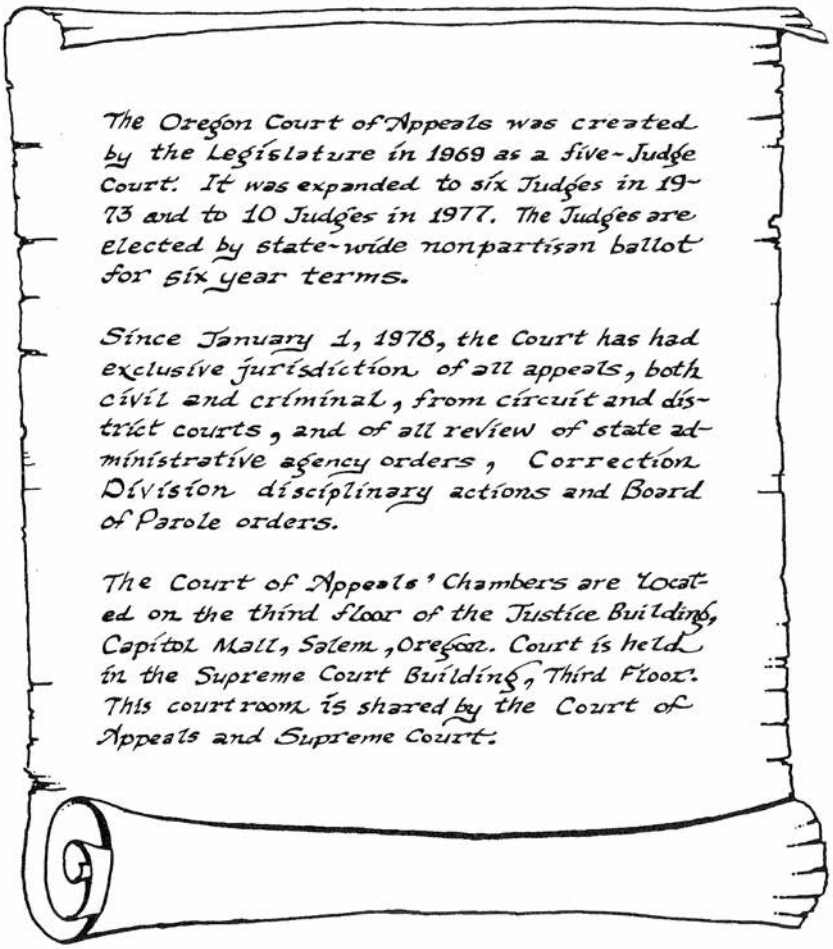
1 Appropriate training and monitoring would have to be instituted to insure that the bailiff not wear clothing that would detract from the decorum of the proceedings.

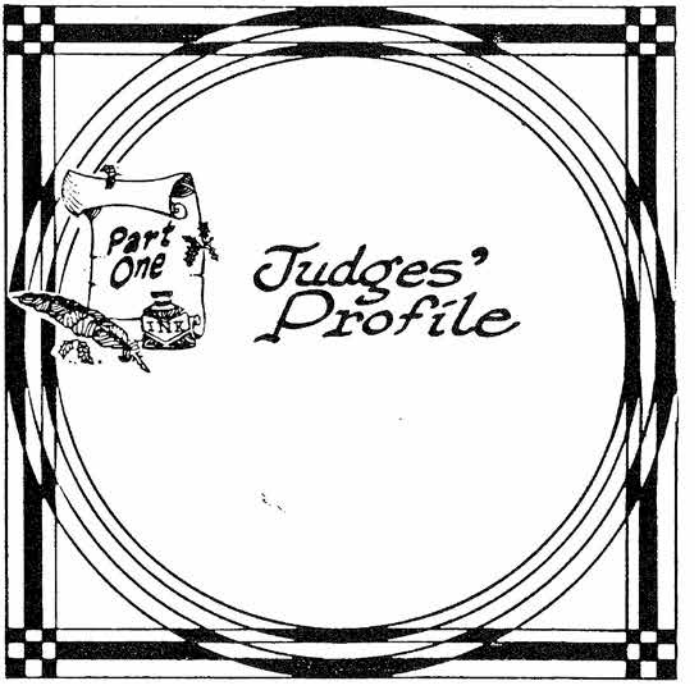
OREGON
COURT OF APPEALS

1982

ANNUAL REPORT




The Oregon Court of Appeals was created by the Legislature in 1969 as a five-Judge Court. It was expanded to six Judges in 1973 and to 10 Judges in 1977. The Judges are elected by state-wide nonpartisan ballot for six year terms.
Since January 1, 1978, the Court has had exclusive jurisdiction of all appeals, both civil and criminal, from circuit and district courts, and of all review of state administrative agency orders, Correction Division disciplinary actions and Board of Parole orders.
The Court of Appeals' Chambers are located on the third floor of the Justice Building, Capitol Mall, Salem, Oregon. Court is held in the Supreme Court Building, Third Floor. This courtroom is shared by the Court of Appeals and Supreme Court.


Part One
Judges' Profile

MEMBERS

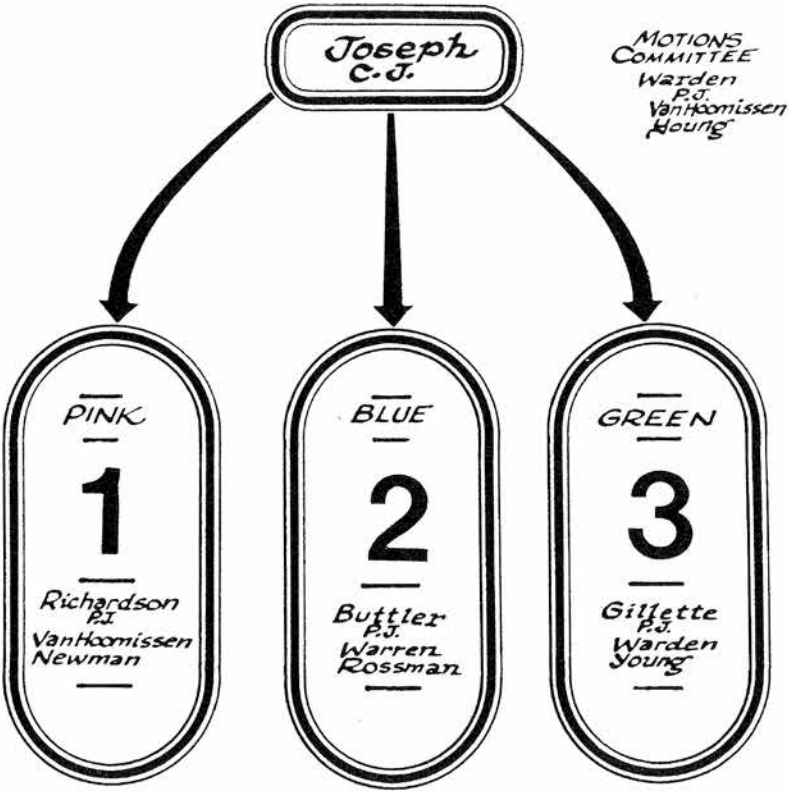
Oregon Court of Appeals

(AS OF JANUARY, 1983)

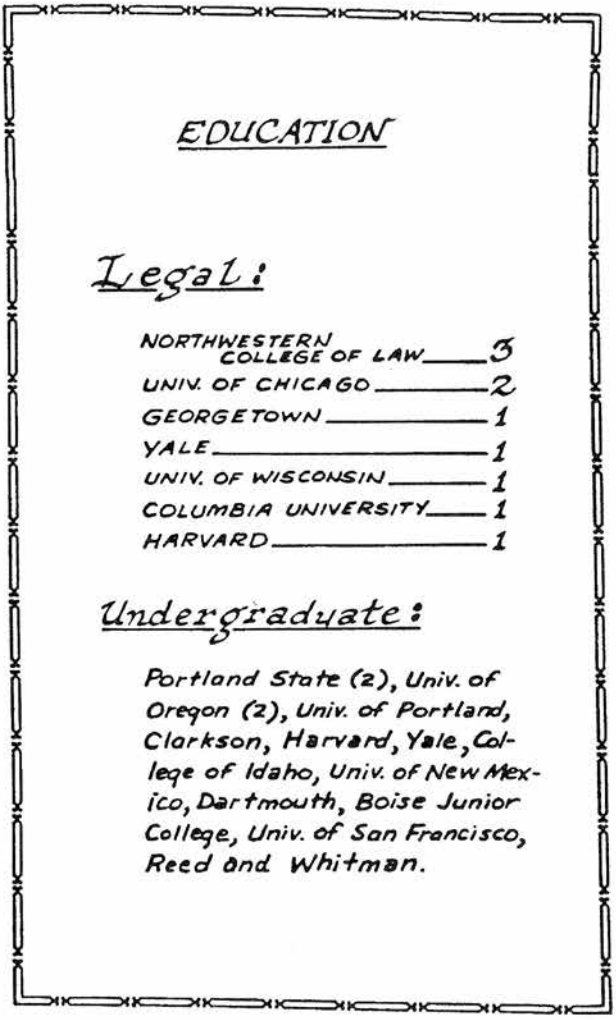
—Listed By Position Number—

		PRESENT TERM EXPIRES
1.	Thomas F. Young	1989
2.	Geo. A. VanHoomissen	1987
3.	John C. Warden	1989
4.	Wm. R. Richardson	1989
5.	Jonathan Newman	1989
6.	Edward H. Warren	1987
7.	John H. Buttler	1985
8.	George M. Joseph	1985
9.	W. Michael Gillette	1985
10.	Kurt C. Rossman	1989

Court Organization



THE COURT IS DIVIDED INTO THREE DEPARTMENTS. THE CHIEF JUDGE ASSIGNS THREE JUDGES TO EACH PANEL: ONE OF THE JUDGES IS APPOINTED BY THE CHIEF JUDGE TO SERVE AS PRESIDING JUDGE FOR THE DEPARTMENT.


EDUCATION
Legal:
NORTHWESTERN COLLEGE OF LAW 3
UNIV. OF CHICAGO 2
GEORGETOWN 1
YALE 1
UNIV. OF WISCONSIN 1
COLUMBIA UNIVERSITY 1
HARVARD 1
Undergraduate:
Portland State (2), Univ. of Oregon (2), Univ. of Portland, Clarkson, Harvard, Yale, College of Idaho, Univ. of New Mexico, Dartmouth, Boise Junior College, Univ. of San Francisco, Reed and Whitman.

AGES

Judges of the Oregon Court of Appeals

(AS OF JANUARY 1, 1983)

	Judge	Age	Birthday
1.	John C. Warden	59	1/20/23
2.	John H. Buttler	59	8/4/23
3.	Jonathan Newman	55	1/9/27
4.	Thomas F. Young	54	10/7/28
5.	Geo. A. Van Hoomissen	52	3/7/30
6.	George M. Joseph	52	8/31/30
7.	Wm. R. Richardson	50	1/10/32
8.	Kurt C. Rossman	50	12/27/32
9.	Edward H. Warren	46	3/6/36
10.	W. Michael Gillette	41	12/29/41

Average Age 51.8

PRIVATE PRACTICE EXPERIENCE

1.	Jonathan Newman	31 yrs ~
2.	John H. Buttler	26 yrs ~
3.	Thomas F. Young	23 yrs ~
4.	Edward H. Warren	12 yrs 10 mos
5.	George M. Joseph	8 yrs 6 mos
6.	John C. Warden	6 yrs 11 mos
7.	Wm. R. Richardson	4 yrs 8 mos
8.	Geo. A. VanHoomissen	4 yrs ~
9.	W. Michael Gillette	~ 8 mos

Total..... 117 years 7 months

Note: ONLY TWO JUDGES HAVE EXPERIENCE AS A SINGLE PRACTITIONER: Judge Van-Hoomissen - 4 years and Judge Warden - 2 years, 3 months.

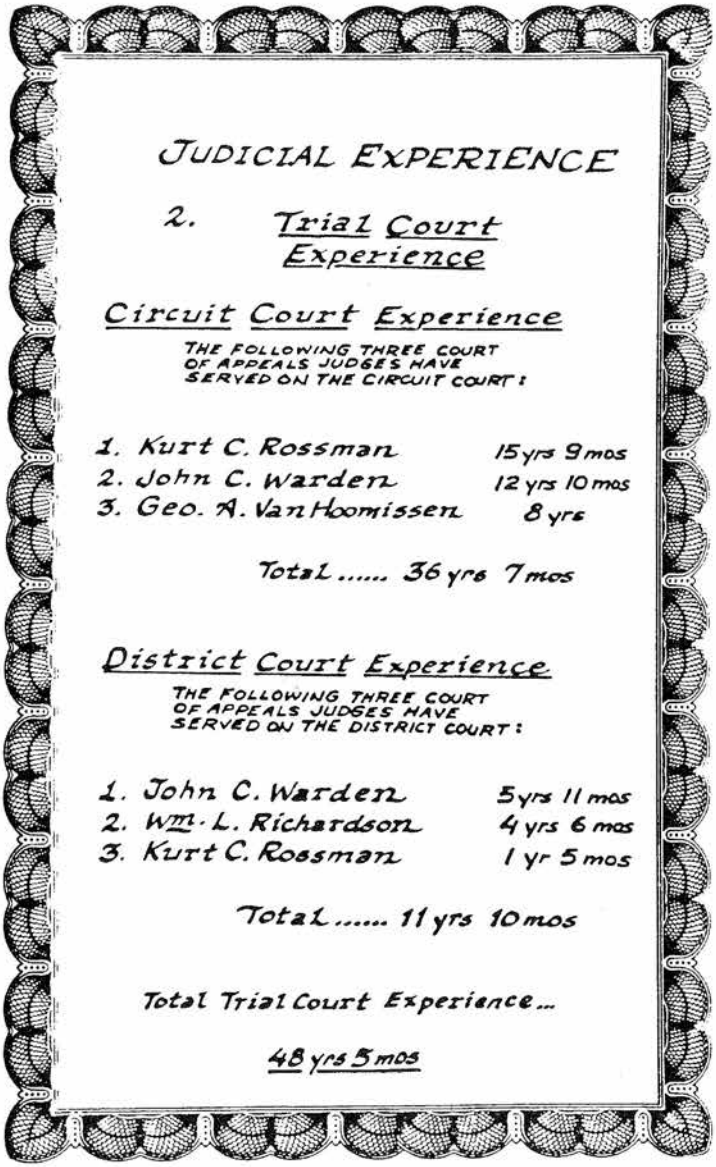
JUDICIAL EXPERIENCE

1. Court of Appeals Experience

(AS OF JANUARY 1, 1983)

1.	Wm. L. Richardson	7 years 2 mos.
2.	John H. Buttler	5 years 4 mos.
	George M. Joseph	5 years 4 mos.
	W. Michael Gillette	5 years 4 mos.
5.	John C. Warden	2 years 10 mos.
6.	Edward H. Warren	2 years 9 mos.
7.	Geo. A. VanHoomissen	2 years ~
8.	Thomas F. Young	2 years ~
9.	Kurt C. Rossman	10 mos. ~

Total ..... 33 years 7 months


JUDICIAL EXPERIENCE
2. Trial Court Experience
Circuit Court Experience
THE FOLLOWING THREE COURT OF APPEALS JUDGES HAVE SERVED ON THE CIRCUIT COURT:
1. Kurt C. Rossman 15 yrs 9 mos
2. John C. Warden 12 yrs 10 mos
3. Geo. A. VanHoomissen 8 yrs
Total ..... 36 yrs 7 mos
District Court Experience
THE FOLLOWING THREE COURT OF APPEALS JUDGES HAVE SERVED ON THE DISTRICT COURT:
1. John C. Warden 5 yrs 11 mos
2. Wm. L. Richardson 4 yrs 6 mos
3. Kurt C. Rossman 1 yr 5 mos
Total ..... 11 yrs 10 mos
Total Trial Court Experience...
48 yrs 5 mos

JUDICIAL EXPERIENCE

3. Total Experience in the Oregon Court System*

(AS OF JANUARY 1, 1983)

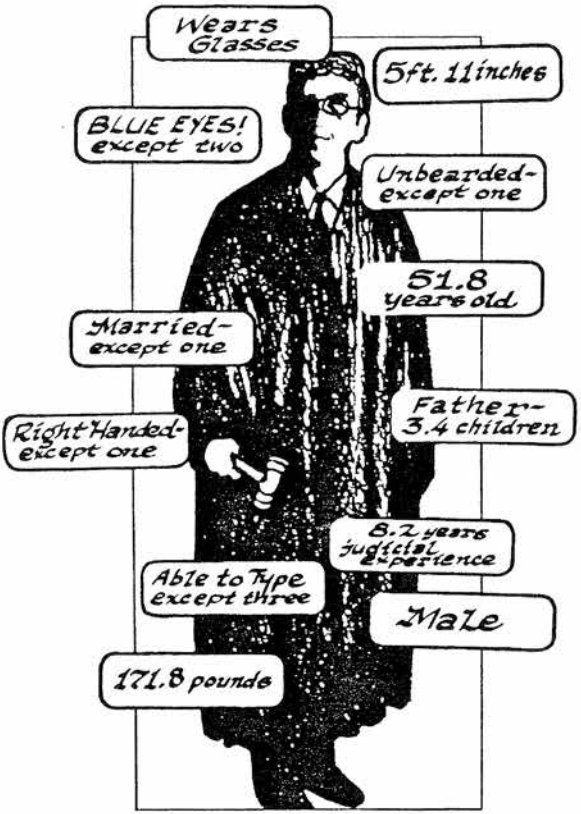
1.	John C. Warden	21 yrs 7 mos
2.	Kurt C. Rossman	18 yrs ~
3.	Wm. L. Richardson	11 yrs 8 mos
4.	Geo. A. Van Hoomissen	10 yrs ~
5.	John H. Buttler	5 yrs 4 mos
	W. Michael Gillette	5 yrs 4 mos
	George M. Joseph	5 yrs 4 mos
8.	Edward H. Warren	2 yrs 9 mos
9.	Thomas F. Young	2 yrs

Total ..... 82 years

* includes service of the District Court, Circuit Court and Court of Appeals.

NOTE: NO MEMBER OF THE COURT OF APPEALS HAS SERVED, BY EITHER APPOINTMENT OR ELECTION, ON THE SUPREME COURT.

The Composite Judge



FOUR JUDGES HAVE CLERKED IN OUR SUPREME COURT AND ONE CLERKED FOR CIRCUIT COURT WHILE ATTENDING LAW SCHOOL.

THE MEMBERS OF THE COURT HAVE A WIDE VARIETY OF WORK EXPERIENCE PERTAINING TO THE LAW, INCLUDING EMPLOYMENT AS COUNTY COUNSEL, DISTRICT ATTORNEY, LAND TITLE EXAMINER, DEAN OF THE NATIONAL COLLEGE OF DISTRICT ATTORNEYS, SOLICITOR GENERAL, LAW SCHOOL PROFESSOR, AND MANY MORE.

AMONG HOBBIES LISTED: OUTDOORS, SKI PATROL, CLASSICAL MUSIC, COOKING, HIKING, TENNIS, FISHING, PHOTOGRAPHY, WOODWORKING, BACKPACKING, CAMPING, READING, ASTRONOMY, EYGPTOLOGY, HISTORY, POLITICS, TROPICAL FISH, COMPUTERS, SPORTS OFFICIATING, PUBLIC SPEAKING, TEACHING, MOTION PICTURES, CARTOONING AND NOSTALGIA COLLECTING, ETC.


Part
TWO
INK
Workload
and
Statistics

ANALYSIS of CASES FILED

1982 - 1981 // COMPARED

		% of total cases filed	Filings 1982	Filings 1981	Gain or Loss
1.	Criminal	36.9	1333	1346	-13
2.	Civil	21.2	767	797	-30
3.	Workers' Comp.	11.3	410	318	+92
4.	Ad. Review	10.3	372	239	+133
5.	Domestic Relations	7.3	265	249	+16
6.	Disciplinary Review	3.2	116	98	+18
7.	Traffic	2.9	107	92	+15
8.	Parole Review	2.4	88	102	-14
9.	Juvenile	1.2	46	52	-6
10.	Post Conviction	1.2	44	45	-1
11.	Habeas Corpus	0.5	19	24	-5
12.	Probate	0.5	18	13	+5
13.	Mental Commitment	0.4	15	--	+15
14.	Adoption	0.2	8	5	+3
15.	Other	0.1	3	2	+1

	1982	1981
Oral arguments heard	2,092	2,222
Cases submitted on briefs	160	157

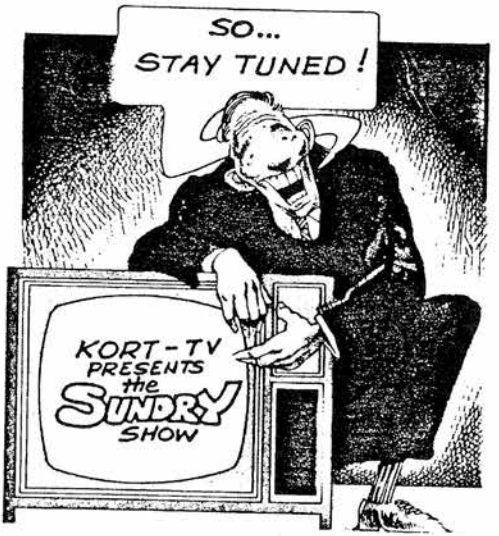
COURT OF APPEALS

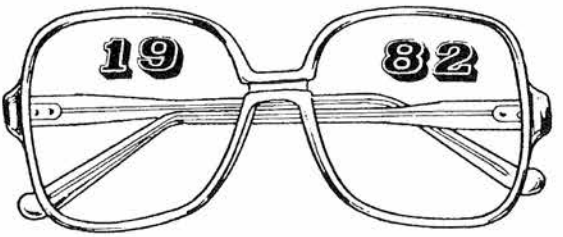
So much for (1) Judges' Profiles and (2) Workload and Statistics.

WELCOME to the third and final Segment of this in-depth report-- our informative and fascinating

SUNDRY SECTION

featuring a lifetime pictorial roster with all the judges who have served on the court since its inception in 1969, memorable news clips heralding the arrival of our two newest members, a very hilarious.. and slightly unoriginal.. cartoon, the long awaited announcement of the winner of the JUDGE OF THE YEAR award, and finally..a lovely picture of our beloved chief.., suitable for hanging.





By gubernatorial appointment, Kurt Rossman becomes the 20th person to serve on the Oregon Court of Appeals.

McMinnville judge gets Appeals post

By GEORGE REDE
and JANET EVENSON
Of the Statesman-Journal

Veteran circuit judge Kurt C. Rossman of McMinnville was named Thursday to the Oregon Court of Appeals by Gov. Vic Atiyeh.

Rossman, 49, will fill the position vacated by Betty Roberts, whom Atiyeh appointed to the Oregon Supreme Court on Dec. 17.

Rossman has been a Yamhill County circuit judge since June 1966. He was a Yamhill County district judge for 1½ years before that.

"I'M SOMEWHERE between over exuberant and just plain ecstatic," Rossman said Thursday night about his appointment.

Serving on the appellate bench has been his career goal. He has been recommended for the last five appellate appointments by the Oregon State Bar board of governors.

Rossman said he has 10 to 12 work days of cases to conclude in Yamhill County before he assumes his new job. His first official day with the Court of Appeals will be March 1, he said.

HIS NEW JOB pays $52,039 a year. To retain it for a full term he must win at the polls in May.

Rossman, like Atiyeh, is a Republican.

He was one of three candidates nominated for the appointment by the Bar's board of governors.

Also recommended were Jonathan Newman, a Portland lawyer and candidate for election to another seat on the appeals court, and John A. Reuling, a senior assistant attorney general with the state Department of Justice.

A PORTLAND native, Rossman attended Portland State University and the University of Oregon. He received his law degree in 1958 from Northwestern College of Law at Lewis and Clark College.

He moved to McMinnville in 1961 as assistant manager of the Yamhill County branch of Title & Trust Co. He was first elected to the bench three years later.

He is chairman of the Oregon Judicial Conference's committee on probate law and procedure and a member of several professional organizations.

Active in numerous church and civic projects in the community, he was named McMinnville's Junior First Citizen in 1965.

Atiyeh will appoint Rossman's successor to the circuit court.

Statesman-Journal photo by Don Black

New Appeals Court judge Kurt Rossman and Gov. Vic Atiyeh.

Friday, February 5, 1982

Jonathan Newman is the man

Newman: Courts need outside view

Jonathan Newman, candidate for the Oregon Court of Appeals, told a Redmond audience Thursday that someone from "outside the system" can enhance the court's ability to deal with the approximately 3,000 cases brought to it each year.

"Some of the judges ought to come from outside the (judicial) system," Newman said after his speech to the Central Oregon Bar Association.

Newman, 54, who's been in private practice in Portland since 1953, is running against a Multnomah County district court judge, Steven Walker.

Currently, Newman has a general civil practice with the firm of McEwen, Newman, Hanna & Gisvold. He's served as acting Multnomah County Circuit Judge and as a U.S. District Court trial master. The breadth of that background has prepared him for the wide variety of civil and criminal matters that come before the appeals court, he said.

His credentials include the Oregon State Bar's board of governors rating as "exceptionally well qualified."

"I believe that an able practicing lawyer from outside the system, who is concerned about human problems and their fair solution, by bringing an independent and fresh view to the work of the appellate court, has much to offer the public in effective and useful service," he said Thursday.

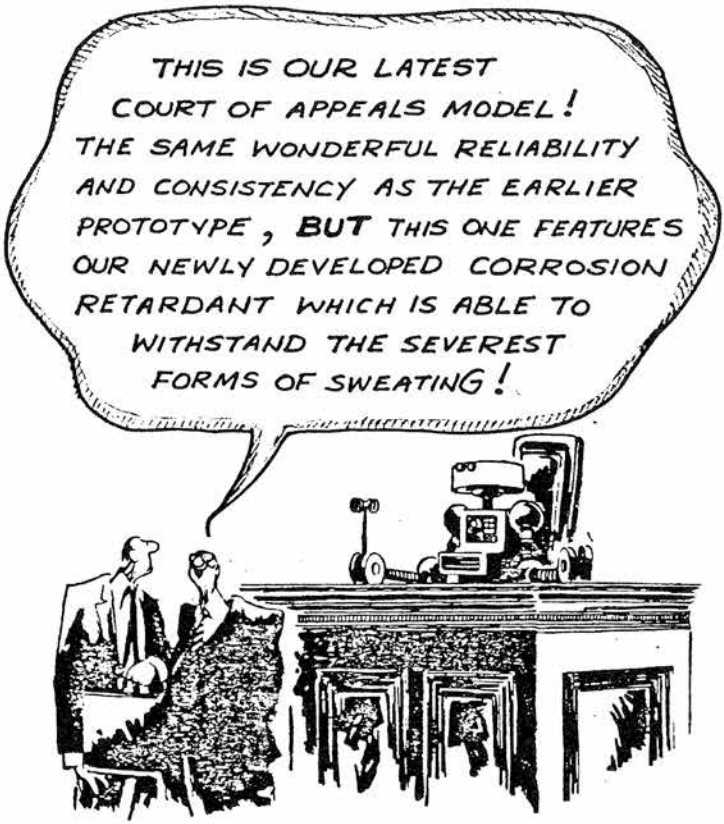
Newman earned his undergraduate and law degrees (Phi Beta Kappa) from Yale College. He's been active in the legal profession's organizations and also in civic affairs, serving on the Portland school board from 1968-1979.

The Court of Appeals position will be decided in the May 18 primary election. Position No. 5, which Newman and Walker are seeking, is held by Judge Robert Thornton, who is retiring.

Jonathan Newman

Shortly thereafter, Jonathan Newman won a sweeping victory at the polls, to become the court's 21st judge!

Bend, OR Bulletin


THIS IS OUR LATEST COURT OF APPEALS MODEL! THE SAME WONDERFUL RELIABILITY AND CONSISTENCY AS THE EARLIER PROTOTYPE, BUT THIS ONE FEATURES OUR NEWLY DEVELOPED CORROSION RETARDANT WHICH IS ABLE TO WITHSTAND THE SEVEREST FORMS OF SWEATING!


NOW.., WE TAKE GREAT PRIDE IN PRESENTING THE OREGON COURT OF APPEALS JUDGE OF THE YEAR AWARD TO...
GOOD FOR YOU, MICK
HOT DIGGETY!
HON. W. MICHAEL GILLETTE
I WISH TO EXPRESS MY HEARTFELT THANKS TO THE MEMBERS OF THE ACADEMY FOR THIS SPLENDID AWARD! I WILL CHERISH IT FOREVER!
ALONG WITH JUDGES BUTTLER, JOSEPH AND ROBERTS, JUDGE GILLETTE WAS APPOINTED TO THE COURT BY GOV. STRAUB ON SEPT. 1, 1976. CONSISTENTLY ONE OF THE COURT'S TOP PRODUCERS, JUDGE GILLETTE, AT 41, IS THE YOUNGEST MEMBER OF THE COURT. DESPITE HIS RELATIVE YOUTH, HE HAS A MOST EXTENSIVE--AND IMPRESSIVE RECORD IN PUBLIC AND PROFESSIONAL SERVICE.
JUDGE GILLETTE STANDS 6 FEET 2 INCHES, WEIGHS IN AT A TRIM 210 POUNDS, HAS BLUE EYES, WEARS GLASSES AND IS RIGHT HANDED. HIS SHIRT SIZE IS 16½-35. HIS SHOE SIZE IS A LESS COMMON 11EE.
HIS PERSONAL INTERESTS AND HOBBIES INCLUDE SPORTS OFFICIATING (BASKETBALL and BASEBALL), HISTORY, TRAVEL, AND PUBLIC SPEAKING. ALSO, HE IS AN AVID MOTION PICTURE BUFF!
TURN THE PAGE FOR JUDGE GILLETTE'S BIOGRAPHICAL SKETCH.

BIOGRAPHICAL SKETCH

W. Michael Gillette

FOR THOSE OF YOU WHO WOULD PREFER A CLEAN-SHAVEN VERSION OF OUR JUDGE OF THE YEAR.

Born in Seattle, Wn., December 29, 1941.
Raised in Milton-Freewater, Oregon.

Education:

Public Schools, Milton-Freewater.
Valedictorian of McLoughlin Union High School, Class of 1959.
Starting forward on school's 1959 A-2 State basketball championship team.

Whitman College, class of 1963. Student body president, Freshman Class president.
Double majored and took a combined degree in German and Political Science.
Graduated cum laude with honors in both major subjects.

Harvard Law School, class of 1966.
Concentrated studies in property, administrative law and labor law.

Professional:

Associate in law firm of Rives and Rogers, Portland, 1966-67.

Deputy District Attorney, Multnomah County, 1967-1969. Prosecuted cases ranging from speeding to murder.

Assistant Attorney General, Government of American Samoa, 1969-1971. Several times served as acting Attorney General. Directed both civil and criminal litigation for the territory.

Assistant Attorney General, Oregon Department of Justice, 1971-September, 1976. Assignments included:

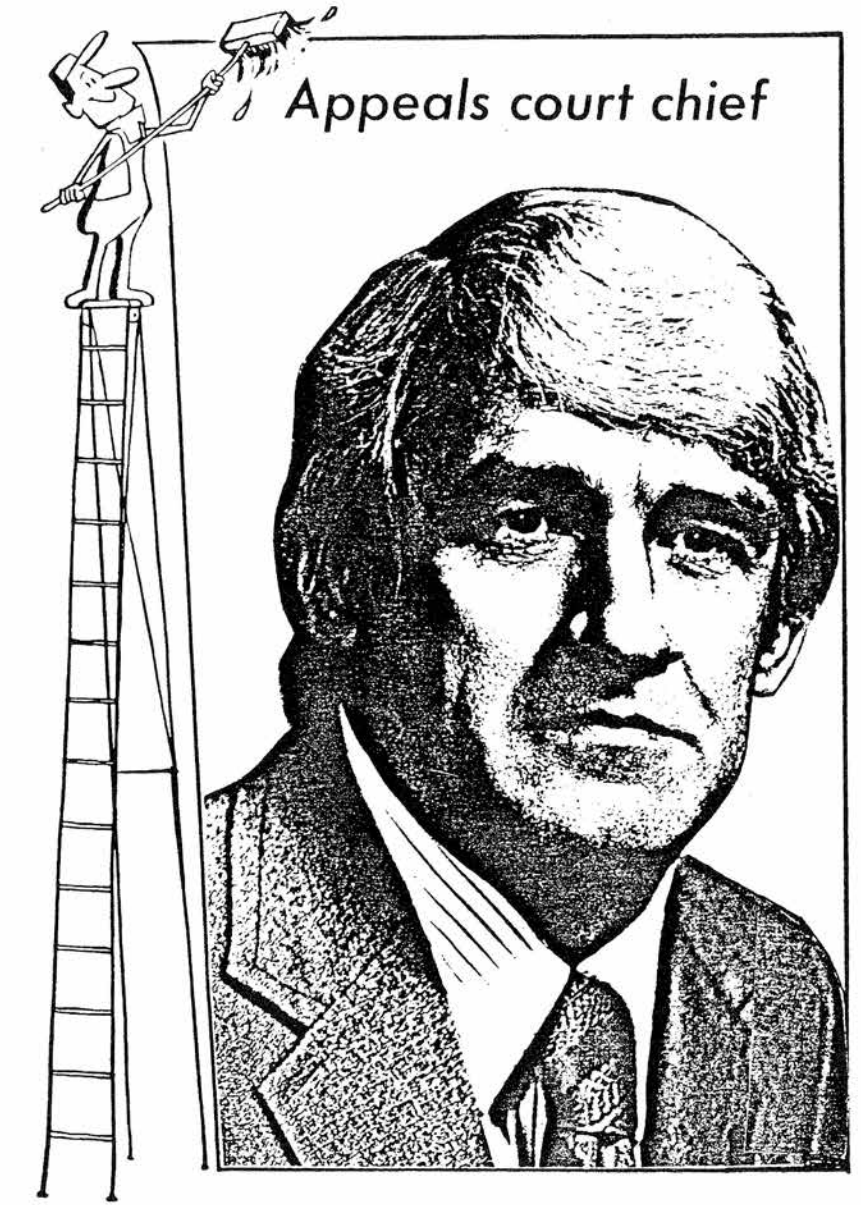
1. Organized Consumer Protection Division and served as its first Chief Counsel, July, 1971-August, 1973.
2. Chief Trial Counsel, August, 1973 to October, 1973.
3. Solicitor General of Oregon since October, 1973. Directed all appeals in which the state or any of its agencies was a party in any appellate court in the United States. Participated in four United States Supreme Court cases.

Taught at Portland State University three years - criminal law and constitutional law.

Taught one year at Northwestern School of Law at Lewis & Clark College - consumer protection.

Appointed to the Oregon Court of Appeals by Governor Straub on September 1, 1976.

NOTE TO JUDGES: IF YOU, TOO, WOULD LIKE TO BE A JUDGE OF THE YEAR AWARD WINNER, SEE OUR PUBLISHER ON HOW YOU CAN QUALIFY!


Appeals court chief

"DELUSIVE EXACTNESS IS A SOURCE OF FALLACY THROUGHOUT THE LAW."

Truax v. Corrigan, 257 US 314, 342 (1921) (Holmes, J., dissenting).

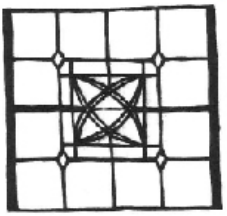
"THERE IS A USELESS LAWSUIT IN EVERY USELESS WORD OF A STATUTE AND EVERY LOOSE, SLOPPY PHRASE PLAYS THE PART OF A TYPHOID CARRIER."

Elihu Root, "The Layman's Criticism of the Lawyer," 39 American Bar Association Report 386, 395 (1914).

Oregon Court of Appeals
1982 Annual Report

The following is an excerpt from a report conceived, designed, researched, written, and illustrated by the Honorable Kurt Rossman

during his first year on the Court of Appeals. Simultaneously informative and diverting, this piece—in the humble view of your editors—epitomizes the mission of the Oregon Appellate Almanac: "to be useful, but with a pleasant degree of humor." We hope that Justice Gillette likes it, too.



PASSAGES

The Bar reports that, during 2005, no members of the Appellate Practice Section passed away. However, we lost two distinguished former appellate jurists, whom we remember here.

The Honorable Kurt C. Rossman

Judge Rossman, a member of the Oregon Court of Appeals for more than 12 years, died on April 7, 2005. He was 72.

Judge Rossman was born in Portland in 1932 and graduated from Nortwestern School of Law in 1961. He was elected to the District Court bench in Yamhill County in 1965, and, in 1966, Governor Hatfield appointed him to the Yamhill County Circuit Court. Judge Rossman served on that court for 16 years.

In 1982, Judge Rossman was appointed to the Court of Appeals. By the time of his retirement in 1994, he had authored more than 900 opinions and had made his mark as a judge of common sense, unflagging humor, and sartorial splendor.

Judge Rossman was well known and beloved in the community of McMinnville, where he was an active leader of the Boy Scouts, Law Explorer Scouts, Citizens for Better Schools, and the Rotary Club. He was a collector of nostalgic early Americana and was noted within the Court of Appeals for the artistic embellishment he lavished on brief covers.

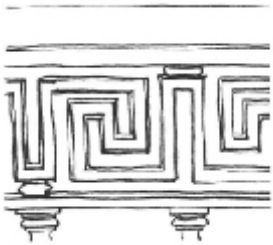
"BUT THIS IS A CASE FOR APPLYING THE CANON OF CONSTRUCTION OF THE WAG WHO SAID, WHEN THE LEGISLATIVE HISTORY IS DOUBTFUL, GO TO THE STATUTE."

Greenwood v. United States,
350 US 366, 374 (1956).

"SO FAR AS WE ARE CONCERNED THE DOCTORS MAY CONTINUE TO BURY THEIR MISTAKES AND RECOVER FOR THEIR SERVICES AS THEY HAVE ALWAYS DONE. IF WE WERE DEALING WITH LAWYERS, THE RULE MIGHT BE DIFFERENT, BUT SUFFICIENT UNTO THE DAY IS THE EVIL THEREOF."

Hall v. Mooring, 76 SE 759 (Ga App 1912).

Survivors include his wife, Virginia, and five children.



The Honorable Herbert M. Schwab

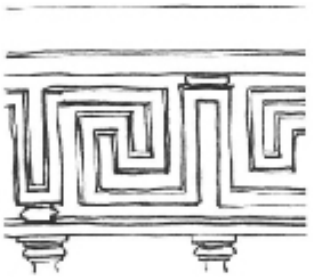
Judge Schwab, a driving force behind the creation of the Oregon Court of Appeals and its first Chief Judge, died on October 18, 2005. He was 89.

Judge Schwab was born in Portland in 1915 and graduated from the Northwestern School of Law in Portland in 1939. He served five years in the army and worked in private practice in Portland for 13 years until Governor Hatfield appointed him to the Multnomah County Circuit Court in 1959. He sat as a judge pro tempore of the Oregon Supreme Court in 1965 and 1966.

When the Oregon Court of Appeals was created in 1969, Judge Schwab was appointed its first Chief Judge. He served in that capacity for 12 years until his retirement in 1981. He was known for his untiring efforts to keep the very busy court running efficiently.

Judge Schwab's public service was not limited to the bench. He was a member of the Portland School Board from 1950 to 1959. In 1964-65, he was the chair of the Committee on Race and Education, a board appointed by the Portland School Board to study issues of racial segregation in the district. The committee's 1965 report drew national attention and was the basis for Portland's model schools program. He also served on the Northwest Power Planning Council in the early 1980s and was active in public life in Cannon Beach, where he moved after his retirement, including a stint as mayor from 1991 to 1994.

Survivors include his wife, Barbara, and three children.



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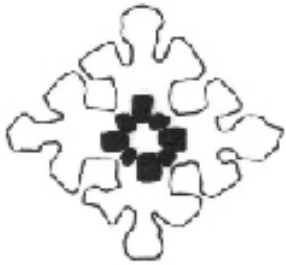

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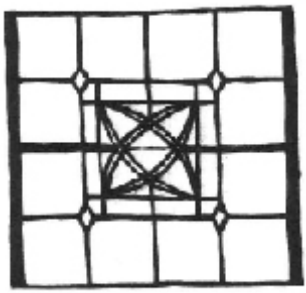
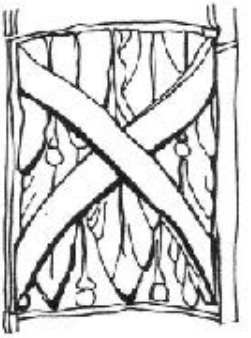


3. _____

4. _____

5. _____

6. _____



7. _____ 8. _____

9. _____ 10. _____

11. _____ 12. _____

"SPEAKING FOR MYSELF, I FIND MY JOB AS A FEDERAL APPELLATE JUDGE DELIGHTFUL, VIVID, AND EVEN ROMANTIC. IN FIGURATIVE TERMS, THROUGH MY JUDICIAL ENDEAVORS, I LIVE MORE LIVES THAN THE PROVERBIAL CAT; I PLAY MORE ROLES THAN THE MOST VERSATILE OF ACTORS. IF VARIETY IS THE SPICE OF LIFE, AS MANY PEOPLE THINK, AND IF YOU SEEK A SPICY LIFE, THENI RECOMMEND THAT YOU GET YOURSELF APPOINTED TO THE FEDERAL BENCH."

Armistead M. Dobie, A Judge Judges Judges, 4 Wash L Q 482-82 (1951).

THE ALMANAC CONTENDERE

AND THE WINNER IS ??

"WE DRAW ON WHAT WE AND WHAT ALL OTHERS CONSTITUTING THAT COMPOSITE REASONABLE MAN HAVE COME TO KNOW. THE SOURCES OF THIS KNOWLEDGE ARE AS VARIABLE AS ARE THE SUBJECTS OF INQUIRY."

Lussan v. Grain Dealers Mutual Ins. Co., 280 F2d 491, 493 (5th Cir 1960).

Imagine that you are fifth out of five cases scheduled for oral argument and the other four all include the State Accident and Industrial Fund as a party. (The editors have nothing against workers' compensation appeals; we seek only to make the point that, as with everything in life, moderation is a consideration.) Normally, the only choices are to sit on one of the Oregon Judicial Department (OJD) ever-so-comfortable settees (if you are lucky enough to grab a spot) and gaze up at the stained glass for the umpteenth time, or sit in one of the not-so-comfortable OJD wooden chairs (which still are better than the folding chairs reserved for overflow audiences) and gaze up at the stained glass for the umpteenth time.

Not anymore! Throw caution to the wind. Forget about re-reading those index cards or opposing counsel's last minute memorandum of additional authorities (which seems to you more like a brief than a list of citations anyway). Instead, "riches" await you (and, perhaps as well, dismissal or reversal—as the case may be—if you fail to rise when your case is called—together with an attorney fees award, or, at the worst, contempt (if the panel is in a particularly foul mood)). Why not simply leave the courtroom and roam the halls that are the product of turn-of-the-century craftsmanship? Touch—no, caress—the Carrerra marble and, in so

doing, take a shot at winning one of two reprints of Charles Carey's The History of the Oregon Constitution (no first editions, only the 1984 reprint).

We here at the Oregon Appellate Practice Section are happy to offer to our membership—that is, those of you who are reading this *and* are dues paying members for 2006—the Oregon Appellate Almanac's first annual "CONTENDERE." Set out below are illustrated renditions from our talented and capable artiste Carrie Poust of a dozen architectural elements or other items of interest that can be found in the public areas of the 1914-built Oregon Supreme Court Building. Let one of the editors (by email or give us a call) know what each of those sketches represents. Simply tell us what the drawings depict—we neither need nor want the actual items themselves (there are laws against that sort of thing). If you are the first or second person to do so, then you will win one of the volumes and public acknowledgment of that fact in next year's Almanac.

So, subject to the following disclaimer, HAPPY HUNTING:

> "No purchase necessary. Must be 18 years of age or older and a legal resident of one of the 50 states, the District of Columbia, one of the Trust Territories of the United States, or a country or other sovereign entity recognized by the United Nations. Contestants also must be 2006 members of the Appellate Practice Section of the Oregon State Bar. Members of the Executive Board of the Appellate Practice Section of the Oregon State Bar and their immediate family members are not eligible to participate in the contendere. The decision of the editors is final and may be arbitrary, capricious, or both. For questions about the tax

implications of being a big winner, contact the Tax Section of the Oregon State Bar. Do not contact the Honorable Henry Breithaupt, Judge of the Oregon Tax Court, directly (there are ethics rules about that sort of thing). Suffice it to say, the books, though handsomely bound and of inestimable value both to the practicing appellate advocate and as "shelf candy," are cheap. The editors assume no liability for sanctions imposed—be they professional, civil, or criminal—arising out of or resulting from the conduct of this contendere. Service of any process is to be made at the home of Walter J. Ledesma, editor of next year's Almanac, on weekends between the hours of 11:00 p.m. and 5:00 a.m. Pacific Standard Time."

IT IS ONE OF THE MISFORTUNES
OF THE LAW THAT IDEAS BECOME
ENCYSTED IN PHRASES AND
THEREAFTER FOR A LONG TIME CEASE
TO PROVOKE FURTHER ANALYSIS.

Hyde v. United States, 225 US 347, 391 (1912) (Holmes, J., dissenting).

REVERSE DEDICATION

For the past 14 years, Oregon's judiciary has had the benefit of the thoughtful and steady leadership of Chief Justice Wallace P. Carson, Jr. As Chief Justice Carson's service as an active judge reaches its final year, his colleagues on the Court want to enshrine permanently for Oregon's judicial history their profound appreciation for his valuable and sustained contribution to Oregon's judicial system. This first Oregon Appellate Almanac presents the opportunity to do so. It is altogether fitting that, with Chief Justice Carson graciously dedicating Appellate Practice Section's effort at the front of this volume, we dedicate back to him this inaugural issue as but one small token of the deep debt of gratitude that all of us on the Oregon Supreme Court owe to him.

Chief Justice Carson was born in Salem, where his father practiced law in a firm that his grandfather founded in 1889. Other than undergraduate school at Stanford University and military service in Korea and Taiwan, Chief Justice Carson's life has been anchored firmly in Salem. Following his graduation from Willamette University College of Law in 1962, Chief Justice Carson joined his father and uncle in private law practice in Salem. Four years later, Carson made his debut into Oregon politics, successfully running for the Oregon House of Representatives. He served two terms in the House, one as majority leader. In 1970, Carson was elected to the Oregon Senate, where he served through 1977 and was minority floor leader from 1975-77. As a Republican state senator, Carson helped pass Oregon's bottle bill, greenway bill, state constitutional revisions, and significant land use legislation. During his decade of service in the Oregon legislature, Carson earned high praise from the public and his follow legislators for his intelligence, thoughtfulness, common sense, and the bipartisan approach he took to the legislature's law-making function.

Carson's productive legislative career ended in 1977 when Democratic Governor Robert Straub appointed him to the Marion County Circuit Court. As a circuit court judge, Carson again distinguished himself by his respectful treatment of litigants and lawyers, and his careful and measured approach to his role

as a judge. Five years later, in 1982, Governor Victor Atiyeh recognized Carson's immense talents as a judge and appointed him to the Oregon Supreme Court. In 1991, his court colleagues acknowledged Carson's unmatched work ethic and exceptional administrative skills, unanimously electing him Oregon's 36th Chief Justice.

During his nearly 25 years on the Oregon Supreme Court, Chief Justice Carson has come to be regarded by everyone associated with Oregon's judiciary and the legal profession as a person and jurist of great integrity and selfless public service. Attempting to relate his many contributions to the Oregon judiciary during his entire judicial career, and the 14 years he served as Chief Justice, is fraught with the risk of serious oversight. Instead, two endeavors during his tenure as Chief Justice come immediately to mind as symbols of the breadth and impact of his steadfast and imaginative leadership as Oregon's longest-serving Chief Justice.

The first example occurred in 2003, when Oregon's judicial branch was hard hit by the biggest economic downturn in its history. Unprecedented budget shortfalls ordered by the legislature compelled Chief Justice Carson to confront unforeseen administrative challenges in guiding the response of our state judiciary. Those challenges included the loss of numerous employees statewide, closure of courthouses one day a week, and the unflattering spotlight on Oregon in the national media. However, due to Chief Justice Carson's leadership, those dark times passed in less than one year, and he was able to restore normal courthouse operations. Oregon's judicial system weathered that storm. However, many Oregon judges and lawyers now realize that the damage could have been much worse if the judiciary had not had the benefit of Chief Justice Carson's thoughtful and disciplined leadership throughout