NOT IN, BUT LARGELY ABOUT THE APPELLATE
COURTS IN THE STATE OF OREGON

In Re: A Publication of the
Appellate Practice Section,
of the Oregon State Bar.

VOLUME 3

OREGON APPELLATE ALMANAC

2008

A Collection of Helpful Appellate Tidbits, Attempted Humor, Sage Advice,
and Somewhat Scholarly Work from the Appellate Practice Section

Filed following four written motions for extension based on entirely vague
and groundless reasons such as "pressing business" and an emergency
telephone extension following the birth of the editor's twins

Scott Shorr, Editor

OREGON APPELLATE ALMANAC

VOLUME 3 – 2008

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WELCOME

Before its third annual publication, the Appellate Almanac may have accidentally gained what Aretha always wanted, demanded – R-E-S-P-E-C-T. The Almanac was somehow cited in a law review, 43 Willamette L Rev 495 n 1, 514 n 3 (2007). This made the year for Keith Garza, the Almanac's founder. Yes, Keith's life is such that catching a large bass or seeing his baby cited in a law review can really turn things around.

So standing on Keith's and second editor Walter Ledesma's shoulders, we present the third Almanac. It starts with a dedication to the recently passed, former Oregon Supreme Court Chief Justice Berkeley ("Bud") Lent. The dedication is by his former clerk, Kathy Dodds. Based on Kathy Dodds' lovely tribute and other fond memories provided by Judge Timothy Sercombe, another former clerk, we suspect Justice Lent would have appreciated the mix of humor (attempted humor in any event), helpful appellate practice information, and scholarly work that makes up this Almanac.

This Almanac includes it all. There is high-quality work by Judge Landau (on law reviews), Justice Balmer (providing the second part of an article on the Oregon Reports that he started in the first Almanac) and Oregon Supreme Court staff attorney Stephen Armitage (on the Location Act controversy). These serious articles give the Almanac its only chance of being cited again in a law review. Judge Landau's article, however, demonstrates why he will likely not cite an Almanac article in one of his opinions. Charlie Adams also allowed us to republish his very helpful article on Preserving Error.

There is other practical information for the appellate practitioner, including the now standard yearly summaries of case law from the United States Supreme Court, Ninth Circuit, Oregon Supreme Court, and Oregon Court of Appeals. This will prove especially valuable to the "head note lawyers" out there – although woe is the lawyer who relies on our summaries for a brief. There are also updates, reports, statistics and calendars relating to the Oregon appellate courts provided by staff counsel Jim Nass, Lora Keenan and Melanie Hagan.

We also leaned on some current appellate clerks (Dallas DeLuca, Cody Hoesly, and Heather Weigler) to give advice on issues that they

see when they read your briefs. Pay attention, practitioners, to this audience as they are the ones often giving your brief or petition that critical initial review.

The great art work, including the hand drawings of Justice Lent and Judge Sercombe, were provided by Carrie Poust. She gave the Almanac more style than I could ever provide. The less stylish clip art work was added by me.

Thanks to all of the authors, including several members of the Appellate Practice Section executive committee not mentioned above, who contributed to this year's Almanac. Send any complaints, corrections (my twins were born as I was editing this so you are bound to find a few), and any answers to the Contendere on the last page to next year's editor, Judy Giers.

Best – *Scott Shorr*

DEDICATION

By Kathleen Dodds, former law clerk, 1979-80, Justice Berkeley Lent; current career law clerk to Judge Edward Leavy, Ninth Circuit, 1995-present

cpoust 2/08

Hon. Berkelely Lent

The executive committee of the Oregon State Bar's Appellate Practice Section is honored to dedicate this third volume of the Oregon Appellate Almanac to the life and memory of Berkeley "Bud" Lent, a distinguished Oregon attorney, legislator, and chief justice of the Oregon Supreme Court.

Berkeley Lent was born in Los Angeles on September 22, 1921. He moved as a child with his family to the southeast Portland, working-class neighborhood of Lents, named after an ancestor who traveled the Oregon Trail. Lent graduated from Franklin High School in Portland. After high school, he attended Occidental College in California from 1944-1945. He joined the United States Navy in 1945 and served during World War II. He achieved the rank of Signalman 2nd Class. After serving in the Navy, Lent returned to Portland and enrolled at Reed College, graduating in 1948. He enrolled in Willamette University College of Law, graduating in 1950 as president of his graduating class.

After law school, Lent worked as an editor for Bancroft-Whitney Law Publishing Company in San Francisco. He returned to Portland, working for the Bonneville Power Administration as a staff attorney. He went into private law practice, first in Coos Bay Oregon, and in 1953, in Portland with the law firm of Peterson and Pozzi. Lent remained in private practice for 25 years and developed a renowned labor law trial practice. During this time, Lent developed his long career of public service. He served in the Oregon House from 1957 to 1965, and was elected in 1965 as the Democrat Minority Whip. He served in the Oregon Senate from 1967 to 1971, and was elected as the Democrat Senate Majority Leader in 1971. Lent's many years in the Oregon legislature were involved and distinguished, with the Oregon Journal stating that he was "one of the most astute brains" ever to serve in Oregon legislative branch.

In 1971, Lent was the leader of a 16-member Democratic Oregon Senate majority, and was in line to become the Senate President. But a Grants Pass Democrat joined the Republicans to block Lent's election. The deadlock lasted 12 days and 54 ballots, until a coalition elected another Portland Democrat to the presidency. A few months after this Oregon Senate battle, Governor Tom McCall appointed Lent a Circuit Judge in Multnomah County. Lent served as a Multnomah County Circuit Judge until 1977. He was well-liked and highly respected as a courtroom judge. Lent unsuccessfully ran for election in 1974 against the incumbent Justice William McAllister on the Oregon Supreme Court, but went on to win election to the open position in 1976 of retiring Justice Kenneth O'Connell. Justice Lent was re-elected to another six-year term in 1982. During the twenty year period between 1968 and 1988, Lent was the only member of the Oregon Supreme Court to gain a seat on that court by election, rather than by appointment in the first instance. Justice Lent's fellow justices elected him the 38th Chief Justice of the Oregon Supreme Court in July 1982, upon the retirement of Chief Justice Arno Denecke. Lent chose to serve in this position for one year, until August 1983. Lent and his fellow justices selected Justice Edwin Peterson as the Chief Justice in 1983. Justice Lent remained on the Oregon Supreme Court as the Senior Associate Justice until his retirement in 1988. Judge George Van Hoomissen was elected that year to replace Justice Lent on the Oregon Supreme Court.

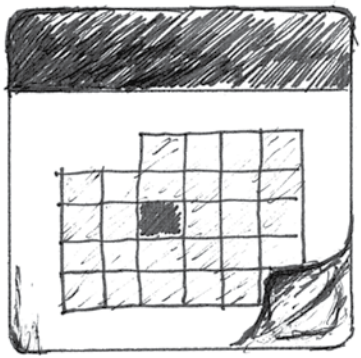
Following his retirement from the bench, Justice Lent worked in alternative dispute resolution as an arbitrator and mediator in Oregon and in Las Vegas, Nevada, where he maintained a retirement home with his wife Joan. Justice Lent and his wife Joan have, between them, two sons and four daughters. Justice Lent died suddenly of a heart attack while at home in Las Vegas on November 11, 2007, at age 86.

Justice Lent was well-known for his good humor, broad smile and devoted friendships, his great intellect, his talents as a trial lawyer, legislator, and judge, and his long public service to the State of Oregon. He was extremely well read, and had a remarkable memory for quotations. He studied mathematics at Reed College and solved calculus problems for enjoyment. He studied history and often included historical background in his opinions. His writings are marked by their clarity, and were written for the understanding of the lay reader.

His twelve years on the Oregon Supreme Court covered an historic time in state law jurisprudence. During this time, the Oregon Supreme Court championed the concept that the Oregon Constitution could be read independently, and that state constitutional guarantees of free speech and expression were more expansive than federal provisions. Justice Lent was a constitutional scholar in his own right, and was also well known for his expertise in legislative processes and for his comprehensive knowledge of employment and workers' compensation law.

United States District Court Judge James Redden, a friend of "Bud" Lent for over 45 years, dating from when they served together in the Oregon House of Representatives, recalls Justice Lent as "a brilliant individual, a great trial lawyer, judge, legislator, appellate judge - and a friend of anyone who knew him." At a memorial ceremony for Justice Lent held in a special session of the Oregon Supreme Court on January 24, 2008, many fellow judges, lawyers, legislators, and friends gathered to honor Justice Lent as one of the finest and most personable public servants of the State of Oregon.

2007: THE YEAR IN REVIEW



SURVEY OF UNITED STATES SUPREME COURT
(DECISIONS OF THE OCTOBER 2006 TERM)

By Harry Auerbach, Chief Deputy City Attorney, City of Portland

In its October 2006 Term, the United States Supreme Court disposed of 75 cases by written opinion, 14% fewer than in the October 2005 Term. This year's survey highlights the emergence of Justice Kennedy as the focal point tilting the outcome of many of the Court's decisions. We also nominate two cases as "Appellate Wonk Cases of the Year," present a lesson on the power of video, and summarize decisions on review from the Ninth Circuit and from the Oregon and Washington Supreme Courts.

ANTHONY KENNEDY: THE MOST POWERFUL MAN IN AMERICA?

This Term saw the emergence of Justice Kennedy as the critical swing Justice between the blocs of, on the one hand, the Chief Justice and Justices Scalia, Thomas and Alito, and, on the other, Justices Stevens, Souter, Ginsburg and Breyer. Justice Kennedy was in the majority in every 5-4 decision last term. Justice Kennedy sided with the former (the social conservatives) in: *Gonzales v. Carhart*, 550 U.S. ____ , 167 L.Ed.2d 480 (2007) (the federal Partial Birth Abortion Ban Act of 2003 is not facially unconstitutional); *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. ___, 168 L.Ed.2d 424 (2007) (taxpayers lacked standing to challenge the President's faith-based initiative); *Federal Election Commission v. Wisconsin Right to Life, Inc*, 551 U.S. ____, 168 L.Ed.2d 329 (2007) (prohibitions on corporate advertising mentioning incumbent candidates' names, but not expressly opposing their reelection, violate First Amendment); *Morse v. Frederick*, 551 U.S. ____, 168 L.Ed.2d 290 (2007) (suspension of student for displaying banner promoting drug use at school-sanctioned and school-supervised public event did not violate student's First Amendment rights); *Parents Involved in Community Schools v. Seattle School District No.1*, 551 U.S. ___, 168 L.Ed.2d 508 (2007) (school districts may not use race as a "tiebreaker" to allocate slots in particular schools); *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. ___, 167 L.Ed.2d 982

(2007) (statute of limitations on Title VII claim based on failure to raise pay runs from date of individual pay decisions); *Leegin Creative Leather Products, Inc., v. PSKS, Inc.*, 551 U.S. ___, 168 L.Ed.2d 623 (2007) (vertical price restraints are not *per se* illegal, but are subject to same "rule of reason" as other antitrust claims); *Bowles v. Russell*, 551 U.S. ___, 168 L.Ed.2d 96 (2007) (habeas—see Appellate Wonk Cases of the Year below).

In one economic case, however, Justice Kennedy sided with the "liberal" bloc. *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. ___ _, 166 L.Ed.2d 956 (2007) (holding that a bankruptcy court has the power to deny a debtor what is otherwise a statutory right to convert a Chapter 7 petition to a Chapter 13 proceeding, if the debtor acts fraudulently or in bad faith). And he split in the two major environmental cases of the year, siding with the "conservatives" in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. ____, 168 L.Ed.2d 467 (2007) (holding that the Clean Water Act required EPA to approve transfer of permitting authority to State meeting the statutes enumerated criteria, without regard to the future effect of the transfer on Environmental Protection Act's requirement that federal agencies confer on actions that might jeopardize listed species), but with the "liberals" in *Massachusetts v. EPA*, 549 U.S. ___, 167 L.Ed.2d 248 (2007) (reversing EPA's decision not to regulate carbon dioxide in new vehicle emissions under the Clean Air Act).

Justice Kennedy also proved to be the swing vote in death penalty cases. Siding with the "conservatives," he authored the Court's opinions in *Ayers v. Belmontes*, 549 U.S. ____, 166 L.Ed.2d 334 (2006) (California jury instruction allowing consideration of "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" permitted the jury to consider defendant's post-crime evidence, and was "consistent with the constitutional right to present mitigating evidence in capital sentencing proceedings"), and in *Uttecht v. Brown*, 551 U.S. ____, 167 L.Ed.2d 1014 (2007) (state trial court did not exceed its discretion in excusing a potential juror whose "'views [regarding capital punishment] would have prevented or substantially impaired [his] ability to follow the court's instructions'"). Justice Kennedy joined the "conservative" majority in *Schriro v. Landrigan*, 550 U.S. ____, 167 L.Ed.2d 836 (2007) (district court correctly denied evidentiary hearing on criminal defendant's ha-

beas claim, where defendant, in his state court death penalty sentencing trial, would not have allowed his lawyer to present any mitigating evidence), and in *Lawrence v. Florida*, 549 U.S. ___, 166 L.Ed.2d 924 (2007) (habeas statute of limitations is not tolled while certiorari is being sought to review final decision of state court).

But, in four death penalty cases from Texas, Justice Kennedy sided with the "liberals." He authored the Court's opinions in *Smith v. Texas*, 550 U.S. ___, 167 L.Ed.2d 632 (2007) (holding that habeas petitioner was entitled to relief where he had adequately preserved his claim of error and had shown he suffered "*some* harm" from the error), and in *Panetti v. Quarterman*, 551 U.S. ____, 168 L.Ed.2d 662 (2007) (holding that the Fifth Circuit "employed an improperly restrictive test" in rejecting habeas petitioner's claim that he was not competent to be executed). And he joined in the Court's opinions authored by Justice Stevens in *Abdul-Kabir v. Quarterman*, 550 U.S. ___, 167 L.Ed.2d 585 (2007), and in *Brewer v. Quarterman*, 550 U.S. ___, 167 L.Ed.2d 622 (2007) (both holding that Texas' former capital sentencing statute impermissibly prevented juries from giving consideration to petitioners' mitigating evidence).

In *Tennessee Secondary School Athletic Assn. v. Brentwood Academy*, 551 U.S. ___, 168 L.Ed.2d 166 (2007) all nine Justices agreed that the First Amendment did not prohibit TSSAA from barring certain solicitations by its member high schools in recruiting junior high school athletes. Justice Kennedy authored a concurring opinion, joined by the Chief Justice and Justices Scalia and Alito, and in turn concurred in by Justice Thomas, disagreeing with the principal opinion's reliance on *Ohralik v. Ohio State Bar Assn.*, 436 U.W. 447 (1978), which had upheld the Bar's ban on in-person solicitation by an attorney of an accident victim as a potential client. The tension in this case, as is evident in some of the others noted above, is that the "conservative" Justices would extend greater free speech protection to economic activity than would the "liberal" Justices.

There were a number of cases in which the usual blocs experienced some shifting. In *Philip Morris USA v. Williams*, 549 US ___, 166 L.Ed.2d 940 (2007), Justice Kennedy joined with the Chief Justice and Justices Breyer, Souter and Alito, in reversing a punitive damage award, while Justices Stevens, Thomas, Ginsburg and Scalia dissented. The same division prevailed in *James v. United States*, 550 U.S.

___, 167 L.Ed.2d 532 (2007) (holding that attempted burglary, under Florida law, qualified as a violent felony for purposes of the federal Armed Career Criminal Act). In *Zuni Public School District No. 89 v. DOE*, 550 U.S. ___, 167 L.Ed.2d 449 (2007) (holding that DOE could look to number of pupils, as well as to per-pupil expenditures, in determining whether State had "equalize[d] expenditures" throughout the State), Justice Kennedy sided with Justices Breyer, Stevens, Ginsburg and Alito, over the dissent of the Chief Justice and Justices Scalia, Thomas and Souter. In *Watters v. Wachovia Bank*, 550 U.S. ___, 167 L.Ed.2d 389 (2007), the Court held that state chartered banks that were wholly owned subsidiaries of federally chartered banks were subject to federal, and not State, oversight. Justice Kennedy joined the majority with Justices Ginsburg, Souter, Breyer and Alito, over the dissent of Justice Stevens, joined by the Chief Justice and Justice Scalia (with Justice Thomas not participating). In *Limtiaco v. Camacho*, 549 U.S. ___, 167 L.Ed.2d 212 (2007), the Court held that Guam's debt limitation must be calculated according to the assessed, rather than the appraised, valuation of property in Guam. Justice Kennedy joined the majority, with the Chief Justice and Justices Thomas, Scalia and Breyer, while Justices Souter, Stevens, Ginsburg and Alito dissented.

For all the talk of blocs and shifting blocs, it must also be noted that, in seventeen cases -- nearly 23% of the 75 disposed of this Term -- the Court issued unanimous opinions: *Brendlin v. California*, 551 U.S. ___ , 168 L.Ed.2d 132 (2007) (when police make a traffic stop, a passenger in the car is seized, and may challenge the constitutionality of the stop); *Beck v. PACE Int'l Union*, 551 U.S. ____, 168 L.Ed.2d 1 (2007) (Employer sponsoring and administering a single-employer defined-benefit plan has no fiduciary obligation under ERISA to consider merging with a multiemployer plan as a method of terminating the plan); *United States v. Atlantic Research Corp.*, 551 U.S. ___, 168 L.Ed.2d 28 (2007) (CERCLA provides PRP's a private right of action to recover clean-up costs from other PRP's); *Watson v. Philip Morris Cos., Inc.*, 551 U.S. ___, 168 L.Ed.2d 42 (2007) (Philip Morris was not acting under an officer or agency of the United States with respect to its federally-regulated testing of cigarettes; it could not remove to federal court a state-court lawsuit brought against it); *Long Island Care at Home, Ltd., v.Coke*, 551 U.S. ___, 168 L.Ed.2d 54 (2007) (upholding Department of Labor's exemption from FSLA of companionship workers employed by an employer or agency other than the family or household

using their services); *Sole v. Wyner*, 551 U.S. ___, 167 L.Ed.2d 1069 (2007) (a civil rights plaintiff who obtains a preliminary injunction, but ultimately is denied a permanent injunction, is not a prevailing party entitled to recover attorney fees under 42 U.S.C. § 1988); *Office of Senator Mark Dayton v. Hanson*, 550 U.S. ___, 167 L.Ed.2d 898 (2007) (the Congressional Accountability Act of 1995 did not give the Supreme Court jurisdiction over an appeal of the denial of a motion to dismiss an employment discrimination claim against a former Senator's office); *Hinck v. United States*, 550 U.S. ___, 167 L.Ed.2d 888 (2007) (the Tax Court has exclusive jurisdiction for judicial review of IRS's refusal to abate interest under Section 6404(e)(1) of the Internal Revenue Code); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. ___, 167 L.Ed.2d 705 (2007) (rejecting Federal Circuit's "teaching, suggestion or motivation" test for obviousness to invalidate a patent); *EC Term of Years Trust v. United States*, 550 U.S. ___, 167 L.Ed.2d 729 (2007) (trust could not challenge IRS levy through an action for a tax refund, where it missed the statutory deadline for an action to challenge the levy itself); *Travelers Casualty & Surety Co. v. Pacific Gas & Electric Co.*, 549 U.S. ___, 167 L.Ed.2d 178 (2007) (federal bankruptcy law does not preclude an unsecured creditor from recovering attorney's fees authorized by a prepetition contract and incurred in postpetition litigation); *Whorton v. Bockting*, 549 U.S. ___, 167 L.Ed.2d 1 (2007) (*Crawford v. Washington*, 541 U.S. 36 (2004) is not retroactive to cases that were already final on direct review at the time it was decided); *Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. ____, 166 L.Ed.2d 911 (2007) (same test applies in antitrust predatory bidding claims as in predatory pricing claims: plaintiff must establish that "predatory bidding led to below-cost pricing of the predator's outputs," and that "defendant has a dangerous probability of recouping losses incurred in bidding up input prices through the exercise of monopsony power"); *Jones v. Bock*, 549 U.S. ____, 166 L.Ed.2d 798 (2007) (rejecting limits circuits had placed on suits brought under Prison Litigation Reform Act of 1995); *Burton v. Stewart*, 549 U.S. ____, 166 L.Ed.2d 628 (2007) (Declining to answer question later answered in *Whorton*, because the District Court lacked jurisdiction over criminal defendant's "second or successive" petition); *Purcell v. Gonzalez*, 549 U.S. ___, 166 L.Ed.2d 1 (2006) (Vacating Ninth Circuit's injunction against enforcement of Arizona statute requiring proof of citizenship when registering to vote

and presentation of identification when voting on election day).[1]

APPELLATE WONK CASES OF THE YEAR

This Term produced two arcane cases of appellate jurisdiction, one involving a case removed from state to federal court and then remanded back to state court, and the other where the trial court purported to extend the time to file a notice of appeal beyond the limit authorized by statute. In both cases, the Court held there was no appellate jurisdiction.

In *Powerex Corp. v. Reliant Energy Services, Inc.,* 551 U.S. ___, 168 L.Ed.2d 112 (2007), the State of California and others filed suit in state court against a number of power companies the plaintiffs claimed had conspired to fix prices in violation of California law. Some of the defendants filed cross-claims bringing into the action the Bonneville Power Administration and the Western Area Power Administration, both agencies of the United States, and two entities owned by the Province of British Columbia, Canada. These cross-defendants removed the entire action to federal court. The plaintiffs moved to remand. The District Court held that one of the two Canadian entities was immune from suit under the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. § 1603, and that the federal agencies were immune from suit in state court so that the District Court lacked jurisdiction over the claims against them. The District Court remanded the entire case to state court. Although 28 U.S.C. § 1447(d) provides that an "order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," the Ninth Circuit reversed, holding that it had jurisdiction to review "substantive issues of law that preceded the remand order," and that the District Court should have dismissed the immune defendants before remanding the case to state court. *California v. NRG Energy, Inc.*, 391 F.3d 1011 (2004). Reversing the Ninth Circuit, the Court held that 28 U.S.C. § 1447(d), deprived

1 In the following cases, the disposition was unanimous, but there were separate concurring opinions: *Davenport v. Washington Education Ass'n*, 551 U.S. ___, 168 L.Ed.2d 71 (2007) (Washington's prohibition on labor unions' use of agency-shop fees of a nonmember for election-related purposes without the non-member's express consent did not violate the First Amendment); *Safeco Insurance Co. v. Burr*, 551 U.S. ___, 167 L.Ed.2d 1045 (2007) (recklessness would support recovery under Fair Credit Reporting Act, but neither defendant was liable); *Carey v. Musladin*, 549 U.S. ____, 166 L.Ed.2d 482 (2006) (Spectators wearing buttons portraying picture of victim did not deprive defendant of a fair trial).

the Ninth Circuit of jurisdiction of the appeal of the District Court's remand order. The Court expressly disapproved a line of Ninth Circuit cases holding that § 1447(d) does not preclude review of merits determinations preceding remand.[2]

In *Bowles v. Russell*, 551 U.S. ___, 168 L.Ed.2d 96 (2007), the District Court granted Bowles' motion to reopen and extend the time to file an appeal under 28 U.S.C. § 2107(a) and Fed. R. App. P. 4(a)(6). The statute and the rule limit the extension to a period of fourteen days. The District Court, however, extended the period for seventeen days, and appellant filed his appeal on the sixteenth day. In a 5-4 decision the Court held that, where a statute expressly limits the time for filing, including where it limits the time that a deadline may be extended, that limit is jurisdictional, and cannot be waived or excused. Specifically, the Court held, "that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." 168 L.Ed.2d at 105. The Court further held that it had "no authority to create equitable exceptions to jurisdictional requirements." *Id.* Consequently, the Court overruled *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), and *Thompson v. INS*, 375 U.S. 384 (1964), "to the extent they purport to authorize an exception to a jurisdictional rule" based on "the 'unique circumstances' doctrine." 168 L.Ed.2d at 105.

THE POWER OF VIDEO

A picture may be worth a thousand words, but video is priceless. In *Scott v. Harris,* 550 U.S. ___, 167 L.Ed.2d 686 (2007), the Court was called upon to decide whether a police officer involved in a high-speed chase with a fleeing motorist was entitled to qualified immunity from suit, under 42 U.S.C. § 1983, on the motorist's claim that the high-speed chase, which culminated with the motorist's crashing his car and suffering significant injuries, constituted the unconstitutional use of force. The Court was aided in its review by the fact that both officers involved in the chase had video cameras attached to their vehicles, so that the entire chase was preserved on tape. The Court was

2 In another FSIA case, the Court held that the City of New York could sue a foreign sovereign to determine "the validity of tax liens on property held by the sovereign for the purpose of housing its employees," under an exception to immunity where "'rights in immovable property situated in the United States are in issue.'" *Permanent Mission of India v. City of New York*, 551 U.S. ___, 168 L.Ed.2d 85 (2007), quoting 28 U.S.C. § 1605(A)(4).

so affected by the videos that it posted them on the Court website along with its opinion. The reader may view the videos at http://www.supremecourtus.gov/opinions/06slipopinion.html. The effect of the videos was that, instead of viewing the motorist as a man who suffered injuries disproportionate to the minor speeding violation for which he was originally sought to be pulled over, the Court perceived him as a dangerous menace, who put an entire community at risk. 167 L.Ed.2d at 693; *id*. at 698 (Breyer, J., concurring). In an 8-1 decision (Justice Stevens dissenting), the Court held that the high speed chase did not violate the motorist's constitutional rights.

THE BATTLE OF GUANTANAMO: COMING THIS TERM TO A THEATER NEAR YOU

The Court ended its term on June 29, 2007 by taking the unusual step of changing its mind and granting certiorari in *Boumediene v. Bush*, 476 F.3d 981 (DC Cir 2007), and in *Al Odah v. United States*, *id*. These cases, brought by "foreign citizens imprisoned at Guantanamo Bay, Cuba[,] raise an important question: whether the Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600, deprives courts of jurisdiction to consider their habeas claims, and, if so, whether that deprivation is constitutional." 549 U.S. at ___, 167 L.Ed.2d 578 (Breyer, J., dissenting from denial of certiorari). On April 2, 2007, the Court denied the certiorari petitions; on April 26, 2007, the Chief Justice, acting as Circuit Justice, denied their applications for an extension of time to file a petition for rehearing and for suspension of the order denying certiorari. 550 U.S.___, 167 L.Ed.2d 257 (2007). On April 27, petitioners filed their petitions for rehearing, and on June 29, 2007, the Court granted them, vacated the orders denying certiorari and granted certiorari. By the end of the October 2007 Term, we should see decisions in these cases.

CASES ON REVIEW FROM THE NINTH CIRCUIT

The Court issued decisions in twenty cases from the Ninth Circuit, reversing in eighteen.

Ninth Circuit Affirmed

- *Fry v. Pliler*, 551 U.S. __, 168 L.Ed.2d 16 (2007) (Habeas

– On collateral review of a state-court criminal judgment, test for prejudice from unconstitutional exclusion of evidence is whether it "had substantial and injurious effect or influence in determining the jury's verdict," under *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993), and not whether it was "harmless beyond a reasonable doubt," under *Chapman v. California*, 386 U.S. 18, 24 (1967)).

- *Global Crossing Telecommunications, Inc., v. Metrophones Telecommunications, Inc.*, 550 U.S. ___, 167 L.Ed.2d 422 (2007) (FCC validly determined that carrier's refusal to compensate payphone operator whose payphones were used for free access to carrier's lines was "unjust or unreasonable," and Communications Act gave payphone operator a private right of action against carrier for such compensation).

Ninth Circuit Reversed

Habeas Corpus

- *Ayers v. Belmontes*, 549 U.S. ____, 166 L.Ed.2d 334 (2006) (California jury instruction allowing consideration of "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" permitted the jury to consider defendant's post-crime evidence, and was "consistent with the constitutional right to present mitigating evidence in capital sentencing proceedings");

- *Schriro v. Landrigan*, 550 U.S. ____, 167 L.Ed.2d 836 (2007) (District court correctly denied evidentiary hearing on criminal defendant's habeas claim, where defendant, in his state court death penalty sentencing trial, would not have allowed his lawyer to present any mitigating evidence);

- *Uttecht v. Brown*, 551 U.S. ____, 167 L.Ed.2d 1014 (2007) (State trial court did not exceed its discretion in excusing a potential juror whose "'views [regarding capital punishment] would have prevented or substantially impaired [his] ability to follow the court's instructions'");[3]

3 As noted above, each of the death penalty cases split 5-4, with the Chief Justice and Justices Kennedy, Scalia, Thomas and Roberts in the majority, and Justices Stevens, Souter, Ginsburg and Breyer dissenting.

- *Carey v. Musladin*, 549 U.S. ____, 166 L.Ed.2d 482 (2006) (Spectators wearing buttons portraying picture of victim did not deprive defendant of a fair trial);

- *Whorton v. Bockting*, 549 U.S. ____, 167 L.Ed.2d 1 (2007) (*Crawford v. Washington*, 541 U.S. 36 (2004) is not retroactive to cases that were already final on direct review at the time it was decided);

- *Burton v. Stewart*, 549 U.S. ____, 166 L.Ed.2d 628 (2007) (Declining to answer question later answered in *Whorton*, because the District Court lacked jurisdiction over criminal defendant's "second or successive" petition).[4]

Criminal Procedure

- *United States v. Resendiz-Ponce*, 549 U.S. ____, 166 L.Ed.2d 591 (2007) (Defendant's indictment, which did not allege a specific overt act constituting a substantial step toward completion of the crime, was nonetheless sufficient to charge him with attempting to reenter the United States unlawfully).

Immigration

- *Gonzales v. Duenas-Alvarez*, 549 U.S. ____, 166 L.Ed.2d 683 (2007) (California joy-riding statute was a "theft offense," and immigrant convicted for aiding and abetting was therefore subject to removal).

Civil Rights

- *Los Angeles County v. Rettele*, 550 U.S. ____, 167 L.Ed.2d 974 (2007) (Deputies executing valid search warrant, who were unaware that suspects had moved out three months earlier, did not violate the Fourth Amendment rights of the house's new residents);

- *Purcell v. Gonzalez*, 549 U.S. ___, 166 L.Ed.2d 1 (2006) (Vacating Ninth Circuit's injunction against enforcement of Arizona statute requiring proof of citizenship when registering to vote and presentation of identification when voting on election day).

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4 As noted above, in each of the non-death penalty cases, all of the Justices joined in reversing the Ninth Circuit.

- *Parents Involved in Community Schools v. Seattle School District No.1*, 551 U.S. ___, 168 L.Ed.2d 508 (2007) (school districts may not use race as a "tiebreaker" to allocate slots in particular schools).

- *Morse v. Frederick*, 551 U.S. ____, 168 L.Ed.2d 290 (2007) (Suspension of student for displaying banner promoting drug use at school-sanctioned and school-supervised public event did not violate student's First Amendment rights).

Environment

- *National Assoc. of Homebuilders v. Defenders of Wildlife*, 551 U.S. ____, 168 L.Ed.2d 467 (2007) (Clean Water Act required EPA to approve transfer of permitting authority to State meeting the statutes enumerated criteria, without regard to the future effect of the transfer on Environmental Protection Act's requirement that federal agencies confer on actions that might jeopardize listed species).

Civil Litigation

- *Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. ____, 166 L.Ed.2d 911 (2007) (Antitrust -- Same test applies in predatory bidding claims as in predatory pricing claims: plaintiff must establish that "predatory bidding led to below-cost pricing of the predator's outputs," and that "defendant has a dangerous probability of recouping losses incurred in bidding up input prices through the exercise of monopsony power");

- *Travelers Casualty & Surety Co. v. Pacific Gas & Electric Co.*, 549 U.S. ____, 167 L.Ed.2d 178 (2007) (Bankruptcy – Federal bankruptcy law does not preclude an unsecured creditor from recovering attorney's fees authorized by a prepetition contract and incurred in postpetition litigation);

- *Safeco Insurance Co. v. Burr*, 551 U.S. ____, 167 L.Ed.2d 1045 (2007) (Fair Credit Reporting Act – Reckless disregard of statute's notice obligation would support liability for "willful failure", but neither defendant was liable in this case);

- *Beck v. PACE Int'l Union*, 551 U.S. ____, 168 L.Ed.2d 1 (2007) (ERISA – Employer sponsoring and administering a single-

employer defined-benefit plan has no fiduciary obligation to consider merging with a multiemployer plan as a method of terminating the plan);

- *Powerex Corp. v. Reliant Energy Services, Inc.,* 551 U.S. ___, 168 L.Ed.2d 112 (2007) (28 U.S.C. § 1447(d) deprived Ninth Circuit of jurisdiction of appeal of District Court's remand of removed case back to state court; disapproving line of Ninth Circuit cases holding that § 1447(d) did not preclude review of merits determinations preceding remand).

OREGON SUPREME COURT

Ever since the United States Supreme Court decided that the Eighth Amendment imposes some limit on punitive damages, *BMW North America, Inc. v. Gore*, 517 U.S. 559 (1996), it and the lower courts have struggled to find the constitutional equilibrium. The end of the struggle is nowhere in sight. In *Philip Morris USA v. Williams*, 549 US ___, 166 L.Ed.2d 940 (2007), the Court reversed the Oregon Supreme Court, which had upheld an award of $79.5 million in punitive damages. The Court held that it was unconstitutional for the trial court to permit the jury to award punitive damages "to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." 166 L.Ed.2d at 948. The Court remanded to the Oregon Supreme Court, directing it to "apply the standard we have set forth," which might result in a new trial or in a change in the amount of punitive damages. *Id*. at 951. Justice Ginsburg authored a dissent, joined by Justices Scalia and Thomas, urging that Oregon courts "have endeavored to follow our decisions . . . and have 'deprive[d] [no jury] of proper legal guidance.'" *Id*. at 954 (Ginsburg, J., dissenting, quoting Court's opinion, *id*. at 950).[5]

5 Justice Thomas also dissented because he does not believe that the Constitution constrains the size of punitive damage awards. 166 L.Ed.2d at 953-54 (Thomas, J., dissenting). Justice Stevens filed a separate dissent. *Id.* at 951-53 (Stevens, J., dissenting).

WASHINGTON SUPREME COURT

A Washington statute prohibits public-sector labor unions from using for election-related purposes the agency-shop fees of a nonmember without the nonmember's affirmative consent. The Washington Supreme Court held that such a restriction violated the First Amendment rights of the unions. In *Davenport v. Washington Education Ass'n*, 551 U.S. ___, 168 L.Ed.2d 71 (2007), the United States Supreme Court reversed, and held "that it does not violate the First Amendment for a State to require that its public-sector unions receive affirmative authorization from a nonmember before spending that nonmember's agency fees for election-related purposes." 168 L.Ed.2d at 83.

NINTH CIRCUIT: 2007 YEAR IN REVIEW

By Peter Hawkes, Stephanie Hendricks, and Tom Sondag (Lane Powell)

The Ninth Circuit decided lots of cases last year, and we read every one of them. Well, okay, maybe not every one. But we did search long, and hard, looking for those very special cases—the ones the appellate practitioner would find, as Arte Johnson used to say, "very interesting…." but *not* stupid.

Effect of Intermediate State Court Precedent. In *Ryman v. Sears, Roebuck and Co.*, 505 F3d 993 (9th Cir 2007), the court addressed the issue of determining state law when the only relevant precedent to be found comes from the state's intermediate appellate court. The case involved a claim for retaliatory discharge under the Oregon Family Leave Act (OFLA). The district court determined that the OFLA did not provide a cause of action for retaliation—even though, the court acknowledged, the Court of Appeals had held otherwise in *Yeager v. Providence Health Sys.*, 195 Or App 134, 96 P3d 862, *rev den*, 337 Or 658 (2004). The Ninth Circuit held that the district court erred in disregarding *Yeager*, because the court failed to cite any evidence that the Supreme Court was unlikely to reach the same conclusion. The district court's *own* view that *Yeager* was wrongly decided was not "evidence" that the Supreme Court would reach the same conclusion.

Inclusion of Attorney Fees in Rule 7 Bond. Did you know that a cost bond under FRAP 7 can be increased to include potential attorney fees? To be honest, we'd never even read FRAP 7 until we came across *Azizian v. Wilkinson*, 499 F3d 950 (9th Cir 2007). The appellant in that case was a member in a class action under the Clayton Act who objected to approval of a proposed settlement. The district court ordered the appellant to post a Rule 7 bond that included the appellee's anticipated attorney fees, reasoning that the Clayton Act includes attorney fees within the definition of recoverable "costs." The court also found that the Ninth Circuit was likely to find the appeal frivolous and impose fees as a sanction under FRAP 38. The appellant posted a bond, but it did not include an amount for attorney fees. The appellees sought dismissal of the appeal for failure to post the bond as ordered.

The Ninth Circuit first surveyed the split among the circuits over whether fees can be included in a Rule 7 bond. The minority rule fol-

lowed by the D.C. and Third Circuits is that "costs" under Rule 7 are those that may be taxed under FRAP 39, which do not include attorney fees. The newer, majority rule, followed by the Second, Sixth, and Eleventh Circuits, holds that attorney fees may be included in a Rule 7 bond if they would be treated as recoverable costs under an applicable fee-shifting statute.

The Ninth Circuit agreed with the majority rule, but nonetheless held that the district court erred in including fees in the bond in *Azizian*. The court noted that fee-shifting under the Clayton Act was one-sided, allowing fees against unsuccessful defendants but not unsuccessful plaintiffs. Since the appellant had been a plaintiff in the underlying action, the appellees could not recover fees under the statute. The court also held that it was improper for a district court to include fees in anticipation of a Rule 38 sanction, as such a sanction is a matter of discretion vested in the appellate court. Because the appellant had made legitimate efforts to reduce the amount of the bond and because her appeal was not frivolous, the court determined that her failure to post the full amount of the bond ordered by the district court did not require dismissal of her appeal.

Timeliness. Of course, the court issued several decisions concerning the timeliness of appeals. We don't know about you, but these cases always scare us. We've collected four here, and to make it worth your while, we've identified a rule for each one.

1. The "You-Were-Right-the-First-Time" Rule. In *In re Wiersma*, 483 F3d 933 (9th Cir 2007), the appellants timely appealed, had their appeal dismissed, tried again, and were told they were too late. This scenario played out in an appeal to the Bankruptcy Appellate Panel: debtors appealed to the BAP from a bankruptcy court's "Secured Status Order" clarifying creditors' rights in proceeds of a lawsuit. As you may know, finality in bankruptcy is tricky, and a BAP clerk questioned whether the Secured Status Order was final and appealable, and asked the parties to brief the issue. Appellants did not respond to that order or to another that followed it. The BAP dismissed the appeal for failure to prosecute.

Two months later, the bankruptcy court dismissed the entire case, and the debtors again appealed the Secured Status Order. This time, the BAP vacated its earlier dismissal of the debtors' *first* appeal, rea-

soning that the dismissal had been a mistake. The BAP said that it really hadn't meant to dismiss that appeal for lack of prosecution—it had intended to dismiss because the appealed order was interlocutory. And it had been wrong about that: the Secured Status Order, it now realized, had been final and appealable all along. The BAP concluded it had inherent authority to correct its mistakes, and so could consider the appeal on the merits.

The Ninth Circuit concluded that the BAP should not have exercised jurisdiction. The court agreed that the Secured Status Order was appealable and that the original appeal from the order had been timely. That appeal, however, had been dismissed for failure to prosecute, and the BAP lacked authority to fix things the second go-round. The court explained that a court can only correct clerical errors and mistakes of fact, not mistakes of law, and the conclusion that the Secured Status Order was interlocutory was a mistake of law. Moreover, the BAP's assertion that it had intended to dismiss the first appeal on that basis, rather for failure to prosecute, was not supported by any evidence.

The BAP also had reasoned that it could consider the debtors' second appeal under the "unique circumstances" doctrine. The Ninth Circuit disagreed with that conclusion, too. The doctrine applies only when a court's affirmative assurance causes a party to bring an untimely appeal, and here, the BAP clerk's order was not affirmative enough: the order stated that "there *may* be an issue concerning finality," not that there *was* such an issue. At most, the Ninth Circuit said, such language was only implicitly misleading. The debtors should have sought clarification from the court that a later appeal would be timely—*then* they might have had an "affirmative assurance" triggering the unique circumstances doctrine.

2. The "You-Would-Have-Been-Right-Five-Years-Ago" Rule. In *Stephanie-Cardona LLC v. Smith's Food and Drug Ctrs., Inc.*, 476 F3d 701, 702 (9th Cir 2007), the defendant obtained summary judgment on all claims but one, and later stipulated with the plaintiff to dismiss the last claim. An order on the stipulation was entered on June 16, 2004, after which the defendant filed a motion for attorney fees. That motion was denied in December, and a "Judgment in a Civil Case" was entered on January 25, 2005. The plaintiff filed its notice of appeal on February 22. Timely? No—too late.

FRAP 4, of course, requires that a notice of appeal be filed within 30 days "after the * * * order appealed from is entered." Since the Rule was amended in 2002, FRAP 4(a)(7)(a) has provided that when FRCP 58 requires entry of a separate document—as it does with respect to a judgment—then a judgment or order will be deemed to have been entered (1) when it is entered in the docket *and* (2) the earlier of the date the judgment or order is set forth on a separate document *or* 150 days from the date the order was entered in the docket. That means that even when a judgment is *not* set forth on a separate document labeled "judgment," a judgment will be deemed to have been entered 150 days after entry of an order dismissing the final claim in the action. And that, the court explained, is what had happened: the stipulation and order dismissing the plaintiff's final claim had been entered on June 16, 2004. Although the clerk should have entered judgment then, the failure to do so "did not keep the clock from running." Instead, judgment was entered as a matter of law on November 15, 2004—150 days after June 16. Plaintiff's notice of appeal three months later was too late.

3. The 150 Day-Plus Rule. Another case dealing with the 150-day rule was *Menken v. Emm*, 503 F3d 1050 (9th Cir 2007). Emm was a Nevada judgment creditor who attached a lien on the plaintiff's Arizona home and then allegedly tried to extract more from the plaintiff than the amount of the judgment before agreeing to release the lien. Refusing to pay that extra amount, Menken allegedly lost an opportunity to sell the home. He then brought various state law claims against Emm, who moved to dismiss for lack of personal jurisdiction. The district court granted that motion on January 27, 2005, but did not separately enter judgment. Menken asked the court to retain *in rem* jurisdiction and also moved to amend his complaint; both motions were denied on June 29, 2005. The district court also entered judgment on June 29—153 days from the original order on the motion to dismiss. Menken then filed his notice of appeal on July 22—within 30 days of the document labeled "judgment," but 176 days after the original order.

Emm argued that the appeal was untimely under the 150-day rule just discussed. Menken, however, argued that the running of the 150-day period triggers the *start* of the 30-day period to appeal, so that he actually had 180 days to appeal after entry of the order dis-

posing of his claims. The Ninth Circuit agreed, relying on the "plain language" of Rule 4. (The Court went on to find that the district court did have personal jurisdiction over Emm, and remanded for further proceedings.)

4. The Rule When There is Only a Rule. In *U.S. v. Sadler*, 480 F3d 932 (9th Cir 2007), the court held that the time for filing an appeal under FRAP 4(b) is not jurisdictional, and can be waived (or, technically, "forfeited"). The court examined *Eberhart v. United States*, 546 US 12 (2005) and *Kontrick v. Ryan*, 540 US 443 (2004), and concluded that "[t]he distinction between jurisdictional rules and inflexible but not jurisdictional timeliness rules drawn by *Eberhart* and *Kontrick* turns largely on whether the timeliness requirement is or is not grounded in a statute." Rule 4(a), governing time limitations in civil cases, is jurisdictional because it is based in a statute; Rule 4(b) is not jurisdictional because no statute imposes its restrictions, and "Congress's general authorization of federal court procedural rules cannot fill the statutory gap." The court therefore held that the dictates of Rule 4(b) "are subject to forfeiture by unvigilant parties."

Standing to Appeal. In *Employers-Teamsters Local No. 175 v. Watson Pharm., Inc.*, 498 F3d 920 (9th Cir, 2007), the Ninth Circuit held that a member of a putative class in an uncertified class action lacked standing to appeal a "lead plaintiff" ruling following dismissal of class claims. The district court had initially declared Anchor Capital the lead plaintiff, but later granted the defendant's motion to dismiss the complaint for failure to plead fraud with sufficient particularity. The court granted leave to replead, but Anchor Capital advised that it did not intend to do so, and moved for dismissal with prejudice of the individual uncertified actions. The appellant pension fund did not object, and the court granted the motion. The pension fund then appealed the lead plaintiff ruling, arguing that it, rather than Anchor Capital, should have been declared lead plaintiff.

The Ninth Circuit held that the pension fund lacked standing to appeal. The court reasoned that since a class had never been certified, the pension fund had never been a party below. Although a class member must await final judgment before it may challenge a lead-plaintiff ruling, the court pointed out that the pension fund had not lacked a remedy: it could have moved to intervene in the case below.

JMOL Motions. A little on procedure in the trial court: in *Summers v. Delta Air Lines, Inc.*, 508 F3d 923 (2007), the court pointed out that FRCP 50(a) prohibits a district court from granting judgment as a matter of law on grounds different from those specified by the moving party, or to grant judgment as a matter of law without permitting the nonmoving party to be "fully heard." The court observed that "[a]lthough the district court in this case gave Plaintiff an opportunity to address the matters raised in Defendants' motion, that 'opportunity' [wa]s rendered meaningless when the court granted the motion on wholly different grounds. Plaintiff was neither apprised of the alleged deficiencies in her proof nor given the opportunity to cure such deficiencies."

Political Question Doctrine. No procedure here; we just found this one interesting. The next time you're confronted with the "political question" doctrine—and we know you were just thinking about it—consult *Corrie v. Caterpillar, Inc.*, 503 F3d 974 (9th Cir 2007). That case involved claims by individuals whose family members had been killed or injured when the Israeli Defense Forces demolished homes in Palestinian territories. The plaintiffs alleged various state, federal, and international law claims against Caterpillar, Inc. for having sold bulldozers to the IDF knowing they would be used to destroy Palestinian homes. The district court dismissed the case pursuant to the political question doctrine, after establishing, based on facts outside the complaint, that the United States government had paid for the bulldozers on Israel's behalf.

The initial question on appeal was whether the political question doctrine is jurisdictional or prudential in nature. If the doctrine raised jurisdictional concerns, consideration of matters outside the complaint was proper; but if it was merely a prudential doctrine, the court needed to confine itself to the allegations of the complaint. The court held that although prudential considerations inform the constitutional analysis, the doctrine is "inherently jurisdictional" because it is grounded in separation of powers. Accordingly, consideration of matters outside the complaint was proper.

The court then applied the six independent tests announced by the Supreme Court in *Baker v. Carr*, 369 US 186 (1962), for determining whether a case presents a nonjusticiable political question. Of course, you know those tests by heart, so we won't repeat them here.

The court found it "decisive" that Caterpillar's sales to Israel had been paid for by the United States, which demonstrated an implicit decision by the political branches that the sales were in the interest of U.S. foreign relations. A judicial decision against Caterpillar would be contrary to that political determination, and on that basis the case was held to meet the first, fourth, fifth, and sixth *Baker* tests. The court affirmed dismissal of the action for lack of subject matter jurisdiction.

Thus endeth the tale.

SPEAKING CIVILLY: THE 2007 OREGON SUPREME COURT

By Keith M. Garza (Solo Practitioner, Clackamas County (below grade).
The author wishes to thank Jim Nass. Although Jim repeatedly declined offers to review and comment upon earlier drafts of this article, he nevertheless offered words that an objective person could construe as encouraging. Also, by way of caveat, I tried to spend as little time writing this article as possible; any reliance on what follows would be plain nuts.)

I. BACKGROUND

Two years ago, one of the co-editors of the first Oregon Appellate Almanac asked that I write a summary of Oregon Supreme Court decisions from the preceding year. I was happy to oblige, and, 25 single-spaced pages and nearly 100 citations later, that work was complete. 1 Or App Alm 24-50 (2006). Last year, the editor asked me to find a photocopy of an old Appellate Practice Newsletter and write no more than one short introductory paragraph. Taking my comeuppance in stride, two paragraphs – I bow to no arbitrary page limitation – and one notice of intention to bring suit for libel later, that work too was complete. 2 Or App Alm 101-09 (2007). (And, yes, the Almanac has gained sufficient acceptance in our field that it may properly be cited as authority. *See, e.g.,* 43 Willamette L Rev 495 n 1, 514 n 3 (2007).) This year, Editor Shorr has invited me back into the fold so to speak (okay, so I begged), but he has put me on a rather short leash. I have been permitted to summarize only those "civil" decisions of the Oregon Supreme Court issued between January 1 and December 31, 2007. So, here goes.

II. CAN'T WE JUST ALL GET ALONG?

First things first, as the Supreme Court likes to remind us, what exactly is a civil Supreme Court case? Notwithstanding a decrease in the number of unanimous decisions – or, to use the term favored by former Chief Justice Carson, an increase in "fractiousness" – the civility on the Court seems today about what it has been for a great long while, and certainly there is nothing like the barb trading that goes on at that other Supreme Court on the east coast. The closest our Court came to taking the gloves off was perhaps the spirited dissent (Gillette,

J., joined by De Muniz, C.J.) offered in *Costco Wholesale Corp. v. City of Beaverton*, 343 Or 18, 28-32 (2007). (Consistently with what I am sure will be a failed effort to amend the ORAP to provide that citations to Oregon cases need not include a reference to the regional reporter, I am not including P, P2d, or P3d cites in this submission.) Ours, therefore, safely may be described as a court that issues civil decisions. But that characterization is of little help in deciding about which of those civil decisions to write.

So what about the civil / criminal dichotomy? If I took one thing away from my first-year legal writing Professor Finbar McCarthy (my fault, not his) it is to always remember your audience (and something about split infinitives). In that regard, a simple civil versus criminal world cuts too broadly, both requiring civil practitioners to read about the civil cases that are really criminal in substance – habeas (*Barber v. Gladden*, 215 Or 129, 142 (1958)); post-conviction (*Bryant v. Thompson*, 324 Or 141, 145 n 2 (1996) (each stating that proposition)) – and would encroach into the work of fellow contributor Marc Brown. So those cases will not be mentioned.

Even then, there are things about the non-criminal cases that the Oregon Supreme Court either must or chooses to decide that really are of little interest to most of the practicing bar. I have used the Oregon Judicial Department's website as the source for this recap. The OJD website shows that the Court "decided" some 119 matters in 2007. (That number both over-reflects the number of Supreme Court decisions by including certain dispositive orders and under-represents the actual work of the Court.) Of those 119 matters, a full 50 had to do with the Court's statutory responsibility to review ballot titles for proposed initiative measures. As interesting as those cases may be to the less than a handful of lawyers who practice regularly in that area (apart from the Assistant Attorneys General who are unlucky enough to be assigned those cases), there is almost nothing about those decisions that carries over into the work-a-day world of the rest of the bar. Accordingly, no mention will be made of those cases either.

After all that, still more peeling of the onion may be in order with respect to the myriad non-criminal, non-ballot title cases that the Court decided last year. For example, how interested are folks generally about the four direct review Tax Court opinions issued in 2007? Or about the judicial reviews of administrative decisions? I am assum-

ing that lawyers **are** interested in the judge and attorney discipline docket, or at least we all should be. The point here is that, even among "civil" cases, there is something of a hierarchy. To ensure that I have something left about which to write, I will include all those cases, but I will begin with those cases that address matters of state constitutional, statutory, or common law first, and will address many of the other cases in only a cursory fashion.

III. BY THE NUMBERS

Excluding Tax Court and lawyer/judge discipline cases, the Court decided only 19 "civil" cases last year. Read into that whatever you want. As for those 19 cases, the Court issued its decision on average approximately 180 days following submission, or within a six months or so. When comparing that to past years, the time to decision mathematics suggests to me that the Supreme Court has hit something of a stride. With the Court having issued 110 opinions in 2006 (up from 78 in 2005 and 58 in 2004), it seems reasonably clear that much of the Court's backlog has been reduced and that litigants may now expect more regularity in the amount of time that a case spends under advisement. Those are good things of course, but petitions are still being filed, cases are still being allowed, and parties and their lawyers are still wanting resolution as soon as possible. That is, although the pressures that an appellate court faces can be quick-building (*see, e.g., George v. Courtney*, ___ Or ___ (Feb 2, 2008) (legislative special session question; certified appeal dated January 29, argument February 1, decision February 2 – which was a Saturday)), more often they are like an ever-present iceberg continually, yet slowly, bearing down. How the Court will deal with the floe of cases in 2008 will be something for next year's author to assess.

IV. BUY ORGANIC (OREGON CONSTITUTIONAL CASES – "ORGANIC ACT," GET IT?)

Unless I have missed something, the Supreme Court last year issued only two decisions touching on state constitutional law issues in the civil context. And it waited until December 28th to drop the big one. In *Clarke v. OHSU*, 343 Or 581 (2007), the Court upheld an as-applied challenge to the Oregon Tort Claims Act's proscription against

suing individual public employees or agents as violative of the Remedies Clause of Article I, section 10. The medical malpractice case pitted over $10 million in economic damages alone against the $200,000 cap in ORS 30.265(1). Although the Court agreed with OHSU that that entity is subject to immunity as an instrumentality of the state, immunizing its agents under the circumstances left the plaintiff with an emasculated remedy. And, as *Smothers v. Gresham Transfer, Inc.*, 332 Or 83 (2001), teaches, that will not do.

Feeling the bite of the reins – this article is limited to "summarizing" and not "analyzing" the Court's decisions – it nevertheless seems safe to say that, to the extent there was any question before *Clarke*, there is no doubt now but that *Smothers* has traction. 343 Or at 606 ("Article I, section 10, is not merely an aspirational statement * * *."). Where the slip point lies remains to be seen, as Justice Balmer, joined by Justice Kistler, noted in a concurring opinion. At the same time, His Honor's invitation to the legislature to "increase the existing claims limit substantially and immediately and, perhaps, retroactively," 343 Or at 612, seems to have fallen on deaf ears at least for purposes of the 2008 legislative session. (Note, however, that the legislature at least decided to consider during its 2008 sitting whether to require the Supreme Court to rule on ballot title cases within 30 days of the filing of the petition. SB 1083 (2008). Who says that the third is not the least dangerous branch?) The upshot is more litigation, anxious public servants sending e-mails about indemnification rights, calls to insurance brokers, and, in the meantime, hopefully some meaningful awards in meaningful cases.

As an aside, the Court's other constitutional case last year was a little ditty that upheld the right of the 10 judges of the Oregon Court of Appeals to either drive down, come up, or walk to (if you are Judge Edmonds, the only Court of Appeals judge who actually lives in the state's capital by my recollection) Salem to fulfill their judicial obligations. In *Carey v. Lincoln Loan Co.*, 342 Or 530 (2007), the Court put to bed an argument that had been kicking around the courts for years in one iteration or another that Article VII (Amended) was invalid and, accordingly, the legislature's creation of the Court of Appeals in 1969 based on the authority granted by that article, was also invalid. The challenge was based on, among other provisions, the multiple amendment prohibition of Article XVII, section 1. Although the Court

took a walk through the judicial history of this state, used cool terms such as "equal dignity," 342 Or at 542, and invoked arcane sounding legal principles like the doctrine of "subsequent validation," *id.* at 541 n 8, the long and the short of the case really seemed to come down to the fact that the people – validly or invalidly – adopted Article VII (Amended) almost a century ago – that's 100 with two zeros – and have been assuming that it was okay ever since. (The whomping that it took notwithstanding, kudos for the argument *contra*, which, if I recall correctly (and my memory is fuzzy on this) was first developed by a pro se litigant in the late 1990s.)

V. BY THE DAWN'S EARLY LIGHT (U.S. CONSTITUTIONAL CASE)

SAIF is not immune from suit under the Eleventh Amendment to the United States Constitution, is a "person" under 42 USC 1983, and can be sued for an alleged deprivation of a federal right. *Johnson v. SAIF*, 343 Or 139 (2007).

VI. BY THE BOOK (STATUTORY CONSTRUCTION)

Let's start with the one case that I personally believe (and it is only my personal, yet always respectful, view) the Supreme Court got wrong last year. In *Wilson v. TriMet*, 343 Or 1 (2007), the Court reversed contrary decisions by an arbitrator, circuit court judge, and Court of Appeals panel (AWOP) all of which enforced under the circumstances of that case the "call the police" requirement of the phantom vehicle provisions of the uninsured motorist statutes. The Court held – unanimously with five justices participating – that because TriMet had enacted an ordinance reflecting its statutory obligation to provide such coverage to its passengers, and further because that ordinance contained only a reference to the statutory requirement of law enforcement notification of a phantom vehicle accident, the notification requirement was not enforceable against the insured. The losing appellate advocate: yours truly. In the words of sage legal scholar Forrest, Forrest Gump: "That's all I have to say about that."

More significantly, the Court took away from public bodies a cute (too cute by half, perhaps) argument they had been springing on unsuspecting plaintiffs that the OTCA requires both filing and service of

a complaint within two years as opposed to permitting timely service within 60 days after filing as ORS 12.020(2) otherwise permits. *Baker v. City of Lakeside*, 343 Or 70 (2007). Alas, the same rule (that is, plaintiffs get the additional 60 days) applies to all complaints – as it should. Justice Durham, in a concurring opinion joined by Justice Gillette, and consistently with views on statutory construction that each of them have expressed elsewhere, took the majority to task for moving to the third level of the *PGE* methodology and then construing from what the concurrers saw as legislative silence the meaning of a purportedly ambiguous statute: "Legislative silence about the intent underlying a legislative proposal is just that: silence." 343 Or at 85. A nod to Mr. Udziela for his advocacy on behalf of the plaintiff.

Now, for the rest of the pack:

Grisby v. Progressive Preferred Ins. Co., 343 Or 175 (2007) (PIP case; agreeing to coverage but refusing to pay for certain claimed medical expenses is not acceptance of coverage for purposes of attorney fees provisions of ORS 742.061), *on recons*, 343 Or 394 (2007) ("this court's interpretation and application of the phrase 'accepted coverage' may not have been correct," but insurer still loses).

TSPC v. Bergerson, 342 Or 301 (2007) (reversal of teacher dismissal; also APA discussion regarding modifications to ALJ's proposed final order).

ETU, Inc. v. EQC, 343 Or 57 (2007)
(proper service of notice of violation under APA).

Jordan v. SAIF, 343 Or 208 (2007) (SAIF's own-motion authority).

Joarnt v. Autozone, Inc., 343 Or 187 (2007) (class certification not required for interlocutory appeal of "class action" under ORS 19.225 – counterintuitive at first blush, seemingly; counterintuitive following four pages of statutory construction, no).

North Marion Sch. Dist. #15 v. Acstar Ins. Co., 343 Or 305 (2007). This case involved as its stated issues "(1) whether a surety is liable for penalty wages under ORS 652.150 in an action on a construction bond pursuant to ORS 279.526; and (2) whether the late payment of wages violates the prevailing wage statute, ORS 279.350(1), thereby entitling plaintiffs to liquidated damag-

es from the surety under ORS 279.356(1)." 343 Or at 308. If you are into that kind of stuff, then I commend to you Justice Linder's lengthy majority opinion, Justice Durham's special concurrence, and Justice Walter's dissent. Also, the majority opinion may be worth mentioning for what at least to me was a noticeable break in "tradition" at the Court to make as little mention as possible of dissenting material in majority opinions. The majority devoted some three pages and repeated notational references to the losing side of the decision. Whether our Supremes will go the way of those in D.C. and start sending thousands of footnotes out into battle, thrusting and parrying in the margins, remains to be seen.

Johnson v. Swaim, 343 Or 423 (2007) (letter to insurer stating that "'[y]our file on the matter should remain open until fair and full compensation is paid for all losses * * *'" was not an ORS20.080(1) demand entitling the plaintiff to an award of attorney fees).

Wetherell v. Douglas County, 342 Or 666 (2007) (LCDC cannot preclude local government from considering profitability or gross farm income in deciding whether land is "agricultural land").

Costco Wholesale Corp. v. City of Beaverton, 343 Or 18 (2007) (city cannot annex only part of an island that it surrounds; feisty dissent by Justice Gillette, joined by Chief Justice De Muniz).

State ex rel Neidig v. Superior National Ins. Co., 343 Or 434 (2007). Justice Balmer, who seems to have written or weighed-in on most of the Court's civil cases last year, must have drawn the short straw to author the opinion in "[t]his ancillary receivership action." *Id.* at 436. The opinion contains at least the following acronyms: DCBS, CCCC, CalComp, BICO, OIGA, and SNIC. It also uses, more than once, the term "retrocessionaires." Let me emphasize that I am not being compensated for writing this article. I should not be required to try to figure out what was going on in this case when I cannot even preserve for my client an AWOP in the Court of Appeals. I will note, however, that the opinion does contain a lengthy discussion and application of the doctrine of piercing the corporate veil, which may be of some use to civil appellate practitioners.

VII. BY GRABTHAR'S HAMMER, BY THE SONS OF WORVAN, YOU SHALL BE AVENGED

(Torts, and a free turtle coprolite to the first person to match the quote to the movie, one of Sigourney Weaver's finest)

Near as I can tell, there was only one tort case last year, and it was an interesting one. In *Bailey v. Lewis Farm, Inc.*, 343 Or 276 (2007), defendant May Trucking Company sold a tractor- trailer to someone in November 1999. The rig "'was then owned by other non-parties * * *.'" *Id.* at 279. Defendant Lewis Farm then bought the rig in January 2000. In November 2000, the rig came apart while being operated by a Lewis Farm employee, and the bouncing wreckage apparently crossed the highway into oncoming traffic and struck the plaintiff's vehicle, causing it to careen down an embankment and burst into flames. Go figure. The plaintiff sued, among others, May Trucking for alleged failure to maintain the axle of the tractor-trailer. May Trucking moved to dismiss on foreseeability grounds, the trial court agreed, and an evenly divided Court of Appeals affirmed.

Writing for a unanimous court, Justice Kistler's opinion reversed the Court of Appeals' decision. First, the Court rejected arguments based on the notion that May Trucking's status as a prior owner of the rig absolved it of any potential liability on a lack of duty or related theory. It likewise rejected May Trucking's invitation for the Court to simply hold as a matter of law that there was no reasonable foreseeablity based on the allegations of the plaintiff's complaint. Justice Balmer, concurring it seems in large part to attempt to assure the defense bar that the sky really may not be falling, went to lengths to emphasize the procedural posture of the case and that it could be that the plaintiff's case would fall apart on summary judgment. I suppose the old Oregon adage rings true: a lawyer should think twice before moving to dismiss. At the same time, and thinking more in generalities both as to facts and to later stages of proceedings (that is, something besides challenging a pleading), is there really anything so inconsistent with our populist heritage in asking Oregon's elected judges to draw lines every once-in-a-while at the margins in common law cases? Isn't that what judges are supposed to do in this fast-shrinking sliver of the justice system not fully occupied by legislative or administrative action? *See, e.g., Schaff v. Ray's Land & Sea Food Co., Inc.*, 334 Or 94 (2002) (independent contractor question as matter of

law; 3-judge dissent). A little nougat to chew on, or not, depending on your tastes.

VIII. BY HOOK OR BY CROOK (LAWYER DISCIPLINE)

In re Balocca, 342 Or 279 (2007) (fees earned on receipt?; not if unwritten fee agreement; also conflict of interest and other violations).

In re Fadeley, 342 Or 403 (2007) (fees earned on receipt?; *see Balocca, supra*).

In re Redden, 342 Or 393 (2007) (acknowledged neglect; extended sanction discussion).

In re Levie, 342 Or 246 (2007) (one-year suspension for various false statements).

In re Fitzhenry, 343 Or 86 (2007) (DR 1-102(A)(3) violation in corporate context).

IX. BY THE POWER VESTED IN ME (JUDICIAL DISCIPLINE)

In re Ochoa, 342 Or 571 (2007) (30-day suspension for comments and conduct that, among other things, reasonably might be expected to impair the fairness of a proceeding).

In re Mendiguren, 342 Or 498 (2007) (consent to censure for violating JR 1-101(E) (familial, social, or other relationships that influence judicial conduct) and JR 2-102(A) (party's and lawyer's right to be heard)).

X. BY EQUAL ALLOTMENTS

Tax Court Judge Henry Breithaupt batted .1000 last year, but they were throwing him mostly softballs.

Knapp v. City of Jacksonville, 342 Or 268 (2007) (rejecting various challenges, including state privileges and immunities challenge, to municipal sewer/water safety surcharge).

Wynne v. DOR, 342 Or 515 (2007) (rejecting pro se taxpayer's various challenges to Tax Court's refusal to consider claims first filed in Regular, rather than Magistrate, division of Tax Court).

Gall v. DOR, 343 Or 293 (2007) (rejecting pro se taxpayer's arguments concerning the assessment and taxation of manufactured home).

Sharps v. DOR, 343 Or 531 (2007) (rejecting pro se taxpayer's arguments respecting the accrual of interest on refund).

XI. BY THE WAY (OTHER STUFF)

Crandon Capital Partners v. Shelk, 342 Or 555 (2007). This year's Appellate Almanac editor won the right to fight another day in this shareholder derivative action. The question was whether the plaintiffs' claim for attorney fees remained justiciable after the defendants took actions that rendered the underlying claims moot. Under the equitable substantial benefit theory, but not the common fund theory, the answer was "no."

Strunk v . PERB, 343 OR 226 (2007). Under the common fund theory, but apparently not under the substantial benefit theory (*see Crandon Capital Partners, supra*), awarding petitioners in PERS litigation over $2 million in attorney fees and costs.

Logan v. D.W. Sivers Co., 343 Or 339 (2007). In an honest to goodness breach of contract type case involving a document that, paradoxically, purported not to be a binding agreement regarding the sale of real property but only a promise by the seller not to sell to other buyers within a 60-day window, the Court split 4-3. The majority held in favor of the seller; the dissent (Kistler, J., joined by Durham and Walters, JJ.) disagreed, as dissenters are wont to do. I was most taken by seeing the term "expectation damages" used in the decision, which is a word I cannot recall coming across hardly at all since law school.

XII. BYE-BYE (ORT AND ZINGERS)

"Judicial estoppel generally does not prevent a party to a case from challenging a court's subject matter jurisdiction, even after the party has invoked or consented to the jurisdiction of the court." *Carey v. Lincoln Loan Co.*, 342 Or 530, 534 n 2 (2007).

"We do not read that provision, as some might, as licensing the use in [insurance] policies of a language other than English." *Wilson v. TriMet*, 343 Or 1, 13 (2007).

"The fact that * * * statutes are complimentary and work together does not mean that this court can mix and match the obligations and remedies that they contain." *North Marion Sch. Dist. #15 v. Acstar Ins. Co.*, 343 Or 305, 323 (2007).

"In Oregon, on time means on payday." *North Marion Sch. Dist. #15 v. Acstar Ins. Co.*, 343 Or 305, 338 (2007) (Walters, J., dissenting).

"[W]e must give effect to a statute's wording as the means by which we discern and further its underlying policy." *Johnson v. Swaim*, 343 Or 423 (2007).

"For the life of me, I cannot understand how such a reading of the statute could persuade anyone, much less the majority." *Costco Wholesale Corp. v. City of Beaverton*, 343 Or 18 (2007) (Gillette, J., dissenting).

OREGON SUPREME COURT: 2007 YEAR IN REVIEW (CRIMINAL CASES)

By Marc Brown, Criminal Defense Attorney and Adjunct Professor of Criminal Justice, Washington State University, Vancouver

Bailey v. Lampert, 342 Or 321, 153 P3d 95 (February 8, 2007)

In this post-conviction appeal, the issue before the court was whether a post-conviction petitioner's convictions for felon in possession of a firearm must be set aside because the predicate conviction on which his status as a felon was based had been overturned three years after the felon-in-possession convictions. In 1995, a trial court convicted the petitioner of a felony and six related misdemeanors. His direct appeal and subsequent post-conviction action were unsuccessful. In 2000, petitioner was convicted of two counts of felon in possession of a firearm. In 2003, the Ninth Circuit Court of Appeals concluded that petitioner's 1995 convictions were invalid because the prosecutor had failed to disclose potentially exculpatory information. Petitioner then filed a petition for post-conviction relief from his felon in possession of a firearm conviction.

Petitioner argued that (1) the felon-in-possession statute requires a constitutionally valid predicate felony, (2) under Article I, section 11, of the Oregon Constitution, an invalid prior conviction cannot be used to enhance a defendant's punishment, and (3) that the federal due process clause prohibits the use of a constitutionally invalid predicate felony to convict a defendant for felon-in-possession.

On the first argument, the court concluded that ORS 166.270(3) defines the phrase "has been convicted of a felony" to mean if, at the time of conviction for an offense, that offense was a felony under the law of the jurisdiction in which it was committed. Additionally, the court concluded that ORS 166.270 contains certain exceptions which do not apply to petitioner. Because petitioner was a convicted felon at the time of the felon-in-possession offense, his first argument failed.

On petitioner's second argument, the court held that the fact of a predicate felony conviction is an element of the offense and that it remains undisputed that petitioner had a felony conviction. Unlike cases where a defendant challenges an unconstitutional predicate for

use as an enhancement factor, in this case, petitioner's conviction was not held to be unconstitutional until three years after the felon-in-possession conviction.

Finally, the court held that petitioner's due process argument leads directly back to his statutory argument and that the statute does not require a valid predicate felony.

State v. Guzek, 342 Or 345, 153 P3d 101 (February 15, 2007)

In February, the death penalty proceeding against Randy Lee Guzek returned to the court for a fourth time. A jury convicted defendant of two counts of aggravated murder and sentenced him to death for the 1987 shooting of Rod and Lois Houser. On appeal from that proceeding, the Oregon Supreme Court concluded that the sentencing court erred by not allowing the jury an opportunity to consider evidence that may have militated against a death sentence. The court affirmed the defendant's convictions, but vacated the death sentence and remanded the case for a new sentencing proceeding. *State v. Guzek*, 310 Or 299, 797 P2d 1031 (1990) (*Guzek I*). On remand, a jury again sentenced the defendant to death. However, the Oregon Supreme Court concluded that certain victim-impact evidence introduced by the state was not relevant to any questions that the jury was required to consider. The court remanded the case for a third sentencing proceeding. *State v. Guzek*, 322 Or 245, 906 P2d 272 (1995) (*Guzek II*). At the defendant's third sentencing proceeding, the defendant unsuccessfully sought to have the trial court instruct the jury regarding the possibility of a true-life sentence as a penalty option. The jury sentenced the defendant to death for a third time. On appeal, the court held that the trial court's failure to give the requested instruction was reversible error. As a result, the court vacated the defendant's death sentence for a third time, remanding for a fourth sentencing proceeding. *State v. Guzek*, 336 Or 424, 86 P3d 1106 (2004) (*Guzek III*). In *Guzek III*, the court noted that the defendant raised other issues and proceeded to address those issues, including a question regarding the admissibility at sentencing of the defendant's previously adduced alibi evidence. As part of its ruling, the court held that Eighth Amendment to the United States Constitution required the sentencing jury to consider the live alibi testimony of defendant's mother. The state petitioned the United States Supreme Court for a writ of certiorari on the alibi evidence rul-

ing, and the Court allowed the petition. The Court ultimately held that the state possessed the authority to regulate, through exclusion, the live alibi testimony of defendant's mother. *Oregon v. Guzek*, 546 US 517, 126 S Ct 1226, 163 L Ed 2d 1112 (2006).

On remand from the Supreme Court, the court first focused on the question of whether transcripts of prior alibi testimony could be introduced at sentencing. Looking at the relationship between ORS 138.012 and ORS 163.150, the court concluded that, in a death penalty proceeding, "pursuant to ORS 138.012(2)(b), a transcript of all testimony properly admitted in [a] defendant's prior trial and sentencing proceedings" is admissible in a defendant's sentencing proceeding without regard to issues of relevancy or balancing.

The court then turned to the question regarding the admissibility of live alibi testimony at the sentencing proceeding. The court first determined that proceeding analysis did not apply to live testimony and that "the plain terms of ORS 138.012(2)(b) make live testimony from a prior witness admissible under the statute only insofar as that testimony encompasses 'additional *relevant* evidence.'" (Emphasis in original). In the case at hand, the court concluded that the live alibi testimony that the defendant wished to present had only one purpose: to convince a sentencing jury of his innocence. However, because the sentencing jury was powerless to alter the defendant's conviction, the live alibi testimony was not relevant in the sentencing proceeding.

Finally, the court concluded that the live testimony was not admissible for purposes of impeachment evidence because the defendant's guilt was a collateral matter and not subject to impeachment.

State v. Crosby, 342 Or 419, 154 P3d 97 (March 1, 2007)

The ultimate issue in this case involving an erroneous jury instruction was "whether the trial court erred when it attempted to clarify a jury instruction defining the mental state required to convict a defendant of the crimes at issue in this case." Factually, the defendant lived with her mother and, as her mother's health declined, defendant became her mother's sole caregiver. When the defendant brought her mother to an emergency room, the hospital staff suspected abuse after observing that the defendant's mother was dehydrated, malnourished and covered with feces. Her mother also had numerous bedsores. The

defendant's mother was transferred to a convalescent home, where she died a few days later. The state charged the defendant with two counts of murder by abuse, ORS 163.115(1)(c).

In its instructions to the jury, the court defined "recklessly" as follows:

> "A person acts recklessly if that person is aware of and consciously disregards a substantial and unjustifiable risk either
>
> "(1) That a particular result will occur; or
>
> "(2) That a particular circumstance exists.
>
> "The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

During deliberations, the jury asked the court to clarify the phrases the court had used to define the mental states required for the crimes. Specifically, the jury asked whether it should assume or infer that the phrase "that a particular result will occur" meant death. Additionally, the jury asked whether the phrase "that a particular circumstance exists" referred to death or "'just exist[e]nce of skin breakdown.'"

The court responded, in part, as follows:

> "In this case, the phrase 'a particular result' can only mean the death of [defendant's mother]. *The phrase 'that a particular circumstance exists' does not necessarily mean only one thing in this case. Based upon your application of all of the court's instructions and definitions, you should decide what circumstances should be considered in your deliberations*."
>
> (Emphasis in original).

The defendant objected to the clarifying instruction, disputing the trial court's assertion that "particular circumstance" could mean more than one thing. Specifically, the defendant argued that "particular circumstance" could only mean the death of the defendant's mother.

First, the court concluded that the defendant stated her objection with enough particularity to satisfy the goals of preservation. Additionally, the court concluded that, for purposes of preservation, the

defendant was not required to object to the original instruction regarding "reckless" because defendant's objection was not to the original instruction but to the clarifying instructions.

The court explained that the "statutory definitions of the mental states refer to three different types of material elements: a conduct, a circumstance, or a result." The court continued, explaining that in Oregon those categories are general, and the substantive criminal statute will describe the specific material element to which the mental state relates.

Ultimately, the court concluded that what the term "recklessly" means depends on how a substantive criminal statute uses the term. "The object of the recklessness will be described in the statute, and it will be either a result or a circumstance." Specifically here, the statute at issue referred to only a result, the death of the victim. The trial court erred when it instructed the jury that "particular circumstance" could mean more than one thing. "The trial court should have instructed the jury that 'particular result' meant death, and that 'particular circumstance' did not apply to this case."

State v. Sandoval, 342 Or 506, 156 P3d 60 (March 29, 2007)

In another case involving jury instructions, the court held that the trial court erred when it instructed a jury that a defendant was required to retreat before using deadly force to defend against the imminent use of deadly force by another.

In this case, the state charged the defendant with intentional murder for the death of his ex-wife's domestic partner. According to the defendant, the victim was driving on a road and defendant turned onto the road behind the victim. The victim stopped his truck and backed into the defendant's truck. The victim turned and aimed a pistol at the defendant. The defendant then grabbed his own rifle and fired a single shot at the victim, killing him instantly. The police later found the victim's loaded and cocked pistol beneath him. The state argued that defendant ambushed the victim, provoking him until he pulled out his pistol.

The trial court gave the following instruction to the jury:

"A person is justified in using physical force upon another per-

son to defend himself from what he reasonably believes to be the use or imminent use of unlawful physical force. In defending, a person may only use that degree of force which he reasonably believes to be necessary.

"The burden of proof is on the state to prove beyond a reasonable doubt that the defendant did not act in self-defense.

"* * * * *

"There are certain limitations on the use of deadly physical force. The defendant is not justified in using deadly physical force against another person in self-defense unless he reasonably believed that the other person was using or about to use unlawful deadly physical force against him and/or committing or attempting to commit a felony involving the use or threatened imminent use of physical force against a person.

"Even in the situation where one of these threatening circumstances is present, the use of deadly physical force is justified only if it does not exceed the degree of force which defendant reasonably believes to be necessary in the circumstances."

The court gave the following additional special instruction at the request of the prosecution:

"The danger justifying the use of deadly force must be absolute, imminent, and unavoidable, and a necessity of taking human life must be actual, present, urgent and absolutely or apparently absolutely necessary. There must be no reasonable opportunity to escape to avoid the affray and there must be no other means of avoiding or declining the combat."

The issue before the court was whether the "duty to retreat" instruction that the trial court gave is a correct statement of Oregon law.

After looking at the text of ORS 161.209 and 161.219, the court held that the statutory authority "sets out a specific set of circumstances that justify a person's use of deadly force (that the person reasonably believes that another person is using or about to use deadly force against him or her) and does not interpose any additional requirement (including a requirement that there be no means of escape)." The court concluded that "[t]he legislature did *not* intend to require a person to

retreat before using deadly force to defend against the imminent use of deadly physical force by another." (Emphasis in original).

State v. Birchfield, 342 Or 624, 157 P3d 216 (April 19, 2007)

In this case, the court overruled its earlier decision in *State v. Hancock*, 317 Or 5, 854 P2d 926 (1993) and held that the provisions of ORS 475.235 relating to the admission of laboratory reports in a criminal trial violated criminal defendants' right "to meet the witness face to face" under Article I, section 11 of the Oregon Constitution.

A police officer arrested the defendant for driving under the influence of intoxicants and, incident to that arrest, searched the defendant. The officer found a glass pipe on the defendant and sent it to the Oregon State Police laboratory for analysis. The criminalist at the laboratory analyzed the pipe's contents and submitted a written report stating that the pipe contained cocaine residue. The state charged the defendant with attempted possession of a controlled substance.

Prior to trial, the defendant objected to the admissibility of the laboratory report as hearsay and informed the court and the state that he wanted to have the state call the criminalist to testify. The state argued that the defendant could subpoena the criminalist himself. The defendant responded that making his right to confront the state's witness dependant on his procuring the state's witness to testify was unconstitutional. The trial court overruled defendant's objection and admitted the laboratory report. A jury convicted the defendant as charged.

Pursuant to ORS 475.235, a laboratory report containing an analysis of a controlled substance can be admitted into evidence without requiring the state to call the criminalist who prepared the report to testify. It further allows the defendant to subpoena the criminalist who prepared the report to testify at no cost to the defendant.

In *Hancock*, the court had considered a challenge to ORS 475.235 and decided that it did not violation the right to confrontation provided by the state and federal constitutions. The court interpreted the statute to be a "formalized way of asking a defendant to stipulate to use of the criminalist's report, rather than requiring that the criminalist be called to establish that particular element of the offense." *Hancock*, 317 Or at 11.

After *Hancock*, the court decided *State v. Moore*, 334 Or 328, 49 P3d 785 (2002). In *Moore*, the court reaffirmed that under Article I, section 11, the state, not the defendant, bears the burden of producing the witness for confrontation by the defendant. The court continued: "Before the state may introduce into evidence a witness's out-of-court declarations against a criminal defendant, the state must produce the witness at trial or demonstrate that the witness is unavailable to testify." *Moore*, 334 Or 341.

First, the *Birchfield* court concluded that the statutory requirement that a defendant notify the state that he will insist on the right to cross-examination and secure the attendance of that witness at trial, as held in *Hitchcock*, cannot be equated with its later holding in *Moore*. Next, the court concluded that "[t]he right to meet an opposing witness face to face cannot be transformed into a duty to procure that opposing witness for trial. It is the state that seeks to adduce the evidence as to which the criminalist will testify."

Ultimately, the court held that the trial court's admission of the laboratory report without requiring the state to produce at trial the criminalist who prepared the report or to demonstrate that the criminalist was unavailable to testify violated the defendant's right to confront the witness against him under Article I, section 11, of the Oregon Constitution.

State v. Howard/Dawson, 342 Or 635, 157 P3d 1189 (April 26, 2007)

In this April opinion, the court focused on trash, specifically answering the question of "whether Article I, section 9, of the Oregon Constitution prohibits the police from engaging in a warrantless search of garbage that a sanitation company had picked up in the regular course of business and turned over to the police."

Factually, the police believed that the defendants were manufacturing methamphetamine. A police officer asked the defendants' trash collection service to turn the defendants' garbage over to him after the company had collected it. The company agreed and, on two occasions, turned over defendants' garbage. Based on the information gleaned from the garbage, the police applied for and received a search warrant for the defendants' home. As a result of that search, the police obtained additional evidence of drug manufacturing and use. The

defendants filed a motion to suppress the evidence stemming from the warrantless search. The trial court denied the motion and a jury convicted the defendants of the charged crimes.

The court began by noting that the defendants did not argue that they retained either an ownership or a possessory interest in the garbage once the sanitation company picked it up. Instead, the defendants argued that they retained a protected privacy interest in the garbage, the invasion of which gave rise to a search.

The court held that the facts were materially indistinguishable from an earlier case where a police officer asked the hotel staff to keep the trash they had collected from a hotel room separate and then to give that trash to the officer. *See State v. Purvis*, 249 Or 404, 438 P2d 1002 (1968). Here, the court held that when the defendants turned the garbage over to the garbage hauler without any restrictions on its disposition, they effectively abandoned that property. As a result, the court concluded that the defendants no longer had a protected privacy interest in the garbage and, as a result, the police did not violate the defendants' Article I, section 9, rights when they looked through it.

As to the defendants' alternative argument that they had a subjective expectation that the hauler would not look through their garbage or permit someone else to do so, the court held that it did not need to decide whether the defendants' subjective expectations were reasonable because "the privacy protected by Article I, section 9, is not the privacy that one reasonably *expects* but the privacy to which one had a *right*." *State v. Campbell*, 306 Or 151, 164, 171, 759 P2d 1040 (1988) (emphasis in original).

State v. Hess, 342 Or 647, 159 P3d 309 (May 10, 2007)

A grand jury indicted the defendant for three counts of public indecency. Each count of the indictment reiterated that the defendant had been previously convicted of the crime of public indecency and, described each crime as a Class C felony pursuant to ORS 163.465(2)(b). Prior to trial, the defendant informed the court that he would stipulate to his prior convictions for public indecency. He further asked the court not to disclose his stipulation to the jury and that the court consider his prior convictions only at sentencing if the jury convicted him. In response, the state filed a motion *in limine* requesting that the court read

the defendant's stipulation on the record in the presence of the jury and include the stipulation in the court's jury instructions. The trial court denied the state's motion, accepted the defendant's judicial admission to his prior convictions, and prohibited the state from introducing evidence of otherwise disclosing to the jury the juridical admission that the defendant had made. The state appealed.

Relying on ORS 138.060, the defendant first argued that the state lacked the statutory authority to appeal the trial court's order. In response, the court concluded that the pretrial order had the effect of excluding evidence from the jury's consideration and, therefore the state had authority to appeal the order under ORS 138.060(1)(c). Next, the defendant argued that the state was not entitled to relief on appeal because it could not demonstrate that the trial court's order will cause prejudice affecting a substantial right enjoyed by the state. The court explained that the state had a statutory right to trial by jury in criminal cases pursuant to ORS 136.001 (1). Because the defendant did not waive his right to a trial by jury, the state's statutory right to a jury trial remained in effect. As a consequence, the trial court ruling did affect a "substantial right" of the state under OEC 103(1).

Having resolved the defendant's preliminary arguments, the court moved on to the merits of the state's argument, "whether, in a prosecution for felony public indecency, a trial court, after a defendant has made a judicial admission to his prior convictions, may prevent the state from introducing evidence of that admission to the jury."

The court observed that ORS 163.465(2)(b) is silent regarding matters of trial procedure in the context of a defendant's judicial admissions to a prior conviction as compared to similar statutes that provide explicit procedural instructions to a trial court regarding similar judicial admissions by a defendant in other criminal trials. Accordingly, the court concluded that the legislature's silence "signifies an intent to allow the familiar rules of evidence, rather than legislatively specified procedural rules, to govern the admissibility of a juridical admission of a prior conviction under ORS 163.465(2)(b)." Because the defendant's judicial admission to his prior convictions established the existence of the prior convictions as a factual and legal matter and relieved the state of its burden to prove their existence during trial, the evidence of those prior convictions was not relevant to any issue at trial and was therefore properly excluded.

State v. Bray, 342 Or 711, 160 P3d 983 (June 1, 2007)

In this case, the court continued to determine how to apply the United States Supreme Court opinions in *Apprendi v. New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000) and *Blakely v. Washington*, 542 US 296, 301, 124 S Ct 2531, 159 L Ed 2d 403 (2004). The primary issue was whether a sentencing enhancement factor, "persistent involvement in similar offenses," comes within the prior conviction exception to the rule in *Apprendi*.

Factually, the defendant, an inmate at Snake River Correctional Institution, worked on a computer at a call center located within that institution. The inmates may not use the Internet while working on the computers. As part of an investigation into inmates' use of computers to access the internet, officials discovered that the defendant had visited Internet web sites related to child pornography. The defendant admitted to visiting the sites but claimed that it was for legal research purposes. A search of the defendant's computer revealed 11 images of sexually explicit conduct involving children. The state charged the defendant with 11 counts of first-degree encouraging child sexual abuse and 11 counts of second-degree encouraging child sexual abuse.

At the conclusion of the state's case, the defendant moved for a judgment of acquittal on all the counts of first-degree encouraging child sexual abuse arguing that the state failed to present any evidence that the defendant intended to print or display the child pornography for distribution or public exhibition. The trial court denied defendant's motion and eventually found defendant guilty of four counts of first-degree encouraging child sexual abuse and 11 counts of second-degree sexual abuse. At sentencing, the trial court merged the four first-degree and four second-degree convictions that arose out of the same four images saved on the computer and then considered whether to impose an enhanced sentence on the remaining 11 convictions. After argument on the enhancement issue, the trial court found three aggravating factors and imposed an upward departure sentence on each of the defendant's 11 convictions.

On appeal, the Court of Appeals upheld the trial court's ruling on the motion for judgment of acquittal but agreed that the court erred in imposing the upward departure sentence.

The court affirmed the decision of the trial court and Court of Appeals on the motion for judgment of acquittal concluding that a reasonable trier of fact could find that the defendant had the means to print computer images and that the jury could infer from the pictures of children that the defendant possessed in his cell that he intended to print the images of child pornography that he had saved on his computer so that he could view those images as well in the relative privacy of his cell.

The court then turned to the second issue, whether the trial court correctly imposed enhanced or upward departure sentences on defendant's convictions. In doing so, the court began by reiterating the rule from *Apprendi*: "under the Sixth and Fourteenth Amendments to the United States Constitution, '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" The state argued that the "persistent involvement in similar crimes" factor comes within the "prior conviction exception" of *Apprendi*.

The court concluded that

> "whether the record establishes 'persistent involvement in similar offenses,' a sentencing court must do more than find that a defendant has two or more prior convictions for similar offenses. The trier of fact must infer from the number and frequency of those prior convictions whether the defendant's involvement in those offenses is 'persistent'; that is, the trier of fact must determine whether the defendant's involvement in similar offenses is sufficiently continuous or recurring to say that it is 'persistent.'"

Ultimately, the court held that "'[p]ersistent involvement in similar offenses' presents a factual issue that, under *Apprendi* and *Blakely*, a defendant may insist that a jury find beyond a reasonable doubt."

State v. Murray, 343 Or 48, 162 P3d 255 (June 28, 2007)

As the court stated at the outset of its opinion, "[t]his criminal case requires this court to visit once again an old conundrum respecting the permissibility of punishing an individual criminally for reckless activity when the "victim" of that activity to some degree participated

in the reckless conduct." Specifically, the issue here was whether a person can be found guilty of third-degree assault when the victim was a willing participant in the activity.

Factually, the defendant owned an automobile shop where he converts cars into racing machines. The victim was the defendant's employee. On the night in question, the defendant was test-driving a car that he and the victim had modified. Defendant drove the car while the victim was in the front passenger seat monitoring the car's performance. The defendant drove the car through a residential neighborhood in excess of 90 miles per hour, lost control of the car, and skidded into a power pole. The defendant escaped from the burning car with a concussion but the victim suffered severe injuries.

Among other charges, the state charged the defendant with third-degree assault. Under ORS 163.165, a person is guilty of third-degree assault if he recklessly causes injury to another using a dangerous weapon. At trial, the defendant waived his right to a jury and agreed to be tried by the court. He stipulated that the victim suffered serious physical injuries from the crash, that he drove recklessly, and that his recklessness led to the victim's injuries. At the close of the state's case, the defendant moved for a judgment of acquittal on the assault charge on the ground that "the evidence established that the victim had been a knowing participant in the recklessness and, as a consequence, there was no 'legal causation' on which to base a conviction."

After examining the text of ORS 163.165, in context, the court held

> "that a person commits third-degree assault if, in addition to participation in the reckless activity, that person's own recklessness causes -- *i.e.*, brings about, makes, or effects by force -- serious physical injury to another by means of a deadly or dangerous weapon, regardless of the other person's willing participation in the reckless activity."

The court concluded that because defendant caused the victim's serious physical injuries, that he was driving recklessly, and that his reckless driving led directly to the crash that injured the victim, the trial court properly denied the judgment of acquittal and found defendant guilty of third-degree assault.

State v. Orueta, 343 Or 118, 164 P3d 267 (July 19, 2007)

This mandamus proceeding involves the question of whether a trial court errs when it allows a defendant to enter into diversion from a DUII charge when he had a commercial driver's license (CDL).

At the time the defendant was arrested and charged with DUII, he possessed a CDL but no longer drove a commercial vehicle and did not have the required medical examination certificate for a CDL. When the defendant had renewed his driver's license, he did not intend to renew his CDL but, following its procedures, the Department of Motor Vehicles automatically renewed the license. The defendant paid the fee for a CDL which was higher than for a standard driver's license. The state charged the defendant with DUII, and the defendant petitioned to enter into a diversion agreement. A diversion agreement allows a first-time offender charged with DUII to have the charge dismissed if he or she successfully completes certain programs. Diversion is not available to persons holding a CDL. The trial court found that the defendant did not intend to renew his CDL, did not know he was renewing it, had not been using it, and did not intend to use it. Therefore, the court concluded that defendant was eligible for diversion. The state petitioned for a writ of mandamus.

The first argument advanced to deny to state's petition was that the defendant did not have a CDL because he did not have the required medical certification. In answer to that argument, the court concluded that "[t]he fact that a person may not have a medical certificate in his or her immediate possession does not mean he or she does not hold a commercial driver's license."

Additionally, it was argued that the DMV erroneously issued the defendant a CDL without proof that he possessed the requisite medical certificate. In other words, the DMV did not have the authority to issue him a CDL without the medical certificate. The court concluded that the state and federal rules governing CDLs state that it is sufficient if a person who applies to renew a CDL certifies on the renewal application that he or she meets all the required driver qualifications. Because the defendant signed an application to renew his license, and that application stated that, if renewing a CDL the applicant certified that he complied with the applicable federal regulations, the court concluded that the application certified that he complied with the ap-

plicable federal regulations and the DMV had the authority to renew his CDL.

Finally, the argument was made that the provision disqualifying the defendant from diversion violated Article I, section 20, of the Oregon Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Specifically, the statute impermissibly distinguishes between two statutorily defined classes of persons, denying persons with CDLs the opportunity to participate in diversion while allowing those without a CDL that opportunity. First, the court pointed out that the class of persons who do not have a CDL does not exist independently of the statutes relating to that class. "As this court has explained, those classes are entitled to no protection under Article I, section 20." Likewise, the federal equal protection argument fails, the court concluded, because the classification bears a rational relation to some legitimate ends. Specifically, the court held that "[t]he legislature reasonably could conclude that persons who are authorized to drive commercial motor vehicles may either drive larger, heavier vehicles or drive more miles than other drivers." Therefore, preventing those persons from participating in diversion and subjecting them to harsher sanctions provides an incentive to avoid that behavior and increases highway safety.

The court ultimately concluded that the trial court erred in permitting the defendant to enter into a diversion agreement. Justice Walters wrote a dissenting opinion.

State v. Scott, 343 Or 195, 166 P3d 528 (August 23, 2007).

In this appeal, the state challenged a pretrial order suppressing statements made by the defendant during a custodial interview. The issue was whether, during that interview, the police violated the defendant's right against self-incrimination and his derivative right to counsel under Article I, section 12, of the Oregon Constitution.

The defendant was arrested and charged with murder. While transporting the defendant to the police station, the officers informed him of his *Miranda* rights. At the station, two officers escorted the defendant to an interview room and started an interview. At the start of the interview, the defendant asked to speak with an attorney. In response, an officer again informed the defendant of his *Miranda* rights.

The defendant asked for an attorney for a second time. He further explained that he saw on television that he was the suspect of a murder. The officer asked if he wanted a specific attorney. The defendant responded that he just wanted one. The officer asked if there was a lawyer the defendant had spoken with in the past. The defendant then said that he did not care about a lawyer and he would speak with one when he got to court. Ultimately, the defendant filed a pretrial motion to suppress the inculpatory statements the he made during and after the interview.

The court began its analysis by explaining that "[t]he right against self-incrimination includes a derivative right to counsel during custodial interrogation." It continued:

> "Three points must be addressed in determining whether the police have violated a suspect's right against self-incrimination and the right to counsel in cases such as this one: (1) whether the suspect was subject to custodial interrogation; (2) whether the suspect invoked the right to counsel in an equivocal or an unequivocal manner; and (3) in some cases, whether the suspect waived a prior invocation of the right to counsel."

Here, the state did not dispute that the defendant made an unequivocal request for counsel. Therefore, the contested issue was whether the questions that the officer asked after the defendant's unequivocal request for counsel constituted interrogation for purposes of Article I, section 12. For the purposes of this case, the court applied the United States Supreme Court's definition of the term "interrogation" to its analysis of the defendant's Article I, section 12, rights. The Court "explained that interrogation extends to the type of police conduct that the police 'should know [is] reasonably likely to elicit an incriminating response'; 'incriminating response' in turn, means any inculpatory or exculpatory response that the prosecution later may seek to introduce at trial.'" In determining whether the questions met the definition of "interrogation," the court considered both the substance of the questions posed to the defendant and the manner in which those questions were asked.

The court concluded that the questions posed to the defendant after he unequivocally requested an attorney gave the defendant an invitation and opportunity to provide an incriminating response.

Therefore, the court held that the defendant was subject to custodial interrogation during the police interview in violation of his constitutional rights.

State v. Ice, 343 Or 248, 170 P3d 1049 (October 11, 2007)

In this case, the defendant asked the court to find that jury findings are required to impose consecutive sentences in certain situations. The issue on review was whether the state or federal constitutions require that a jury, rather than a judge, find the facts that Oregon law requires be present before a judge can impose consecutive sentences.

The trial court found that a burglary charge and two related sexual abuse charges occurred within a single criminal episode, ordinarily requiring that the sentences on those convictions be concurrent unless the court made certain factual findings. ORS 137.123 permits consecutive sentences in two different situations. First, when a court sentences a defendant for offenses that "do not arise from the same continuous and uninterrupted course of conduct," or when a court sentences a defendant who is already serving a previously imposed sentence. Second, when "a defendant has been found guilty of more than one criminal offense arising out of a continuous and uninterrupted course of conduct, the sentences imposed for each resulting conviction shall be concurrent unless the court" finds one of two facts. Pursuant to ORS 137.123(5), if the court finds either:

> "(a) that the criminal offense for which a consecutive sentence is contemplated was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant's willingness to commit more than one criminal offense; or
>
> "(b) [that t]he criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a risk of causing loss, injury or harm to a different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct,"
>
> then the trial court "has discretion to impose consecutive terms of imprisonment."

The court began with Article I, section 11, of the Oregon Constitution, concluding that questions of the nature presented here are to be resolved primarily in terms of whether the fact that authorizes the enhanced punishment is an "element" of the crime for which the defendant is to be punished. If the fact is not an "element," for example, those that pertain to the defendant's character or status, it is for the sentencing court. If it is an "element," then it is for the jury. Based on the facts presented in this case, the court concluded that none of the findings at issue went to an "element" of any crime for which the defendant was to be punished. Therefore, Article I, section 11, did not require the jury to make those findings.

Next, the court turned to the Sixth Amendment to the United States Constitution, and the United States Supreme Court's recent decisions involving sentence enhancements, notably *Apprendi v. New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000) and *Blakely v. Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004). In *Apprendi*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."

After reviewing those and other applicable cases, the court explained that "[i]t is important to recognize, in that regard, that, under ORS 137.123, consecutive sentencing in this state is not simply a matter of judicial discretion, but can be imposed only after the offenses that arise out of the same continuous and uninterrupted course of conduct, the jury's issuance of multiple guilty verdicts will *only* support concurrent sentences, unless the judge makes those required findings." (Emphasis in original).

Ultimately, the court held:

> "Under the statutes that we just have described, the maximum aggregate sentence that may be imposed, based solely on the jury's verdicts and without judicial factfinding, when a defendant is convicted of multiple offenses, assumes that all the sentences run concurrently. But, under the same statutes, additional factfinding -- *judicial* factfinding -- is required to justify consecutive sentencing. Under that arrangement, a consecutive sentence necessarily 'expose[s] the defendant to a greater punishment than that au-

thorized by the jury's guilty verdict,' *Apprendi*, 530 US at 494, based on judicial factfinding-- and thereby violates the principles discussed in *Apprendi* and *Blakely*." (Emphasis in original).

Based on the facts of this case, the court concluded that "[t]he trial court thus imposed the consecutive sentences based on its own fact-finding and in violation of defendant's Sixth Amendment rights. That was error under the rule of *Apprendi* and *Blakely*, as we understand it."

Justice Kistler, with Justice Balmer joining, dissented in *Ice*, stating that "[n]either the holding in *Apprendi* nor its reasoning supports extending that decision to the question of consecutive sentencing. Almost every court that has considered this question has held that *Apprendi* does not apply in this context."

The state filed a Petition for Certiorari with the United States Supreme Court on *State v. Ice* on January 4, 2008.

State v. Rutley, 343 Or 368, 171 P3d 361 (November 8, 2007)

In *Rutley*, the defendant was convicted, pursuant to ORS 475.999 (1999), of delivering controlled substances "within 1,000 feet of the real property comprising a public or private elementary, secondary or career school attended primarily by minors." The issue presented here was whether that statute required the defendant to know that the delivery took place within 1,000 feet of a school.

The court began by summarizing Oregon law with regard to the mental state requirement for crimes. "In Oregon, criminal liability generally requires an act that is combined with a particular mental state. The act (or failure to act) must be voluntary, ORS 161.095(1), and it must be made 'with a culpable mental state with respect to each material element of the offense that necessarily requires a culpable mental state,' ORS 161.095(2)." (Footnote omitted). The court continued, explain that "Oregon statutory law defines four different 'culpable mental states': intentionally, knowingly, recklessly, and criminally negligent. *See* ORS 161.085(6) (defining the term 'culpable mental state'). Those culpable mental states do not exist in isolation -- instead, they relate to the elements contained in the definition of the crime." (Footnote omitted).

The court concluded that with regard to statutes like the one at

issue here, in which the statutory definition does not include an identified culpable mental state, ORS 161.095, ORS 161.105, and ORS 161.115 are pertinent to determine whether a mental state must nonetheless attach to an offense or material element of an offense. Because ORS 475.999 (1999) is not part of the Oregon Criminal Code, the court began by determining whether the legislature had clearly indicated an intent to dispense with a culpable mental state with regard to the material element at issue, delivery within 1,000 feet of a school.

Starting with the text of the statute, the court concluded "that the statute evidences a clear legislative intent to give drug dealers a reason to locate the 1,000-foot school boundary and stay outside of it -- by punishing the failure to do so as the most serious of crimes, a Class A felony. Requiring a knowing mental state with regard to the distance element, the court explained, works against the obvious legislative purpose, in that it would create an incentive for drug dealers not to identify schools, and not to take into consideration the distance from the schools when engaging in illegal activities.

State v. Knight, 343 Or 469, __ P3d __ (December 6, 2007)

The state charged the defendant with sexual abuse in the first degree and unlawful sexual penetration in the second degree. In a telephone call to his mother prior to trial, the defendant made several disparaging remarks about his attorney and told his mother that if she did not get him a different attorney, he was going to place his children in state custody. At trial, the defendant testified that he loved his children. The prosecutor sought to admit the taped telephone conversation between the defendant and his mother for impeachment purposes. The defense counsel objected, arguing that the jury would conclude that the defendant's derogatory comments about his attorney were directed at him making it impossible to advocate for the defendant in front of the jury, undermining the defendant's Sixth Amendment right to counsel. After discussion, the court agreed with the defense counsel and informed the prosecutor that if he could "sanitize" the recording to include only the comments that defendant made that are admissible, the recording could be used to impeach the defendant's statements.

Upon resuming cross-examination of the defendant, the prosecutor asked him if he threatened to sign his children over to the state. The defendant acknowledged making the statement but explained that

he made the statement because he wanted a good life for his children and did not want to burden his mother and sister with raising them. At that point, the prosecutor asked the court to allow him to play the entire tape. The defense counsel objected on the grounds that the probative value of the recording is outweighed by the prejudicial effect and a deprivation of counsel. The trial court overruled the objections and allowed the prosecutor to play the entire recording.

Here, the defendant argued that the trial court's decision to allow the jury to hear the disparaging statements violated OEC 403 and his constitutional right to counsel and due process. After determining that the defendant's arguments were preserved, the court began and ended its analysis with OEC 403. The court agreed that once the defendant testified that he had not abused the victim, his credibility became relevant. Additionally, the court hesitantly assumed that the four statements defendant identified as objectionable has some relevance to the issue of credibility. However, the court determined that the statements were not essential to the state's case. Turning to the prejudicial effect of the statements, the court rejected the state's argument that the jurors would not necessarily infer that the defendant's comments were about his trial counsel. The nature of the defendant's comments, the court concluded, focused the jury's attention on the lawyer-client conflict, something that had no relevance. Ultimately, on the issue of unfair prejudice, the court concluded that "the record shows that the potential for unfair prejudice that attached to defendant's recorded statements was extremely high."

Next, the court turned to the third step of the OEC 403 analysis, the balancing test. The court concluded that the trial court abused its discretion when it determined that the weight of the probative value of the evidence outweighed the unfair prejudice.

Finally, the court turned to the final step, the decision whether to admit or exclude the evidence altogether or to admit only part of it. The court concluded that the trial court erred in failing to exclude the portion of the recording containing the statements the defendant made about his trial attorney.

Justice Linder wrote a dissenting opinion, joined by Justices Kistler and Walters.

State v. Ramirez, 343 Or 505, __ P3d __ (December 13, 2007)

As the year neared an end, the court issued three opinions focusing on its plain error analysis. Here, the court revisited the question of plain error review of unpreserved *Blakely* sentencing claims. The state charged the defendant with attempted murder, first-degree assault, and unlawful use of a weapon. Factually, the defendant accosted a woman, placed a handgun to her head, and threatened to kill her. He ordered the victim to her hands and knees and shot her in the head. She survived but lost her right eye and suffered other injuries. The defendant invoked his right to a jury trial, and the jury found him guilty on all counts. At the conclusion of that part of the trial, the court discharged the jurors. The defendant neither objected to the discharge of the jury nor executed a written waiver of jury trial respecting the fact-finding portion of sentencing to come. At the conclusion of the sentencing hearing, the court made factual findings to support an "upward departure" sentence for the first degree assault conviction. Among other findings, the court found that the defendant caused permanent injury to the victim for the victim's loss of her eye. The court then imposed an "upward departure" sentence. The defendant did not object. On appeal, the defendant argued that the trial court's imposition of an "upward departure" sentence by judicial factfinding alone violated his right to a jury as articulated in *Blakely v. Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004) (a criminal defendant has a right under the Sixth Amendment to the United States Constitution to have a jury determine, beyond a reasonable doubt, virtually all facts legally essential to the sentence that a defendant receives). On appeal, the defendant acknowledged that he failed to preserve the issue but asked the court to review it as plain error.

In *State v. Gornick*, 340 Or 160, 130 P3d 780 (2006), the court held that when a defendant waived his right to a jury trial, it was permissible to infer that defendant did not wish to assert any right that he may have had to have a sentencing jury. In that situation, the court refused to review the error as plain error. Here, however, the Court of Appeals held that, because the defendant did not waive his right to a trial by jury, that same inference could not be made.

The authority of a reviewing court to consider error apparent on the face of the record is described in ORAP 5.45(1):

> "No matter claimed as error will be considered on appeal unless the claimed error was preserved in the lower court and is assigned as error in the opening brief in accordance with this rule, provided that the appellate court may consider an error of law apparent on the face of the record."

The court started its analysis by assuming that the trial court's act of dismissing the jury was in error. The court then moved to the second part of the plain error analysis, whether the Court of Appeals properly exercised its discretion to review the alleged error. This court reversed the Court of Appeals, holding that the court abused its discretion. The court first concluded that the undisputed facts indicate that the victim suffered permanent injury. *See* OAR 213-008-0002(1)(b)(I) (listing "permanent injury to the victim" as a basis for imposing a departure sentence). Second, the court concluded that the record reveals no legitimate debate regarding victim's loss of an eye. Therefore, a second sentencing hearing would only confirm the court's findings, and the state has a significant interest in avoiding a second, unnecessary sentencing hearing. Therefore, the competing interests of the parties establish that this case was not appropriate to consider as plain error. Third, the failure to submit the questions of permanent injury to a jury was not grave because only one reasonable conclusion could be drawn from the facts. Finally, the court concluded that, although the argument that the state "has no valid interest in requiring defendant to serve an unlawful sentence," has a nice ring to it, such an argument makes little sense in this case because the record all but demands imposition of the sentence imposed by the trial court. Therefore, the court held that the Court of Appeals abused its discretion by reviewing the issue as plain error.

State v. Fults, 343 Or 515, __ P3d __ (December 13, 2007)

In the second plain error case, decided on the same day as *Ramirez*, the court, again, took the Court of Appeals to task on its exercise of discretion to take an unpreserved sentencing issue as plain error. Here, the defendant was convicted of several crimes including manufacturing a controlled substance. The sentencing court classified the defendant as a 4-F on the sentencing guidelines grid and imposed a 36-month probation term, 12 months greater than the presumptive 24-month term for a 4-F offender. Defendant expressly stated that he

had no objection to the sentence and, although his criminal record would support an extensive sentence of incarceration, the sentencing court stated that it was not imposing a longer jail term. The defendant appealed, arguing that the sentencing court erred when it sentenced him to a term of probation that exceeded the presumptive sentence set out in the sentencing guidelines without the requisite findings on the record. The defendant acknowledged that the claim was unpreserved but asked the court to review it as plain error. The Court of Appeals exercised its discretion and reviewed the claim as plain error.

The court began by observing that the defendant's failure to object was likely a strategic decision. Nevertheless, the court assumed, for purposes of this case, that the sentencing court committed plain error, and subsequently turned to a review of the Court of Appeals' decision to consider the alleged error. The court noted that the only reason the Court of Appeals provided for exercising its discretion was that the state had no valid interest in requiring the defendant to serve an unlawful sentence.

Ultimately, the court concluded that the Court of Appeals failed to consider other factors that might outweigh the one it relied on. After listing some factors the court believed might apply, the court reminded the Court of Appeals that the "no valid interest" statement itself is a truism, which, if it were dispositive, would require consideration of and reversal based on any sentencing error. The court held that the Court of Appeals' decision to consider the defendant's unpreserved claim of error, "based on the single rationale that it expressed, was an abuse of discretion."

State v. Barber, 343 Or 525, __ P3d __ (December 13, 2007)

In the third case looking at the Court of Appeals discretion to review an issue raised as plain error, the Supreme Court again reversed the Court of Appeals. In this case, however, it held that the Court of Appeals erred by failing to allow plain error review.

Here, the defendant was convicted of burglary and theft in a "stipulated facts" trial to the court. The record does not contain either a written waiver of the defendant's right to a jury trial or any other agreement waiving his right to a jury trial. On appeal, defendant argued, among other issues, that the lack of a written waiver invalidated

his convictions. While the Court of Appeals acknowledged that the defendant's Article I, section 11, right to a jury trial was violated, it exercised its discretion not to review the claim. In doing so, the Court of Appeals explained that the error was harmless in light of the defendant's oral waiver.

After reviewing the plain error analysis, the Supreme Court explained that Article I, section 11, is unique in that it prescribes the only way in which an accused person may waive his or her right to a jury trial, "and adherence to that method by the trial judge is itself a substantive constitutional right to which the accused is entitled." The court explained that the factors the Court of Appeals weighs in deciding whether to exercise its discretion must be weighed against a constitutional provision specifying the only way that the right may be waived. "So understood, there is no contest." The court concluded that in such a situation as this, the Court of Appeals abuses its discretion by denying plain error review.

State v. Wheeler, __ Or __, __ P3d __ (December 28, 2007)

The issue presented in this case was whether the life sentences that the trial court imposed for numerous sexual crimes involving three boys between the ages nine and 15 violates the proportionality clause of Article I, section 16, of the Oregon Constitution, which provides that "all penalties shall be proportioned to the offense." In this case, the defendant previously had been convicted of two felony sex crimes. "Based on the convictions in this case and [the] defendant's prior convictions, the trial court imposed a sentence of life imprisonment without the possibility of parole for each of the 18 charges, with the sentences to run consecutively.

After conducting an extensive review of the history of the "proportionality clause" of the Oregon Constitution, the court concluded that "[a]t the most basic level, the framer's concern was that the penalty imposed on a criminal defendant be 'proportioned' to the specific offense for which the defendant was convicted -- that it bear the appropriate 'comparative relation' to the severity of that crime." The court continued its analysis by reviewing previous cases involving that clause, summarizing its conclusion in four points: (1) the court has used the test of whether the penalty was so disproportionate to the offense as to "shock the moral sense of reasonable people;" (2) the court ordinarily has de-

ferred to the legislative judgments in assigning penalties for particular crimes, requiring only that the legislature's judgments be reasonable; (3) the cases permit the legislature to impose enhanced sentences on recidivists, even if those sentences would be disproportionate when applied to a defendant without prior convictions; and (4) the proportionality provision bars the legislature from punishing a lesser-included offense more severely than the greater-included offense.

The court made the following observations: (1) that under the sentencing guidelines, the defendant was subject to mandatory minimum sentences ranging from 70 to 100 months for each of the 18 counts and if the court had imposed the sentences consecutively, his sentence for the crimes would have amounted to 111.67 years; (2) the sentencing court did not depart from the presumptive sentence for each of the defendant's convictions pursuant to ORS 137.719(1) ("The presumptive sentence for a sex crime that is a felony is life imprisonment without the possibility of release or parole if the defendant has been sentenced for sex crimes that are felonies at least two times prior to the current sentence."); (3) the fact that the presumptive sentence for a murder committed by a defendant with no prior convictions is less severe than the presumptive sentence for a felony sex crime committed by a defendant who has been convicted of two prior felony sex crimes does not "shock the moral sense of reasonable people"; (4) the legislature set the presumptive penalty for a felony sex crime committed by a person with two prior convictions for such crime as life imprisonment without the possibility of parole and such a penalty is not disproportionate to the offense; (5) the legislature was not unreasonable in its choice to impose a more serious penalty on the serial sex offender and the penalty does not shock the moral sense of reasonable people; (6) "[s]ex crimes may or may not result in permanent physical injury, but the legislature is entitled to presume that they are a serious matter in light of the potential for both physical and psychological injury and that lengthy sentences are necessary to protect the public from further harm by recidivists." Ultimately, the court held that the defendant's sentences bear a sufficient relationship to the gravity of the crimes of which he was convicted and his prior felony convictions and, therefore, do not violate the "proportionality clause."

State v. Shaff, __ Or __, __ P3d __ (December 28, 2007)

In this case, a pizza delivery driver called the police because he was concerned about the welfare of one of his customers. Two law enforcement officers responded to the report and went to the address to check on the woman. When the officers made contact with the defendant, they explained that they received a report of a dispute and asked about the woman in the house. Defendant led the officers into the trailer and one officer went down the hall to check on a woman he say lying on a bed while the other officer stayed with the defendant. The officer who stayed with the defendant started a conversation, turning to the reason for the officers' presence. Defendant acknowledged an earlier argument with the woman but said that it had not become physical. At one point, the defendant got up and went to the kitchen for a cigarette or an ashtray. The officer with defendant noted that the woman's injuries were consistent with an assault. However, the other officer explained that she reported that a dog knocked her down. The officer asked the defendant "if he knew why the woman would say now that she had been assaulted." After the officer said that he understood and asked what she had done to anger him, the defendant confessed to hitting her. The officer then advised the defendant of his *Miranda* rights and eventually arrested defendant.

The issue presented in this case is whether the state constitution required *Miranda* warnings during the officers' investigation of suspected domestic abuse. The defendant argued that the circumstances were "compelling" within the meaning of Article I, section 12. "The question whether the circumstances were compelling does not turn on either the officer's or the suspect's subjective belief or intent; rather, it turns on how a reasonable person in the suspect's position would have understood his or her situation." In looking at the particular facts of this case, the court concluded that the defendant was not free to leave but the officers detained him for only a brief period of time and not more than a typical traffic stop. Next, the court observed that questioning that occurs in a suspect's home can diminish the police-dominated atmosphere that *Miranda* warnings were intended to counteract. The court continued, stating that the officer did not act in a threatening manner, pressure or coerce the defendant to answer any questions. The officer also allowed the defendant to get up and go to the kitchen. Although the officer asked defendant if he knew why the

woman would say she was assaulted, knowing that she maintained that she was knocked down by a dog, the court noted that "the officer commented only on the woman's evident injuries and then asked a question that implied, inaccurately, that she had reported an assault. Ultimately, based on the facts of the case, the court concluded that the circumstances were not sufficiently compelling to require *Miranda* warnings.

OREGON COURT OF APPEALS: 2007 YEAR IN REVIEW (CIVIL CASES)

By Meagan Flynn; Preston, Bunnell & Flynn

A comprehensive summary of the many civil decisions issued by the Court of Appeals in 2007 would be an almanac in itself. As that is not the goal, this article offers selective highlights of the civil issues decided last year. The Supreme Court has already allowed review of several of these decisions, and many more have petitions for review pending.

APPELLATE PROCEDURE

In *Bhattacharyya v. City of Tigard*, 212 Or App 529; Wollheim, P. J., the court held that an order setting aside two earlier judgments was appealable even though it did not order a new trial. The court explained that the order setting aside the judgments was appealable under ORS 19.205(3) because it was an order entered after a general judgment is entered and affects a substantial right.

In *Warren v. Licon*, 211 Or App 535, Landau, P. J., the court held that even in trial court proceedings that are designed to be quick and summary, in this case an action for forcible entry and detainer (FED) under the Oregon Residential Landlord and Tenant Act, "all parties must be afforded an opportunity to present their case, and there must be a record that is sufficient for us to determine the correctness of the trial court's decision." The Court of Appeals reversed the dismissal of the plaintiff's claim because the record of the trial court, in which the plaintiff was not allowed to testify regarding the issue the trial court found dispositive, did not permit the court to determine whether the dismissal was correct.

ARBITRATION

The Court of Appeals issued several decisions in 2007 dealing with enforcement of arbitration clauses under the Federal Arbitration Act.

In *Vasquez-Lopez v. Beneficial Oregon, Inc.,* 210 Or App 553; Schuman, P. J., the court considered a challenge to an arbitration

clause in the rider to a loan contract. The Court of Appeals first emphasized that this case is controlled by the Federal Arbitration Act and that under United States Supreme Court precedent the trial court, rather than an arbitrator, was the proper forum to rule on the arbitration question if the plaintiffs' claim challenged only the validity of the arbitration provision rather than the validity of the entire contract. The Court held that the relevant "claim" for purposes of this determination, includes all issues properly before the court at the time it considers a motion to compel arbitration. Thus, the plaintiffs' claim challenged the validity of the arbitration rider even though the plaintiffs' complaint did not challenge that rider, and the trial court was the proper forum to determine the validity of the arbitration rider.

The court also affirmed the trial court's determination that the arbitration rider was unconscionable, a determination that is governed by Oregon law. The Court of Appeals explained that unconscionability in Oregon has both a procedural and substantive component, with the greater emphasis on substantive unconscionability. The procedural component focuses on oppression in the contract formation and on surprise. Oppression refers to inequality of bargaining power that leads to no meaningful choice, and surprise means the extent to which supposedly agreed-upon terms of the bargain are hidden in a printed form prepared by the party seeking to enforce them. The substantive component focuses on the one-sided nature of the substantive terms. Both procedural and substantive unconscionability are relevant under Oregon law, but "only substantive unconscionability is absolutely necessary."

The court emphasized that, under Oregon law, each claim of unconscionability is decided on its facts. The circumstances in this case involved both oppression and surprise. Those circumstances included the fact that the loan contract was a contract of adhesion, that the plaintiffs did not read or speak English – the language in which the contract was written – and that the defendants misled the plaintiffs about the meaning of the arbitration agreement. The Court also held that the arbitration rider was substantively unconscionable because it banned class actions and required that the plaintiffs share the cost of the arbitrator's fee.

Finally, the Court of Appeals concluded that the trial judge acted within her discretion to choose to declare the arbitration rider unen-

forceable rather than to simply sever the unconscionable provisions.

However, in subsequent decisions, the Court of Appeals enforced arbitration clauses in employment contracts of adhesion, underscoring its emphasis in *Vasquez-Lopez* that each claim of unconscionability is decided on its own facts.

In *Sprague v. Quality Restaurants Northwest, Inc.*, 213 Or App 521, *rev denied,* 343 Or 223, Schuman, J., the court concluded that the arbitration clause was not unconscionable despite the facts it appeared in a contract of adhesion and imposed a slightly reduced statute of limitations. The court concluded that, although the nature of a contract of adhesion makes contract formation somewhat oppressive, "procedurally, the agreement was no more unconscionable than the typical employment, consumer, or service contracts that are a common feature of contemporary commercial life and that Oregonians sign (and Oregon courts enforce) as a matter of course." The court emphasized that there was no evidence of other oppressive circumstances, such as the deception in *Vasquez-Lopez,* and that the arbitration provision in this case was clearly and fully described in the employee handbook, in non-technical language, with the key provisions set off in italics, boldface and large typeface. Thus, the trial court erred in finding the agreement to be unconscionable.

In *Motsinger v. Lithia Rose-FT, Inc.* 211 Or App 610, Edmonds, P. J., the court also found the arbitration clause in an employment contract not to be unconscionable. The court emphasized that mere inequality in bargaining power between the parties did not create sufficient procedural unconscionability to make the clause unenforceable. In addition the terms of the arbitration clause were not so one-sided as to render it substantively unconscionable, even though it required the employee to submit all claims to arbitration without imposing a comparable requirement on the employer. The Court of Appeals declined to adopt the approach of other courts that view a nonmutual arbitration clause as *presumptively* unconscionable when the parties lack equal bargaining power. It concluded "that an approach that focuses on the one-sided *effect* of an arbitration clause-rather than on its one-sided *application*-to evaluate substantive unconscionability is most consistent with the common law in Oregon regarding unconscionability of other kinds of contractual provisions and with state and federal policies regarding arbitration."

ATTORNEY FEES

The Court of Appeals decided a variety of issues related to the awarding of attorney fees.

Calculation of fee amount

Vasquez-Lopez v. Beneficial Oregon, Inc., 210 Or App 553; Schuman, P. J., which was most significant for its holdings related to arbitration clauses, also offered an important interpretation of awards under federal fee-shifting statutes. The Court of Appeals affirmed the trial court's use of a multiplier to calculate the attorney fees to which the plaintiffs' counsel were entitled for prevailing under the federal Truth in Lending Act, explaining that, under federal law, evidence that few Oregon attorneys take predatory lending cases and that the plaintiffs' attorneys worked on this case to the exclusion of new business supported an enhancement to the "lodestar" figure – the base figure arrived at by multiplying hours by standard hourly rate.

In *Country Mutual Insurance Company v. White*, 212 Or App 323; Brewer, C.J., the court affirmed as "reasonable," an award of 50% of the prevailing party's total attorney fees against a defendant who was ultimately responsible for only 10% of prevailing party's total recovery. (The other 90% came from a settling party against whom no fees were sought) The Court of Appeals emphasized that ORS 742.061, the authority for awarding fees in this case, makes "'reasonableness,' not a particular formula, the lodestar" for determining the amount of the award. Because the trial court offered a reasonable explanation for awarding the prevailing party 50% of her total fees, the Court of Appeals affirmed.

Fees under ORS 36.425(4)(b)

In *Anderson v. Wheeler,* 214 Or App 318; Landau, P. J., the court held that ORS 36.425(4)(b), which provides for fees in trial *de novo* and on appeal from court-annexed arbitration, provides only for the taxing of fees "incurred." The court denied fees because the plaintiff was an attorney in private practice who represented himself, and the record did not show that he "'incurred' attorney fees in the ordinary sense of that term." The Court emphasized, "we do not mean to suggest that an attorney who represents himself or herself can never recover attorney fees under ORS 36.425(4)(b). But there must be a record from which

we can determine that the attorney fees were actually 'incurred' within the meaning of the statute."

ORS 20.190(3) versus ORS 20.105

In *Patterson v. Freeman*, 213 Or App 70, Landau, P. J., the court emphasized that the defendants, who prevailed on motion to dismiss without filing pleadings, had fully complied with the requirement of ORCP 68 C(2)(b) by alleging in their motions the basis for their right to a fee. However, the Court of Appeals rejected the defendants' argument that the trial court's decision to award an enhanced prevailing party fee under ORS 20.190(3) necessarily included findings that required an award of fees under ORS 20.105. As the decision concludes: "The standards are not coextensive. An award under ORS 20.190(3) does not necessarily imply a finding that 'there was no objectively reasonable basis for asserting the claim,' which is required for an award under ORS 20.105(1)."

ORS 105.180(2)

In *Lemargie v. Johnson*, 212 Or App 451; Wollheim, J., the court held that ORS 105.180(2), which provides for an award of attorney to the party prevailing on a claim for maintenance of an easement under ORS 105.175, makes the award mandatory. The trial court had no discretion to deny fees to the prevailing plaintiffs.

CLAIM PRECLUSION

In *Ram Technical Services, Inc. v. Koresko,* 215 Or App 449, *adhered to on recon,* 217 Or App 463, Haselton, P. J., the court acknowledged that its past cases have taken varying approaches to deciding whether a state law claim is precluded by earlier federal litigation on the theory that the claim "could have been" brought in the earlier litigation pursuant to the federal court's discretion to exercise supplemental jurisdiction over state claims.

The court concluded that the approach of its more recent claim preclusion decisions, which have held that a party must at least "attempt joinder" of the state claim in the federal litigation, "comports with the evolution of federal law on the proper relationship between supplemental jurisdiction and claim preclusion," including the broad-

ening of the principle of federal supplemental jurisdiction. Although the plaintiffs in this case argued that it would not have made sense for them to attempt joinder of the state claim in federal court because the state claim and the federal ERISA claim were mutually exclusive, the Court of Appeals viewed this mutual exclusivity as, if anything, offering even more reason to require that the claims be joined in the same proceeding.

On reconsideration, the court emphasized that the federal court's dismissal of the ERISA claim for "failure to state a claim" was a dismissal on the merits, not simply a dismissal for lack of jurisdiction as the plaintiff argued.

EMPLOYMENT

In *Lamson v. Crater Lake Motors*, 216 Or App 366, Edmonds, P. J., the court held that the trial court should have granted a directed verdict to the defendant on the plaintiff's claim of wrongful discharge. The plaintiff was terminated after he had complained internally about sales tactics used by a firm running a "sales event" for the employer and then failed to show up for the "sales event." The Court of Appeals held that the plaintiff's internal complaints about the "sales event" did not rise to the level of public importance necessary to support a common-law claim for wrongful discharge. The Court also concluded that the plaintiff did not perform an "important public duty" when he refused to show up for work at the sales event because he was "not directed-expressly or implicitly-to do anything unlawful or unethical" when he was directed to attend the sales event.

In *Gafur v. Legacy Good Samaritan Hospital and Medical Center,* 214 Or App 343, *rev allowed* 343 Or 467, Schuman, J., the court construed ORS 653.055, which authorizes a private right of action when an employer does not pay the wages to which the employee is entitled under ORS 653.010 to 653.261. The court held that employees do not have a private right of action when an employer fails to provide the meal breaks required by Bureau of Labor and Industry regulation because neither the regulations nor the statutes under which they were promulgated state that an employee is entitled to wages for meal breaks. So a failure to provide meal breaks is not a failure to pay wages. However, the court held that employees do have a private right of action

when the employer fails to provide rest breaks because the regulations authorizing rest breaks provide for *paid* rest breaks.

TORT ISSUES

As it typically does, the Court of Appeals in 2007, issued a number of decisions that will be significant to tort law practitioners.

Premises Liability

In *McPherson v. State ex rel Department of Corrections*, 210 Or App 602, Schuman, J, the court addressed the liability of a landlord for harm from criminal acts of a third person. The Court held that a landlord has a common-law duty to take reasonable steps to protect tenants in the property's common areas from reasonably foreseeable criminal acts by third persons.

In describing when past crimes will make future criminal acts foreseeable, the court acknowledged that some of its cases have suggested that prior crimes must be highly similar to the crime at issue before the criminal act of a third-party tortfeasor can be foreseeable. However, the court explained, its more recent cases have moved toward a "qualitatively similar" requirement. The court endorsed this "qualitatively similar" standard as supported by Supreme Court precedent.

The Court ultimately emphasized that whether a rational juror can find harm from criminal conduct foreseeable "is an *ad hoc* determination depending on the particular circumstances of each case. No bright line rules exist. Fact-matching is of limited utility. Unforeseeability as a matter of law should be found only in extreme cases." On the record of this case, the court concluded, a jury could find the attacks on the plaintiffs to be a reasonable foreseeable result of the defendants' acts and omissions.

In *Johnson v. Short*, 213 Or App 255, Haselton, P. J., the court held that a delivery driver who has routinely delivered packages to a person's home over a substantial period of time is a "business visitor" invitee because his presence is for the "economic advantage" of the owner, and the owner's ongoing acceptance of the beneficial delivery services without objection or qualification constitutes an implied invitation to enter. The court also emphasized that the residential character of the

property in this case is immaterial to the determination of whether the plaintiff was a "business visitor" invitee.

In addition, the court rejected the argument of the defendant home owners that they had in effect eliminated the risk of slippery porch steps by supplying a second set of steps. The court emphasized, "[e]ven assuming that, in some circumstances, a possessor of property could 'eliminate' an otherwise unreasonably dangerous condition by providing an obvious and easily accessible alternative, safer route," it was the defendants' burden to prove that the alternative route was safer, and they did not do so.

Finally, the court held that the plaintiff's awareness that the steps were "very slick" and that he needed to be "exceedingly cautious," did not establish as a matter of law that he had "such an appreciation of the danger presented" that there could be no causal connection between the plaintiff's injury and the defendants' failure to discover and warn of the danger. The plaintiff had testified that, although he was aware of the need to be "exceedingly cautious," he thought he could manage to safely climb the steps.

Products Liability

In *Znaor v. Ford Motor Co*, 213 Or App 191, Ortega, J., the court considered whether the plaintiff presented sufficient evidence that his seat belt failed from a manufacturing defect when he relied on an expert who admitted he had not reviewed the manufacturer's specifications for the belt. The Court rejected the defendants' argument that *Phillips v. Kimwood Machine Co.*, 269 Or 485 (1974), articulates a rule of law that a claim of manufacturing defect can only be proven by analysis of design specifications or a comparison of similar products. But the court also concluded that the evidence here, in any event, met that standard because the plaintiff's expert based his opinion on a review of safety performance tests for other seat belt assemblies manufactured by the defendant, which allowed him to rationally deduce that the plaintiff's seat belt failed from a manufacturing defect. Accordingly, the court reversed the trial court's directed verdict.

Statute of limitations

In *Fox v. Collins*, 213 Or App 451, *rev denied* 343 Or 223, Armstrong, J., the court revisited the issue of the legislature's revival of

claims previously dismissed for the lack of a discovery rule in ORS 30.905(2). The Court emphasized that the Supreme Court's decision in *McFadden v. Dryvit Systems, Inc.*, 338 Or 528, 112 P3d 1191 (2005), in which it held that the revival provision does not violate the Oregon Constitution's separation of powers doctrine, is controlling. The court rejected the defendants' argument that *McFadden* should be viewed as merely advisory because it was decided on a certified question from the federal court and therefore addressed the affect of the statute on a federal court judgment. The court emphasized that the Supreme Court's determination regarding "the validity of a *state* statute under the *state* constitution--is not 'merely advisory,' but a binding pronouncement of state law."

The court also decided that the revival provision did not violate the defendants' Due Process rights under the Fourteenth Amendment to the United States Constitution because the defendants had no vested right in the prior judgment of dismissal remaining in effect.

In *Waldner v. Stephens*, 213 Or App 610, *rev allowed,* 344 Or 43 (2008). Edmonds, P. J., the court held that the plaintiffs' negligence claims against their landlord for harm from exposure to mold and other toxic material were governed by the one-year statute of limitations governing claims arising under a "rental agreement" or the Landlord-Tenant Act, ORS 12.125. The Court emphasized that ORS 12.125 does not deprive tenants of the two-year period for bringing *common-law* claims against the landlord but viewed the allegations of the negligence claim in this case as describing duties that arose out of a rental agreement because the allegations included that the plaintiffs had a written landlord-tenant agreement and that the defendant had owed certain duties that arose from the plaintiffs' status as tenants.

In *Johnson v. Multnomah County Department of Community Justice*, 210 Or App 591, *aff'd* ___ Or ___ (February 14, 2008), Schuman, J., Rasmussen, J., pro tempore, concurring, the court held that, for purposes of determining when a plaintiff discovers a cause of action, the plaintiff does not have an obligation to be aware of information in the media that is relevant to his or her potential tort claim. Thus, although there had been newspaper and television reports that the man who raped the plaintiff had been under supervision of the defendant, it would be left to a jury to decide whether the plaintiff should reasonably have been aware of the reports.

Wrongful death

In *The Union Bank of California, N.A., PR of the Estate of Nagl v. Copeland Lumber, Yards, Inc.,* 213 Or App 308, Landau, P. J., the court held that a decedent's estate cannot bring a wrongful death action against a defendant whom the decedent has already successfully sued prior to his death for harm from the wrongful conduct. The court concluded ORS 30.020(1) did not permit the wrongful death action because, had the decedent lived, he would not have been able to bring a second action against the same defendant for the same wrongful conduct. The court rejected the approach of a minority of jurisdictions, which do allow wrongful death actions after successful pre-death actions, because those jurisdictions regard wrongful death actions as independent from the decedent's claims while Oregon views wrongful death actions as derivative.

TRIAL COURT PROCEDURE

Expert testimony

In *Marcum v. Adventist Health System/West,* 215 Or App 166, Haselton, P.J., Armstrong, J., concurring in part, dissenting in part, the court discussed the requirements for an expert opinion based on the method of differential diagnosis. It held that the trial court properly excluded expert testimony that the plaintiff's suffered Raynaud's syndrome in her left hand as a result of badly administered MRI dye in that hand. The expert ruled in the dye as a possible cause because of temporal and spatial proximity and because of literature indicating the exposure the plaintiff suffered would be toxic and can cause necrosis. The doctor then ruled out all other possible causes to conclude that the dye exposure caused the plaintiff's Raynaud's syndrome.

The Court of Appeals concluded that although the process of ruling out potential causes – differential diagnosis – is a legitimate scientific method, the method was not legitimate in this case because the expert did not have a scientifically valid basis for ruling in the dye exposure as a possible cause of the plaintiff's condition. The court emphasized that the expert in this case could not identify how necrosis would lead to Raynaud's Syndrome and that he had never observed or read about another case of Raynaud's Syndrome developing after this type of exposure. The court ruled that Supreme Court case law on scientific evidence requires "[e]ither the expert must be able to identify a

scientifically demonstrable mechanism of causation or there must be some independent, verifiable corroboration of otherwise inexplicable causation." Neither existed here.

ORCP 46 B(2)(c)

In *Belinskey v. Clooten,* 214 Or App 172, Edmonds, P. J., the court held that a trial court does not need to make findings that the plaintiff acted with willfulness, bad faith, or a similar degree of fault before it dismisses a complaint without prejudice as a sanction under ORCP 46 B(2)(c). Although the Supreme Court has required these findings where the sanction was a dismissal *with prejudice,* the Court of Appeals held that a finding that the sanction is "just" under the circumstances is the only finding required when the trial court imposes a lesser sanction that still permits the disobedient party to pursue a hearing on the merits.

ORCP 64 B(4)

In *State v. Cadigan*, 212 Or App 686, *rev denied* 343 Or 223, Sercombe, J., the court held that "newly discovered evidence" which will justify a new trial under ORCP 64 B(4) must take into account knowledge of the party even if the party does not appreciate the value of the evidence. On this basis, the court reversed a grant of new trial because the "new" evidence that the defendant's lawyer learned of during jury deliberations was evidence known to the defendant prior to trial.

ORCP 64 F - "Entry" of new trial order

In *McCollum v. Kmart Corporation*, 214 Or App 367, Rosenblum, J., after initially vacating a new trial order, the court granted reconsideration and offered a pragmatic approach to challenging circumstances. Within the 55-day time limit required by ORCP 64 F, the trial court issued an order granting new trial and a letter opinion that referred to and attached a copy of the order. But, for unknown reasons, only the letter opinion was entered within the 55-day limit. On reconsideration, the Court of Appeals emphasized that, although past decisions of the Supreme Court establish that an entry of an order in the court register rather than just a letter opinion is generally necessary to satisfy the requirement of ORCP 64 F, under the circumstances here the letter opinion effectively incorporated the order and, "thus, itself constituted an order granting the motion for a new trial."

ORCP 68

In *Jaffe v. The Principle Company*; 215 Or App 385; Wollheim, J., the trial court awarded attorney fees and costs to the defendant despite its failure to file a statement of attorney fees and costs within 14 days after the entry of judgment, as required by ORCP 68 C(4). The Court of Appeals reversed, holding that the trial court had no discretion to ignore the time requirement of ORCP 68 C(4), even though there was a delay in the attorney's receipt of notice that the judgment had been entered. The court also held that the defendant's delay could not be excused under ORCP 12B because missing the 14-day requirement affects a substantial right of the opposing party. Finally, the court refused to apply ORCP 15 D ("[t]he court may, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or allow any other pleading or motion after the time limited by the procedural rules, or by an order enlarge such time"), primarily because the defendant had not sought an extension of time to file the fee statement.

ORCP 71B - relief from summary judgment

In *Wah Chang v. Pacificorp*, 212 Or App 14, Haselton, P. J., the court addressed the scope of what trial courts may consider when ruling on a motion for relief from summary judgment under ORCP 71 B. After the defendant obtained summary judgment, the plaintiff sought relief under ORCP 71B based on newly discovered evidence that would have affected the outcome of the motion. The Court of Appeals explained that even if newly discovered evidence would have changed the ruling on which the summary judgment was based, relief from summary judgment under ORCP 71B must be denied if the opposing party was entitled to summary judgment on some other ground advanced to the trial court at the time the court entered summary judgment. But the court emphasized that this principle is subject to the same constraints that limit an appellate court's ability to affirm on an alternative basis. Thus, "a party who obtained summary judgment cannot, in opposing ORCP 71 B relief, advance new and qualitatively different reasons for why it should have been entitled to summary judgment in the first instance."

OREGON COURT OF APPEALS: 2007 YEAR IN REVIEW (CRIMINAL CASES)

By Marc Brown, Criminal Defense Attorney and Adjunct Professor of Criminal Justice, Washington State University, Vancouver

Once again, the Oregon Court of Appeals lived up to its reputation as the busiest intermediate appellate court in the country. A large portion of the court's work is made up of the criminal docket, including criminal appeals, post-conviction appeals, habeas corpus appeals and judicial reviews of orders from the Board of Parole and Post-Prison Supervision. Below is a summary of a small part of the criminal docket, looking at some areas that were particularly ripe for review this year.

CONFRONTATION CLAUSE

In 2004, the United States Supreme Court changed course on the way it determines whether a defendant's Sixth Amendment right to confrontation is violated. *See Crawford v. Washington*, 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177 (2004). However, the Oregon Supreme Court continued to analyze the state constitutional confrontation protections under the previous framework. *See State v. Cook*, 340 Or 530, 540, 135 P3d 260 (2006). This area saw several state and federal Confrontation Clause opinions from the Court of Appeals.

In *State v. Mendoza-Lazaro*, 211 Or App 349, 155 P3d 63 (2007), the state charged the defendant with two counts of assault in the fourth degree and one count of possession of a controlled substance. On appeal, the defendant argued that under *Crawford*, the trial court erred in admitting two statements made by his girlfriend to the police officers at the incident. The girlfriend did not testify at trial, but her statements were admitted through the testimony of the officer. The defendant did not make a confrontation argument at trial, but asked the court to review the issue as plain error. The court exercised its discretion to review the error and held that the second set of statements made by defendant's girlfriend fell squarely into the United States Supreme Court's definition of "testimonial" because those statements occurred after the defendant had been arrested and placed in the patrol car. Once the defendant was secured, there was no longer an "ongoing emergency" or any immediate threat as required by the Court to be

non-testimonial. *See Davis v. Washington*, 574 US 813, 126 S Ct 2266, 165 L Ed 2d 224 (2006).

In another case, the court held that the Court's decision in *Crawford* did not announce a "watershed rule" for post-conviction relief purposes. In *Peed v. Hill*, 210 Or App 704, 153 P3d 125 (2007), the post-conviction relief petitioner argued that his trial and appellate counsel were inadequate for failing to raise a "*Crawford*-like challenge" to the admission of certain statements at his trial and appeal. Because the *Crawford* opinion did not announce a watershed rule, trial and appellate counsel were not constitutionally inadequate for failing to make a "*Crawford*-like" argument.

At issue in *State v. Ennis*, 212 Or App 240, 158 P3d 510 (2007), was whether the trial court had violated the defendant's Sixth Amendment right to confront witnesses against him when it admitted testimony by police detectives regarding statements made to them by a non-testifying codefendant and by other persons. Under *Crawford*, "testimonial" hearsay statements are admissible against a particular defendant only if the declarant of the statement is unavailable and the defendant had a prior opportunity to cross-examine the declarant. The court first determined that all of the statements at issue in this case were "testimonial." It also determined that the statements made to police detectives by the non-testifying codefendant were made by an unavailable declarant. The court next concluded that, despite having been redacted, each of the relevant statements was admitted against defendant. Admission of the statements therefore violated defendant's Sixth Amendment Confrontation Clause rights. Moreover, the error was not harmless beyond a reasonable doubt because admission of the statements impaired defendant's ability to prove his affirmative defense to felony murder under ORS 163.115(3).

In *State v. Gonzalez*, 212 Or App 1, 157 P3d 266 (2007), the question was whether the admission of hearsay evidence at the defendant's probation revocation hearing violated his Sixth Amendment confrontation rights. The court held that the Sixth Amendment applies in the context of "criminal prosecutions." Because a probation revocation hearing is not a "criminal prosecution" for purposes of the Sixth Amendment, *Crawford* does not preclude the admission of hearsay testimony at a probation revocation hearing even in the absence of an opportunity to cross-examine the declarant.

In *State v. Sine*, 214 Or App 656, 167 P3d 485 (2007), the Sixth Amendment confrontation issue involved the exclusion of defendant's wife's guilty plea. The defendant's wife invoked her spousal privilege not to testify against her husband and was therefore unavailable for cross-examination. The court held that a plea agreement is testimonial evidence and a defendant must be afforded the right to confront the declarant if the statement is to be admitted. Because the defendant's wife was unavailable for confrontation purposes, her plea should have been excluded

The defendant in *State v. Sullivan*, 217 Or App 208, __ P3d __ (2007), was convicted of two counts of sexual abuse in the first degree. He assigned error to the trial court's determination that the child victim was competent and available to testify, arguing that, in overruling his objections to the admission of the child's out-of-court statements, the court violated his state and federal constitutional rights to confrontation. Specifically, the trial court found the victim, now 12 years old, to be competent after asking her a series of questions. During trial, the victim testified that the defendant had touched her but when pressed for details, the victim did not respond. On cross-examination, the victim answered questions about her family, family events, her activities at school, and various activities she engaged in with the defendant. However, when asked about the incidents at issue, she refused to talk about them. On redirect, the victim responded "yeah" when asked whether she was having a hard time talking about the incidents. The state then offered the testimony of various witnesses who recounted statements that the victim had made to them about the details of the defendant's conduct. The court held that the child victim was a competent and available witness. As a result, the admission of her out-of-court statements did not violate the defendant's state or federal constitutional right to confrontation.

Focusing on the Oregon Confrontation Clause and the Oregon Supreme Court's decision in *State v. Birchfield*, 342 Or 624, 157 P3d 216 (2007), the court reviewed, as plain error, a trial court's admission of a laboratory report without requiring the state to produce the criminalist who prepared the report. In *State v. Marroquin*, 215 Or App 330, 168 P3d 1246 (2007), the defendant objected to the admission of the report under the Sixth Amendment. On appeal, the defendant argued that, pursuant to Article I, section 11, of the Oregon Constitu-

tion, and *Birchfield*, the trial court erred in admitting the report. The court held that the admission of the report was plain error under Article I, section 11, and exercised its discretion to review the error. The court concluded that the trial court erred under *Birchfield*. However, in *State v. Raney*, 215 Or App 339, 168 P3d 803 (2007), *modified on recons*, __ Or App __, __ P3d __ (January 23, 2008), the court held that the trial court's admission of a laboratory report without requiring the state to produce the criminalist who prepared the report was not error apparent on the face of the record and chose not to review the error. In *Raney*, the defendant made no objection to the admission of the report. The court concluded that competing reasonable inferences may be drawn from the record, including the inference that the defendant consciously chose not to object to admission of the laboratory report. The critical difference between *Marroquin* and *Raney* is that in the former case, the defendant made a Sixth Amendment objection, negating any competing inferences. In the latter case, no objection was made to the introduction of the report.

Finally, in *State v. Ruggles*, 214 Or App 612, 167 P3d 471, *modified on recons*, 217 Or App 384, __ P3d __ (2007), the court found no violation of the defendant's state or federal constitutional right to confrontation when the trial court admitted a laboratory report over the defendant's objection. In this driving under the influence (DUII) case, the defendant refused to take a breath test and, instead, requested a blood test. The hospital sent the blood sample to a private laboratory where several laboratory employees handled the sample prior to and during testing. At some point after the report was prepared, a certifying scientist reviewed and signed the report. At trial, the certifying scientist testified to the procedures used to test blood at the laboratory and further testified that he reviewed and signed the report. The defendant objected to the admission of the report on confrontation grounds. Although the court held that the laboratory report was hearsay, it concluded that it was the out-of-court statement of the certifying scientist and, therefore, the defendant had an opportunity to confront the declarant, and the admission of the report violated neither the state nor federal Confrontation Clauses.

GENERAL CRIMINAL/APPELLATE PROCEDURE

In *State v. Starr*, 210 Or App 409, 150 P3d 1072 (2007), the defendant was found guilty on April 6, 2006. On April 18, 2006, the defendant filed a motion in arrest of judgment. At the sentencing hearing, the trial court orally denied the motion as untimely filed but the court never entered an order on the motion. The trial court entered a judgment of conviction and sentence on April 19, 2006. On May 10, 2006, the defendant filed a notice of appeal from the judgment. The Court of Appeals dismissed the appeal as premature because the trial court had not entered an order ruling on the motion in arrest of judgment. The order of dismissal and appellate judgment issued on June 9, 2006. On August 8, 2006, the defendant filed a second notice of appeal, which she asserted was not premature because more than 55 days had passed since the date of the entry of judgment. The defendant reasoned that, like a motion for a new trial, a motion in arrest of judgment is automatically "deemed denied" if it has not been "heard and determined by the court within 55 days from the time of the entry of the judgment." ORCP 64F. The court held a motion in arrest of judgment is not subject to a "deemed denied" period, and the judgment remains non-appealable until the trial court enters an order disposing of the motion.

In *City of Milton-Freewater v. Ashley*, 214 Or App 526, 166 P3d 587 (2007), the court held that ORS 53.030 requires a defendant to file "the original" notice of appeal with the municipal court as a prerequisite to the circuit court obtaining jurisdiction over an appeal. In this case, the defendant printed several copies of her notice of appeal from a computer printer and signed each copy with an original signature. In addition, her designation in the certificate of service indicated that she filed "the original" with the State Court Administrator and served a "true copy" on the municipal court. Because the defendant failed to satisfy the requirement that she file "the original" notice of appeal with the municipal court, the circuit court lacked jurisdiction to consider the defendant's appeal.

The court tackled a joinder question in *State v. Wittwer*, 214 Or App 459, 166 P3d 564 (2007). The defendant in this case was charged with unlawful use of a weapon, harassment, and menacing stemming from two separate incidents of violence toward his girlfriend. The defendant signed a release agreement and was released from jail. He did

not attend the arraignment and was charged with failure to appear. Over the defendant's objection, the trial court joined the failure to appear charge with the other charges. On appeal, the defendant argued that, pursuant to ORS 132.560, the failure to appear charge is insufficiently related to the other charges and the trial court impermissibly joined the charges. The court disagreed, holding that the trial court did not err in joining the charges because the failure to appear charge and the actions resulting in a later charge were part of a common scheme or plan to intimidate his girlfriend and to avoid accountability for his actions that resulted in the earlier charges.

At issue in *State v. Arnold*, 214 Or App 201, 164 P3d 334 (2007) was whether ORS 138.222(4)(a) ("In any appeal, the appellate court may review a claim that: (a) The sentencing court failed to comply with requirements of law in imposing or failing to impose a sentence") permits the Court of Appeals to review a sentencing issue when the sentence that was imposed indisputably was a lawful sentence. The asserted legal error is not that the court imposed a sentence that was unlawful under ORS 137.700; rather, it is that the court erroneously determined that defendant was not eligible to be considered for a different lawful sentence. On that issue, the court concluded that the application of the "failing to impose" provision of ORS 138.222(4)(a) permits the court to review a sentencing issue when the sentence that was imposed was an authorized sentence, but the trial court was asserted to have erroneously determined that the defendant was not eligible for a different authorized sentence.

The authority for a trial court to amend a charging instrument was the central issue in two cases. In *State v. Pachmayr*, 213 Or App 665, 162 P3d 347, *rev allowed*, 343 Or 363 (2007), the defendant's car struck a vehicle head-on, seriously injuring the two occupants of the other car and the passenger in his car. The grand jury indicted defendant with three counts of assault in the second degree. In counts 1 and 3, the indictment used the phrase "dangerous weapon" while in count 2, the phrase "deadly weapon" was used. At the end of the state's case-in-chief, the defendant moved for a judgment of acquittal as to count 2, arguing that the state failed to prove that the car was a deadly weapon as alleged in the indictment. The court denied the defendant's motion and amended count 2 by striking "deadly" and inserting "dangerous." The defendant objected that such an amendment was a ma-

terial change to the substance of the indictment and thereby violated Article VII (Amended), section 5, of the Oregon Constitution, which states that only a properly convened grand jury can indict a person for a felony or make an amendment to the substance of a felony indictment. On appeal, the defendant renewed his argument. The court held that the trial court's amendment to count 2 of the indictment was an impermissible amendment to the substance of the indictment because it altered the availability to the defendant of a defense and of evidence. The court concluded that count 2 was sufficient to charge the lesser-included offense of assault in the third degree.

However, in *State v. Kuznetsov*, 215 Or App 533, 170 P3d 1130 (2007), the court held that irrespective of whether the amendment to an information charging a misdemeanor assault in the fourth degree is one of form or substance, Article VII (Amended), section 5, of the Oregon Constitution does not prohibit a trial court from amending the information. Here, the defendant was charged with a misdemeanor. The trial court permitted the state to amend the information on the day of trial. The defendant objected, arguing that the amendment was one of substance not form and thereby prohibited. The court overruled the defendant's objection. The critical difference between *Pachmayr* and *Kuznetsov* is that in the former, the amendment was to a grand jury indictment charging a felony while in the latter case, the amendment was to an information charging a misdemeanor.

DRIVING UNDER THE INFLUENCE OF INTOXICANTS (DUII)

A perennial candidate for the top number of appeals is DUII. Each year, the court reads new and creative arguments. This past year was no exception, with a number of opinions involving ORS 809.235(1)(b) (requiring a trial court to impose lifetime revocation of driving privileges for a person convicted of a third misdemeanor DUII). In *State v. Vazquez-Escobar*, 211 Or App 115, 153 P3d 168 (2007), the defendant pleaded guilty to DUII and the court revoked his driving privileges for life as required by ORS 809.235(1)(b). The defendant argued that the revocation violated the *ex post facto* provisions of the state and federal constitutions because the conduct giving rise to his third DUII conviction occurred before the effective date of that statute. The court held that the permanent revocation of the defendant's driving privileges did

not violate the *ex post facto* provisions of either constitutions because revocation was not "punishment" for *ex post facto* purposes.

In *State v. Terry*, 214 Or App 56, 162 P3d 372 (2007), the defendant pleaded guilty to his third DUII and, pursuant to ORS 809.235(1)(b), the court imposed lifetime revocation of his driving privileges. On appeal, the defendant argued that the statute runs afoul of Article I, section 20, of the Oregon Constitution, in that it treats persons differently on the basis of their residence. Specifically, the defendant argued that the statute applied only to persons who have been convicted three times under the Oregon statute and it would not apply to people from another state with prior convictions under the laws of that state. The court held that it was not clear that the statute treats persons differently on the basis of their residence. The statute distinguishes on the basis of where the person committed the offense, not on the basis of where the person who committed the offense resides. Additionally, the court held that it was not clear that the persons who defendant contends are disadvantaged under the statute comprise a "true class" under Article I, section 20.

The defendant raised the same issue in *State v. Nave*, 214 Or App 324, 164 P3d 1219 (2007). Here, the defendant pleaded guilty to his third DUII and the court imposed lifetime revocation of his driving privileges. The defendant challenged the constitutionality of ORS 809.235(1)(b). The state argued that, because the defendant pleaded guilty, the matter was not appealable. The court held that under 138.050(1), a defendant who has pleaded guilty may challenge a "disposition" including the revocation of his driving privileges. However, the court found that the constitutional challenge was foreclosed by its earlier decision in *Terry*.

Another popular challenge to ORS 809.235(1)(b) was that the language of the statute required a court to permanently revoke a defendant's driving privileges if the person has been convicted of a DUII "for a third time," and therefore does not apply to a person convicted of a DUII in excess of three. In *State v. Dollarhide*, 214 Or App 329, 164 P3d 1222 (2007), the defendant asked the court to review the issue as plain error. The court declined to review the issue as plain error, holding that whether ORS 809.235(1)(b) applied only to a third conviction and not to any subsequent convictions is a matter that is reasonably in dispute and therefore there is no plain error.

Several months later, the court, sitting *en banc*, reached the question raised in *Dollarhide*, namely whether ORS 809.235(1)(b) applied only to a third conviction and not to any subsequent convictions. In *State v. Rodriguez*, 217 Or App 24, __ P3d __ (2007), the defendant was convicted of DUII for the fourth time. Pursuant to ORS 809.235(1)(b), the court imposed lifetime revocation of his driving privileges. The defendant argued that the statute applied to those persons who were convicted of a third DUII only. After reviewing the text and context of the provision at issue, the court concluded that the phrase in question was ambiguous. Moving to the legislative history to discern the legislature's intent, the court held that it demonstrates that the legislature's purpose in enacting the disputed phrase was to increase penalties for repeat DUII offenders. Ultimately, the court concluded that the legislature intended the phrase "for a third time" to mean "for a third or subsequent time." Therefore, the trial court correctly imposed lifetime revocation for the defendant's fourth DUII.

Under ORS 813.010(5), a DUII becomes a felony when a defendant has been convicted in violation of ORS 813.010 or its statutory counterpart in another jurisdiction at least three times in 10 years. In *State v. Mersman*, 216 Or App 194, 172 P3d 654 (2007), the defendant argued that the trial court erred when it relied upon two prior Alaska DUII convictions as a "statutory counterpart" to ORS 813.010. More specifically, the defendant argued that the Alaska statute, unlike the Oregon statute, permitted a conviction for operation of a vehicle if the defendant was in physical control of the vehicle, even if the circumstances rendered it impossible for the defendant to move the vehicle, and even if the defendant, while intoxicated, neither attempted nor intended to cause the vehicle to move. The court held that the trial court correctly concluded that the Alaska convictions qualified as a "statutory counterpart" to ORS 813.010 because the two statutes are either remarkably similar or have the same use, role, or characteristics. A difference in the scope of the statutes does not defeat that similarity.

In *State v. Matviyenko*, 212 Or App 125, 157 P3d 268 (2007), the court held that the trial court erroneously denied the defendant's motion to suppress the evidence of his breath test results. In this case, the defendant asked to consult with an attorney prior to taking the breath test. The arresting officer sat at a table with defendant and told him he could use the telephone on the table. The defendant did not call

an attorney. The court held that the arresting officer did not provide the defendant a reasonable opportunity to consult with an attorney because the right to counsel includes the right to confidential communications. Because the officer sat at the table with the defendant and provided no indication that he would give the defendant privacy if he called an attorney, the defendant was not provided with an opportunity to speak to an attorney in private.

The defendant in *State v. Bloom*, 216 Or App 245, 172 P3d 663 (2007) also asked the Court of Appeals to reverse a trial court order denying his motion to suppress the results of a breath test. Here, the defendant argued that the officers administering the test violated ORS 813.100 and ORS 813.130 when they did not inform the defendant of the correct amount of the fine imposed for a refusal to take the breath test. The court held that even if the officers violated those statutes, the test was admissible because ORS 136.432 states that a court may not exclude relevant and otherwise admissible evidence in a criminal action on the grounds that it was obtained in violation of any statutory provision unless exclusion is required by the state or federal constitution, the rules of evidence governing privileges and the admission of hearsay, or the rights of the press.

In *State v. Kirsch*, 215 Or App 67, 168 P3d 318 (2007), the state appealed from an order suppressing the evidence of a breath test on the grounds that the officer asked the defendant to take a breath test after the defendant initially refused. The court reversed the trial court, holding that ORS 813.100(2) does not preclude the giving of a breath test when a driver who initially refused to take a breath test is later invited to reconsider and agrees to take the test.

SENTENCING

In *Buffa v. Belleque*, 214 Or App 39, 162 P3d 376 (2007), a post-conviction petitioner sought relief on the ground that his trial counsel failed to object to the trial court's imposition of an "upward departure" sentence based on facts that the trial court rather than a jury found. In *Blakely v. Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004), the Court built upon its earlier decision in *Apprendi v. New Jersey*, 530 US 466, 120 US 2348, 147 L Ed 2d 435 (2000), and held that any fact that increases the penalty for a crime beyond the sentence the

guidelines authorize without additional factual determinations, must be submitted to a jury and proved beyond a reasonable doubt. The petitioner was sentenced after *Apprendi* but before *Blakely*. The court affirmed the trial court's order denying relief, holding that at the time of the petitioner's sentence, reasonable counsel could have believed that there was no merit to an objection to the use of facts that the judge rather than the jury found in imposing an upward departure sentence under the guidelines when the sentence was less than the maximum statutory indeterminate sentence.

Another aspect of sentencing seeing some opinions was the use of aggravating factors to increase a sentence. In *State v. Schenewerk*, 217 Or App 243, __ P3d __ (2007), the defendant argued that the aggravating factor of persistent involvement in similar offenses was unconstitutionally vague. The court disagreed, holding that to find "persistent involvement in similar offenses," a factfinder must determine, from the number and frequency of a defendant's prior convictions for similar offenses, whether the defendant's involvement in those offenses was so continuous or recurring as to be "persistent." The term "persistent involvement in similar offenses" is not unconstitutionally vague because its meaning can be readily ascertained from published substantive law.

Similarly, in *State v. Crocker*, 217 Or App 238, __ P3d __ (2007), the defendant argued that the aggravating factors on which trial court predicated the upward departure sentence, "prior criminal justice sanctions have not deterred defendant" and "defendant has a history of institutional or prison disciplinary problems," are unconstitutionally vague. Specifically, the defendant argued that those factors were vague because they fail to afford fair warning to potentially affected citizens and were susceptible to arbitrary and unprincipled application. The challenge to those factors, as the court observed, was a facial challenge. The court held that even if those factors might, as applied in some circumstances, be vague, there is no question that the defendant here falls within their "indisputable core." The court observed that the defendant committed his crimes while incarcerated for other crimes and that he has a lengthy criminal history. Given those factors, the court concluded, the defendant cannot claim that he lacked fair notice that he could be subject to enhanced punishment because prior criminal justice sanctions had not deterred him. The court further observed

that, given his institutional disciplinary record of nearly 50 major rule violations in the four years preceding trial, the defendant "has a history of institutional or prison disciplinary problems."

In *State v. Gallegos*, 217 Or App 248, __ P3d __ (2007), decided the same day as *Schenewerk* and *Crocker*, the trial court imposed an "upward departure" sentence based on a finding that the defendant was on post-prison supervision at the time of the offense. The defendant argued that the use of that aggravating factor, which is not specifically listed in the state sentencing guidelines, violates due process. The court disagreed, holding that to successfully mount a facial due process challenge to the use of an aggravating factor not specifically listed in the state sentencing guidelines, a defendant must demonstrate not that the rule embodies "an imprecise but comprehensive normative standard," but rather that "no standard of conduct is specified at all." After reviewing the language of OAR 213-008-0002(1), the court concluded that the meaning of the term "aggravating" and the totality of the context in which it is used satisfies due process in that it embodies "an imprecise but comprehensive normative standard." To the extent that the defendant was challenging, on vagueness grounds, the actual factor used in the case, that he was on post-prison supervision at the time of the offense, that factor could be ascertained by reference to published substantive law.

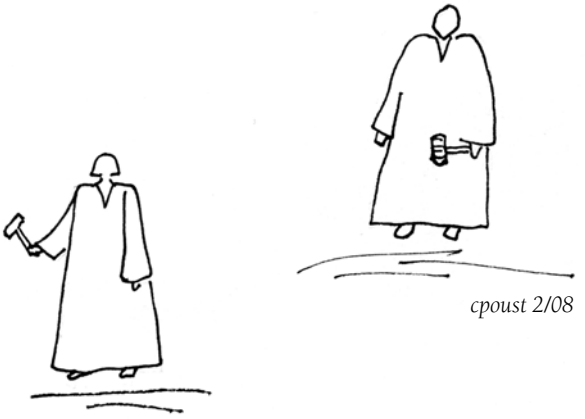
The Court of Appeals also focused on the imposition of compensatory fines and restitution. In *State v. Morris*, 217 Or App 271, __ P3d __ (2007), the defendant argued that the trial court committed plain error by imposing a compensatory fine because no evidence was presented of any pecuniary loss. The court held that where the evidence does not establish that the victim has incurred or will incur pecuniary harm, it is error to impose a compensatory fine and that error is plain on the face of the record. In *State v. Thorpe*, 217 Or App. 301, __ P3d __ (2007), decided on the same day as *Morris*, the defendant was convicted of one count of criminal possession of a forged instrument. On appeal, he argued that the trial court did not have authority to order restitution for three separate counterfeit checks when the defendant was convicted of and admitted to possessing only a single forged instrument. Pursuant to ORS 137.103(1), a trial court has the authority to impose restitution for offenses that a defendant was convicted of committing and "any other criminal conduct admitted by the defen-

dant." The court held that the trial court erred in ordering restitution on the two checks that the defendant was not convicted of possessing because the defendant did not admit to criminal conduct regarding those checks. The defendant's statement that he delivered one of the checks from a codefendant to a third party, without evidence that the defendant admitted to knowing the check was forged, did not constitute an admission of criminal conduct.

In the final two cases in this section, the court looked at whether specific sentences imposed pursuant to Ballot Measure 11 (mandatory sentencing for certain crimes) constituted cruel and unusual punishment in violation of Article I, section 16, of the Oregon Constitution. In the first, *State v. Rodriguez*, 217 Or App 351, __ P3d __ (2007), a jury convicted the defendant of one count of first-degree sexual abuse, a Ballot Measure 11 offense, for pressing the back of the head of a 13-year-old boy into her clothed breasts. The trial court concluded that the 75-month sentence mandated by Measure 11 would amount to cruel and unusual punishment, and imposed a sentence of 16 months. The state appealed, arguing that, given the nature of the relationship between the defendant and the victim, the 75-month sentence mandated by Measure 11 would not shock the moral sense of all reasonable people. The court held that it was undisputed that the victim was young and vulnerable and that the defendant was in a position of trust and responsibility, charged with helping children, including the victim, make appropriate behavioral choices. Because her conduct seriously abused that trust, a 75-month sentence would not shock the moral sense of all reasonable people as to what is right and proper under the circumstances.

The court decided *State v. Buck*, 217 Or App. 363, __ P3d __ (2007), the same day as *Rodriguez*. Similarly, the state appealed the trial court's decision that the Ballot Measure 11 sentence of 75 months constituted cruel and unusual punishment in relation to the defendant's offense. The trial court convicted the defendant of one count of sexual abuse in the first degree, a Measure 11 offense, for touching the clothed buttocks of a 13 year-old girl. As with *Rodriguez*, the court held that the sentence would not shock the moral sense of all reasonable people as to what is right and proper where the defendant touched the victim several times, including swiping her buttocks twice to remove dirt.

JUDICIAL PROFILE



cpoust 2/08

In past years, the Almanac has republished Multnomah Bar Association profiles of justices of the Oregon Supreme Court and judges of the Oregon Court of Appeals. There is only one new judge on either court since our last publication and there has yet to be a Multnomah Bar Association profile on him. Therefore, your editor had a casual and entertaining lunch with our newest Oregon Court of Appeal Judge Timothy Sercombe and shares some of the judge's background, interests and insights below.

THE HONORABLE TIMOTHY J. SERCOMBE

Oregon Court of Appeals Judge

By Scott Shorr, Stoll Berne

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Judge Timothy Sercombe began life in the middle of the country and has moved across both coasts. Born in Columbia Missouri, he lived in Kansas City until he was eleven. His family moved to Glastonbury, Connecticut (outside Hartford) where he attended junior high and high school. He graduated from Northwestern University (Ill.) in 1971 where he concentrated in political science and history.

He was always drawn to law, but initially was discouraged from a legal profession by his college professors. One professor was concerned that the future judge was already a "linear" thinker and that law would only make him more so. To dip his toes in the water, Sercombe worked as a paralegal at the Sidley Austin firm in Chicago, Illinois. Rather than stifle or dissuade him, the experience confirmed his ambition as he enjoyed the experience of working within the law.

Befitting his Midwest roots, Judge Sercombe is straightforward and polite. His plainspoken style, however, does not hide his curious mind. It was that curiosity that first brought him to Oregon in the mid-seventies. He saw Oregon as a place for progressive and new ideas that would challenge his thinking. He enrolled in the University of Oregon Law School where he graduated first in his class in 1976.

Judge Sercombe began his legal career as a clerk for the Oregon Supreme Court. His first clerkship was for Justice Kenneth J. ("KJ") O'Connell. He fondly recalls Justice O'Connell as an academic-type constantly interested in discussing current ideas. Justice O'Connell, who was interested in making written opinions more gender neutral, was more likely to talk with Sercombe about current issues of feminism than to discuss the latest draft of an opinion. Justice O'Connell retired mid-way through Judge Sercombe's clerkship and Sercombe went to work for Justice Berkeley ("Bud") Lent.

Judge Sercombe has equally fond memories of Justice Lent to whom this volume is dedicated. (See the tribute by another former Justice Lent clerk, Kathy Dodds, at the beginning of this volume). While Sercombe describes Lent as "very smart" as well, he did not have the academic style of Justice O'Connell. Justice Lent liked to unwind with his clerk at the pool parlor near the courthouse in Salem. Judge Sercombe remembers Justice Lent as a florid, earthy man who was a great mentor to him. Judge Sercombe finished his clerkship helping Justice Linde with a few opinions as well and has sought out Justice Linde for both legal advice and mentoring many times since Sercombe's clerkship.

Following his clerkship, Judge Sercombe started at the Harrang Long firm in Eugene in 1977 where he developed a practice representing local governments. He was the lead attorney for the City of Eugene for years and also represented other cities and counties. As an outside

attorney for governments, Sercombe developed skills in municipal law and was exposed to substantial appellate work. In 1991, Judge Sercombe was recruited to the then Preston Gates & Ellis (Portland) where he further developed his municipal, land use, and appellate practice. He stayed there until March 2007 when he was appointed to the Court of Appeals by Governor Kulongoski.

Interestingly, Judge Sercombe had previously considered becoming a judge and had initially rejected the idea out of a concern for "isolating" himself in the purported ivory tower of the court. He had a substantial practice and enjoyed the camaraderie of his fellow attorneys and clients at Preston Gates (now K&L Gates), where he ultimately became managing partner for the Portland office. He reanalyzed that decision later in life and decided to throw his hat into the ring when an appointment opportunity arose in 2006. He had realized that he had a "wonderful job" as an appellate clerk, strongly believed in public service, and felt drawn to the intellectual challenge of being a judge.

He also felt his family was in a position that he could perform public service. He has two twin boys who are currently seniors at Wilson High School, a daughter who is in college, and an adult daughter who is a lawyer at a large firm in New York. Sercombe's wife, Jane Van Boskirk, is a longtime actor/producer and founder of the Oregon Repertory Theater in Eugene. Outside of work, Judge Sercombe and his wife enjoy theater, music, and current events/politics. Judge Sercombe is also active in his Portland church where he is a member of the choir, drawing on his experience in college choirs.

As a judge, Sercombe has found the court to be far less "isolating" and "ivory tower" than he initially feared. He enjoys the intellectual camaraderie of the court, which he describes as "very collegial" with "no rancor." While he cannot be active in candidate or non-judicial issue politics anymore and is less active in non-profit work, he has taken up the slack with involvement in judicial and bar activities. Judge Sercombe still feels as if he is settling into the job, which he sees as a two-year process before he feels he can reach a comfort level. While he draws upon his past experience in land-use and municipal law on occasion, he is new to many of the substantive areas of the court, such as criminal law, workers compensation, and juvenile law. In addition to the new substantive areas, Judge Sercombe sees the transition as diffi-

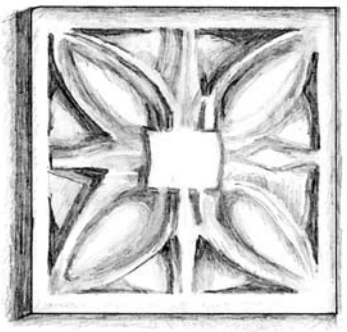
cult because of the different time demands on a judge when compared to private practice. He believes a reasonable expectation for a Court of Appeals judge may be four opinions a month, but the writing time must be squeezed into spare moments during the two weeks he is not preparing for other cases, hearing oral argument, or attending to other judicial or administrative duties.

For advice, Judge Sercombe suggests attorneys focus their briefs as much as possible. While he readily admits that as an attorney he would repeat an argument many times to ensure his point was made, he finds those briefs more fatiguing as a judge who has to read countless briefs. He urges attorneys to make their points concisely in a shorter argument section rather than many times over. He is very impressed with his fellow judges and is confident that they will spot an argument made well once. He is also impressed (and perhaps surprised based on his pre-court notions) by the amount of vetting that an opinion gets from the clerks, staff attorneys, support staff, and the judges themselves.

For oral argument, Judge Sercombe suggests that attorneys focus more on preparing to address the one or two core issues that the court is likely to address. There is no time for a long prepared speech at argument. Attorneys should know the record and the law and strive to communicate the core points of the appeal. He believes that quality preparation will show itself in the question and response dialogue that is most common at argument. He also suggests acknowledging weakness, but directly addressing it when an issue is not conceded.

Judge Sercombe's judicial style sounds much like his personal style: polite, direct, and intellectually curious.

ENACTMENTS AND PROMULGATIONS



cpoust 2/08

2007 LEGISLATION AFFECTING APPELLATE PRACTITIONERS

By Jim Nass, Appellate Commissioner, Oregon Court of Appeals

The 2007 Legislative Assembly did not have any blockbusters, like the bills overhauling the law of judgments and enforcement of judgments in 2003 and 2005, but it did enact a considerable number of smaller bills that will impact appellate practitioners. Those bills are discussed here in summary fashion.

I. APPELLATE PROCEDURE

A. JUDGMENTS: MONEY AWARD, SUMMARY JUDGMENT, JUDGMENT LIEN RECORD — SB 501 Or Laws 2007, ch 339 Effective: 01/01/08

Distinguishes the money award section of the judgment under ORS 18.042(2)(e) – (h) from the money award made on a request for relief in the pleadings in the action under ORS 18.042(2)(d).

Names the unnamed separate record, formerly known as the docket before 2003 House Bill 2646 (2003); that record now will be known as the judgment lien record .

Amends ORCP 47D and F to clarify that the court grants or denies a motion rather than entering a judgment on every motion for summary judgment.

NOTE: The importance of the amendments to ORCP 47 is that the former wording supported an argument that an appeal could be taken from an interlocutory judgment granting summary judgment for less than all claims in the action without entering it as a limited judgment.

B. EFFECT OF MOTION FOR NEW TRIAL/JNOV ON APPEAL — HB 2368 Or Laws 2007, ch 66 Effective: 01/01/08

AMENDMENTS TO ORCP 63 AND 64 — Or Laws 2007, Vol 12, p 135 Effective: 01/01/08

The Council on Court Procedures amended ORCP 63 and 64 to allow motions for judgment notwithstanding the verdict and motions

for new trial to be filed and ruled on by the trial court notwithstanding the filing of notice of appeal.

HB 2368 complements that action by amending ORS 19.270 to clarify that the trial court retains jurisdiction, notwithstanding the filing of a notice of appeal, to decide a motion for jnov or motion for new trial. HB 2368 also clarifies that the trial court retains jurisdiction to rule on a motion for relief under ORCP 71 filed during the pendency of appeal. The Council amended ORCP 71 to confer that authority on the trial court, but no corresponding change was made at that time to ORS 19.270.

NOTE: The filing of a motion JNOV or for new trial has the effect of rendering the judgment nonappealable, until the motion is disposed of, *Welker v. TSPC*, 332 Or 306, 27 P3d 1038 (2001), but it did not prevent the judgment from being enforced, *Thompson v. TLAT, Inc.*, 205 Or App 518, 134 P3d 1099 (2006). Before enactment of HB 2368, a notice of appeal filed while a timely-filed motion JNOV or for new trial is pending created two problems: (1) it deprived the trial court of jurisdiction to rule on the motion; and (2) it tolled the running of the 55-day deemed-denied period under ORCP 63 and 64. *Alternative Realty v. Michaels*, 90 Or App 280, 753 P2d 419 (1988). HB 2368 fixed the latter two problems, because after January 1, 2008, the filing of a notice of appeal will not deprive the trial court of jurisdiction to rule on the motion JNOV or for new trial, nor will it toll the running of the 55-day deemed-denied period. However, HB 2368 did not address the problem that a motion JNOV or for new trial renders the judgment nonappelable, but leaves the judgment enforceable, a situation that, in some circumstances, could leave the judgment debtor in the position of being subject to enforcement but with no ability to file notice of appeal and a supersedeas undertaking. Look for the 2009 Legislative Assembly to consider a bill addressing that problem.

C. APPEALS FROM JUSTICE AND MUNICIPAL COURTS

SB 267 Or Laws 2007, ch 330
Effective: 01/01/08

Provides that justice or municipal court may commence or cease operation as court of record only after governing body of county or city, as appropriate, files declaration with Supreme Court. Requires Supreme Court to enter order acknowledging filing of declaration and to give notice of order to county or city and to public. Requires justice

court or municipal court operating as court of record on or before January 1, 2008, to file declaration that includes specified information with Supreme Court. Requires Supreme Court to enter order acknowledging filing of declaration and to give notice of order to county or city and to public.

The Records Section of the Office of the State Court Administrator will be the permanent repository of information about municipal and justice courts that have become courts of record, and for posting that information on the OJD website: http://scadom01/Web/OJDPublications.nsf/AcknowledgementasCourtofRecord?OpenView.

NOTE: This legislation is significant because judgments of a justice or municipal court are appealable directly to the Court of Appeals if the justice or municipal court has become a court of record. Before SB 267, there was no central point of information to determine which justice and municipal courts had become courts of record.

D. FILING FEES: WAIVER/DEFERRAL SB 271 Or Laws 2007, ch 493 Effective: 01/01/08

Revises laws governing waiver and deferral of court fees and costs. Provides that judge may delegate authority to waive or defer fees and costs to court administrator. Requires courts to provide, free of charge, forms to request fee waivers or deferrals.

Provides that if person prevails in action for which the court waived fees and costs, court may include in judgment of money award, payable by any party liable to person receiving waiver, amount equal to waived fees and costs. Requires judgment debtor to pay money award amount to court administrator. Allows court to enter limited or supplemental judgment against person for deferred fees and costs or to include money award for deferred fees and costs in general judgment. Prohibits court from delaying or refusing to enter an order or judgment in an action or proceeding because deferred court fees and costs have not been paid.

Allows motion for relief from judgment based on showing that obligor's financial circumstances have changed since entry of judgment. Provides that most personal financial information provided to the court is confidential.

NOTE: Chief Justice De Muniz has adopted an order adopting financial standards based on income levels tied to the federal poverty guidelines. Effective January 1, 2008, depending on the applicant's income and assets, the presumptive disposition will be waiver of fees (generally, for a party receiving welfare or food stamps), presumptive denial of waiver (generally for a party whose incomes exceeds 200% of the federal poverty guideline or with substantial liquid assets), and a presumptive deferral of payment of fees (generally for a party between those two extremes).

E. FILING FEES FOR MOTIONS

HB 2331
Or Laws 2007, ch 860
Effective: 07/31/07

Modifies certain court fees and imposes surcharge on specified court filing fees. Increases certain prevailing party fees. Reduces dispute resolution surcharges. *Authorizes Chief Justice of Supreme Court to impose fees on motions.* Creates Interim Committee on Court Facilities to evaluate status of state court facilities, recommend standards for reasonable and sufficient court facilities, and develop proposal for ensuring that needed improvements to court facilities are made. Creates Interim Committee on Court Technology to evaluate technology transition plan of Judicial Department and make recommendations on plan.

NOTE: Chief Justice De Muniz tentatively has applied the motions filing fee to the following motions filed in the Court of Appeals or Supreme Court: Motions to dismiss and motions to determine jurisdiction. That tentative determination may be refined to exclude an appellant or a petitioner's motion to dismiss own appeal or judicial review and motions to dismiss arising from settlements.

F. TRIAL COURT TRANSCRIPTS: USE OF PRIVATE STENOGRAPHERS

SB 292
Or Laws 2007, ch 394
Effective: 01/01/08

Provides that in any court proceeding in which the court uses audio recording or video recording, with reasonable notice to the court, any party may arrange for stenographic reporting of the proceeding. The party arranging for stenographic reporting must pay the reporter

costs and the cost to provide transcript to the court, unless other parties agree to pay all or part of those costs. Requires that the stenographic reporter be certified in shorthand reporting under ORS 8.415 to 8.455 (OSCA-administered certification program) or certified by a nationally recognized certification program, the reporter's notes be filed in the office of the clerk of court, and that the party arranging for the stenographic reporter must give the court the reporter's name, address, and telephone number.

Provides that, if all parties to the proceeding agree, the stenographic reporting is the official record for the purpose of appeal. For all other purposes, the audio or video recording is the official record of the proceeding.

G. SUPERSEDEAS STAYS; EXCERPT OF RECORD

HB 2322 Or Laws 2007, ch 547
Effective: 06/22/07

Clarifies that a supersedeas undertaking to stay enforcement of a judgment pending appeal does not operate to stay enforcement of the judgment until notice of appeal has been filed; that is, an appellant cannot stay enforcement of a judgment by filing a supersedeas undertaking before filing notice of appeal. (ORS 19.335). *See* ORCP 72 A regarding the trial court's discretionary authority to grant a stay pending the filing of an appeal.

Updates the reference to an abstract of record to excerpt of record in describing costs recoverable on appeal to be consistent with appellate rules. (Section 6) (ORS 20.310)

H. STAYS OF PROCEEDING FOR MILITARY MEMBERS

HB 2093
Or Laws 2007, ch 400
Effective: 01/01/08

Allows service members to request relief from courts or administrative bodies from obligations or liabilities incurred before the members' periods of active service or state duty began.

Also allows service members to request stays of civil and administrative proceedings in which the member is a party. In either case, relief must be requested while the member is in active service or active state duty, or within six months after that service or duty ends. A court

or administrative body need not grant either request if the member's ability to comply with the terms of the obligation or liability, or the ability of the member to appear in a proceeding, are not materially affected by active service or state duty.

Codifies in state law what is already existing preemptive federal law.

I. ORAL ARGUMENT SITES; COURT OF APPEALS PANELS HB 2322 Or Laws 2007, ch 547 Effective: 06/22/07

Authorizes Chief Justice in an emergency to designate additional sites for holding court. (Sections 8 - 11) (ORS 1.085, 3.070, 3.185, 305.475)

Clarifies that a pro tem judge can sit on a three-judge panel with two other regular Court of Appeals judges who were elected or appointed. (Section 13) (ORS 2.570)

J. PLAIN WORDING FOR PUBLIC DOCUMENTS HB 2702 Or Laws 207, ch 142 Effective: 05/17/07

Directs Governor to assign state agency responsibility for developing plan to ensure that written documents produced by Executive Department agencies conform to plain-language standards. Requires agency assigned responsibility to adopt plan by November 1, 2007, and report to Legislative Assembly on specified dates. The bill as originally written would have applied to all Judicial Department documents, including, presumably, appellate opinions, as well as statutes, and administrative rules. Those provisions were deleted from the final bill.

K. WORKERS' COMPENSATION CASES: PTJR SERVICE; SETTLEMENTS SB 268 Or Laws 2007, ch 17 Effective: 01/01/08

Restores former requirement that timely service of petition for judicial review of order of Workers' Compensation Board on adverse parties is jurisdictional.

Authorizes Workers' Compensation Board to approve disputed claim settlement while case is pending on judicial review. Allows appellate court to dismiss petition for judicial review if settlement dis-

poses of all issues or to limit scope of judicial review to issues not disposed of by settlement.

Replaces obsolete references to appeal with judicial review.

NOTE: Bill will eliminate the need to dismiss workers' compensation cases while the Board considers whether to approve a disputed claim settlement. When workers' compensation cases are referred to the Appellate Settlement Conference Program, mediators will need to be aware, and be sure the parties understand, that if a settlement is reached, the parties may immediately go the Workers' Compensation Board for approval of the settlement and need not first dismiss the judicial review.

L. WORKERS' COMPENSATION CASES: HEARING EXPENSES

SB 404
Or Laws 2007, ch 908
Effective: 01/01/08

Allows the Court of Appeals, Supreme Court, Workers' Compensation Board, or administrative law judge to award fees and expenses for necessary witnesses and reasonable costs for expert witness reports in workers' compensation cases when claimant prevails and receives award of attorney fees. Caps payment at $1,500, unless claimant demonstrates extraordinary circumstances justifying payment of larger amount. Under some circumstances, requires administrative law judge or Workers' Compensation Board to grant a lien for attorney fees on additional compensation awarded or proceeds of settlement.

NOTE: Likely will result in some workload increase for the Court of Appeals and Supreme Court to consider assignments of error challenging the denial or reasonableness of awards made by the Administrative Law Judge and Workers' Compensation Board and, when a claimant prevails for the first time on judicial review, reviewing requests for witness fees and expenses and considering evidence needed to establish that a witness fee or expense was reasonable and/or whether a witness was necessary.

M. MOOT CASES: CAPABLE OF REPETITION YET EVADING REVIEW

HB 2324
Or Laws 2007, ch 770
Effective: 01/01/08

Allows court to render judgment on action challenging constitutionality or legality of policy, practice, or act of public body even though policy, practice, or act no longer has effect on party bringing action if court determines challenged act is capable of repetition and likely to evade judicial review in future. The case must meet three requirements: (1) the party had standing to commence the action; (2) the act challenged is capable of repetition **or** the policy/practice continues in effect; and (3) the challenged policy/practice or similar acts are likely to evade judicial review in the future.

Bill is a response to *Yancy v. Shatzer*, 337 Or 345 (2004) (judicial power under Oregon Constitution does not extend to moot cases that are capable of repetition, yet evade review); see also *Kellas v. Dept of Corrections*, 341 Or 471 (2006) (legislature has authority to confer standing on person who otherwise has no legally protected interest affected by administrative rule to prosecute facial challenge to validity of administrative rule).

II. APPELLATE COURT ADMINISTRATION

A. APPELLATE CASE MANAGEMENT SYSTEM: ACCESS TO REGISTER IN CONFIDENTIAL CASES

SB 273
Or Laws 2007, ch 331
Effective 01/01/08

Gives State Court Administrator (SCA) authority to set standards/procedures for allowing limited access to non-Judicial Department users who need access to case registers for "confidential" cases (adoption, juvenile, and mental commitment) to perform their official functions efficiently. Applies to case information kept in case registers and not otherwise open to public inspection. Non-Judicial Department users must need access to perform duties related to the case. Provides that person granted access to records must preserve confidentiality of records.

NOTE: This clarification of legislative authority supports the Judicial Department's policy regarding security and access to case register in OJIN (trial court case register system) and ACMS (appellate court

case register system). The State Court Administrator has developed forms and a procedure for access to juvenile and mental commitment cases in the new Appellate Case Management System (ACMS). Similar procedures and standards are being developed for OJIN access.

B. E-COURT HB 2357 Or Laws 2007, ch 129
Effective: 01/01/08

Provides that Chief Justice by rule may authorize, in lieu of original paper copies for any document, process, or paper that is served, delivered, received, filed, entered, or retained in any action or proceeding:

- Use of electronic documents or electronic images of paper documents, except summons and initial complaint or petition;
- Use of electronic signatures or other form of identification; and
- Use of electronic transmission for service, except service of summons.

Allows State Court Administrator, to extent directed by Chief Justice, to establish procedures that provide for destruction of records, instruments, books, papers, transcripts and other documents filed in circuit court after making photographic film, microphotographic film, electronic image, or other photographic or electronic copy of each document that is destroyed.

NOTE: This broad grant of authority is intended to authorize the Chief Justice to take such action as needed to implement the "eCourt" initiative (electronic filing and payment of filing fees and electronic document management, at both the appellate and trial court levels).

C. ADDRESS CONFIDENTIALITY PROGRAM HB 2131
Or Laws 2007, ch 542
Effective: 06/22/07

Modifies Address Confidentiality Program in various ways, including protecting against disclosure of telephone numbers as well as addresses of program participants. May require appellate courts to

amend ORAP 1.35(1)(b) relating to nondisclosure of addresses protected against public disclosure by law or court order. May result in applications by opposing parties and public bodies requesting orders for disclosure. If made, such orders must be based on a finding of good cause, which exists when disclosure is sought for a lawful purpose that outweighs the risk of the disclosure and, where requested by a governmental entity, also provides information that describes the official purpose for which the program participant's address and telephone number will be used.

D. IDENTIFICATION ANTI-THEFT BILL

SB 583 Or Laws 2007, ch 759
Effective: 10/01/07

Enacts the Oregon Consumer Identity Theft Protection Act. Prohibits printing or displaying a social security number (SSN) unless made unreadable, with exceptions. Creates duty to safeguard personal information. Prohibits person from printing consumer's SSN on materials not requested by consumer or part of transaction unless SSN is redacted, except in specific circumstances, including most court records. Requires person that owns, maintains, or possesses data that includes consumer's personal information to implement security program for data. The duty to safeguard provision takes effect January 1, 2008.

NOTE: Bill in effect exempts most court records from redaction requirements. Section 11 provides that court records are exempt when a person could have protected the information by statute or rule. There are rules in place that permit litigants in circuit court, the Tax Court, and the appellate courts to file a redacted copy of a court document at the time of filing or later and to request that the unredacted version be sealed. UTCR 2.100 and UTCR 2.110 (see CJO 05-048); ORAP 8.50; TCR 35..

III. SUPREME COURT; PRACTICE OF LAW

A. BALLOT TITLES FOR 2007 AND 2008 REFERRALS

HB 2640
OR Laws 2007, ch 750
Effective: 07/09/07

Establishes election procedures, ballot titles, explanatory statements, and fiscal impact estimates for legislatively referred measures

to be voted on in November 2007, May 2008, and November 2008 elections.

The ballot titles, explanatory statements, and estimates of financial impact of these measures will be published as is in the voter's pamphlet and are not subject to the normal challenge to the Oregon Supreme Court. These are the referrals affected by HB 2640:

- HB 3540 (Measure 49 – Measure 37 fix. Note: Provides that judicial review of Measure 37 claims will occur in circuit court under writ of review for claims made against local government and other than contested case for claims made against state government. Would overrule *Corey v. LCDD*, 212 Or App 536 (2007) (DLCD order determining Measure 37 is an order in a contested case subject to judicial review by Court of Appeals.) Scope of review is limited to (1) evidence in the record of the public entity at the time of its final determination, and (2) issues raised before the public entity with sufficient specificity to afford the entity an opportunity to respond);
- SJR 4C (Measure 50 – tobacco products tax to fund Healthy Kids, other health care, and prevention);
- SJR 18B (constitutional amendment – civil forfeiture);
- HJR 4 (constitutional amendment regarding school district elections);
- HJR 15A (modifies double majority requirement for tax measures);
- HJR 31 (constitutional amendment – reapportionment dates, residency requirements, and exceptions);
- HJR 49B and 50B (constitutional amendments – allowing crime victims to enforce constitutional rights).

B. BALLOT TITLES: CORRECTING CLERICAL ERRORS

SB 124
Or Laws 2007, ch 159
Effective: 01/01/08

Allows Attorney General to correct clerical errors in draft or certified ballot titles prepared by Attorney General for state initiative peti-

tions and referendum measures. Defines clerical error. Sets deadline for making corrections. Specifies that time for filing petition for judicial review of corrected ballot title begins on date corrected title is certified.

NOTE: In the case of a certified ballot title, the AG must correct the error not later than the tenth business day after the ballot title was certified. In the event of a correction, that becomes the date from which time begins to run on the right to seek review by the Oregon Supreme Court.

Clerical error is defined as, a typographical, arithmetical or grammatical error or omission that is evident from the text of the draft or certified ballot title or by comparison of the text of the draft or certified ballot title with a written explanation that was provided by the Attorney General and issued concurrently with the draft or certified ballot title.

This bill is meant to address the situation where no one files comment on a draft ballot title or challenges a certified ballot title that contains a clerical error. The intent of the bill is to give the AG the power to correct these errors when there is no other way to make the correction.

IV. CRIMINAL AND COLLATERAL RELIEF LAW

A. LAB REPORTS IN DRUG CASES

HB 2340
Or Laws 2007, ch 636
Effective: 01/01/08

Amends ORS 475.235 by requiring a defendant who objects to the admission of an analytical report as prima face evidence of the results of the analytical finding to serve and file a written notice of objection at least 15 days before. Sunsets January 2, 2010.

Bill responds to *State v. Birchfield*, 342 Or 624, 157 P3d 216 (2007) (admission of a laboratory report without testimony from criminalist who prepared report violates defendant's right to confront witnesses against him under Or Const Art I, § 11).

B. MAKES BLAKELY FIX PERMANENT SB 258
Or Laws 2007, ch 16
Effective: 01/01/08

Makes permanent, with some minor changes, the 2005 legislation (SB 528) to address legal issues that arose when the United States Supreme Court issued its decision in *Blakely v. Washington*, 532 US 296, 124 S Ct 2531, 157 L Ed 2d 309 (2004), regarding a defendant's right to a jury trial on facts that enhance a sentence beyond what the law otherwise provides is a presumptive sentence.

C. TRANSCRIPTS ON APPEAL FOR INDIGENT OFFENDERS HB 2668
Or Laws 2007, ch 291
Effective: 01/01/08

On appeal in criminal and post-conviction relief cases, authorizes Public Defense Services Commission to authorize preparation of transcript at state expense if the trial court has determined that the offender is eligible for court-appointed counsel or, if the offender is proceeding without counsel, the Commission determines that the offender is financially eligible. Deletes obsolete authority of appellate court to award costs and attorney compensation and clarifies that the Commission determines the costs and compensation of the offender's counsel on appeal.

D. CORRECTED OR SUPPLEMENTAL JUDGMENTS IN CRIMINAL CASES HB 2322
Or Laws 2007, ch 547
Effective: 06/22/07

Provides that the time for filing an amended notice of appeal as to a corrected or supplemental criminal judgment entered while appeal is pending does not begin to run until the parties' receipt of notice of entry of the corrected or supplemental judgment. (Sections 2 and 3, amending ORS 138.071 and 138.083.) With respect to corrected judgments, continues duty, and with respect to supplemental judgments, creates duty, of trial court to forward copy of corrected or supplemental judgment to the appellate court.

In presenting this bill to the legislature, Judicial Department obligated appellate courts' clerk's office to forward a copy of judgment to appellate counsel for both the state and the defendant (or to the defen-

dant, in the event the defendant is *pro se)* in order to facilitate notice to the parties, thus triggering the running of the appeal period.

E. POST-CONVICTION RELIEF: PETITION FILING DATE WHEN CERTIORARI PETITION PENDING

HB 2669
Or Laws 2007, ch 292
Effective: 01/01/08

Extends filing deadline for petition for post-conviction relief when, on direct appeal, offender has filed petition for certiorari to United States Supreme Court.

F. POST CONVICTION RELIEF: VARIOUS NEW PROVISIONS

HB 2133
Or Laws 2007, ch 193
Effective: 01/01/08

Requires petitioner, if trial court grants post-conviction relief, to provide copy of judgment to district attorney and to circuit court of county in which convicted.

If petitioner appeals, allows for late filing of notice of appeal if the petitioner was not personally responsible for the late filing and establishes colorable claim of error for review on appeal.

If state appeals, provides for stay of post-conviction judgment pending appeal.

G. PAROLE REVIEW: MOTION FOR LEAVE TO PROCEED ELIMINATED

HB 2667
Or Laws 2007, ch 411
Effective: 01/01/08

Eliminates requirement for petitioner on judicial review of an order of the Board of Parole and Post-Prison Supervision to file a motion for leave to proceed based on a showing that the case presents a substantial question of law.

V. FAMILY AND JUVENILE LAW

A. DOMESTIC PARTNERSHIPS

HB 2007
Or Laws 2007, ch 99
Effective: 01/01/08

Establishes requirements and procedures for entering into a domestic partnership contract between individuals of the same sex. Provides that registered partners have the same privileges, immunities, rights, benefits and responsibilities as those that exist for and between married Oregonians, including those that apply with respect to a child of the partnership. No solemnization ceremony is required to enter into a domestic partnership contract. Partners complete and file a Declaration of Domestic Partnership with the county clerk, who then registers it and provides the partners with a Certificate of Registered Domestic Partnership.

Requires that the declaration provide that both signatory partners consent to the circuit court jurisdiction to obtain a judgment of dissolution, annulment or legal separation, or in any other proceeding related to the partners' rights and obligations including those pertaining to a child of the partners. Courts must apply the same Oregon laws to such cases as apply in different-sex marriages.

Registered partners cannot enter into another domestic partnership without dissolving a prior union.

NOTE: Appellate courts will begin seeing appeals from cases seeking dissolution, separation, and annulment of domestic partnerships, as well as proceedings related to parental rights and responsibilities regarding the children of domestic partners.

B. JUVENILE CASES: INITIATING AN APPEAL

HB 2343
Or Laws 2007, ch 58
Effective: 01/01/08

Permits court-appointed counsel to discharge duty to file appeal of juvenile court judgment by complying with certain policies and procedures of Office of Public Defense Services.

NOTE: The Office of Public Defense Services (OPDS) has established an interactive web site that trial counsel can use to transmit

information to OPDS about the appeal. An OPDS staff attorney then files the notice of appeal. OPDS may handle the appeal using its own staff attorneys or appoint an attorney in private practice to handle the appeal.

VI. ADMINISTRATIVE LAW

A. HEARINGS OFFICER DUTIES IN CONTESTED CASE

HB 2822
Or Laws 2007, ch 659
Effective: 01/01/08

Requires hearings officer in a contested case proceeding to ensure that the record reflects not only a full and fair inquiry into the facts at issue, but also correct application of the law to the facts necessary for consideration of the issues before the hearing officer. On judicial review of a contested case, the Court of Appeals shall remand the final order for further agency action if the hearings officer did not comply with those requirements.

B. DELEGATION OF AUTHORITY TO ISSUE FINAL ORDERS

HB 2122
Or Laws 2007, ch116
Effective: 01/01/08

Authorizes agency to delegate authority to enter final order in proceeding or class of proceedings to officer or employee of agency or to class of officers or employees of agency.

NOTE: Bill responds to *Marshall's Towing v. Department of State Police*, 339 Or 54, 58, fn 5 (2005), where the court questioned whether a state police lieutenant had statutory authority to issue a final order on behalf of the State Police Department. Currently, some, but not all, state agencies are authorized by statute to delegate final order authority; bill clarifies that the statutory authority to delegate extends to all state agencies, absent a statute to the contrary. The delegation can be made to a specific employee or to a class of employees, must be in writing, and must be retained in the agency's records. This legislation will be added to ORS chapter 183 (Administrative Procedures Act).

VII. OTHER BILLS RESPONDING TO APPELLATE CASES

A. CONCEALED HANDGUN LICENSES

HB 2300
Or Laws 2007, ch 202
Effective: 01/01/08

Clarifies language regarding denial and revocation of concealed handgun licenses.

Responds to Court of Appeals decision in *Bates v. Gordon*, 201 Or App 619, 120 P3d 512 (2005) (addressing substantive effect of an amendment in the Revisor's or Scrivener's bill). Later, during session, the court reconsidered the matter on its own motion, reversing its earlier decision and holding that the amendment did not change substantive law, *Bates v. Gordon*, 212 Or App 336, 157 P3d 1219 (2007))

B. MOTOR VEHICLE LIABILITY ARBITRATION

SB 256
Or Laws 2007, ch 328
Effective: 01/01/08

Specifies requirements for auto liability arbitration proceedings unless the parties agree otherwise. For personal injury protection arbitration proceedings, requires findings and awards to be binding on both parties to the dispute but not for other litigation.

NOTE: Regarding UM/UIM and PIP arbitrations, section 3 overturns *Barackman v. Anderson* 338 Or 365, 109 P3d 370 (2005), and specifically states that findings and awards in a PIP arbitration are not binding on any other party and may not be used for collateral estoppel in a suit against a third party.

C. PUBLIC RECORDS V. PUBLIC BODY'S LAWYER PRIVILEGE

SB 671
Or Laws 2007, ch 513
Effective: 06/20/07

Where public body's attorney conducts an investigation, notwithstanding the attorney-client privilege, allows public body to release condensed version of factual information in record in lieu of disclosing record. Specifies that factual information contained in public record that is exempt from disclosure under public records law because

of attorney-client privilege may be disclosed under certain conditions. Allows person receiving condensed version to petition for review of denial to inspect or receive copy of record. Requires judge, Attorney General, or district attorney conducting review to compare record to condensation to determine whether condensation adequately describes record. Provides that disclosure of record does not offset attorney-client privilege.

NOTE: Bill is a response to *Klamath Falls School District v. Teamey*, 207 Or App 250, 140 P3d 1152 (2006) (school district's attorney's report of investigation not subject to disclosure under Public Records Law because confidentiality of report is protected by attorney-client privilege).

2008 ORAP COMMITTEE

By Lora E. Keenan, Staff Attorney, Oregon Court of Appeals

In alternate years, the Oregon Supreme Court and Oregon Court of Appeals jointly undertake to review and, as necessary, amend the Oregon Rules of Appellate Procedure (ORAP). By tradition, the courts republish the Oregon Rules of Appellate Procedure as amended on January 1 of every odd-numbered year. Also by tradition, even-numbered years are "ORAP Committee years," that is, years in which the ORAP Committee convenes to review proposed amendments and advise the courts on the merits of those proposals. As we head into an "ORAP Committee year" in 2008, I am pleased to provide the readers of the *Almanac* some information about the rules and the committee.

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 2.120; ORS 2.560(2). The courts historically have exercised that authority jointly to promulgate the Oregon Rules of Appellate Procedure. The rules are divided into chapters: after a chapter of general provisions, the rules – very roughly speaking – follow the life-cycle of an appeal, beginning with case initiation and progressing through the record on appeal, briefs, oral argument, petitions for review, costs and attorney fees, and appellate judgments. Other chapters contain rules governing judicial review proceedings, motions, and the Appellate Settlement Conference Program. There are two chapters of "special rules," one for each court, and, of course, the ever-popular "miscellaneous rules" chapter.

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 two judges from each court, the Solicitor General from the Oregon Department of Justice, the Chief Defender from the Office of Public Defense Services, a designee of the Appellate Practice Section, six other practitioners with substantial appellate experience, and a trial court administrator. Nonvoting members include the Counsel to the Committee, the Appellate Legal Counsel, a Supreme Court staff attorney, and the Director of the Appellate Courts Services Division. (The 2008 ORAP Committee roster appears below.) The value of such a variety of input is, we hope, reflected in a set of well-crafted and workable rules.

As of mid-January, the committee faces an initial agenda of 40 items. Practitioners who learned that font size is not necessarily constrained by the choices in a drop-down menu when the courts, in 2007, adopted the "13-point-minimum" rule for briefs using proportionally spaced fonts may have the opportunity to put that knowledge to broader use: one proposal is to extend that requirement to motions, if not to all documents filed in the state appellate courts. Thankfully, however, at *Almanac* press time, no saber-rattling has been heard from either the "serif" or the "anti-serif" camp. On the other hand, the radical notion of relegating citations to footnotes has reared its head and will undoubtedly lead to spirited debate.

The committee will meet in Salem five times between January and May 2008. The proposed rule changes approved by the committee will then be published with notice of proposed rulemaking in the Oregon Advance Sheets. At the same time, all members of both the Supreme Court and Court of Appeals will review the proposed rule changes. The committee then will meet again in Salem in September to make adjustments to the proposed rule changes in response to comments received. The final proposed rule changes will then be submitted to all the members of both courts for adoption. Those changes will be published in early December 2008 in the Oregon Advance Sheets and may be viewed online at www.publications.ojd.state.or.us.

Although the rules as a whole are amended and republished biennially, the courts may also adopt temporary amendments at any time. ORAP 1.10(3). Temporary amendments sunset on December 31 of the even-numbered year following their issuance; to become permanent, temporary amendments must go through the usual biennial amendment process. Temporary amendments are published in the Oregon Advance Sheets and may be viewed online at www.publications.ojd.state.or.us.

The courts and the ORAP Committee welcome suggestions for amendments to the rules. Anyone who would like to suggest an amendment to the rules may contact me, Lora Keenan, Staff Attorney, Oregon Court of Appeals, 1163 State St., Salem, OR, 97301-2563, (503) 986-5660, lora.e.keenan@ojd.state.or.us. Attorneys with substantial appellate practice experience who would like to be considered for ORAP Committee membership in future cycles may also contact me.

The courts appreciate the time and effort of the members of the committee, each of whom demonstrates a sincere interest in improving appellate practice in the Oregon state courts and a cooperative approach to working with the variety of interests represented on the committee. In addition to the members of the 2008 ORAP Committee listed below, several members who recently completed service on the committee deserve recognition and thanks: the Honorable Virginia Linder, James Murchison, Cecil Reniche-Smith, Thomas Sondag, and Timothy Volpert.

2008 ORAP COMMITTEE ROSTER

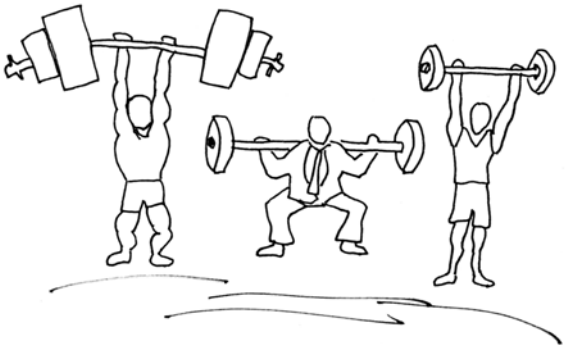
Voting Members

- Hon. Thomas A. Balmer, Associate Justice, Oregon Supreme Court (Chair)
- Hon. Rives Kistler, Associate Justice, Oregon Supreme Court
- Hon. David Brewer, Chief Judge, Oregon Court of Appeals
- Hon. Walter I. Edmonds, Judge, Oregon Court of Appeals
- Mary H. Williams, Solicitor General, Department of Justice, Appellate Division
- Peter Gartlan, Chief Defender, Office of Public Defense Services
- Wendy M. Margolis (OSB Appellate Practice Section designee)
- J. Michael Alexander
- Keith M. Garza
- Lindsey H. Hughes
- George W. Kelly
- Sarah R. Troutt
- James N. Westwood
- Mari L. Miller, Trial Court Administrator, Clackamas County Circuit Court

Nonvoting Members

- Lora E. Keenan, Committee Counsel, Staff Attorney, Oregon Court of Appeals
- Jim Nass, Appellate Legal Counsel
- Judith Baker, Appellate Court Services
- Melanie C. Hagan, Staff Attorney, Oregon Supreme Court

HEAVY LIFTING AND SAGE ADVICE



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OREGON COURT OF APPEALS
ANNUAL REPORT 2007

A WELCOME FROM THE CHIEF JUDGE

The Oregon Court of Appeals is pleased to announce the issuance of the court's 2007 Annual Report. The format and approach adopted in this year's report vary to some extent from those of previous years' reports. I've asked several judges and staff members of the Court of Appeals team to write updates concerning a number of projects that the court has undertaken, and those updates are the cornerstones of this year's report. I use the word "team" deliberately, because the court strives to achieve a cohesive model of shared responsibility for its governance that takes full advantage of the skills and energies of the many talented people who plan and perform its work. Each of the projects described in this report relates in some way to the court's commitment to being as transparent as possible about how we perform our work so that we can better serve the public. The court leaders who have contributed to this report epitomize that effort.

In this introductory section, I will briefly share several additional pieces of news that may be of interest. First, 2007 marked a year of increasing continuity in judicial experience for the court. Nine of our ten judges have now served with the court for at least three years; of that number, five judges have been members of the court for ten years or more. The experience that our judges gain in every year of service is critical to the accurate and timely performance our work. Our tenth judge, Tim Sercombe, joined us in 2007. Judge Sercombe brings 30 years of legal experience to the court. His many accomplishments in private law practice include management of a major Oregon law firm and many years of stellar practice in the fields of land use and local government law, two vital areas of expertise for our case load. We welcome Judge Sercombe to the Court of Appeals as a friend and colleague.

Second, the court must constantly examine its internal practices and decisional structure so as to maximize its efficiency within the constraints of existing resources. To that end, over the past 18 months the Court of Appeals has sponsored and supported a survey of the best practices of state intermediate appellate courts across the na-

tion. The culmination of that survey will be the publication this year of a thoughtful study authored by Willamette University College of Law professor Warren Binford and four law student externs, Preston Greene, Maria Schmidlkofer, Robert Wilsey, and Hillary Taylor, who, together with three of our judges, comprise the "Willamette Court Study Group." We hope and expect that the study group's work will meaningfully contribute, both in Oregon and across the nation, to the improvement of intermediate appellate court performance through the systematic sharing of information pertaining to court processes and design. We will post publication information for the study on our court's web page as soon as it is available.

Third, we continue to progress toward full implementation of a new automated Appellate Case Management System, a key component of the Chief Justice's vision for an "electronic courthouse." The first three releases of the Appellate Case Management System are now up and running, and the final phases of the system are scheduled to be implemented in the first six months of 2008. Although many people have contributed to this effort, I especially want to thank Court of Appeals staff attorney Julie E. Smith for her tireless and self-sacrificing efforts in spearheading the various Court of Appeals releases for the project over the past two and one half years. In addition, I would like to recognize the similarly dedicated efforts of Judicial Services Specialist Debbie Rosenberger, Administrative Analyst Judi Baker, and Appellate Legal Counsel Jim Nass, who have also helped create a first-rate, modern case management system for our court.

Fourth, with the support and leadership of the Chief Justice, the Court of Appeals expects to improve and expand the store of information about its work that is electronically available to the public on its web pages. In 2007, we published our Internal Practice Guidelines and the results of our Bench and Bar survey on the court's web pages, and we expect to add more useful information to our digital storehouse in 2008 and beyond.

Fifth, I am pleased to report that renovation of the Justice Building is complete. As I indicated in the 2005 and 2006 annual reports, a much-needed and comprehensive renovation of the building began in early 2005 while we, and other tenants of the building, continued to occupy it. During the renovation, the judges and staff of our court were separated onto two floors of the building, and each of us moved

offices twice. Our entire staff, with special credit going to Court of Appeals Office Manager Linda Weigel and Judicial Services Specialist Nancy Livermore, worked tirelessly to assure the uninterrupted flow of work in our office during the renovation process. We now occupy a safer facility, and – of primary importance to our day-to-day work – we are reunited on a single floor. Convenient in-person contact is an integral component of collegial decisionmaking and helps the court efficiently process its workload.

Finally, the court continues its efforts to maintain its productivity goals, once again reaching the 400 mark for total authored opinions in 2007. I can assure you that each of our judges and our court staff are committed to a high level of personal and institutional performance as we face the uncompromising goals of both timely and correctly deciding the cases that are entrusted to us.

Respectfully,

David Brewer,

Chief Judge

THE OREGON COURT OF APPEALS INTERNAL PRACTICES GUIDELINES

Hon. Jack L. Landau, Judge, Oregon Court of Appeals

The Oregon Court of Appeals is committed to improving communications with the bench, the bar, and the public about its work. As part of its efforts to fulfill that commitment, the court has prepared a written summary of its internal processes, the *Oregon Court of Appeals Internal Practices Guidelines*. Completed in 2007, the *Guidelines* describe the internal workings of the court, from the filing of documents that trigger the court's jurisdiction, to the issuance of judgments that end it. Included are descriptions of the organization of the court and its professional and administrative staff, how the court processes various filings at the initiation of an appeal or judicial review proceeding, how the court typically arrives at its decisions, and how it prepares them for publication. It also includes descriptions of how the court processes its more than 20,000 motions annually and how cases may be referred to its nationally recognized Appellate Settlement Conference Program. It is the court's hope that, by providing these insights into its internal workings, its work is more accessible and litigants may be aided in complying with its rules and procedures.

The court is also committed to reviewing its internal practices on an ongoing basis, in an effort to improve its practices to better serve the bench, the bar, and the public. As it changes those practices, it will modify the *Guidelines* to reflect those changes.

Copies of the *Guidelines* may be obtained online at the court's webpage on the Oregon Judicial Department website at the address listed below. A limited number of printed versions of the *Guidelines* also may be obtained at the Appellate Court Records Section.

http://www.ojd.state.or.us/courts/coa/PracticesGuidelines.htm

JUVENILE APPEALS WORK GROUP

Hon. Darleen Ortega, Judge, Oregon Court of Appeals

This group, originally formed in 2006, consists not only of members of both the Court of Appeals and the Supreme Court, but also members of the Legislature and of the executive branch, meeting periodically to consider ways of improving the efficiency and effectiveness of the disposition of appeals in juvenile dependency cases. This year the group's efforts have focused on a pilot project to attempt mediation of appeals in cases involving termination of parental rights. Even with expedited processing, such appeals typically take many months and, occasionally, years to resolve, a time period that can feel like an eternity to the families and, particularly, the children affected. Additionally, appellate review is necessarily limited to the record at the time of trial, although circumstances may well change during the pendency of the appeal. The work group's hope has been that focused mediation of such cases may result in a disposition that better accounts for a family's changing circumstances and better protects the best interests of children.

This past October, as part of that effort, various trial court and appellate judges and representatives of the Department of Human Services, as well as a representative group of advocates, mediators, and others involved in working with families in juvenile dependency cases, met for a training session. The focus of the training was to educate each other regarding how mediation can best be approached in the appellate context and to work together to address some of the apparent barriers to resolution of cases at a point in the proceedings where the stakes may be very high and, frequently, the pattern of communication between the parties may be very poor. The session opened lines of communication between the various participant groups and enabled the work group to focus its strategy toward mediated resolution of a targeted group of such cases.

THE OREGON COURT OF APPEALS PERFORMANCE MEASURES PROJECT

Alice Phalan, Strategic Planning and Evaluation Manager, Office of the State Court Administrator

The Court of Appeals Performance Measures design team, which began meeting in the fall of 2005, finalized the court's success factors and accompanying core performance measures.

Success factors:

- *Quality:* Fairness, equality, clarity, transparency, and integrity of the judicial process.
- *Timeliness and Efficiency*: Resolution of cases in a timely and expeditious manner.
- *Public Trust and Confidence*: Cultivating trust and confidence in the judiciary.

Core performance measures:

1. *Appellate Bar and Trial Bench Survey*: The percentage of members of the Oregon appellate bar and trial bench who believe that the Oregon Court of Appeals is delivering quality justice, both in its adjudicative and other functions.
2. *On-Time Case Processing*: The percentage of cases disposed or otherwise resolved within established time frames.
3. *Clearance Rate:* The ratio of outgoing cases to incoming cases expressed as an average across all case types and disaggregated by case type—that is, civil, criminal, collateral criminal, juvenile, and agency/board.
4. *Productivity:* The number of cases resolved by the Court of Appeals disaggregated by decision form—that is, signed opinions, per curiam opinions, AWOPs (affirmances without opinion), and dispositive orders.

In spring 2007, the court invited attorneys and judges involved in a circuit court case on appeal in which a case dispositional decision was entered between July and December 2006 to complete an anony-

mous online survey as our first formal effort to measure the quality of the court's work. Survey respondents gave the highest marks to the court's treatment of the trial court judges and appellate attorneys involved in the cases on appeal. Nine out ten believe that the Court of Appeals treats them with courtesy and respect. A lesser percentage of respondents, approximately two out of three, believe that the court handles its caseload efficiently, that the court is accessible to the public and attorneys in terms of its cost, and that the court does a good job in informing the bar and the public of its procedures. Overall four out of five appellate attorneys and trial judges indicated that the court is doing a good job. The statistical summary is posted on the court's webpage on the Oregon Judicial Department website at the address listed below.

During the Appellate Management Case System phase-in, the design team's extensive work on the case processing, clearance rate, and productivity measures helped identify the proposed standard reports that will provide enhanced quality appellate case data.

In 2008 and beyond, the design team will guide the monitoring, analysis and integration of performance measurement into the court's management and leadership, including how are we doing over time, what are we doing to improve or maintain good performance, and what performance targets and goals should we set for future performance.

http://www.ojd.state.or.us/courts/coa/BenchBarSurvey

REORGANIZATION OF THE OFFICE OF APPELLATE LEGAL COUNSEL

Jim Nass, Appellate Legal Counsel

The Office of Appellate Legal Counsel is adding a new assistant appellate legal counsel position. In addition, the Office of Appellate Legal Counsel is being reorganized into an appellate commissioner's office. The appellate commissioner, aided by two assistant appellant commissioners, will have authority to decide motions, own motion matters, and cost and attorney fees matters arising from cases not decided by a department. Parties will be able to move for reconsideration of a decision of the appellate commissioner, resulting in review of the decision by either the Chief Judge or the Motions Department of the Court of Appeals. The appellate commissioner position is modeled on commissioner positions found in the State of Washington appellate courts, except that the Oregon appellate commissioner would not have authority to decide any cases on their merits.

The goal of adding a new attorney position and creating an appellate commissioner position is to reduce substantially the amount of time it historically has taken for substantive motions in the Court of Appeals to be decided.

Until the reorganization process is completed and a recruitment is undertaken for the appellate commissioner position, current Appellate Legal Counsel Jim Nass will be serving as the appellate commissioner. The target date for implementing the appellate commissioner project is February 2008.

One of the consequences of the appellate commissioner having decisionmaking authority is that the commissioner will be subject to the same ethical limitations that constrain judges with respect to *ex parte* communications. The appellate commissioner will not as available as appellate legal counsel was for explanations of appellate practice or to respond to inquiries about appellate procedures. However, the assistant appellate commissioners will remain available to respond to such inquiries.

THE OREGON RULES OF APPELLATE PROCEDURE COMMITTEE

Lora E. Keenan, Staff Attorney, Oregon Court of Appeals

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 2.120; ORS 2.560(2). The courts historically have exercised that authority by jointly promulgating the Oregon Rules of Appellate Procedure.

In alternate years, the Supreme Court and Court of Appeals undertake to review and, as necessary, amend the Oregon Rules of Appellate Procedure (ORAP). By tradition, the courts republish the Oregon Rules of Appellate Procedure as amended on January 1 of every odd-numbered year. Also by tradition, even-numbered years are "ORAP Committee years," that is, years in which the ORAP Committee convenes to review proposed amendments and advise the courts on the merits of those proposals.

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 two judges from each court, the Solicitor General from the Oregon Department of Justice, the Chief Defender from the Office of Public Defense Services, a designee of the Appellate Practice Section, six other practitioners with substantial appellate experience, and a trial court administrator. Nonvoting members include the Counsel to the Committee, the Appellate Legal Counsel, a Supreme Court staff attorney, and the Director of the Appellate Courts Services Division. (The 2008 ORAP Committee roster appears below.)

The committee will meet in Salem five times between January and May 2008. The proposed rule changes approved by the committee will then be published with notice of proposed rulemaking in the Oregon Advance Sheets. At the same time, all members of both the Supreme Court and Court of Appeals will review the proposed rule changes. The committee then will meet again in Salem in September 2008 to make adjustments to the proposed rule changes in response to comments received. The final proposed rule changes will then be submitted to all the members of both courts for adoption. The adopted changes to the rules will be effective January 1, 2009. Those changes will be pub-

lished in early December 2008 in the Oregon Advance Sheets and may be viewed online at www.publications.ojd.state.or.us.

The courts and the ORAP Committee welcome suggestions for amendments to the rules. Anyone who would like to suggest an amendment to the rules may contact Lora Keenan, Staff Attorney, Oregon Court of Appeals, 1163 State St., Salem, OR, 97301-2563, (503) 986-5660, lora.e.keenan@ojd.state.or.us.

The courts appreciate the time and effort of the members of the committee, each of whom demonstrates a sincere interest in improving appellate practice in the Oregon state courts and a cooperative approach to working with the variety of interests represented on the committee. In addition to the members of the 2008 ORAP Committee listed on page 122, several members who recently completed service on the committee deserve recognition and thanks: the Honorable Virginia Linder, James Murchison, Cecil Reniche-Smith, Thomas Sondag, and Timothy Volpert.

PRESERVING ISSUES FOR APPEAL IN OREGON CIVIL ACTIONS

By Charles F. Adams, Stoel Rives, LLP

(Updated 12/11/07 through 216 Or App 193 and 343 Or 422)

I. MATTERS THAT CAN BE RAISED ON APPEAL EVEN WHEN NEVER PRESENTED BELOW

A. Failure to State a Claim Can No Longer Be Raised.

Although in the past failure to state a claim could be raised for the first time on appeal, that holding has been superseded by the adoption of ORCP 21 G(3).

B. Subject-Matter Jurisdiction.

Subject matter jurisdiction either exists or is missing, and cannot be created by stipulation. Consequently, lack of such jurisdiction is a defect that may be raised at any time.

C. Issues Raised on Matters of Public Importance.

Where issues were not preserved at trial, Oregon's appellate courts nonetheless may exercise discretion to review when the questions are ones of public importance and substantial public money is in dispute.

D. Errors of Law Apparent on the Face of the Record.

Whether error is "apparent" is determined based on the perspective of the appellate court deciding the question and the timing of that decision. The error must be obvious and not reasonably disputed, it must be an error of "law," the court must be able to identify the error from the record without choosing between competing inferences, and the facts constituting the error must be irrefutable. An unpreserved claim of error is available for appellate review only if (1) it qualifies as an error "apparent on the face of the record" and (2) the appellate court expressly applies the plain-error methodology to justify consideration of the question.

E. Statutory Interpretation – Limited Exception.

When the issue is one of statutory interpretation, and a party preserved at trial interpretations of the statute as an issue ***generally***, the appellate court must interpret the statute correctly, even if the appellant failed to raise at trial the *correct* interpretation.

F. Supporting the Judgment on Alternative Grounds.

Based on the existing factual record, a ***respondent*** may present for the first time on appeal new arguments to support the judgment. If, however, the appellant might have developed a different factual record at trial had the new argument been presented, then affirmance on that new ground is forbidden.

II. PRESERVATION GENERALLY

A. Purpose.

Rules regarding preservation of error are based on two concerns: (1) fairness to the parties in making and responding to arguments in a case, and (2) efficient judicial administration. When the trial court is presented with both sides of an issue, it then has the opportunity to correct any errors.

B. Court's Role.

An appellate court is obliged, on its own motion, to determine independently whether the rules of preservation have been satisfied.

C. Requirements Generally.

The general rule is that a question not preserved in the trial court cannot be raised on appeal. The Oregon Supreme Court, however, has explained that, in order to preserve an assignment of error for appeal, it is essential to raise the relevant ***issue*** at trial but less important to make a specific ***argument*** or identify a specific legal ***source*** with respect to the issue raised. In determining whether an assignment of error has been preserved, the most significant question is whether the trial court had a realistic opportunity to make the right decision.

D. Pleading Is Not Enough.

Ordinarily, it is not enough to have simply pleaded an assertion.

E. Evidence Is Not Enough.

The mere introduction of evidence during trial does not preserve for appellate review a legal theory that was never presented to the trial court.

F. Specificity and Clarity Are Essential.

Any exception taken must be specific, clear, and unequivocal.

III. BEFORE TRIAL

A. Motions in Limine.

Motions in limine can preserve exceptions or objections, but only if the procedures followed are ones that would adequately preserve the issue if followed during trial. For example, if a party seeks a ruling in limine on admission of evidence but either the party makes no actual offer of proof or the court reserves its ruling, nothing has been preserved for appeal. Additionally, a motion and ruling in limine on exclusion or admission of evidence on one ground will not support presentation of a different ground on appeal. As a general proposition, to preserve the issue, a party need not object to evidence at the time of hearing or trial if there has been a conclusive determination of admissibility beforehand. When a party raises in limine a substantive issue before trial and obtains a definitive ruling but does not raise the issue again when the court instructs the jury and submits the verdict form, such conduct does not waive for appeal the party's argument on the issue.

One critical caveat exists, however, in relying on written submissions before trial or hearing in order to preserve evidentiary objections. Despite an express written pretrial objection, an issue may not be held preserved for appeal if the party did not argue this objection orally or obtain a specific ruling from the court either at the pretrial hearing or when the evidence was introduced at trial.

B. Motion to Strike.

A pretrial motion to strike an allegation will not support an assignment of error on appeal unless the moving party also moves at trial to take the allegation from the jury or in some other way gives the trial court opportunity to correct any error in the pretrial ruling.

If a matter is stricken, care must be taken to preserve objection to the stricken matter. Repleading, when not accomplished carefully and skillfully, can result in waivers of issues for appeal.

C. Pretrial Hearing.

Arguments discussed at a pretrial hearing and ruled on by the court are preserved for appeal.

D. Defenses Automatically Waived.

Certain defenses are automatically waived if not made by motion before pleading or not made in a responsive pleading.

1. Lack of jurisdiction over the person.
2. Another action pending between the same partners on the same cause.
3. Insufficiency of process.
4. Insufficiency of service of process.
5. The plaintiff does not have the legal capacity to sue.
6. The party asserting the claim is not the real party in interest.
7. Statute of limitations.

Defenses 5-7 above can be raised by amendment, but only in very limited circumstances.

Defects in pleadings must be raised before the trial court, or they will not be considered on appeal.

E. Defenses Waived if Not Raised by Motion or Responsive Pleading.

Other affirmative defenses are not automatically barred but may be precluded if not raised by motion or responsive pleading, or if leave to amend is denied. Such defenses include those listed in FRCP 8(c), plus a defense alleging unconstitutionality.

F. Right to Jury Trial.

Trial of all fact issues must be by jury unless the parties expressly stipulate to trial without a jury. Despite the express provisions of ORCP 51 C and its predecessor statute, case law establishes that a party can waive a right to a jury trial by failing to timely assert that right.

G. Jury Selection.

Any claim of failure to comply with the jury-selection provisions of ORS chapter 10 must be brought within seven days after a party discovers or should have discovered facts showing the failure.

H. Summary Judgment.

A party opposing summary judgment must, before the motion is decided, make any evidentiary objections it has. An appellate court will not review the admissibility of evidence that was admitted without objection in opposition to summary judgment.

A party that obtained summary judgment cannot, in opposing either ORCP 71 B relief at trial or an appeal from summary judgment, advance new and qualitatively different reasons for why it should have been entitled to summary judgment in the first place.

An attorney's affidavit under ORCP 47 E can create a factual dispute by asserting that an expert will provide admissible evidence. However, an affidavit that specifies the issues on which the expert will testify yields a triable dispute only as to those specific issues.

If materials are submitted late in opposition to a motion for summary judgment, those materials are not, merely by having been filed, automatically part of the record for appellate review of a trial court's grant of summary judgment. Rather, the appellate court will first decide, and then review only for abuse of discretion, whether the trial court did or did not consider the late-filed materials. If the trial court did not consider such materials and is found to have acted within its discretion on the facts presented, the late materials are not part of the record that the appellate court will consider in deciding whether to uphold summary judgment.

Error is preserved when a court treats a motion to dismiss as one for summary judgment and fails to give the party against which judgment is entered an opportunity to respond.

When cross-motions for summary judgment are filed on the same claim, the record for review consists of documents submitted in support of and in opposition to both motions.

IV. AT TRIAL

A. Conduct of Trial in General.

1. One party cannot avail itself of the record made by another.

2. The Oregon Court of Appeals will not reverse a trial court for evidentiary error unless the error affects a substantial right of a party. The admission or exclusion of evidence that is merely cumulative does not affect a substantial right. To obtain reversal, an appellant is not always required to establish that the absence of evidentiary error would have produced a different result. Instead, the test for prejudicial error has been whether the evidence affected a substantial right, that is, whether erroneously admitted evidence had some likelihood of affecting the result.

B. Admission of Evidence.

A party must either specifically object to, or move to strike, inadmissible evidence. If a witness gives allegedly inadmissible testimony, a prompt motion to strike is required if exclusion is to be considered on appeal.

C. Exclusion of Evidence.

1. When evidence is excluded, the trial lawyer must declare on the record, before or immediately after the ruling, why the evidence is admissible and must make an offer of proof. An offer of proof may be made through questions to and answers from the witness or by counsel summarizing what the proposed evidence is expected to be. Either method is acceptable if the reviewing court can determine whether excluding the proferred evidence was prejudicial error.

2. A party failing to explain to the trial court why the evidence is admissible waives its right to challenge the ruling on appeal. Moreover, evidentiary objections once made easily can be waived subsequently.

Once a party has sufficiently objected to the admission of evidence and that objection has been overruled, the objecting party does not waive its evidentiary objection by thereafter countering its opponent's evidence during trial.

3. When evidence is offered and excluded, and the party fails to offer evidence of foundation at the time of exclusion, exclusion of the evidence is not error even if, later in the case, evidence is admitted that could have supplied the foundation earlier.

4. If cross-examination of a witness is precluded, the attorney must make an offer of proof of what the prohibited questioning would have shown. An offer of proof may be made by questioning the witness with the jury excused.

5. When an error that affects a substantial right of a party is based on a ruling that excludes evidence, error is preserved if the substance of the evidence was made known to the court or was apparent from the context within which the questions were asked.

6. Under ORCP 59 C(1) the jury is entitled to have demonstrative exhibits in the jury room, and the attorney should move for submission of exhibits to the jurors before they begin deliberations.

7. Exclusion of evidence is preserved for appellate review, even without an offer of proof, when the exclusion is a consequence of a trial court's underlying legal ruling.

8. A party cannot reverse positions on appeal and argue for reversal on a ground which that party contradicted at trial.

9. Exclusion of evidence will be considered harmless if there is little likelihood that it affected the result. The test includes two inquiries: (1) What was the relative strength of the parties' evidence? (2) In the totality of the parties' evidence, how significant was the excluded evidence?

D. Examination and Cross-Examination of Witnesses.

An objection must be specific when seeking to examine a witness.

E. Jury Instructions Given.

1. Error in an instruction is not preserved unless the opposing party both objects and particularly states the grounds for its objection. Generally, only citing a case as the basis for an objection is insufficient to preserve an objection. A party that disagrees with a proposed instruction must call the court's attention to a specific objection so that the court may have an opportunity to correct the error. Additionally, an exception to a jury instruction on one ground does not preserve the claim of error on a different ground.

2. Two exceptions are recognized to the requirement of ORCP 59 H that specific objection be made after an instruction is given. First, refusal by the court to give a requested instruction can, in certain circumstances, preserve error in an instruction that was given. ***See infra*** Section IV.E.4. Second, error is preserved when counsel has made its objection very clear before the jury is instructed.

3. Failure to give a requested instruction does not automatically serve as an exception to instructions that were in fact given. If an attorney believes an instruction is objectionable in comparison to an instruction he or she requested on the same issue, the attorney should not rely solely on tender of the requested instruction to preserve the issue. Instead, the attorney should also object to the court's instruction, with an explanation on the record. Refusal of a requested instruction preserves error as to an instruction given only if the requested instruction both is a correct statement of the law and clearly and directly brings to the trial court's attention the claimed error in the instruction actually given.

4. If an exception is taken and an instruction proves to be erroneous on some other ground, the exception will not preserve the error for appeal. An exception focusing on only part of an instruction can, however, be sufficient to preserve an exception to the whole instruction when the emphasis on the portion is consistent with the argument against the whole.

5. The giving of an erroneous instruction must also be shown to be prejudicial. In context with the instructions as a whole, this

requires persuading the court that the instruction probably created an erroneous impression of the law in the minds of the jurors and affected the outcome of the case.

F. Jury Instructions Refused.

1. Effective January 1, 2006, ORCP 59 H was amended to ***delete*** language that, until then, provided an automatic exception when a trial court refused to give a requested instruction. In cases tried after January 1, 2006, refusal to instruct is preserved as error only if counsel (1) objects to the refusal as error, (2) explains with particularity and on the record why the refusal is error, and (3) also states this objection immediately after the trial court instructs the jury. ORCP 59 H does not, however, preclude "plain error" review of a trial court's failure to deliver an instruction that was not requested but that the law nevertheless required. The rule instead bars review of an unpreserved objection only when the trial court (1) delivers an instruction that a party later contends is erroneous or (2) refuses to deliver an instruction that the party requests and the party fails to argue why the refusal was error.

2. Instructions should be requested in writing and, once approved by the court, should be given in writing to the jurors, who will take those instructions with them while deliberating. It is not sufficient to request the court to instruct generally on an issue; rather, the party must state for the record precisely the form and content of the proposed instruction. A party is entitled to jury instructions consistent with its theory of the case, provided that the instructions (1) correctly state the law, (2) are based on the current pleadings, and (3) are supported by evidence. No party is required to request a jury instruction that advances the use of evidence in a way that benefits the party's adversary.

3. If an attorney discovers that he or she has requested an instruction that is erroneous, he or she should withdraw it before the court instructs, in order to avoid invited error. A party can assign error on appeal to a challenged instruction similar to the one that party requested, so long as the requested instruction was unequivocally withdrawn before the jury was instructed.

4. Failure to instruct on an allegation has been deemed not equivalent to striking the allegation from the pleading. It is thus necessary to object separately to a trial court's striking of allegations from a pleading.

5. The test for prejudice from an erroneous refusal to instruct resembles the test for prejudice arising from the giving of an erroneous instruction. Again considered in context with the instructions as a whole, prejudice arises if the failure to instruct probably created an erroneous impression of the law in the minds of the jury and that impression may have affected the outcome of the case. **CAVEAT:** A court's interpretation of ORS 19.415(2) may require showing that the error ***did*** affect, not merely "may have affected," the outcome.

G. Verdict Form.

A deficiency in a verdict form is waived unless excepted to before submission to the jury. Objecting after the jury has been dismissed is too late. Similar to an instructional error, an error in a verdict form is reversible only if it probably created an erroneous impression of the law in the minds of the jurors and affected the outcome of the case.

H. Sufficiency of the Evidence.

1. In a jury trial, a party must move for a directed verdict before the jury is instructed. The motion must specify grounds; grounds not argued to the trial court cannot be raised on appeal.

2. When there are multiple claims in a jury trial, it is possible that some claims may be factually sufficient while others may arguably be insufficient. In that circumstance, counsel needs to decide whether to seek or oppose use of either a special verdict or a general verdict with interrogatories seeking a separate finding on each claim. If an attorney earlier timely objected to submission of a claim as being legally erroneous or factually insufficient, but agreed to use a general verdict, an appellate court may not be able to tell whether the jury actually based its verdict on the factually insufficient or legally erroneous claim.

   Appellate courts (1) may no longer employ the "we can't tell" rule to vacate a judgment and order a new trial, but (2) may,

when the appeal is from a JNOV, employ the "we can't tell" rule among other factors in deciding in its discretion whether to order a new trial. In either event, the court must be able to say that the error ***has not*** substantially affected, and not merely ***might have affected*** the outcome of the case. Because the "we can't tell" rule yields affirmance of a judgment, compound questions in a special verdict also should not be submitted or, if submitted by the adverse party or the court, should be challenged.

3. In a trial to the court, a party must move for dismissal before the court's decision. In civil cases tried before a judge, a litigant cannot raise the sufficiency of the plaintiff's evidence on appeal unless the litigant has asserted the legal insufficiency of the evidence in the trial court.

   Whether at law or in equity, a party ***without*** the burden of proof must assert the legal insufficiency of its opponent's evidence in the trial court in order to assert that issue on appeal. A party that ***bears*** the burden of proof on an issue at trial is not required to raise, for preservation purposes, the claim that it should prevail on the evidence as a matter of law.

4. Differences exist between motions for summary judgment, for dismissal, and for a directed verdict. Renewal of a summary judgment motion at the end of the plaintiff's case does not preserve error that could have been preserved by a motion for dismissal or for a directed verdict.

5. The proper method for moving to withdraw fewer than all issues in a claim is not by motion for a directed verdict or dismissal. Instead, a peremptory instruction should be requested or the attorney should move to strike the deficient allegations. A motion for a directed verdict may not preserve an error for appeal when the error is insufficient evidence on an issue but not on a claim. For example, if the evidence in a negligence action shows without dispute that a defendant violated a statute, that the injured party is within the class intended to be protected, and that the risk presented was within the scope of the risk intended to be avoided, a peremptory instruction on negligence per se would be proper. This is not, however, equiva-

lent to a directed verdict on the negligence claim. A jury issue remains if there is also evidence from which a jury could find that the defendant acted reasonably in violating the statute. If there is such evidence and only a directed verdict is moved for and denied, that denial will not preserve error that could have been preserved by offering a peremptory instruction.

6. Finally, a party seeking to preserve either legal error or factual insufficiency as to a particular specification of fault cannot rely on a blanket motion asserting factual insufficiency of all specifications. Also, the objection must be in the motion itself.

I. Misconduct of Counsel or Court.

Alleged impropriety must be challenged by contemporaneous objection or motion for mistrial. When a court makes comments that could be the subject of a mistrial motion, it is imperative that the attorney move against those comments immediately. A motion for mistrial is timely only if it is made when the objectionable event occurs.

J. Entitlement to Attorneys' Fees.

If fees are going to be sought, the safest course is to make explicit by pleadings and during trial the grounds on which fees will be sought and to timely file the petition. Submission of a detailed statement of attorneys' fees is not required to preserve challenge to a trial court's refusal to award any fees at all. **CAVEAT:** A trial court does not have discretion under ORCP 12 B or ORCP 15 D to award fees despite an untimely filing of the attorneys' fees statement.

V. IN THE TRIAL COURT AFTER VERDICT OR DECISION

A. JNOV.

Motions for a new trial and JNOV are timely when filed before entry of judgment. Unlike in federal court, a motion for JNOV in state court is not required to preserve on appeal an attack on the sufficiency of the evidence in a jury case, so long as the appellant timely moved for a directed verdict before submission to the jury. A corollary to this is that a court may not grant a JNOV on grounds not previously asserted and rejected in a motion for directed verdict. **CAVEAT:** If, how-

ever, a party *only* files on a specific issue a motion for JNOV, and does not join it with an alternative motion for a new trial on that specific issue, the party has waived for appeal any and all arguments for a new trial as to that specific issue, but not otherwise.

B. Motion for New Trial.

With one notable exception, a motion for a new trial is not required to preserve on appeal an error previously preserved during trial. When there was a "we can't tell" verdict with at least one factually insufficient claim, any right to a new trial as to that specific claim is waived if a party files, after the verdict, a motion for JNOV alone as to that specific claim. **CAVEAT:** Evisceration of the "we can't tell" rule in a 2003 Oregon Supreme Court decision probably moots this exception. **CAVEAT:** A party may not use "surprise" under ORCP 64 B as a basis for seeking a new trial unless a party moved for a continuance so as to respond during trial, thus possibly eliminating the need for a new trial.

C. Motion to Reconsider.

Never file a motion to reconsider. Motions to reconsider are "asking for trouble." An argument is not preserved for appeal if it is made for the first time in a motion for reconsideration.

D. Flaws in the Verdict.

1. An improper verdict must be challenged when the verdict is returned, or the error is waived.
2. An objection to the form of judgment will not preserve for appeal the issue of whether the verdict is defective.
3. If, however, a verdict is void and not just improper, failure to object before the verdict is received and filed is not a waiver.
4. If a party fails to request a jury poll, the right to request a poll is waived. The court does not have to poll the jury in the exact manner requested by counsel.

E. Amount of Punitive or General Unliquidated Damages.

Before one can claim that the amount of a jury's general or puni-

tive damage award was the product of passion and prejudice, or that the amount of a punitive damage award is excessive under federal due process, there must first be a verdict. Just as a ruling on a motion for a new trial is reviewable when it concerns juror misconduct, a motion for remittitur or, in the alternative, a new trial, is an appropriate means for challenging an excessive verdict.

F. Defects in Court's Findings.

1. Unless a request is made before commencement of the trial, a court is not required to make special findings.

2. If special findings are made, a party need not object to the findings themselves, nor even to general findings, in order to challenge the findings on appeal. If, however, the issue is not the findings themselves, but instead the sufficiency of those findings to support a judgment, a party must assert the insufficiency before the trial court in order to argue insufficiency on appeal.

3. Additionally, in a trial before the court, a party must object to a legally erroneous damage determination in the period after issuance of the judge's opinion but before entry of judgment.

G. Evidentiary Errors or Legal Errors Previously Raised.

No motion for a new trial or other post-trial motion is required to preserve for appeal exceptions or objections already made.

H. Loss of Right to Appellate Review Through Acceptance of Benefits.

An appellant can lose the right to appeal by accepting benefits under a judgment when that acceptance is inconsistent with appeal of the judgment. An appellant cannot accept the benefits of a judgment and also pursue an appeal that may overthrow the right to those benefits. An appeal may, however, be maintained when benefits have been accepted and the relief sought on appeal is consistent with that acceptance. Similarly, if a judgment is divisible, an appellant may accept benefits under one portion and challenge on appeal a divisible portion of the judgment.

VI. ON APPEAL

A. Appeal.

1. Timely appeal from a judgment also serves as an appeal from prior rulings and orders leading to that judgment.

2. If, in a notice of appeal, a party designates less than the complete transcript of all testimony and all instructions given and requested, it must specify in the notice of appeal the errors it assigns.

3. Error is not preserved by an appellant unless error is specifically assigned in the appellant's brief, with verbatim quotations showing how the issue was raised below.

4. An issue cannot be raised for the first time at oral argument or in a reply brief.

B. Cross-Appeal.

1. A cross-appeal is not required to argue, in ***support*** of the judgment, a ground that the trial court considered but rejected.

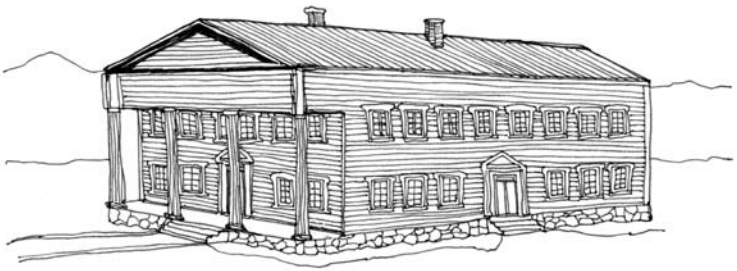
2. A cross-appeal is required when a party seeks relief that would alter the judgment.

C. Respondent's Cross-Assignment of Error.

1. A cross-assignment of error by a respondent is an assertion of error that becomes relevant if and when the trial court reverses or otherwise awards relief to the appellant, *e.g.*, evidentiary issues that will again arise following reversal and remand for a new trial.

2. Although a cross-assignment of error does not require that a cross-appeal has been filed, such arguments are preserved for appellate review only when the respondent makes the arguments in its brief, in the format required for assignments of error generally.

HISTORY MATTERS



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Oregon's First Capitol Building in Oregon City

AN IN-DEPTH HISTORY OF THE LOCATION ACT CONTROVERSY

By Stephen P. Armitage, Staff Attorney, Oregon Supreme Court.

In late 1851, the three justices of the Supreme Court of the Territory of Oregon all issued lengthy written opinions regarding the validity of an act of the Territorial Legislature. The Location Act controversy, which concerned an act making Salem the seat of Government for the Oregon Territory, split the Supreme Court and created what amounted to a constitutional crisis, in which the Legislature and the Supreme Court each treated the actions of the other as null and void. But while the broad outlines of the Location Act controversy are fairly well known, the details are not. And neither are the opinions of the justices; they are difficult to find, as they were not reported in the Oregon Reports.[1]

The bare outlines of the Location Act controversy can be summarized in a few sentences. In 1851, the Territorial Legislature, meeting in Oregon City, passed an act that (among other things) established the seat of government at Salem. At the next term of the Territorial Supreme Court, the Chief Justice and one associate justice met in Oregon City and declared the Location Act void, because it contained more than one object, in violation of the act of Congress establishing the Territory. At the same time, the majority of the Legislature met for its next session in Salem, where they were joined by the other associate justice of the Supreme Court. That justice not only gave the Legislature his opinion that the Location Act was valid, he also asserted that the written opinions of the other justices were a nullity, because those justices had not met at the seat of government as required by law. In 1852, Congress resolved the impasse by confirming that Salem was the capital and ratifying the actions that had been taken by the Legislature that had met in Salem at the previous term.

The three justices of the Supreme Court of the Territory of Oregon during the Location Act controversy were Chief Justice Thomas Nelson, Associate Justice Orville C. Pratt, and Associate Justice William

1 The earliest opinions reported in the Oregon Reports date from the December term, 1853. Keith Garza and I are preparing a book that will publish the full text of the Location Act opinions, together with other unreported actions of the Territorial Supreme Court prior to 1853.

Strong. Justice Pratt had been appointed to the office by President James K. Polk, a Democrat, in 1849. Sidney Teiser, *First Associate Justice of Oregon Territory: O.C. Pratt*, 49 Or Hist Q 171, 171-74 (1948). Pratt was the first territorial justice to arrive in Oregon, and he administered the oath of office to the other territorial officials. *Id*. at 173-74. He was from New York state. He had received an appointment to West Point, but he attended only two years before resigning. Pratt then took up the study of law at a firm, becoming admitted to the practice of law in 1840. He practiced in New York for three years, then moved to Illinois and practiced there for four. Eventually, he traveled to California and Oregon as a confidential agent for the Secretary of War. He did not learn of his appointment to the Territorial Supreme Court until after he arrived in Oregon. *Id*. at 174-76.

The next participant in the Location Act controversy to arrive in Oregon was Associate Justice William Strong. Sidney Teiser, *William Strong, Associate Justice of the Territorial Courts*, 64 Or Hist Q 293, 293 (1963). Strong, appointed by the Whig administration of President Zachary Taylor in 1849, was born in Vermont and raised in New York. He graduated from Yale College and afterward studied law, eventually being admitted to the Ohio bar. His trip by sea from New York City to Oregon took eight months; he left in December of 1849, but he did not arrive until August of 1850. *Id*. at 293-96.

The final justice to arrive in Oregon was the Chief Justice, Thomas Nelson. Also from New York state, Nelson had graduated from Williams College at the age of 17. Sidney Teiser, *The Second Chief Justice of Oregon Territory: Thomas Nelson*, 48 Or Hist Q 214, 214 & n 8 (1947). He became a lawyer in 1840 and entered into a partnership with his father. In 1851, President Millard Fillmore, a Whig, appointed Nelson as Chief Justice of the Territory. Nelson arrived in Oregon City in April of 1851. *Id*. at 214-16.

The dispute would revolve around the "single object" requirement for legislation, found in section 6 of the 1848 Act of Congress that made Oregon a Territory. Act of August 14, 1848, ch 177, 9 Stat 323 ("Territorial Act"). The organization of section 6 is chaotic at best. Section 6 governed the powers of the Territorial Legislature, making a general grant of authority to legislate, but then withdrawing that authority as to certain specified subjects -- "interfering with the primary

disposal of the soil," entering into debt, issuing scrip, etc. Following that list section 6 provides:

> "and all such laws, or any law or laws inconsistent with the provisions of this act, shall be utterly null and void[.]"

While I have added a period to end the sentence, section 6 does not; without even pausing for breath, it continues the same sentence by also requiring that taxes must be equal and uniform and different forms of property may not be assessed differently. And then, tacked to the very end of section 6, is the following:

> "To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

That requirement of a single object expressed in the title would be the central focus in the debates over the validity of the Location Act.

The Territorial Act also had authorized the Legislature to designate the seat of government for the Territory. Section 15 provided that the first session of the Legislature would be wherever the Governor directed, and

> "at said first session, or as soon thereafter as they shall deem expedient, the legislative assembly shall proceed to locate and establish the seat of government for said territory, at such place as they may deem eligible[.]"

The Territorial Legislature nevertheless did not take steps to establish a seat of government until early 1851, when it passed the Location Act. Act of Feb. 1, 1851, *Statutes of a General Nature Passed by the Legislative Assembly of the Territory of Oregon, 2d Session*, at 222-23 (1851).

The Location Act was entitled "An act to provide for the selection of places for location and erection of the Public Buildings of the Territory of Oregon." It contained ten sections.

Section 1 established the seat of government in Salem, and required the Legislature to hold every session there. Sections 4-7 established a board of commissioners to supervise the construction of buildings at the seat of government.

Section 2 established a penitentiary at Portland. Sections 8 and 9 prescribed the capacity of the penitentiary and established a board of commissioners to supervise the construction.

Section 3 established a university at Marysville (now Corvallis).

Section 10 provided that the act took effect immediately on its passage.

Although the Location Act later became the object of fierce partisan squabbling, it may not have had any real political import at the time. *See* Walter Carleton Woodward, *The Rise and Early History of Political Parties in Oregon II*, 12 Or Hist Q 35, 37-38, 43-44 (1911) (suggesting that Democratic Party leaders used Location Act to force party alignment). For example, there seems to have been no effort to declare Oregon City the seat of government. The bill as introduced into the House of Representatives appears to have had blanks as to all of the locations -- for the seat of government, for the penitentiary, and for the university. It was not until the third reading, on January 30, 1851, that the House moved to "fill the blanks." *Journal of the House of Representatives of the Territory of Oregon*, 2d Sess, 80-81 (1851). The first proposal to fill the blanks would have made the seat of government Cincinnati (later Eola), in Polk County, but that was defeated. *Id.* at 80. The second proposal, to fill the blanks regarding the seat of government with Salem and Marion County, passed. *Id.* More significantly, one of the House votes ***against*** passage of the Location Act was cast by Matthew P. Deady, a staunch Democrat. *Id.* at 81. It seems unlikely that Deady would have bucked the interests of his party, unless those interests had not yet been declared.[2]

Having passed the House by a vote of 10-8, the bill moved to the Council, the second legislative house of the Territory. There, the bill passed 6-3, on February 1, 1851. The three dissenting voters, however, "entered their protest against the passage of said act, on the ground that it was in conflict with the act of Congress 'to establish the Territorial Government of Oregon.'" *Journal of the Council of the Territory of Oregon*, 2d Sess, at 99 (1851).

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2 Deady himself would later write that, during the period 1850-53, "'we stripped the husk from our party platform and found the binary kernel to consist of the simple elementary parts, "*Victory*" and the "*Spoils*."'" Robert N. Peters, *The "First" Oregon Code: Another Look at Deady's Role*, 82 Or Hist Q 383, 392 (1981) (citation and footnote omitted; emphasis in original).

That note of protest seems to have been the first claim that the Location Act was unconstitutional. Under other circumstances, perhaps that objection would have been the end of the matter. But then the Whig Governor, John P. Gaines, got involved. On February 3, 1851, he sent a letter to the Territorial Legislature declaring that the Location Act violated the "single object" requirement (among other things). H.R. Exec. Doc. No. 94, 32d Cong, 1st Sess, no. 2, at 3-4 (1852). Gaines declared that it was his duty not to carry out any part of the Act.

That letter seems to have irritated many people. Under the Territorial Act, the Governor had no authority to either approve or veto legislation, so Gaines was thought to be tampering in things that were not his business. Woodward, 12 Or Hist Q at 38. Besides which, Governor Gaines was a Whig appointee in a majority Democratic state. And finally, Gaines was not popular:

> "Pompous and aristocratic in bearing, he was tactless in action and overzealous in exerting his authority. At best it was somewhat repugnant to these western Americans, used the governing themselves, to be placed under what they considered foreign officials; under such a man as Gaines it was positively galling."

Id. at 37. Gaines's remonstrance was presented to the House of Representatives on the afternoon of February 3, but the House did nothing.[3]

Governor Gaines was unwilling to let the matter rest there. He submitted the matter to the Attorney General of the United States, asking for his opinion. Attorney General John J. Crittenden responded in April of 1851, concurring in Governor Gaines's conclusion that the Location Act violated the "single object" clause of the Territorial Act, and hence it was invalid. H.R. Exec. Doc. No. 94, *supra*, no. 3, at 5-6.

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3 *Journal of the House of Representatives*, at 87. There was a motion to have 30 copies of the message printed, but the motion was defeated in an 8-9 vote. The representatives who voted to print the message were the same eight who had voted against the Location Act -- including, again, Matthew P. Deady.

The circumstantial evidence thus suggests that Deady himself *may* have believed that the Location Act violated the "single object" provision of the Territorial Act. That said, Deady also has been attributed with having written a September 1851 editorial that vigorously argued that the Location Act was constitutional. Donald C. Johnson, *Politics, Personalities, and Policies of the Oregon Territorial Supreme Court, 1849-1859*, 4 Envtl L 11, 44 (1973).

The opinion of the Attorney General reached Oregon in the summer of 1851. Donald C. Johnson, *Politics, Personalities, and Policies of the Oregon Territorial Supreme Court, 1849-1859*, 4 Envtl L 11, 38 (1973). Democrats now began to rally to the claim that the Location Act was valid. While some Democratic leaders privately expressed doubts about forcing the issue, they were eventually persuaded. Woodward, 12 Or Hist Q at 43. The opinion of the Attorney General was attacked, both for being partisan (Crittenden was Attorney General for President Fillmore, a Whig) and for being nonbinding. Johnson, 4 Envtl L at 38 (quoting newspaper editorial).

At the same time that the Location Act became a major partisan controversy, other matters within the Supreme Court contributed to the discord. First was the infamous "Blue Book" controversy, in which Chief Justice Nelson and Justice Strong both (individually) concluded that another act of the Territorial Legislature had violated the "single object" requirement, when Justice Pratt concluded that it had not. Johnson, 4 Envtl L at 36-37; Lawrence T. Harris, *History of the Oregon Code: The Controversy About the Seat of Government and Blue Books*, 1 Or L Rev 184, 184-92, 193-94 (1922). (The Blue Book controversy is too complex to be addressed in this article.) Second were two separate incidents in the summer and fall of 1851 in which Chief Justice Nelson, acting with questionable legal authority, released two persons that Justice Pratt had committed to jail for contempt. Teiser, 49 Or Hist Q at 180-81; Harris, 1 Or L Rev at 194-95. Relations between the justices were undoubtedly strained.

Meanwhile, the Location Act controversy rapidly proceeded toward its crisis, which came on December 1, 1851. On that date, both the Territorial Legislature and the Territorial Supreme Court were supposed to convene at the "seat of government." The parties, however, had hardened their positions, and party members picked the seat of government according to party doctrine. The Whigs, who contended that the Location Act was void, appeared in Oregon City, while the Democrats, who contended that the Location Act was valid, appeared in Salem. For the Legislature, this meant that the majority appeared in Salem. Charles Henry Carey, 1 *History of Oregon* 497-98 (1922); Woodward, 12 Or Hist Q at 44.

But for the Supreme Court, with two Whig justices to one Democratic justice, the quorum sat in Oregon City. Woodward, 12 Or Hist

Q at 44. In the first case called on December 1, *Short v. Ermatinger*, an objection was raised that the court lacked authority to hear the matter because it was not met at the seat of government. Chief Justice Nelson and Justice Strong took the matter under advisement. Johnson, 4 Envtl L at 41. The very next day, December 2, the justices issued written opinions concluding that the Location Act was void. *Id*. at 41-42.

Both written opinions are quite lengthy. Justice Strong's opinion covers seven printed pages, while Chief Justice Nelson's opinion covers eight. H.R. Exec. Doc. No. 94, *supra*, no. 4, at 6-21. Given that the opinions were released only one day after taking the matter under advisement, it seems likely that the justices had anticipated the objection and written their opinions ahead of time.

Justice Strong's analysis starts by noting that the Legislature must meet at the seat of government. The Provisional Government had made Oregon City the seat of government in 1844. *Id.* at 8. For the seat of government to have been changed from Oregon City, then, there must have been a valid act of the Legislature. The Location Act purported to be such a law, but was it valid? That depended on the power of the Legislature. The Territorial Act, which functioned as a constitution for the Territory and constrained the powers of the Legislature, required that "every law shall embrace but one object, and that shall be expressed in the title." Strong concluded that the Location Act failed that requirement. First, the title of the act did not express the object, which was to establish the seat of government. *Id.* at 10. Second, the act itself contained three different objects: the location of the seat of government, the location of the penitentiary, and the location of the government. *Id*. at 11. "Every one of those objects is of sufficient importance to be the subject of a separate act * * *." *Id*. By the very terms of section 6 of the Territorial Act, then, the Location Act is "null and void." *Id.*

Strong then anticipated an objection that the Supreme Court had to presume the validity of the Location Act and meet in Salem before the court could strike down the Act. He was willing to concede that an act should be treated as presumptively valid, but, he argued, that did not mean that an act is valid until struck down by some formal action. *Id.* at 12. A void act is void, and no one needs to obey it. *Id.* Relatedly, Justice Strong also argued that the individual justice's decision about where to meet was an official act by the justice, and so the mere fact

that a majority met in Oregon City itself functioned as a judicial determination of the invalidity of the Location Act. *See id.* (so indicating).

That bare summary of Justice Strong's opinion leaves out several poisoned barbs thrown at his opponents. It is not enough for Justice Strong to conclude that the Location Act is invalid -- he goes on to attribute it to maliciousness on the part of the Legislature.

> "Any one, upon reading the law, would infer that there was a studied design running through the whole of that act, to see how many provisions of the organic law could be violated in so limited a space, and that the title is a labored effort to express as little as possible of what is explained in the body of the bill. * * * [T]he conclusion is almost irresistible that there must have been some improper influences at work, to have intermixed them [the three objects identified by Strong] in one and the same act."

Id. at 11. And while Justice Pratt is not named specifically, he seems a likely target of Justice Strong's contention that the "single object" matter is

> "so clear, it seems to me, as to leave no cause for a reasonable doubt in the mind of any man who had his ordinary allowance of common sense and the disposition to use it fairly and honestly. Although purely a question of law, yet it [the invalidity of the Location Act] is so plain to the comprehension of any man who examines it, that it requires a considerable effort of legal ingenuity to so far mystify, as to raise the shadow of a doubt."

Id. at 7.

Chief Justice Nelson's opinion analyzed the legal issues the same way that Justice Strong did -- he concluded that Oregon City had been the seat of government, that a valid act of the Legislature was needed to change that, and that the Location Act was not valid. Chief Justice Nelson agreed that the Location Act contained "at least three different objects" -- the seat of government, the location of the penitentiary, and the location of the university. *Id.* at 17. He also agreed that the Location Act was void, and no action was needed to set it aside:

> "But the court has no power *to set aside* any law. That is a legislative function -- it is the province of the court simply to declare what the

law is * * *. A void act is none the more void because the court has so judicially determined; the court does not make the law void, it only settles the question and removes the uncertainty."

Id. (emphasis added). He also agreed with Justice Strong that the court did not need to travel to Salem to hold the law invalid.

Chief Justice Nelson's opinion differs substantially in tone, however, from that of Justice Strong. The Chief Justice was conciliatory, noting his "sincere" and "unfeigned respect" for the Legislature, against which he concluded that his duty required him, nevertheless, to hold the Location Act invalid. *Id.* at 16, 20. Of the three opinions written on the Location Act, Chief Justice Nelson's best reflects a judicial temperament.

The Legislature then asked Justice Pratt to give his opinion of the Location Act, which he offered on Christmas Day, 1851. In 26 printed pages, Justice Pratt assailed the Court's decision and argued that the Location Act was valid. Again, the opinion of Justice Pratt is not reported, but the Legislature printed it as an appendix to the Journal of the Council. *Journal of the Council of the Territory of Oregon*, 3d Sess, Appendix, at 7-33 (1852).

I will treat Justice Pratt's written opinion as if it were a dissenting opinion to the majority's ruling. I should point out, though, that there's good reason to question whether one should dignify Justice Pratt's writing with the term "opinion," at least in the legal sense. No case was pending before Justice Pratt -- he did not purport to render his opinion in the context of *Short v. Ermatinger*. Even if Justice Pratt was correct that the Supreme Court had to sit in Salem, there was no quorum of the court in Salem, and so Justice Pratt could not have been exercising any judicial power of the Supreme Court. Besides which, the majority had already ruled that Salem was not the seat of government, which cast even more doubt on Justice Pratt's authority to offer any judicial opinion there.

That aside, Justice Pratt's opinion is a good example of alternative pleading, because in it he denied virtually every premise of the majority's argument. He denied that the Provisional Government had ever established the seat of government in Oregon City, arguing that only the "resolution of a sort of committee of safety" had seemed to make it so. *Id.* at 14. But even if the Provisional Government had es-

tablished Oregon City as the seat of government, the Territorial Act had invalidated it, because it gave the Governor power to designate where the first Territorial Legislature would meet, and gave the Legislature authority to locate the seat of government at that or any future session. *Id.* at 10-11, 14-15. The Supreme Court was required by the Territorial Act to meet at the seat of government, but Oregon City had not been the seat of government since at least the Territorial Act; hence "the Supreme Court undertaken to be holden there on the first instant, never had *any legal existence nor any legal power*." *Id.* at 17 (emphasis in original).

Having asserted that the opinions of the Supreme Court majority were entirely invalid, Justice Pratt now turned to the Location Act itself. First, he contended, the Territorial Act did not make laws passed in violation of the "single object" provision void. He admitted that section 6 of the Territorial Act provided that "any law or laws inconsistent with the provisions of this act, shall be utterly null and void," but he contended that, properly understood, it did not apply to the "single object" clause. The "null and void" text came before the single object clause, he noted, and it referred only to the powers that Congress had specifically refused the Territorial Legislature (chartering banks, entering into debt, issuing scrip, etc.). *Id.* at 23-24. The requirement that laws embrace only a single object was, according to Justice Pratt, merely directory only; it was not mandatory, such that its violation would have made the law void. *Id.* at 24-27.

But even if the "single object" requirement were mandatory, Justice Pratt argued, the Location Act did not violate it. "I believe that the location law has but a *single* object, the location and erection of the public buildings of the Territory * * *." *Id.* at 32 (emphasis in original).

Like Justice Strong, Justice Pratt was not above jabbing at his opponents. For example, he contended that "the Executive or his immediate personal and political friends alone" had tried to take on themselves full authority to interpret the "constitution" (the Territorial Act). *Id.* at 8. Justice Pratt noted that the Territorial Supreme Court was the proper body to interpret laws, but "not the Judges when *illegally organized*, and assuming, without authority of law, such important powers[.]" *Id.* at 8-9 (emphasis in original). He complained that "two of the Judges met at Oregon City, and there sought to clothe themselves with the power of the Supreme Court, in contravention of the law of Con-

gress, and in defiance of this location act[.]" *Id.* at 13. Pratt characterized the actions of Chief Justice Nelson and Justice Strong as "strange" and "hasty." *Id*. If the other justices had stopped to think, Pratt argued, they would have

> "saved [Oregon] its present embarrassments, and themselves from what must be too apparent to all, the prostration of even decent respect for what was thus sought to be enforced in the name of judicial power."

Id.

Justice Pratt's opinion fell on fertile ground with the Legislature. The Legislature voted to have 3,000 copies printed. Johnson, 4 Envtl L at 44. They also passed an act stripping Chief Justice Nelson of trial court jurisdiction over Marion and Linn Counties, and setting the date of the terms of court for one week earlier than previously. (That left Nelson with trial court jurisdiction over only Clackamas County, which had Oregon City was the county seat.) Chief Justice Nelson concluded that those acts of the Legislature were void, because they had not been passed at the true seat of government, Oregon City. Accordingly, he showed up in Marion County at the time originally scheduled for the term of court to begin -- only to discover that Justice Pratt had already appeared and decided all the cases. Johnson, 4 Envtl L at 44-45; Tieser, 48 Or Hist Q at 220; Harris, 1 Or L Rev at 194.

Matters had reached an impasse. A majority of the Supreme Court had effectively held that the Legislature was not lawfully met and could not pass laws, while for its part the Legislature refused to recognize the validity of the Supreme Court's decision voiding the Location Act.

Congress would take swift action (given the distances involved) to resolve the matter -- and in doing so it vindicated the Legislature. In May of 1852, Congress passed an act that (1) ratified the Location Act making Salem the seat of government, and (2) resolved that the actions taken by the Legislature when it had met at Salem were "hereby declared to have been held in conformity to the provisions of law." Joint Resolution of May 4, 1852, 10 Stat 146.

The Legislature and the Democrats immediately took this as complete vindication against the Whigs. At least one newspaper noted that the 1852 act had received the unanimous vote of a committee com-

posed of both Whigs and Democrats, and gloated in an editorial that "'the "Supreme Court" is "done for," laid out, kilt[.]'" Carey, at 501 (quoting Oregon Statesman, June 8 & 29, 1852). As for the opinion of the majority:

> "'Perhaps before leaving the subject we had better advertise for a few bottles of lavender water in which to preserve a copy of its "decision," and the record of its never-to-be-forgotten session. In after times they will be looked upon with the same painful interest with which John Rogers' children "looked upon their father's face when he was dead and gone."'"

Id. (quoting Oregon Statesman, June 8 & 29, 1852).

Justice Pratt's term expired in 1852, while the terms of Chief Justice Nelson and Justice Strong expired in 1853. None of the three justices would be reappointed to Oregon's Territorial Supreme Court.

Chief Justice Nelson had been the focus of much of the vituperation of the Democratic newspapers of the state. Teiser, 48 Or Hist Q at 222; Teiser, 64 Or Hist Q at 301. He apparently considered resigning before the end of his term. Teiser, 48 Or Hist Q at 222-23. In the end, he did complete his term, but he returned to New York afterward. *Id.* at 224. He returned to Oregon for a visit in 1889, and a newspaper editorial would say that Nelson "'has been kindly remembered in Oregon through all these years[.]'" *Id.* at 224.[4]

Justice Strong's judicial district (and his home) lay north of the Columbia River. In 1852, Strong and four others started a movement to set off that area as a separate territory. The movement was successful, and in 1853 Congress created the territory of Washington. Teiser, 64 Or Hist Q at 301. Strong later helped prepare the first code of laws for Washington, served in the Washington Territory's House of Representatives, and eventually was appointed as Associate Justice to the Supreme Court of Washington Territory. *Id.* at 301-04. In 1861, he moved back to Oregon and lived in Portland for the rest of his life. *Id.* at 304.

Justice Pratt, who had seemingly won the Location Act contro-

4 I should point out that the newspaper that printed that editorial, the *Oregonian*, was one of the Whig newspapers that had supported Nelson and Strong during the Location Act controversy.

versy, found that it availed him little. The newly-elected Democratic President, Franklin Pierce, announced his intention to appoint Pratt as Chief Justice. But Senator Stephen Douglas and one other senator, both Democrats, approached the President and "'made charges of a character that made it absolutely necessary and proper'" for the President to withdraw Pratt's nomination. Johnson, 4 Envtl L at 50-51 (internal quotations and citation omitted). Despite the advice of his friends, Pratt ran for the office of territorial delegate to Congress against the incumbent, fellow Democrat and former Territorial Governor Joseph Lane. Pratt was soundly defeated. Teiser, 49 Or Hist Q at 186-87. Shortly afterward, Pratt moved to California. He became very wealthy through various business and real estate deals. He was involved in a couple of minor scandals -- one an adulterous affair that led to his divorce, and the other his assertion of the privilege against self-incrimination in a court case associated with a raid on a "banco game." *Id*. at 188-90. He died in 1891 at age 72. *Id*. at 191.

A BRIEF HISTORY OF THE OREGON REPORTS (PART 2 OF 2)

By Thomas A. Balmer, Oregon Supreme Court

THE STORY THUS FAR . . .

As we saw in part 1 of this article (1 Oregon Appellate Almanac 157 (2006)), although the Oregon Constitution requires that the Supreme Court file "concise written statements" of its decisions with the Secretary of State "at the close of each term," early legislatures made no provision for publication of those decisions. Credit for publication of volume one of the Oregon Reports goes to Joseph G. Wilson, who had been appointed clerk of the territorial Supreme Court in 1852 and of the new state Supreme Court in 1859. In 1862, Wilson gathered, edited, and published all the written opinions of both courts that he could find, through the December 1861 term of the state Supreme Court, as well as several long opinions by Oregon federal district court Judge Matthew Deady. Wilson personally arranged for the publication of volume one by Banks & Brothers, Law Publishers, of New York, and Wilson's choices as to typeface (Century Schoolbook), size, and traditional lawbook colors (light brown covers; red/orange and black spine plates) are still followed in the current Oregon reports. The 1862 legislature provided at least a bit of help to Wilson, appropriating $800 for the state to purchase 100 copies of volume one from him. Wilson, who himself had been appointed to the Oregon Supreme Court in 1862 (and had been designated as "reporter" in 1867) also edited volume 2 (1869), again published by Banks & Brothers, and volume 3 (1872), published by A.L. Bancroft & Co., of San Francisco.

We also saw in part 1 how later reporters followed Wilson's lead in the style of the Oregon reports and in using A.L. Bancroft as the primary publisher, although some volumes in the 1880s identify various private Portland or Salem book publishers as the "printer," "publisher," or "copyright holder." In 1889, the legislature, complaining about the "present inefficient and costly system of reporting," put the state in the business of publishing the Oregon reports and required that the judges prepare the opinions for publication. Thus, volume 18 (1889) was published by the state printer, with Chief Justice Thayer identified

as the court reporter. (At that time, the state printer was an elected officer who published official state documents on his own equipment and with his own employees.) But Bancroft-Whitney of San Francisco (A.L. Bancroft having merged in the 1870s with another San Francisco law publisher, Sumner Whitney & Co.) brought out an identical volume 18, and that competition continued for some years. By the turn of the century, the legislature had returned responsibility for publication of the Oregon reports to a "supreme court reporter" and identical volumes were being published on an ongoing basis both by the state printer and by Bancroft-Whitney. Meanwhile, Bancroft-Whitney and Portland publisher George Bateson were busy reprinting and selling earlier volumes of the reports to Oregon's growing legal community.

OTHER "REPORTS" OF OREGON DECISIONS

Before we take up the story of the Oregon Reports after 1900, we digress briefly to remind the reader that the official reports were not the only source available to those interested in Oregon Supreme Court opinions. As noted in part 1, perhaps the first Oregon decision to be "published" was the June 1847 decision of the Supreme Court of the provisional (pre-Oregon Territory) government, *Knighton v. Burns,* which appeared in the *Oregon Spectator* newspaper around the that time it was issued and later was reprinted in 1883 in volume 10 of the Oregon Reports. The more significant development, however, was the extraordinary growth in the late 1800s of printed legal materials, particularly reports of appellate cases from around the country. Oregon cases, while small in number and impact compared to those from the courts of New York, Massachusetts, and other heavily populated states, began to be included in those compiliations.

The first great wave of law books came not from West Publishing Company, but from Bancroft-Whitney of San Francisco. In 1871, a year before the founder of West even began publishing summaries of Minnesota cases for local lawyers, Bancroft-Whitney embarked upon the unprecedented task of publishing a series of "reports [that] will contain all cases hereafter adjudicated in the courts of last resort in United States, unincumbered by practice cases and those of local interest only." Or, as the title page of "American Reports" describes the volume, "the American Reports, containing all decisions of general interest decided in the courts of last resort of the several states, with

notes and references by Isaac Grant Thompson." An Oregon decision first appeared in American Reports two years later, in volume 8, apparently because Mr. Thompson considered *Weise v. Smith*, 3 Or 445, 8 Am Rep 620 (1869) – a case involving riparian rights and whether the Tualatin River was navigable – to be the only case in volume three of the Oregon reports to be of "great general importance," rather than of merely local interest. Two more Oregon cases, drawn from volume 4 of the Oregon Reports, were included in volume 18 of the American Reports (1878).

Perhaps buoyed by strong sales of the American Reports (which, after 80 volumes, were succeeded by Bancroft-Whitney's "American State Reports" (140 volumes, 1888-1911), and then Lawyers Reports, Annotated, eventually to be followed, in 1919, by the more familiar American Law Reports (ALR) published by Bancroft-Whitney and Lawyers Cooperative Publishing Co.), the company undertook to cover the ground it had missed when it started the American Reports in 1871: the thousands of reported cases issued before that date. Beginning in 1878, Bancroft-Whitney brought out 100 volumes of "American Decisions," which purported to include all the important cases prior to 1869. Beginning with the cases from the 1700s, it is perhaps not surprising that the first Oregon cases in this retrospective collection do not appear until volume 62 (1886), which reprints three cases decided by the territorial Supreme Court in the mid-1850s and that appear in volume one of the Oregon Reports.

West Publishing began its national reporter system with the Northwest Reporter in 1879, and published the first volume of the Pacific Reporter in 1884 (although that volume includes some cases from 1883). Unlike Bancroft-Whitney, which selected what it saw as the important cases, from the beginning West apparently was of the view that more was better, undertaking to publish every available reported appellate court decision. Oregon makes its first appearance in volume one of the Pacific Reporter, with *Davidson v. O. & C. Railroad Co.,* 11 Or 136, 1 P 705 (1883), a case involving such timeless legal issues as whether a complaint is deemed amended when the proof at trial goes beyond the complaint, but is not objected to, and whether a railroad could be liable for damages to a neighboring landowner for improper construction of drainage ditches. (The answer is yes.)

We therefore see that, in addition to the Oregon Reports that were

being published by the state printer and by Bancroft-Whitney, an Oregon lawyer at the turn of the 20th century also could have obtained at least some Oregon Supreme Court decisions through the two major competing law publishers, Bancroft-Whitney, with its American Reports and then American State Reports, and West, through the Pacific Reporter.

SHIFTING RESPONSIBILITIES AND LEGISLATIVE TINKERING

In the years immediately following 1900, the Oregon reports were published by the state printer and separately by Bancroft-Whitney in almost identical editions. In addition, Bancroft-Whitney reprinted entire sets of the Oregon reports in 1887, 1906, and 1911 and other years, and George Bateson of Portland reprinted at least some volumes. Demand for the volumes was apparently difficult to predict, as evidenced by the frequent reprinting of volumes only a few years after they appeared and the Oregon legislature's varying directives as to the number to be produced by the state printer. A 1901 statute, for example, specified that the state printer was to print 600 copies of each volume, while in 1913 the number was increased to 900. In 1913, according to minutes of the newly established State Printing Board (consisting of the Governor, the Secretary of State, and State Treasurer), the state had exhausted its inventory of volumes 14, 37 to 41, and 43 to 52 of the Oregon Reports.

For reasons that are not altogether clear, the state printer apparently ceded responsibility for the publication of the reports to Bancroft-Whitney in 1913. This may have resulted from a substantial restructuring of the state printing function, which had long been associated with corruption and mismanagement and which, through a constitutional amendment in 1906 and legislation in 1911 and 1913, was turned over to the State Printing Board. As a result, while elected state printers had published official editions of the Oregon Reports, as directed by the legislature, from volume 18 (1889) through volume 64 (1913), with the advent of the state printing board, official publication abruptly ceased in 1913. The state did, however, contract with George Bateson of Portland to print at least several volumes during this period. Bancroft-Whitney thus prevailed, and was (so far as the author can determine) the sole publisher of volumes 65 (1913) through 130

(1930) of the Oregon Reports. Although the state had withdrawn from the publication of Oregon Reports, the state printing office, in at least one way, retained a close relationship with the Supreme Court: the organizational changes in 1913 led the state to purchase its own printing equipment and hire its own employees – and the state established its printing department on the first floor of the new Supreme Court building in 1914, where it remained until 1928.

In 1930, the State Printing Board "upon the request of the Supreme Court and the recommendation of the Secretary of State" decided to resume its own publication of the Oregon Reports and "to inform Bancroft-Whitney of its action." Volume 131 (1930) was published by the State Printing Department in Salem, and the volume describes Bancroft-Whitney as "Official Distributors" – a designation that continued through volume 164 (1940). Beginning with volume 139, pursuant to an agreement with West Publishing Co., the Oregon Reports began including syllabi and indices prepared by West and a notation was added on the title page indicating that those parts of the reports were copyrighted by West.

During the early decades of the 20th century, the legislature continued to tweak the style, publication, and distribution of Supreme Court opinions. In 1901, for example, the legislature specified that opinions should contain "the names of counsel on each side of the case" and a "concise syllabus of the points decided," and that volumes of the reports should have "not less than 700 pages." In 1903, the judges were told to prepare opinions in quadruplicate and to deliver them to the court clerk for transmittal to counsel, the secretary of state, and the court reporter (with the reporter directed to send a copy to the state printer). By 1909, the opinions were to be prepared in quintuplicate, with the additional copy to go to the trial court judge for the case.

The legislature also frequently weighed in on the cost of printing, sales, and other details related to the state's versions of the Oregon Reports. For example, the court reporter was paid $500 per volume in 1901, but only $400 in 1921. In 1901, the legislature specified that the state printer be paid $3 per copy for new volumes during the following biennium and that the secretary of state should sell those volumes at $3.50, but also provided that the secretary of state could sell "any other reports of the Supreme Court of Oregon that he may now have on hand to the public at $3.00 per volume." Statutes also

directed who should receive volumes of the reports at state expense – generally judges, clerks, district attorneys, the legislature, and other state officials.

In the 1920s the legislature addressed for the first time the topic of advance sheets. The court had always prepared and distributed a few copies of individual slip opinions before sufficient opinions had been produced to warrant a new volume of the Oregon Reports. By this time, however, the court had instituted a practice of preparing advance sheets as an intermediate step between the slip opinion and the bound volume. In 1927, the legislature authorized the sale of advance sheet subscriptions for $4.50 per year. Ten years later sales apparently were sufficiently strong (or the general fund's need for operating funds sufficiently great) that the legislature ordered that all receipts for the sale of advance sheets in excess of a reserve balance of $500 be transferred to the state's general fund.

Slowly but surely during the middle years of the century, the legislature gave greater authority to the Supreme Court and the state's Department of Finance and Administration over the details of publishing the Oregon reports. In 1935, the legislature, which for 75 years had specified the price of the Oregon reports, provided instead that the sales price be set at a level that covered the actual cost of printing, binding, and shipping, and in 1961 it authorized the state administrative department to sell copies of the reports at the prices that the department determined. By 1967, the legislature was no longer dictating which individuals and offices should receive how many copies of the reports and instead directed the state Department of Finance and Administration to produce the number of copies it deemed appropriate and distribute them as it saw fit. Even in that year, however, the legislature found it necessary to set the price of advance sheet subscriptions, raising the annual price to $13.50.

THE EVOLUTION OF THE MODERN OREGON REPORTS – IN PRINT AND ON-LINE

In the later decades of the 20th century, the legislature devoted its attention to other matters, amending the statutes regarding the Oregon reports only to reflect administrative changes, such as creation of the Oregon Judicial Department and the office of State Court Ad-

ministrator and the replacement of the Department of Finance and Administration with the Department of General Services and later the Department of Administrative Services (DAS).

The last 200 plus volumes of the Oregon Reports have been published exclusively by the state, Bancroft-Whitney apparently deciding not to try to compete with the state printing department, perhaps assuaged initially by its designation as "official distributor" and later by an understanding of the limited profits available from the enterprise. The state printer of the 1880s to 1913 gave way to the "state printing department," and, by volume 333, to "DAS [Department of Administrative Services] Publishing and Distribution." In 2004, the state began contracting out the actual printing of the Oregon Reports (having divested itself of its larger printing presses), and beginning with volume 340 (2006), the printing and binding has been done by Lynx Group Inc., of Salem.

Responsibility for the reports, however, continues to rest with the Court, the State Court Administrator's office, and – perhaps most importantly – with the official editor. Although the 1973 legislature eliminated the official position of Supreme Court Reporter, vesting the responsibilities of that position instead in the state court administrator, the key position is that of editor of the Oregon Reports. Mary Bauman, now in her 24th year as editor, is the latest in a long line of outstanding reporters and editors, supervising the editing and production of each volume.

Although strong themes of continuity and tradition are visible in the nearly 150-year history of the Oregon Reports, change – sometimes gradual, sometimes sudden – is also a constant. Probably the most significant change in recent years is the impact of the internet and the increasing use of on-line legal resources, including the Oregon Reports. The Supreme Court publications office began putting opinions on the Oregon Judicial Department website in 1997. That step, of course, makes the opinions broadly available to the public and practitioners at little or no cost, but it also has reduced demand for the advance sheet subscriptions. Advance sheet subscriptions fell from almost 2000 in 1991 to not quite 1000 in 2007. Demand for the bound volumes of the Oregon Reports is steady, but also down from the 1980s, when older volumes were being reprinted and 1200 copies of new volumes were being produced (although many of those

remained in inventory). The print run currently is 620 copies per volume. Oregon, along with about half of the other states, continues to publish its own versions of its reports, declining to give what is now Thomson/West a monopoly over print versions of Oregon appellate decisions.

The Oregon Reports are a vital source of the state's law, an indispensable tool for lawyers, judges, and legislators. Users now have many options, from the free, electronic versions on the OJD website (and the various free legal databases that make use of the OJD version) to the Westlaw and Lexis commercial services and Thomson/ West's Pacific Reporter, both in the full version and in the green "Oregon Cases" version. But all users, and particularly those who still enjoy the heft of a book in their hand (even if the covers are no longer leather), owe a large debt to the Oregon Supreme Court's first reporter (and, later, justice), Joseph G. Wilson, who in 1862 took the initiative to compile and publish volume one of the Oregon Reports.

A BRIEF HISTORY OF THE STATE OF OREGON OFFICE OF PUBLIC DEFENSE SERVICES

By Walter J. Ledesma, Esq.

As a former Deputy Public Defender for the Oregon State Public Defender, the history of the office has always been an interest of mine. There was a time when no professional appellate public defender existed in Oregon. Fortunately, that oversight was corrected and the office with its excellent staff continue to provide quality representation that comes from specialization.

Oregon's Office of Public Defense Services is comprised of two branches: the Legal Services Division and the Contract Business Services Division. Currently, the Legal Services Division, formerly known as the State Public Defender, provides appellate representation for indigent offenders in two areas: offenders appealing convictions and sentences for crimes and inmates petitioning for judicial review of final orders of the Oregon Board of Parole and Post-Prison Supervision. This article is a brief and unofficial history of the Legal Services Division. A note is in order about this article: the responsibility for its contents is solely mine. Any errors or omissions are mine and should not be attributed to anyone other than the author.

The Office of Public Defense Services traces its origin from a case that was not tried or appealed in Oregon. The professional specialized appellate function in Oregon is part of the legacy of a Florida criminal case. Clarence Earl Gideon was accused of burglary of a poolroom in Florida.

At trial, Mr. Gideon asked for court appointed counsel arguing that the Due Process Clause of the Fourteenth Amendment to the United States Constitution required representation. His plea for an attorney was ignored. Mr. Gideon was convicted and sentenced to prison. His state habeas corpus petition to the Florida Supreme Court was rejected.

Mr. Gideon petitioned for certiorari in a five-page document hand-written in pencil. Gideon argued that an indigent citizen's right to due process of law is violated when a trial court denies a request for

an attorney in a criminal case. Gideon mentioned a right to counsel approximately six times in the petition; however, the Court had ruled that the Fourteenth Amendment did not provide a universal right to counsel in all felony cases, rather, a defendant is entitled to counsel only in such cases as when the lack of counsel would result in "a denial of fundamental fairness." Gideon, asking for a change in the law, received what he asked for; the Court ruled that an indigent person is entitled to counsel at court expense. *Gideon v. Wainwright*, 372 US 335 (1963). Such a beginning provides a compass for the mission that Legal Service Division defenders provide.

Oregon's experience before 1963 was less generous. A statute provided for trial court representation in appropriate cases. *Former* ORS 21.470 provided for an attorney for indigent defendants at county expense. However, the statute had no application to services rendered on appeal and did not authorize the Oregon Supreme Court to appoint counsel. *State v. Delaney*, 221 Or 620, 332 P2d 71 (1958). It was not until the Oregon legislature passed ORS 138.480 in 1963 that any authority existed for the appointment of counsel. With that statute, individuals deprived of liberty and without means to retain an attorney, were provided an attorney to help with an appeal.

Oregon's first Public Defender was Lawrence A. Aschenbrenner. Mr. Aschenbrenner charted new territory as Oregon's first Public Defender. Unlike the elected Attorney General, the Public Defender was and is an appointed position. Mr. Aschenbrenner, was a committed defender whose interests included defending Native Americans. The first reported case for Mr. Aschenbrenner is *State v. Adams*, 240 Or 179, 400 P2d 556 (1965). The case dealt with damaging and prejudicial statements made by Mr. Adams to police officer inquiry after he was charged with the crime but had not been advised of the right to counsel or the right to remain silent. The Oregon Supreme Court reversed and remanded for new trial. A review of the brief filed in the archives of the State of Oregon Law Library, formerly known as the Oregon Supreme Court Library, discloses a tight well-written brief written in the style of that time. The Oregon Supreme Court, then consisting of Chief Justice McAllister, Perry, Sloan, O'Connell, Goodwin, Denecke and Holman, Justices, reversed and remanded the case for a new trial. The opinion by Justice Sloan is swift with its judgment; four paragraphs are all that was needed to cover the facts, law and

dispatch the state's counter argument. With such an auspicious beginning, the office was destined for success.

The office helps focuses on indigent defendants. Taking up the cause of preserving constitutional rights for those without the funds to retain an attorney, attracts individuals with a deep commitment to protecting the rights of those accused of crime. Mr. Aschenbrenner made the first hire of the fledgling organization. Mr. Gary Babcock, seeking work after a stint as a prosecutor, was hired as the first staff attorney. Mr. Babcock was 31 years old when he took his post. He resigned after 25 years as Oregon's Public Defender. Under his watch, the duties of the office expanded including habeas corpus, psychiatric reviews, parole appeals, and prison discipline appeals. The office appeared 12 times before the United States Supreme Court. Mr. Babcock argued three of the cases.

Subsequent to Mr. Babcock, the public defenders included Ms. Sally Avera, Ms. Diane Alessi, Mr. David Groom, and the current public defender, Mr. Peter Gartlan. The office has always had a congenial relationship with the courts. The appellate docket is filled with appeals from the public defender office. However, that is not the only tie they share. The office was intertwined with the judicial department in the early days. The budget of the public defender office was part of the judicial budget. One Court of Appeals judge referred to the office as the "orphan step-child of the judicial department." Currently, the office is funded independently from the courts.

The staff included stellar attorneys who left to go on to careers with distinction. Notably, Chief Justice Paul DeMuniz was a staff attorney at one point. Former staff attorneys continue to appeal and argue and it is not unusual to see the names of former staff attorneys on opinions.

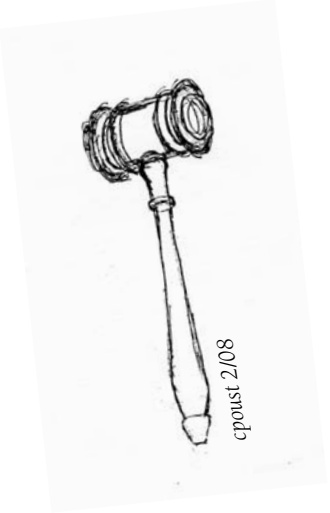
Ms. Avera clerked for the office in 1976. At that time, the office was informal without the current technical sentencing guidelines or Balfour briefs. Typewriters were the current technology of the day. A huge advance was dictation with "mag cards" that could hold up to five pages of text. When Ms. Avera took the helm, computers and the internet were making the practice very different from what it was before. That trend continues today.

Despite the significant caseload, the office manages to find time for fun activities. The staff positions attract the athletic as well as the committed defender. Whether it be lunch basketball with Justices Paul DeMuniz, Michael Gillette, and Mr. John Hoover, lunch tennis with Mr. Gartlan and Mr Jess Barton, or the annual "Advil Cup" softball game with the Court of Appeals, the office has always managed to find time for some fun and games.

The office could not provide the level of service it does without a support staff that fits in with the nature of the office. It has been said that it is easier to replace a staff attorney than it is to find a qualified and committed legal assistant. The office is fortunate to have long-term committed support staff that help the defenders with their important work.

Currently, the office website has 60 people associated with both branches of the Office of Public Defense Services. The important work continues and the quality continues to be top rate. Appellate practice in criminal law is highly specialized. The office does a fine job of handling some of the most difficult cases that an attorney will ever handle. The stakes are high and the office ensures that the playing field is level. The office has a rich history and tradition of excellence that continues to this day.

THE WRITE STUFF



LAW REVIEWS AND THE COURTS: AN OFF AND ON AND OFF AGAIN AFFAIR

By Hon. Jack L. Landau, Oregon Court of Appeals

I have been asked to comment on the question why appellate judges do not cite law review articles in their opinions. The question assumes that, at some Golden Age in the past, judges did cite law reviews and the law reviews influenced judicial decisions. As it turns out, the assumption is correct, at least in part. Law reviews and the courts have had an off and on relationship that is currently fairly decisively off again. Why that is so appears to be a result of a substantial and increasing gap between the focus of legal education and legal scholarship, on the one hand, and the day-to-day workings of the law in the real world, on the other.

In the larger scheme of things, law reviews are relatively recent inventions. The *Harvard Law Review*, first published in 1887, claims credit for being the first. Other schools (the University of Pennsylvania and Albany School of Law, to name two) contest that assessment, but even their publications appeared only a few years earlier. With the notable exception of Louis Brandeis and Samuel Warren's pathbreaking article, "The Right to Privacy," the student-run journals were initially ignored by the bench. Law reviews, as Justice Oliver Wendell Holmes once quipped from the bench, were the "work of boys."

Things changed, however, and with a surprising swiftness. Law reviews proliferated. (Interestingly, when, in 1906, Northwestern University Law School decided to publish the fifth law review in the nation, there was concern that the field had already become "overcrowded." That, however, stopped no one. By 1930, 43 schools had law reviews. By 1955, the number had increased to nearly 80.) Law professors and students authored articles that not only catalogued existing cases but also provided critical analysis and influential prescriptions for future developments. The focus of the scholarly writing was on the law of real-world transactions, litigation, and judging. And that writing found an attentive audience.

In the first half of the twentieth century, law reviews were hugely influential. Much of modern products liability law, for example, can be traced to a path-breaking article by William Prosser. Scholars have

traced much of our modern contract theory, with its emphasis on the reasonable expectations of the parties, to a series of articles by Arthur Linton Corbin. Closer to home, much of the Oregon "constitutional revolution" finds its genesis in Hans Linde's *Oregon Law Review* article, "Without 'Due Process.'"

But things changed further beginning the 1970s and 1980s. Law reviews multiplied like kudzu. Law schools began to produce two, three, or more different journals, each of which publishes up to eight times a year. Harvard, for example, currently publishes 14 different journals each year, while Yale produces nine. By one recent count, there are now over 800 different law reviews published in this country.

The articles published in those reviews became bloated caricatures of themselves. According to one study, in the 1930s, law review articles averaged 13 pages; in the 1960s, 36 pages; and, in the 1980s, 45 pages. It is now easy to find articles as lengthy as a small-town telephone book. I recently ran into an article on New York search and seizure law published in the *Brooklyn Law Review* that was in excess of 350 pages long, with over 1,300 footnotes. The table of contents alone was five pages long. Of course, as footnotes go, that article is a piker, compared with the mother-of-all-law-review-articles, Arnold Jacobs's 1987 tome on Section 16 of the Securities Exchange Act, with 4,824 notes.

Meanwhile, the focus of academic scholarship shifted to federal law, almost to the exclusion of state law concerns. No doubt this is born of competitive pressures in the academic marketplace. Law schools needing to compete for students from around the country do not want to devote their attention to such parochial matters as local law, while teachers find little advantage to publishing on subjects such as the vagaries of the Wyoming law of intestate succession. Federal law is transportable and, as a result, much more attractive.

A recent 2007 issue of the *Virginia Law Review*, for example, consists of five articles, four of which are about federal law. Even better, a recent symposium edition of the *Boston University Law Review* devoted to "The Role of the Judge in the Twenty-First Century" comprises eighteen articles, authored by such legal luminaries as Richard Posner, Erwin Chemerinsky, Judith Resnik, and Stephen Reinhart, each and every one devoted to the role of the *federal* judge. Apparently, the role of "the judge" does not include the role of the state judge.

At the same time, there developed a noticeable preference among law reviews for certain types of scholarship. Federal constitutional law, in particular, became the darling of the law reviews. I daresay that it would be hard *not* to find at least one article about federal constitutional law in every single issue of a "general interest" law review. That recent *Virginia Law Review* issue with four of five articles devoted to federal law? Three of the four were about federal constitutional law. Similarly, the most recent issue of the *Michigan Law Review*, volume 106, number 3, consists of four articles, three concerning federal constitutional law. Mind you, the phenomenon is not limited to the law reviews of the top-ten schools. For example, I just pulled off of my bookshelf, at random, an issue of the *Lewis and Clark Law Review*, volume 10, number 3. Of the eight articles in that issue, every single one was about federal law, and five were about federal constitutional law.

In part because of that increasing focus on federal constitutional law, academics began to question the nature of their own endeavors. Debates ensued over the meaning and significance of "legal scholarship" and whether it was worthwhile to devote scholarly attention to matters of doctrine. With the emergence of the critical legal studies movement, the very idea that legal doctrine matters became suspect. In the resulting vacuum, there has emerged a pronounced interest in interdisciplinary legal studies. A recent check of the curriculum at Harvard, for example, reveals nearly two dozen different "law and" courses, ranging from "Law and Economics," "Law and Climate Change," and "Law and Social Movement," to (my favorite) "Law, Psychology, and Morality: An Exploration Through Film."

In the process, scholarly writing has become increasingly abstract and theoretical, even ethereal. Articles with titles such as "Paretian Intergenerational Discounting," "The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics," "Epistemological Foundations and Meta-Hermeneutic Methods: The Search for a Theoretical Justification of the Coercive Force of Legal Interpretation," or "Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis" are not uncommon. (The latter article was especially fun. It explained, among other things, that "explanatory economic analysis" of common law decisions has been subject to skepticism because common law decisions are traditionally cast in "language of deontic morality" as opposed to

the "consequentialist language of efficiency.")

In the meantime, judges increasingly find little of use to them in legal periodicals. As Judge Dennis G. Jacobs, Chief Judge of the New York Court of Appeals, said in a recent *New York Times* article about the declining impact of law reviews, "I haven't opened a law review in years. No one speaks of them. No one relies on them." The quotation recalls a similar, albeit fictional, remark from John Mortimer's *Rumpole of the Bailey*: "'What do you think of academic lawyers at the Old Bailey?' The practitioner replies, 'Well, to tell you the truth, . . . We hardly think of them at all.'"

Chief Judge Jacobs and Rumpole might be accused of overstatement. But only a little. The fact of the matter is that judicial reliance on law reviews has fallen sharply in recent years. According to one study published in the *Oklahoma Law Review* in 1998, judicial citations to law review articles has dropped by over 47 percent in the period from 1975 to 1995. According to a 2007 study, between the 1970s and the 1990s, citations to the *Harvard Law Review* dropped by half, and in the last decade have dropped by half again. According to still another recent study of the citations to 147 articles on contract law, the rate of federal and state high court citation was 0.7 cites per article; 70 percent of the articles were not cited at all, and most of the citations were to one of four articles. I am not aware of any empirical studies of Oregon judicial citations to law review articles. But my own thoroughly unscientific review of recent volumes of the Oregon Reports reveals that, in the last several years, the Oregon Supreme Court rarely cites law review articles, usually no more than a few articles in each volume. Even then, when the court cites articles, it is usually for matters of historical scholarship, concerning the intended meaning of Oregon's nineteenth-century constitution.

The reasons for the steady decline in judicial reliance on legal scholarship are not difficult to fathom.

To begin with, there is simply too much out there. Law review articles are published not to meet any particular demand for the scholarship but instead for the publication needs of students and tenure-seeking teachers. With over 800 reviews, publishing four or five articles (a conservative estimate) an issue on the average of three times a year, that makes for nearly 10 thousand new law review articles

each year. As Professor Kenneth Lassen commented in his trenchant article,"Scholarship Amok," published in the *Harvard Law Review*, "[s]cholarship could be valuable. Most of it isn't. Whatever rich stew there might have been thins quickly into gruel through the sheer multitude of journals seeking fodder for their troughs. Simply put, there are too many of them." And that does not even begin to take into account the availability of scholarship on the internet through blogging and electronic self-publishing.

Aside from that, much of the scholarship that is published in the law reviews simply is not about what lawyers and judges do in the real world. The abstract and theoretical emphasis of much legal scholarship has little to say to working lawyers and judges. As the American Bar Association's Task Force on Law Schools and the Profession found in 1992, "practitioners tend to view much academic scholarship as increasingly irrelevant to their day-to-day concerns." According to the Task Force, practitioners believe that law professors "are more interested in pursuing their own intellectual interests than in helping the legal profession address matters of important current concern."

Moreover, the fact of the matter is that, notwithstanding the pedagogical and scholarly biases of legal education, the overwhelming majority of the nation's legal work is not federal constitutional law, not even federal law generally, but state law. While the total of all federal cases filed--both trial and appellate--totals a little more than 400,000 each year, there were more cases than that filed last year in Oregon alone. And the national total of all state case filings has ranged between 37 and 38 million each year for at least a decade.

In addition, the nature of that work is quite different from that contemplated by the average law review article. The day-to-day work of the courts is not constitutional law, or even common law, but statutory and administrative law. In Oregon, for example, between two-thirds and three-quarters of the published decisions of the Supreme Court and the Court of Appeals concern the construction and application of statutes and administrative regulations.

Another explanation that has been posited is that modern judges themselves are simply less intellectually curious than their predecessors. As Columbia law professor Michael Dorf commented in a recent symposium on declining reliance on law reviews, complaints about the

theoretical nature of current legal scholarship "seems to me anti-intellectual know-nothingism." I'm not sure that's fair. But it must be acknowledged that there is sometimes a bit of reverse snobbery on the bench and that judges can be too quick to reject legal scholarship as "theoretical." I can recall when one of my former colleagues, a former law teacher, included a citation to a law review article in a draft opinion and was told by another judge that "we don't do that sort of thing."

It should also be remembered that modern judges--both at the trial and the appellate court levels--labor under case loads that their predecessors working during the Golden Age of law review influence would have found unimaginable, leaving little time for perusing many of those 10 thousand articles that are published each year. And, particularly on appellate courts, where the nature of the collegial decision-making process inherently works against novelty, there are few incentives for judges to spend too much energy trying to recast their decisions in terms of, say, cutting-edge hermeneutic theory informed by recent developments in literary criticism.

There is hope, however. Some law reviews seem aware, even concerned, about the recent trends. *Harvard Law Review*--responding to a 2004 survey in which over 80 percent of respondents suggested that its articles were too long--now imposes a page limit of 50 pages, including footnotes. Others have devoted symposium issues to matter of state law. The *Valparaiso* and *Albany Law Reviews*, for example, regularly devote issues to state constitutional law developments. Closer to home, I have seen some very fine scholarship on topics related to Oregon law. The *Willamette Law Review* regularly devotes entire issues to recent developments in Oregon law. I see in my mail today, in fact, the *Review*'s most recent issue is devoted to the work of the Oregon Law Commission. Professor Mooney's "open letter" to the Oregon courts about the parol evidence rule and Professor Harris's article about property distribution in Oregon divorce cases also come to mind. I could easily cite others.

Meanwhile, not all judges have given up. A number of the judges on Oregon's appellate courts, for example, regularly receive copies of the tables of contents of a number of different law reviews, so as to remain informed at least about the general nature of developments in legal scholarship. My own court tends to cite law review articles more frequently than the Supreme Court, particularly when we confront

novel issues of state tort law or statutory construction issues involving Oregon statutes patterned after federal legislation or model acts. In *Lowe v. Philip Morris*, for example, I cited a number of law review articles in my opinion for the court concerning the question whether to recognize an action for medical monitoring.

Finally, it should not be forgotten that, just because judges do not cite law review articles does not necessarily mean that they do not read them. I know that, on my own court, judges often will read law review articles to obtain background information about the development of doctrines or the origins of statutes--information that, although perhaps not leading to a citation, is quite helpful.

Still, the decline in citation should be cause for concern.

What should be done about the current state of the affair between law reviews and the courts? First of all, law schools need to knock it off. Is there really a demand for 10 thousand law review articles each and every year? Does the world really need a new journal devoted to East European Constitutional Law? Enough already.

Second, judges need to get over their current antipathy to legal scholarship and their fear of theory. The fact is that theory and practice are not mutually exclusive concerns. I have argued, for example, that judges could make much more sense of their statutory construction decisions if they paused to think about the underlying theory of the endeavor and did not continue to cite ancient, outmoded and often contradictory rules of interpretation.

Third, practitioners and judges themselves should contribute to the law reviews, setting an example of the sort of scholarship that benefits the bench, the bar, and the public. In our own state, Chief Justice Paul DeMuniz, Justice Tom Balmer, former Justice Susan Leeson, and Judge David Schuman have contributed significant scholarship on a variety of issues. The practice should continue and broaden.

Finally, and most important, legal scholars laboring in The Academy must be willing to turn their sights--and their cites--from the United States Supreme Court and federal constitutional law. Unless scholars are willing to devote more attention to the workings of the law in the real world, the law reviews will continue their current devolution into the documentation of an increasingly irrelevant conversation among themselves.

A CLERK'S-EYE VIEW OF GOOD MERITS BRIEFS AND PETITIONS FOR REVIEW

By

Dallas DeLuca, Law Clerk to the Honorable Justice Thomas A. Balmer, Oregon Supreme Court

Cody Hoesly, Law Clerk to the Honorable Justice Rives Kistler, Oregon Supreme Court

Heather Weigler, Law Clerk to the Honorable Judge Ellen Rosenblum, Oregon Court of Appeals

INTRODUCTION

Lawyers read a lot. Judges read more. The judges of the Oregon Court of Appeals and Oregon Supreme Court stop reading only to eat, sleep, and hear oral argument. (Okay, that may be a bit of an overstatement, but not by much.) When you read that much, the cases sometimes run together, even for a brilliant appellate judge. In an environment like that, poorly written briefs languish. A good brief or petition -- clear, concise, well-reasoned, and lively -- will stand out in a judge's mind.

Practitioners who regularly appear before the Oregon appellate courts must take extra care in filing briefs and petitions. Over time, they develop a reputation among the judges based on their filings and oral arguments. Frequent filers may even develop a reputation among the clerks. Although all cases are considered equally carefully on their merits, human nature dictates that briefs filed by practitioners with a good reputation are read through a different lens than briefs filed by practitioners with a bad reputation. A practitioner who distorts the facts of a case, for instance, might find his or her facts section read with a jaundiced eye, and opposing counsel's facts section read with a sigh of relief. Hyperbole and *ad hominem* attacks cause judges and clerks to wince. You and your clients will improve your chances for success if your name is shorthand for quality work.

There are no secrets revealed in this article. Not only are we obliged not to discuss confidential court matters, but, even more importantly, there are no secrets to reveal. A brief or petition filed in the Oregon ap-

pellate courts demands the same writing skills that all other persuasive writing tasks require. That said, we hope to highlight some aspects of good briefs and petitions that are most frequently neglected by attorneys appearing before our courts. Following the suggestions in this article will not guarantee that you win all your cases, but it might help.

MERITS BRIEFS

A merits brief should be simple enough so that any law school graduate (*i.e.*, any law clerk) can understand the key facts and arguments. It should also be comprehensive and convincing in its discussion of the relevant authorities. At the same time, the best advocates not only convince the court that they should win on an intellectual level, they also inspire the court to want to help them win as an emotional matter. That is not to say that you should engage in pleas for personal sympathy. Rather, try appealing to the judge's sense of justice by focusing on the fundamental values underlying the legal issues in the case. You can also earn good will by confronting the weaknesses of a case candidly. If you are trustworthy and thorough, the reader will appreciate it and give you the benefit of the doubt.

Some things almost go without saying: advocates should carefully follow the Oregon Rules of Appellate Procedure and use proper grammar and punctuation. Although some judges could care less about errors in matters of form, other judges are greatly distracted by them. Obviously, you don't want to frustrate the judge. By contrast, you can help your client by making the court's work easier to accomplish. If your transcripts contain a word index and your briefs are electronically searchable (*see* ORAP 9.17(5) (the new rule requiring the filing of an electronic copy of merits briefs in the Supreme Court)), judges and clerks will be able to locate key passages more quickly. We also appreciate it when lawyers include accurate and precise citations to the record and append key portions of the record to their briefs. When all the relevant materials are located in one place, we can focus more of our attention on your arguments because we won't have to stop reading them to thumb through transcripts or thick trial court files.

We understand that lawyers are busy, and it is okay to cut and paste from briefs filed in prior cases. If you do, be sure to double-check that you change the names of the parties, etc., to match the

present case. If you can't spend ten minutes reviewing your brief, it tells us that we shouldn't either.

Each section of a merits brief serves a different purpose. The summary, for instance, is supposed to *summarize* your arguments, not explain them. Leave your argument for the argument section. If you raise multiple assignments of error, it may be helpful to explain how they relate to one another and how that affects the case. Moreover, take care in identifying your assignments of error; they dictate the standard of review. Although it is often treated perfunctorily, that one issue frequently determines the substantive outcome of a case because it establishes which version of competing facts controls as well as what kinds of error are reversible. Those points may sound basic, but parties shoot themselves in the foot more often than you might think by assigning error to the wrong ruling, stating the facts according to the wrong standard of review, or basing their arguments on authorities that are inapposite. The more candid and thoughtful you are about your assignments of error, and the better you heed the standard of review, the more success you'll have.

The facts of your case are what set it apart from the rest. You may have heard before that your brief needs to tell a story. That's true, and if you don't tell it, the judges and clerks will have to piece it together on their own. A punchy start can set the tone for the entire brief, but the best way to state the facts differs from case to case. A chronological order, while often logical, is not always emotionally potent or helpful in clarifying the relevant legal issues, and repeating the trial testimony in the order in which the witnesses testified is almost always a bad idea. Similarly, including too many facts that are irrelevant to your arguments will leave the reader wondering what matters. You lose the opportunity to tell us what is important if you are busy telling us everything. By contrast, you can clarify the issues if you seize the opportunity to tell us what is *not* important. If a damaging fact is not actually relevant, let us know right away so it does not poison our view of the case.

Attorneys who distort the facts, hide damaging facts, or ignore the explicit and implicit findings of the factfinder, not only undermine their credibility, they lose the chance to tell the court why they should win anyway. You need that chance because the clerks and judges *will* read the record in its entirety. However, although you want to be spe-

cific when *citing* to the record, be sure not to be too specific when *designating* a record. If your record is missing crucial evidence, the court may not be able to affirm on an alternative basis or otherwise give you the full benefit of the rule you want it to announce.

The argument section is your masterpiece. A good argument explains the legal premises, connects them to the facts of the present case, and explains why and how the court should rule in your favor. The best lawyers are able to place their arguments in context, showing how the present case fits into the bigger picture of law and policy. Understanding exactly what ramifications a particular rule of law would have on future cases is the reason why appellate judges pepper you with hypotheticals at oral argument. Effective advocates know that and confront those hypotheticals in their briefs before the judges think of them.

Usually, the law changes incrementally, not in leaps and bounds. Although there are exceptions to that general rule, the safer bet is to explain how the result you seek is supported by existing law and is the natural next step in the evolution of that law. Of course, you should thoroughly research the area of law at issue to find all relevant authorities. If the facts of a favorable case do not match the facts of your case exactly, show why it should be extended to your case. At the same time, if precedent cuts against your argument, recognize that and distinguish it, or try to persuade the court that the precedent should not be followed. If binding precedent is against you, distinguish it, explain why *stare decisis* should not apply, or clarify that you mean only to preserve your claim for review by a higher court. Too often, parties fail to address negative authority, the bases on which lower tribunals relied to rule against them, and arguments made by opposing counsel.

Although we recommend being thorough and complete in your argument, you have to strike a balance. Do not cite and explain *every* case that supports your position if a few cases will suffice. The same balance must be applied to your selection of arguments. If multiple alternative arguments support your position, it is good practice to include them. But if you throw in the kitchen sink, you run the risk that your stronger arguments will not be developed as well as they should be, that the reader's eyes will glaze over, or, worse yet, that the reader will neglect your stronger arguments to focus on your weaker arguments. No argument looks convincing when it is surrounded by

a dozen others. Similarly, think about what it will take for you to win. If you need to win on each of three issues in order for your appeal to succeed, say so. If you only need to win on one issue out of three, say that as well. That lets the judges and clerks know where to focus their attention.

Do not, under any circumstances, distort the holdings of prior cases. Even if your opponent misses the error, we will find it, and your lack of credibility will color our perception of all of your arguments. Another way to lose credibility is to argue that an issue is unpreserved when, in all fairness, it was preserved. Overaggressive and strained preservation claims give off an aura of desperation. On the other hand, if you are raising an issue on appeal that might not be preserved, make sure to explain why the issue qualifies as plain error. You are better off being candid about preservation and letting the judges and clerks spend more time thinking about the substance of your arguments.

PETITIONS FOR REVIEW

The Supreme Court receives dozens of petitions for review each week. Those petitions, in turn, are divided equally among the justices and then distributed to their law clerks. The clerk to whom your case is assigned will conduct the most searching review that it is likely to receive before a decision is made whether or not to allow review; the clerk, for instance, may be the only person on the Supreme Court who will read the briefs filed in the Court of Appeals, and, if anyone reviews the record, it will be the clerk. Based on his or her review of the case, the clerk will write a memo to his or her justice discussing the factual and legal issues and stating whether he or she thinks the court should allow or deny review and the reasons for that recommendation. The justice will then make a recommendation to the court. The weaker a petition is, the more the judges will rely on the clerk's memo.

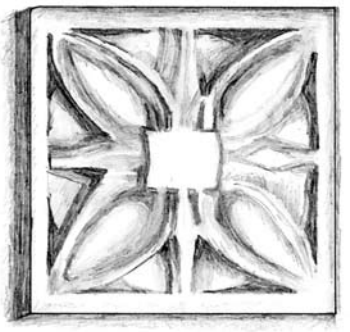
The petition for review serves one central purpose: convincing the court to allow review in your case. Generally, persuading the court that you are right on the merits is an important part of convincing it to allow review, and you should include your (best) arguments in the petition instead of merely referring to the brief you filed in the Court of Appeals. Remember, however, that being right on the merits is not enough: the case must also raise a significant issue of law or otherwise

have statewide importance. Too often, lawyers file petitions that argue only the merits of a case and never mention why the case should matter to anyone but the parties involved. If your case involves an unusual set of facts, or the mere application of settled principles to the facts of your case, you may have an uphill battle explaining why the court should not simply deny review on that basis alone.

The solution is not rote repetition of the grounds for allowing review listed in ORAP 9.07. If a criterion is relevant to your case, by all means mention it. But you must also show that the criterion truly establishes the case as important. For instance, a case is not worthy of review merely because it involves the interpretation of a statute, even though that's listed as a ground for allowing review in ORAP 9.07. The interpretive question might already have been answered in prior cases, or it might not be especially significant. Similarly, a lawyer claiming that a particular decision will affect many people should describe in detail the number or groups of persons likely to be affected and the manner in which they will be affected. An *amicus* brief supporting your petition can demonstrate, often powerfully, the significance of your case to affected interest groups. Because the Supreme Court receives so few *amicus* briefs at the petition stage, they help your petition stand out from the rest.

The Supreme Court receives over a thousand petitions for review annually and allows review less than ten percent of the time. Obviously, not every case warrants Supreme Court review. If your case doesn't, and you're just going through the motions, then rest assured that rote citation of the factors listed in ORAP 9.07 is acceptable. But if you really believe that your case deserves review, spend the time it takes to write a persuasive petition. When you do, be careful to match the questions presented with the assignments of error in the Court of Appeals unless that court raised new issues itself. Otherwise, follow the advice given above with regard to merits briefs, because it is equally applicable in the petition context.

MISCELLANY



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THE OREGON APPELLATE COURTS' "ECOURT" INITIATIVES

by Melanie Hagan, Staff Attorney, Oregon Supreme Court

In 2005, the Oregon Supreme Court and Court of Appeals began working to develop and implement systems for internal case management and opinion processing. In December 2006, the courts implemented a new Appellate Case Management System (ACMS) that replaced OJIN as the electronic case register system for the appellate courts. Shortly thereafter, in February 2007, the courts rolled out the Public Access system, which is the public component of ACMS. For more information about accessing ACMS, please visit http://www.ojd.state.or.us/ojin/ACMSHelp.html.

In 2007, the legislature amended ORS 1.002, which governs the duties and authority of the Chief Justice as administrative head of the Oregon Judicial Department. This amendment granted broad powers to the Chief Justice to oversee the development and use of electronic applications in the Oregon courts. ORS 1.002(2) provides:

(2) The Chief Justice may make rules for the use of electronic applications in the courts, including but not limited to rules relating to:

(a) Applications based on the use of the Internet and other similar technologies;

(b) The use of an electronic document, or use of an electronic image of a paper document in lieu of the original paper copy, for a document, process or paper that is served, delivered, received, filed, entered or retained in any action or proceeding;

(c) The use of electronic signatures or another form of identification for any document, process or paper that is served, delivered, received, filed, entered or retained in any action or proceeding and that is required by any law or rule to be signed;

(d) The use of electronic transmission for the service of documents in a proceeding, other than service of a summons or service of an initial complaint or petition;

(e) Payment of statutory or court-ordered monetary obligations through electronic media;

(f) Electronic storage of court documents;

(g) Use of electronic citations in lieu of the paper citation forms as allowed under ORS 153.770, including use of electronic citations for parking ordinance violations that are subject to ORS 221.333 or 810.425;

(h) Public access through electronic means to court documents that are required or authorized to be made available to the public by law; and

(I) Transmission of open court proceedings through electronic media.

Pursuant to that authority, in the fall of 2007, the Oregon Supreme Court and Court of Appeals began the process for developing electronic content management, eFiling, and ePayment procedures. These "eCourt" initiatives will allow appellate court users increased self service, through electronic filing of documents, electronic payment of filing fees, and access to court calendars and records. The eCourt project's scope will also eventually include electronic document management and distribution as well as electronic communication from the courts to users.

The first phase of the eCourt project focuses on the Supreme Court. Beginning in May or June 2008, the Supreme Court will accept certain filings and payment of filing fees electronically. The initial phase of the project will be limited to initiating documents only (for example, petitions for review, notices of appeal, petitions for writs of mandamus, etc.). To use the eFiling process, an attorney will need to register via the Oregon Judicial Department's website to obtain an eFiling account from the Appellate Court Records Section. Following registration, attorneys will be authorized to file their initiating documents electronically via the Court's website and will be able to pay any applicable filing fees electronically, via credit card. The initial phase will allow only attorneys who are active members of the Oregon State Bar to use the eFiling system; later phases will expand the group of users to include *pro se* litigants. Additionally, in later phases of the eCourt project, the Supreme Court will expand the categories of documents that can be electronically filed. Following the implementation of the electronic content management phase, users will be able to access documents in most cases via the Court's website. It is anticipated that filing and obtaining electronic documents in the Court of Appeals will be available by March 2009.

OREGON APPELLATE COURTS BRIEF BANK

By Jim Nass, Appellate Commissioner, Oregon Court of Appeals

For many years, collections of briefs filed in connection with Oregon Supreme Court and Court of Appeals cases were found at the Supreme Court Law Library (now the Oregon Law Library) and at a few courthouses located around the state. Practitioners wanting to see arguments made in other appellate cases had to travel to one of those sites to review those briefs. Now, large numbers of those briefs are available to practitioners anywhere and anytime.

The Oregon Law Library has inaugurated an Oregon appellate court brief bank available to practitioners via the Internet. The collection of briefs includes unofficial copies of Oregon Supreme Court briefs filed from May 2007 to present and Oregon Court of Appeals briefs filed with respect to cases reported at 212 Or App 488 to 213 Or App 391.

The collection of briefs in the brief bank is a work in progress; new briefs are being added daily with the goal of making available recently filed briefs for cases not yet argued, as well as Supreme Court and Oregon Court of Appeals briefs filed back to the mid 1980's. The Law Library is adding briefs to the collection as quickly as staff and time permit.

The site also allows full text searching and printing of the Oregon Supreme Court and Oregon Court of Appeals opinions to which the briefs relate.

Users of the brief bank may notice redactions from some of the briefs. That is being down to protect disclosure of Social Security numbers, driver license numbers, victims' names and other sensitive information. Also, briefs are not available in adoption, juvenile dependency, and mental commitment cases, because court records in those categories of case are protected from public disclosure.

The collection of briefs can be found at:
http://66.54.37.22/index.html.

Credit Oregon Law Library Electronic Services Librarian Cathryn

Bowie for establishing the brief bank, a very welcome additional legal research tool now available to practitioners. Questions? Contact Cathryn Bowie at 503.986.5921 or law.library.digital.collection@ojd.state.or.us

APPELLATE INTERNET RESOURCES

By Scott Shorr, Stoll Berne

Appellate practitioners are the lawyers most likely to resemble Luddites. After all, we do not have to engage in electronic discovery or learn the latest trial presentation software program. An appellate judge would likely roll her eyes if we tried to give a powerpoint presentation or present something through electronic media. It seems the only essential electronic tool is access to Lexis, Westlaw or some similar statute and case law database. Still, appellate practitioners are missing some insightful information and commentary if they are unaware of some of the interesting blogs and resources available on the internet. If you are not already aware, here are a few of the good internet resources for the appellate attorney.

(1) SCOTUSblog (www.scotusblog.com): SCOTUSblog covers the "SCOTUS" (Supreme Court of the United States). It is not only one of the best appellate blogs, but one of the most insightful legal blogs. It is run by Akin Gump and its Supreme Court practice section. Among other things, it summarizes current cases, posts the briefs before argument, prepares argument previews and recaps, and posts transcripts of arguments. It also posts orders and opinions (along with analysis) almost immediately after they come out. In fact, I found out that one of my cases was granted certiorari on the SCOUTSblog website before I received word from the Supreme Court itself. The blog has a reporter at the Court who is there when orders and decisions are physically handed down (before any electronic posting by the Court itself).

In addition, SCOTUSblog has an academic roundup of the latest academic articles and books on the court. It is also very proficient at identifying trends and predicting certain results. Tom Goldstein, the head of the Akin Gump Supreme Court Practice group, has become very proficient at identifying certiorari petitions that are likely to be accepted by the Court and posts the predictions on the site as "Petitions to Watch."

(2) OYEZ (www.oyez.org): This site has a history of United States Supreme Court cases and the transcripts and oral recordings for all modern cases. As a rule, the oral recordings from the Supreme Court are provided to the National Archives in October following the term

in which the case was argued. The Court, on rare occasion, releases tapes of arguments of historical significance on the day of argument. Written transcripts of arguments are always available later on the same day of argument. Oyez organizes the audio archives and allows for playback.

(3) How Appealing (www.howappealing.com): This site is run by an appellate lawyer in Pennsylvania named Howard Bashman. It is less organized than a site like SCOTUSBlog and is a more traditional blog of short running insights and helpful postings of cases and articles. Still, it contains insight into important recent appellate rulings and other items of interest to appellate lawyers. It has an interesting feature called "20 Questions for the Appellate Judge" in which an appellate judge, usually federal judges but also state judges, are asked questions dealing with their personal preferences, background and court practices. It is insightful and a good resource if you have a judge on an upcoming panel on this list. There are a number of Ninth Circuit Judges profiled, including O'Scannlain, Kleinfeld, Reinhardt, and Hawkins.

(4) Ninth Circuit Website (www.ca9.uscourts.gov): The Ninth Circuit's website includes their recently posted opinions and orders as well as opinions dating back to 1995 (although organized by date and not name or topic). The Ninth Circuit posts their opinions and orders each day on or before 10 a.m. (PST). A practitioner who is checking here for their own case will discover it posted here first before they receive any word from the Ninth Circuit. The Ninth Circuit also posts its general calendar for the year (identifying each city and sitting) around the New Year or earlier (It is reprinted in this Volume in the "Calendars" section.) The Ninth Circuit releases a more specific oral argument calendar each month, but does not publicly identify judges on the assigned panel until the first business day of the week before oral argument.

The Ninth Circuit also has audio recordings of oral arguments – if you are interested in boring spouses and family members with your arguments -- available for download for free on the day after argument. Check the audio files button on the Ninth Circuit's home page and search by case number or oral argument date.

(5) Oregon Supreme Court and Court of Appeals Websites: The Oregon Supreme Court's (www.ojd.state.or.us/courts/supreme/index.htm)

and Oregon Court of Appeals' (www.ojd.state.or.us/courts/coa/index.htm) websites are accessed through the Oregon Judicial Department (www.ojd.state.or.us). The opinions for both (dating back to 1998 and organized by date) are available at www.publications.ojd.state.or.us. The appellate sites also have access to the ORAP, recent amendments to the ORAP (before they appear in the West book version), the appellate courts style manual and other reports and information from the state appellate courts and tax court. You also can access a new electronic library of recently filed briefs filed in the Oregon Appellate Courts. (See Jim Nass's Brief Bank article in this issue.) The Oregon Judicial Department website states that it will be updating its website soon.

(6) Oregon State Bar Appellate Section: Last, but not least, your Oregon State Bar appellate section has its website at www.osbappellate.homestead.com/index.html. This website gives information about section events, budget, goals, and accomplishments. It also has helpful links to sites such as those noted above. It also has very helpful memoranda written by appellate lawyers and judges on appellate practice, including past CLE materials from Judge Lesson on Seeking Oregon Supreme Court Review and by Judges Kistler and Haselton on preserving error and plain error.

OREGON COURT OF APPEALS TO INAUGURATE APPELLATE COMMISSIONER PROGRAM

By Jim Nass, Appellate Commissioner, Oregon Court of Appeals

The Office of Appellate Legal Counsel is being reorganized into an appellate commissioner's office. The appellate commissioner will have authority to decide a variety of procedural matters, primarily motions and own motion matters. Parties will be able to move for reconsideration of a decision of the appellate commissioner, resulting in review of the decision either by the Chief Judge or the Motions Department of the Court of Appeals. The appellate commissioner position is modeled on commissioner positions found in the State of Washington appellate courts, except that the Oregon appellate commissioner will not have authority to decide cases on their merits.

Until the reorganization process is completed and a recruitment is undertaken for the appellate commissioner position, current Appellate Legal Counsel Jim Nass will be serving as the appellate commissioner.[1] The Office of Appellate Legal Counsel also is adding a new attorney position. When the reorganization is complete, the new position and present Assistant Appellate Legal Counsel Jan Shea will become an assistant appellate commissioner.

The goal of creating an appellate commissioner and adding a new attorney position is to reduce substantially the amount of time it historically has taken for substantive motions in the Court of Appeals to be decided.

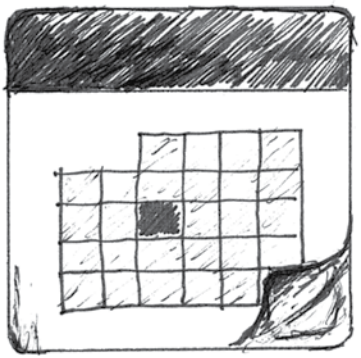
The target date for implementing the appellate commissioner project is February 2008.

One of the consequences of the appellate commissioner having decision-making authority is that the Court of Appeals intends that the commissioner will be subject to the same ethical limitations that constrain judges with respect to ex parte communications. The appellate commissioner will not be as available as appellate legal counsel

1 Editors Note: Since Jim Nass originally wrote this article, he was more formally appointed as the Appellate Commissioner on March 5, 2008 in a public ceremony officiated by Chief Judge Brewer.

was for explanations of appellate practice or to respond to inquiries about appellate procedures. However, the assistant appellate commissioners will remain available to respond to such inquiries.

APPELLATE CALENDARS



UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 2008 COURT SESSION

(TAKEN FROM THE NINTH CIRCUIT'S WEBSITE)

MONTH	DATE	CITY
January	7th through 11th	Seattle , Pasadena
	14th through 18th	San Francisco
February	4th through 8th	Portland, Seattle, Pasadena
	11th through 15th	Pasadena, San Francisco
March	3rd through 7th	Portland, Seattle, Pasadena
	10th through 14th	Pasadena, San Francisco
April	7th through 11th	Seattle, Pasadena
	14th through 18th	San Francisco
May	5th through 9th	Portland, Seattle, Pasadena
	12th through 16th	Pasadena, San Francisco
June	2nd through 6th	Seattle, Pasadena
	9th through 13th	Pasadena, San Francisco
	16th through 20th	Honolulu
July	7th through 11th	Portland, Seattle
	14th through 18th	Pasadena, San Francisco
August	4th through 8th	Anchorage, Seattle, Pasadena
	11th through 15th	San Francisco
September	8th through 12th	Seattle, Pasadena
	8th through 12th	San Francisco
October	20th through 24th	Portland, Seattle
	20th through 24th	Pasadena, San Francisco
November	17th through 21st	Honolulu, Portland, Seattle
	17th through 21st	Pasadena, San Francisco
December	8th through 12th	Portland, Seattle
	8th through 12th	Pasadena, San Francisco

OREGON SUPREME COURT

Public Calendar for 2008

(Compiled by Melanie Hagan, Staff Attorney, Oregon Supreme Court)

The following is the public calendar for the Oregon Supreme Court. The calendar is tentative and therefore subject to change; however, the dates for oral argument rarely change. The court will hear argument in January, March, May, June, September, and November in 2008. The court may set special argument dates for certain expedited or significant cases that arise during the year.

Consistent with past practice, the court will hold public meetings once per month in 2008, with the exception of August. Business conducted at public meetings include approval of pro tempore, senior and reference judges, approval of various rules, and various other administrative and regulatory tasks. Public meetings are generally held at 1:30 pm in the Wallace P. Carson, Jr. Conference Room on the second floor of the Oregon Supreme Court Building.

The court's conferences are private meetings where the court conducts most of its adjudicatory business, including consideration of draft opinions, petitions for review, original jurisdiction matters and motions that have not been decided by the Chief Justice or his designee. Conferences generally take place twice per month, conducted on Tuesdays and Wednesdays. Additional conferences may be scheduled for emergency or time-sensitive matters.

JANUARY 2008

1– New Year's Day Holiday
3, 7, 8, 9 – Oral Argument
15 – Public Meeting
15, 16 – Conference
21 – Martin Luther King, Jr. Holiday
29, 30 – Conference

FEBRUARY 2008

12 - Public Meeting

12, 13 - Conference
18 - President's Day Holiday
26, 27 - Conference

MARCH 2008

3, 5, 7- Oral Argument
18 - Public Meeting
18, 19 - Conference

APRIL 2008

1 - Public Meeting
1, 2 - Conference
15, 16 - Conference
29, 30 - Conference

MAY 2008

2, 5, 6- Oral Argument
20 - Public Meeting
20, 21 - Conference
26 - Memorial Day Holiday

JUNE 2008

3, 4 - Oral Argument
10 - Public Meeting
10, 11 - Conference
24, 25 - Conference

JULY 2008

4 - Independence Day Holiday
15 - Public Meeting
15, 16 - Conference
29, 30 - Conference

SEPTEMBER 2007

1 - Labor Day Holiday
4 - Public Meeting
4, 5 - Conference
15, 16, 17, 18, 19 - Oral Argument
23 - Public Meeting
23, 24 - Conference

OCTOBER 2008

7 - Public Meeting
7, 8 - Conference
12, 13, 14 - Oregon Judicial Conference
28, 29 - Conference

NOVEMBER 2008

3, 4, 5, 6, 7 - Oral Argument
11 - Veterans' Day Holiday
18 - Public Meeting
18, 19 - Conference
27 - Thanksgiving Holiday

DECEMBER 2008

2 - Public Meeting
2, 3 - Conference
16, 17 - Conference
25 - Christmas Holiday

THE OREGON COURT OF APPEALS CALENDAR

By Lora E. Keenan, Staff Attorney, Oregon Court of Appeals

Unlike the Oregon Supreme Court, the Oregon Court of Appeals does not set an annual calendar in advance. Instead, the Chief Judge and the four Presiding Judges meet early each month to set the oral argument and internal conference schedule for the month three months in the future. (For example, March dates are set in December, April dates are set in January, and so on.)

ORAL ARGUMENT: The Court of Appeals generally hears oral argument nine days per month, typically with each of its three departments sitting three times. The court usually sits in Salem, most often in the Supreme Court courtroom, butBwhen that courtroom is not availableBsometimes in the Tax Court courtroom or a hearing room at the Capitol. The court travels about once a month, hearing oral arguments at a law school, college, or high school. The court presently has the following "road dates" scheduled in 2008: January, University of Oregon, Eugene; February, St. Mary's Academy, Portland; March, West Linn High School; April, Portland Community College, Cascade Campus; May, Lakeview High School.

Oral argument for a particular case is generally scheduled several months after the last brief has been filed. Certain types of cases (for example, land use review and termination of parental rights) are expedited and will be heard sooner after they are "at issue." The calendar clerk in the Appellate Court Records Section prepares a preliminary calendar for a month of arguments and sends it to the Chief Judge. The clerk will typically assign between 10 and 15 cases for argument each day, depending upon the type of case and the maximum amount of argument time the Oregon Rules of Appellate Procedure allow for the type of case. The actual dates and panels for arguments are set at the monthly meeting of the Chief Judge and the Presiding Judges.

Once the calendar has been approved, the Appellate Court Records Section sends notice to counsel. That notice does not identify the panel of judges who will hear arguments; however, that information is available on the court's website before the beginning of the month in which oral argument is set to occur. The court is divided into

three "departments" of three judges each, and most often those judges hear arguments together. However, sometimes a panel will consist of a different group of Court of Appeals judges or two Court of Appeals judges and a senior judge or judge pro tempore, such as the Tax Court Judge or a Circuit Court Judge.

A party generally will be allowed to reset an oral argument date one time; additional requests are subject to the approval of the Presiding Judge of the department to which the case has been assigned. All requests to reset oral argument must be submitted in writing to the Appellate Court Records Section, with a copy to opposing counsel. The request must indicate whether any other party opposes the request. Last minute requests are discouraged. If necessary, however, they may be made by phone to the Appellate Court Records Section, who will consult with the Presiding Judge. Again, the party making the request must advise the court whether any other party opposes it.

Parties wishing to waive oral argument should advise the Appellate Court Records Section in writing as early as possible, with a copy to opposing counsel. The court regards nonappearance at oral argument as waiver of argument. If one party chooses not to appear, the other side may still argue the case.

CONFERENCES: Like the Supreme Court, the Court of Appeals conducts its adjudicatory business at regularly scheduled private conferences. The primary purpose of these conferences is to consider draft opinions that have been circulated to the participating judges by a set deadline preceding each conference date.

All ten judges meet once a month at "full court conference." The purpose of this conference is to discuss draft opinions in cases that have been taken *en banc*, to consider whether to take new cases *en banc*, and to act on administrative issues requiring the attention of the full court. Full court conference is typically, although by no means always, held during the first week of the month.

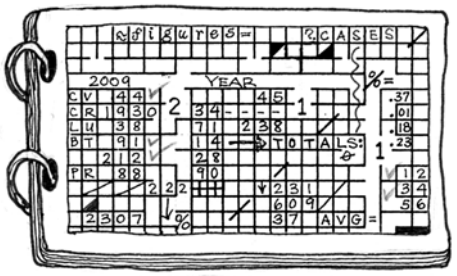
Each of the three "merits departments" usually meets twice a month. Attending this conference are the Chief Judge, the three regular members of the department, any judges who are participating in a case that has a draft opinion before the department, and the department's staff attorneys. The Chief Judge chairs the conference. Generally, draft opinions are considered in order of seniority of the author

of the majority. The department will also consider at conference cases submitted on briefs (*i.e.*, without oral argument) and petitions for reconsideration of opinions that issued from that department.

The court's motions department meets once a month. Certain motions are required by statute to be heard by a three-judge panel and other motions are sent to the motions department by the Chief Judge, often in consultation with the office of Appellate Legal Counsel. Attending this conference are the Chief Judge, the three members of the department, Appellate Commissioner, and Assistant Appellate Commissioner. The department usually acts on motions by order, but occasionally by written opinion.

OPINION PUBLICATION: Every opinion approved to be published is put in a regular queue for publication. Barring referral of an opinion for consideration by the full court, the opinion will be released on a Wednesday either two or three weeks after the conference at which it was approved, depending on the day of the week when the conference was held. In cases having special statutory timelines or in weeks in which a holiday falls, the release date of an opinion may be on a day of the week other than Wednesday. Notice of all case dispositions on the merits, as well as summaries of all authored opinions, are available on the court's website at 8:00 a.m. on the release date.

STATISTICS



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OREGON SUPREME COURT

2007 STATISTICS

Total Number of Filings:	1179
Total Number of Petitions for Review Filed:	951
Total Number of Petitions for Review Allowed:	84
Total Number of Opinions Issued:	80

Selected Case Types of Petitions for Review Filed (not all case types included)

– Criminal (includes appeals, post-conviction, habeas corpus and parole):	739
– General Civil:	100
– Domestic Relations:	14
– Juvenile (including dependency, delinquency, and termination of parental rights):	25
– Agency Review:	32
– Workers' Compensation:	13
– Land Use:	4
– Mental Commitment:	0
– Probate:	5

Original Proceedings

– Mandamus Filed/Allowed:	71/5
– Habeas Corpus Filed/Allowed:	20/1
– Quo Warranto Filed/Allowed:	1/0

Other Proceedings

– Ballot Measure:	49
– Tax:	8
– Certified Questions:	2
– Death Penalty:	2
– Professional Regulation:	70

OREGON COURT OF APPEALS

CASES FILED 2007

Total	**3,311**

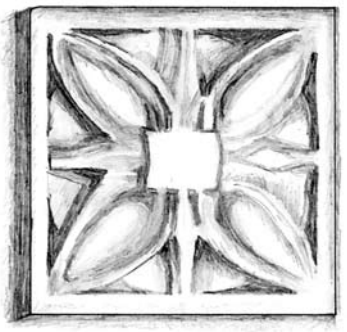
Selected case types *(not all case types included)*

– Criminal (including appeals, habeas corpus, post-conviction relief, and parole)	1924
– General Civil	387
– Domestic Relations (including adoption)	197
– Agency Review (not including workers' compensation or land use)	235
– Workers' Compensation	102
– Land Use	26
– Juvenile (including dependency, delinquency, and termination of parental rights)	177
– Mental Commitment	102
– FED	29
– Probate	8

Opinions Issued
2005 – 2007

2005	2006	2007
400	420	400

ALAMANAC CONTENDERE AND CONCLUSION



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THE ALMANAC CONTENDERE: 2008

By Scott Shorr

We have a first in Appellate Almanac history as a non-Oregon attorney won last year's contendere. The famous Washington state appellate lawyer Oliver Wendell Brandeis -- his parents Joseph and Miriam Brandeis had a wicked sense of humor that turned prescient in light of Oliver's legal accomplishments -- answered all ten questions correctly. When told that none of his Oregon counterparts correctly answered any of the questions about their own state appellate history, Oliver sneered that he always found Oregon appellate lawyers a few steps behind their Washington counterparts. As I hung up with Oliver, he mentioned that he may set up a branch office in Salem as he thought the quality and competition down here was "weak."

With that gauntlet thrown down, it is time for Oregon appellate lawyers and interested others to redeem yourselves in 2008. Answer the following questions by sending answers to next year's editor, Judy Giers (jgiers@GOappeals.com), before January 1, 2009 (or before Oliver beats you to it):

1. What is the most common first name for an Oregon Supreme Court Chief Justice? (Hint: It is not Erasmus, but there was one of those).
2. Name an Oregon Supreme Court Justice who was later a vice presidential candidate on a major party ticket? When did he run for vice president and with whom? (Hint: Not Dan Quayle).
3. Who is the longest serving Chief Justice in Oregon Supreme Court history? (This is a "gimme.")
4. Who has served on both the Oregon Supreme Court and Washington Supreme Court?
5. How many women have served as judges on the Oregon Court of Appeals through its history? Who and when was the first?

CONCLUSION

That's all folks. Until next year . . .