OREGON APPELLATE ALMANAC

VOLUME 2
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A Publication of the Appellate Practice Section of the Oregon State Bar

Walter J. Ledesma, Editor

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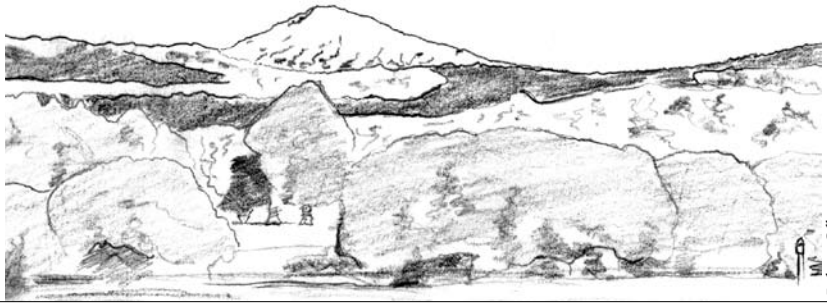

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Mount Bachelor from the Sunriver Resort Golf Course

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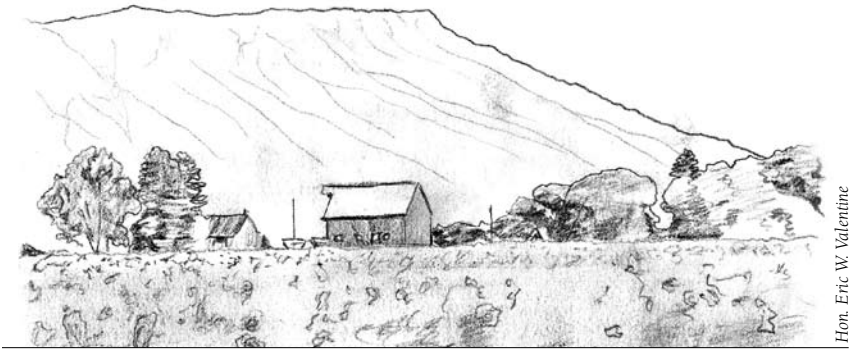


Hon. Eric W. Valentine

Mt. Emily

This second volume of the Oregon Appellate Almanac is the product of the members of the Appellate Practice Section of the Oregon State Bar. Like its predecessor, this edition of the "Almanac" is for those who work as lawyers in the appellate world and those who would like to read the musing of our section members and get useful information.

It goes without saying that the Almanac owes its existence to the tireless work of Past Chair Keith Garza. Mr. Garza's vision for this work and tireless efforts to ensure its publication are the sole reason for its continued existence. A hearty thanks to Mr. Garza and may this Almanac continue on long after he finishes his stint on the Executive Committee of the Appellate Practice Section of the Oregon State Bar.

Appellate lawyers are the wordsmiths of the legal world. Yet, most of their labor goes unnoticed and unappreciated by the public and their fellow members of the bar. In order to be a good appellate lawyer, one must master the procedural and substantive law of the particular area that an issue presents. However, to be a great appellate lawyer, one must possess the knack for written clarity and persuasiveness. It is a shame that the work of the wordsmiths in Oregon's legal community, the briefs, are seldom seen by the public. In no small part, the ability to shape the law in a particular jurisdiction is in large part a reflection of the ability to write well. It is our hope that this volume of the Almanac will reveal the depth of talent that the section houses. The members of the section daily bring clarity to the written word in briefs. Borne

of logic and good writing, appellate wordsmiths create a product that help keep the delicate structure of law from toppling. Everyone has read a brief or motion that left you feeling confused, tired, perhaps annoyed, and most importantly unpersuaded. In the pages the follow, you will find examples of good writing that are models of how to do it. Enjoy yourself!

AND SUCH

As promised in the first volume, the garish color is now officially a tradition. Also now a tradition, is the excellent quality of the submissions. The section commends those who took the time to help capture the history and flavor of what it is like to work in Oregon's appellate courts.

We are indeed fortunate to toil in the verdant fields of Oregon's appellate world. Judging from the reaction of lawyers who come from other jurisdictions, this is a most unusual place to practice. The type of items sought for the Almanac are often quirky, but always interesting. Please keep the submissions coming for the next volume and as always, keep writing well.

Walter

DEDICATION

Andy Baudoin

R. William Linden, Jr.

"[B]y all accounts, an extraordinary man." *The Oregonian* (February 11, 2007).

The Executive Committee of the Oregon State Bar's Appellate Practice Section is honored to dedicate this second volume of the Oregon Appellate Almanac to the life and memory of Bill Linden.

Bill took over the reigns as State Court Administrator in 1983, shortly after the unified state court system was established. In the dozen years that followed, Bill worked tirelessly to build from the most basic foundation, the Oregon court system that we have today. Behind almost every state court program and structure can be seen the hand and work of Bill Linden. At the same time, during his more than a decade of public service, Bill also served as the court administrator of the Oregon Supreme Court and Court of Appeals.

Chief Justice Edwin Peterson, who hired then 32-year-old Bill away from his position as Lane County's trial court administrator as a "callow youth" for the daunting task of melding together what had previously been more than 30 separately functioning circuit courts, saw in Bill "a lot of strengths," including:

-credibility – when Bill Linden said something, you could believe him;

-remarkable people skills – he had the ability to get people, including judges, to work together very effectively; and

-an almost innate talent for hiring good people – the fact that many of those "hires" still work for OJD stands as a testament to his keen sense of judgment.

But more than all those things, Chief Justice Peterson most remembers how much fun it was to work with Bill: "Oh God was he a joy to work with! Not a harsh word was spoken between us in all the years that we worked together." Early on, Chief Justice Peterson and Bill Linden would meet weekly, and they spent considerable time creating a written document outlining the types of decisions that each would make either with, or without, consulting the other. After all that work, Chief Justice Peterson recalls the number of times that they had to refer back to that organic instrument – "never."

Chief Justice Wallace P. Carson, Jr. also remembers Bill as a "young whipper snapper" who "put everything in place" and who oversaw the evolution of the state court system from "very little to a well functioning judicial branch." Chief Justice Carson also applauded Bill as a "very able administrator but also as a person who was smart enough to hire good key people." It was altogether fitting that, when he left his position as State Court Administrator, the Oregon Supreme Court bestowed on Bill its first Award of Exceptional Service and Extraordinary Achievement in 1994.

When Bill left state service for his second career as a lobbyist, he continued to work closely with the Judicial Department in its relations with the other branches of state government. By those who knew him well and worked with him often, Bill was remembered as a "brilliant yet humble strategist" who was always professional, gentle, and calm in demeanor. As one colleague put it: "Bill was a great guy, and, even if you were on different sides of an issue, he was always great to work with because you could trust what he told you."

His commitment to the judiciary was "unwavering," recalled Chief Justice Paul J. De Muniz, so much so that, "when I became Chief Justice, the first thing that I did was to arrange a meeting with Bill. That meeting proved invaluable to me in charting a new course for the Or-

egon judiciary this past year." Indeed, shortly before he passed away, Bill asked to see Chief Justice De Muniz. The Chief Justice expected that visit to be for the purpose of saying good bye to each other. But that was not what Bill had in mind:

> "Instead – and in vintage Linden style – it was to complete unfinished business. And that is exactly what we did. Bill was a devoted advocate for the state courts throughout much of his professional life and – indeed during the end of his life. Those of us in the judiciary want [everyone] to know how much we valued Bill's solid and calm advice and counsel."

He was, as Legal Counsel Linda Zuckerman observed, "a true leader; someone who inspired people and instilled in them his commitment and a feeling of purposefully working together to create a truly integrated court system. The whole unified system really developed under his leadership." In a word, Bill Linden was "dignified."

But there was, of course, more to Bill than his managerial persona. He loved the Oregon Ducks, Jimi Hendrix, and the Grateful Dead. He was also, as long time Judicial Department employee Kim Blanding recalls, one of the most gullible people she had ever come across. Knowing that he trusted those around him and that, as a result, he often would read only the first and last paragraphs of a memo to go out over his signature, those working with him often would lard the middle with humorous material. Most of the time, but not always, the insertions would come out in the editorial process.

Kim also remembers a birthday lunch that Bill could attend only in the form of a blank check. Afterward, the partygoers falsely reported back an outrageous amount spent on the afternoon's festivities, and later Bill was seen sneaking out of the office headed for the bank to buttress his balance for the major hit that he assumed would follow: "That was classic Bill. You could pull things over on him."

Simply stated, Bill Linden was a gifted, dedicated, and honorable man, and the appellate bench and bar is privileged to pay this modest tribute to his life and accomplishments through this dedication. In Bill Linden's eyes, our judicial system was never just another branch of government. It was, instead, a human institution. To him, our courts were always more than mere edifices, forms in triplicate, or budget items. Rather, they most importantly were – and they remain – a reflection of the sweat, laughter, fears, missteps, insights, arguments,

and foibles of all the people who play a role in judicial goings on. And it did not matter to Bill whether that role was as administrator, judge, juror, witness, party, legislator, lawyer, reporter, or victim. Bill understood and reveled in the outer edges that all that frenzied activity added to the judicial branch. And we are all better off today because of his efforts and his insights.

And it is because of Bill's appreciation of the periphery that is fitting to memorialize him here, in this forum that is "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." Wallace P. Carson, Jr., Dedication, *Oregon Appellate Almanac* at 13 (Vol I 2006).

Bill Linden truly was, by all accounts, an extraordinary man.

Keith Garza
Past Chair

OREGON SUPREME COURT

Hon. Eric W. Valentine

"Oregon Supreme Court"

Calendar for 2007

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

13 - Public Meeting

13, 14 a.m. - Conference

19 - President's Day Holiday

27, 28 a.m. - Conference

MARCH 2007

1, 2, 5, 6, 7 - Oral Argument
13 - Public Meeting
14, 15 a.m. - Conference
20, 21 a.m. - Conference

APRIL 2007

3 - Public Meeting
3, 4a.m. - Conference
17, 18 a.m. - Conference
24, 25 a.m. - Conference

MAY 2007

2, 3, 4, 7, 8 - Oral Argument
15 - Public Meeting
15, 16 a.m. - Conference
28 - Memorial Day Holiday
30, 31 a.m. - Conference

JUNE 2007

12 - Public Meeting
12, 13 a.m. - Conference
18, 19, 20 - Oral Argument
20, 21 a.m. - Conference

JULY 2007

4 - Independence Day Holiday
17 - Public Meeting
17, 18 a.m. - Conference
24, 25 a.m. - Conference

AUGUST 2007

7 - Public Meeting
7, 8 a.m. - Conference

SEPTEMBER 2007

3 - Labor Day Holiday
5, 6, 7, 10, 11 - Oral Argument
25 - Public Meeting
25, 26 a.m. - Conference

OCTOBER 2007

9 - Public Meeting
9, 10 a.m. - Conference
14, 15, 16, 17 - Oregon Judicial Conference
30, 31 a.m. - Conference

NOVEMBER 2007

1, 2, 5, 6, 7 - Oral Argument
12 - Veterans' Day Holiday
14 - Public Meeting
14, 15 a.m. - Conference
22 - Thanksgiving Holiday
27, 28 a.m. - Conference

DECEMBER 2007

11 - Public Meeting
11, 12 a.m. - Conference
18, 19 a.m. - Conference
25 - Christmas Holiday

SUPREME COURT DIARY

Hon. Eric W. Valentine

"Attitude Adjustment"

By Scott Shorr

The following is a roughly accurate, light-hearted recreation of my thought process from the time we prevailed in a number of Ninth Circuit cases until the conclusion of my argument before the United States Supreme Court on January 16, 2007. These cases were filed against several insurance companies under the Fair Credit Reporting Act ("FCRA"). Our complaints allege that the insurance companies failed to give proper notice under the FCRA that they had taken "adverse actions" against consumers by denying them insurance and increasing their premiums based, in part, on consideration of the consumers' credit information.

August 4, 2005: We won. Having argued several cases in the Ninth Circuit in March, we had been waiting for a ruling. The decision is better than we hoped for. We go out for a drink to celebrate.

August 5, 2005: It is certain that the insurance companies will seek *certiorari*. Because I am not a member of the Supreme Court bar, something I had been meaning to do for the nifty certificate, I look into the application process. It is less demanding than I expected, only requiring that you are a three-year member in good standing of a State Bar, meet basic good character requirements and be sponsored by two current members.

August 6, 2005 – January 25, 2006: The Ninth Circuit revises the opinion twice while defendants continue to file and re-file petitions for panel and *en banc* rehearing. The Ninth Circuit scales back its ruling that *sua sponte* directed liability in plaintiffs' favor. This is ultimately good for us because the revised opinion is now unanimous, bringing a more conservative panel member into the fold on all issues. It is less of a target for *en banc* review. The final revised opinion wordsmiths the prior opinion, but not significantly.

August 22, 2005: Received the suitable-for-framing United States Supreme Court bar certificate.

April 20, 2006: The Ninth Circuit denies *en banc* rehearing and provides those soothing words to the winner of an appellate case, "The mandate shall issue forthwith."

July 19, 2006: As expected the insurance companies file petitions for certiorari. They hire the big guns of the specialty Supreme Court bar, Carter Phillips (50-plus appearances before the Supreme Court), later Maureen Mahoney (nearly 20 appearances), and other similarly qualified veterans. I check my Supreme Court record again. Yep, zero appearances.

Late July 2006: We hire Public Citizen, a Ralph Nader founded organization, and Scott Nelson of their Supreme Court Assistance Project. Public Citizen has a specialty Supreme Court practice of attorneys with past experience before the Court and an interest in helping consumers. Ralph Nader is no longer involved. He is still busy trying to explain there is no difference between George W. Bush and Al Gore.

August 2006: We spend a lot of time working on the opposition to the certiorari petitions. Our odds of fighting off certiorari are immensely better than our odds of a complete affirmance if certiorari is granted. The Supreme Court takes only 80-100 out of approximately 8,000-plus certiorari petitions filed each year or approximately 1%. Recently, they have been on the low end. Our odds against review seem good. If the Court takes the case, however, the Court has recently reversed or vacated approximately 70% of the time.

Unfortunately, there is an arguable split in the federal circuits, which is the single most important factor in granting certiorari. Some

circuits conclude that a civil willful violation of the FCRA includes a knowing or reckless violation and some discuss only proof of knowledge without directly confronting if recklessness is sufficient. We write a good opposition brief that focuses on the absence of a true, well-developed split in the Circuits and give less attention to the definition of "adverse action" under the FCRA, which does not seem like a compelling issue for the Court.

September 26, 2006: The announcement on the certiorari grants is expected today. The big question: would I rather the Supreme Court deny certiorari and preserve several huge wins in the Ninth Circuit or have them grant certiorari with a decent chance that I will argue the case.

There it is. We are headed to the Supreme Court in two of the four cases on the issue of the definition of willful. In one case, they are also considering the defendants' argument on "adverse action," which is a surprise and could be determinative.

September 26-27, 2006: I start asking my partners and co-counsel what they think about hiring another private bar Supreme Court specialist. My co-counsel gives some interesting insight. In his view, the specialty part of the Supreme Court practice is opposing certiorari. (Hey, we already lost certiorari!). He believes that oral argument at the Supreme Court is similar to oral argument at most appellate courts albeit at a higher level. He cautions me though; he lost the only case he argued 9-0! Gee, thanks. Good to know. It is also clear that while there is an inner clique of Supreme Court specialists who are immensely talented, they are specialists at least in part because this same group has convinced everyone else (and the press) that you need a specialist. This limits their competition. After wrestling around with this, everyone decides that I should do it. What did I just do?

October 2006 – January 2007: I spend about every waking hour working on the merits brief, preparing for the argument, thinking about the argument, boring my wife about bad oral argument ideas I had in the shower, boring my dog with the same. I read the apparent bible on Supreme Court oral argument, Frederick's *Supreme Court and Appellate Advocacy*. It is troubling to find that the book is written by counsel from one of the opposing firms and counsel at the other firm is cited several times.

I attend oral argument at the Supreme Court in the *Williams v. Philip Morris* punitive damage case to get a better feel for the courtroom and oral argument at the Court. I am relieved that while the practitioners are very good (the Philip Morris counsel has argued nearly fifty times), they aren't perfect. There are plenty of awkward pauses, stumbles, and less than perfect oratory. That is a relief.

January 4-12, 2007: We have filed our merits case and I am on the national moot court tour: Boston, Portland, Washington D.C. I feel like I am touring with the Stones, but without the sex, drugs or rock and roll. Actually, nothing like the Stones; the moot court judges are still in their prime. Each moot court is at least one hour of non-stop questions and points out something new to work on. A number of great Oregon appellate lawyers help with my moots and offer encouragement. The final moot court at Georgetown is the most formal. Georgetown has copied the Supreme Court bench and courtroom to scale with frightening detail down to the matching carpet.

January 16, 2007: I arrive an hour early to settle in. I slept about five hours the night before, which is more than I expected. I had set two different alarms and asked for the wake-up call – all fairly useless since I was already up anyway. I feel nervous, but notice that opposing counsel, who is on her twentieth argument, seems equally uneasy. We wait in the lawyers' lounge that is down the hall from the courtroom.

I am still on edge up until the moment that the argument starts. At that point, I am fine, actually raring to go. The insurance companies are petitioners so they begin. In all of the moot courts, no one played the opposing counsel so I never had a chance to watch the mock "judges" beat up the other side's argument. It is refreshing to see real Supreme Court justices do this (although not complete solace as I am expecting similar treatment shortly). During my argument, I am peppered with difficult questions from a hot bench, but to an extent all of the questions (in some form or another) had been raised in the moot courts or were sometimes easier questions than I anticipated. I get through it without a hitch although suspecting that certain justices may be unconvinced and perhaps one was beyond convincing.

In all, it was a thrill. I am glad that I took the chance to do this and that Steve Larson and my other law partners gave me the opportunity.

If I had sat next to someone else arguing this after declining the opportunity, I would have kicked myself when I realized that I was fully capable of handling it. I remark to my co-counsel Scott Nelson how surprised I was that the real argument was easier than the moot court arguments. He had assured me all along that would be the case, but I only believe it now.

SURVEY OF UNITED STATES SUPREME COURT

By Harry Auerbach

DECISIONS OF THE OCTOBER 2005 TERM

In its October 2005 term, the United States Supreme Court disposed of 87 cases by written opinion. It is a daunting, and, ultimately, doomed task to try to isolate the most noteworthy of those decisions. Many of the most controversial decisions were decided on grounds that are unlikely to have substantial impacts on the development of the law, even though the cases are of tremendous importance politically or practically. A number of cases have serious importance to practitioners in specific areas of the law. Practitioners will, of course, differ as to which cases in which areas are most significant. What follows is one writer's attempt to distill the decisions into a review that will be of some use or interest to appellate practitioners in Oregon. Apologies are offered up front for any failure to highlight any case or issue that any reader believes deserved special attention.

Hamdan v. Rumsfeld –Full of Sound and Fury, Signifying ?

Perhaps the most highly anticipated case of the year was *Hamdan v. Rumsfeld*, 548 US ___, 165 L.Ed. 2d 723 (2006), in which a Yemeni national captured in Afghanistan and imprisoned by the United States military at Guantanamo Bay, Cuba, challenged the authority of a military commission to try him. The Court held that the military commission at issue lacked the power to proceed because its structure and procedures violated both the Uniform Code of Military Justice and the Geneva Conventions.

The Court split 5-3, with Justice Kennedy providing the swing vote, Justices Scalia, Thomas and Alito in dissent, and the Chief

Justice not participating. All told, there were six separate opinions issued in the case. Justice Stevens authored the Court's opinion, but Justice Kennedy did not join that portion of the opinion in which the plurality, comprised of Justices Stevens, Souter, Ginsburg and Breyer,, would have held that none of the acts Hamdan was alleged to have committed were war crimes, and that the case did not present "circumstances in which, by any stretch of the historical evidence or this Court's precedents, a military commission established by Executive Order under the authority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment." 165 L.Ed. 2d at 766.

The first issue confronting the Court was the effect of the enactment of the Detainee Treatment Act of 2005 on December 30, 2005 (after certiorari had been granted). The Court rejected the Government's contention that the DTA had the effect of stripping the Court of jurisdiction of the case. Section 1005(h)(2) of the DTA specified that it applied to claims governed by Sections 1005(e)(2) and (3), i.e., those other than habeas claims such as Hamdan's, that were pending on or after the date DTA was enacted; but it did not specify that the Act had any retroactive effect on habeas claims, which are governed by Section 1005(e)(1). The Court held that the omission of habeas claims from the retroactivity provision was neither accidental nor absurd, and that the Court therefore retained its certiorari jurisdiction over Hamdan's habeas claim. The Court declined the Government's invitation to abstain from jurisdiction.

On the merits, the Court held that there was no Congressional authorization for the specific form of military commission that the President had purported to create to try Hamdan. Rather, the Court held that "[t]he procedures that the Government has decreed will govern Hamdan's trial by commission will violate" the American common law of war, the Uniform Code of Military Justice and the "'rules and precepts of the law of nations,' – including, *inter alia*, the four Geneva Conventions signed in 1949," upon compliance with which the UCMJ conditions the use of military commissions. 165 L.Ed.2d at 766 (citations omitted).

The decision, while of immediate relief to Mr. Hamdan, ultimately may give little consolation to those concerned about the perceived erosion of civil liberties and, conversely, may not be as restrictive to the government's asserted national security interests as much of the

rhetoric surrounding the decision may suggest. That is so because the decision rests on the Court's conclusion that the Congress had not granted the President the authority to "create military commissions of the kind at issue here," but that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary." 165 L.Ed.2d at 780 (Breyer, J., concurring).

Gonzales v. Oregon – Oregon's Death With Dignity Act Survives

Another highly anticipated decision was *Gonzales v. Oregon*, 546 US ____, 163 L.Ed.2d 748 (2006). The Attorney General issued an interpretive rule which said, in essence, that doctors could not prescribe controlled substances for use in accordance with Oregon's Death With Dignity Act without violating the federal Controlled Substances Act. In a 6-3 decision, the Court, in an opinion authored by Justice Kennedy, invalidated the rule. The Chief Justice, Justice Scalia and Justice Thomas dissented. After deciding that the Attorney General's interpretation of the CSA was not entitled to deference under the Court's administrative law precedents, the Court held that the CSA did not purport to authorize the Attorney General to displace the States as arbiters of what constitutes appropriate medical practice. Thus, the Attorney General could determine which drugs were without any medical value, so that doctors could be prohibited from prescribing them for *any* purpose; but where drugs were placed on schedules that permitted their prescription for medical purposes, it was up to the individual States to determine what constituted acceptable medical practice. The Court upheld the invalidation of the Interpretive Rule that purported to outlaw the use of legally prescribable drugs for treatment that the Attorney General determined to be unacceptable medical practice.

FAIR Limits on the First Amendment?

In *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*, 547 US ___, 164 L.Ed.2d 156 (2006), a number of law schools challenged, on First Amendment grounds, the Solomon Amendment, by which Congress required that all colleges and universities receiving federal funds make their campuses available to military recruiters on at least equal terms as for any other recruiters. The law schools objected to the military recruiters because the military's ban on homosexuals violated the schools' non-discrimination policies. A unanimous Court, with

Justice Alito not participating, held that the Solomon Amendment violated neither the law schools' freedom of speech nor their freedom of association, and reversed the Third Circuit's judgment, which had directed entry of a preliminary injunction against enforcement of the amendment.

In other First Amendment cases of note, a fractured Court held Vermont's stringent campaign contribution and spending limits unconstitutional in *Randall v. Sorrell*, 548 US ___, 165 L.Ed.2d 482 (2006), and, in *Garcetti v. Ceballos,* 547 US ___, 164 L.Ed 2d 689 (2006), the Court held that, when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and that the Constitution does not insulate their communications from employer discipline.

Receding Remedies on the Abortion Front.

There were no cases in the 2005 Term wrangling with the substantive constitutional issues relating to abortion. In two cases, however, proponents of a woman's right to abortion lost ground on remedies available to them.

In *Ayotte v. Planned Parenthood*, 546 US ___, 163 L.Ed.2d 812 (2006), Planned Parenthood and others successfully challenged and obtained a permanent injunction against the enforcement of New Hampshire's law requiring parental notification prior to performance of an abortion on a minor. The District Court and the First Circuit held that the law was unconstitutional because it did not contain an explicit exception for the preservation of the pregnant minor's health. The Court was not called upon to revisit, and did not revisit, any of its precedents concerning a woman's constitutional right to abortion, the constitutionality in general of parental notification statutes, or the need for exceptions that preserve the health of the pregnant woman. Rather, a unanimous Court decided only that, when a statute restricting access to abortion may be applied in a manner that harms a woman's health, the preferred remedy is not invalidation of the whole law, but, rather, enjoining only its unconstitutional applications or severing its "problematic portions." 163 L.Ed.2d at 821. The Court remanded the case for the lower courts to determine whether a remedy short of total invalidation of the law was consistent with the New Hampshire legislature's intent in passing the law.

In *Scheidler v. National Organization for Women, Inc.*, 547 US ___, 164 L.Ed.2d 10 (2006), the Court reversed a judgment obtained under the Racketeer Influenced and Corrupt Organizations Act (RICO) against "pro-life, anti-abortion protest" activists. The "predicate acts" required to support a RICO claim had been alleged to have been violent conduct in violation of the Hobbs Act. The unanimous Court held "that physical violence unrelated to robbery or extortion falls outside the scope of the Hobbs Act," and that, consequently, there was no viable RICO claim.

Death Penalty Cases.

It was generally a good Term for death penalty advocates, including Oregon lawyer Joshua Marquis, who was favorably cited in Justice Scalia's concurring opinion in *Kansas v. Marsh*, 548 US ___, 165 L.Ed.2d 429, 456-57 (2006) (Scalia, J., concurring). In *Marsh*, the Court held constitutional a Kansas statute which required the imposition of the death penalty if the jury unanimously found that aggravating circumstances are not outweighed by mitigating circumstances, i.e., if "aggravating evidence and mitigating evidence are in equipoise." 165 L.Ed.2d at 437.

In *Clark v. Arizona*, 548 US ___, 165 L.Ed.2d 842 (2006), the Court held that it was not unconstitutional for Arizona to limit its insanity defense solely to the lack of capacity to tell right from wrong, nor to prevent evidence of mental illness, outside the insanity defense itself, to be used to disprove *mens rea*. As noted below, the Court also upheld the death penalty in *Oregon v. Guzek*, 546 US ___, 163 L.Ed.2d 1112 (2006), and in *Brown v. Sanders*, 546 US ___ , 163 L.Ed 2d 723 (2006).

But, in *House v. Bell*, 547 US ___, 165 L.Ed.2d 1 (2006), the Court concluded that House had made the "stringent showing" of actual innocence necessary to entitle him to a hearing on his otherwise procedurally defaulted federal habeas claims. And, in *Hill v. McDonough*, 547 US ___, 165 L.Ed.2d 44 (2006), the Court held that a person facing the death penalty could challenge the constitutionality of the lethal injection procedure the State intended to use in a suit under 42 USC § 1983, which was not barred as a second or successive habeas corpus petition.

Search and Seizure.

In *United States v. Grubbs*, 547 US ___, 164 L.Ed 2d 195 (2006), the Court upheld the constitutionality of anticipatory search warrants (see below); in *Hudson v. Michigan*, 547 US ____, 165 L.Ed.2d 56 (2006), the Court held that a violation of the "knock and announce" rule in executing a valid search warrant did not warrant suppression of the evidence seized; in *Samson v. California*, 547 US ___, 165 L.Ed.2d 250 (2006), the Court held that a suspicionless search of a parolee, under the authority of a California statute, did not violate the Fourth Amendment.

The Appellate Wonk Case of the Year

The case that may turn out to be the most significant for the ordinary civil appellate practitioner is *Unitherm Food Systems, Inc. v. Swift-Ekrich, Inc.*, 546 US ___, 163 L.Ed.2d 974 (2006). There the Court held that making a motion for judgment as a matter of law at the close of the evidence (what we used to call a motion for a directed verdict), will not preserve for appeal the claim of error of insufficiency of the evidence. Rather, a party whose Fed. R. Civ. P. 50(a) motion is denied must, if the jury returns a verdict against that party, make a post-trial motion under Rule 50(b); because Swift-Ekrich failed to do so, "there was no basis for review of [its] sufficiency of the evidence challenge in the Court of Appeals." 163 L.Ed.2d at 987.

CASES ON REVIEW FROM THE NINTH CIRCUIT

The Court issued decisions in fourteen cases from the Ninth Circuit, reversing in eleven of them. Below is a summary of the cases, some of which are described in more detail elsewhere in this note:

Ninth Circuit Affirmed

IBP, Inc. v. Alvarez, 546 US _____ , 163 L.Ed 2d 288 (2005) (Under FLSA, time employees spend walking from changing room to production floor prior to beginning of shift is compensable; reversing 1st Cir., time in changing room waiting to don first piece of protective gear is not)

Lockhart v. United States, 546 US ____, 163 L.Ed 2d 557 (2005) (United States could offset Social Security benefits to collect a student loan debt that had been outstanding for more than ten years).

Gonzalez v. Oregon, 546 US ____, 163 L.Ed 2d 748 (2006) (The Controlled Substances Act did not permit the Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide).

Ninth Circuit Reversed

Kane v. Garcia Espitia, 546 US _____, 163 L.Ed 2d 10 (2005) (Habeas corpus – Violation of *pro se* pretrial detainee's purported right to law library access was not contrary to or unreasonable application of clearly established federal law)

United States v. Olson, 546 US _____, 163 L.Ed 2d 306 (2005) (Federal Tort Claims Act provision waiving sovereign immunity, if a private person would be liable under the law where the act or omission occurred, did not waive immunity where local law would make a state or municipality liable.)

Evans v. Chavis, 546 US ___ , 163 L.Ed 2d 684 (2006) (Habeas – Under California's peculiar habeas corpus scheme, prisoner's request for supreme court review, made three years after intermediate appellate court's decision, was not "reasonable," i.e., not timely, and did not toll AEDPA's 1-year limit for federal habeas review).

Brown v. Sanders, 546 US ___, 163 L.Ed 2d 723 (2006) (Death Penalty Habeas – Even though one of California's specified statutory aggravating factors was later held to be invalid, the death sentence was not unconstitutional; regardless of whether California was a "weighing" state or a "non-weighing" state, all of the aggravating facts and circumstances that the invalidated factor permitted the jury to consider the jury properly could consider under one of the other, valid factors).

Marshall v. Marshall, 546 US _____, 164 L.Ed 2d 480 (2006) (The Anna Nicole Smith Case – So-called "probate exception" did not deprive District Court of jurisdiction of Smith's counterclaim against her deceased husband's son in son's adversary proceeding in Smith's bankruptcy case).

Domino's Pizza, Inc. v. McDonald, 546 US ____, 163 L.Ed 2d 1069 (2006) (Civil Rights – A black man, who was the sole shareholder and president of a corporation, could not personally sue under 42 USC § 1981 based on allegations of race discrimination relating to contracts between Domino's and the corporation).

Texaco Inc. v. Dagher, 547 US ____, 164 L.Ed 2d 1 (2006) (Antitrust – It was not illegal price-fixing for a lawful, economically integrated joint venture formed between Texaco and Shell to set the prices at which the joint venture sold its products).

United States v. Grubbs, 547 US ___, 164 L.Ed 2d 195 (2006) (Search and Seizure – Anticipatory warrants, i.e., warrants based on probable cause that evidence of a crime will in the future be found at a particular place, are not *per se* unconstitutional; they require that it is *now* probable that contraband, evidence of a crime or a fugitive *will be* on the specified premises *when* the warrant is executed. The Fourth Amendment does not require that the triggering condition be set forth in the warrant itself).

Gonzales v. Thomas, 547 US ___, 164 L.Ed 2d 376 (2006) (Immigration – Ninth Circuit should have remanded to the agency, rather than deciding for itself in the first instance, the fact question of whether an alien's family relationship constituted "membership in a particular social group," for purposes of statute governing discretionary grant of asylum).

Garcetti v. Ceballos, 547 US ___, 164 L.Ed 2d 689 (2006) (Civil Rights – When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline).

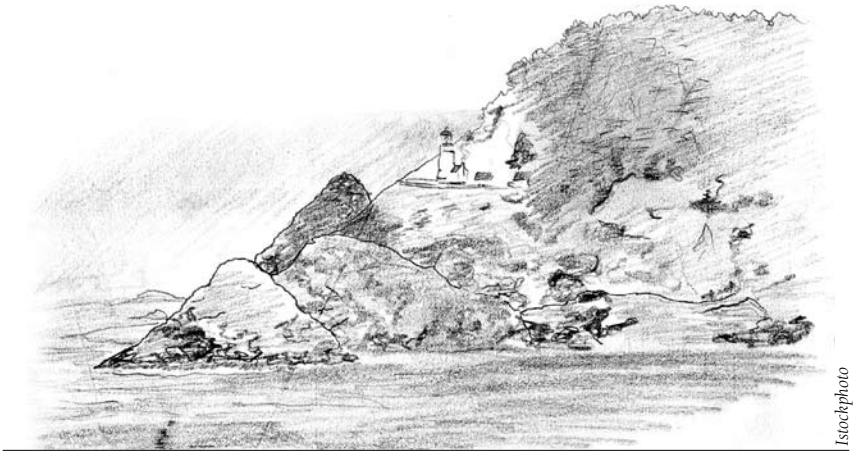
Woodford v. Ngo, 548 US ___, 165 L.Ed 2d 368 (2006) (Civil Rights – Prisoner who filed untimely prison grievance failed to properly exhaust administrative remedies; his claim was barred by Prison Litigation Reform Act).

CASES ON REVIEW FROM OREGON AND WASHINGTON

The Court issued decisions in two cases on review from the Oregon Supreme Court, and two from the Washington Supreme Court. In *Oregon v. Guzek*, 546 US ___, 163 L.Ed.2d 1112 (2006), the Court, reversing the Oregon Supreme Court, held that the Eighth Amendment did not require Oregon to permit Guzek to admit new alibi evidence in the sentencing phase of his capital murder trial. In *Sanchez-Llamas v. Oregon*, 548 US ___, 165 L.Ed. 2d 557 (2006), the

Court, affirming the Oregon Supreme Court, held that a violation of a foreign national's right, under Article 36 of the Vienna Convention, to be informed of his right to consult with his nation's consular officials prior to police questioning in this country, did not require suppression of statements the foreign national made to police, and, in any event, that a State, in post-conviction proceedings, could apply its regular rules of procedural default to Article 36 claims.

In *Davis v. Washington*, 547 US ___, 165 L.Ed. 2d 224 (2006), the Court, affirming the Washington Supreme Court, held that statements made to a 911 operator in response to inquiries about events as they were actually happening, in order to garner information for an appropriate emergency response, were not "testimonial hearsay," and the introduction of the 911 recording did not violate Davis' rights under the confrontation clause of the Sixth Amendment. In *Washington v. Recuenco*, 548 US ___, 165 L.Ed.2d 466 (2006), the Court reversed the Washington Supreme Court and held that failure to submit a sentencing factor to the jury, as required by *Blakely v. Washington*, 542 US 296 (2004), was not structural error, and, therefore, was subject to harmless error analysis.



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An icon of the Oregon Coast

PROFILE – DAVID V. BREWER, CHIEF JUDGE OF THE OREGON COURT OF APPEALS

By Jennifer Oetter, Hoffman Hart & Wagner and Court Liaison Committee.

If your faith in the law is thin or if you have lost sight of why you chose the law as a profession, sit down for five minutes with David Brewer. His love of the law and commitment to the profession are infectious. His presence is both humble and commanding. He is passionate and committed but also kind and professional. And if the measure of a person is partly reflected in the words or deeds of those close to them, then he is as good as they come. He recently celebrated his 25th anniversary with his wife, Myrna. His children exhibit the same desire to learn and explore as their father. His son just got back from Romania and is on his way to teach in Korea, his daughter is on her way to study in Chile. And those who know Judge Brewer are enthusiastic in singing his praises.

Prior to our meeting, I'd been warned that he would probably not agree to be interviewed. When I asked why people thought he would be reluctant, he paused, and admitted that he was thinking of me as an old friend and simply trying to forget that he was being interviewed. You see, he explained, I just don't like these kind of things - never

been the kind of person to inflate my own self importance. Even so, it took quite a bit for this new friend to extract information.

David Brewer was born in Modesto, California on August 12, 1951. His father was a farmer and his mother a school teacher. He lived near Modesto until he was 15 and moved to Marin County where his mother had been given a position as a school administrator. After high school he attended California State University at Sonoma where he studied economics and received his bachelor of arts in 1974.

He chose the law, in part, because of his mother; it was what she had always wanted to do. He chose the U of O School of Law and recalls being "scared to death" that first day, certain that he was not smart enough to be there. So certain, that during his first semester he took the civil service exam and was prepared to begin work as an engineer in California. When he left for winter break, he packed everything into his 1964 Volkswagen bug (the hood tied down with a coat hanger) and headed home to California. But he came back. Even with his insecurities, he knew he had made the right choice - he loved every class, he lost track of time reading law school texts and none of it ever seemed like work. And the friends he made in law school are among those he continues to count among his closest.

Out of law school he started working with Herb Lombard and stayed for the remainder of his years in private practice. It was a true general practice, taking anything that came in the door. Not surprisingly, he remains close friends with his partners from his civil practice.

He did not plan to become a judge; he loved his private practice. A group of lawyers from Eugene asked him to consider a vacancy on the Lane County Bench because of his business background. He agreed to "put in" but, out of concern for his clients, he resolved that if he was not appointed, he would not try again. He was appointed to the Lane County Circuit Court in 1993 by Barbara Roberts. When he got the call from then Governor Roberts, he thought it was a friend playing a joke until she reassured him that she was indeed the Governor.

When asked about memorable experiences in Lane County, he recalled his first criminal trial. A teacher had been hit head-on by a meth dealer. After the trial, she was being threatened in the hall by the dealer's friends. Judge Brewer heard the commotion from his chambers and started to run out. His judicial assistant, Sharon, grabbed him by

the collar and said, "Kid, you just got here, don't go home with blood on your dress." He got the message: the role of a judge is different.

His appointment to the Court of Appeals happened in much the same way as his Circuit Court appointment but to him, was an even greater surprise. Prodding from colleagues combined with his thirst for new experiences and knowledge prompted him to apply. He has been at the Court of Appeals since 1999 and now serves as its chief. As a judge, his work ethic is well known. As the chief, the judges describe him as one of the best "managers" they've worked with.

He is a man who allows his conduct to speak for itself. When asked to reflect on his career, Judge Brewer is not forthcoming about the "big" cases, he truly believes that every case is important and that every person deserves the chance at justice. To learn that he worked with both sides to reach a plea agreement in the Kip Kinkel shooting case, or that he facilitated a settlement in the litigation surrounding the new hospital in Springfield, or about his special appointment by the Supreme Court to conduct pre-hearing investigations in the PERS litigation (only a few of his high profile cases), you will have to do some outside research.

At this point in his career, when passion for the law and justice might be waning, Judge Brewer's is insatiable. He is distinctly aware of the challenges facing the preservation of an independent judiciary and is not daunted. He appreciates the role of a judge is an important and unique one in preserving and promoting democracy. He remains committed to and actively involved in ensuring that legal services are available to all. He is an inspiration, albeit a reluctant one.

PROFILE – WALT EDMONDS, JUDGE, COURT OF APPEALS

By Leslie Kay, Regional Director, Multnomah County Office, Legal Aid Services of Oregon and Court Liaison Committee.

Court of Appeals Judge Walter I. Edmonds grew up on the North Umpqua River near the towns of Wilbur and Winchester. After graduating from Roseburg High School in 1961, he attended Linfield College, wrote for the college newspaper and worked part time for the

McMinnville News Register covering news and sports. After considering a career in journalism, Edmonds decided to attend law school at Willamette University College of Law. He envisioned becoming a small town lawyer and living the rural life he came to know as a child. After law school he was offered a job as an associate by a sole practitioner with a general practice in Madras. When he was discharged from the Army Reserves in 1967, Edmonds packed all of his belongings into his '57 Ford to begin his legal career in a town and area where he did not know a soul.

That first year in practice, Edmonds was appointed to represent a transient man who was charged with murder. Providing a defense in this tragic case helped Edmonds understand the role that criminal defense lawyers play in seeing that justice is done even when that role may not be popular in a community.

Within a year of arriving in Madras, Edmonds was appointed as the District Attorney of Jefferson County. During a fateful telephone call, Governor Tom McCall told the new lawyer that 25 was "a little young" to become the district attorney, but he was going to appoint Edmonds anyway. Edmonds found working as a district attorney in a small county to be fascinating. He worked closely with law enforcement and other county officials. On one occasion he personally effectuated an arrest of a man who had barricaded himself in an apartment with a shotgun, because the interim sheriff, an undertaker, did not feel that he had the training to do so. Edmonds would also go on evening state police ride-alongs to help the thinly stretched officers, and on one memorable occasion tackled a robbery suspect who was hiding in some sagebrush near the Warm Springs Reservation. Edmonds had to be cautioned by a tribal officer to release the hammerlock he applied to the suspect. During this period Edmonds tried a criminal case against future federal Judge Owen Panner, one of the giants of the legal culture in eastern Oregon at the time. (Edmonds lost.)

When Edmonds was 26, attorney Ron Bryant approached him about joining his firm in Redmond. Edmonds accepted and spent the next six years trying cases all over Central and Eastern Oregon. The firm owned a plane, and Edmonds obtained his instrument rating, flying in and out of the small airports that dot the eastern part of the state to try cases in Condon, Fossil, John Day, Prineville, Burns, Pendleton and Baker. He remembers knowing the contents of deposi-

tions so well that he could visualize and recall the record on demand. Edmonds learned everything he knew about trying cases from future Court of Appeals Judge Robert Foley, who sat on the 11th Judicial District Circuit Court, and from his partner Joe Larkin, who would debrief his trials. Later, his judicial role models would be Judges John Copenhaver and Bob Campbell, who sat on the 11th Judicial District Circuit Court. Edmonds became the president of the Central Oregon Bar Association and in 1975 was appointed to the Circuit Court bench by Governor Robert Straub.

The 11th Judicial District at that time encompassed Deschutes, Gilliam, Jefferson, Crook, Grant and Wheeler counties. Edmonds rode the circuit, hearing cases in all six counties. Edmonds was all of 32 when he began and it took some adjustment to referee trials between Owen Panner and others. He learned to command the courtroom using common sense and wisdom.

While living in Madras, Judge Edmonds met and married his wife, Janet, who was a schoolteacher in the Madras School District. In 1980 they moved to Bend from Redmond. They have two children, born in 1975 and 1979. His children grew up on the backs of horses and are now veterinarian students who hope to eventually settle east of the mountains. Edmonds is active in church activities and with farm work when he is not on the bench.

In 1989 Governor Neil Goldschmidt appointed Judge Edmonds to the Oregon Court of Appeals. He moved his family to West Salem where they purchased a small farm. He is now the Presiding Judge for Department Three of the Court. On the bench, Edmonds has authored over 1600 published opinions. He brings his wealth of experience as both a circuit court judge and trial attorney to the court. Edmonds humbly regards his opinions as those of the court as a whole and acknowledges the role that judicial clerks and staff play in the work of the court. He tends to apply the law in as literal manner as possible and does not view the constitution as an evolving instrument. He believes that the courts "ought not legislate in the guise of interpretation of the constitution." That said, Edmonds believes that the constitution is the protector of individual liberties and that the court must be mindful of safeguarding those interests.

Edmond's advice to those who appear before the court is to "...be prepared, and anticipate the position of one's opponent. Consider how

a holding will affect all Oregonians. Be responsive to questions from the panel, and educate the court in a nice, respectful way. Be flexible and provide the court with the rationale that leads to a conclusion." Judge Edmonds regards practicing law as a "noble profession" and this man, whose career and outlook has been shaped by life in the eastern part of the state, puts those ideals into practice each day at the Court of Appeals.

PROFILE – JUDGE REX ARMSTRONG, OREGON COURT OF APPEALS

By Doug Bray, Multnomah County Circuit Court Administrator.

Rex Armstrong was born in Salem in 1950. His parents introduced him early to Oregon politics and government. His father served as Chief of Staff for Governors McKay, Patterson and Smith, succeeding Tom McCall in that position. In 1959, the Armstrong family relocated to southwest Portland, where his mother became a high school teacher, obtained a doctorate in educational psychology, and founded the Institute for Managerial and Professional Women. His mother was deeply committed to promoting equality for women in all aspects of life, which led Rex and his siblings to share that commitment.

In his early years, Rex worked for his spending money. He picked strawberries and beans in fields near Progress that are now part of the Washington Square shopping center, and had *Oregon Journal* and *Oregonian* paper routes. He delivered flowers with his older brother on holidays for Tommy Luke Florists.

At his initiative, Rex left Portland in 1964 to attend high school at Phillips Academy, in Andover, Massachusetts. That summer, his mother purchased a large trunk and packed it full of the things he would need for the ninth grade academic year at Andover. Trunk packed, his parents took him to Union Station and put him on a train for Boston. He spent the next four days and three nights crossing the country by coach. When he arrived in Boston, he lugged his trunk from the train station to the bus station to catch a bus to Andover, where he was dropped at a corner to make his way to the campus. The independence that the trip reflected and the experience that Andover fostered is emblematic of Rex.

Rex spent the summer between high school and college working as a choker setter on a logging crew in Raymond, Washington, which led to an experience that affected his perspective on law. On the night that he left Raymond at the end of the summer, two jewelry stores in town were burglarized. The police came to believe that Rex had committed the burglaries, based on eyewitnesses who said that they had seen him in town that night looking in the jewelry store windows. The Raymond police chief traveled to Oregon to arrest Rex for the burglaries, but fortunately, Rex had an unassailable alibi. He had been stopped by a Washington State trooper while driving to Portland when he ostensibly was in Raymond committing the burglaries. Rex came away from the experience convinced that he would likely have been convicted of the burglaries if the case had gone to trial, which led him to appreciate the principles that animate our approach to the prosecution of people for crimes.

Rex got further drawn into politics while in college, serving as an intern in Senator Hatfield's Washington office in 1971 and then as the Eastern Oregon field director for Hatfield's 1972 re-election campaign. In the latter position, he drove 70,000 miles in ten months in Oregon campaigning for Hatfield, which gave him a good appreciation for the state. It also convinced him that he had no desire to run for elective office.

After a three-year hiatus during which Rex worked as a long-haul truck driver in addition to his work with Hatfield, Rex returned to school at the University of Pennsylvania. While there, he took an undergraduate course on constitutional law that further focused his interest in law. That interest grew after reading several books about William O. Douglas, whose 36-year career on the US Supreme Court was drawing to a close.

When selecting an Oregon law school to attend, his undergraduate interest in Justice Douglas led Rex to enroll at the University of Oregon School of Law so that he could take classes with Professor Hans Linde, who had clerked for Justice Douglas in 1950-51. Rex took all of the classes that he could with Linde, taking constitutional law in his third rather than second year to accommodate a Linde sabbatical. Rex continued his legal education with Linde by serving as Justice Linde's law clerk at the Oregon Supreme Court in 1977-78.

After his clerkship, Rex practiced law in Portland, focusing principally on civil litigation and appellate work. He also did a significant amount of work as a cooperating attorney for the ACLU, handling a number of cases that helped to develop Oregon's constitutional law on free speech and religious liberty.

In 1994, Judge Kurt Rossman decided to retire from the Oregon Court of Appeals and to have his seat filled by election rather than by gubernatorial appointment. Notwithstanding his earlier conviction that he would never run for elective office, Rex entered the race to succeed Judge Rossman and was elected to the court in November 1994. Ironically, had Judge Rossman's successor been appointed rather than elected, Rex would not have sought the position because the governor at the time was Barbara Roberts, who is Rex's step-mother-in-law.

Rex is married to Portland lawyer Leslie Roberts. They have two children who joined their family by birth and five who joined it by adoption in China. The adoptions took place over a 10-year period from 1996 through 2005. The whole family has gone to China for each adoption, which has helped foster a great family interest in China. An experience on their second adoption trip also deepened Rex's appreciation for our judicial system. The police detained Rex in Changsha, China, for videotaping a street protest against what the protestors believed to be a corrupt court decision in favor of a wealthy land developer. The police released him after he erased the offending portion of the videotape and signed a confession, but the experience said much to him about the work that needs to be done to promote the rule of law in China.

PROFILE – RICK HASELTON, PRESIDING JUDGE, DEPARTMENT 1, OREGON COURT OF APPEALS

By Greg Silver, Metropolitan Public Defender and Court Liaison Committee

"I feel incredibly fortunate. I have a terrific home life [and] I'm doing the work I want to be doing. How many people get to say that?" Judge Rick Haselton smiles with almost a sense of wonder. The comment, and his reaction to it, capture the spirit of a man who could have a deservedly large ego, but has chosen not to.

A native Oregonian, Rick Haselton and his older sister were raised by their mother in Albany after his parents divorced. His mother was a high school English teacher and Judge Haselton remembers that his bedtime stories were her lesson plans for the next day. Some children heard about the *Three Pigs* and *Little Red Riding Hood*; he learned about *Beowulf* and *Macbeth*. While he was in high school – presumably long after the bedtime stories had ended – his mother went back to college for her Ph.D. and later taught at Oregon State University.

Judge Haselton graduated from West Albany High School in 1972, where his debate partner was a friend he had met while trading baseball cards in the 8th grade: future lawyer and gubernatorial candidate Ron Saxton. He went to Stanford University where he briefly toyed with the idea of going into medicine, until he took freshman calculus. "If calculus felt that way, I could only imagine what organic chemistry was going to be like."

He graduated *Phi Beta Kappa* from Stanford and went to Yale Law School, where he became active in a clinical program representing inmates at the Danbury Federal Prison. He was second chair on a matter for Watergate burglar G. Gordon Liddy, who was "very clear in terms of what he wanted." The judge's third year adviser was Robert Bork – another Watergate figure – whom the judge said was "unbelievably quick and funny." The Bork he saw in the Supreme Court confirmation hearings in 1987 "wasn't the man I'd gotten to know a little bit at the law school."

The new lawyer returned to Portland in 1979 to clerk for Ninth Circuit Court of Appeals Judge Alfred Goodwin, an experience which is clearly a watershed event in his life. Judge Goodwin helped him learn to write "in ways I still can't explain" and also helped him discover how to take a straightforward, non-ideological approach to cases. Judge Haselton tries to give his clerks the same balance of responsibility and legal education his mentor gave to him.

In 1980, he became the 28th lawyer at Lindsay, Hart, Neil & Weigler, where he stayed for 13 years. He credits firm founder Dennis Lindsay as being someone who had a great influence on him as a lawyer. Lindsay Hart in the 80's was an exciting firm with young lawyers who were both politically and socially active in the community. It was also the breeding ground for many future Oregon judges including Rex Armstrong, Jack Landau, Robert Wollheim, Thomas Balmer and

Janice Wilson; and future Oregon political figures including Kevin Mannix and Ron Saxton. Portland lawyer Martha Spinhirne, now a Chief Attorney at Metropolitan Public Defender, clerked at Lindsay Hart while she was in law school. She remembers Judge Haselton as the "go-to-guy" at the firm whenever anyone needed to find a case or refine a point of legal analysis.

Although he was raised a Catholic, Judge Haselton had been on a long path since high school that gradually led him to convert to Judaism. It also led him to his wife, Sura. In 1987, he was having dinner with Portland lawyer Jeff Druckman and his wife, Erica Goldman. The three had met on their first day at Stanford 15 years earlier. At dinner, he was talking with Portland lawyer Emily Simon who, within a few minutes of what Judge Haselton jokingly calls "cross examination," determined that he was single, interested in meeting someone, and, while not Jewish, was seriously thinking of converting. Emily's conclusion: "Have I got the girl for you."

Rick Haselton and Sura Rubenstein, the *Oregonian's* religion writer at the time, were engaged four months after they met. Emily performed a civil wedding with a Jewish betrothal ceremony in 1988. They had a religious ceremony in 1989 after Judge Haselton's conversion process had progressed to a point where he felt the ceremony was the appropriate next step. They are now happily raising their 14-year-old daughter – who has told her parents she does not want to be a lawyer – with a quiet but deeply-rooted faith.

Judge Haselton was appointed to the Court of Appeals in 1994 and has been the Presiding Judge in Department 1 since 2001. His judicial philosophy is similar to that of his mentor, Judge Goodwin: to view each case on its own merits without any predetermined ideology or goal to influence him. "When I approach a case," Judge Haselton says, "I'm really not trying to make law. The idea is to take the matter on its own terms. If law ends up being made in the process, that's fine. But that's not the point of what we're about."

That philosophy fits well with the discussions he and some other jurists have on their carpool rides to Salem. Occasionally, someone will begin to discuss the legacy of appellate court judges. "I don't think I'll have a legacy," Judge Haselton says, "because I don't think anyone will be able to pin down some constant theme or thread that I'm about. And by me, that's just fine."

PROFILE – PRESIDING JUDGE LANDAU, OREGON COURT OF APPEALS

By Tom Cleary, Multnomah County DA's office and Court Liaison Committee.

He moved all over the country as a child, attending more than 20 schools before graduating from Franklin High and making Oregon his home. Presiding Judge Jack Landau of the Oregon Court of Appeals brings to the bench a strong work ethic that he developed from his experiences as a young man.

Attending Lewis & Clark College, he obtained undergraduate degrees in history and psychology. In the process, he developed a passion for learning that over the course of his career would bring him back to the classroom, both as a student and as a teacher. After college, Judge Landau took time off to indulge another passion - music. He played guitar in a bluegrass band and indicates that the group met with some success, in that they actually "had some paid gigs." "Don't be too impressed, though," he cautions. "Sometimes we played for audiences of six people, and that was counting our girlfriends."

Wanting to take on a new challenge, Judge Landau entered law school at Lewis & Clark. He enjoyed his law school experience, especially classes in environmental law and - he notes with some hesitation - legal research and writing. He was Editor-in-Chief of the law review and while a student published several articles on environmental and natural resources law.

Upon graduation, Judge Landau followed his interest in teaching and writing and accepted a position as a legal writing instructor at the law school. It was during that year of teaching that Judge Landau developed an interest in clerking for a judge. "Actually, it wasn't my idea. The director of student employment, whose office was right next to mine, pretty much insisted that I apply for a federal court clerkship." That led to an interview with U.S. District Court Judge Robert Belloni. It proved an uncomfortable interview. "One of the case notes that I had published the previous year was fairly critical of Judge Belloni's famous Indian treaty fishing rights decisions," Judge Landau explains. "I had hoped that he didn't know anything about the article but, much to my chagrin, I saw that he had a copy of it right on his desk. I figured I was toast at that point." What followed was a "spirited" discussion of the case. Much to Judge Landau's surprise, at the end of the discus-

sion, Judge Belloni said that he had enjoyed the experience so much that he wanted to offer Landau the job. Judge Landau says that he thoroughly enjoyed working for Judge Belloni for two years and that working for the judge caused him to dream of someday becoming a judge himself.

Judge Landau joined the firm of Lindsay Hart, where he practiced in both the trial and the appellate courts. He spent six and one-half years with the firm and ultimately became a partner. In 1989, then-Attorney General Dave Frohnmayer hired him to lead a Special Litigation Unit within the Trial Division of the Oregon Department of Justice. In 1990, Frohnmayer appointed him to be Oregon's Deputy Attorney General, a position he also served under Attorney General Charles Crookham. In December 1992, Governor Barbara Roberts appointed Judge Landau to the Court of Appeals.

When asked what makes a good appellate judge, Judge Landau replied that, first and foremost, the judge must be fair and impartial. "The Court of Appeals," he noted, "is not a good place for anyone with an agenda." In addition, he suggested that the judge must be prepared to work extremely hard and, in particular, to read a lot of briefs. Judge Landau said that, in his 12 years on the bench, he has read a stack of briefs more than 20 stories tall. He said that it also is indispensable to be collegial. According to Judge Landau, "appellate courts work in panels. So you must be able to get along well with your colleagues, even in the face of vigorous disagreement. Otherwise," he explained, "you'll end up spending all your time writing nothing but dissents." He also said that a good appellate judge must have a "passion for the law" and must love to write. Judge Landau says that one of the things he enjoys most about his job is writing his own opinions and that one of his goals is that "whether or not you agree with it, you only have to read the opinion once to understand it."

In the meantime, Judge Landau has not lost his passion for learning or teaching. Despite his busy schedule at the Court of Appeals, he returned to the classroom to obtain an advanced law degree from the University of Virginia. And, for the past 13 years, he has been sharing his knowledge and experience as a visiting professor at Willamette University College of Law.

PROFILE – JUDGE VIRGINIA LINDER, OREGON COURT OF APPEALS

By Catherine N. Carroll, Attorney at law, Court Liaison Committee member

During several conversations with Court of Appeals Judge Virginia Linder as we worked out scheduling our interview for this profile, I thought several times about how I might begin the article.

I had given her several previous MBA judicial profiles so that she could think about what she might want to see about herself in print; and, when I asked if there would be anything in particular that she felt people might be interested in about her, she responded in her quiet way, "No, I really don't think so."

Then one morning she called to ask if it would be convenient to get together following a scheduled meeting a few days later at the State Bar office. "And I'm hoping to have time to stop at a couple of stores along Highway 217," she said. Thinking she meant Washington Square, or maybe Powell's or Borders, I asked her about that. "Well, there are a couple of woodworking stores where I can get tools I just can't find in Salem," she said.

Woodworking tools?

Judge Linder builds kayaks. There are four of them in her tidy garage, all of them handmade by Judge Linder herself, all of them beautiful, and all of them used regularly. She finds relaxation and enjoyment in the tangible, detailed, precise work of building her kayaks; and her affinity for detailed, precise work is apparent also in her approach to her work on the Oregon Court of Appeals.

It's also true that Judge Linder has been the first person around to do lots of things, and she's never let that slow her down a bit.

Raised in a household of teachers, Judge Linder spent her early childhood years in Colorado, and grew up in Carmichael, California, not far from Sacramento. She is known to family and friends as 'Gini' or 'Gin,' as in her toddler nephew's question on walking into a new neighbor's house, "Where's your Gin?" She and her partner of 18 years, Colleen, live a short distance outside Salem with their dog, Toby.

She describes happy childhood memories of all-summer-long road trips back to Colorado with her parents and sister. Last summer,

Judge Linder, her parents, and Colleen re-created those family trips with a 4-week car trip to Colorado, re-visiting former family homes and favorite haunts, staying happily at the champagne-style accommodations of Breckenridge and other resorts at beer budget summer prices, and visiting the mountain places they had so enjoyed many years before.

Unemployed after graduation from Southern Oregon College (now University), Judge Linder's sister and brother-in-law invited her to live with them and their baby son in Virginia, on the theory that you might as well be out of a job with us here as alone back in Oregon.

After two years, it was time to transition back, and Judge Linder applied to Willamette Law School because...Because...Well...She didn't know any lawyers, and didn't know what it would be like to practice law, and she'd never heard of a woman being a lawyer. A teacher of civics and American government had sparked her interest, making the court system seem vital and important and exciting; and sparking in the young Gini Linder lasting interest in the value of the court system as a means of dispute resolution, and in children's rights.

She found law school less than full-time enthralling, and took a part-time job clerking in the Appellate Division of the Attorney General's Office. "I found my place in the law right then and there," she says, recalling that the office was the kind of place where a young, green law student was allowed to tackle any project she could handle, so that, by the time she was ready to graduate from law school, she had worked on perhaps as many as 50 appeals.

Judge Linder also recalls that, of the 12 lawyers in the office at that time, 4 were women - an unusually high percentage in those days. She remembers that her very first case was argued by then-Asst. A.G., now retired Court of Appeals Judge, Mary Diets - because young Gini Linder, who had prepared the case, wasn't licensed as a lawyer yet. The case was argued on the other side by a young attorney from Medford named Rebecca Orf - now also a judge.

Speaking with Judge Linder, one remarks that she always noticed, and still remembers, whether there were women lawyers and how many.

On graduation from law school, she accepted a position in her beloved Appellate Division when Chris VanDyke's departure to run

for District Attorney in Marion County created a vacancy. She stayed with the Appellate Division for 17 years, working under 5 Attorneys General, and serving as Oregon's Solicitor General for 11 of those years. Gov. John Kitzhaber appointed Judge Linder to the Court of Appeals in 1997.

Judge Linder describes the Court's 10 judges as working together as a real group, with a strong sense of collegiality and a work ethic which she says can best be described as "indefatigable." She speaks of the judges' deep awareness of the importance of their decisions to the litigants; and of the Court's innovative programs, including an exchange program in which appellate judges trade places with trial judges, so that each gains an appreciation for the other's realities; and the "Courtroom on Wheels," which presents appellate arguments in schools around the state.

Judge Linder has the matter-of-fact outlook and low-key, forthright courage of the pioneer that she's been throughout her career. She loves what she does, enjoying the wide range of cases, the case load, and her co-workers. As she says, "That's about as good as it gets."

PROFILE – JUDGE DARLEEN ORTEGA, OREGON COURT OF APPEALS

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

Over breakfast at Lorn and Dotties in Portland, Judge Darleen Ortega shared personal experiences not easily seen from her accomplished resume. She had just returned from a trip to Thailand, a first for her in that country, though she makes an annual trip overseas. Hearing about those annual trips, one is impressed with her love of being immersed in foreign cultures and her openness to new experiences.

Oregon voters know of her dedication and intelligence, graduating summa cum laude from George Fox University in 1984 and magna cum laude from the University of Michigan Law School in 1989. Attorneys and judges recognized her as a talented, hardworking litigator, first in Michigan, and then in Oregon where she specialized in complex civil cases and appeals. While an associate, then partner, at Davis Wright Tremaine, Ortega served on, state and county bar committees and demonstrated a commitment to diversity education, mentoring

and professionalism. When Governor Kulongoski appointed her to the Court of Appeals in August 2003, he selected a woman whose passions have become her integral asset.

Ortega's family moved from Los Angeles, California to Banks, Oregon, when she was ten years old. As a child, she recalls being obsessed with reading novels, then while at Banks High School, becoming passionate about writing. She envisioned a life telling other people's stories.

Early on, she grasped the power of language. Growing up in a mixed race household, having a cultural background different than any of her classmates, Ortega recalls often struggling to make herself understood and to make sense of situations in which she felt alien. Judge Ortega's parents had not been to college and while they did not oppose her going, they had neither the funds nor the cultural experience to support her.

In college, Ortega excelled. She majored in writing and literature while working as teacher assistant to Professor Karen Larsen, later known as columnist "Ms. Grammar" for the OSB *Bulletin*. Summers, Ortega worked in daycare, then in an arthropod exhibit at the Washington Park Zoo.

With no prior exposure to attorneys and only a rudimentary understanding of what the practice of law entailed, Ortega enrolled in law school. Her parents were not supportive of her decision, but she carried within her the belief that the legal education would provide her the tools to help others. Law school opened up her world and at the same time cemented a strong connection to Oregon being "home" that she appreciated in new ways.

Financial considerations dictated Ortega's choice to enter private practice. After three years litigating in Detroit, she returned to Oregon. Ortega discovered that appellate practice perfectly matched her approach to detail, her writing skills and her interest in telling the stories of her clients. In private practice she also had the opportunity to mentor law students and young lawyers and to be of service in the community.

Entering her third year on one of the busiest appellate courts in the nation, Judge Ortega has not lost sight of the importance of "hearing" the experience of others while efficiently managing a large volume

of cases. Matters involving families and children hold a special interest for her; however Ortega recognizes that the court is a blunt instrument for resolving family issues. She has not lost sight of the real impact of appellate decisions on an Oregonian's family life.

Besides writing on cases before her, Judge Ortega, a longtime movie buff, regularly renders opinions through semi-annual film reviews for family and friends. A recent film favorite, "Crash," dealt with race issues and the dilemmas ethnic minorities face in the dominant culture. An all-time favorite for her is the original "Matrix." Film, like travel, allows her to spend time in another person's experience and to come to understand that experience better.

Judge Ortega is grateful to be serving on the Oregon Court of Appeals, which suits her legal strengths and allows her to serve in the public interest. Oregonians are fortunate to have Ortega on the bench, a judge with a deep appreciation for the diverse experiences of others and an awareness of the richness that diversity brings to us all.

PROFILE – JUDGE DAVID SCHUMAN, OREGON COURT OF APPEALS

By Jeff Chicoine, Newcomb Sabin et al and MBA Court Liaison Committee.

Speed skater, English professor, law professor, college administrator, deputy attorney general, judge and avid recreational bicyclist. These are just some of the words that describe the Honorable David Schuman, Judge of the Oregon Court of Appeals.

Judge Schuman was born and raised in the Chicago area. As a 17 year old, he was an accomplished speed skater, placing second in the North American finals in the 220 yard competition. Although he harbored some Olympic aspirations, he passed up the opportunity because he was anxious to start school that fall at Stanford University.

In 1966, Judge Schuman graduated from Stanford University with a major in psychology. Inspired at least in part by his father who was a Chicago business lawyer, Judge Schuman started law school later that year at the Hastings School of Law. At Hastings, his first year professors included Prosser in Torts, Farnsworth for Contracts and Powell on Property. Despite (or because of) the opportunity to learn from

such legal luminaries through their rigorously Socratic method, Judge Schuman decided the law was not for him and quit after six weeks.

That same fall, Judge Schuman enrolled in the San Francisco State University, where he earned an M.A. in English. While in graduate school, he married his wife, Sharon. He then taught English for two years at Santa Clara University. Deciding to pursue a Ph.D., he returned to his roots and attended the University of Chicago.

With a doctorate in hand, Judge Schuman and Sharon decided they preferred the west coast. The couple accepted a position in a job-share arrangement to teach literature at the unique Deep Springs College in California. The college is located on an alfalfa and cattle ranch near the Nevada border. It had 25 students in a two-year program who worked 20 hours per week on the ranch. Judge Schuman and Sharon decided to leave that bucolic setting when their children attained school age so that the children would not have to travel 41 miles to school each day.

Although Judge Schuman has no regrets about studying and teaching literature, the family's move in 1981 prompted Judge Schuman to "recycle" himself and to try law school a second time. He attended the U of O School of Law and found the experience more inviting than his initial law school exposure.

After graduating from the U of O, Judge Schuman clerked for Justice Hans Linde and then worked at the Department of Justice for two years handling appellate cases. He returned to academia, this time as a law professor at the U of O, and served as the associate dean of academic affairs for two years. He taught classes on constitutional law, criminal procedure and legislative and administrative processes.

In 1997, Judge Schuman joined Attorney General Hardy Myers as deputy attorney general, a post he held through 2000, when appointed to the Court of Appeals.

Judge Schuman, the former English professor, finds Scott Turow's novels very well written. As for another lawyer-novelist, he says he has picked up a Grisham volume a time or two at an airport, but only when stuck without advance sheets to read.

Judge Schuman retired from running after his second Portland marathon, and now bicycles to keep fit. Sharon teaches literature at

the U of O's honors college. His daughter, Rebecca, obviously picked up her parent's affinity for literature, for she is now enrolled in a Ph.D. program in comparative literature. His second child, Ben, is an investment banker in Portland.

PROFILE – JUDGE ROBERT WOLLHEIM, OREGON COURT OF APPEALS

By Theresa Wright, Lewis & Clark Law Clinic and Court Liaison Committee.

Robert Wollheim thinks he has the best job in the world. He has a great work environment; he works with people who get along and respect each other, and who are committed to "getting it right." He particularly enjoys working with his law clerks, and at least annually invites all his clerks to a get together at his Portland home.

Judge Wollheim came to the law in a less than traditional manner. He began his college career at Reed College in 1968, but did not finish. In the early 70's, Judge Wollheim became involved in doing prison reform work, along with lawyers from the National Lawyers Guild. Through the guild, Judge Wollheim met some local lawyers who eventually formed a local partnership, with Judge Wollheim signing on as a legal assistant. He worked with that firm and another before moving to Lindsay Hart as a legal assistant. It was through this legal assistant work that Judge Wollheim developed his interest in the law. Not having a BA, he looked for the fastest way to complete his degree so he could apply to law school. He took some classes at Portland Community College, then attended Portland State University, while working full time, earning his BS in General Studies in 1979.

Once he had completed his degree, Judge Wollheim spent a year traveling throughout North America, describing the United States in an "amazing country." He began law school at the U of O in 1980. On June 6, 1980, Judge Wollheim met Karen Erde, a doctor with an established practice in Portland. Within a year, they decided to marry, and Judge Wollheim transferred to Lewis & Clark, from which he graduated in 1983.

Judge Wollheim began his legal career as a floater clerk with the Court of Appeals, at the end of the year working with Chief Judge Joseph and presiding Judge Gillette. He notes that he is the only former

Oregon Court of Appeals clerk who has then taken the Court of Appeals bench. Then, Judge Wollheim began working for Welch, Bruun, and Green, focusing his practice on workers compensation, personal injury, and Social Security Disability. Approximately one-third of his work was appellate practice. He became a partner in the firm in 1990, becoming a named partner in 1993.

Throughout his practice, Judge Wollheim did significant pro bono work. In addition, he served on the boards of the Multnomah County Legal Aid Service and the Willamette Valley Law Project and on the AFL-CIO Laborers' Community Service Agency. Judge Wollheim believed that becoming a judge would allow him to continue his public service. He was appointed to the bench in early 1998 by then-Governor John Kitzhaber, M.D. He was sworn in on March 8, 1998, filed for election the next day, thereafter being elected to his position.

In 2004, during Judge Wollheim's most recent re-election campaign, he found himself in a contested race. As a result he campaigned throughout the state, which he found to be a humbling experience and says he learned a lot in the process. He spent time in rural Oregon. He found himself becoming a civics teacher, talking with voters about the rule of law, the necessity of having an independent judiciary and the separation of powers. He also said it was heart-warming to receive so much support from other lawyers during his re-election campaign, especially since he has much less interaction with lawyers as a judge than he did as a lawyer.

Judge Wollheim continues his involvement with legal programs. He is on the Oregon Judicial Department's Access to Justice for All Committee, and sits on the court's motions panel which reviews and decides over one thousand substantive motions each month. He is on the board for the Campaign for Equal Justice, and is just finishing his second term on the Oregon Judicial Department's Employees Appeal Board, hearing grievances from employees from the Oregon Department of Justice.

To keep his skills honed, Judge Wollheim occasionally sits as a trial court judge. He sat in Lane County for a time two years ago, has heard civil commitment cases in Marion County, and video-conferenced post-conviction trials in Malheur County.

Judge Wollheim grew up on the south side of Chicago, the youngest of three boys. He has a cousin he is close to, and considers her like

a sister. He has been a White Sox fan for years, and says he has never been a Cubs fan and never will be, although his father and brothers have gone over to the "dark side."

Judge Wollheim and Dr. Erde have three sons - Josh, 21, finishing his junior year as a business major at the U of O, and 17 year-old twins, Nate and Theo, who will be seniors at Grant High School in the fall. In his "spare" time, Judge Wollheim enjoys spending time with his family, using his season tickets to the Oregon Ballet and White Bird Dance Group, and he enjoys spending time at the family's shared cabin near Mt. Hood. He also enjoys reading, despite the fact that he reads thousands of pages each month for his job.

Judge Wollheim thrives in his position as an appellate judge and is honored to serve Oregon's citizens in this role.

PROFILE – ASSOCIATE JUSTICE MARTHA LEE WALTERS

By David Meyer, MBA Court Liaison Committee member.

Oregon Supreme Court Associate Justice Martha Lee Walters "has a unique blend of brilliant intellect and deep, down-to-earth compassion for individuals," according to Governor Ted Kulongoski, who appointed Walters as the 98th justice – and fourth woman – to the Oregon Supreme Court in October 2006. Walters did not get the job with Kulongoski's law firm when she applied as a student at the U of O School of Law in the 1970s; "this time, I got to hire her," Kulongoski said.

Justice Walters grew up in Michigan and graduated with a BA in sociology from the University of Michigan in 1972. Looking for "adventure," she moved to Eugene, where she got a job as a daycare worker. Walters sometimes feels as if her early career was scripted by Gary Trudeau; like the long-standing *Doonesbury* character Joanie Caucus, Walters headed west, worked in a daycare center and in 1974 entered law school.

After graduating with Order of the Coif from the School of Law in 1977, Justice Walters went to work for Johnson, Johnson & Harrang. Working as an associate for a law firm in a medium-sized town like Eugene exposed her to a number of areas of the law, including busi-

ness and franchise work, family law, personal injury, trusts and estates, municipal law and criminal prosecution.

Walters recalls the day the mayor of Drain, Oregon came to her office for advice regarding a detailed contract with the Washington Public Power Supply System that required the city to guarantee payment of bonds for the construction of power plants that were never completed. She joined with attorneys for 88 other public utilities in the Pacific Northwest, which resulted in a ruling by the Washington Supreme Court that the guarantees were void, in what became the largest municipal bond default in US history.

During the early 1980s, Walters found she was handling an increasing number of employment-related cases, although employment law was not considered a distinct legal specialty at the time. In one of her early cases, Walters recalls representing the city of Eugene in a labor grievance. The city had disciplined a male employee for sexually harassing a female employee and the union was questioning whether there was "just cause" to do so. In 1985, Walters joined Les Swanson to form Swanson & Walters, where she developed a focus on employment law. In 2001, Walters and her firm, Walters, Romm and Chanti, together with Bill Wiswall of Wiswall and Walsh, won a lawsuit on behalf of professional golfer Casey Martin, requiring the PGA to accommodate Martin by allowing him to ride in a golf cart while competing in association events. The trial court ruling was upheld by the US Supreme Court.

Prior to taking the bench, Justice Walters' professional activities included serving as a Commissioner for the National Conference of Commissioners on Uniform State Laws since 1992, where she was a member of the committee that drafted the Uniform Mediation Act. In addition to having served as President of the Lane County Bar Association, Walters has been a member of the OSB Disciplinary Board, the Judicial Conference of the Ninth Circuit, the Lane County Local Professional Responsibility Committee and the American College of Trial Lawyers.

Outside her professional life, Justice Walters enjoys spending time working on her garden. She is married to John Van Landingham, an attorney with the Lane County Law & Advocacy Center. Like many Eugene residents, Walters is an active runner; she and her husband have participated in the Pear Blossom Run in Medford since 1978.

Walters and Van Landingham have two grown children and a cocker spaniel named Freckles.

PROFILE – JUDGE ELLEN F. ROSENBLUM, OREGON COURT OF APPEALS

By Cliff Collins[1]

Because she did not want her generation that finished law school in the mid-'70s to be "the first and last" where women had more than token representation, Oregon Court of Appeals Judge Ellen F. Rosenblum has felt an obligation to be an active role model.

It is "instinctively important to me" to try to make the profession more diverse, and to be involved in judicial ethics, says Rosenblum. In peer recognition of her dedication, this fall she was named chair of the Fellows of the American Bar Foundation. The foundation is an affiliate – what she calls the "intellectual arm" – of the American Bar Association, which conducts multidisciplinary empirical research to improve legal institutions.

Rosenblum, who grew up in Evanston, Ill., first heard about the foundation through her father, Victor, who was a law professor at Northwestern University for 47 years. The foundation rents space from the law school. She later became a fellow, and eventually Western regional chair.

It was not a foregone conclusion – at least to her – that Rosenblum, one of eight children, would become a lawyer just because of her father's influence. She was the family member who argued the most at the dinner table, she says, but finished the University of Oregon at age 20 as a sociology major not knowing what she was going to do. After one year of unsatisfying work, she entered law school at the U of O more or less by default, feeling no particular aptitude for science, business or the arts.

Rosenblum clerked at and ended up working for "a very good, small firm" in Eugene, where she immediately was given the opportunity to argue cases before the Oregon Court of Appeals. She says this

1 This article was originally published in the November, 2006 issue of the Bar Bulletin as *Ellen F. Rosenblum: Setting an Example*.

gave her the opportunity to do things she would not have gotten to do for years had she been with a larger firm. She had been one of the first "Nader's Raiders" in Oregon, and expected to work for the Oregon State Public Interest Research Group or a similar organization, but liked the job she accepted.

She spent five years in private practice, which included representing author Ken Kesey in his lawsuit against the filmmaker of "One Flew Over the Cuckoo's Nest," and continued to represent the Kesey family. She then served eight years as assistant U.S. attorney, first in Eugene for one year, and then in Portland. She was ready to move to a larger city, she says. She married Richard H. Meeker, who became publisher of Willamette Week. The couple raised three children, and all the while, Rosenblum continued to work as a federal prosecutor.

Even though she had started her career arguing before the Court of Appeals, Rosenblum's interest in becoming a judge developed gradually, over time. "Observing what they did, I thought: Maybe I could do that, as well or better," she says, noting that for years, there were few female judges. "A lot of my motivation was to develop the diversity in Oregon of the bar and the bench."

In 1989, she was appointed to the Multnomah County District Court, and four years later, to the Circuit Court. She spent a combined total of 16 years at what became the Circuit Court. In 2005, Gov. Ted Kulongoski appointed her to the Court of Appeals.

Out of court, Rosenblum loves singing. For her 50th birthday, she rented a club and invited 120 friends.

Rosenblum's volunteer work is vast. She chaired the Oregon Judicial Conference Judicial Conduct Committee for nine years. It issues ethics advisory opinions to judges and judicial candidates based on the Oregon Code of Judicial Conduct. She served as president of the Owen M. Panner American Inn of Court; initiated the Courthouse Connections program of Oregon Women Lawyers; and speaks frequently on attorney and judicial ethics, as well as motion and trial practice.

Rosenblum has been a member of the American Bar Association House of Delegates since 1988. She became an ABA member right out of law school, a gift from her father to encourage her involvement. Her ABA work has included serving as secretary of the association;

advising a commission that is revising the ABA Model Code of Judicial Conduct; serving on the ABA's Coalition for Justice and its Commission on Racial and Ethnic Diversity in the Profession; and serving as special adviser to the ABA Standing Committee on Judicial Independence.

Rosenblum has received the Oregon Women Lawyers Justice Betty Roberts Award for promoting women in the profession; the Oregon State Bar President's Public Service Award; Lewis & Clark Law School's Andrea Swanner Redding Mentoring Award and Honorary Alumna Award; the University of Oregon Law School Meritorious Service Award; and the Multnomah Bar Association Award of Merit.

"I love being a judge, but I am not sure I would be happy just being a judge," she says. "I think it's very important for judges to be out there in the community, explaining what we do."

THREE OF OUR FAVORITES

Keith Garza, Lora E. Keenan, and Stephen Armitage

One sign that you have been spending too much time in or around the appellate process is the development of an appreciation for judicial opinions in terms of pure entertainment value. Here are a few that we can't seem to forget.

KEITH'S: *State v. Hood*, 225 Or 40, 356 P2d 1100 (1960) – "[A]llaying the thirst [of] Bacchus himself * * *."

By the time Charles Junior Hood came before the Oregon Supreme Court on appeal, Justice George Rossman already had served more than 33 years of the 38 that he spent on that bench, including a two-year stint as Chief Justice from 1947 to 1949. Hood's case was argued on November 9, 1960, and Justice Rossman turned the opinion around just two weeks later, on the day before Thanksgiving. The decision is, if nothing else, an engaging read.

As Judge Ruggero Aldisert has noted, with respect to "many eloquent speakers[, t]he beat that captivated and moved the audience is gone when pen comes to hand. The pen becomes mired in glue and what should be written rhetoric becomes as stultifying as an Internal Revenue Service ruling." Hon. Ruggero Aldisert, *Opinion Writing*, 196 (West 1990). Not so with the venerable Justice Rossman that autumn nearly a half a century ago.

ROSSMAN, Justice.

This is an appeal by the defendant Charles Junior Hood from a judgment of the circuit court which adjudged him guilty of the crime of assault with a dangerous weapon. The judgment was based upon the verdict of a jury. The indictment charged this defendant and a co-indictee by the name of Louis Gibbons with:

> '* * * then and there acting together, and then and there being armed with a dangerous weapon, to-wit, a stove poker, did then and there wilfully, unlawfully and feloniously assault one Cyril Bierle by then and there striking and beating the said Cyril Bierle on the head and face with said dangerous weapon and with a glass bottle * * *.'

The indictment was based upon ORS 163.250. The two defendants were tried separately. Gibbons, who was tried first, was found guilty.

The two defendants and the complaining witness, Cyril Bierle, pursuant to invitation, came to a dwelling house in Chiloquin known as the Lotches home at about 10 a. m. in the morning of November 11, 1959. Before long some three or four cronies joined them. Although the appointments of the home were scanty and included neither a rug for the floor nor a clock for the telling of time, its guests made such ample provisions for allaying the thirst that had Bacchus himself entered the house he would have felt at home and given it an accolade. The invitation to the group was for breakfast, but the evidence mentions wine as the item that engaged the principal attention of the group. Later John Barleycorn put in an appearance and when a repeated demand arose for his wares he returned. The party, if such it may be called, lasted until midnight or later. In its course there was some conversation, seemingly some eating and a considerable amount of drinking. One guest strummed a guitar. At about midnight the altercation upon which the indictment is based broke out. By that time the copious quaffs of alcoholic beverages which some of the revelers had taken had placed them securely in the arms of Morpheus. They had not sought out any bed or lounge, but lay draped over chairs or other objects wherever the spirits fermenti had deposited them. They took no part in the encounter which we will presently describe, either as participants or as onlookers. They were completely de hors de combat even as witnesses. But the two defendants were still awake

and active. If the state's evidence reflects the truth, they were looking for new fields, or at least for small men to conquer.

About 11:30 p. m. the defendant-appellant Hood, according to Bierle, pulled him off of a couch where he had been sleeping and demanded of him $2. When the demand was ignored Hood pinned Bierle's arms behind him, so Bierle swore, while the other defendant (Gibbons) struck him several times, principally upon the head, with the stove poker that is mentioned in the indictment. The stove poker is a metal rod about 2 ½ feet long and possibly 3/8 of an inch in diameter. The metal of which it is made permits it to be bent without excessive effort. Bierle swore that after Gibbons had struck him several times with the poker Hood released his hold and thereupon hit Bierle over the head with an empty wine bottle which broke upon the impact. In the encounter Bierle at one point fell to the floor and Hood did likewise. Hood and Gibbons gave a different version of the affray. They denied that Bierle had been asleep. According to them, Bierle sought to provoke a fight with Hood, who declined to become engaged, and thereupon Bierle found himself in an encounter with Gibbons. Gibbons denied that any stove poker or empty wine bottle played a part in the fight. He seemed anxious to have the fracas identified as one of pure fisticuffs in which he vanquished his opponent. However, if the account he gave is true, the combatants were badly matched. Bierle, a lightweight, had taken on, according to the two defendants, a younger man who was substantially heavier than a middle-weight.

Photographs were taken of Bierle a few hours later after he had received attention from a physician. They show that he had many wounds and that his ribs were taped for fracture. A physician removed particles of glass from his scalp and closed a wound in the latter by means of stitches. Patches of adhesive were required by wounds in Bierle's face and neck. The foregoing will suffice for present purposes as a statement of the facts.

The defendant-appellant's brief manifests scarcely a nodding acquaintance with our rules that are intended to afford the court a ready grasp of the case and facilitate its access to the parts of the record that need attention. Citations to the transcript of evidence are few. An appellant should cite the page of the transcript where the challenged instruction can be found or where this court can locate a requested instruction which the appellant says should have been given. Like-

wise, appellant should cite the page of the record where evidence was excluded which he says should have been received or was admitted over his objections. In addition, the challenged ruling and ancillary matter should be quoted. When those simple rules are followed no undue burden is placed upon the appellant, but this court can thereupon perform its duty expeditiously and with a feeling that it found the material which the appellant had in mind. Notwithstanding the fact that those simple rules were largely neglected in the preparation of appellant's brief we have read with care the transcript of the trial. We did so because this is a criminal case. We will overlook the nonconformity of appellant's brief with our rules; they resulted possibly from the limitations of the young man who prepared those parts. But the fact that our rules, which govern the preparation of a brief, are frequently haughtily contemned where they could have rendered valuable help justifies the remark that there is a limitation beyond which patience and sufferance will not permit themselves to be driven.

* * * * *

In light of that setup, it should come as little surprise that the outcome for Mr. Hood was not good – the four-justice panel rejected each of his six assignments of error. Nor did his co-defendant, Mr. Gibbons, fare any better. Later the next year, Gibbons also drew Justice Rossman for the disposition of Gibbon's 11 assignments of error, with five justices affirming the Klamath County judgment. *State v. Gibbons*, 228 Or 238, 364 P2d 611 (1961). However, by that time, Justice Rossman had had his fun with the case and, with respect to his statement of the facts, offered only that they would "not be recited here, since they are stated in the companion case * * *." 228 Or at 241. So the next time you feel at all emboldened by your old buddy Weiser, your dear old Granddad, your pal Jack Daniels (or his partner Jimmy Beam), or one of the brothers Johnny, Black, or Red Walker – thank you George Thorogood for those – consider raising a glass (but not a stove poker) to the late Justice Rossman before stumbling off to conquer small fields or even smaller men.

LORA'S: *State v. Broadhurst*, 184 Or 178, 196 P2d 407 (1948) – "Their Love Was a Flame That Destroyed!"[1]

In one of my favorite movies, *So I Married an Axe Murderer*, an

1 Tagline for the 1946 film *The Postman Always Rings Twice*.

imaginative but commitment-phobic Charlie (Mike Myers) falls in love with the enchanting but mysterious Harriet (Nancy Travis). Charlie quickly realizes that Harriet is a woman with a past, and, after reading an article in "the paper" (*The Weekly World News*), he becomes convinced that his beloved has traveled from state to state, serially marrying and killing unsuspecting men. Love ultimately propels Charlie to ignore the clues connecting Harriet with the crimes: they wed and embark for their honeymoon at a remote inn. But then Harriet disappears from the dinner table at the inn just before a pummeling storm knocks out the power and the lights go out. In the audience, our hearts leap. Should Charlie have heeded his fears? Is he about to become the next victim of the beguiling siren-murderer?

Women who use love to lure men to their dooms were a stock feature of film noir. As described by the Oregon Supreme Court in 1948, Gladys Elaine Lincoln Broadhurst Williams could have walked out of a screenplay by Raymond Chandler.

Her age was uncertain: "In 1942 she gave her age as 32; in May of 1946 she represented it as 35; four months later she reported it as 30. Each occasion was an application for a marriage license." She claimed (falsely) that her first husband had died, but that he had a twin–Lester–who possessed a sinister birthmark and "vicious, brutal and psychopathic" disposition. Lester, she maintained, was threatening her and wanted to take the place of her "late" (not) husband so that he would have access to a three million dollar legacy left to Gladys by her "late" (also not) Aunt Mary who lived in the Hawaiian Islands. Before she married Willis "Doc" Broadhurst, a 51-year-old rancher from Caldwell, Idaho, she secured from him a written assurance that "I have no heirs and dependents." Less than six months after their marriage and within a month of his death, she convinced Doc to execute a will giving his entire estate to his "beloved wife" and expressly excluding his brothers and sisters.

Gladys told Doc she had to travel to California to settle her aunt's estate, and the concerned Doc sent along his trusted 23-year-old ranch hand Alvin Williams as her driver. Gladys and Williams left Caldwell on August 5, 1946. During their first night on the road, Gladys kissed him. When asked at her trial what effect that had, Williams responded, "That didn't have much effect, but the next one did." Gladys and Williams were married in Reno on September 17th.

As the pair "drove around the country and amused themselves," they attended a "motion picture performance," unnamed by the Supreme Court, but easily identifiable from its plot: the picture "told the story of a married proprietor of a café who hired a young man to work for him and was killed by his employee after the latter had fallen in love with his wife." Maybe Gladys could have written the script of *The Postman Always Rings Twice*, or maybe she was only inspired by it – either way, Doc's fate was sealed with that viewing. Immediately afterward, Gladys broached the subject of murder with Williams. Although Williams was fond of Doc and somewhat squeamish about the sight of blood, Gladys convinced him that Doc was "more animal than man" and mistreated her. Besides, Williams was under Gladys's spell. As the Supreme Court put it, "Access to the fleshpots had made him the slave of his mistress."

When Gladys and Williams returned to Caldwell, Doc was on a hunting trip, and Williams took up residence not only in Doc's house, but in his bed. (Gladys used an adjacent, connecting bedroom.) Williams prepared himself to face his "sanguinary mission" with a new look ("the attire of a cowboy, including the large hat [and] even * * * a mustache and a goatee"), "a sponge bath and a pair of Dr. Broadhurst's pajamas," and "a quart bottle and a half of whisky" provided by Gladys "to help settle my nerves." Thus fortified, Williams drove a borrowed Model A Ford to "the death rendezvous": a remote spot on the Oregon-Idaho-Nevada highway.

On the fateful morning, Williams set the trap by lifting the hood of the car, as if he were a stranded motorist in need of aid, and waited for Doc to come along on the way to his second ranch in Jordan Valley. Playing true to type, Doc stopped to help Williams and leaned over the Model A's engine. It was time for Williams to strike, and he brought down a wrench on Doc's skull. As Doc staggered and asked Williams what had hit him, Williams's nerve began to falter, but then he heard Gladys's words calling to him: "Don't fail me! Don't fail me! If you do, for God's sakes don't come back." Williams finished the deed. Doc breathed his last at the unhelpfully named Succor Creek.

When Doc didn't show up at Jordan Valley as expected, searching parties were organized, but not joined by Gladys or Williams. Certain of Doc's friends wondered why Gladys was not more worried; unable to feign fear for her missing husband and probably trying to mask

signs of her own guilt, she took a heavy dose of nembutal and spent several days in bed. (Where she summoned to her side a physician named Thomas Magnum, who perhaps moved to Hawaii with Aunt Mary after the events related in this tale.) After Doc's faithful horse turned up, it became clear that there had been foul play, and Gladys began to concoct distracting theories: that she and Doc's friend Red Wells had quarreled over money or that the evil Lester had interfered with Doc in order to get at her so-called millions. She went as far to "discover" under the door a threatening note that she claimed Lester had penned and signed with the menacing moniker "Sweet Pea."

Gladys and Williams quickly came under the suspicion of both Oregon and Idaho authorities. Williams was taken into custody within several days of Doc's disappearance. Gladys protested (perhaps too much) his innocence, endearingly citing his fear of blood and physical weakness. In part, Gladys was hung on a classic gaffe: convincing someone to provide an alibi for Williams that would have required, as Gladys put it, an "aeroplane" for him to have been at the place of the crime at the time it was committed ... before those details had been announced.

Before long, Williams confessed and led authorities to Doc's body and to the gopher hole where he'd hidden the shotgun he used to finish the job. Gladys was then quickly taken into custody and put on trial.

Perhaps Gladys and Williams didn't stay through all of the "motion picture performance" they attended on the road, or maybe they were too distracted to pay attention to the ending: although justice was less dramatically delivered to them than it was to the lovers of the film, it was delivered nonetheless. Gladys was convicted of first-degree murder and sentenced to life imprisonment; her appeal to the Oregon Supreme Court was unsuccessful. According to the Malheur County Sheriff's Association, she was released on parole after nine years. Williams, it seems, was also convicted of first-degree murder and sentenced to life imprisonment.

Although the Supreme Court had some sympathy for Williams, it had none for Gladys:

> "It is evident that Williams was a simple youth readily susceptible to influence. * * * Before long this simple youth had become so thoroughly enamored of his mistress that he did everything that she suggested. * * *

> Surely a court need not be so naive as to assume that the defendant regarded her relationship with Williams in the same light as he, her gull, regarded it. The man on the bench, like the man in the street, can properly reason that the defendant had skillfully maneuvered Williams into her power so that eventually she could make him her partner in the dance Macabre which would usher Dr. Broadhurst to his doom. She had no less marked him her victim than she had Dr. Broadhurst. Both were the dupes of treasonous love."

And what, you may ask, about Charlie? We left Charlie in the dark: the lights had gone out and his bride had disappeared. Well, 1993 was not 1948, and Mike Myers makes comedy, not film noir. I won't spoil the ending for those who haven't yet had the pleasure, but I will say that, although surprise and suspense may await Charlie, so does happily ever after.

STEPHEN'S: *State v. Hunter*, 208 Or 282, 300 P2d 455 (1956): "For the times they are a- changin'."[1]

A criminal case against " 'a person not of the male sex, to-wit: of the female sex,' " in which the opinion waxes lyrical about the advances that women had made toward equality -- as of 1956. But, the opinion concludes, the legislature intended to create "one island on the sea of life reserved for man that would be impregnable to the assault of woman." And that island is (drum roll, please) . . . the right to wrestle in competitions or exhibitions.

TOOZE, J.

Defendant Jerry Hunter, a person of the feminine sex, was charged by complaint filed in the district court for Clackamas county, with the crime of "participating in wrestling competition and exhibition," in violation of the provisions of ORS 463.130.

The complaint, omitting formal parts, charged as follows:

> "Jerry Hunter is accused by W. L. Bradshaw, District Attorney, by this Complaint of the Crime of PERSON OF FEMALE SEX PARTICIPATING IN WRESTLING COMPETITION AND EXHIBITION committed as fol-

1 Bob Dylan (1964).

lows: The said Jerry Hunter on the 25th day of October, A.D., 1955, in the County of Clackamas and State of Oregon, then and there being a person not of the male sex, to-wit: of the female sex, did then and there unlawfully and wilfully participate in a wrestling competition and wrestling competition and wrestling exhibition, said act of defendant being contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Oregon."

To this complaint defendant filed a demurrer based upon the following grounds:

"[I]

"That the facts stated do not constitute a crime.

"[II]

"That this Court has no jurisdiction over the subject of the complaint in that the statute on which said complaint is founded is unconstitutional."

The demurrer was overruled by the district court. Thereupon, defendant petitioned the circuit court of Clackamas county for, and obtained, a writ of review pursuant to the provisions of ORS 34.010 to 34.100, incl. Upon review by the circuit court, the order of the district court overruling the demurrer was sustained. Defendant appeals.

In support of the demurrer defendant asserts on this appeal that the statute involved in this prosecution is unconstitutional and void in two respects:

"1. It denies to defendant the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the U. S. Constitution, and it grants other citizens and classes of citizens privileges or immunities which upon the same terms do not equally belong to defendant and all other citizens, in violation of Section 20, Article 1 of the Constitution of the State of Oregon.

"2. It unlawfully delegates legislative power to an administrative body in violation of Article III, Section 1 of the Constitution of the State of Oregon."

ORS 463.010 to 463.990, inclusive, provides for the creation of boxing and wrestling commissions, for registration of boxers and wrestlers, authorizes certain prize fights and wrestling exhibitions, with certain regulations pertaining to the same, invests the commissions created with certain powers, including the rule-making power, provides for licensing, for penalties, and, in general, assumes to cover the entire field involved in boxing and wrestling exhibitions. ORS 463.130 provides as follows:

> "Wrestling competitions; females barred; licensing; fees. (1) The commissioners may license referees, professional wrestlers, the managers of wrestlers and seconds, and collect such fees as they deem just and reasonable. Wrestling competitions shall be held only under license of the commission. No person other than a person of the male sex shall participate in or be licensed to participate in any wrestling competition or wrestling exhibition.
>
> "(2) The commission shall collect a fee of six percent from the gross receipts of each competition. The secretary shall check the gross receipts and collect the six percent fee after each wrestling competition."

(Italics ours.)

The principal question for decision is whether the foregoing ban against women wrestlers constitutes an unreasonable exercise of the police power of the state and violates Art XIV, § 1, of the U.S. Constitution and Art 1, § 20, of the Oregon Constitution. Is the classification contained in the statute arbitrary and unconstitutional, or is it based upon a reasonable distinction having a fair and substantial relation to the object of the legislation and, therefore, is constitutional?

Class legislation is permissible if it designates a class that is reasonable and natural and treats all within the class upon the basis of equality. We take judicial notice of the physical differences between men and women. These differences have been recognized in many legislative acts, particularly in the field of labor and industry, and most of such acts have been upheld as a proper exercise of the police power in the interests of the public health, safety, morals, and welfare. As we said in *State v. Baker*, 50 Or 381, 385, 92 P 1076, 13 LRA NS 1040:

> "By nature citizens are divided into the two great classes

of men and women, and the recognition of this classification by laws having for their object the promoting of the general welfare and good morals, does not constitute an unjust discrimination."

The Baker case involved a statute which prohibited women from entering and remaining in a saloon. The statute was upheld.

Moreover, there is no inherent right to engage in public exhibitions of boxing and wrestling. Both sports have long been licensed and regulated by penal statute and, in some cases, absolutely prohibited. It is axiomatic that the Fourteenth Amendment to the U. S. Constitution does not protect those liberties which civilized states regard as properly subject to regulation by penal law. Neither does Art 1, § 20, of the Oregon Constitution. *McHugh v. Mulrooney*, 258 NY 321, 179 NE 753, 83 ALR 693, and note commencing at page 696.

In addition to the protection of the public health, morals, safety, and welfare, what other considerations might have entered the legislative mind in enacting the statute in question? We believe that we are justified in taking judicial notice of the fact that the membership of the legislative assembly which enacted this statute was predominately masculine. That fact is important in determining what the legislature might have had in mind with respect to this particular statute, in addition to its concern for the public weal. It seems to us that its purpose, although somewhat selfish in nature, stands out in the statute like a sore thumb. Obviously it intended that there should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman. It had watched her emerge from long tresses and demure ways to bobbed hair and almost complete sophistication; from a creature needing and depending upon the protection and chivalry of man to one asserting complete independence. She had already invaded practically every activity formerly considered suitable and appropriate for men only. In the field of sports she had taken up, among other games, baseball, basketball, golf, bowling, hockey, long distance swimming, and racing, in all of which she had become more or less proficient, and in some had excelled. In the business and industrial fields as an employe or as an executive, in the professions, in politics, as well as in almost every other line of human endeavor, she had matched her wits and prowess with those of mere man, and, we are frank to concede, in many instances had outdone him.

In these circumstances, is it any wonder that the legislative assembly took advantage of the police power of the state in its decision to halt this ever-increasing feminine encroachment upon what for ages had been considered strictly as manly arts and privileges? Was the Act an unjust and unconstitutional discrimination against woman? Have her civil or political rights been unconstitutionally denied her? Under the circumstances, we think not.

If anyone is interested in reading a few authorities that might shed some light upon the subject, we recommend the following: *Christian et al. v. La Forge*, 194 Or 450, 460, 242 P2d 797; *State v. Bunting*, 71 Or 259, 139 P 731; *Muller v. State of Oregon*, 208 US 412, 52 L ed 551, 28 S Ct 324.

We need not decide whether any portion of the statute under consideration constitutes an unconstitutional delegation of legislative power. Even if it did, that would not affect the validity of that portion of the statute under which defendant is being prosecuted. The several provisions of the statute are separable. The part thereof involved in this litigation is in no way dependent upon any other provision. It deals with a distinct and particular subject matter. It is obvious that with any other provision of the statute removed, except the penalty clause, the ban against wrestling by women would yet form a complete act within itself. Its enforcement after separation would be entirely reasonable in the light of the act as originally drafted and enacted. That is all that is required to uphold the law. *Gilbertson et al. v. Culinary Alliance et al.*, 204 Or 326, 352, 282 P2d 632; 2 Sutherland, Statutory Construction, 3d ed, 178, § 2404.

The judgment is affirmed.

LATOURETTE, J., did not participate.

HOW APPELLATE JUDGES PREPARE FOR ORAL ARGUMENT

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By Jona Maukonen

Oregon's appellate judges prepare for oral argument in a variety of ways. Understanding the courts' practices and predilections, however, may help an appellate practitioner to present his or her case most effectively.

The appellate judges review the briefs for numerous cases in a short period of time. They usually review the briefs less than a week before oral argument, and often just a few days before. In most months, the Oregon Supreme Court sits for a week of argument, hearing up to five cases a day. Thus, at the busiest times, the justices have 25 cases to review prior to a week in which their days are occupied by arguments. Typically, a Court of Appeals panel sits for one day in which they hear approximately ten cases. In the few days leading up to oral argument, the judges spend their time assimilating a large volume of material on a variety of factual and legal issues.

Much of the appellate judges' preparation for oral argument occurs away from the office. Some of the judges review the briefs at home over the weekend or in the evenings prior to arguments. Some review briefs as they commute to and from Salem in their carpools or on the bus. One judge even reads briefs while walking.

Because of amount of reading required to prepare for oral argument and the environment in which the briefs are read, the appellate judges rarely review information outside of the briefs. In particular, they typically do not review anything in the record that is not included in the excerpt. In fact, prior to argument, the record is not readily accessible to the court.

Appellate judges also rarely review the cases cited in the briefs except when one or two cases control the outcome of case. Of course, in many instances the judges are already familiar with the cases cited by the parties. While reviewing cited cases is not typical, many of the appellate judges will review the statutes being interpreted in a case. The parties typically quote only the most critical portions of the statutes in their briefs. Often the judges want to see not only the entire text and immediate context of the provision in dispute, but also want to read surrounding statutory provisions in order to understand the broader statutory scheme.

The Supreme Court justices generally do not review the Court of Appeals briefs prior to argument, but are likely to reread the petition for review and the Court of Appeals' opinion if one was written.

Individual appellate judges have differing views as to the importance of various parts of the briefs. Some judges find the preliminary sections of the brief, such as the statement of the case, questions presented, and summary of argument, very helpful in getting a grasp of the case prior to argument. Others pay little or no attention to those sections. Some judges review the briefs in their entirety in the order of filing, beginning with the appellant's brief, moving on to respondent's brief, and concluding with the reply, if any. Other judges review the preliminary sections of both sides' briefs to get an understanding of the issues before reading the briefs all the way through.

Although the individual appellate judges spend a significant amount of time reading briefs for oral argument, the court or panel hearing a case does not formally discuss the case at any great length before the argument. In the Supreme Court, if the case is one of discretionary review, there may be some discussion of the merits of the case at the time the court is deciding whether to accept review. The Supreme Court justices meet for fifteen minutes before oral argument to discuss the four or five cases to be argued that day.

The Court of Appeals' pre-argument conferences are also limited. They meet for 30 minutes in the morning to discuss the approximately ten cases to be argued that day. At the pre-argument conference, the appellate judges often identify the important issues, but rarely delve very far into the merits of any party's argument. Outside of the formal pre-argument conference, some judges have conversations about cases prior to argument with their colleagues on the bench, clerks, or staff attorneys. Others rarely do.

Oral argument occurs early in the court's decision making process. And, of course, after oral argument and during the opinion writing process, the court engages in thorough and sometimes very extensive discussions of the case.

The specific lessons to be taken from the environment and manner in which appellate judges prepare for oral argument reinforce what we know about good appellate advocacy:

> (1) Briefs should be "self contained" – that is, everything the appellate judge needs to be fully prepared for argument should be included in the brief, excerpt or appendix.
>
> (2) Appellate practitioners should focus on one or two good issues rather than presenting numerous legal issues, including likely losers that merely distract the reader.
>
> (3) Briefs should be well organized so that the issues and arguments are clear, so the judge can quickly find those parts of the brief that he or she considers most helpful in preparing for oral argument.

THE EIGHTH JUSTICE? WEBSTER, HIS DICTIONARY, AND ITS INFLUENCE ON OREGON LAW

Noah Webster

By Hon. Jack L. Landau

Arguably, the person most influential in the recent development of Oregon law is not even a judge, and the resource most influential in the development of that law is not even a law book. In the last decade, *Webster's* dictionary–one edition or another–has been perhaps the most cited single resource in all of Oregon's appellate court case law.

The resort to dictionaries is nothing new. In Oregon, it dates back at least to 1889 and the case of *Patterson v. Haydon*, in which the court was confronted with the problem of determining whether a woman had been "seduced" within the meaning of a criminal statute when, at the time of the supposed seduction, she had already "lost her virtue." The court cast its opinion as a battle of dictionaries: *Webster's American Dictionary of the English Language* reported that the term applied only to the act of "persuading a female to surrender her chastity," while *Burrill's Law Dictionary* defined the term more broadly as "the act of inducing a woman to consent to unlawful intercourse," without requiring proof of loss of chastity. The court picked *Webster's*. "To hold otherwise," the court explained, "would be to break down all the distinctions between

the virtuous and the vicious, and to place the common bawd on the same plane with the virtuous woman."

In the years that followed, the courts occasionally returned to dictionaries, usually to better effect. But recent years have witnessed a marked increase in the extent to which they rely on the work of lexicographers to determine what the work of legislators signifies. In the last decade, over 700 appellate court opinions include references to dictionaries of one sort or another. Barely that many references to dictionaries can be found in the courts' case law from the preceding 150 years.

Oregon courts most often resort to *Webster's Third New International Dictionary*, particularly in statutory construction cases, which is to say, in most of their cases. In state constitutional cases, too, the courts most often resort to *Webster's*, albeit the original 1828 version, given that the courts' orientation is to reconstruct what our nineteenth-century forebears most likely understood the constitution to mean.

The Oregon courts' remarkable reliance on *Webster's* and its later editions would no doubt please the old lexicographer. Noah Webster was, according to Bill Bryson's delightful and informative *The Mother Tongue: English and How It Got That Way*, a "severe, correct, humorless, religious, temperate man who was not easy to like, even by other severe, religious, temperate, humorless people." A lawyer and a school teacher, he was also the author of one of the most widely read works of literature in American history–a spelling book. (In fact, its sales are eclipsed only by sales of the Bible. There were 300 editions of the speller by 1829. *Sixty-two million* copies were sold by the end of the Civil War.)

Webster attempted to capitalize on that success with a dictionary. He had several purposes in taking on the task. He was, first and foremost, a devout, born-again Calvinist who decried the tendency of existing dictionaries, such as Samuel Johnson's, to include vulgar words like "shabby" and definitions that contained references to such "low" authors as Shakespeare. (Webster was quite the prude and, among other things, produced a bowdlerized version of the entire Bible, with all the references to sex omitted.) He was also something of a patriot, devoted to the cause of advancing a uniquely American language. "As an independent nation," he wrote, "our honor requires us to have a system of our own, in language as well as government."

Thus, for example, Webster is responsible for our saying "aluminum," while the English say "aluminium," and for the fact that we pronounce lieutenant "lootenant," instead of the English "leftenant." (Other suggestions, fortunately, did not have such lasting effect. For example, he insisted that "deaf" be pronounced "deef," that "heard" be pronounced "heerd," and that "beauty" should be pronounced "booty.") In promoting this new American language, Webster followed the lexicographical conventions of the time, openly prescribing his own personal vision of the form that the language *should* take, not describing actual usage of the time.

Webster, for all his energy and erudition, was an amateur with limited knowledge of language and linguistics. After completing work on the first two letters of the alphabet, he came to realize that fact. He stopped work on the dictionary altogether and devoted the next ten years of his life to the study of etymology. Unfortunately, Webster came to that task hampered by a refusal to acknowledge recent developments in historical philology (by the famous Brothers Grimm, among others) and by an insistence that "the truth" about language origins rested in a proper understanding of the literal truth of the Bible. According to Webster, all words derived from a common *ur*-language spoken by the Noah of *Genesis*, which he denominated "Chaldee." Thus, he proclaimed, English consists of "words which our ancestors brought with them from Asia," through Hebrew–skipping entirely any detours into Anglo-Saxon, the existence of which Webster apparently was unaware. Then, based on what appeared to him to be similarities between the consonantal patterns among words of various languages, Webster attempted to connect changes in language over time. He proposed that the word "lad," for example, derived from "YLD," the Hebrew word for "boy," because both contained the consonants "l" and "d" and had similar meaning.

Webster also was, like many early lexicographers, a bit of a copycat. The vast majority of the headwords in his original dictionary were taken from Johnson or from a dictionary by an English schoolmaster, John Entick. Webster added only around 5,000 new words (of a total of 70,000). A number of the definitions themselves come from usage in the King James Bible (which is why the 1828 dictionary continues to be popular with a variety of religious organizations, who provide access to on-line full text, searchable versions of the dictionary to this day).

For all its flaws, Webster's original dictionary was popular. Its definitions, in particular, are admired to this day for their clarity and conciseness. Webster, however, was about as good a businessman as he was an etymologist; he sold the rights to the book outright and never received any royalties. The Merriam brothers ultimately acquired the rights to the dictionary and, in 1847, they published a new edition–cleansed of laughable etymologies–the first "Merriam-Webster" unabridged dictionary. As Jonathon Green notes in *Chasing the Sun: Dictionary Makers and the Dictionaries They Made*, that cleansing probably saved Webster from becoming an obscure joke. Instead, Webster's name became eponymous with the very idea of dictionaries and, before long, one could be found in virtually every American home. *Webster's International Dictionary* followed in 1890, and a *Webster's New International Dictionary* was published in 1909. A second edition was published in 1934.

The publication of *Webster's Third New International Dictionary* in 1961 (actually the eighth edition, but who's counting) marked something of a watershed in American lexicography. There had always lurked some controversy about whether dictionaries should merely report actual usage or should prescribe correct usage. The traditional approach was the latter. Philip B. Gove, the editor of *Webster's Third*, believed that approach to be elitist. His edition consciously set about describing actual–even "incorrect"–usage. As a result, for example, *Webster's Third* reported that the word "ain't," although "disapproved by many," is now commonly used "by many cultivated speakers." (Earlier editions had described the word as "illiterate.")

The literary world–especially the world of newspaper editors–was aghast. A war of words followed. The *New York Times* refused even to call *Webster's Third* a "dictionary," much less allow the "word book" to grace its editorial desks. The *Chicago Times* followed suit, decrying the dictionary's surrender to linguistic "permissiveness." The *Detroit News* ran a story about the publication of the dictionary with the headline: "New Dictionary Cheap, Corrupt." Jonathon Green reports that the American Heritage Company even went so far as to propose buying out the publisher of *Webster's Third*, so that it could be pulled out of print. (That never happened, and the company instead published its own unabashedly prescriptive *American Heritage Dictionary* in 1969, designed to enable the ordinary person to "discover just how and to what extent his presumed betters agree on what he ought to say

and write." To this day, for example, the *American Heritage Dictionary* insists that the use of the word "ain't" is "a mark of illiteracy" and that the word "has acquired such a stigma that it is beyond any possibility of rehabilitation.") In the meantime, Gove was unapologetic. "For us to attempt to prescribe the language," he declared, "would be like *Life* reporting the news as its editors would prefer it to happen."

Appellate courts have typically exhibited a blissful unawareness of that sort of controversy. From relatively early on, they have cited dictionaries as authoritative references as to the proper meaning of words used in constitutions, statutes, and regulations. I have already mentioned *Patterson*, one of the Oregon Supreme Court's earliest decisions to rely on *Webster's*. Another early example may be found in *State v. Carmody*, a 1907 criminal case in which poor Carmody was indicted for purchasing beer in violation of a local ordinance prohibiting the sale of "intoxicating liquor." He argued that, although the state had established that he had purchased something called "beer," it had neglected to establish that he had purchased the intoxicating kind. The Oregon Supreme Court would hear none of that. The court explained that the term "intoxicating liquor" should be understood in its ordinary sense, determined by reference to "the dictionary." The court then noted that *Webster's* defined "beer" to be "a fermented liquor made from any malted grain," and that was the end of the matter. (The court acknowledged that other sorts of non-alcoholic "beer" exist, but it dismissed those as "remote and special, and not primary or general" in meaning.) The court accepted without question the authoritative nature of *Webster's* to establish the "plain, ordinary, and popular" meaning of the words of the law.

In the years that followed, the courts occasionally resorted to *Webster's* to establish the "plain" or "ordinary" meaning of words. In the 1935 case of *State v. Hurst*, for example, the court had to decide whether the defendant's transportation of onion sets violated certain provisions of the Produce Dealers and Peddlers Act of 1933, which regulated the transportation of "vegetables." The court looked to a number of dictionaries, including the just-published *Webster's Second New International Dictionary*, to establish that the term "vegetables" refers to "[a] plant cultivated for food." The court found that an "onion set" is not such a vegetable, given that the same dictionaries made clear that "onion sets" are mere tubers or bulbs from which vegetables are grown. More recently, in 1985, the Supreme Court in *Totten v. New*

York Life Insurance Company resorted to *Webster's Third* in determining whether a hang glider is subject to a life insurance policy exclusion that applied to injuries while traveling in "any aircraft." (It is.)

The courts' reliance on dictionaries to establish the plain or ordinary meaning of statutory or constitutional terms was, however, occasional. Sometimes, the courts even recommended *against* the practice, as in *Davidson v. Oregon Government Ethics Commission*, a 1985 decision in which the court explained that "[t]his court's function in interpreting statutes is to construe the language to give effect to the intent of the legislature. That is not done by consulting dictionary definitions of words, unless there is reason to believe that the legislature consulted the same dictionary."

All that changed in the early 1990s. In a little over one year, the court issued decisions in *Priest v. Pearce*, *Ecumenical Ministries v. Oregon State Lottery Commission*, *Hoffman Construction v. Fred S. James & Co.*, and *PGE v. Bureau of Labor and Industries*, each of which carefully described the interpretation of legally significant documents–constitutions, constitutional amendments adopted by initiative, insurance policies, and statutes, respectively–in terms of a three-step analytic process that emphasizes the importance of their texts. Just as the publication of *Webster's Third* proved a watershed in American lexicography, the issuance of those decisions represents something of a watershed in Oregon law. In particular, each of the cases emphasized the principle that, in the absence of evidence to the contrary, the courts will presume that the framers of those texts intended that their words be given their "plain, natural, and ordinary meaning," as reflected in "the dictionary."

Thus, for example, in the 2006 case of *State v. Murray*, the Supreme Court explained that, "[a]bsent a special definition, we ordinarily would resort to dictionary definitions, assuming that the legislature meant to use a word of common usage in its ordinary sense." Similarly, in *Massee and Massee*, a 1999 decision about the meaning of the term "homemaker" in the context of the statutory presumption of equal contribution to marital assets, the court held that "[t]he statute provides no definition of the term. Thus, we rely for the meaning of the term 'homemaker' on its common dictionary definition."

In some cases, *Webster's Third* is not just cited as an authority for the meaning of a statute. It is the *only* authority cited for the meaning

of a statute. In *Young v. State of Oregon*, for example, one issue was how the overtime compensation statute required such compensation to be calculated. The statute required employers to pay one and one-half times the "regular rate" of an employee's compensation. The question was whether the "regular rate" should be calculated based on the number of hours an employee *actually* worked per week or based on an assumption that the employee regularly worked 40 hours per week. The Court of Appeals adopted the former, based on an analysis of the wording of the statute, amendments to the statute over time, other statutes on the same subject, state regulations implementing the state statutes, the federal law on which the state law was based, and the federal regulations interpreting that federal law (and adopting the actual-hours approach). The Supreme Court reversed. The court's explanation–in its entirety–consists of a single paragraph, in which the court quoted the definitions of the words "regular" and "rate" from *Webster's Third* and, without further ado, concluded that the meaning of the term "regular rate" was "plain."

By far and away the most frequently cited dictionary is *Webster's Third*, particularly in statutory construction cases. Of the more than 700 cases in which the courts have cited a dictionary, more than three-fourths refer to *Webster's Third*. In constitutional cases that involve the construction of the original 1859 constitution, the courts nearly always refer to *Webster's* 1828 edition.

The courts virtually ignore all other dictionaries. In the last ten years, for example, the Court of Appeals has cited the *American Heritage Dictionary* in only three cases, while the Supreme Court has not cited that source even once. During the same period of time, the Court of Appeals has cited the venerable *Oxford English Dictionary* only a half-dozen times (although, in one case, the court boldly referred to it as "more authoritative" than *Webster's*), while the Supreme Court has cited it only once, in referring to a matter of English law.

To my knowledge, the courts have never explained their sudden attraction to dictionaries in general and to *Webster's*, in particular. And it certainly is easy to make sport of some appellate court decisions that rely on *Webster's*–particularly those that rely on *Webster's* alone–to establish the meaning of terms in legally significant documents. But the fact that courts occasionally misuse dictionaries does not necessarily mean that proper use is inappropriate. The courts' increasing resort to

dictionaries in general, and to *Webster's* in particular, is in fact explainable, even defensible, at least if that use is–excuse the pun–judicious.

To begin with, we must remember that, since the 1990s, the objective in interpreting legally significant documents in Oregon–whether constitutions, statutes, regulations, or contracts–has been to determine what the parties who approved them intended them to mean. In the absence of direct evidence (for example, in the form of definitions in the documents themselves), it seems perfectly reasonable to assume that the parties who executed a document intended its words to carry the meaning ordinarily associated with those words.

That's where *Webster's Third* comes into play. Recall that what made *Webster's Third* so controversial was precisely that it records actual, as opposed to "correct," usage. If the focus of interpretation is what the parties who executed a document most likely intended its words to mean, then a dictionary that records how people actually, ordinarily use those words would seem to be a perfectly useful resource from which to draw inferences about what the parties likely intended. By the same token, a dictionary that records "correct" usage does not so readily support the same inferences unless there is reason to believe that the people who executed the document at issue were relying on such a dictionary at the time. In that light, the Supreme Court's disparagement of the use of dictionaries in *Davidson* makes more sense, assuming that what the court was contemplating was the prescriptive sort of dictionary that does not, like *Webster's Third*, describe actual usage.

So far so good. We can now feel better about relying on *Webster's Third*. What about all the cases that rely on earlier editions of the dictionary, particularly the 1828 original? Do the same arguments apply?

In a word: No. The fact is that the original dictionary, while a fascinating lexicographical accomplishment, is not a reliable indicator of actual usage at that time. Unlike *Webster's Third*, the original did not even purport to accomplish that task. Instead, *Webster's* 1828 original reflects the editor's own unique, patriotic, regional, and religious notions of what he thought American English *should* look and sound like. Recall that many of the definitions are based on the King James Bible, itself already over two centuries old at the time. Other of the definitions Webster borrowed from other, older, English dictionaries or just plain made up. As Rickie Sonpal details in his excellent Fordham Law Review article, "Old Dictionaries and New Textualists," it simply

makes no sense to rely on a single eighteenth- or nineteenth-century dictionary as reliable evidence from which to infer what anyone at the time (other than the dictionary editors) understood words to mean. Dictionaries of that era were prescriptive in nature, not based on usage, largely pirated from other older dictionaries, highly idiosyncratic (as in the case of Samuel Johnson refusing ever to quote Thomas Hobbes), and sometimes downright misleading.

The only plausible justification for reliance on *Webster's* original 1828 dictionary might be that, even if it did not directly describe actual usage, it was sufficiently popular *after* its publication (Simon Winchester reports in *The Meaning of Everything* that, for years, it outsold even the Bible) that it is reasonable for us to assume that people relied on its definitions in coming to an understanding of particular words. I proposed that justification in *Liberty Northwest v. Oregon Insurance Guaranty Association*, but, on reflection, even that seems weak, particularly in the absence of actual evidence of the extent to which our forebears in the Oregon territory actually did own that particular dictionary and rely on it.

Again, the key is to remember that, in construing the 1857 constitution, the courts are attempting to reconstruct nineteenth-century understandings of the words the framers employed. That reconstruction can be ventured–historians do it all the time–but not on the basis of a single book. The courts must be prepared to look at a wide range of source materials, including *all* available dictionaries, contemporaneous statutes, constitutions, treatises, newspapers, pamphlets, and the like. At least then–to the extent that there emerges some recognizable pattern or consistency in usage at the relevant time–the courts would have a basis for drawing inferences about usage generally and the likely understandings of the framers. Relying on only one source, even *Webster's*, to support conclusions about those understanding cannot be defended.

At all events, it must be kept in mind that dictionaries, even when properly consulted, do not tell what words mean. At best, they tell us what words *can* mean. Nearly all headwords in a dictionary are followed by multiple definitions (in historical order, not–as is often assumed–from primary meanings on down). *Webster's Third*, for example, lists over 200 different definitions for the word "set." What determines which of those definitions applies is how the words are used in context. I am reminded of a story–probably apocryphal–about

a word-for-word translation of the Biblical passage "the spirit is willing, but the flesh is weak" from English to Russian and back to English again. In the end, the phrase was translated "the vodka is fine, but the meat is rotten." Each individual word was correctly translated, but without reference to context, the resulting translation was silly.

Frankly, too many appellate court opinions jump directly from a favorable definition–or part thereof–to a desired conclusion, skipping any consideration of context and actual usage. Return, for instance, to *Young*, in which the Supreme Court relied solely on *Webster's Third* to conclude that the word "regular" in the phrase "regular wage" simply means "normal, standard." *Webster's Third* actually says quite a bit more about the word "regular." To begin with, the particular definition that the court cited contains more than what was quoted; the word is defined as "normal, standard, correct : as (1) undeviating in conformance to a standard set (as by convention, established authority or a particular group) (2) : being such without any doubt : thorough, complete, unmitigated." In that context, even the reference to the "normal, standard" part of the definition that the court quoted takes on a slightly different significance. Aside from that, the dictionary also defines the term to mean, among other things, "constituted, selected, conducted, made, or otherwise handled in conformity with established or prescribed usages, rules, of discipline." In that light, it seems to me that, whether or not the Court of Appeals' ultimate decision was correct, the Supreme Court's decision hardly can be justified by reference to *Webster's Third* alone.

Lest anyone think that I am unfairly picking on the Supreme Court, let me acknowledge that my own court is a repeat offender, as well. In *Sunflower v. Bladorn*, for example, the Court of Appeals concluded that the City of Portland had "posted" a rental house as uninhabitable by making such a determination, but never telling anyone about it. The court relied on, among other things, the fact that *Webster's Third* defined the term "post" as to "denounce or invoke censure." What the court failed to mention was the fact that the very same definition goes on to say that the denouncing and invoking censure must occur "by public notice."

But enough. Let me close with these thoughts by way of summary and conclusion. There can be no doubt that the Oregon appellate courts are relying on dictionaries to a phenomenal extent. In part, it is

a reflection of the textual and originalist interpretive orientation of the courts. And, at least to the extent that the courts rely on a descriptive dictionary like *Webster's Third*, that reliance seems entirely consistent with the courts' interpretive choices. But, to the extent that the courts rely on prescriptive dictionaries, particularly old ones like the original 1828 edition of Webster's *American Dictionary of the English Language*, the courts are standing on shaky lexicographical–and legal–ground. Reconstructing meanings understood by our forebears a century and a half ago requires more than resort to a single, prescriptive, sometimes downright loopy, book. Even when resort to dictionaries is appropriate, we must recall their limited utility. They describe for us a universe of possible meanings. Looking up a word in the dictionary can never be a substitute for careful, contextual analysis.

2007 AMENDMENTS TO THE OREGON RULES OF APPELLATE PROCEDURE

Istockphoto

Western Cougar

By Lora Keenan[1] and James Nass[2]

INTRODUCTION

The Oregon Supreme Court and Oregon Court of Appeals have authority to make rules "necessary for the prompt and orderly dispatch of the business of the court." ORS 21.120; ORS 2.560(2). The courts have jointly exercised that authority to promulgate the Oregon Rules of Appellate Procedure (ORAPs). The rules are traditionally amended biennially, although temporary amendments may be adopted at any time.

Since about 1985, the courts have relied on the ORAP Committee to review and develop proposals to amend, add to, and generally improve the rules. The voting members of the committee include judges from each court, the Solicitor General from the Oregon Department of Justice, the Chief Defender from the Office of Public Defense Services,

1 Staff Attorney, Oregon Court of Appeals; Counsel to the ORAP Committee, 2006 through present.

2 Appellate Legal Counsel to the Oregon Supreme Court and Court of Appeals; Counsel to the ORAP Committee, dawn of recorded history through 2005.

a designee of the Appellate Practice Section, six other appellate practitioners, and a trial court administrator. Nonvoting members include the Counsel to the Committee, Appellate Legal Counsel, a Supreme Court staff attorney, and the Director of the Appellate Courts Services Division. (The 2006 ORAP Committee roster appears at the end of this article.) It's a big group, requiring a big table, but the value of such a variety of input is, we hope, reflected in a set of well-crafted and workable rules.

The committee met five times between February and June 2006. The proposed rule changes approved by the committee were then published with notice of proposed rulemaking in the Oregon Advance Sheets. The committee met again in September 2006 to make additional adjustments in response to comments received. The rule changes were then submitted to all the members of both courts for adoption. In November 2006, the Chief Justice and Chief Judge signed an order officially adopting changes to the ORAPs effective January 1, 2007. Those changes are published in volume 25 of the Oregon Advance Sheets and may be viewed online at www.publications.ojd.state.or.us.

In addition to rule changes adopted during the regular cycle, temporary rule changes may be adopted by the courts at any time. ORAP 1.10(3). Temporary amendments are published in the Oregon Advance Sheets and may be viewed online at www.publications.ojd.state.or.us. Wince the close of the work of the 2006 ORAP Committee, the courts have adopted temporary amendments to ORAP 1.35, 2.05, 4.60, and 8.50. Those temporary amendments will expire on December 31, 2008, if not adopted in the next regular cycle.

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2007 AMENDMENT HIGHLIGHTS

This outline covers the major changes that went into effect on January 1, 2007, that we believe will be of interest to appellate practitioners. Although its authors may be exhausting, they do not represent that this material is exhaustive. Consult the published amendments and/or rules for a complete version of the changes.

CRIMINAL APPEALS

Procedures Upon Death of the Defendant – ORAP 8.05(2)

ORAP 8.05(2)(a): Any party who learns of the death of the defendant now must notify the court within 28 days of learning of the death. As before, any party may move to dismiss the appeal.

ORAP 8.05(2)(b): In appeals from a judgment of conviction and sentence, the party filing the notice is to simultaneously file a memorandum in support of any proposed court action. Any other party has 28 days to file a similar memorandum.

ORAP 8.05(2)(c): This provision sets out expanded presumptive dispositions upon the death of a defendant in different circumstances. Parties may argue against those dispositions in the memoranda outlined above, and the court may order a different disposition even in the absence of such memoranda.

-State's appeal from a pretrial order: dismiss appeal.

-Defendant's appeal, brief filed containing an assignment of error that, if successful, could result in a reversal: vacate the judgment and dismiss the appeal.

-Defendant's appeal, brief filed containing an assignment of error as to a part of the sentence other than a monetary provision: dismiss the appeal but do not vacate the judgment.

-Defendant's appeal, brief filed containing an assignment of error as to a monetary provision in the sentence: dismiss the appeal and vacate only the monetary provision of the judgment.

-Not addressed in the rule – defendant's appeal, defendant dies before filing a brief: dismiss the appeal and probably vacate the judgment.

Dismissal Because Appellant Has Absconded – ORAP 8.05(3)

ORAP 8.05(3) amended to clarify that if, by the time the court considers a motion to dismiss under this rule, the court has not been advised that the offender has surrendered, the court may assume that the offender has not surrendered.

Guilty/No Contest Plea, Etc., Cases: Colorable Claim of Error – ORAP 2.40(2), (3) and 5.50(3)

Under ORAP 2.40(2), a defendant in guilty, no contest, etc., case need not identify a colorable claim of error in the notice of appeal when the notice of appeal is filed concurrently with a motion for delayed appeal under ORS 138.071(4).

Under ORAP 2.40(3), a defendant who entered a conditional guilty or no contest plea under ORS 135.335(3) need not identify a colorable claim of error in the notice of appeal, but the caption of the notice must clearly identify the case as a "Conditional Plea Case." In a companion change to ORAP 2.40(3), ORAP 5.50(3) was amended to require a defendant who appeals after a conditional guilty or no contest plea under ORS 135.335(3) to include in the excerpt of record a copy of the writing in which he or she reserved the right to appeal an adverse ruling.

TRANSCRIPTS AT STATE EXPENSE; APPOINTED COUNSEL

Transcript Coordinator's Duties Where Transcript Prepared at State Expense – ORAP 3.33(2)

ORAP 3.33(2)(c) rewritten to address the transcript coordinator's duties where OPDS has authorized preparation of transcript at state expense:

> -Where the transcript coordinator has received authorization for preparation of a transcript at state expense, the transcript coordinator must forward the authorization to the assigned court reporter/transcriptionist.
>
> -Where the transcript coordinator has not notified the reporter(s) or assigned transcriptionist(s) before the due date of transcript, transcript coordinator must notify appellate court of that fact. We contemplate that the Records Section then on its own initiative will extend the due date of the transcript.

Withdrawal and Substitution of Court-Appointed Counsel – ORAP 8.10(1), (2) and 8.12(1), (2)

ORAP 8.10(1) clarified to require that court-appointed counsel seeking to substitute in new counsel must serve the motion on all parties to the appeal and must have leave of the court to substitute in new counsel. ORAP 8.10(2) amended to provide that a motion for substitution of counsel other than court-appointed counsel must be signed by both attorneys to be deemed ordered by the court.

ORAP 8.12(1)(a) clarifies to indicate that a motion to withdraw or substitute in new counsel is subject to ORAP 8.10(1). Under amended ORAP 8.12(2)(a), court-appointed counsel seeking substitution must consult with OPDS and serve any motion for substitution on OPDS. Seven days after the motion is filed, the court will presume good cause to grant the motion and the motion will be deemed granted without a written order to that effect if three prerequisites are met:

> -Counsel of record has signed the substitution.

-OPDS has determined that the attorney to be substituted in is qualified to accept that kind of case.

-No objections are filed to the motion.

ORAP 8.12(2)(b): Sets out procedure for motion for substitution of counsel when OPDS does not concur (essentially like any potentially contested motion), including proof of service of the motion on OPDS.

Appeal of OPDS Decisions Regarding Compensation of Service Providers – ORAP 13.15(2)

Where a provider of indigent defense services, such an attorney, transcriptionist, or translator, disputes the amount of compensation OPDS has approved for services rendered on appeal and the provider seeks review of OPDS's decision, ORAP 13.15(2) amended to require service of the motion for review on the Public Defense Services Commission.

INITIATING APPEALS OR REVIEW PROCEEDINGS

Contents of Notice of Appeal – ORAP 2.05(10)

ORAP 2.05(10)(a) amended to require service on the Attorney General of a notice of appeal in those civil cases in which the district attorney appeared. (This requirement is not jurisdictional.)

Parties to Appeals; Case Title Change by Administrator – ORAP 2.25(4)

ORAP 2.25(4) amended to clarify that the court on its own motion may modify a case title for the purpose of protecting the identifies of juveniles or for other good cause. Note that the Chief Justice recently adopted a Chief Justice Order requiring the exercise of that authority in cases arising from juvenile court and in mental commitment and adoption cases, in which, by statute, the court is required to prevent disclosure of the identifies of parties.

Form, Content, and Service of Petition for Judicial Review – ORAP 4.15(5)

ORAP 4.15(5)(b) amended to clarify that the Attorney General must be served with a petition for judicial review in a workers' compensation case only if SAIF is (1) a party and (2) representing a state agency.

BRIEFS

Brief Type Size – ORAP 5.05(4)

ORAP 5.05(4)(f) amended to increase minimum type size for briefs from 12 to 13 point for proportionally spaced type. Note: The rule continues to impose the same minimum type size requirements for text and footnotes. The minimum type size for uniformly spaced type continues to be 10 characters per inch.

Briefs Containing Confidential Materials – ORAP 5.95(1), (2)

The unredacted version of a brief containing confidential materials need not (read: should not) italicize, highlight, etc. the confidential material. The redacted version of the brief must have the confidential material removed or marked out (no change); the number of copies of redacted brief filed in the Court of Appeals increased by one, to six copies.

Number of Copies of Briefs – ORAP 5.10(1)

ORAP 5.10(1) internally renumbered. ORAP 5.10(1)(a) reduces the number of copies of briefs that the Attorney General must file in Balfour cases and where an indigent appellant confined in an institution files a brief.

New ORAP 5.10(1)(b) codifies the pilot project operating by the Records Section. Allows for filing the original and 10 copies of briefs for certain specified cases, i.e., cases in which the Attorney General represents one side and appointed counsel compensated by OPDS represents the other. In such cases, the Records Section will make additional copies and bill for those copies if additional copies are needed, such as if the Supreme Court grants review.

MOTIONS; BANKRUPTCY; COST BILLS

Motion Title Designations – ORAP 7.10(1); Appendices 7.10-1, 7.10-2, 7.10.3

ORAP 7.10(1)(b) and (c) contain new requirements for motion title designations. Acceptable motion title designations and proper format are set out in Appendices 7.10-1, 7.10-2, and 7.10-3. If none of the titles listed fairly identifies the motion, use "Motion – Other" plus a title that accurately describes the mo-

tion. If a single document contains more than one motion, the caption must identify the title of each motion. A response to a motion must indicate that it is a response to the motion using the designated title.

Motion Page Limits – ORAP 7.10(2)

ORAP 7.10(2) amended to clarify that 20-page limit applies to combined total of motion and supporting memorandum.

Effect of Bankruptcy Petition – ORAP 8.20(1)

ORAP 8.20(1) amended to require the court to issue an order holding a case in abeyance when federal bankruptcy laws require that a case be held in abeyance. Past practice had been merely to hold the case in abeyance administratively, and on occasion the parties either were unaware that the court had done so or were unsure whether the court had done so. Issuance of an order in such cases will remove all doubt.

No Verification of Cost Bills – ORAP 1.40

Former footnote 1 to ORAP 1.40, which referred to the requirements of ORS 138.500(2) and ORS 20.320 to verify, respectively, requests for court-appointed counsel compensation and cost bills, has been repealed because requests for court-appointed counsel compensation are no longer filed in the appellate courts and the legislature has amended ORS 20.320 to delete the requirement to verify cost bills.

Juvenile Dependency and Adoption Appeals – ORAP 10.15(1)

ORAP 10.15(1) amended to clarify types of expedited juvenile dependency cases. All juvenile dependency cases except support judgments under ORS 419B.400 to 419B.408 will be expedited. Parties may move not to expedite any juvenile dependency cases except termination of parental rights cases.

CONFIDENTIAL INFORMATION

Address Shielded From Public Disclosure – ORAP 1.35(1)

New provision added to ORAP 1.35(1)(b) to require parties with an address shielded from public disclosure to provide alternative contact address that can be disclosed.

Protected Personal Information – ORAP 8.50(2)

New ORAP 8.50(2)(b) provides a procedure to seek segregation of protected personal information already in the appellate court file. (Parallels existing procedure in ORAP 8.50(2)(a) to request segregation of protected personal information in connection with new filings.)

SUPREME COURT PROCEEDINGS

Petition for Review of Summary Determination of Appealability – ORAP 2.35(4)

ORAP 2.35(4) amended to require a Supreme Court petition for summary determination of appealability to bear caption noting expedited case status.

Amici Curiae – ORAP 8.15(5)

ORAP 8.15(5)(b) amended to change deadline to file application to appear amicus curiae in support of a petition for review to 14 days after filing of petition. (Conforms with deadline for a party's response to a petition for review under ORAP 9.10(2).)

Ballot Title Review – ORAP 11.30(6), (11)

ORAP 11.30(6) amended to enlarge the page limit for answering memoranda by five pages per additional consolidated petition in the same proceeding.

ORAP 11.30(11) amended to provide that objection to modified ballot title after referral from Supreme Court must be actually received by the Atttorney General within five business days from filing of the modified ballot title. The Attorney General now may file a response to any objection unless the court otherwise directs. (Former presumption was no objection unless requested by the court.)

Mandamus – ORAP 11.05(6)

ORAP 11.05(6), governing records in mandamus proceedings, amended to clarify requirements.

Administrative Review Cases In Supreme Court – ORAP 4.40(4)

ORAP 4.40(4) amended to create deadline for brief of agency whose order, rule, ruling, policy or other action is at issue. An agency that wishes to file a brief in such cases must do so no later than the date that the respondent's brief on the merits is due.

ADMINISTRATIVE REVIEW

Procedure After Agency Issues Order on Reconsideration – ORAP 4.35(4)-(6)

Various provisions of ORAP 4.35 amended to require, in agency review cases, that a petitioner who desires review of an order on reconsideration to file either an amended petition for judicial review or a notice of intent to proceed with judicial review.

Agency Record – ORAP 4.20(3)

ORAP 4.20(3) amended to clarify that agency record may be prepared in either chronological or reverse-chronological order.

LAND USE

Standing – ORAP 4.60(2)

ORAP 4.60(2) amended to delete requirement that petitioners establish constitutional standing in their petitions for judicial review. Petitioners must still establish statutory standing.

Time To File Briefs – ORAP 4.66(1), (2)

ORAP 4.66(1) and (2) amended to add seven days to the time period within which opening and respondent's briefs must be filed in land use cases.

Local Government Documents – ORAP 4.67

New ORAP 4.67 adopted. Requires petitioners in land use cases to include in their opening briefs copies of provisions of all local government documents pertinent to arguments on judicial review.

APPELLATE SETTLEMENT CONFERENCE PROGRAM

Abeyance Period – ORAP 15.05(4)(a)

ORAP 15.05(4)(a)(ii) amended to allow program director to extend abeyance period for longer than 60 days if the parties agree.

Motions To Stay Enforcement – ORAP 15.05(4)(b)

ORAP 15.05(4)(b) amended to require service on program director of any motion to stay enforcement of the judgment. Rereferral to the program after the court disposes of a motion to stay enforcement or denies a motion to dismiss is now discretionary.

Fees – ORAP 15.05(7)

ORAP 15.05(7), governing ASCP fees, amended in several respects. *Initial program fee* (all cases other than workers' compensation increased from $250 to $350 and now covers five (formerly six) hours of settlement conference time, regardless of whether more than one session is involved. Neutrals may request that *preparation time* of more than one hour from the initial fee. Rate for additional hours beyond the initial fee increased from $125 to $150 per hour, shared equally by the parties. *Multiple parties represented by one attorney* are considered a single party for purposes of ASCP fees. Program director has discretion to require *non-party who participates in settlement conference* to pay mediation fee.

ABOUT THE RULES

ORAP 1.10 amended to clarify process for amending or adding rules; when amendments or new rules apply; process for temporary amendments or rules.

Formerly, the ORAP appendices were designated by letter. Now each appendix is designated by the number of the rule that it primarily illustrates.

ADDITIONAL INFORMATION

WOW! I LOVED LEARNING ABOUT THE ORAP CHANGES AND I WANT TO HAVE THE RULES AVAILABLE ALL THE TIME – CAN A MERE MORTAL LIKE ME OBTAIN A COPY?

But of course. No desk of any Oregon appellate lawyer is complete without an updated edition of the ORAPs occupying a prominent position, preferably near volumes 1 and 2 of the *Oregon Appellate Almanac*. If somehow you lack your own personal copy of the ORAPs, you can obtain both the rules and the classy red binder that houses them for the low price of $16 (or, if you already have the binder, the new rules are a steal at only $10). Contact the Oregon Judicial Department's Publications Section at (503) 986-5656 to order.

WOW! I WAS EVEN MORE INSPIRED THAN MY COLLEAGUE ABOVE – WHAT CAN I DO WITH THIS IDEA I HAVE TO IMPROVE THE RULES?

Please feel free to contact any member of the committee with whom you are acquainted to suggest a change to the rules. In addition, ideas for improving the rules may be submitted to Committee Counsel, Lora Keenan, at the Oregon Court of Appeals, 1163 State Street, Salem, OR 97301, (503)986-5660, or lora.e.keenan@ojd.state.or.us.

WOW! I AM OVERCOME WITH AN URGE TO BE MORE INVOLVED – WOULD IT EVER BE POSSIBLE FOR ME TO SERVE ON THE COMMITTEE?

Most members of the committee are appointed by the Chief Justice and Chief Judge to serve three years terms, with the possibility of one additional term. If you have substantial appellate practice experience and would like to be considered for appointment, please contact Committee Counsel, Lora Keenan, at the Oregon Court of Appeals, 1163 State Street, Salem, OR 97301, (503)986-5660, or lora.e.keenan@ojd.state.or.us.

U.S. Fish and Wildlife

Oregon State Bird, Western Meadowlark

2006 ORAP COMMITTEE ROSTER

The Supreme Court and Court of Appeals extend their thanks to the appellate practitioners who contributed their time and expertise to the work of the 2006 ORAP Committee. Two of those practitioners, Tim Volpert and Tom Sondag, will have served their maximum two terms before the ORAP Committee reconvenes in 2008. So in particular, kudos to Tim and Tom for six years of dedication to improving the rules!

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NEW TITLES REQUIRED FOR MOTIONS IN THE APPELLATE COURTS

By Walter J. Ledesma

ORAP 7.10 has a new appendix that appellate practitioners should know about. Appendix 7.10-1 lists titles for motions filed in appellate cases. The court is tracking the number of motions in various categories so it can formulate a plan to deal with high volume of motions it deals with each year. According to Jim Nass, the court deals with over 20,000 motions annually.

The courts have admonished practitioners that failure to properly title the motion will result in the motion being stricken. Don't say you haven't been warned.

APPENDIX 7.10-1

LIST OF COMMONLY USED MOTION TITLES FOR ORAP 7.10(1)(B) AND (C)1

MOTION TITLES (MOTIONS OTHER THAN MOTIONS FOR EXTENSTION OF TIME–ORAP 7.10(1)(B))

Motion–Allow Oral Argument

Motion–Amend Brief

Motion–Amend Designation of Record

Motion–Appear Amicus Curiae

Motion–Appoint Counsel

Motion–Appoint Counsel and for State-Paid Transcript

Motion–Appoint Legal Advisor

Motion–Appoint Special Master

Motion–Assign to Settlement Conference Program

Motion–Authorize Service

Motion–Consolidate Cases

Motion–Correct/Amend Record

Motion–Default Order

Motion–Determine Jurisdiction

Motion–Dismiss - Appellant/Petitioner

Motion–Dismiss - Non-Appellant/Non-Petitioner

Motion–Dismiss - Settlement

Motion–Dismiss - Stipulated

Motion–Disqualify Judge/Justice

Motion–Excerpt of Record Preparation

Motion–File Additional Authorities

Motion–File Additional Evidence

Motion–File Extended Brief/Excerpt/Appendix

Motion–File Extended Petition for Review

Motion–File Extended Memorandum of Additional Authorities

Motion–File Late Appeal

Motion–File Late Brief

Motion–File Late Transcript

Motion–File Reply Brief

Motion–File Supplemental Brief

Motion–Hold In Abeyance

Motion–Hold In Abeyance - Bankruptcy

Motion–Inspect Sealed/Confidential Material

Motion–Intervene

Motion–Issue Appellate Judgment - Stipulated

Motion–Law Student Appearance

Motion–Leave to File Petition for Review

Motion–Leave to Proceed

Motion–Modify Case Title

Motion–Other

Motion–Out-of-State Counsel

Motion–Postpone Oral Argument

Motion–Present Oral Argument

Motion–Reactivate Case

Motion–Reactivate Case from Settlement Conference Program

Motion–Reactivate Petition for Review

Motion–Recall Appellate Judgment

Motion–Reconsider Order

Motion–Reinstate Case

Motion–Release Transcript

Motion–Relief From Default

Motion–Remand Agency - Other

Motion–Remand Agency - Take Additional Evidence

Motion–Remand Non-Agency

Motion–Remove Court Appointed Counsel and Proceed Pro Se

Motion–Request Appointment of Masters in JFC Proceeding

Motion–Request Assignment of Judge in Class Action

Motion–Request Record/Exhibits

Motion–Restraining Order

Motion–Review of PDSC Payment Decision

Motion–Review Under ORAP 8.40

Motion–Sanctions

Motion–Seal Case/Make Case Confidential

Motion–Seal Materials/Make Materials Confidential

Motion–Settle Transcript

Motion–Sever Cases

Motion–Show Cause

Motion–State Paid Transcript

Motion–Stay Enforcement of Appellate Judgment

Motion–Stay Issuance of Appellate Judgment

Motion–Stay Previous Judgment/Order

Motion–Stay Trial Court Proceedings

Motion–Strike

Motion–Submit on Briefs

Motion–Submit on Record

Motion–Substitute Appointed Counsel

Motion–Substitute Party

Motion–Substitute Retained Counsel

Motion–Summary Affirmance

Motion–Summary Determination of Appealability

Motion–Summary Reversal

Motion–Supplement Record

Motion–Suspending Judge/Lawyer Pending Disability/Disciplinary Proceeding

Motion–Take Judicial Notice

Motion–Transmission of Part of Record Not Designated

Motion–Vacate and Remand - Joint

Motion–Waive Court Rules

Motion–Waive Transcript

Motion–Waive/Defer Filing Fee

Motion–Waive/Defer Settlement Conference Program Fee

Motion–Withdraw as Court Appointed Counsel

Motion–Withdraw as Retained Counsel

Motion–Withdraw Filing

MOTIONS FOR EXTENSION OF TIME (MOET) TITLES–ORAP 7.10(1)(C)

MOET–Correct Brief

MOET–Extend Time in Settlement Conference Program

MOET–File Agency Record

MOET–File Agreed Narrative Statement

MOET–File Amicus Brief

MOET–File Answering Brief

MOET–File Answering on Cross-Assignment of Error Brief

MOET–File Answer to MotionMOET–File Answer to Petition for Attorney Fees

MOET–File Combined Answering and Cross-Assignment of Error Brief

MOET–File Combined Reply and Answering on Cross-Assignment of Error Brief

MOET–File Cost Bill

MOET–File Cross-Answering Brief

MOET–File Cross-Opening Brief

MOET–File Cross-Reply Brief

MOET–File Intervenor's Brief

MOET–File Motion for Leave to File a Reply Brief

MOET–File Motion for Leave to File an Extended Brief

MOET–File Motion for Sanctions

MOET–File Motion to Correct Agency Record

MOET–File Motion to Correct Transcript

MOET–File Objection to Cost Bill

MOET–File Opening Brief

MOET–File Petition for Attorney Fees

MOET–File Petition for Reconsideration

MOET–File Petition for Review (Supreme Court)

MOET–File Reply

MOET–File Reply Brief

MOET–File Reply on Cross-Assignment of Error Brief

MOET–File Reply to Answer to Petition for Attorney Fees

MOET–File Reply to Objection for Cost Bill

MOET–File Respondent's Brief

MOET–File Response to Order to Show Cause

MOET–File Response to Status Request

MOET–File Revised Order on Reconsideration

MOET–File Supplemental Brief

MOET–File Transcript

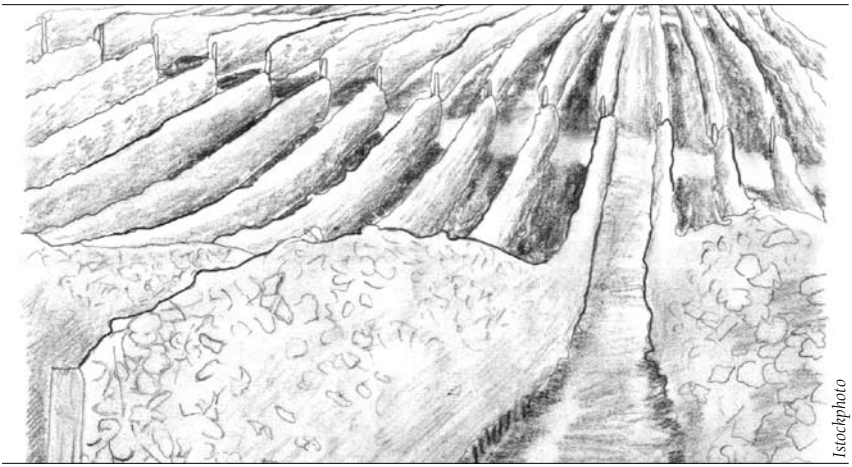
MOET–Other

MOET–Pay Filing Fee

MOET–Provide Copy of Judgment/Order Being Appealed

MOET–Provide Service of Document

RECOVERY OF ECONOMIC LOSSES IN NEGLIGENCE ACTIONS: "SPECIAL RELATIONSHIPS" AND BEYOND



Istockphato

One of Oregon's many vineyards

By Adam Clanton and George Pitcher of Williams, Kastner & Gibbs

Oregon law traditionally holds that a plaintiff cannot recover for *purely economic harm* caused by another's negligence. In 1992, however, the Oregon Supreme Court in *Onita Pacific Corp. v. Trustees of Bronson* held that damages for economic harm could be recoverable in negligence or negligent misrepresentation actions if the plaintiff could establish some "duty of the negligent actor to the injured party beyond the common law duty to exercise reasonable care to prevent foreseeable harm." Under the *Onita* framework, then, the key to whether a plaintiff could recover for economic losses was whether he could show a "special relationship" with the defendant that created a "heightened duty." Although no exhaustive list of "special relationships" has been finalized, early examples have been relatively predicable – lawyers and doctors owe a heightened duty of care to their clients; agents have a duty to act with due care in their principals' interest; brokers, architects, engineers, and liability insurers who take on a duty to defend all assume a "special duty" beyond that imposed by traditional common law because plaintiffs have "authorized the party who owes the duty to exercise independent judgment" on their behalf, and rely on that judgment to their detriment.

Yet, while "special relationships" have generally involved situations where plaintiff and defendant enter into an agreement requiring defendant to act in furtherance of plaintiff's economic interest, in recent years Oregon courts have drifted from *Onita* and the "special relationship" approach and provided alternative means for a plaintiff to recover for economic losses.

The first approach is simply one of nomenclature. Where the court is unable to find a "special relationship," it can declare that the damages sought do not actually relate to "economic harm," and are therefore still recoverable. In *Bunnell v. Dalton Construction, Inc*., for example, defendant built a home in 1997 and sold it to the original buyer. Expressing interest in buying the home from the original buyer, plaintiffs retained an inspector who discovered siding defects. Plaintiffs then purchased the home and discovered substantial water damage. Plaintiffs sued the builder for negligence. Defendants countered, arguing that no "special relationship" existed between the parties, and that therefore plaintiffs could not recover for the economic harm caused by the defects. In response, the Oregon appellate court did not dispute that there was no "special relationship." Rather, it concluded, quite simply, that "defective construction is property damage and not 'economic loss'" and that plaintiffs were not barred from recovering repair costs. Following the *Bunnell* court, then, and the recent case of *Harris v. Suniga* on which it relies, "economic losses" can be narrowly construed as "financial losses such as indebtedness incurred and return of monies paid, as distinguished from damages for injury to person or property." In short, in order to temper the scope of *Onita*, Oregon courts are willing to limit the definition of "economic harm" to exclude property damage, thereby allowing recovery without requiring a plaintiff to establish any "special relationship" with the defendant.

The second approach utilized to work beyond the *Onita* framework is to delineate situations other than "special relationships" in which economic losses are recoverable. Recent court decisions have emphasized that even if there is no "special relationship" observable at common law, the court may be willing to award damages for economic harm where it appears such damages are available by statute. For example, in *Simpkins v. Connor*, decedent died of a heart attack after he was negligently told by his physician that his stress test results were normal and required no follow-up. Although the estate requested

decedent's medical records, the hospital failed to provide them until after the applicable statute of limitations had run for any negligence action associated with the stress test. The estate subsequently brought an action against the hospital for purely economic losses – the loss of the medical malpractice claim – maintaining that under former ORS § 192.525 a health care provider owed a duty to give notice of the nondisclosure of records. The court noted that on the face of ORS § 192.525 the legislature clearly stated both a policy of protecting the confidentiality of medical records and a policy of preserving an individual's right to review their own records. But the legislature did not express the specific harms it intended to prevent. The court reasoned:

> [b]ecause the text does not plainly address that issue, then, we turn to the legislative history – which supports the view that the duty exists to protect patients from experiencing harm during litigation as a result of health care providers' failure to fully produce medical records on request.

The *Simpkins* court noted that the Oregon State Bar Procedure and Practice Committee proposed the legislation, and argued that its purpose was to avoid the "untimely discovery" that results when "complete patient records have not been provided in response to the patient's request." The court further observed that the bar committee's concerns were raised in the staff measure summary. Consequently, it reasoned that in light of the legislative history, plaintiff could assert a negligence claim for economic harm. Under the *Simpkins* approach, then, as discussed in other recent Oregon case law, "[w]hether a statute creates a duty, the breach of which could be tortious to the one harmed as a result of the breach, is determined by discerning what the legislature intended."

Given *Onita* and subsequent case developments, attorneys face difficult challenges in assessing whether a plaintiff can recover for economic injury. While analyzing whether the parties entered into a "special relationship" may be difficult enough, counsel must also determine whether the harms complained of are truly "economic" or if they are merely "property" damages. *Simpkins* creates an additional wrinkle. By turning to legislation as another source granting the right to recover economic losses, an attorney must consider not only the

text of pertinent local statutes, but also comments made about the statutory language both by legislators *and* the lobbyists who proposed the statute.

A BLAST FROM THE PAST

Uncovered by Keith Garza

Before the *Oregon Appellate Almanac* there was *Coram Nobis*, the "quasi-semi-annual publication of the Oregon State Bar's Appellate Practice Section." Reprinted here for your reading enjoyment is "Number 5" from the summer of 1997 – or 10 years ago. Lora "Packrat" Keenan kept a few of these oldies but goodies and made the mistake of forwarding them along to the above-named individual.

Look to see how far we have come as a section in the decade that has intervened. Read about such timeless events and individuals as the "new" Chief Judge Deits (page 1), "new Justice on the block" Theodore R. Kulongoski (page 3), and the nomination of then Justice Susan Graber to the Ninth Circuit (page 8). Enjoy Jim Westwood's high school yearbook portrait (page 5), Thom Brown looking for errors in the minutes to support a motion to amend (page 7), and Michael Duane Brown's superb editorial skills (passim). More importantly, perhaps, try to guess whose back is featured prominently on the upper left photograph on page 6 (is that the only photograph of Justice Unis the section could find?). Or simply take a quick look-through.

CORAM NOBIS

Summer 1997 Newsletter of the Appellate Practice Section, Oregon State Bar Number 5

Inside This Issue -

New Chief Judge Has a New Look

The paint wasn't dry on the bookshelves in the new offices for new Chief Judge in the Court of Appeals **Mary J. Deits**, as she took time out from her busy schedule for an interview in July. Books and materials were temporarily piled onto the floor of her spacious new offices.

"I've only been Chief Judge for two weeks, so it's a little early to know what I think about the change," Judge Deits said. On the one hand, the new Chief doesn't plan any major changes in operations. "Our docket is more current than it has been in recent memory," Judge Deits said, giving credit to the tenure of her predecessor and the other hard working judges on the Court.

Judge Deits is not new to the Court of Appeals, having served for 11 years, in the administration of her predecessor's Judge Joseph and Judge Richardson, before becoming the Court's first woman Chief. "It's a collegial appellate body, and you have to learn how to disagree, and then go have lunch," Judge Deits said, hoping to continue the sense of collegiality she has enjoyed.

"It's a collegial appellate body, and you have to learn how to disagree, and then go have lunch."

The new Chief sees this change in administration as an opportunity to "evaluate our entire process." Rumors had been passing amongst appellate practitioners about new, tighter standards for extensions, and Judge Deits admitted that was one area that she anticipated some review. But, her concerns were more directed at abuse of extensions, rather than tighter standards. "In some instances 9 or 10 extensions had been granted over the course of a year, and I'm not convinced that serves anyone's best interests," Judge Deits said. She hopes to develop some criteria for a consistent approach to extensions, which recognizes the different needs in different cases.

Judge Deits also stated she wanted to evaluate how the docket is set. Is it too heavy for oral argument to

Court of Appeals Judge **Mary J. Deits** settles into new offices and new responsibilities in July, taking over the Chief Judge position from retiring Court of Appeals Judge William Richardson.

"CORAM NOBIS," meaning "in our presence; before us," is the name of a common law writ for correction of the reviewing court's own error. Ballentine's Law Dictionary.

CORAM NOBIS

Editor:
Michael Duane Brown

Coram Nobis is a quasi-semi-annual publication of the Oregon State Bar's Appellate Practice Section distributed to section members. This newsletter is intended to focus on issues affecting appellate practitioners, stimulate interaction among lawyers and judges, and function as an appellate clearinghouse for exchange of ideas and resources. Lawyers who wish to join the Appellate Practice Section should contact Donna Richardson at the Oregon State Bar at (800) 452-8260, ext. 404, or (503) 620-0222, ext. 404. Dues are $10 per year.

have 4 cases in 3 hours? "If it's 11:45 am, and you have an hour's oral argument left, the attorneys and the judges know that's not a good situation." Judge Deits said she wanted to look at every possible way to better manage the Court's cases.

A change for the better, cited by the Judge during her time on the bench was more diversity on the Court. "Because we are a collegial appellate court, the diversity helps us have better opinions, even when the opinion is not unanimous," Judge Deits said. Alternative Dispute Resolution is another positive change since Judge Deits came to the Court of Appeals, and she was pleased with the success of the appellate mediation program, now in its second year.

Another change that was not so good was decreased funding for the appellate courts in important areas like clerks and other staff, noting that clerk positions had been reduced from two law clerks to one in many instances. On the other hand, the competition for lawyers seeking to become clerks has increased significantly. "The quality of applicants from all over the nation is phenomenal."

Judge Deits said what makes good appellate advocacy has not changed, and she continued to advise practitioners to narrow the issues and "focus on your strengths." She said the "good attorneys do that" declining to name names, but encouraging us all to feel comfortable saying less in briefs and at oral argument, noting the power of brevity.

As she acknowledged the work load of the Court was increasing, Judge Deits cited her own family as being her most important off the bench activity. Judge Deits enjoys outdoor activities, including tennis, biking, and hiking. "I realize my daughters are just about out of the nest," said the judge, who has one daughter who is a junior at University of Montana, and one who is a senior at Beaverton High School. She's used to the commute. "I've done it 24 years, first while working for the Department of Justice, then on the Court of Appeals."

She admitted taking some briefs home to read. "You just *have to* sometimes. This is not a light job," the Judge said. One case might be deciding a worker's comp issue, the next a murder case, and then a breach of contract, and few simple issues make it to the appellate level. But, those changing and challenging issues are what makes her job interesting. And, also her colleagues. "The judges take their jobs seriously, but they have a terrific sense of humor, which makes our job much more pleasant."

It helps that sense of collegiality that's so important to the ability to disagree, "and then have lunch."

Appeal & Review Supplement

OSB CLE is planning a December 1997 supplement for *Appeal and Review*. If you use the book and have suggestions for improvements or additions, or if you have noted any errors in the book, please write to Mary Oberst, OSB CLE, P.O. Box 1689, Lake Oswego, OR 97035-0889; telephone (503) 620-0222 (toll free 1-800-452-8260), ext 412. The E-mail address is moberst@osbar.org.

New Justice On the Block

After five months on the job, new Supreme Court Justice **Theodore R. Kulongoski** says he is still learning the process. The most surprising thing about the new position is the realization of the importance of the institutional nature of the court. "There is a culture to the Supreme Court and its traditions that is hard to explain," said the articulate, former politician at a loss for words. "It can only be experienced to be understood."

The Supreme Court experience is startlingly different from most legal or political positions Justice Kulongoski has held. He's used to the responsibility and trappings of government positions of power. He's been in the legislature, headed executive departments, and last held the position of Attorney General. But, this is different. Visitors don't just walk up to the chambers of the justices and say "Howdy, is the Justice in?" The chambers are located on the top floor of the Supreme Court Building, and you seek your intended audience from the law library reception desk on the floor below. After being announced electronically from the lower floor, someone greets you on third floor, and you are escorted to the otherwise inaccessible chambers located around the third floor.

It's not that the Justices are formal or stuffy. They're not. Not even the Chief Justice. Especially not the Chief Justice. It's just that the "Institution" of the court is steeped in tradition and has a "culture" that Justice Kulongoski recognizes, even if it defies definition.

The Supreme Court is a "way of life" that is different from any other branch of government or bureaucracy the new justice had ever experienced. "In the legislature or while serving in the executive department, I could always take charge of an issue. I knew how to solve the issue, or knew someone who could help me solve it."

However, on the Supreme Court, there are less options or tools available. "You are dealing with a record that is already set, but you can't help feeling responsible for the result," Justice Kulongoski said. "So many times, you can only speculate about what's not in the record."

It's a more passive role, but one which his active past helps him meet. "We have these legal issues that effect government agencies. Unless you have run one of these agencies, it's hard to see the impact of the legal rulings we are making," he said.

Where his diverse experience is most helpful is in understanding the roles of the three branches of government and the separation of powers under the Constitution. "The constitution is more than the Bill of Rights," Justice Kulongoski stated. He noted that three other Supreme Court Justices have served in the legislature, besides himself: Justices Carson, Fadeley, and Van Hoomissen. One of his fellow justices on the Supreme Court was his former law partner, Justice Durham.

That common background from these diverse personalities, plus the awesome culture of the court as an institution, contributes to a sense of collegiality which the new Justice enjoys. An articulate and interesting conversationalist, Kulongoski adds to the culture of the court, even as he remains somewhat in awe of the institutional nature of that culture that he now inhabits.

After careers in private practice, the legislative and executive branches of government, new Supreme Court Justice **Ted Kulongoski** takes his experience to Oregon's highest court.

Appointment Process Continuing

The Governor's office has finished initial interviews with the 11 candidates being considered for the Court of Appeals vacancy left by Judge Richardson's retirement, eight previously announced from the blue ribbon appellate judge panel, and three additional candidates: **Hon. Paul Lipscomb**, Circuit Court Judge from Marion County; **Dale Penn**, Marion County District Attorney; and **Martha O. Pagel** from the Oregon Water Resources department.

No date is given for the final appointment decision, and the Governor has been preoccupied with a number of legislative issues since the end of the '97 Session. But, we might have a new judge next month, and likely will know before our next annual meeting at the OSB Convention in Seaside at the end of September.

Kathy Knauf Retires

After 33 years of government service, **Kathy Knauf** retired as supervisor of the Records Section, and was recognized at a farewell reception for her on June 30th at the Supreme Court Building. Justices, judges, law clerks and staff were on hand to wish her well. There were also lots of hugs and "hellos" from former co-workers who came to say "goodbye."

"She's the last of a group that has been here for many years," said **James Nass**, legal counsel to the appellate courts, wondering about the impact of losing so much institutional memory.

Knauf worked for the Appellate Division of the Department of Justice for J. Michael Gillette and Jacob Tanzer, who both ended up on the Supreme Court. A quarter century ago, she began her tenure with the Judicial Department, when she became judicial assistant to Judge Virgil Langtry. In 1977 she became assistant editor of the Oregon Reports, and then editor, which is why her name appears so familiar to those who spend time in law libraries.

Kathy Knauf (right) and her sister Imogene Knauf (left) enjoy refreshments, recognition, presents and good wishes from co-workers at the farewell reception in the Supreme Court Building for the retiring supervisor of the Records Section on June 30th.

What's in store for the retiring Judicial Department supervisor? "I want to take a few months off, before deciding that," she said at her retirement party. She anticipates eventually working in some part time job. "It may not even be in the legal field," she said with a smile.

Knauf enjoyed the contact with people most during her years of service. "There's a great feeling of team work, everyone willing to pitch in and help out," Knauf said of her co-workers. She also enjoyed working with the attorneys (imagine that!) in appellate practice, with whom she has dealt over the years.

Upcoming Events
Annual Meeting Elections

The Nominating Committee, comprised of Jas. Adams, Frank Hunsaker and Elizabeth Duncan, hereby nominates the following individuals to serve as officers and members-at-large of the Executive Committee of the Appellate Practice Section of the Oregon State Bar.

Officers:

Chair-Elect	James W. Nass
Secretary	Jane Ellen Stonecipher
Treasurer	Douglas E. Hojem

Members-at-Large

Helen T. Dziuba	(Portland)	(one year term)
Inge Dortmund Wells	(Eugene)	(two year term)
Jeffrey M. Batchelor	(Portland)	(two year term)
Janet A. Klapstein	(DOJ/Salem)	(two year term)

The slate will be voted on at the annual meeting of the section which is scheduled for Thursday, September 25, 1997, **4:30 pm** in Seaside, Oregon, in conjunction with the Oregon State Bar Annual Meeting.

Appellate Court "On Line"

The Oregon Appellate Courts can now be found on the World Wide Web, according to Mary E. Bauman, Oregon Reports editor. "Slip opinions from the Supreme Court and Court of Appeals can now be found on our Website," Bauman said.

The site is updated weekly, listing opinions by court, case name, number, date, and the bound volume in which they will be published. "Once the opinions are published in the Advance Sheets, they will be deleted off the web," Bauman stated. "Our site can be linked to the Oregon State Library where the cases are indexed."

Bauman encouraged practitioners to visit the Judicial Department's Website at:

www.publications.ojd.state.or.us

"We are actively seeking feedback from users, since this is a test project of limited duration," Bauman noted. "An E-mail address is available for this purpose accessible from this website," according to Bauman.

If you have further questions, call Mary Bauman (503) 988-5567 or send her a fax at (503) 986-5934 or E-mail Mary E. Bauman @ state.or.us. You can also contact her the old fashioned way, by regular mail at the Oregon Judicial Department, Publications Section, Supreme Court Building, 1163 State Street, Salem, OR 97310.

Westwood Heads Appellate Section

The OSB Appellate Practice Section is led this year by new chairperson **James Westwood** with wit, humor and aplomb. Any group of lawyers can be a challenge to manage, but Westwood keeps the Executive Committee on task.

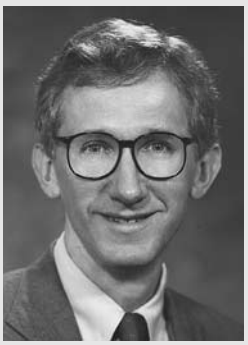
Westwood grew up in Oregon City. Westwood acknowledges his "fifteen minutes of fame" as captain of the Portland State team on the GE College Bowl team in 1965, which retired undefeated after five weeks of victory. The team captured more than fifteen minutes of fame, as they put Oregon on the intellectual map, and captured the hearts of a nation of viewers, as they steam-rolled over one opponent after another.

That competitive nature and leadership ability have helped Westwood become active during Columbia University student demonstrations (he was in the group trying to keep the University open). He served 3 ½ years in the Navy, between his first and second years in law school. He was a Thai linguist in the Naval Security Group, serving mostly in the Philippines and Thailand.

Westwood married his wife Janet in 1980, and the couple has two children, Laura, aged 13, and David, aged 10. The family lives in northeast Portland, where he is active in public school funding and state higher education matters.

As Oregon coordinator of Citizens for Colin Powell in 1995 (and still working to get Powell as a candidate in 2000), Westwood brings together his military background and leadership energy.

While working in one of the larger law firms, Westwood has served as PSU Alumni Board President in 1989-90, City Club of Portland President in 1991-92. He was co-editor of the OSB Appeal and Review Handbook in 1992-93 and 1996-97, and written the chapter on mandamus for the OSB Practice Manual in 1994, updated in 1996.



James N. Westwood

His modest ambition is to someday become a decent appellate lawyer. Those whom he has flattened on appeal, like the PSU opponents of GE College Bowl days, would acknowledge his goal has been met.

Supreme Court Justice Richard Unis Retires

Judges, lawyers, friends and family came to honor retiring Supreme Court Justice Richard Unis at a reception sponsored by the Appellate Practice Section and the Multnomah County Bar Association. Justice Unis was fondly remembered by a number of speakers, and gave many thanks for those with whom he served, starting on the Portland municipal court, many years ago, and working all the way to Oregon's highest court.

Guest of Honor retiring **Oregon Supreme Court Justice Richard Unis** (*left*) was speechless (well, not quite speechless) at the recognition and well wishing from friends and family.

Appellate Practice Section Executive Board members **Kimberly Chaput** (*left*) and **Helen Dziuba** (*right*) brightened up the reception for Justice Unis held at the elegant Governors Hotel in Portland.

Marc Blackman (*left*) enjoyed festivities with **Justice Robert D.**

Judges Lauded for "Clearspeak"

Every appellate practitioner eventually comes across case law that should be over-ruled, but in deference to *stare decisis*, we try to distinguish the bad cases. Appellate courts do the same thing. So, on those occasions when judges and lawyers "tell it like it is," we should rejoice. Congratulations to Judge Warren for doing so in his concurring opinion:

> "[W]e have no jurisdiction to consider the Board's order and [citation omitted] to the contrary is simply wrong. The majority concludes that this case is distinguishable from *Baar. Baar* is not distinguishable, and we should overrule it." *Quaker State Oil v. Taskinsen,* 147 Or App 245, 251, 935 P2d 1229 (1997)

In that same case, Judge Edmonds makes an interesting point, or at least he makes a point in an interesting manner. Lawyers and judges sometimes write in a crushingly boring manner (that was not his point). Appellate judges should be encouraged to write more colorful opinions, whenever possible. Here, Judge Edmonds comments on the effect on the parties of legislative changes in a statute involved in an appeal:

> "[T]he parties must feel that they are encased in a washing machine in an unending spin cycle because of the continuous changes to the law made by the legislature and its direction that its amendments be applied retroactively. ***
>
> "[The law] applied retroactively, materially changed the goal posts and the playing field for the parties and encroached on the concept of judicial review. *** Now, claimant is required to repeat the administrative review process with the 'deck stacked' against him[.]"
>
> "A process intended to provide for an expeditious, final determination of disputes has gone awry. It is no wonder that some who are involved in the workers' compensation system view it as an obstacle course designed to frustrate, rather than promote, rational claims resolution. In a culture where public mistrust of government is rampant, it behooves all of us to be mindful of that perception." *Supra, 147 Or App at 255.*

Wow! From washing machines to goal posts and playing fields, stacked decks, and obstacle courses, all in one concurring opinion. It's fascinating reading, even for those of us not involved in workers comp cases. (Except for that "behooves" part at the end. Most of us don't behoove very well. Judge Leeson, on the other hand, with a reputation for good behoovior, joined in the concurrence.)

James Westwood (*at head of table -center- with tie*) presides over OSB Appellate Practice Section Executive Board meeting, typically held every two months at the offices of **Tonkin, Torp**, thanks to the hospitality of board member **Barbee Lyon**.

From the Editor

Those of you who track such matters, like the Appellate Practice Section Executive Committee, will notice that this is the first issue of *Coram Nobis* in a long time. My apologies to you all. This is my best issue. It is my worst issue. As the new editor, it is my first issue, and I'm glad it's finally published. I hope to publish quarterly with a newsletter that is first and foremost something you enjoy. Something interesting, amusing, informative, maybe even educational, and I certainly wouldn't turn down contributions from others who are more qualified than I to educate our readers.

This newsletter belongs to the section, a fairly tightly defined group of public and private practitioners and appellate judges. What this newsletter can do, better than any other publication, is to communicate matters of interest or concern to its narrowly focused membership. That means we should address what's going on in the membership and the appellate courts. If you win a case, have an interesting vacation, or read, write, or see something amusing or interesting in your appellate practice, share it.

Jas Adams went on a dog sled run in Alaska. When a photo and caption captured the event in an issue of *Coram Nobis*, he received more comment about that than anything else he had ever done in his appellate career. That's not a reflection on his career-he's had a distinguished career so far, and is under consideration to replace the retiring Judge Richardson on the Court of Appeals. What it reflects, I think, is that we would like to know each other better, and differently than just opposing counsel. To the extent we know each other better, we are increasing the sense of community in our section, and that will make us all better practitioners and judges.

I hope to have the next newsletter out in the fall, just after the annual section meeting at the OSB Annual Meeting in Seaside. Please contact me ***now*** with your ideas for items for that issue. My mother used to say that the hardest thing about meal preparation was coming up with ideas for what to prepare. She didn't mind preparing the meal, but wanted help in the "idea department." That's what I want - help with the idea department. If you also want to help me "fix dinner," by writing something for the newsletter, well, "that would be just dandy" (quoting mother again)!

Michael Duane Brown

GRABER NOMINATED

Oregon Supreme Court Justice Susan Graber was nominated July 30 to a seat on the 9th U.S. Circuit Court of Appeals. She would fill the vacancy created in May when Judge Edward Leavy moved to a senior judge position.

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THE ALMANAC CONTENDERE 2007

By Keith Garza and Lora E. Keenan

Last year's contendere generated the whopping one response, which happened to identify correctly each of 12 obscure architectural elements found in the Supreme Court Building. DOUGLAS ZIER, Assistant Attorney General with the Department of Justice's Appellate Division, nailed the contendere and submitted his responses within a few days of publication. Doug's keen eye won him not only fame for the ages, but a reprint copy of Carey's *A History of the Oregon Constitution*.

When asked how winning the contendere changed his life, and following an uncomfortably long silence (actually, the silence was broken occasionally with some chuckling), Doug had this to say: "Winning the contendere renewed my already keen interest in historical architecture." As for his prize, the volume remains unopened on his shelf (he already owns a first edition), but we at the *Almanac* cannot help but think that Doug rests more fitfully each night knowing that the key to whipping any *Priest v. Pearce* issue lies comfortably within his wingspan.

As for this year's contest, we are offering the remaining reprinted version of the Carey compilation – leftover from last year due to the underwhelming response – to the first person who correctly answers the following questions:

1. The Oregon Court of Appeals as originally constituted had how many judges?

2. Who is the only former Oregon Court of Appeals law clerk to become a judge on that court?

3. Which appellate court judge is acknowledged in David James Duncan's novel *The Brothers K*?

3. What writer said, "No passion in the world is equal to the passion to alter someone else's draft"?

4. The artists who created the stained glass skylight in the courtroom of the Oregon Supreme Court also designed the stained glass for what Portland bar?

5. The annual softball game between the Oregon Supreme Court and the Oregon Court of Appeals is known as (a) the Advil Cup; (b) the Weasel Cup; (c) the Salem Series.

6. Which sitting appellate court judge is related by marriage to former Oregon Supreme Court Justice Oliver P. Coshow?

7. Which appellate court judge went on to serve as mayor of Cannon Beach?

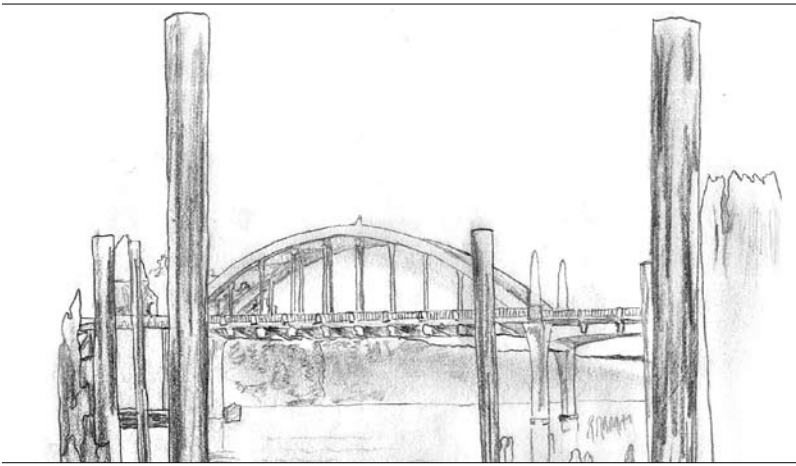
8. The death of what settler in 1841 prompted the creation of a judicial system in the Oregon country?

9. What is the difference between a "down draft" and a "go down"?

10. What does the "I" stand for in the name of veteran appellate lawyer and radio personality I. Franklin Hunsaker?

So get cracking at your trivial pursuits! Submit your contendere entry to next year's *Almanac* editor Scott Shorr at sshorr@ssbls.com. He may or may not know all the answers to these questions. In any event, his decisions will be final and binding, and likely arbitrary as well.

PASSAGES – GORDON WRIGHT SLOAN



Hon. Eric W. Valentine

The Florence Bridge

Gordon Wright Sloan, senior judge of the State of Oregon and former associate justice of the Oregon Supreme Court died on Wednesday afternoon, August 23, 2006 in Wilsonville, ending a most remarkable life. Judge Sloan was 95.

Born April 9, 1911 in Hoxie, Kanas, he attended the University of Kansas where he was the president of his senior class. He went onto follow his father, Edward and brother, Eldon as distinguished graduates of the Washburn University Law School in Topeka, Kansas. In 1938 he married Geneve Tipton and in 1939 they moved to Astoria, beginning a lifelong joy in being Oregonians. In 1958, he was appointed to the Oregon Supreme Court where he served two highly esteemed terms. He served on several statewide commissions, most notably a study of Oregon Forest Resources, commissioned by Governor McCall. His judicial excellence was recognized in his appointment as the first senior judge of the State of Oregon. Throughout his life he was a very active member of organizations devoted to many civic activities that included the Oregon Bar Association, Kiwanis, SCORE and both the Oregon and Clatsop County historical societies. In recognition of his keen legal mind and ability to amalgamate new information, he was appointed by President Truman to the International Tuna Commission. A great many of his fellow citizens benefited by his wisdom, his devotion and his uncommon zeal.

While he dearly loved the people and way of life so unique to Oregon, he loved his family even more. He is survived by his brother Eldon of Topeka, Kansas whom he always described as his best friend. He delighted in the visits of his family: son Bill and wife Betsy Sloan; daughter Sally and husband Jerry Nelson, their daughter Sally Sepulveda and her son Austin and their son Geoff and wife Carrie Nelson and daughters Katherine and Eleanor, all of Texas. His son Bill lives with his wife in Wisconsin "in Oregon without the mountains." Two "adopted" daughters, Connie Protto of Wilsonville and Bonnie Hindman of Salem were of very special importance, bringing him comfort and joy.

His extended family grew by leaps and bounds when he moved into the Spring Ridge Court in Wilsonville. The staff and his neighbors became so much apart of his life that it would be hard to described them as anything other than family. Their affection and tender mercies made his later years much more enjoy able than anyone, least of all they, could imagine.

Gordonwasavoraciousreader,dedicatedsportsfan,rancher,gardener andhadthe keenestappreciation forthefinefoodsofOregon,seekingout farmer's marketsfarand wide.Buthe wasperhapsJbestknownforhis insatiable curiosity and his unfailing friendliness: Much like Will Rogers, neitherhenor Geneve evermeta stranger.

He will be wmissed! At his request, no services will be held. Arrangements are being made by Cornwell Colonial Chapel, 29222 SW Town Ctr. Loop E, Wilsonville, OR. Memorial gifts may bemade to the giver's favorite charity.

THOMAS ALLEN MCBRIDE, J.
Portrait of a Family

By Susan Marmaduke

Thomas Allen McBride is well known for his time on the Oregon Supreme Court, where he served from 1909 until his death in 1930 at the age of 82. He authored nearly 900 opinions of the court, as well as many *per curiam* decisions, and served several terms as Chief Justice. Known to his friends as "Tom," McBride was also a circuit judge, statesman, legislator, and lawyer. His rich and varied contribution to the law of Oregon is rivaled only by the remarkable lives led by his parents and siblings.

Tom McBride's parents, Dr. James McBride and Mahala Miller McBride, brought their family to Oregon by wagon train from Missouri in 1846. They used their last dollar to pay the toll on Sam Barlow's Road around Mt. Hood, and borrowed money for the ferry toll to cross the Willamette River at Oregon City. They arrived in Yamhill County with a pony, five yoke of oxen, a wagon, and a few tin plates and cups, and nine children. Someone had already claimed the land they had chosen, forcing them to swap two yoke of oxen and the wagon to "buy" the parcel. The children cried as the new owner drove off with the faithful oxen that had brought them 2,000 miles across the country.

Tom, the tenth child, was born the following year, on November 15, 1847. Four more children followed.

Dr. James McBride was the first physician to settle in Yamhill County, and only the third to settle in Oregon. Affectionately known as "Uncle Jim," Dr. McBride was also a nondenominational Christian preacher who rode a preaching circuit in Yamhill and Polk Counties. He became Superintendent of Public Instruction for the Oregon Territory in 1849, and was elected a member of the Territorial Council in 1850.

In 1863, President Abraham Lincoln appointed Dr. McBride to serve as US Minister to the Hawaiian Islands. While stationed in the small American colony at Honolulu, he met a Russian sea captain who told him of Alaska's fisheries, gold, furs, and other riches. Dr. McBride took it upon himself to persuade Secretary Seward of the value of Alaska. He is regarded by some as the true author of the Alaska purchase.

Tom McBride's mother, Mahala Miller McBride, was a bright, well-read, and generous woman. In addition to raising her fourteen children, she was involved in various charitable activities. At a time when church facilities were few and far between, she regularly opened the family home to the community for Sunday gatherings. She agreed to let an impoverished, but well-read pioneer, W.L. Adams, and his wife stay in one of the McBride family's buildings in exchange for teaching the McBride children and several neighbors in one of the rooms of their log cabin. Adams had carted his personal library, 250 volumes of the best literature of the day, across the country by covered wagon. The treasured books got soaked while fording one of the rivers along the way.

The McBrides' oldest son, John Rogers McBride, was admitted to the bar in 1857. That same year, he was elected to serve as the sole Republican member of the Oregon Constitutional Convention, running on a pledge to offer a section in the bill of rights forbidding slavery. He played an active role in its deliberations, although he was the convention's youngest delegate. His description of that experience is reprinted in Charles Henry Carey's book, *The Oregon Constitution.*

In 1860, John McBride was elected to the first Senate of Oregon. Two years later, he became a United States Congressman. In 1865, President Lincoln appointed him Chief Justice of the Idaho Territory's Supreme Court at age 32. After three years, John resigned to return to the practice of law in Salt Lake City, and later moved to Spokane. For several decades, he was one of the leading mining lawyers of the Northwest.

One of Tom's younger brothers, Dr. James H. McBride, became one of the leading "alienists," or psychiatrists, in the United States. He served as superintendent of the Wisconsin State Insane Asylum until he resigned that position to establish a private sanitarium. In 1882, he was an expert witness for the prosecution at the trial of Charles Guiteau, President Garfield's assassin. Guiteau's trial was one of the first high profile cases in the United States in which the insanity defense was raised. According to Wikipedia:

> "Guiteau became something of a media darling during his trial for his bizarre behavior, including constantly badmouthing his defense team, formatting his testimony in epic poems which he recited at length, and soliciting

> legal advice from random spectators in the audience via passed notes. He dictated an autobiography to the *New York Herald*, ending it with a personal ad for a nice Christian lady under thirty."

Perhaps not surprisingly in light of the primitive state of psychiatry and the strict M'Naughten Rules, Giteau was convicted and hanged.

Tom's youngest brother, George Wycliffe McBride, studied law and was admitted to the bar, but never practiced. A merchant, he was elected to the state house of representatives in 1882. He served as speaker, and was twice elected Secretary of State of Oregon. In 1895, he was elected to the United States Senate.

The McBrides had ten daughters, all but one of whom lived to adulthood. According to one source, at least one of the daughters became a physician, and another, Lucinda, a midwife. She married Charles Caples who, coincidentally, had traveled west as part of the same wagon train as had the McBrides. Before becoming a physician, Charles Caples had joined the gold rush and saved enough to put himself and his sister through Pacific University. The Caples' house is now a museum in Columbia City, just north of St. Helens.

Justice Thomas McBride and his family reflect the intelligence, values, and sense of public service that epitomize the best of Oregon's spirit.

EPILOGUE

By Walter J. Ledesma

We hope you enjoyed this volume of the Almanac. As the editor for this tome, I invite those of you who appeal decisions to a higher court to consider writing an article for the next volume. We look for interesting, well written submissions with a twist. Don't be shy, show off your writing skills. We need to hear from you, the wordsmiths who help develop the law. To those who contributed, thank you; please contribute again.

Until the next call for submissions, keep writing and good luck in your cases and in your personal lives.

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by Andy Baudoin, from original photography by authors credited with each image.