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 4

OREGON APPELLATE ALMANAC

2009

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

Filed following numerous motions for extension based on entirely vague and groundless reasons such as "paying work", "budget chaos", and "I forgot".

Judith Giers, Editor

OREGON APPELLATE ALMANAC

VOLUME 4 – 2009

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WELCOME

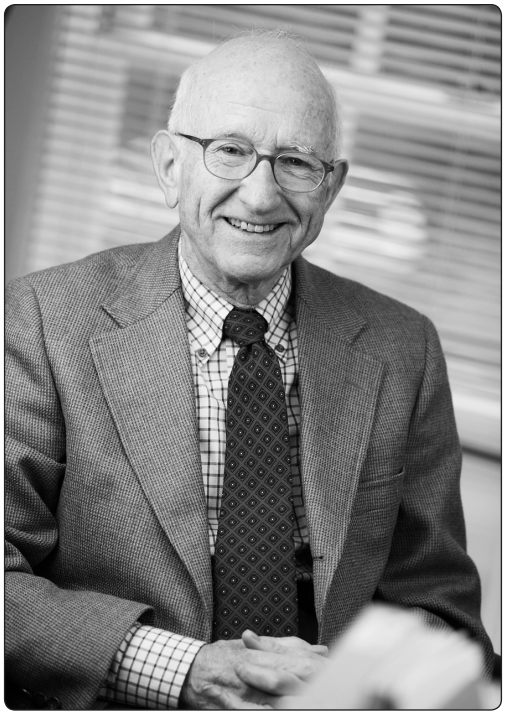
Welcome faithful Almanac readers! We hope this, the Fourth Annual Appellate Almanac, enhances your "small library" collection. As has become the tradition, this Almanac is the result of hard work, uncompensated by any means but fame, by all of our contributors. Thank you to all of our contributors!

We urge you, Dear Reader, to contribute next year. As revealed by the pages within, in addition to publishing useful reviews of the courts' work, rule changes and various statistics, we publish quirky, funny and otherwise interesting pieces. Have something you have always wanted to publish that does not fit the stodgy law review format? We're your guy! If you are interested in submitting a piece for next year, contact next year's editor, Jeff Dobbins at Willamette University College of Law.

Enjoy! Judy Giers, *Editor*

DEDICATION: HON. HANS LINDE

By Judge David Schuman, Oregon Court of Appeals



The Appellate Practice Section of the Oregon State Bar dedicates this 2009 edition of the Appellate Almanac to Hans Linde.

Born in Berlin, Hans Linde moved with his family to Copenhagen at the age of seven. He attended school there until the family once again moved when he was fifteen, this time to Portland. He attended Lincoln High School, where he met his future wife, Helen, and quickly came to the attention of his English teacher, Maurine Neuberger, later a United States Senator. Despite the fact that English was his third language, he quickly acculturated and became the editor of the school newspaper. When he finished high school, he went on to Reed College (senior thesis: a study of Hans Kelsen, Georg Jellinek, and Carl Schmitt, three German philosophers of law). He served in the U.S. Army during World War II and went to law school at Boalt

Hall, where he was editor-in-chief of the California Law Review (and supervised publication of one of Professor Prosser's seminal articles on torts). Upon graduation, he and Helen moved to Washington, DC, so Hans could serve for a year as law clerk to Supreme Court Justice William O. Douglas (and play in a weekly poker game with other clerks, including William Rehnquist and Abner Mikva). After his clerkship, he served in the state department and as legislative aide to Senator Richard Neuberger, the husband of his high school English teacher.

Having achieved the trifecta of federal government service – serving in all three branches – he returned to Oregon and, at the request of then-Dean Orlando Hollis, he joined the faculty of the University of Oregon Law School (to teach torts and tax). He remained at Oregon for 17 years, with visiting appointments to Stanford, Boalt and other law schools, until Governor Robert Straub appointed him to the Oregon Supreme Court in 1978. He "retired" in 1991. The quotation marks around "retired" are in recognition of the fact that, since 1991, he has been Distinguished Jurist in Residence at Willamette University College of Law, where he energetically maintains a teaching, writing, correspondence, and advising schedule that would fatigue a person whose capacity for work was merely normal.

In the world of constitutional scholarship – a world beset by trends, fads, and fashions – Professor Linde's work remains as important (and as frequently cited) today as when it was first published. By now, several generations of scholars have studied, admired, responded to, argued about, criticized, but always recognized the seminal importance of such articles as "Due Process of Lawmaking," 55 *Nebraska Law Review* 197 (1976), and "Judges, Critics, and the Realist Tradition," 82 *Yale Law Journal* 227 (1972). Among his past and current professorial colleagues, he is regarded as a pragmatic, grounded analyst with a respect for common sense, a disdain for high theory, and an insistence on questioning long-accepted first principles.

The readers of this Almanac need no reminder of Justice Linde's influence on the substance of appellate law in Oregon, particularly his reintroduction of state constitutional law as an independent and primary source of individual rights. Nearly two decades after his retirement, Article I, section 8 cases are still elaborations of *State v. Robertson*, 293 Or. 402, 412, 649 P.2d 569 (1982); and equality cases are still elaborations of *State v. Clark*, 291 Or. 231, 630 P.2d 810 (1981).

Less recognized are his contributions to administrative law (*Megdal v. Board of Medical Examiners*, 288 Or. 293, 605 P.2d 273 (1980) still remains foundational), torts (*Fazzolari v. Portland School District No. 1J*, 303 Or. 1, 734 P.2d 1326 (1987) still defines negligence), and public financing (bond lawyers around the country still love "the WPPSS case," *DeFazio v. Washington Public Power Supply System*, 296 Or. 550, 679 P.2d 1316 (1984)).

Regardless of the subject matter, his opinions were notable – and nationally noted – for their intellectual rigor, their willingness to question assumptions, and their intolerance of formulaic thinking.

And yet, if Hans Linde were to make a list of what he would want a dedication like this to mention, I suspect it would not contain the things for which he is most famous. Rather, and somewhat ironically, it would emphasize his dedication to the principles that law is not made in appellate opinions and that scholarship must always resonate in the untidy world of politics. He would point, not to his careers as professor and judge, but to his participation in law reform, from the Constitutional Revision Commission in the late fifties and early sixties to the Oregon Law Commission, which he helped bring into existence and on which he served since its inception. And, whether he wanted it to or not, the dedication would not be complete without mentioning the incalculable influence he has had on generations of students, friends, and law clerks, as well as his loyalty and generosity to them.

David Schuman

Judge, Oregon Court of Appeals

2008: THE YEAR IN REVIEW

SURVEY OF UNITED STATES SUPREME COURT: DECISIONS OF THE OCTOBER 2007 TERM

By Harry Auerbach, Chief Deputy City Attorney
Portland City Attorney's Office

In its October 2007 Term, the United States Supreme Court disposed of 73 cases by written opinion, including two which simply affirmed the decisions below by an equally divided Court. This year's survey begins with a quick review of the decisions on cases from the Ninth Circuit. The remaining cases are summarized by subject area. The 2007-08 Term produced no decisions on direct review from the Oregon or Washington Supreme Courts.

CASES ON REVIEW FROM THE NINTH CIRCUIT

The Court issued decisions in only eleven cases from the Ninth Circuit, reversing in ten.

Ninth Circuit Affirmed

Engquist v. Oregon Dep't. of Ag., 553 U.S. ___, 170 L.Ed.2d 975 (2008) (A public employee cannot maintain a claim under the Equal Protection Clause by alleging she was arbitrarily treated differently from other similarly situated employees, with no assertion that the different treatment was based on the employee's membership in any particular class. The Court affirmed the Ninth Circuit's rejection of the "class-of-one" theory of equal protection in the public employment context.)

Ninth Circuit Reversed

Habeas Corpus

Arave v. Hoffman, 552 U.S. ____, 169 L.Ed.2d 580 (2008) (Hoffman sought a writ of habeas corpus on two claims of ineffective assistance of counsel—one relating to the guilt phase of his trial, the other to the penalty phase; the Ninth Circuit ordered relief on both. The State sought certiorari only on the claim relating to the guilt phase. Hoffman then abandoned his guilt-phase claim. In a per curiam de-

cision, the Court agreed that the guilt-phase claim was moot, and "vacate[d] the judgment of the Court of Appeals to the extent it addressed that claim." The Court then remanded with directions that the Ninth Circuit "instruct the United States District Court for the District of Idaho to dismiss the relevant claim with prejudice.");

Criminal Procedure

Boulware v. U.S., 552 U.S. ____, 170 L.Ed.2d 34, 40-41 (2008) (A person receiving a distribution, who is then accused of criminal tax evasion, "may claim return-of-capital treatment without producing evidence that either he or the corporation intended a capital return when the distribution occurred.").

U.S. v. Ressam, 553 U.S. ___. 170 L.Ed.2d 640 (2008) (Defendant was carrying explosives hidden in his car when he attempted to enter the United States through Canada. He made false statements regarding his name and nationality on the customs declaration form a customs official asked him to complete. Another customs official searched the car and found the explosives. The Court held that Ressam could be convicted of carrying an explosive during the commission of a felony because he was carrying the explosives in the car at the same time that he made the false statements to the customs official, rejecting the Ninth Circuit's holding that the statute required "that the explosive be carried 'in relation to' the underlying felony.")

U.S. v. Rodriquez, 553 U.S. ___, 170 L.Ed.2d 719 (2008) (Where a state statute provided a maximum penalty for a drug offense of five years in prison, but also provided that a second or subsequent offense could double the maximum penalty, defendant's recidivist drug conviction carried a maximum penalty of ten years, and, therefore, was a "serious drug offense" that could be counted as one of the three prior convictions necessary under the Armed Career Criminal Act to support a 15-year minimum sentence on defendant's federal conviction for felon-in-possession.)

Labor

Chamber of Commerce v. Brown, 554 U.S. ____, 171 L.Ed.2d 264 (2008) (California statute that prohibited employers receiving state funds, whether by reimbursement, grant, contract, use of state property or pursuant to a state program, from using such funds to "assist,

promote, or deter union organizing" was pre-empted by the National Labor Relations Act. The Court held the statute pre-empted under *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1975), because it regulated conduct that Congress intended to be controlled by the free play of economic forces—*Machinists* preemption—and declined to address whether the statute also would be pre-empted under *San Diego building Trades Council v. Garmon*, 359 U.S. 236 (1959), because it interfered with the "integrated scheme of regulation" established by the NLRA—*Garmon preemption.*).

Elections

Washington State Grange v. Washington State Republican Party, 552 U.S. ___, 170 L.Ed.2d 151 (2008) (Washington law, enacted by initiative, which provides that candidates for office are to be identified on the ballot by their self-designated party preference, that voters may vote for any candidate, and that the top two vote getters for each office, regardless of party preference, advance to the general election, does not on its face violate the associational rights of political parties.)

Energy

Morgan Stanley Capital Group, Inc. v. PUD No. 1, 554 U.S. ___, 171 L.Ed.2d 607 (2008) (Federal Energy Regulatory Commission may abrogate a valid energy contract only if the contract harms the public interest. The test is the same whether the challenge to the contract comes from the buyer or the seller.)

Civil Litigation

Exxon Shipping Co. v. Baker, 554 U.S. ___, 171 L.Ed.2d 570 (2008) (Federal maritime law does not bar a punitive damage award on top of damages for economic loss, but the award in the present case should be limited to an amount equal to compensatory damages).

Hall Street Associates, LLC v. Mattel, Inc., 552 U.S. ____, 170 L.Ed.2d 254 (2008) (The statutory grounds under which the Federal Arbitration Act provides for prompt vacatur and modification of an arbitration award are exclusive, and may not be supplemented by contract);

Republic of the Philippines v. Pimentel, 553 U.S. ___, 171 L.Ed.2d 131 (2008) (In an interpleader action to determine whether victims of

abuse by former Philippine President Ferdinand Marcos or the Philippine Republic were entitled to the alleged proceeds of Marcos' illegal activities, the Republic and its Presidential Commission on Good Governance were necessary parties under Fed. R. Civ. P. 19; however, the Republic and the Commission both were immune from suit under the Foreign Sovereign Immunity Act, and the action could not proceed without them).

The other published decisions included:

Second Amendment

In perhaps the most highly anticipated decision of the Term, *District of Columbia v. Heller*, 554 U.S. ___, 171 L.Ed.2d 637 (2008), the Court held that the Second Amendment protects an individual right, unconnected with service in a militia, to possess a firearm and to use it for self-defense within the home. The Court held that the District of Columbia's total ban on handgun possession in the home violated the Second Amendment. The Court was careful to point out, however, that the right is not absolute, and that prohibitions such as those against concealed weapons, possession by felons or the mentally ill, in "sensitive places such as schools and government buildings," as well as laws imposing conditions on the commercial sale of firearms, were not invalid under the Second Amendment. 171 L.Ed.2d at 678. Furthermore, the Court held that the privilege recognized by the Second Amendment extends only to weapons that were in common use at the time the Amendment was adopted. Thus, people do not have a right to possess M-16 rifles, bombers or tanks. *Id*. at 679. But the District of Columbia law, which totally banned handgun possession in the home, and which required all lawful firearms in the home to be disassembled or bound by a trigger lock, violated the Second Amendment. *Id*. at 683-84. Justices Stevens, Souter, Ginsburg and Breyer dissented. *Id*. at 684 (Stevens, J., dissenting); *id*. at 710 (Breyer, J., dissenting).

Death Penalty

The 2007-08 Term produced five written decisions in death penalty cases. In *Kennedy v. Louisiana*, 544 U.S. ___, 171 L.Ed.2d 525 (2008), the Court held that a sentence of death for the aggravated rape of defendant's 8-year old stepdaughter was unconstitutional under the Eighth Amendment. Writing for the Court, Justice Kennedy wrote:

"Petitioner's crime was one that cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror inflicted on his victim or to convey the revulsion society, and the jury that represents it, sought to express by sentencing petitioner to death." 171 L.Ed.2d at 534. Justice Kennedy then went on to describe, in fairly gory detail, the horrific details of the crime. Regardless of one's views of the death penalty, one may well question how a person who intentionally and consciously inflicted such unspeakable cruelty on a defenseless child is in any position to complain that any punishment inflicted on him is "cruel" or "unusual." Nonetheless, the Court held that, in all cases, "the death penalty is not a proportional punishment for the rape of a child," 171 L.Ed.2d at 555, concluding that the death penalty may only be imposed "in cases of crimes against individuals, for crimes that take the life of the victim." *Id.* Justice Alito dissented, in an opinion joined by the Chief Justice and by Justices Scalia and Thomas. *Id.* at 556 (Alito, J., dissenting).

In *Snyder v. Louisiana*, 552 U.S. ___, 170 L.Ed.2d 175 (2008), the Court reversed a conviction and death sentence, holding that the trial court committed clear error in rejecting the defendant's objection to the prosecutor's arguably race-based peremptory challenge of a black juror, under *Batson v. Kentucky*, 476 U.S. 79 (1986). Presumably, the Court's decision will result in a new trial for Mr. Snyder, because the Court concluded that there was no "realistic possibility that this subtle question of causation could be profitably explored further on remand at this late date, more than a decade after petitioner's trial." 170 L.Ed.2d. at 186. Justice Thomas, joined by Justice Scalia, dissented on the ground that the Court ought to have deferred to the factual determinations of the trial judge. *Id*. at 186-89 (Thomas, J., dissenting).

Two of the Term's written death penalty decisions involved Texas's execution of Jose Medellin. The Court upheld the death sentence in *Medellin v. Texas*, 552 U.S. ___, 170 L.Ed.2d 190 (2008). Medellin, a Mexican national, lived in the United States "since preschool." He was convicted of capital murder and sentenced to death for the gang rape and brutal murder of two Houston teenagers. Because Medellin was a Mexican national, he was entitled under the Vienna Convention to consult with a representative of the Mexican consulate before being questioned by the police. He was not given that opportunity, and, after receiving his *Miranda* warnings, signed a written waiver and gave a de-

tailed written confession. He was thereafter convicted and sentenced to death. Notwithstanding that the International Court of Justice held, in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, (also known as the *"Avena"* decision), that Mexican nationals, including Medellin, whose Vienna Convention rights had been violated were entitled to review and reconsideration of their convictions and sentences in the United States, and notwithstanding that then-President George W. Bush directed in a Memorandum to the Attorney General "that the United States would 'discharge its international obligations' under *Avena* 'by having State courts give effect to the decision,'" the Court held that "neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that preempts state limitations on the filing of successive habeas petitions." 170 L.Ed.2d at 206.

Subsequently, on August 5, 2008, the Court, in a Per Curiam decision, denied Medellin's petition for stay of execution, reasoning that the possibilities that either Congress or the Texas Legislature might determine to give weight to the *Avena* decision "are too remote to justify an order from this Court staying the sentence imposed by the Texas courts." *Medellin v. Texas*, 554 U.S. ___, 171 L.Ed.2d 833, 834 (2008). Justices Stevens, Souter, Ginsburg and Breyer dissented. Medellin was executed that night.

In *Baze v. Rees*, 553 U.S. ___ , 170 L.Ed.2d 420 (2008), the Court rejected petitioners' claim that "the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment." Although only Justices Ginsburg and Souter dissented from the holding, no single opinion commanded a majority support from the Justices, who were divided about what test governed the inquiry. A three-Justice plurality (the Chief Justice, joined by Justices Kennedy and Alito) wrote that a challenge to the constitutionality of the method of execution should be measured by whether there is an alternative procedure that "must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain." 170 L.Ed.2d at 434 (plurality opinion of Roberts, C.J.). Justice Stevens, although concurring in the judgment, called for a reassessment of the constitutionality of the death penalty itself, having himself concluded that it is unconstitutional. *Id*. at 445-55 (Stevens, J.,

concurring in the judgment). Justice Thomas, in an opinion joined by Justice Scalia, would hold that "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain." *Id*. at 459 (Thomas, J., concurring in the judgment). Justice Breyer agreed with Justice Ginsburg's assessment of the appropriate test, i.e., "whether the method creates an untoward, readily avoidable risk of inflicting severe and unnecessary suffering," but agreed with the majority that petitioners had failed to make the requisite showing, even under that test. *Id*. at 468-71 (Breyer, J., concurring in the judgment). Justice Ginsburg, joined by Justice Souter, dissented, arguing that the case should be remanded for a determination of "whether the failure to include readily available safeguards to confirm that the inmate is unconscious after injection of sodium thiopental, in combination with the other elements of Kentucky's protocol, creates an untoward, readily avoidable risk of inflicting severe and unnecessary pain." *Id*. at 477 (Ginsburg, J., dissenting).

As Justice Stevens observed, *Baze* is unlikely to "bring the debate about lethal injection as a method of execution to a close." *Id*. at 445 (Stevens, J., concurring). Rather, particularly given Justice Stevens's own call for a reassessment of the constitutionality of capital punishment *per se*, we can anticipate seeing the Court struggle with these issues in coming Terms.

Habeas Corpus

In *Allen v. Siebert*, 552 U.S. ___, 169 L.Ed.2d 329 (2007), the Court, in a *per curiam* decision, reiterated its holding in *Pace v. DiGugielmo*, 544 U.S. 408 (2005), that untimely petitions in state court are not "properly filed," so as to extend the one-year limitation on federal habeas petitions, and held that this is true whether that untimeliness is jurisdictional or merely a waiveable affirmative defense under state law.

In *Boumediene v. Bush*, 553 U.S. ___, 171 L.Ed.2d 41 (2008), the Court held that aliens designated as enemy combatants and detained at Guantanamo Bay, Cuba, have the constitutional privilege of habeas corpus, and that Section 7 of the Military Commissions Act of 2006, 28 U.S.C. § 2241(e) operated as "an unconstitutional suspension of the writ." The Court remanded to the District Court for the District of Columbia to determine "whether the President has authority to de-

tain these petitioners" and to answer "other questions regarding the legality of the detention." The Chief Justice, along with Justices Scalio, Thomas and Alito, dissented.

A unanimous Court decided, in *Munaf v. Geren*, 553 U.S. ___, 171 L.Ed.2d 1, 10 (2008) "that the habeas statute extends to American citizens held overseas by American forces operating subject to an American chain of command, even when those forces are acting as part of a multinational coalition." Unfortunately for the petitioners, the Court also held, "Under circumstances such as those presented here, however, habeas corpus provides petitioners with no relief." *Id*. The petitioners were American citizens who had traveled to Iraq and were alleged to have committed crimes in that country. The Court held that habeas would not lie to enjoin petitioners' release into Iraqi custody to allow them to be tried before Iraqi courts. *Id*. at 26.

In *United States v. Santos*, 553 U.S. ___, 170 L.Ed.2d 912 (2008), the Court, with the Chief Justice and Justices Kennedy, Breyer and Alito dissenting, held that the term "proceeds" in the federal money-laundering statute, 18 U.S.C. § 1956(a)(1) only criminalized activities involving criminal profits, rather than the gross receipts of criminal activity. The Court therefore affirmed the Sixth Circuit's holding that the petitioners were entitled to collateral relief, invalidating their convictions.

In *Wright v. Van Patten*, 552 U.S. ___, 169L.Ed.2d 583 (2008), Van Patten claimed (and the Seventh Circuit held) that his state court trial lawyer's performance was constitutionally inadequate because the lawyer participated in a plea hearing by speaker phone. The Court, in a *per curiam* decision, held that its "cases give no clear answer to the question presented." Therefore, the state court did not unreasonably apply clearly established federal law, and Van Patten was not entitled to habeas relief.

Criminal Law and Procedure

In *Gonzalez v. United States*, 553 U.S. ___, 170 L.Ed.2d 616 (2008), the Court held that defendant's lawyer could validly consent to have a Magistrate Judge preside over *voir dire* and jury selection, even if the defendant did not himself consent or even know that there was a right to be waived. Justice Thomas dissented. 170 L.Ed.2d at 631 (Thomas, J., dissenting).

In *United States v. Williams*, 553 U.S.___, 170 L.Ed.2d 650 (2008), the Court held that provisions of 18 U.S.C. § 2252A(a)(3)(B), which make it a crime to pander or solicit child pornography, were neither overbroad, in violation of the First Amendment, nor impermissibly vague, in violation of the Due Process Clause of the Fifth Amendment. Justices Souter and Ginsburg dissented. 170 L.Ed.2d at 673 (Souter, J., dissenting).

In *Virginia v. Moore*, 553 U.S. ___, 170 L.Ed.2d 559 (2008), the Court unanimously held that the police did not violate the Fourth Amendment when they arrested and searched the defendant, when they had probable cause to believe he had violated a State statute, but where the statute provided that the officers should have issued him a summons instead of arresting him. Therefore, the drugs that the police discovered were not subject to the exclusionary rule.

In *Danforth v. Minnesota*, 552 U.S. ___, 169 L.Ed.2d 859, the Court held that, while federal law does not require state courts to give retroactive effect to "new law" established by the Supreme Court to cases that were final when the Supreme Court case was decided, neither does it prohibit it from doing so. Therefore, the Minnesota courts were free to decide whether to apply *Crawford v. Washington*, 541 U.S. 36 (2004) and its prohibition of testimonial hearsay, to postconviction review of a conviction that was final before *Crawford* was decided. The Chief Justice and Justice Kennedy dissented. 169 L.Ed. 2d at 878 (Roberts, C.J., dissenting).

In *Giles v. California*, 554 U.S. ___, 171 L.Ed.2d 488 (2008), the Court held that *Crawford* precluded the State from introducing the hearsay statements of the victim of a homicide, even though the defendant rendered the victim "unavailable" by killing her, because he did not kill her for the purpose of preventing her from testifying. Justice Breyer, joined by Justices Stevens and Kennedy, dissented. *Id*. at 508 (Breyer, J., dissenting).

In *Indiana v. Edwards*, 554 U.S. ___, 171 L.Ed.2d 345 (2008), the Court held that, if a criminal defendant is mentally competent to stand trial if represented by counsel, but is not mentally competent to conduct the trial himself, the right to self-representation guaranteed by the Sixth Amendment does not prohibit the State from insisting that the defendant proceed to trial with counsel. Justices Scalia and

Thomas dissented. 171 L.Ed.2d at 358 (Scalia, J., dissenting).

Sentencing

In another watershed sentencing case, the Court held, in *Gall v. United States*, 552 U.S. ___, 169 L.Ed.2d 445, 451-452, "that, while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." Justices Thomas and Alito dissented.

In *Logan v. United States*, 552 U.S. ___, 169 L.Ed.2d 432 (2007), at the time he was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), Logan had three prior state convictions, which had not been expunged or set aside, and for which he had not been pardoned. Because these convictions never resulted in the loss of his civil rights in the first instance, the Court unanimously held that the "civil rights restored" exemption in 18 U.S.C. § 921(a)(20) did not apply, and Logan was properly sentenced to the mandatory minimum 15-year sentence required by the Armed Career Criminal Act.

In *Begay v. United States*, 553 U.S. ___, 170 L.Ed.2d 490 (2008), the Court held that driving under the influence of alcohol is not a "violent felony," for purposes of the sentencing enhancements in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1). Justices Alito, Souter and Thomas dissented. 170 L.Ed.2d at 505 (Alito, J., dissenting).

In *Watson v. United States*, 552 U.S. ___, 169 L.Ed.2d 472 (2007), the Court unanimously held that a person who trades drugs for a gun does not "use" a firearm in the commission of the crime, and is not subject to the mandatory minimum sentence provided by 18 U.S.C. § 924(c)(1)(A).

In *Burgess v. United States*, 553 U.S. ___, 170 L.Ed.2d 478 (2008), the Court held unanimously that a conviction of a state law drug crime, punishable by more than one year's imprisonment, is a "felony drug crime" for purposes of the mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A), even if the state law defined the crime as a misdemeanor.

In *Greenlaw v. United States*, 554 U.S. ___, 171 L.Ed.2d 399 (2008), Greenlaw appealed his conviction and sentence, but, even though the sentence was clearly less than the statutorily-mandated minimum, the Government neither appealed nor cross-appealed. The Court held that it was error for the Eighth Circuit, acting on its own initiative, to order an increase in the defendant's sentence. Justices Alito and Stevens, joined in part by Justice Breyer dissented. 171 L.Ed.2d at 415 (Alito, J., dissenting).

In *Irizarry v. United States*, 553 U.S. ___, 171 L.Ed.2d 28 (2008), the Guidelines provided for a sentence of up to 51 months, while the statutory maximum was five years (60 months, for the arithmetically-impaired). The trial court sentenced Irizarry to the maximum, without giving him prior notice that it was considering a sentence outside the Guidelines range. The Court held that, since the Guidelines are now merely advisory, all defendants are on notice that they may be sentenced up to the statutory maximum, and that a sentence between the top of the Guidelines range and the statutory maximum is a "variance" and not a "departure," so that individualized notice was not required. Justices Breyer, Kennedy, Souter and Ginsburg dissented. 170 L.Ed.2d at 37 (Breyer, J., dissenting).

The Sentencing Guidelines treat crack cocaine substantially more seriously than powder cocaine: a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine. In *Kimbrough v. United States*, 552 U.S. ___, 169 L.Ed.2d 481 (2007), the Court held that the crack/powder disparity is no longer mandatory. A sentencing judge "may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses." 169 L.Ed.2d at 488. Justices Thomas and Alito dissented. *Id.* at 502 (Thomas, J., dissenting); *id*. at 504 (Alito, J., dissenting).

Immigration

In *Dada v. Mukasey*, 553 U.S. ___, 171 L.Ed.2d 178 (2008), the petitioner, an alien, requested and was granted voluntary departure. Petitioner also had pending a motion to reopen the removal proceedings that had resulted in the order of voluntary departure. Under the immigration law, petitioner was caught in a Catch-22. If he departed the United States, he forfeited his motion to reopen; if he failed to depart within the required time, he would be statutorily ineligible for

certain forms of relief, including adjustment of status, for ten years. The Court held that petitioner should have been permitted to withdraw his motion for voluntary departure and to pursue his motion to reopen. Justice Scalia, joined by the Chief Justice and Justice Thomas, dissented, 171 L.Ed.2d at 196 (Scalia, J., dissenting), as did Justice Alito. 171 L.Ed.2d at 201 (Alito, J., dissenting).

Civil Rights

In *CBOCS West, Inc. v. Humphries*, 553 U.S. ___, 170 L.Ed.2d 864 (2008), the Court held that 42 U.S.C. § 1981(a), which guarantees that all persons in the United States have the same right to make and enforce contracts "as is enjoyed by white citizens," provides a remedy for "retaliation against a person who has complained about another person's contract-related 'right.'" The plaintiff was allowed to sue on the theory that he was fired because he complained that his employer had fired a fellow black employee for race-based reasons. Justices Thomas, joined by Justice Scalia, dissented. 170 L.Ed.2d at 877 (Thomas, J., dissenting).

In *Gomez-Perez v. Potter*, 553 U.S. ___, 170 L.Ed.2d 887 (2008), the Court held that the federal-sector provision of the Age Discrimination in Employment Act, 29 U.S.C. §633a, does provide a remedy to a federal employee who claims to be a victim of retaliation for filing an age discrimination complaint. The Chief Justice, and Justices Scalia and Thomas, dissented. 170 L.Ed.2d at 902 (Roberts, C.J., dissenting); *id*. at 911 (Thomas, J., dissenting).

In *Federal Express Corp. v. Holowecki*, 552 U.S. ___, 170 L.Ed.2d 10 (2008), the Court held that, in order to meet the statute's requirement that a claimant file a "charge" with the EEOC, the filing must be sufficient so that "taken as a whole, [it may] be construed as a request by the employee for the agency to take whatever action is necessary to vindicate her rights." 170 L.Ed.2d at 20. The Court rejected FedEx's argument that proper filing of a "charge," and, therefore, the claimant's ability to sue, depended on "EEOC's fulfilling its mandatory duty to notify the charged party and initiate a conciliation process." *Id.* at 23. The Court held that Holowecki's filing satisfied the statute's command, and affirmed the Second Circuit, which had reversed a contrary finding by the district court. *Id.* at 24, 26. Justice Thomas, in an opinion joined by Justice Scalia, dissented. 170 L.Ed.2d at 26 (Thomas, J., dissenting).

In *Kentucky Retirement Systems v. EEOC*, 554 U.S. ___, 171 L.Ed.2d 322 (2008), the Court held that a Kentucky statute, which provides preferential treatment to police, firefighters and other "hazardous position" workers who become disabled before they become eligible for retirement, did not discriminate unlawfully against such workers who became disabled only after becoming eligible for retirement on the basis of age. Justice Kennedy, joined by Justices Scalia, Ginsburg and Alito, dissented. 171 L.Ed.2d at 335 (Kennedy, J., dissenting).

In *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. ___, 171 L.Ed.2d 283 (2008), the Court held that an employer has both the burden of coming forward with evidence and the burden of persuasion, when defending a disparate-impact age discrimination claim on the basis of the statutory exemption for "reasonable factors other than age."

In *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. ___, 170 L.Ed.2d 1 (2008), the Court unanimously held that testimony by nonparties alleging discrimination by supervisors of the defendant company who played no role in the adverse employment decision alleged by the plaintiff was neither *per se* admissible nor *per se* inadmissible. The Court remanded so that the District Court could clarify the basis for its ruling excluding the proffered evidence under FRE 401 and 403. The Court stressed that, "[w]ith respect to evidentiary questions in general and Rule 403 in particular, a district court virtually always is in the better position to assess the admissibility of the evidence in the context of the particular case before it." 170 L.Ed.2d at 8.

Riley v. Kennedy, 553 U.S. ___, 170 L.Ed.2d 837 (2008), involved a procedural dilemma: Alabama, a state required to obtain "preclearance" of changes to its election laws under Section 5 of the Voting Rights Act of 1965, passed such a law and obtained the required preclearance. However, the Alabama courts subsequently invalidated the legislation. The Supreme Court held that Alabama was not required to obtain new "preclearance" to reinstate the election practice prevailing before the enactment of the invalidated law. Justices Stevens and Souter dissented. 170 L.Ed.2d at 856 (Stevens, J., dissenting).

In *Rothgery v. Gillespie County*, 554 U.S. ___, 171 L.Ed.2d 366 (2008), the plaintiff sued the County under 42 U.S.C. § 1983, claiming that he suffered damages because a County policy resulted in the denial of his right to counsel. The Court held that the plaintiff's right

to counsel was triggered when he was first brought before a Texas magistrate and informed of the charge against him, and his liberty was subject to restriction. The Court remanded for determination of whether he was unconstitutionally deprived of his right to counsel. The Chief Justice, along with Justices Alito and Scalia, concurred, but distinguished "between the time the right to counsel attaches and the circumstances under which counsel must be provided." 171 L.Ed.2d at 383 (Roberts, C.J., concurring); *id.* (Alito, J., concurring). Justice Thomas dissented. *Id.* at 387 (Thomas, J., dissenting).

ERISA

In *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. ___, 171 L.Ed.2d 299, 305 (2008), the Court held that if an entity both determines whether an employee is entitled to ERISA benefits and pays those benefits out of its own pockets, that entity has a conflict of interest, and a court "should consider that conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits."

In *LaRue v. DeWolff, Boberg & Assoc., Inc.*, 552 U.S. ___, 169 L.Ed.2d 847, 854 (2008), the Court held that ERISA § 502(a)(2), 29 U.S.C. §1132(a)(2), which ordinarily requires that recovery inure to the benefit of the plan as a whole, "does authorize recovery for fiduciary breaches that impair the values of plan assets in a participant's individual account."

Taxation

In *CSX Transportation, Inc. v. Georgia State Bd. of Equalization*, 552 U.S. ___, 169 L.Ed.2d 418 (2007), a unanimous Court held that railroads could challenge the *method* as well as the specific valuation, on a claim that a State tax discriminated against railroad property.

In *Dept. of Rev. of Kentucky v. Davis*, 553 U.S. ___, 170 L.Ed.2d 685 (2008), the Court held that Kentucky's income tax, which exempts from taxation income from interest on Kentucky municipal and State bonds, while taxing income from interest on other municipal bonds of other States and their subdivisions, did not violate the Commerce Clause. The Chief Justice, Justice Scalia and Justice Thomas concurred, but each wrote an opinion criticizing the "dormant Commerce Clause" rationale applied by the Court. 170 L.Ed. 2d at 708 (Roberts, C.J., concurring in part); *id.* (Scalia, J., concurring in part);

id. at 709 (Thomas, J., concurring in the judgment). In a stirring paean to the free market, Justice Kennedy, joined by Justice Alito, dissented. 170 L.Ed.2d at 709-18 (Kennedy, J., dissenting).

In *Knight v. Commissioner*, 552 U.S. ___, 169 L.Ed.2d 652 (2008), a unanimous Court held that investment advisory fees incurred by a trustee of a trust could only be deducted from the trust's taxable income to the extent they exceeded 2% of the trust's adjusted gross income. The Court held that these fees were not incurred "in connection with the administration of the trust" for purposes of the statutory exception that allows such expenses to be fully deductible, irrespective of the 2% floor, because they are expenses that it would not have been uncommon, unusual or unlikely for an individual to have incurred, had the property in question been held by the individual, rather than by a trust.

In *MeadWestvaco Corp. v. Illinois Dep't. of Revenue*, 553 U.S. ___, 170 L.Ed.2d 404 (2008), the Court held that Illinois improperly determined that a wholly owned business was part of petitioner's "unitary business," whose extra-territorial income was subject to apportionment and taxation in Illinois. The Court held that operational functionality was not a basis for determining a business to be "unitary." The Court remanded for a determination under the proper standard.

In *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. ___, 170 L.Ed.2d 392 (2008), a unanimous Court held that a taxpayer seeking a refund of taxes unlawfully assessed could not, by attempting to proceed under the Tucker Act, avoid the jurisdictional requirement of first making a timely administrative claim with the IRS.

In *Florida Dept. of Revenue v. Picadilly Cafeterias, Inc.*, the Court held that the special tax provisions of Bankruptcy Code § 1146(a) did not exempt the transfer of Picadilly's assets, made *prior* to the confirmation of its Chapter 11 plan, from Florida's stamp tax.

Patents

In *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. ___, 170 L.Ed.2d 996 (2008), Quanta purchased microprocessors from Intel, which Intel had manufactured under license to use LGE's patents. LGE sued Quanta, claiming that Quanta's combination of the Intel products with non-Intel memory infringed on LGE's patents. The Court held

that the doctrine of patent exhaustion applied to method patents, such as LGE's, and that Intel's license from LGE authorized the sale of components that embodied the patents. Therefore, LGE's patents were "exhausted," and LGE could not assert its patent rights against Quanta.

Energy

In *New Jersey v. Delaware*, 552 U.S. ___, 170 L.Ed.2d 315 (2008), its sole original jurisdiction decision of the Term, the Court held that Delaware had the authority to prohibit construction of a Liquid Natural Gas unloading terminal that would have extended 2,000 feet from New Jersey's shore into territory within the Delaware River that belongs to Delaware.

Elections and Campaign Finance

In *Crawford v. Marion County Election Board*, 553 U.S. ___, 170 L.Ed.2d 574 (2008), the Court upheld the constitutionality of an Indiana statute that required voters to present a government-issued photo identification at the time they cast their ballots. There was no majority opinion, nor even a plurality. Justice Stevens, joined by the Chief Justice and Justice Kennedy, wrote that the state's legitimate interests sufficiently outweighed the burden that the statute might impose on some voters. 170 L.Ed.2d at 591 (Opinion of Stevens, J.). Justice Scalia, joined by Justices Thomas and Alito, wrote that the "Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes." *Id.* at 593 (Scalia, J., concurring in the judgment). Justice Souter, joined by Justice Ginsburg, and Justice Breyer wrote dissenting opinions.

In *New York State Board of Elections v. Lopez Torres*, 552 U.S. ___, 169 L.Ed.2d 665, the Court unanimously held that New York's system of electing trial judges, under which political parties select their nominees at conventions of delegates chosen by party members in a primary election, does not violate the First Amendment.

In *Davis v. Federal Election Comm.*, 554 U.S. ___, 171 L.Ed.2d 737 (2008) the Court invalidated the "Millionaire's Amendment," which increased the maximum dollar amount of individual contributions a candidate could accept if the candidate's opponent expended more than $350,000 of his/her own personal funds in the campaign. The

Court held that, because the statute did not raise the limits for all candidates, but only for the "non-self-financing" candidate, "this scheme impermissibly burdens [the self-financing candidate's] First Amendment right to spend his own money for campaign speech." Justice Stevens, joined in part by Justices Souter, Ginsburg and Breyer, agreed that the petitioner had standing and that the case was not moot, but wrote that the law deprived Davis neither of his First Amendment free speech rights nor of the equal protection guarantees of the Fifth Amendment. 171 L.Ed.2d at 757-63 (Stevens, J., concurring in part and dissenting in part); *id.* at 763 (Ginsburg, J., concurring in part and dissenting in part).

Civil Procedure

In *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. ___, 171 L.Ed.2d 424 (2008), the Court held that an assignee of a legal claim for money owed has standing to pursue that claim in federal court, even if the assignee has promised to pay all the proceeds of the litigation to the assignor. The Chief Justice, joined by Justices Scalia, Thomas and Alito, dissented. 171 L.Ed.2d at 445 (Roberts, C.J., dissenting).

In *Riegel v. Medtronic, Inc.*, 552 U.S. ___, 169 L.Ed.2d 892 (2008), the Court held that the Medical Device Amendments of 1976 (MDA) preempted the plaintiffs' state law tort claims challenging the safety and effectiveness of a device given premarket approval by the FDA. The Court distinguished state law remedies premised on a violation of the FDA requirements, which would not be preempted, from those based on common law theories of tort liability, which are preempted. Justice Ginsburg dissented.

In *Rowe v. New Hampshire Motor Transp. Assn.*, 552 U.S. ___, 169 L.Ed.2d 933 (2008), the Court held that two provisions of a Maine law regulating the delivery and sale of tobacco products were preempted by a federal statutory prohibition on the enactment or enforcement of any law "related to a price route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1); see also 49 U.S.C. § 41713(b)(4)(A). Justice Ginsburg, concurring, urged Congress to solve the problem the State was preempted from addressing, i.e., verifying the age of recipients of tobacco products. 169 L.Ed.2d at 943-44 (Ginsburg, J., concurring). Justice

Scalia also concurred, but expressed his continuing disapproval of the use of Legislative reports to show the intent of Congress "with regard to propositions that are apparent from the text of the law, unnecessary to the disposition of the case, or both." *Id.* at 944 (Scalia, J., concurring in part).

In *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. ___, 171 L.Ed.2d 457 (2008), the Court held that an Indian tribal court lacked jurisdiction to adjudicate an Indian couple's discrimination claim regarding a non-Indian bank's sale to non-Indians of fee land the bank owned on an Indian reservation. Justice Ginsburg, joined by Justices Stevens, Souter and Breyer, dissented in part, agreeing that the tribal court lacked jurisdiction to order the bank to give the Indian couple an option to repurchase the land, but arguing that the tribal court did have jurisdiction to award the Indian couple money damages against the bank on their discrimination claim. 171 L.Ed.2d at 481 (Ginsburg, J., concurring in part and dissenting in part).

In *Ali v. Bureau of Prisons*, 553 U.S. ___, 169 L.Ed.2d 680 (2008), the Court held that the exception to the waiver of sovereign immunity in the Federal Tort Claims Act, which precludes claims arising from the detention of property by "any officer of customs or excise or any other law enforcement officer," applied to all law enforcement officers, and barred the plaintiff's claim based on the alleged torts of officers of the Federal Bureau of Prisons. Justices Kennedy, Stevens, Souter and Breyer dissented.

In *Allison Engine Company, Inc. v. United States*, 553 U.S. ___, 170 L.Ed.2d 1030 (2008), a unanimous Court held that, to prevail on a False Claims Act claim against a person who uses a "false record or statement to get a false or fraudulent claim paid or approved by the Government," 31 U.S.C. § 3729(a)(2), or who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid," 31 U.S.C. § 3729(a)(3), is required to prove, respectively, that the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim, or that the conspirators agreed to make use of the false record or statement to achieve this end.

In *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. ___, 170

L.Ed.2d 1012 (2008),a unanimous Court held that a plaintiff asserting a RICO claim predicated on mail fraud was not required to plead or prove that the plaintiff relied on the defendant's alleged misrepresentations.

In *John R. Sand & Gravel Co. v. United States*, 552 U.S. ___, 169 L.Ed.2d 591 (2008), the Court held that the special statute of limitations governing the Court of Federal Claims required the Court of Federal Claims to raise and consider *sua sponte* the timeliness of a lawsuit, even if the Government had waived the issue. Justices Stevens and Ginsburg dissented.

In *Preston v. Ferrer*, 552 U.S. ___, 169 L.Ed.2d 917 (2008), the Court held that the Federal Arbitration Act superseded state laws lodging primary jurisdiction over a dispute in an administrative forum, as well as those lodging jurisdiction in judicial forums. Justice Thomas dissented.

In *Richlin Security Service Co. v. Chertoff*, 553 U.S. ___, 170 L.Ed.2d 960 (2008), the Court unanimously held that a prevailing plaintiff in a case against the Government subject to the Equal Access to Justice Act was entitled to recover fees for paralegal services at the market rate for such services, and was not limited to the paralegal costs actually incurred by the party's attorney.

In *Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. ___, 169 L.Ed.2d 627 (2008), the Court held that Section 10(b) of the Securities Exchange Act of 1934 does not provide a private right of action in favor of investors against customers and suppliers who allegedly agreed to arrangements that allowed the investors' company to mislead its auditor and issue a misleading financial statement affecting the stock price. Justices Stevens, Souter and Ginsburg dissented, and Justice Breyer took no part in the consideration or decision of the case.

In *Taylor v. Sturgell*, 553 U.S. ___, 171 L.Ed.2d 155 (2008) a unanimous Court rejected the doctrine of preclusion by "virtual representation," and held that the plaintiff was not precluded from bringing a Freedom of Information Act suit on the basis of a judgment in favor of the Government in a suit seeking the same records brought by the plaintiff's friend, who had no legal relationship with the plaintiff, and whose suit the present plaintiff neither controlled, financed nor participated in.

2008 NINTH CIRCUIT REVIEW

By Scott Shorr

I never had a particularly strong opinion about the on-going debate to break up the Ninth Circuit until I was asked to write a summary of some of the Ninth Circuit's opinions from 2008. My view – well, at least for the very limited purpose of researching and writing this article – is now strong. Break it up! Break into tiny little jurisdictions so I can at least try to keep up. I now understand why Tom Sondag graciously bowed out of doing this summary each year and handed the reins to me.

The Ninth Circuit covers nine states and a number of island jurisdictions in the Pacific. In recent years, there have been approximately 15,000 appeals each year. The court has "terminated" (the Ninth Circuit's word) well over 13,000 cases per year.

Even taking into account that most of those appeals are not "terminated" with a written opinion on the merits, there are far too many cases for one person to survey or summarize (although Willamette University does a nice job in its periodic email summaries). As a result, I am following Tom Sondag's prior practice of just giving some of the highlights (and lowlights depending on your point of view) of several cases from 2008. These are not necessarily the most important cases out there. In the spirit of the Almanac, however, these are some of the more interesting, occasionally entertaining, and sometimes dismaying ones.

1. MIDDLE SCHOOL STRIP SEARCHES 13-YEAR OLD GIRL FOR IBUPROFEN.

Yes, you read that title right. And you may hear a lot more about it because the United States Supreme Court has granted *certiorari* in this case. In July 2008, an *en banc* panel of the Ninth Circuit held that it violated the Fourth Amendment's protection against unreasonable searches and seizures for a public middle school to strip search a 13-year old girl for prescription strength ibuprofen on the basis of an uncorroborated tip from a classmate. *Redding v. Safford Unified School Dist. No. 1*, 531 F.3d 1071 (9th Cir. 2008). In *Redding*, an eighth grader

was caught in school with several 400 mg ibuprofen pills that are only available by prescription. Over-the-counter ibuprofen pills, such as Advil (tm, of course), are 200 mg. Go ahead, you do the math and wonder why anyone gets a prescription.

I am not sure why a teenager would be taking strong ibuprofen pills for fun. I might take them for a massive headache after reading too many Ninth Circuit opinions. In any event, back to the case. The caught-red-handed-ibuprofen girl then pointed her guilty and pain-free fingers at Savanna Redding, a 13-year old classmate and honor student. The ibuprofen tipster claimed that Redding gave her the pills. It is unclear if Redding upset her now-former friend during a Hannah Montana-Jonas Brothers debate. (I slightly favor Montana in that awful match-up). It is clear that there was some history between the two that arose out of a past school dance at which someone may have had alcohol. No one claimed that Redding had any ibuprofen on her. Regardless, the assistant principal and a school nurse took Redding into an office, had her remove all of her clothes down to her underwear, and then instructed her to pull her underwear away from her body. No ibuprofen was found. Ms. Redding was justifiably upset and humiliated.

An *en banc* panel of the Ninth Circuit held that the search violated the Fourth Amendment both because the school was not justified conducting a search based on an uncorroborated (and implicated) tipster and it was grossly intrusive to strip search a middle school girl for ibuprofen. Judges Hawkins and Bea and Chief Judge Kozinski dissented on the merits (others dissented on qualified immunity grounds). No, I can't explain that dissent either – something about the state's interest in protecting an otherwise stable society from the risk of headache-free teenagers. The Supreme Court awaits.

2. MUNICIPALITY MUFFLES "MAGIC MIKE"

How can I not write a case summary about a guy named Magic Mike and his magical case, *Berger v. City of Seattle*, 512 F.3d 582 (9th Cir. 2008), *rehearing en banc granted*, 533 F.3d 1030 (July 14, 2008). Apparently Michael "Magic Mike" Berger has a long history of performing his magic and making those funny balloon creatures in the Seattle Center area – the large public entertainment area near downtown that

includes the Key Arena, Space Needle and various entertainment and theater halls. The City runs the area and delegates rulemaking authority to the Seattle Center Director. The Director established various rules requiring permits and badges for street performers, barring "active solicitation," and mandating that performers only use certain spaces within the public grounds. Magic Mike made a facial and as applied challenge to each of those rules. The Ninth Circuit (O'Scannlain, J.) held that the permit and badge rules were content neutral, narrowly tailored to protect a governmental interest protecting the safety of its citizens (some of whom apparently felt threatened by his Magicness's outbursts), and left open other places for Magic Mike to perform his magic. It further upheld the ban on active solicitation and designated performance areas.

Judge Berzon dissented in part from the majority and noted that this was the first case of its kind where a court upheld an advance permitting requirement for speech in a public *fora* (one designed for arts and entertainment) in which there was no "coordination" issue; a coordination issue occurs when the free expression intrudes on other public uses for which there must be coordination – for example, a march down Broadway during rush hour. Either Judge Berzon's dissent caught others' attention or Magic Mike may still have some magic up his sleeve. The Ninth Circuit granted an *en banc* rehearing in July.

3. YOU PAINTED WHAT ON YOUR VAN?

Sticking with our First Amendment theme, this one comes to us from Grass Valley, California. Matthew Fogel had painted on his van the words "I AM A F____ING SUICIDE BOMBER COMMUNIST TERRORIST," "ALLAH PRAISE THE PATRIOT ACT * * * F_____ING JIHAD ON THE FIRST AMENDMENT! P.S. W.O.M.D. ON BOARD!" and "PULL ME OVER! PLEASE! I DARE YA."

The Grass Valley Police Department, never one to turn down a dare, found the van in a parking lot. The initial officer determined that the speech was satire and not a crime. His superior disagreed, claiming it was a bomb threat and the country was on alert for terrorism. The police found and interviewed Fogel, who either said he was trying to "scare people" or "scare people into thinking." The police did not follow its procedures for bomb threats or treat the scene as a bomb-

threat area. Still, it arrested Fogel for making a bomb threat, falsely reporting a bomb threat and using "offensive words in a public place which are inherently likely to provoke an immediate violent reaction." The police also required that Fogel paint over the messages before he retrieved his van. Fogel filed a section 1983 suit and challenged his arrest and the seizure of the van on First, Fourth, and Fourteenth Amendment grounds.

The Ninth Circuit (Fletcher, J.) held that Fogel's statements, under both an objective and subjective standard, were not true threats that were outside the protection of the First Amendment. Instead, they were protected by the constitution as "hyperbolic rhetoric on a matter of public concern." The Court also held that the individual officers were entitled to qualified immunity.

The lesson learned here: better to paint hyperbolically threatening messages on your van on topical issues like terrorism than to perform street magic and balloon shows that intimidate pedestrians in Seattle Center.

4. SHARING YOUR LAPTOP WITH YOUR FRIENDLY CUSTOM AGENT.

In July 2005, Michael Arnold arrived at the Los Angeles International Airport after a 20-hour flight from the Philippines. The customs agent pulled him out of line to inspect his baggage, which included his computer. She asked him to turn on his computer and handed it to a colleague, who opened the folder, Kodak Memories, when it popped up. The pictures displayed nude women. When other agents looked further into the computer and separate drives, they discovered child pornography. A grand jury charged Arnold with various counts relating to child pornography. Arnold moved to suppress the information found on his computer claiming he was subjected to an unconstitutional search without reasonable suspicion.

The Ninth Circuit noted that under Supreme Court law searches of international passengers at airports are the functional equivalent of a "border search." *United States v. Arnold*, 533 F.3d 1003 (9th Cir. 2008) (O'Scannlain, J.). "Reasonable suspicion" is not required for a border search of a closed container, contents of pockets, pursues or pictures. Arnold claimed that greater protection should be given to laptops be-

cause they were the equivalent of searching someone's inner thoughts or something sacred like their home. The Ninth Circuit rejected the argument and held that reasonable suspicion might be required when a search was particularly intrusive or destroyed property, but the search of the laptop and computer drives did not rise to that level.

5. THE "I PLEAD THE FIFTH" CASE

Jerome Alvin Anderson was being interrogated by police in connection with a murder investigation when he stated "I plead the Fifth." The officer stated, "the Fifth, what's that?" The officer then continued to ask questions. The officer ultimately obtained a confession after, the officer claimed, Anderson reinitiated the conversation. The state court held that Anderson's invocation of "the Fifth" was ambiguous and convicted Anderson of special circumstances murder. The federal district court denied Anderson's habeas petition.

An *en banc* Ninth Circuit court reversed and held that "[i]t is rare for the courts to see such a pristine invocation of the Fifth Amendment and extraordinary to see such flagrant disregard of the right to remain silent." *Anderson v. Terhune*, 516 F.3d 781, 784 (9th Cir. 2008). It further held that all questioning should have stopped upon Anderson's invocation so that the officer's comments, "the Fifth, what's that" was not a proper clarifying question and improperly reinitiated the conversation. It also held that Andersen had not reinitiated a later conversation that led to the conviction.

6. "DON'T ASK, DON'T TELL" DON'T NECESSARILY DO DUE PROCESS.

Major Margaret Witt was an Air Force reserve nurse who had a long and decorated active and reserve duty career. She was literally a "poster child" as the Air Force chose to use her picture in recruiting/promotional pamphlets for over a decade. Major Witt had been in a long-term relationship with another woman, who was not in the military and resided far from the military base, for many years during her service. In July 2004, she was contacted by an officer who was investigating whether she was gay. She also was contacted by an Air Force Chaplain who inquired about her sexuality. She declined to speak to both. Just one year before she reached her 20-year service date, which

would qualify her for full retirement pension, the Air Force sent her a memo that it was beginning separation proceedings because of her sexuality. The Air Force ultimately terminated her based on findings that she had engaged in homosexual acts (although not with anyone in the military) and she had stated that she was a homosexual.

On appeal to the Ninth Circuit, Witt argued that the Supreme Court's decision in *Lawrence v. Texas* established a fundamental right to engage in consensual homosexual acts. *Witt v. Department of Air Force*, 527 F.3d 806 (9th Cir 2008). As a result, she argued that the United States had to prove that the "Don't Ask Don't Tell" policy met a heightened standard of scrutiny beyond a rational basis standard. The Ninth Circuit agreed that a heightened level of scrutiny applied, requiring the government prove (1) the existence of an important governmental interest, (2) the military policy furthers that interest, and (3) the application of the policy furthers the interest. *Witt*, 527 F.3d at 817-819. The Ninth Circuit held that the government had an important interest in management of the military, but that there was an incomplete record whether its Don't Ask, Don't Tell policy or Major Witt's termination furthered that interest. It remanded the case to the district court for further findings. It also held that the procedural due process issues were not ripe for consideration and that the equal protection claim was properly dismissed.

CIVIL SERVICE – A RECAP OF THE OREGON SUPREME COURT'S 2008 NON-CRIMINAL, NON-HABEAS, AND NON-PCR CASES

By Keith Garza

I. PAST IS PROLOGUE

In my summary of the Court's 2005 cases, I made no attempt to cull the number of civil decisions that the Court issued. For the 2007 *Appellate Almanac* – calendar year 2006 – I was not invited to offer either summation or commentary on the Oregon Supreme Court in any fashion ("prohibited" would be a more apt descriptor). Last year, I was relegated to offering summary, but not commentary, on the Court's "civil" opinions. This year's editor, the otherwise affable and always energetic Judy Giers, somewhat dejectedly and rather off-handedly, told me simply: "Oh, go ahead and do what you did last year." (Yyeesss!!)

Of course, last year, the Court issued fewer than 20 civil opinions. *See* 3 *Oregon Appellate Almanac* 32 (2008). So, understandably (at least to my way of thinking), I waited until just a few hours ago to start typing this thing – or more than a month past deadline. What I did not realize, however, was that the Court went on something of a civil spree in 2008, publishing something like **70** decisions in civil cases! (What the heck?!) So, if any of the "analysis" that follows seems a little thin, feel free to read the decisions yourself. You only get what you pay for, or so the old saw goes. Feel free to sit yourself back, strap yourself in, and enjoy the ride – or simply skip my musings (which, in all honesty, are for my benefit alone) and go straight to Judge Landau's article.

II. DOWN FOR THE COUNT (STUFF ABOUT #S)

Chief Justice Carson liked to remind people – and probably still does – about the statistician who drowned in a river with an average depth of 18 inches. I prefer the warning about using statistics the same way that a drunkard uses a light post, for support rather than illumination. Regardless, folks seem to like numbers, so I have included a few below.

Here's the caveat: As Professor Bass Sunshine (name reworked to provide defense in expected libel action) remarked to 200 or so of my closest friends a long time ago, "Obviously, Mr. Garza was not a math major in college." (In the course of Socratic abuse, I had been unable to tell my classmates how many years a plaintiff had worked for the defendant company by subtracting from the year he was fired the year he was hired. But, in my defense, it was a pretty big number: something like seven (7) years – that's more than a hand's worth.) Does the fact that I have not forgotten that dialogue from nearly two decades ago and have been known to follow the good professor around the country heckling him say something about my psyche? Who's to say? Psychology is such a soft science. But what it should convey to the reader is that very little – indeed, nothing – by way of reliance should be placed on the calculations that follow.

As noted above, the Court went just about nuts in publishing decisions in civil cases last year. Relying wholly upon the Court's website – which includes some non- dispositional matters such as accepting certified questions and issuing alternative writs of mandamus, and minor dispositions like certifying ballot titles – there were 119 matters listed. Of those, 23 were criminal or PCR/habeas cases. The remaining 96 entries break down roughly as follows (I say roughly because I appear to have lost two cases somewhere (*see* CAVEAT *supra* and also *supra* note re effort expended on preparing this article):

20 mandamus proceedings (a whopping number; some civil but mostly criminal)

19 ballot title review proceedings (ugh)

8 judicial and lawyer discipline and attorney admissions reviews

4 Tax Court

43 other civil matters

But there is more. How about the following tasty little tidbits:

29 the number of cases involving one or more amicus appearances

62 the number of amicus briefs filed (which seems like a lot, frankly)

10 the number of cases with a separate opinion (concur, dissent, etc.)

17 the number of cases in which one or more of the justices did not play (Justice Linder factored in 12 of those cases, and, if pressed, probably would offer up the excuse that she was on the case in the Court of Appeals, likely story.)

0 the amount of remuneration for writing this article

Moreover, I counted approximately 34 cases in which a decision of the Court of Appeals was fairly the decision on review. Of those 34 at bats, the Court of Appeals was affirmed 17 times and reversed (in whole or in part) or modified 16 times. (Yes, I know that the numbers are one off – *see supra*.) Pretty dang good average for an intermediate appellate court, and tons better than Ichiro's.

Finally, by way of breakdown, it looks like the justices lined up as follows with respect to issuing what I will call substantive opinions in civil cases last year.

Chief Justice De Muniz	7
Justice Gillette (aka "the Man")	12
Justice Durham	4
Justice Balmer	5
Justice Kistler	5
Justice Linder	1
Justice Walters	3

Finally, with respect to the time to decision in the "substantive opinions" counted above (minus a case involving a petition for attorney fees), my "calculations" suggest the following: (1) the average time for decision from submission was 202 days, or between six and seven months; and (2) the median time for decision was 145 days, or a little less than five months. Of course, most of those decisions came before the economy – and, with it, the OJD budget – tanked. It will be interesting for Court watchers to see how those figures compare to what the Court produces in 2009 and beyond.

III. WE'VE GOT A REALLY BIG SHOW

A. Appellate Constitutional – A Walk Through the Court's Con Law Cases

Hughes v. PeaceHealth, 344 Or 142. The Court in this case rejected, for what seems like the umpteenth time (but with separate dissents from Justices Durham and Walters), arguments under Article I, section 10, and Article I, section 17, that the noneconomic damages cap of ORS 31.170 is unconstitutional in wrongful death actions. The Court, as it is wont to do in such cases, hit the dusty books, discussing, among others, Lord Campbell's Act (1848), "ancient Germanic practice," and a 1794 Connecticut trial court decision. The upshot:

> "What the evidence *does* suggest is that the colonial, state, and local courts in early America often did manage to arrange for some kind of compensation by persons or entities responsible for a wrongful death to the decedent's survivors. But, before those somewhat haphazard arrangements had coalesced into a clearly defined common-law civil action for wrongful death, various state legislatures stepped into the breach and began to enact legislation explicitly providing for wrongful death actions. With those statutory enactments, efforts to develop a common law of wrongful death came to a halt."
>
> * * * * *
>
> "Even if we were to accept the notion that there was some general movement in the common law of the early nineteenth century that might, had it been left alone, eventually have grown into a common-law recognition of a wrongful death action, there is no basis for us further to conclude that the common law would have recognized the particular cause of action that plaintiff now asserts -- an action seeking damages for *all* injuries occasioned by the wrongful death of a family member, including mental suffering and loss of society and care, without limitation of any kind. In the end, plaintiff has failed to persuade us that the statutory damages cap at ORS 31.710 abolishes a remedy that was available at common law when Article I, section 10, was drafted."

344 Or at 151-52. The Court also held that the lower interest rate on judgments for medical malpractice actions, ORS 82.010(2)(f), ap-

plied: "Why provide a limited interest rate on money judgments in medical malpractice actions, but only if the patient did not die?" 344 Or at 158.

George v. Courtney, 344 Or 76 (2008). This case, a certified appeal in which the Court issued its decision one day after oral argument, involved the legality of the "emergency" legislative session held in early 2008. The case turned on the meaning of a 1976 amendment to Article IV, section 10. And, although the Court applied the prescribed methodology for interpreting constitutional amendments, it did so only loosely and generously in favor of the legislative prerogative (and, perhaps significantly, without addressing the history of the amendment): "In light of the broad range of tasks that confront legislatures every day, we have no basis for assuming that the voters meant to use the term 'emergency' narrowly, *e.g.*, to address, for example, unforeseen emergencies, but not pressing needs." 344 Or at 85. In other words, the question essentially is a political, not a judicial, one, as the Court essentially concluded at the end of its opinion:

> "In other words, plaintiffs ask us to look behind the acts of the legislators to weigh and assess the motives behind those acts. Such an exercise of power by this court would be an improper invasion by the judicial branch into the very thought processes of members of a coordinate branch of government. We have not, and do not, claim such power."

344 Or at 88. Interesting to note that the Court's last real brush with the political question doctrine came 20 years before and involved the same trial judge – the Hon. Paul Lipscomb. *See Lipscomb v. State Board of Higher Ed.*, 305 Or 472 (1988) (Governor's power to veto emergency declaration in legislation (and, therefore, to permit a referendum on the enactment) did not include a line-item veto power for non-appropriation bills with e-clauses).

Goddard v. Farmers Ins. Co., 344 Or 232. This was a bad faith failure-to-settle claim against an insurer in which the insurer had been tagged with nearly $21 million in punitive damages. Accordingly, the review was for excessiveness under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Going through the *Gore* guideposts, and having concluded that the defendant was on notice that a bad faith failure to settle (unlike a bad faith

failure to defend) could sound in tort and thus be answerable in punitive damages, 344 Or at 263-65, the Court concluded:

> "In summary, we conclude that defendant's actions were directed at a financially vulnerable victim, were not confined to this victim alone, and involved intentional malice and deceit. On the other hand, defendant's actions caused economic harm only and did not evince a reckless disregard for the health or safety of others, although defendant is entitled to little credit for either factor -- cases of economic harm like the present one seldom provide malefactors with an opportunity to meet either of those criteria. Taken together, our analysis of the five reprehensibility factors set out in *Gore*, considered in light of the economic nature of defendant's wrongdoing, leads us to conclude that defendant's actions were very reprehensible."

344 Or at 267-68.

However, after concluding that, for purposes of considering the ratio of compensatory harm to punitive damages, prejudgment interest may be considered, *id.* at 268-70, the Court had "little difficulty in concluding" that $20 million in punitive damages was "'grossly excessive[.]'" 344 Or at 272. The ceiling for an award in this case, the Court determined, would be a multiplier of four times the compensatory harm – estimated at $1.28 million – but the Court remanded for the trial court to make a precise calculation of prejudgment interest. *Id.* at 275-76.

Christiansen v. Providence Health System, 344 Or 445. The Court held that ORS 12.110(4), which provides a five-year statute of ultimate repose for medical malpractice actions, both applies to claims filed on behalf of minors and does not violate the Remedy Clause of Article I, section 10, of the Oregon Constitution.

Williams v. Philip Morris, Inc., 344 Or 45. Third time's a charm? Apparently so. During the second term of the Clinton administration, a jury awarded the estate of a long-time smoker approximately $80 million in punitive damages. The trial court reduced the award to $32 million. The Court of Appeals reinstated the full amount of the award in 2002, the Supreme Court denied review, and, in 2003, the "other" Supreme Court vacated the judgment and remanded the case to the Court of Appeals.

The ripples of *Oberg* gently lapping, the Court of Appeals held that the $80 million award did not violate due process. This time, the Oregon Supreme Court took the case on review, and affirmed. Ala *Oberg*, the U.S. Supreme Court again granted cert and, again but unlike in *Oberg*, sent the case back to Oregon. However, on remand – and almost a decade after the jury's verdict – five justices (Balmer and Kistler, JJ., not participating) again upheld the jury's award. The affirmance, however, was not based on the merits but, instead, on the defendant's failure to proffer a jury instruction – which was a whopping two and one-half pages long – that was correct in all respects – an independent state law basis for the decision. Notwithstanding the seeming lack of a federal issue for decision, federal Supremes again took the case up. In arguments held in early December 2008, the tobacco maker's lawyers argued that the Oregon Supreme Court had "thumbed its nose at" the high court.

On March 31, 2009 – which shows how dilatory the author has been in preparing this article – the case went out with a whimper and not a bang. The Justices dismissed the writ of certiorari as having been improvidently granted. 556 US ___, 129 S Ct 1436 (2009). Bottom line for Oregon practitioners, regardless of any implied federal law overlay or lack thereof, is: pay attention to your proffered jury instructions and, for goodness sakes, eschew the multi-page, single instruction submissions unless one is darned sure that every jot and tittle correctly states Oregon law: "asking the court to give a multiple-page instruction – essentially placing all of the party's eggs in one instructional basket – involves a significant danger that the proffered instruction will be erroneous in some aspects." 344 Or at 56.

State v. Johnson, 345 Or 190 (2008). Although a criminal case, *Johnson* should be of interest to civil lawyers because the Court invalidated part of Oregon's harassment statute as facially overbroad and violative of Article I, section 8. The statute, ORS 166.065(1)(a)(B), prohibits(ed) publicly insulting someone with abusive words or gestures in a manner both intended and likely to provoke a violent response. That the defendant did when he became angry at two women in a car that pulled in front of his pickup truck. The women's vehicle displayed a rainbow decal, which – as night follows day – led the defendant to assume that the women were lesbians. Thereafter followed "tailgating," use of some sort of "sound amplification system," racial

and obscene epithets, and "extremely rude gestures." After some period of this exemplary behavior – which the Court generously conceded "may have been offensive" – one of the women got out of her vehicle and "engaged in a heated verbal exchange" with the defendant, which ended when the other woman warned about a man in the back of the defendant's pickup who was, of all things, "swinging a skateboard in a menacing way." (The Court of Appeals, which got reversed out of the deal, described the events more succinctly: "For directing racist, obscene, and homophobic insults at the occupants of a car over an amplified public address system, in stop-and-go traffic, and for upwards of five minutes, defendant was convicted of" harassment." The Court of Appeals also set out some of the precise words and conduct of defendant – which included "doing the tongue thing," whatever that might be. 213 Or App 83, 89 (2007).)

Long story short for this category two *Robertson* case, the Court held that the legislature may proscribe only "exposure to a reasonable fear of immediate harm due to certain types of expression * * *," and the statute in the Court's estimation was directed at preventing only "harassment or annoyance generally." "The offense is complete if the offender speaks the words or makes the gestures in a public manner intended (and likely) to provoke a violent response by *someone* at *some time* and the hearer is [harassed or annoyed]." 345 Or at 195. An unfortunate outcome in light of the conduct at issue, and even the Court itself seemed at least a little apologetic (or perhaps defensive): "We recognize that our decision today prevents using the criminal law to alleviate some kinds of distressing circumstances, but that is a consequence of Oregon's explicit protection of freedom of expression in Article I, section 8." 345 Or at 197 n 5. So it's back to the legislative drawing board, again (this was not the first iteration of the crime of harassment to be struck down), with future challenges virtually assured.

B. There's a Tort in the Court – Common Law Injury Claims

Johnson v. Multnomah County Department of Community Justice, 344 Or 111. For purposes of the "discovery rule," the Court refused to "reject the possibility that, in some circumstances, information appearing in * * * media reports may be imputed to a plaintiff as a matter of law," *id.* at 113, but held that a plaintiff's knowledge through the media of who her attacker may have been did not, at least as a matter of law,

put the plaintiff on notice that her injury may have been the product of tortious conduct by a parole agency or any other third party, *id.* at 120. The Court concluded:

> "In the end, defendant's proposal -- that all plaintiffs should be deemed to know all information relating to their claim that has been published in the local media -- involves a leap of faith that we are not prepared to make. The fact that news about some event was available at a particular time does not, by itself, resolve whether a reasonable person would have read or heard that news, much less what a reasonable inquiry based on that news would have uncovered."

344 Or at 122. That said, the Court also acknowledged that

> "[t]here may be cases in which news coverage of a topic is *so* widespread that a general community awareness (and, thus, the awareness of any objectively reasonable person) can be determined as a matter of law. However, this is not such a case."

Id. at 123 n 7. Finally, although the discovery rule historically has been understood to consist of three elements – harm, tortious conduct, and causation – the Court suggested a fourth element – "the probable identity of the tortfeasor" – but stated that "[w]e think that that element inheres in the concept of 'tortious conduct' – someone, after all, must have carried out the 'conduct.'" *Id.* at 118 n 2.

T.R. v. Boy Scouts of America, 344 Or 282. This was another "discovery rule" case, one decided in the context of a section 1983 claim against the City of The Dalles for *Monell* liability following sexual abuse by the head of the city's Explorer Scout program. Although the abuse occurred in 1996, the plaintiff – a minor at the time and 22 years old when the action was commenced – claimed that he did not learn of the city's potential liability until 2001 when another officer was arrested for misconduct. A jury sided with the plaintiff as to when the plaintiff knew, or should have known, of his cause of action, but the Court of Appeals disagreed. On review, the Supreme Court reversed:

> "To restate, then, the discovery accrual rule provides that a plaintiff's claim against a particular defendant accrues when (1) the plaintiff knows, or a reasonable person should know, that there is enough chance that the defendant had a role in causing the plain-

tiff's injury to require further investigation; and (2) an investigation would have revealed the defendant's role. Application of the discovery accrual rule is a factual issue for the jury unless the only conclusion a reasonable jury could reach is that the plaintiff knew or should have known the critical facts at a specified time and did not file suit within the requisite time thereafter."

344 Or at 296. Regarding those factors, the Court rejected the city's arguments with respect to each:

> "In summary, we hold that, based on the evidence in this record, a reasonable jury could have found that, under the circumstances existing in 1996, plaintiff acted reasonably in not undertaking an investigation of whether the city itself had caused him harm. Alternatively, and even if a reasonable person would have made inquiry as to the city's role in 1996, we cannot conclude, as a matter of law, that an inquiry would have revealed facts indicating that a city policy may have caused plaintiff harm."

Id. at 298.

Harris v. Suniga, 344 Or 301. The defendants in this case allegedly had botched a construction job for an investment company. The investment company then sold the property – an apartment building – to the plaintiffs, warts and all. When the building began to leak, the plaintiffs sued the construction company alleging negligence. The defendants responded with the "economic loss" doctrine in defense, and that was good enough for summary judgment in the trial court. In the defendants' view, any negligence caused property damage to the investment company, not to the plaintiffs. The Supreme Court disagreed:

> "Defendants' theory, however, proves too much. Every physical injury to property can be characterized as a species of 'economic loss' for the property owner, because every injury diminishes the financial value of the property owner's assets. Damage to a car reduces the value of the car -- one of the owner's assets. A tree falling on a person's residence is damage to property, but also can be characterized as a financial loss because it reduces the value of the residence, which the owner may properly view as an asset or financial investment as well as a residence. Yet the law ordinarily allows the owner of the damaged car or residence to recover in negligence from the person who caused the damage. In *Onita Pacific Corp.*, this court

> used the term 'economic losses' to describe 'financial losses such as indebtedness incurred and return of monies paid, *as distinguished from damages for injury to person or property*.' 315 Or at 159 n 6 (emphasis added). That definition did not purport to be comprehensive, but it plainly indicated that the court was adhering to the distinction that had developed in the common law between 'purely economic losses,' on the one hand, and damages for physical injuries to person or property, on the other. The logic of defendants' position would eliminate that distinction."

344 Or at 310. Even so, there was more than a little hemming and hawing in the Court's opinion as to the underpinnings of the doctrine itself and its applications, but the Court ultimately was persuaded that other doctrines (claim preclusion, contribution, comparative *fault*, and mitigation of damages) would ameliorate the potential for unjust or multiple recoveries.

Liles v. Damon Corp., 345 Or 420. The Court held that Oregon's Lemon Law does not require written notification of a defect and an opportunity to correct to occur sequentially.

Lowe v. Philip Morris USA, Inc., 344 Or 403. The plaintiff, a smoker, alleged "that a significantly increased risk of developing lung cancer in the future as a result of defendants' negligence makes it reasonable and necessary for her to undergo periodic medical monitoring," *id.* at 409, and sought by way of injunction a court-monitored program of medical monitoring, smoking cessation and education for her and 400,000 other Oregonians. That was sufficiently significant relief to bring out six amicus briefs. In short, that dog did not hunt: "we hold that negligent conduct that results only in a significantly increased risk of future injury that requires medical monitoring does not give rise to a claim for negligence." 344 Or at 415. Justice Walters, in a separate opinion, went on record for the position that "[w]hen science and medicine are able to identify harm before it becomes manifest, and to do so with sufficient certainty, our precedents do not foreclose an action in negligence or the remedy of medical monitoring." *Id.* at 419 (Walters, J., concurring).

Taylor v. Ramsay-Gerding Construction Co., 345 Or 403. This was an apparent agency case. Long story short, the agency was apparent.

Boyer v. Salomon Smith Barney, 344 Or 583. This was a professional malpractice case in which the plaintiff argued that he had a special re-

lationship with his financial services firm such that he could maintain a tort action against it for negligence. The Court disagreed:

> "(1) The relationship between plaintiff and Smith Barney was that of principal and agent; (2) such a relationship can -- and often will -- be a 'special' one; but (3) the particular provisions of the contract between the parties in this case prevented the parties' relationship from being a 'special' one that would permit imposition of tort liability on the allegations of the third amended complaint."

344 Or at 590. But the Court was careful to limit its holding to the specific allegations and contract wording in the case, noting that

> "[i]n reaching our conclusions today, we note that plaintiff does not rely on any outside source of law -- such as statutes, regulations, or the rules of various licensing agencies and commodity exchanges -- in any respect. That is important, because industry standards, statutes, or regulations could, in a particular case, provide a basis in law for liability on defendants' part that cannot be made out from plaintiff's relatively narrow allegations in this case."

344 Or at 595.

Loosli v. City of Salem, 345 Or 303. This was a case in which, similar to *Boyer v. Salomon Smith Barney*, 344 Or 583, the plaintiffs attempted to prove a special relationship sufficient to overcome the economic loss doctrine based on the city's asserted negligence in approving a vehicle dealer certificate that was not in compliance with local land use ordinances. No sale.

Knepper v. Brown, 345 Or 320. An overzealous sales rep who convinced a doctor to put out a misleading "Yellow Pages" advertisement found itself on the hook for a $1.5 million verdict in favor of a plaintiff following a botched liposuction procedure. The issue was causation resulting from fraud, and the Court held that the resulting malpractice was a foreseeable harm based on the advertisement:

> "Stated in terms of the applicable legal standard, Dex had reason to expect that Knepper would act in justifiable reliance on Dex's misrepresentation by retaining Brown for the surgery, and that an adverse result was more likely if Brown, rather than a board-certified plastic surgeon, performed liposuction surgery. There is no additional requirement that plaintiffs also prove that Dex in fact

did foresee that Knepper would suffer the *particular* adverse results of the medical services that Brown performed. It follows that plaintiffs' injuries were foreseeable as a result of Dex's intentional misrepresentation, and that is all that plaintiffs had to show. Dex must respond in damages accordingly."

345 Or at 331-32.

Hughes v. Wilson, 345 Or 491. A summary judgment, together with a Court of Appeals' AWOP, based on discretionary function immunity was reversed because the Court concluded that there was no evidence that the county had implemented the policy upon which it was relying by failing to notify landowners that only upon request would the county remove brush on their properties that could obstruct the vision of drivers.

Waldner v. Stephens, 345 Or 526. Per Justice Gillette, in this negligence v. landlord-tenant act statute of limitations case:

"This court has stated on more than one occasion that the ORLTA does not supersede the common law of personal injury liability between a landlord and a tenant, and that a tenant may bring both common-law negligence claims and claims under the ORLTA against his or her landlord in the same action."

345 Or at 538. So it was here, the Court of Appeals' contrary conclusion notwithstanding:

"In the end, we hold that it is clear from the text and context of ORS 12.125 that, when the legislature chose to apply a one-year statute of limitations to 'actions arising under the rental agreement or [the ORLTA],' it did not intend to sweep into that category all actions, including common-law actions, that merely bear some nexus to the relationship between landlords and tenants under a rental agreement or the ORLTA. We read the one-year limitations period at ORS 12.125 as applying only to claims that are directly authorized by the ORLTA, i.e., claims that seek damages or injunctive relief *as provided in the ORLTA* for a violation of either the rental agreement or some requirement imposed on landlords or tenants only by a provision of the ORLTA."

345 Or at 542.

C. Ka-Ching – Cases Involving Attorney Fees

Powers v. Quigley, 345 Or 432. Although the Court of Appeals thought otherwise, the attorney fees provision of ORS 20.080 trumps the offer of judgment provision of ORCP 54. Whether reasonableness arguments will provide defendants with a vehicle by which to stop the bleeding if a plaintiff elects not to settle after initiating litigation in favor of keeping the attorney fees clock ticking remains to be seen. Whether the legislature will intervene remains to be seen.

Barbara Parmenter Living Trust v. Lemon, 345 Or 334. Consistently with the decision in *Necanicum Investment Co. v. Employment Department*, 345 Or 138, the Court held that ORS 20.075 applies to whether to award attorney fees in landlord-tenant cases, remanding the case to the trial court for further consideration.

D. Double Indemnity – The Court's Continuing Love Affair With Auto Policy Cases

Mid-Century Ins. Co. v. Perkins, 344 Or 196. In these consolidated underinsured motorist cases, the issue was whether Oregon law allows the recovery of UIM benefits when an insured is injured in an accident and the insured's UIM policy limit is equal to the other motorist's liability policy limit, but the insured's damages exceed the other motorist's policy limit. After concluding that Oregon, not Washington, law governs the dispute, the Court's answer to that question was no. For the Court's alterations to its opinion on reconsideration, see 345 Or 373.

Gonzales v. Farmers Ins. Co., 345 Or 382. This was a class action against insurance companies pressing the theory of diminished value when a damaged vehicle is not restored to its preloss condition. The policy wording did not define the term "repair," and the Court looked to vintage authorities for its interpretation of the provision to require compensation for diminished value. As to the possibility that any vehicle that is repaired will have diminished value even if only because of the stigma that attaches, the Court noted: "Because this case involved a genuine dispute about whether defendants had restored the vehicle to its preloss condition, we need not decide whether the policy requires payment for a claim based solely on 'stigma.'" 345 Or at 394. I

suspect that most of us should be expecting definitional endorsements in the mail sometime soon.

Ivanov v. Farmers Ins. Co., 344 Or 421. This was a case in the nature of a class action challenging the practice of insurance companies to deny PIP benefits based on generalized criteria and not individual IMEs. A four-justice majority held that the insurers had failed to establish the validity of their review processes as a matter of law for purposes of summary judgment. (The Court, however, did not address the implications of the 1999 amendments to ORCP 47 concerning burden shifting, and only time will tell if that is any kind of forecast as to how those amendments will be treated in the future, notwithstanding that the Court in prior cases has seemed to accept the amendments at face value.) Justice Balmer, joined by Justices Kistler and Linder, parted company with the majority as to the disposition:

> "In my view, the question that this court should decide is the same question presented to the trial court (which decided it) and to the Court of Appeals (which did not, because it based its decision on a different ground): do the PIP statutes or the applicable insurance policy provisions require the insurer always to conduct an IME before denying a claim? * * * The short answer to that question -- the only one that, in my view, plaintiffs legitimately are *entitled* to have answered on appeal -- is that the statutes do not make an IME a prerequisite for every valid denial of a PIP medical expense claim."

344 Or at 441 (Balmer, J., dissenting). *See also id.* at 433-34 (for a practical perspective on class action litigation).

Scott v. State Farm Mutual Automobile Ins. Co., 345 Or 146. In yet another automobile insurance case, the Court reiterated that "[a]ny event or submission that would permit an insurer to estimate its obligations (taking into account the insurer's obligation to investigate and clarify uncertain claims) qualifies as a 'proof of loss' for purposes of the statute." *Id.* at 155. Under the facts of the case, there was proof of loss.

E. Family Matters – Dom Rel and Related-Type Cases

Bolt and Bolt, 344 Or 1. In a case that brought out *amicus* briefs from Doctors Opposing Circumcision and a coalition that included the Anti-Defamation League, six justices (Linder, J., did not play)

unanimously held that "the decision to circumcise a male child is one that generally falls within a custodial parent's authority, unfettered by a noncustodial parent's concerns or beliefs – medical, religious, or otherwise." *Bolt and Bolt*, 344 Or 1, 12. Job done? Not quite. The child – "M" – involved was 12 years old, and there was conflicting evidence whether M wanted to be circumcised. It was not that M's thoughts on the matter would be determinative, or even that they could make the noncustodial, moving parent's case (mother, who was seeking a change in custody). *Id.* at 12. Instead, the Court remanded for a determination of M's state of mind "because forcing M at age 12 to undergo the circumcision against his will *could* seriously affect the relationship between M and father [who was arguing for the mohel], and *could* have a pronounced effect on father's capability to properly care for M." *Id*. Either conclusion would constitute the kind of change in circumstances that would trigger a judicial obligation to determine whether changing, modifying, or otherwise tinkering with the existing custodial relationship would be in the child's best interests.

State ex rel. Juvenile Dept. of Multnomah County v. J.W., 345 Or 292. A decision of a juvenile court referee in a dependency proceeding is not appealable.

F. The Devil's in the Details – Cases that are More About Procedure than the Merits

Wallach v. Allstate Ins. Co., 344 Or 314. Applying the principle that, "when the second accident is not a foreseeable consequence of the first, the defendant involved in the first accident is not liable for any aggravation of the plaintiff's injuries that the second accident causes," *id.* at 321, the Court held that a jury instruction given in a multiple accident case was erroneous. That analysis, however, was only the prelude to the issue that divided the Court, which was when does instructional error substantially affect a party's rights in a post-*Shoup* world? The majority's answer was that *Shoup* does not apply to erroneous jury instructions:

> "Because the trial court refused to give the plaintiff's requested instruction, the jury applied an incomplete and thus inaccurate legal rule to the facts, which permitted the jury to reach an erroneous result. That was sufficient, this court held in *Hernandez* and reaffirmed in *Shoup*, to say that the instructional error sub-

stantially affected the plaintiff's rights and required reversal. *Hernandez*, 327 Or at 112-13; *Shoup*, 335 Or at 172 n 2. That was true even though the jury in *Hernandez* properly could have based its verdict on the other allegations of negligence and the plaintiff in *Hernandez* could have memorialized the effect of the trial court's refusal to give his requested instruction by asking the jury to specify which, if any, of the defendant's allegations of negligence it relied on in determining the parties' respective fault."

344 Or at 325. *See also id.* at 329 ("it is sufficient for the purposes of this case to reaffirm the general rule stated in *Pine, Hernandez*, and an unbroken line of cases that, when a trial court incorrectly instructs the jury on an element of a claim or defense and when that incorrect instruction permits the jury to reach a legally erroneous result, a party has established that the instructional error substantially affected its rights within the meaning of ORS 19.415(2)"). Justice Durham, taking 14 pages in dissent, disagreed.

Marcum v. Adventist Health System/West, 345 Or 237. This was a scientific evidence case involving an adverse reaction to an injection, in which the Court concluded that the expert should have been permitted to offer testimony concerning "differential diagnosis" as a means of determining medical causation. Reversing the Court of Appeals, the Court summarized its holding as follows:

"It follows from the foregoing that, by focusing narrowly on the absence of a scientifically accepted mechanism of causation or other verifiable correlation, the Court of Appeals asked for too much. More specifically, the court disregarded the potential connection between the gadolinium extravasation and plaintiff's injuries, because, in that court's view, that potential cause could not be 'ruled in.' Although the court was properly concerned with avoiding the logical fallacy of post hoc, ergo propter hoc (after this, therefore because of this) reasoning, it failed to give appropriate deference to the expert witness's reliance upon plaintiff's sudden, single exposure and her immediate, localized symptoms, as well as to the biological plausibility of the expert's causation theory. The immediate symptoms that plaintiff experienced in her hand indicate a causal link between the exposure and her symptoms, and her expert's careful differential diagnosis supports that connection. Moreover, the expert's reliance on studies demonstrating

the toxicity of gadolinium provide a biologically plausible basis for his conclusion. Applying the criteria identified above, we agree with plaintiff that she had made an adequate showing of a scientifically valid basis for 'ruling in' gadolinium as a potential cause of her symptoms, as well as for 'ruling out' a number of the other possible causes of her injury. The jury should have been permitted to hear the expert's testimony that, in his opinion, the gadolinium extravasation caused that injury."

345 Or at ___ (jump cite unavailable electronically).

Peeples v. Lampert, 345 Or 209. Although a civil case in name only, this post-conviction decision is worth the attention of the bar's civil practitioners in light of Justice Linder's extended discussion of preservation of error:

"The general requirement that an issue, to be raised and considered on appeal, ordinarily must first be presented to the trial court is well-settled in our jurisprudence. *See, e.g., State v. Laundy*, 103 Or 443, 509-10, 206 P 290 (1922) (identifying preservation rule; citing earlier cases). For some years, the requirement also has been part of Oregon's Rules of Appellate Procedure, which provide that '[n]o matter claimed as error will be considered on appeal unless the claimed error was preserved in the lower court[.]' ORAP 5.45(1). The principal exception to preservation requirements is for so-called 'plain error' -- that is, an error apparent on the record, about which there is no reasonable dispute. *See, e.g., State v. Brown*, 310 Or 347, 355-56, 800 P2d 259 (1990) (describing plain error). An appellate court has discretion to consider such an error, but it must do so with the 'utmost caution,' because of the strong policy reasons favoring preservation. *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 382, 823 P2d 956 (1991) (identifying procedure and bases for consideration of plain error).

"Those policies are prudential in nature. Preservation gives a trial court the chance to consider and rule on a contention, thereby possibly avoiding an error altogether or correcting one already made, which in turn may obviate the need for an appeal. *See Shields v. Campbell*, 277 Or 71, 77, 559 P2d 1275 (1977) ('A party owes the trial court the obligation of a sound, clear and articulate motion, objection or exception, so as to permit the trial judge

a chance to consider the legal contention or to correct an error already made.'). Preservation also ensures fairness to an opposing party, by permitting the opposing party to respond to a contention and by otherwise not taking the opposing party by surprise. *Davis v. O'Brien*, 320 Or 729, 737-38, 891 P2d 1307 (1995) (preservation ensures that 'the positions of the parties are presented clearly to the initial tribunal and that parties are not taken by surprise, misled, or denied opportunities to meet an argument'). Finally, preservation fosters full development of the record, which aids the trial court in making a decision and the appellate court in reviewing it. *See Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 659-60, 20 P3d 180 (2001) (to promote judicial efficiency, unpreserved alternative ground for affirmance may be raised on appeal when, among other considerations, record has been fully developed). Our jurisprudence, thus, has embraced the preservation requirement, '[not] to promote form over substance but to promote an efficient administration of justice and the saving of judicial time.' *Shields*, 277 Or at 77-78.

"Preservation rules are pragmatic as well as prudential. What is required of a party to adequately present a contention to the trial court can vary depending on the nature of the claim or argument; the touchstone in that regard, ultimately, is procedural fairness to the parties and to the trial court. *See generally State v. Hitz*, 307 Or 183, 188, 766 P2d 373 (1988) (distinguishing requirements for 'raising an issue at trial, identifying a source for a claimed position, and making a particular argument'). In some circumstances, the preservation requirement gives way entirely, as when a party has no practical ability to raise an issue. *See, e.g., McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 84, 95 n 6, 957 P2d 1200, *modified on recons*, 327 Or 185, 957 P2d 1200 (1998) (party not required to take action to preserve an issue that first arose when court issued its order).[] The same is true if the record establishes that preservation would have been futile, because the trial court would not have permitted an issue to be raised or the record to be developed. *See, e.g., State v. Olmstead*, 310 Or 455, 461, 800 P2d 277 (1990) ('When the trial court excludes an entire class of evidence by declaring, in advance, that it is inadmissible as a matter of law, the ruling renders a further offer futile.'). Finally, a legal right may not be subject to preservation requirements due to the unique nature

of the right itself. *See, e.g., State v. Barber*, 343 Or 525, 530, 173 P3d 827 (2007) (unique wording of constitutional requirement of written jury trial waiver precluded ordinary rules of preservation for claim relating to denial of jury trial right)."

345 Or at 219-21 (footnote omitted).

Bjorndal v. Weitman, 344 Or 470. After limping along on life support for nearly 40 years, the emergency instruction finally passed away last year:

> "The emergency instruction is erroneous because it introduces into the liability determination additional concepts that are not part of the ordinary negligence standard -- whether the person had a 'choice,' whether the person made a 'choice' that a reasonable person 'might' make, and whether the person made the 'wisest' choice or not. The addition of those new, otherwise-undefined concepts to the standard of reasonable care in light of all the circumstances injects a likely source of juror confusion as to the legal standard to be applied."
>
> That said:
>
> "Parties may of course introduce evidence, and may argue about, the 'emergency' nature of the circumstances in which the parties acted and whether or not various 'choices' of conduct, wise or not, were available. The existence of 'emergency' circumstances in vehicle accident cases -- sudden actions by other drivers, unexpected weather events, roadway hazards -- is indisputably appropriate for a jury to consider in determining whether a person has used reasonable care in attempting to avoid harming others. *See* 3 Fowler V. Harper, Fleming James, Jr., and Oscar S. Gray, Harper, *James and Gray on Torts* § 16.11 (3d ed 2007) (describing role of emergency circumstances in determination of reasonable care). But this court has never articulated the legal standard of negligence as turning on those considerations. Rather, the negligence standard focuses on whether a person acted with reasonable care to avoid harm to others, in light of all the circumstances, including any 'emergency.' Thus, the general negligence standard embodied in Uniform Civil Jury Instruction 20.02 encompasses any legitimate concerns about 'emergency' circumstances, without introducing misleading concepts of the extent to which a 'choice'

> available to the person was 'unwise,' 'wise,' 'wiser,' or 'wisest.' Moreover, the negligence instruction already refers to facts that may create an emergency situation when it speaks of the 'dangers apparent or reasonably foreseeable when the events occurred' and the 'circumstances' that are to be considered in determining whether a person used reasonable care. UCJI 20.02. As we stated in *Evans v. General Telephone*, 'the usual instruction on negligence sufficiently covers what a reasonably prudent person would do under all circumstances, including those of sudden emergency.' 257 Or 460, 467, 479 P2d 747 (1971).

344 Or at 479-80 (footnote omitted).

And, finally, the Court was cautious in limiting its holding to "ordinary vehicle negligence cases," 344 Or at 472, but stated that, "[i]n cases outside that context, trial courts should take into account our comments here in deciding whether an emergency instruction is justified," *id.* at 481 n 5. Time will tell whether the Court's failure to put a wooden stake in the heart of UCJI 20.08 will cause any issues of the undead variety.

McDowell Welding & Pipefitting, Inc. v. United States Gypsum Co., 345 Or 272. This was a law versus equity case involving a settlement agreement. Equity won. Wanna know the difference between an executory accord, an accord and satisfaction, and a substituted contract? Then read Justice Kistler's opinion. Don't ask me because I was involved in the case. As an epilogue, the Court also held that the petitioner on review was entitled to prejudgment interest on what appeared to be an equitable theory as well.

G. Battling Bureaucracy – Administrative and Statutory Law Cases

Wolf v. Oregon Lottery Commission, 344 Or 345. The Court validated an administrative rule respecting retailer compensation and, in the course of doing so, took the Court of Appeals to task for considering the evidentiary record made before the Commission: "The governing statute, ORS 183.400(3), could not be phrased more plainly. The record on review (aside from information concerning whether the statutory procedures for rulemaking were followed, an issue not presented by this case) consists of two things only: the wording of the rule itself

(read in context) and the statutory provisions authorizing the rule. ORS 183.400 (3)(a), (b)." 344 Or at 355.

Corey v. DLCD, 344 Or 457. The Court held that a Measure 37 (2004) claim was mooted by Measure 49 (2007). Applying *Yancy v. Shatzer*, 337 Or 345 (2004), the Court did not have occasion to test ORS 14.175 – the Legislature's attempt to overrule *Yancy* (capable of repetition yet evading review) – because Measure 49 provides a vehicle for claimants to both pursue their claims and raise any constitutional challenges to Measure 49. 344 Or at 467. Finally, the Court rejected DLCD's request for an application of the equitable doctrine of vacatur with respect to the Court of Appeals' decision, finding the issue both similar to and easier than the one presented in *Kerr v. Bradbury*, 340 Or 241 (2006).

Nakashima v. Board of Education, 344 Or 497. This case involved a Seventh Day Adventist school's challenge to the Oregon School Activities Association (OSAA) refusal to change the schedule of basketball tournaments to accommodate the religious beliefs of the school's students. The question on review was the meaning of "fair in form but discriminatory in operation" in ORS 659.850(1). Determining that the Oregon Legislative Assembly had adopted that wording based on a 1971 United States Supreme Court decision, the Court looked at that decision – rather than Title VII cases – to hold that the question under that statutory wording is "whether a practice or policy that disparately impacts a protected group is reasonably necessary to a program's or activity's successful operation or the achievement of its essential objectives." 344 Or at 516 (footnote omitted). Because the OSAA did not apply the proper standard, the Court remanded for further proceedings, rejecting OSAA's constitutional arguments along the way (Article I, section 20 and the Establishment Clause of the First Amendment). 344 Or at 521-24.

Gafur v. Legacy Good Samaritan Hospital, 344 Or 525. Allegations that an employer is not providing required rest breaks does not yield a claim for unpaid wages because "employees are working during rest periods, even if they are not performing duties at that time." 344 Or at 534. In reaching that conclusion, the Court rejected BOLI's amicus argument that BOLI had intended to permit wage claims when it promulgated a regulation on the subject generally:

> "As BOLI goes on to recognize, however, this court defers to an agency's interpretation of its own rule only as long as that interpretation 'cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law.' *Id.* As is evident from the above discussion, we have concluded that BOLI's interpretation is inconsistent with the wording of the rule and its context.
>
> In addition, we observe that nothing in BOLI's brief suggests that it has, in the past, 'interpreted' OAR 839-020-0050(1)(b) in the way that it now espouses. It does not offer a past case or policy statement or any other evidence that it ever intended OAR 839-020-0050(1)(b) to have the meaning that it now advocates. In fact, BOLI acknowledges that it has never sought wages for employees who have missed rest periods; rather, it has always enforced the rule by seeking civil penalties against employers that have violated its provisions.
>
> In essence, BOLI's argument in the present case amounts to no more than an assertion that the Court of Appeals opinion was correct. We do not view that as an interpretation to which we owe deference."

344 Or at 537.

American Federation of Teachers-Oregon, AFT, AFL-CIO v. Oregon Taxpayers United PAC, 345 Or 1. This was the ORICO case involving initiative petition signatures gathered for the 2000 general election. The defendants argued that, even if there had been a statutory violation, there was no causation of harm to the plaintiffs. The Court, however, was not persuaded, stating the standard in the following terms:

> "An ORICO violation, like many acts by individuals or groups, may create ripples that spread far beyond the immediate sphere of the actor. Defendants may well be correct that some ripple effects are so remote and attenuated that the legislature did not intend a person injured by them to be able to recover damages. However, this case does not require us to consider exactly how far liability for those effects extends under ORS 166.725(7)(a). The statute permits recovery for those 'injured by reason of' a violation, and, whether that statute is interpreted to require a showing of 'direct' and 'proximate' injury, as defendants assert based on Holmes, or some lesser standard, it unquestionably permits recovery for in-

juries that are the intended consequence of an ORICO violation."

345 Or at 16-17. There was a lot more to the Court's decision, but this author's view is that enough ink has been spilled over this matter during the last decade. Inquiring minds are respectfully referred to the Court's Advance Sheets or website.

Cuff v. Dept. of Public Safety Standards and Training, 345 Or 462. This was the latest, and probably the last, installment in the continuing saga of the corrections officer who was fired, and then ordered reinstated, after purchasing and using marijuana off-duty "nearly every day for a month." 345 Or at 464. The legislature responded to the Court's 2003 decision by amending one of the relevant statutes, and DPSST responded by promulgating a new regulation and then, again, de-certifying the petitioner. On judicial review, the Court affirmed. Disagreeing with the Court of Appeals that the statute was remedial and, therefore, could be applied retroactively, the Court nonetheless concluded that there was no error in considering the officer's past drug use:

> "[I]t is difficult to conceive of any viable way to evaluate a person's present moral fitness without considering the person's past conduct. A person's 'past actions are relevant to his present character and fitness.' * * * Moreover, nothing in the text of either ORS 181.662(1)(c) or OAR 259-008-0010(6) expressly limits in any way the temporal scope of the evidence that DPSST may consider in evaluating an officer's present fitness. It is indisputable that, had petitioner purchased and used illegal drugs every day for a month in the more recent past, that conduct would be sufficient grounds for revocation of his certification."

345 Or at 471.

Fort Vannoy Irrigation Dist. v. Water Resources Commission, 345 Or 56. As stated by the Court, the case

> "arises from a dispute over an application filed by petitioner Ken-Wal Farms, Inc. (Ken-Wal) to change the points of diversion associated with water rights set forth in two water right certificates (8942 and 8943) that were issued in 1930 to the Fort Vannoy Irrigation District (district), of which Ken-Wal is a member. The issue on review is whether Ken-Wal is the 'holder of any water use subject to transfer,' as that phrase is used in ORS 540.510(1),

such that Ken-Wal has authority under that statute to change the points of diversion associated with the water rights established in those certificates."

345 at 59. I will repeat what I have stated both above and in past submissions for this esteemed publication: I am not being compensated for my efforts, either as a work-for-hire or otherwise. Moreover, the royalty checks I have been expecting appear to have been lost in the mail. In other words, I am out-of-pocket here and, frankly, after forcing myself to read through the introduction, I decided to turn on the television.

If you are in to this kind of thing – and I did see references to riparian rights, "the California gold rush" (including Sutter's mill), the Treaty of Guadalupe Hidalgo, and sluice boxes (which I understand are something different than what I gave to the kids after their soccer games) – then I commend Chief Justice De Muniz's opinion for your reading enjoyment and leave the rest of us with the following block quote of the Court's conclusion:

> "Because the text of ORS 540.510(1) and the statutory context render the meaning of the phrase 'holder of any water use subject to transfer' unambiguous, our analysis need not proceed further. The phrase 'holder of [a] water use subject to transfer' connotes a party with an ownership interest. Construing the term 'water use subject to transfer' in this case as the right to use water established by certificates 8942 and 8943, we hold that the district is the 'holder' of those certificated water rights. The requisite ownership interest in those rights vested in the district as trustee upon issuance of the certificates. Ken-Wal's beneficial use has enabled the district's ownership of the water rights through an agency relationship. Ken-Wal's ownership of a portion of the appurtenant land does not equate with ownership of the certificated water rights. Ultimately, because we conclude that Ken-Wal is not the 'holder' of the water rights established in certificates 8942 and 8943, Ken-Wal is not authorized under ORS 540.510(1) to change the associated points of diversion without the district's consent."

345 Or at 93. Manifestly.

Necanicum Investment Co. v. Employment Department, 345 Or 138. Directors are not employees, and, consequently, fees paid to directors are not wages for purposes of state unemployment tax requirements:

> "Directors exercise 'all corporate powers' and direct the management of a corporation's business and affairs, but directors do not take direction from any officer or agent of the corporation. Directors cannot be hired or fired by the corporation, but are elected and may be removed by the shareholders of a corporation. A corporation may decide not to provide remuneration for its directors at all; when it does provide such remuneration, that action by itself does not make a director an 'employee' for purposes of the unemployment tax. To be sure, a director may also be an employee of a corporation if the director is hired to perform other services, however, a director acting only in that capacity is not an employee."

345 Or at 145. For obtaining a reversal of the Court of Appeals' decision to the contrary, petitioners were awarded a whopping $369.24 in costs but no attorney fees. Holding that ORS 183.497(1) – which provides for a discretionary award of fees to a prevailing petitioner in administrative review proceedings – is now subject to the later-enacted factors for attorney fees awards set out in ORS 20.075(1), the Court declined to make an award when the agency's position was reasonable but, ultimately, wrong. *Necanicum Investment Co. v. Employment Department*, 345 Or 518.

H. The Best of the Rest – Other Parts of the Court's Docket

1. Mandami (Commissioner Nass's term, not mine, I swear)

Although the Court in 2008 issued a whopping 16 peremptory writs of mandamus, only one of those was in a civil case (and 9 of the 16 were in consolidated proceedings having to do with DUII diversion). The discussed below concerns three cases – the one civil case in which the Court issued a writ, another civil case in which the Court dismissed an alternative writ by written opinion, and, finally, a criminal mandamus proceeding that could have implications for civil practitioners as well.

Gwin v. Lynn, 344 Or 65. In a case in which the trial court refused to permit the deposition of a witness before trial, the Supreme Court exercised its original jurisdiction and entered peremptory writ of mandamus compelling the deposition. The issue was whether the deponent was an expert or a fact witness, or both. The justices chose the latter:

> "[W]e hold that a witness may be both an expert witness and a fact witness and, therefore, may be deposed concerning facts that pertain to the witness's direct involvement in or observation of the relevant events that are personally known to the witness that were not gathered primarily for the purpose of rendering an expert opinion."

344 Or at 67. The Court was careful to add caveats about the limited nature of its holding, pointing out that the deponent – an attorney – still might have the lawyer-client privilege and attorney work product doctrine to assert while under oath. Missing from the Court's decision was any discussion as to why appeal was an inadequate remedy at law thereby paving the way for relief in mandamus.

Howell v. Willamette Urology, P.C., 344 Or 124. The Court dismissed an alternative writ in a wrongful death action that was premised, presumably, upon a claim of medical malpractice. The defendants resided in Marion County, which was also the county in which the alleged negligence occurred. The decedent, however, died in Multnomah County, which was where the plaintiff sued. Judge Mauer granted the defendants' motion to change venue to Marion County, concluding that venue was not proper in Multnomah County (but denying convenience as an alternative basis). The Court agreed. Long story short, because "the purpose of a wrongful death action is to remove death as a bar to bringing the claim, not to make death the central event, 344 Or at 129, the phrase "county where the cause of action arose" in ORS 14.080(1) refers to "the place where the harm was done," *id.* at 130. That was in Marion County.

State v. Pena, 345 Or 198. Although this was a criminal case, which involved an untimely attempt to "affidavit" a Multnomah County judge under ORS 14.270, I discuss it here for two reasons. First, and at least to me, the rationale was a bit surprising. The Court held that the statute's timing requirements apply to a defendant in a criminal case appearing without an attorney yet having been appointed. 345 Or at 207-08. In other words, it is incumbent upon the defendant in such cases to both know whether he or she wants a different judge and to speak up. Hmmm. It may all be a hurricane in a tea cup, however, in light of the way arraignments generally work in this state, and the unusual facts in *Pena* are not likely to be repeated. And, the Court at least acknowledged that the result "seems harsh", 345 Or at 208 n 3, and invited the legislature to weigh in, *id.*

Second, however, and more importantly for the practicing bar generally, the Court rejected the state's argument that mandamus should not lie because the defendant had an adequate remedy by way of appeal. Deeming that argument "unresponsive," the Court reasoned that "because there is no direct appeal remedy after a verdict to address a defendant's mere *perception* of unfairness [because the "affidavit" process requires only a belief as to unfairness], in the absence of proof of actual prejudice, mandamus is an appropriate remedy to correct an erroneous denial of a motion to remove a judge before trial." 345 Or at 205. That sounds a lot like the reasoning in *State ex rel. Anderson v. Miller*, 320 Or 316 (1994), a case that the Court has not cited since its publication (and did not cite in this case either) and that some have concluded is a dead letter. In other words, an issue that is too insignificant to warrant reversal on appeal can provide the basis for the extraordinary jurisdiction that mandamus affords. I'm not suggesting that that is a bad thing, but only that it does not fit well with the concept of mandamus unless that remedy is truly nothing more than a substitute for the lack of a mechanism for obtaining interlocutory appellate review. More to follow??

2. Scut Work . . . I Mean: Ballot Title Cases

The Court referred back to the Attorney General a half-dozen or so ballot titles in 2008. The volume was low for an election year, but the cases continue to provide the justices with word-smithing candy that is often too tempting to turn away. *See, e.g., Chamberlain v. Myers*, 344 Or 612, 615-16 (citing dictionary definition of "quotation mark" for proposition that the use of that punctuation mark is appropriate to denote technicality, unusual usage, or multiple meaning with respect to terms but not with respect to uncertain legal effect). After what I am sure was much wrangling and table pounding in conference, the Court somehow was able to come out unanimously on that issue.

In another case, however, and after pondering the issues for 85 days (the longest time under advisement for a ballot title review proceeding in 2008), the Court agreed to disagree four justices to three. The majority took the Attorney General to task for, among other things, using broad terminology – "'modifies laws relating to'" – which, in the majority's view was "broad enough to refer, at least in a semantic sense, to virtually every amendment of any kind concerning that legal topic." *Rogers v. Myers*, 344 Or 219, 223-24 (Durham, J.). After all, ballot title

review proceedings are nothing if not a foray into semantics. But not so fast. The standard of review – substantial compliance – is a statutorily relaxed one. ORS 250.085(5). Justice Balmer in dissent relied in part upon that standard for arguing that the Attorney General's effort was sufficient unto the day. *Id.* at 227 (Balmer, J., dissenting (joined by Kistler and Linder, JJ.).

Although I suspect that the Court's ballot title decisions are of little or no interest to most if not all lawyers – not to mention the public – they can be time consuming little matters for the justices and, like intestinal cramps, often come in waves. In my former life, I was sentenced to hour upon hour of drafting proposed legislation, testifying at committee hearings, tweaking rules, and participating in work groups about ballot title review. The net product of all those efforts was something approaching, but not quite reaching, zilch. Like the sales tax, the kicker, and pumping your own gas, it's an Oregon thing. I long ago came to the conclusion that the answer – if the Court thinks that it needs one – lies in the standard of review. "Substantial compliance" suggests something well short of exactitude and, at least in my view, provides a lens that normally would not bring into focus whether a particular word is, or is not, encapsulated in quotation marks. In short, big hugs for Balmer, J.

3. Playing by the Rules – Lawyer and Judicial Discipline

Not much to report with respect to judicial and lawyer discipline and attorney admissions matters. The Court decided only a handful of cases, not counting the three times in five cases that the Court allowed petitions for reconsideration – adhering to the result in each case, however. All but one of the lawyer disciplinary cases involved the now-superseded Disciplinary Rules; cases involving the Rules of Professional Conduct are just beginning to percolate up on review. And, at least in this writer's view, there was nothing about the Court's 2008 decisions in those cases that was systemically interesting or involved the application of settled legal principles to particular facts.

For all of you who are interested – and, really, all of us should be – here are the citations: *In re Gunter*, 344 Or 368 (denying reinstatement based on substance abuse and financial issues), *on recons*, 344 Or 540 (correcting multiple factual errors but adhering to result); *In re Wollheim*, 344 Or 139 (consent to censure under JR 1-101(B) for driving

under the influence of prescription medication); *In re Knappenberger*, 344 Or 559 (two-year suspension for illegal fee under DR 2-106(A) and excessive fee under DR 2-106(B)), *on recons*, 344 Or 96 (amending opinion and denying motion for immediate commencement of suspension); *In re Schenck*, 345 Or 652 (on reconsideration: correcting factual error but adhering to conclusion that accused violated DR 5-101(A)(1) (self-interest conflict)); *In re Koch*, 345 Or 444 (120-day suspension on Bar's petition for review for multiple RPC violations in case in which accused lawyer did not contest complaint's allegations or sanction). The Court also issued a lengthy opinion dismissing a complaint against a lawyer alleging misrepresentation, dishonesty, conduct prejudicial to the administration of justice, and conflict of interest. *See* 345 Or 106.

4. A Penny for Your Thoughts – The Oregon Tax Court

Judge Breithaupt, when he is not deciding summary judgment motions or sitting on the Court of Appeals by designation, actually issues rulings in Tax Court cases. And, as in years past, Oregon's peregrinating Tax Court judge – he is, after all, elected statewide – usually sends a handful of cases up to the Supremes for affirmance. 2008 was no exception, and, as per usual, he went four for four in the following, less than noteworthy cases:

Thomas Creek Lumber and Log Co. v. DOR, 344 Or 131 (penalty interest rate on timber tax deficiencies).

M&S Market, Inc. v. DOR, 344 Or 393 (no estoppel against Department following untimely appeal).

DOR v. Faris, 345 Or 97 (notice of deficiency need not contain hand signature on certification).

Garrison v. DOR, 345 Or 544 (appeal from Magistrate Division held untimely when not accompanied by filing fee as required by Tax Court rule).

I. Too Tempting to Resist – What's Up With PGE? (Or, Oh what a tangled web we see when practicing under PGE! *(with apologies to Sir Walter Scott)*)

Consider the following cases. In coming across them, I was not looking for anything, and there are probably other examples that I

simply did not catch that could be used in the soapbox oration that follows.

State v. Lonegran, 344 Or 15. A majority of the Court in a decision authored by Chief Justice De Muniz placed some reliance on the 1982 edition of a criminal law textbook to interpret the term "escape." 344 Or at 21-22. Dissenting, Justices Kistler and Balmer argued that the majority's interpretation was "at odds with both the ordinary understanding and the legally accepted meaning of that term" and, for their interpretation, relied in part on the more familiar *Webster's Third New International Dictionary* – 2002 unabridged edition, of course – for their textual analysis. 344 Or at 23-24.

State v. Fries, 344 Or 541. The Court, in considering the text and context of a criminal statute, looked to a criminal law treatise and relied upon and seemingly incorporated into the statute's meaning case law from other jurisdictions.

Liles v. Damon Corp., 345 Or 420. The Court, presumably under the first level of *PGE* and in construing provisions of Oregon's Lemon Law, looked to an attorney fees statute, a purchase money security statute, and a rule of civil procedure dealing with class action litigation for the proposition that, "[w]hen the legislature has created prefiling procedural requirements in other contexts, it has used terms that unmistakably convey that intent." 345 Or at 427. *But see PGE*, 317 Or at 611 ("context * * * includes other provisions of the same statute and other *related* statutes") (emphasis added).

I will let minds with more horsepower than mine (intellectually, I am more of an electric trolling motor than an outboard) battle over whether discerning legislative intent is a proper basis for statutory construction. I'm okay with that. I'm even okay with the *PGE* methodology – not that anyone cares what I think. There are benefits and drawbacks to formulaic, bright-line tests and standards – predictability versus inflexibility. And, even though there is probably more play in the joints of the *PGE* methodology than there should be in a bright-line standard, it is at least something with which most practitioners have become familiar and can use effectively. In short, we know what the rules are under which we are playing.

That said, I also think that cases like those above (and, again, I know there are others), suggest that the Court has been moving away

from the "template." (And, yes, I recognize that legislative tinkering has had a role to play in that as well.) The template, of course, was the product of the Court in a different era – and it is not the only one. We have formulas – coming mainly from the early and mid 1990s – for, among others, constitutional analysis (separate ones for original enactments and those by initiative), administrative deference, and even when to reconsider common-law precedent. That's okay too, and certainly it is the Court's prerogative. What I think is troublesome, however, is when there is a bright-line test with dull lines. Then there is no predictability and a big question mark with respect to flexibility.

Where the Court ultimately will end up on all this, or whether I am all wet to begin with, remains to be seen. However, I do believe that the consumers of the Court's legal product could stand to benefit from a little guidance on the subject. With that, I will take myself, and my career, down from the soap box and do that for which I am most capable: quote from the work of others. It's time for table scraps!

J. Appellate Orts

"[W]e think it is important to remind both bench and bar that, as a matter of Oregon law, '[i]t is well established that when evidence is offered as a whole and an objection is made to the evidence as a whole and is overruled, the trial court will ordinarily not be reversed on appeal if any portion of the offered evidence was properly admissible, despite the fact that other portions would not have been admissible had proper objections been made to such portions of offered evidence.'" *State v. Camarena*, 344 Or 28, 33 n 3 (2008) (second brackets in original; citation omitted).

> "Indeed, Gwin goes so far as to argue that "it boggles the mind to conjure a question that * * *. * * * We are not 'boggled,' however." *Gwin v. Lynn*, 344 Or 65, 73 (2008).

> "[N]othing prohibits the legislature from saying the same thing twice * * *." *Thomas Creek Lumber and Log Co. v. DOR*, 344 Or at 138.

> "The [Department of Revenue] * * * as an entity * * * does not have the ability to hand sign a document." *DOR v. Faris*, 345 Or at 102.

"Tolling provisions that recognize a disability are statutes; they are not components of the constitution." *Christiansen v. Providence Health System*, 344 Or at 455.

"[W]ork is a term of art for purposes of wage and hour laws * * *." *Gafur v. Legacy Good Samaritan Hospital*, 344 Or at 534.

"'Inquiry notice' is a confusing and imprecise label. 'Notice' may cause an 'inquiry' based on it, but the inquiry is not one made on 'inquiry notice.' We specifically disapprove of the use of that term." *Johnson v. Multnomah County Department of Community Justice*, 344 Or at 119 n 3.

"English statutes enacted after the American Revolution (as was Lord Campbell's Act), were not in 1857 and are not now part of Oregon's common law." *Hughes v. PeaceHealth*, 344 Or at 149.

"In a textual command that should have particular significance for the judiciary, Article I, section 17, declares that the right of jury trial 'shall remain inviolate.' Those three words, written at statehood by the framers, is a candid acknowledgment that, over time, assaults on the right to jury trial will come not only through efforts at overt withdrawal, * * * but also through the indirect effects of statutes and rules that condition and qualify the right by more subtle means. Those words charge the judiciary with an important duty: to guard the people's right to jury trial against erosion, including from complex statutory schemes that enjoy the support of powerful legislative majorities. Unlike other constitutional provisions, for which the framers intended a fixed and inflexible application over time, the right of jury trial is, and was meant to be, timeless. The right applies to actions at law never imagined, let alone legally recognized, at statehood." *Hughes v. PeaceHealth*, 344 Or at 172 (Durham, J., dissenting).

"The right of trial by jury 'occupies so firm a place in our history and jurisprudence,' * * * that it can be said to define our system of justice. *Hughes v. PeaceHealth*, 344 Or at 172 (Walters, J., dissenting).

"The 12 in whom our constitution places its trust are the 12 who hear each word spoken from the stand, and the silences between. They are the 12 whose eyes watch others' eyes and take their mea-

sure. By their absence, legislators cannot fill that role. Legislators may decide the categories of harm the state should address and the categories of persons who may bring claims in courts of law. But only jurors can shake right out from wrong for individual human beings and do them justice. Since long before 1857 it has been the role of the jury to find the facts, including the fact of damages, in civil actions at law. The constitution requires that the jury's historical fact-finding function continue in the future and remain inviolate." *Hughes v. PeaceHealth*, 344 Or at 180 (Walters, J., dissenting).

"*Voir dire* * * * entails an inherent risk that the panel of prospective jurors will be exposed to information revealed by individual prospective jurors who are excused from the panel for cause." *State v. Evans*, 344 Or at 365.

"Years ago, this court observed that a trial jury 'is not such a delicate instrument of justice that it can be expected to function only when wholly free' of information -- favorable and unfavorable -- to which the jurors may be exposed outside the evidentiary confines of the trial itself." *State v. Evans*, 344 Or at 367.

"We cannot expect that the degree of care used in dispersing or disposing of hazardous chemicals will always be reasonable." *Lowe v. Philip Morris USA, Inc.*, 344 Or at 419 (Walters, J., concurring).

"Considerations of efficiency and finality require us to be circumspect in allowing parties to recast their case on appeal." *Ivanov v. Farmers Ins. Co.*, 344 Or at 434 (Balmer, J., concurring in part and dissenting in part).

"Our prior cases insist that there is more to justice than two irreconcilable guilty verdicts." *State v. Zweigart*, 344 Or at 647 (Walters, J., dissenting).

"Yager is defined, in part, as an obsolete term for a 'short-barrelled [*sic*] large-bore rifle of a type formerly popular in the South and Southwest." *State v. Briney*, 345 Or at 513 n 5.

"The strength of the bond of an earlier ruling is directly proportionate to the moral and intellectual authority that continues to inform our understanding of that earlier holding. When presented

with the opportunity to do so, I urge this court to consider our state's experience in imposing the death penalty and to examine its constitutionality anew." *State v. Davis*, 345 Or at 594 (Walters, J., concurring).

"[A]bsent some legislative or constitutional impediment, courts possess inherent authority to issue those rulings necessary to decide the issues before them." *State v. Kuznetsov*, 345 Or at 487.

"History will not stand that strain." *Hughes v. PeaceHealth*, 344 Or at 152.

IV. PARTING REMARKS

I survived only one year of prep school – my freshman year. A friend of mine, however, managed to graduate from that esteemed institution, and he left his classmates with a thoughtful quote in his senior yearbook entry. His words have come back to me over the years, often when my doubts are greatest, when the night seems darkest, when I not so subtly suggest that this state's highest court is not slavishly adhering to its stated methodology for the construction of legislative enactments. I leave you with them:

"May the wind at your back not be your own."

OREGON SUPREME COURT CRIMINAL LAW YEAR IN REVIEW, 2008

By Yonit Sharaby & Marc D. Brown

And so, we begin another journey through the criminal law opinions of the Oregon Supreme Court. In this past year, no clear trends emerged though the appellate courts are still exploring the applicability of confrontation and sentencing issues in light of the United States Supreme Court's 2004 opinions in *Crawford v. Washington* and *Blakely v. Washington*.

In addition, the courts and criminal bar awaited the United States Supreme Court decision in *Oregon v. Ice*. On January 14, 2009, the United States Supreme Court reversed the Oregon Supreme Court in *State v. Ice*, 343 Or 248, 170 P3d 1049 (2007). *See Oregon v. Ice*, __ US __, 129 S Ct 711, 172 L Ed 2d 517 (January 14, 2009). In that 5-4 decision, the Court held that the *Apprendi/Blakely* line of cases does not require a jury to make the requisite factual findings for a court to impose consecutive sentences. As a result, it is not clear whether the decision in *Hagberg* is still good law. However, for purposes of this review and the historical record, a summary of *Hagberg* is included.

Sentencing: separate criminal episode findings

State v. Hagberg, 345 Or 161, 190 P3d 1209 (July 31, 2008), *en banc*

The court had one case this past year involving a question of whether a jury, and not the sentencing court, was required to make findings to impose a sentence greater than the presumptive maximum sentence. In *State v. Hagberg*, the defendant was charged and convicted of eight sexual offenses committed against his girlfriend's daughter. The sentencing court imposed the mandatory minimum sentences for each offense. Additionally, the court chose to make one of the sentences consecutive to another, and to make those two sentences concurrent with the remaining six offenses. In the indictment, counts one and two had the same date range and the same victim. However, count two included the language "in an act and transaction separate and distinct from that alleged in count 1 * * *." The court did not provide the jury with a definition of "separate and distinct act." Neither side asked for such an instruction and neither objected to the failure to

give one. The jury returned general verdicts finding defendant guilty on all counts and did not return a special verdict on the "separate and distinct act" allegation.

The sentencing court imposed consecutive sentences on counts one and two, and defendant objected to the imposition of consecutive sentences on constitutional grounds. On appeal, defendant acknowledged that the trial judge made the requisite findings to impose consecutive sentences but he argued that such fact-finding by the judge violated his right to a jury under the Sixth Amendment to the United States Constitution. The Court of Appeals affirmed without opinion and the Supreme Court took review.

In Oregon, a sentencing court's authority to impose consecutive sentences is limited by ORS 137.123. Pursuant to that statute, unless the judge makes specific findings required to impose consecutive sentences, the sentences will be concurrent. In other words, the sentencing default is concurrent sentences. Specifically, one factual finding to support consecutive sentences is whether the two crimes did not arise out of a continuous and uninterrupted course of conduct. ORS 137.123(2).

The United States Supreme Court, in *Apprendi* and *Blakely*, held that the Sixth Amendment requires that aside from 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. In *Ice*, the Oregon Supreme Court held that the *Apprendi/Blakely* rule applied to consecutive sentences as well. In other words, "the facts that serve as the foundation for consecutive sentences imposed under ORS 137.123 must have been submitted to the jury and proved beyond a reasonable doubt." Therefore, pursuant to the Oregon Supreme Court's decision in *Ice*, in a case where the sentencing judge imposes a consecutive sentence under ORS 137.123(2), the predicate fact that the two crimes did *not* "arise from the same continuous and uninterrupted course of conduct" must have been found by the jury beyond a reasonable doubt.

Ultimately, the *Hagberg* court held:

> "as a matter of plain English, the fact that the instruction on Count 2 required the jury to find that the acts alleged in one count are 'separate and distinct' from the acts alleged in another count merely establishes that the jury found that defendant committed

two distinct crimes. It does not convey any information about whether the jury found the statutory prerequisite to consecutive sentencing under ORS 137.123(2) -- that those two crimes 'did not arise from the same continuous and uninterrupted course of conduct.' It follows that that finding is insufficient to support the court's imposition of consecutive sentences under that statutory subsection."

Most likely, the United States Supreme Court's decision in *Oregon v. Ice* will cause the court to revisit *Hagberg* in the coming year.

"Testimonial" statements and the Confrontation Clause

State v. Camarena, 344 Or 28, 176 P3d 380 (January 25, 2008)

In 2004, the same year the United States Supreme Court decided *Blakely*, upending sentencing procedures in Oregon, the Court also decided *Crawford v. Washington*, changing the analysis for determining whether a criminal defendant's right to confront a witness against him had been violated. In *Crawford*, after thoroughly explaining the historical underpinnings of the Confrontation Clause of the United States Constitution, the court held that the Sixth Amendment prohibits the "admission of testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." In doing so, the Court shifted away from a reliability test, holding instead that the relevant determination is whether a statement was testimonial. Since the *Crawford* decision, courts have struggled to apply this standard. In *Davis v. Washington*, 547 US 813, 165 L. Ed. 2d 224 (2006), the Court clarified:

"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

The Oregon Supreme Court, in *State v. Camarena*, applied this test and concluded that the complainant's initial 9-1-1 responses were

nontestimonial and therefore were not subject to the confrontation requirements of the Sixth Amendment. The court further determined that the balance of the complainant's responses were unnecessary to resolve an ongoing emergency and were therefore testimonial.

In *Camarena*, a caller called 9-1-1 and, when the emergency operator answered the call, hung up the telephone. The operator quickly called the telephone number from which the call had originated and spoke with the caller. In that call, the caller stated that her boyfriend (defendant) hit her and left. In response to the operator's various questions, the caller identified her boyfriend and his vehicle, and explained the extent of her injuries. The operator then encouraged the caller to press charges and to leave the relationship with her boyfriend. Finally, the operator asked for and received the boyfriend's driver's license number, and the caller explained that the assault occurred a minute earlier. The operator then dispatched a police officer who took photographs of the caller and listened to her reiterate the events leading up to the call. Despite being subpoenaed to testify at defendant's assault trial, the caller did not appear at trial.

Defendant moved to exclude from evidence all the caller's recorded 9-1-1 statements and the statements she later made to the police, basing his argument on the state and federal Confrontation Clauses. The trial court overruled the defendant's objection and defendant was convicted of fourth degree assault. He appealed from the judgment of conviction. The Oregon Supreme Court approved without discussion the Court of Appeals' analysis of the confrontation issue under Oregon's constitution. As such, the sole issue on review was whether the statements made to the 9-1-1 operator were testimonial for Sixth Amendment purposes.

The court began by assuming, as the Supreme Court did in *Davis*, that the 9-1-1 operator was acting as an agent to law enforcement during the telephone conversation, and that the caller's statements to the operator were made, as a practical matter, to a law enforcement officer. The court then noted that the facts of this case were very similar to the facts before the *Davis* Court. In determining whether statements are testimonial (as defined above) the court emphasized that although an interrogator's questions are relevant, it is "*in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.*" (quoting *Davis,* emphasis in original).

Ultimately, the court concluded that the first part of the call was nontestimonial and therefore not subject to the Confrontation Clause protections. The court explained that, first, although the call clearly described an attack that had passed, the call occurred within one minute of the attack. The court concluded that the 60 seconds that separated the attack from the call did not suggest that the danger of a renewed assault had fully abated. Second, the court noted that a reasonable person could infer from the caller's responses that she faced an ongoing emergency. Third, in light of the possibility that the defendant might return, the caller's identification of the defendant, as well as her location, were both necessary to help terminate an ongoing emergency. Fourth, the caller's statements permit the inference that the environment from which she was called would be neither tranquil nor reasonably safe until aid arrived.

Based on the *Davis* analysis, the court held that the initial statements to the 9-1-1 operator were nontestimonial and not subject to the Confrontation Clause of the Sixth Amendment. However, the court further concluded that the remainder of the statements made to the operator were testimonial and were therefore erroneously admitted at trial. The court also held that the statements the caller later made to the responding officer were testimonial and subject to the Confrontation Clause protections. However, the admission of those statements was harmless because the same statements made to the 9-1-1 operator were properly admitted.

Abusive speech and free expression rights

State v. Johnson, 345 Or 190, 191 P3d 665 (August 14, 2008)

In this decision, the court ruled that the abusive speech provision of Oregon's criminal harassment statute is overbroad and violates the free expression protections of Article I, section 8, of the Oregon Constitution.

The relevant provision, ORS 166.065(1)(a)(B), provides that a person commits the crime of harassment if they intentionally "harass[] or annoy[] another person by *** [p]ublicly insulting such other person by abusive words or gestures in a manner intended and likely to provoke a violent response[.]"

The defendant was driving in stop-and-go rush hour traffic be-

hind a car sporting a rainbow decal and occupied by two women, one white and one black. Assuming that the women were lesbians, the defendant proceeded to tailgate the car, making various obscene gestures and shouting various obscene and racist epithets, using an amplification system, at the women. This continued for about five minutes until one of the women left the car and approached defendant's pickup truck to confront him. They engaged in a heated verbal exchange, and although the defendant did not threaten her with violence, she later testified that she believed that he was trying to incite her to violence. Defendant was convicted of two counts of harassment.

The court began by characterizing the challenged provision as one that focuses on the pursuit or accomplishment of forbidden results rather than the kind of content-based prohibition which, subject to a few exceptions, clearly violates Article I, section 8. However, since this results-oriented law expressly prohibits a form of expression (here, "abusive words or gestures,") it must still be analyzed for overbreadth.

In addressing this question, the court emphasized the fact that the prohibition has little connection to imminent violence; it does not require that the offender act violently or that the hearer respond violently. "The offense is complete if the offender speaks the words or makes the gestures in public in a manner intended (and likely) to provoke a violent response by *someone at some time* and the hearer is 'harass[ed]' or 'annoy[ed].' Put most simply, the statute proscribes a certain species of 'harassment' or 'annoyance,' period." (emphasis in original). Although the legislature may seek to prevent violence produced by speech, it must take care not to criminalize protected speech. Legislation may legitimately seek to protect a hearer from exposure to a reasonable fear of imminent harm resulting from certain types of expression. However, the court warned that a criminal law may not be used to suppress harassing, offensive, or annoying expression. Ultimately, the court held that because the prohibition contained in ORS 166.065(1)(a)(B) is insufficiently connected to the likelihood of imminent violence, it is overbroad on its face in violation of Article I, section 8, of the Oregon Constitution.

Probable cause to arrest

State v. Miller, 345 Or 176, 191 P3d 651 (August 14, 2008)

In 2008, the court reviewed two cases involving suppression of

evidence based on violations of Article I, section 9, of the Oregon Constitution, which protects against unreasonable searches and seizures.

In the first case, *State v. Miller*, the defendant argued that the deputy who arrested him lacked probable cause to support the arrest, thereby nullifying both his arrest and the seizure of any evidence obtained as a result of that arrest. At issue in this case was the role of a police officer's subjective belief that probable cause exists for a warrantless arrest. The court took the opportunity to review the history of this prong of the probable cause analysis.

Factually, a deputy was dispatched to investigate a single vehicle accident in which a pickup truck had rolled over on a highway. While traveling to the crash scene, the deputy came across the defendant walking alone along the road about a half mile from the crash site. The deputy noted that the defendant matched the description he received of the driver and that the defendant had debris in his hair and on his clothing, as well as a number of fresh cuts and scrapes on his arms. When the deputy asked him about the accident, the defendant replied, "That's not my truck. I wasn't driving." The deputy held defendant until a second officer responded, then handcuffed the defendant and placed him in the second patrol car. Both vehicles then proceeded to the crash site, where the deputy observed a pickup truck upside down on the road and the remains of a methamphetamine lab and precursor chemicals around and inside the truck. A third officer at the scene positively identified the defendant as having been driving the pickup shortly before the crash. The defendant was then informed that he was under arrest and advised of his *Miranda* rights.

Before trial, defendant moved to suppress all the evidence that had been seized at the crash site. He argued that his actual arrest had not taken place at the crash site, but that it had occurred earlier when the deputy handcuffed him and put him in the patrol car for transport back to the accident scene. Defendant contended that, at that point, the deputy had lacked probable cause to arrest him, thereby nullifying both his arrest and the seizure of any evidence thereafter. The deputy testified that he had reasonable suspicion, but not probable cause, when he put the defendant in his patrol car and drove him back to the accident scene.

The trial court denied the defendant's motion to suppress, con-

cluding that the deputy had possessed probable cause to arrest defendant for "failure to leave his name at the scene of an accident" when defendant was stopped. The Court of Appeals reversed on the grounds that given the deputy's testimony, the trial court could not reasonably have inferred that the deputy subjectively believed that he had probable cause to arrest the defendant.

On review, the state argued that the court's previous cases requiring an officer to have subjective probable cause in addition to an objective test were wrong and should be revisited. After exploring the history of this subjective prong, the court declined the state's invitation to overturn its earlier holdings. Nevertheless, the court concluded that the facts of the case did not warrant suppression of the evidence.

Under Article I, section 9, there are two components to the probable cause inquiry: "an officer must subjectively believe that a crime has been committed and thus that a person or thing is subject to seizure, and this belief must be objectively reasonable in the circumstances." The court explained:

> [T]he subjective component of the probable cause inquiry is satisfied if the officer believes that he or she has lawful authority to restrain the individual's liberty. The fact that the officer may be mistaken about the basis or the extent of the restraint is not fatal for the purposes of the subjective component, as long as objectively there is a constitutionally sufficient basis for the officer's actions.

It is sufficient if the trial court finds, and there is evidence to support its findings, that the officer reasonably believed that he had lawful authority to act, even if the officer's subjective basis for acting turns out to be incorrect. Ultimately, the court held that a probable cause determination is a question of law. Therefore, the court reasoned, the deputy's testimony was simply his opinion on a legal issue, not a statement of fact. As a result, this testimony did not require the trial court to conclude that the deputy subjectively believed he lacked the legal authority to arrest the defendant.

Probable cause to search

State v. Castilleja, 345 Or 255, 192 P3d 1283 (September 18, 2008)

In the second Article I, section 9, case before the Oregon Supreme

Court, the issue was whether there was probable cause to support the issuance of a search warrant. In *State v. Castilleja*, a state trooper responded to a call regarding an attempted homicide. The trooper and other officers had been called because one of the defendants had been shot and seriously wounded by intruders who may have been trying to steal the defendants' marijuana plants (both defendants, husband and wife, had valid medical marijuana cards permitting them to possess six mature marijuana plants).

Officers at the scene told the trooper that there were six mature marijuana plants growing in a greenhouse on the premises, a "large amount" of marijuana drying in the back of the residence, and marijuana paraphernalia and loose marijuana lying around the house. The trooper spoke with Loewen, the mother of one of the defendants, who informed him that she believed the defendants were over their lawful amounts of marijuana, that her son-in-law's medical marijuana permit had expired, and that from her experiences with drugs in her past, she believed that the defendants were dealing drugs. The trooper walked through the house and observed marijuana and marijuana paraphernalia at various locations. Later, the trooper verified that both defendants had valid medical marijuana cards. Additionally, another officer told the trooper that one of the defendants recounted an incident from six months earlier, in which the defendants and other adults had smoked marijuana in front of their children. The other officer also told the trooper that he returned to the defendants' home later on the day of the attempted homicide and saw that the marijuana plants had been harvested. Finally, based on the trooper's experience, he knew that the average mature marijuana plant will produce more than a pound of marijuana. Based on that information, a magistrate issued a search warrant. While searching the house pursuant to that warrant, the officers discovered and seized marijuana in excess of the legal limits under the medical marijuana law.

Before trial, defendants moved to suppress the evidence obtained as a result of the search of their home. They also moved to controvert the warrant by challenging the good faith, accuracy, and truthfulness of the affiant. The trial court concluded that Loewen did not have the authority to consent to the original search of the house and, therefore, excised all the information obtained from the first search from the affidavit. The trial court further concluded Loewen's remaining state-

ments were untrustworthy and should be discounted. After reviewing the remaining information, the trial court concluded that the trooper's affidavit did not establish probable cause for the issuance of a warrant. The trial court did not reach the motion to controvert. The Court of Appeals affirmed the trial court's suppression of the evidence.

The first issue the Supreme Court addressed was the appropriate standard of review. In a search warrant case, an issuing magistrate or judge takes no evidence but simply reviews the affidavit to determine the legal question of whether the affidavit establishes probable cause. Likewise, "a reviewing court asks whether, based on the facts shown by the affidavit, a neutral and detached magistrate could conclude (1) that there is reason to believe that the facts stated are true; and (2) that the facts and circumstances disclosed by the affidavit are sufficient to establish probable cause to justify the search request." On review, the Court of Appeals did not address whether a neutral and detached magistrate, reviewing the excised affidavit, could find sufficient evidence to support probable cause. Instead, it deferred to the trial court and reviewed its ruling to determine if there was evidence to support it. The Supreme Court explained that this standard of review was incorrect: "[t]he sufficiency of the search warrant affidavit presents a legal question for *each* reviewing court, *beginning with the trial court*." (emphasis in original). The proper standard of review is "whether *the issuing magistrate* could have concluded that the affidavit (excluding the excised parts) established probable cause to search defendants' home." (emphasis in original). In other words, the appellate court (and any reviewing court) is in the same position as the trial court to evaluate the sufficiency of the evidence in deciding the probable cause issue. Reviewing courts should not defer to the trial court's findings and conclusions.

Applying this standard to the affidavit, the court concluded that the magistrate could reasonably believe that the facts stated in the affidavit are true. Regarding Loewen's statements, the court noted that the statements were against the criminal interests of her daughter, she was identified by name, her conclusions concerning the likelihood that the defendants were dealing drugs were based on her experience, and she had a familiarity with the medical marijuana laws.

The court also concluded that the facts and circumstances disclosed by the affidavit were sufficient to establish probable cause to

justify the search. The court explained that "to uphold the warrant, the reviewing court need only conclude that the issuing magistrate reasonably could conclude that the facts alleged, together with the reasonable inferences that fairly may be drawn from those facts, establish that seizable things *probably* will be found at the location to be searched." (emphasis in original). The court found that Loewen's statements regarding the quantity of marijuana in the house could support an inference of probable cause to justify the search warrant.

After the Supreme Court issued its opinion, one of the defendants petitioned for reconsideration on the ground that the court's decision revived his argument that all of Loewen's statements should have been excised from the affidavit because all of those statements resulted from the unlawful search of the house. *State v. Castilleja* (S055472), __ Or __, __ P3d __ (December 18, 2008). The court agreed with the defendant that most of the conversations between the trooper and Loewen occurred while the trooper was unlawfully inside the house. The court, however, adhered to its earlier decision: "it does not appear on this record that *where* Loewen was had anything to do with either the fact of or the content of Loewen's statements to the police: Whether the police had been invited into the house or not, Loewen was going to say what she said."

Impartial jury

State v. Evans, 344 Or 358, 182 P3d 175 (March 27, 2008)

In this decision, the court considered whether a prospective juror's comment that she had an outstanding stalking order against the defendant, made in the presence of the other prospective jurors, so tainted the jury pool that the defendant was deprived of his constitutional right to trial by an impartial jury.

Defendant was charged with various offenses as a result of his role in encouraging and aiding various crimes that four of his friends committed against the victim, defendant's former roommate. In response to questioning during *voir dire*, a prospective juror mentioned that she and the defendant used to be friends, and that she had an "outstanding stalking order" against him. This juror was ultimately excused, but because the comment was made in the presence of other jurors, defendant moved for a mistrial, arguing that the entire panel had been "poi-

soned" by the reference to the stalking order. The trial judge denied the motion. On appeal, the defendant argued that this denial was an abuse of discretion, because the comment so tainted the entire panel that defendant was denied his Article I, section 11 right to a "public trial by an impartial jury."

The court first addressed the nature of the constitutional guarantee of juror impartiality. This requires only that jurors have an open mind, and be able to set aside preexisting opinions and impressions in order to decide the case based on the evidence produced at trial and the applicable law. It does not, however, guarantee that jurors will have no preconceived ideas about the case.

Since defendant never challenged any of the remaining jurors for actual bias, the court noted that his claim must be one of assumed bias. That is, his position on appeal was limited to the argument that the reference to the stalking order was so prejudicial that it warrants the assumption that the jurors could not set it aside and try the case impartially. Because the panel was so tainted, the trial judge therefore had no choice, as a matter of law, but to grant the motion for a mistrial.

Set against this exacting standard, it is not surprising that defendant's challenge was ultimately unsuccessful. Following the criteria applied in *State v. Simonsen*, 329 Or 288, 986 P2d 566 (1999), the court observed that the reference here was similarly fleeting, that the prosecutor made no attempt to capitalize on the comment, and that the trial judge was the one who heard the statement in context and was therefore in the best position to assess any effect it had on the panel.

The court went on to discuss some of the unique features of the *voir dire* process. Because *voir dire* calls for an inquiry into jurors' biases, there is an obvious and inescapable risk that prospective jurors will be exposed to information that other prospective jurors reveal during the process. Further, *voir dire* is a procedurally unique context for assessing the effect of prejudicial information on the jury because it permits an actual inquiry into their willingness and ability to decide the case on appropriate grounds. By contrast, a witness's comments at trial can only be assessed based on their potential prejudicial effect.

Because counsel had the opportunity to question individual jurors about the comment, defense counsel was free to explore the effect it may have had on jurors' ability to be impartial. Barring such a direct

inquiry, assessing the effect of the comment on the pool of prospective jurors is "particularly within the province of the trial court." Given the record in this case, the court concluded that the trial court permissibly exercised its discretion to deny the motion for a mistrial.

Habeas corpus/Due Process challenges to prison placement decisions

Barrett v. Belleque, 344 Or 91, 176 P3d 1272 (February 7, 2008)

Petitioner was serving a prison term in Oregon when he was removed from the general population and placed in the prison's intensive management unit (IMU). In the IMU, prisoners are separated from the general population, are subject to greater scrutiny of their conduct, and their privileges are curtailed. Transfer to this unit depends largely on the prisoner's behavior. Petitioner filed a petition for a writ of habeas corpus, arguing that his placement in the IMU violated his due process rights because he was not given a pre-placement hearing.

The petition was dismissed by the trial court for failure to state a claim. The Court of Appeals affirmed, but on the theory that petitioner's habeas claim was precluded by the availability of a federal civil rights action under 42 USC §1983.

While his appeal to the Oregon Supreme Court was pending, petitioner was transferred to Oklahoma under the terms of the Interstate Corrections Compact (ICC). The ICC gives signatory states a way to send prisoners to other states to serve out their sentences. It may be used, for example, to try to break up prison gangs by sending problem prisoners out of state. Among other things, that statute provides that transferred inmates remain under the jurisdiction of the sending state, and that the transfer does not change a prisoner's legal rights.

The state argued unsuccessfully that petitioner's claim was moot because of his transfer to Oklahoma under the ICC. Even though the habeas statute, ORS 34.310, requires that petitioners be imprisoned within the state of Oregon, the court reasoned that the terms of the ICC must supplement ordinary habeas jurisdictional analysis. Petitioner's claim was not moot because the ICC itself provides that a transferred prisoner cannot be deprived of any legal rights they would have enjoyed in Oregon. Further, the record suggested that petitioner's placement in the IMU affects the treatment he receives in Oklahoma.

Turning to the merits, the court held that the availability of a §1983 civil rights action did not foreclose petitioner's habeas claim, because it is not an adequate alternative remedy. A lawsuit for damages and an injunction does not share the central feature of habeas relief: the "speed with which it triggers judicial scrutiny."

Ultimately, however, the court held that the petitioner's claim fails on the merits because he did not demonstrate a violation of his federal due process rights. After reviewing United States Supreme Court precedent, the court decided that Oregon's procedures for challenging IMU placement decisions are constitutionally adequate. Due process does not require a formal, pre-placement, adversary hearing. All that is necessary is notice and an opportunity to submit a written statement as part of an administrative review after an inmate's transfer. In Oregon, inmates are provided written notice regarding their classification and assignment. They may seek administrative review of their placement, and may present evidence in support of their challenges. Further, since the placements are themselves based on specific criteria and are reviewed periodically, the risk of erroneous placement decisions is low. Since these procedures satisfy due process, the court held that the petition was properly dismissed for failure to state a claim.

Trial court's power to allow amendments to charging instruments

State v. Pachmayr, 344 Or 482, 185 P3d 1103 (May 8, 2008)

State v. Kuznetsov, 345 Or 479, 199 P3d 311 (December 18, 2008)

Both of these cases involve the limits set by Article VII (Amended), section 5(6), of the Oregon Constitution, which provides, in relevant part, that "[t]he district attorney may file an amended indictment or information whenever, by ruling of the court, an indictment or information is held to be defective in form."

The issue in *Pachmayr* was whether an amendment to an indictment was one of form or substance. The state charged the defendant with three counts of assault in the second degree arising out of an automobile accident. Counts 1 and 3 of the indictment alleged that the defendant had committed assault in the second degree by means of a "dangerous weapon." Count 2 alleged that defendant had committed assault in the second degree by means of a "deadly weapon." All three

counts described the pertinent weapon as "to wit: an automobile." The statute under which he was charged provides:

> "A person commits the crime of assault in the second degree if the person:"
>
> * * * * *
>
> > "(c) Recklessly causes serious physical injury to another *by means of a deadly or dangerous weapon* under circumstances manifesting extreme indifference to the value of human life."

ORS 163.175(1)(c) (emphasis supplied). In contrast to a dangerous weapon, a deadly weapon must be "specifically designed for and presently capable of causing death or serious physical injury." ORS 161.015.

At the close of the state's case-in-chief, the defendant moved for a judgment of acquittal on Count 2, arguing that the state had failed to present evidence from which the jury could find that he had used a deadly weapon. The state conceded that it had not presented evidence that the car was a deadly weapon, but argued that term "deadly weapon" in Count 2 was a scrivener's error and asked the court for leave to amend Count 2 to allege that the car was a dangerous weapon. The trial court allowed the amendment, and the jury convicted the defendant on all counts. The defendant appealed, arguing that the amendment was not merely a matter of form because it had materially altered the indictment, and that the Oregon Constitution requires that the grand jury make such amendments.

Because the defect did not appear on the face of the indictment, the court looked to the test in *State v. Wimber*, 315 Or 103, 843 P2d 424 (1992) to determine whether the amendment was one of substance or form. That test asks the following four questions:

> "(1) D[oes] the amendment alter the essential nature of the indictment against defendant, alter the availability to him of defenses or evidence, or add a theory, element, or crime? * * *
>
> "(2) D[oes] the amendment prejudice defendant's right to notice of the charges against him and to protection against double jeopardy? * * *

"(3) [I]s the amendment itself sufficiently definite and certain?
* * *

"(4) D[o] the remaining allegations in the indictment state the essential elements of the offenses?"

On the first question, whether the amendment altered the essential nature of the indictment, the court held that it did not because, although the original indictment did not use the phrase "dangerous weapon," it contained all of the allegations that were necessary to make out a charge under that theory, even though the amended charge was not a lesser-included offense. On the second question, whether the amendment prejudiced the right to notice of the charges against him, the court held that the indictment adequately informed the defendant of the charges. Additionally, the court held that the amendment did not deprive the defendant of a defense because a defendant is not prejudiced when he is precluded only from arguing that the state failed to prove allegations that were deleted by the amendment.

Ultimately, the court was convinced that the grand jury determined the charge to be brought and found the facts on which the charge was based, because Count 2 of the original indictment contained the allegations necessary to charge the defendant with assault with a dangerous weapon. Therefore, the amendment was one of form only.

In contrast to *Pachmayr*, which involved modification of a felony indictment issued by a grand jury, the charging instrument that was changed in *Kutnetsov* was a misdemeanor information issued by the district attorney. The question for the *Kutnetsov* court was whether Article VII (Amended), section 5, prohibits a trial court from allowing a substantive amendment to an information charging a misdemeanor. In this case, the state charged the defendant by information with multiple misdemeanor offenses arising out of a traffic accident, including assault in the fourth degree.

On the day of trial, the prosecutor moved to file an amended information to delete the allegation that the defendant had acted with criminal negligence and caused injury by means of a deadly weapon and substitute an allegation that the defendant had acted recklessly. The defendant objected to the change, arguing that it was a substantive amendment and that the statute of limitations had run. The state argued that it was "merely fixing a technical mistake," and the court

allowed the amendment. On appeal, the defendant argued that the court is precluded from allowing a substantive amendment to an information by Article VII (Amended), section 5(6).

On appeal, the state conceded that the amendment was one of substance but argued that the constitutional provision relied on by the defendant did not apply to misdemeanors. The court agreed, holding that the constraints of subsection 5(6) derive, in part, from the requirements of subsections 5(3) to 5(5) that a grand jury or magistrate must authorize the filing of felony charges. But none of those provisions require that an information charging a misdemeanor also be authorized by a grand jury or magistrate. As such, neither those sections, nor subsection 5(6), preclude the trial court from permitting the district attorney to make substantive amendments to an information.

The defendant argued in the alternative that, even if the change is constitutionally permissible, that no law authorizes the trial court to permit such changes. The Supreme Court disagreed, first, on the general ground that courts traditionally have the inherent power to issue rulings necessary to resolve the issues before them, and second, because the trial court does, in fact, have the statutory authority to allow an amendment to an information. Therefore, the court held, trial courts have the power to allow substantive amendments to complaints or informations charging misdemeanors.

Double hearsay and translated statements

State v. Rodriguez-Castillo, 345 Or 39, 188 P3d 268 (July 3, 2008)

In this case, the court was presented with the question of whether a translated statement is hearsay and, if it is, whether the statement comes within an exception to the hearsay rule. The court held that a translation adds another layer of hearsay and that the particular statements at issue do not fit into an exception to the hearsay rule.

The victim in this case, who spoke primarily Spanish, complained that a family member sexually abused her. The interviewing police officer spoke only English. A bilingual middle-school tutor, Perez, served as an interpreter. During that interview, the victim told the officer, through Perez, that the defendant had abused her.

At trial, the officer testified regarding the statements made by the

victim through Perez. Defendant objected on the grounds that the statements were double hearsay. The trial court ruled that both the victim's out-of-court statements and Perez's out-of-court statements were admissible under OEC 803(18a)(b) as reports of abuse. A divided *en banc* Court of Appeals held that the statements were admissible under the residual exception to the hearsay rule, OEC 803(28), an exception that was neither argued before the trial court nor considered by it.

First, the Supreme Court rejected the state's argument that Perez's translation did not add a layer of hearsay. The state argued that Perez's statements did not add a layer of hearsay because he was either a conduit between the victim and the officer or he was acting as an agent of the victim. The court rejected the conduit theory because Perez's translation of the victim's statements is itself an independent assertion, *i.e.* an assertion about what the victim had said. On the agency theory, the court held that the agency exception in the evidence code has an important limit: it applies only to statements that a party's agent makes when those statements are introduced against that party. Here, the victim was not a party to the case and the statements were not introduced against her.

Next, the court pointed out that the victim's statements that the defendant had abused her would have been admissible under OEC 803(18a)(b) if she had made them to the detective. However, here the victim told Perez and Perez told the detective. Because the victim did not make the statement to the detective, the provisions of OEC 803(18a)(b) did not apply.

In deciding that the evidence was not admissible under the residual hearsay exception, an argument not raised below, the court emphasized that raising this issue for the first time on appeal is problematic. This is because the application of this exception requires, among other things, determinations regarding whether other evidence is reasonably available and whether the statement contains circumstantial guarantees of trustworthiness. Not only is the trial court in the best position to make that assessment, but because the argument was never raised below, the parties did not have the opportunity to offer evidence on those criteria.

Finally, the court concluded that the error admitting the testimony was not harmless because, although the victim testified, she was more

thorough in her description of the incident in the interview than she was in her courtroom testimony.

Statutory interpretation: predicate convictions

State v. Jacob, 344 Or 181, 180 P3d 6 (February 22, 2008)

At issue in this case was the interpretation of ORS 161.610, which mandates longer sentences for, among other things, one's second and third gun offenses. The Supreme Court ultimately concluded that the text of the statute does not permit attacks on the validity of the prior gun offenses which serve as the predicates for the higher sentence.

The defendant was convicted of felonies involving the use of a firearm three times, in 1983, 1991, and 2002. The court that sentenced him in 2002 declined to impose the 30-year statutory minimum sentence required by ORS 161.610 because it concluded that the defendant's first sentence was unconstitutional. The defendant's first firearm conviction was in 1982, for first-degree robbery. However, in the time between the conviction and the sentencing hearing, the Oregon Supreme Court decided *State v. Wedge,* 293 Or 598, 607-08, 652 P2d 773 (1982), which held that the portions of the statute permitting a judge, rather than a jury, to make the firearm finding violated a defendant's right to a jury trial as protected by the Oregon Constitution. Nevertheless, during defendant's 1983 sentencing hearing, the judge made the requisite firearm finding, and the defendant did not object at sentencing, on direct appeal, or in any post-conviction proceeding. He also did not raise any issue regarding the lawfulness of the 1983 sentence during any of the 1991 proceedings.

The relevant portions of ORS 161.610 provide:

> "(3) [I]f a defendant is convicted of a felony having as an element the defendant's use or threatened use of a firearm during the commission of the crime, the court shall impose at least the minimum term of imprisonment as provided in subsection (4) of this section. * * *
>
> "(4) The minimum terms of imprisonment for felonies having as an element the defendant's use or threatened use of a firearm in the commission of the crime shall be as follows:
>
> "(a) Except as provided in subsection (5) of this section, upon

> the first conviction for such felony, five years[.] * * *
>
> "(b) Upon conviction for such felony committed after punishment pursuant to paragraph (a) of this subsection, 10 years[.] * * *
>
> "(c) Upon conviction for such felony committed after imprisonment pursuant to paragraph (b) of this subsection, 30 years."

The defendant's central argument was that the terms of the statute prohibit the imposition of a 30-year mandatory minimum sentence based on the presumably invalid 1983 sentence.

The court disagreed, pointing out that the text of the statute has only two requirements for the 30-year minimum: that the defendant use or threaten to use a firearm during the commission of a felony, and that he be convicted of such a felony after serving an enhanced term of imprisonment for a second firearm felony. The fact that the defendant had served a 10-year sentence for his 1991 conviction was sufficient to satisfy that requirement, regardless of the validity of the 1983 sentence. Nothing in the terms of the statute show a legislative intent to consider the validity of the previous convictions in imposing the sentence. The court further noted that its reading of the sentencing statute was bolstered by the fact that post-conviction relief is specifically designated as the *exclusive* means for challenging a final judgment, precluding any other collateral challenges.

That interpretation is also consistent with the court's reading of the statutes at issue in *State v. Sims*, 335 Or 269, 273-74, 66 P3d 472 (2003) (text of driving while revoked statute does not require consideration of the validity of the revocation, or permit collateral attacks upon it), and last year's *Bailey v. Lampert*, 342 Or 321, 153 P3d 95 (2007) (conviction for felon in possession of a firearm need not be set aside after the prior felony conviction was overturned because text of felon-in-possession statute requires only that defendant was a convicted felon at the time he possessed the firearm).

The defendant's attempt to raise an argument based on *Wedge* itself failed as well. First, the court rejected the defendant's interpretation of *Wedge* as too broad. Second, and fatally, the court held that *Wedge* may not be used to pursue a collateral attack on the validity of the 1983 conviction, even if only for sentencing purposes.

Statutory interpretation: meaning of "possession"

State v. Fries, 344 Or 541, 185 P3d 453 (May 30, 2008)

The defendant here challenged his conviction for possession of marijuana. The defendant's friend, who had a medical marijuana card and had been evicted, asked the defendant to help move his marijuana plants to a new apartment. Under the friend's watchful eye, the two loaded the plants and some other items into the defendant's car. On their way to the new apartment, they were pulled over and the defendant was arrested. Both the defendant and the court assumed that defendant's friend lawfully possessed the plants. The question was whether defendant possessed the marijuana while he was moving them from one place to another at his friend's direction. The defendant argued that he did not possess the plants because he did not have any power or sovereignty over the plants; therefore, they were not in his "dominion or control."

Both the trial court and the Supreme Court disagreed. ORS 161.015 provides that "'[p]ossess' means to have physical possession or otherwise to exercise dominion or control over property."

The court concluded that the legislature's use of the term "otherwise" in the statute indicates that it contemplated two *alternative* methods of proof for possession. Although constructive possession requires a showing of dominion or control, a similar showing is not required for physical possession, so long as the physical possession is not fleeting or unintentional physical touching. In this case, the defendant's contact with the marijuana plants was not fleeting, but was part of an extended effort to move the plants from one place to another. This evidence is sufficient for a rational trier of fact to conclude that the defendant possessed the plants.

The court noted that it appeared from the record that the defendant's friend did lawfully possess the plants. Additionally, the relevant statutes do contain a number of specific exceptions which permit common carriers or designated caregivers to lawfully possess controlled substances. The court noted that the defendant did not fall within those exceptions, and moreover, that accepting his interpretation of the possession statute would fail to give effect to those provisions. Although expressing sympathy for the defendant's situation, the court declined to add new exceptions to those that the legislature had creat-

ed, and held that defendant did, in fact, possess the marijuana plants.

Statutory interpretation: scope of an "escape"

State v. Lonergan, 344 Or 15, 176 P3d 374 (January 25, 2008)

In this case, the court considered the meaning of "escape" in order to determine whether the defendant used physical force during the course of his escape or after it had already been completed. This distinction is the difference between a conviction for escape in the second and third degrees.

Here's what happened: a police officer, while responding to a 911 call about a stolen truck, found the defendant driving it. When the defendant saw the police lights and heard the siren, he jumped from the moving truck, leapt over a guardrail, and ran down an embankment. The officer caught him, handcuffed him, and placed him against the trunk of the patrol car. When the officer reached into the car for his radio, the defendant took off running. The officer managed to tackle him about 50 to 75 yards away. At this point, the defendant fought and kicked the officer, but he eventually gave up and consented to be walked to the patrol car.

The defendant was ultimately convicted (among other things) of escape in the second degree, ORS 162.155(1)(a), which requires that he "use[] or threaten[] to use physical force escaping from custody." The defendant argued that an escape is complete when the person has fled from custody and is no longer within a police officer's restraint or control. On this interpretation, his escape was complete when he left the vicinity of the patrol car because, at that point, he was not under the officer's control. When he later struck the officer, he had already escaped. As such, his use of physical force occurred after, not during, the escape, and he could not be convicted of escape in the second degree.

The state responded that the defendant was in the process of escaping when he was tackled and struck the officer. On this interpretation, an escape can be a continuing activity: so long as the defendant was actively trying to escape and was out of the control of the officer, he was still "escaping," since he was still trying to accomplish a complete escape.

The court, interpreting the statutory text, agreed with the defen-

dant. ORS 162.135(5) defines escape, in part, as an "unlawful departure of a person from custody." "Custody" is defined in terms of "actual or constructive restraint by a peace officer pursuant to an arrest." ORS 162.135(4). The court reasoned that he was in custody at the time he was arrested and placed against the trunk of the patrol car, because he was under actual or constructive restraint by the police officer. When he fled from the car, however, he was no longer under the officer's actual or constructive restraint. At that point he had unlawfully departed from custody – that is, he had escaped. Because he only used physical force after he had already departed from custody, he could not be convicted of escape in the second degree. (At that point, he may have been resisting arrest.)

Justice Kistler dissented, with Justice Balmer joining, arguing that the act of escape must include at least the "immediate flight" from the officer.

Statutory interpretation: meaning of "abscond"

State v. Robbins, 345 Or 28, 188 P3d 262 (July 3, 2008)

If a defendant "escapes or absconds from custody or supervision," Rule 8.05(3) of the Oregon Rules of Appellate Procedure allows an appellate court to dismiss the appeal. The question in this case was whether the defendant "absconded," when she missed an appointment with her probation officer.

Relying primarily on that missed appointment, the state moved to dismiss the defendant's pending appeal because she had "absconded" from the supervision of her probation officer. The defendant argued that in order to "abscond," one must make a conscious effort to avoid supervision, and that a single missed appointment does not show such conscious effort. The defendant also stated in an affidavit that she had missed the appointment due to illness and had left messages to the probation officer to that effect.

The court agreed with the defendant. Even though the rule at issue is relatively recent (1994), the power of a court to dismiss an escaped or absconded appellant's appeal had been recognized in the case law much earlier. That case law is consistent with the definition of "abscond," that is, that the person absconding must seek to evade the legal process by hiding within or secretly leaving the court's juris-

diction. The legal process that is evaded includes compliance with a sentence, including a defendant's conduct and availability for probationary supervision.

In applying that standard to the defendant's course of action, the court noted that her intent may be inferred from her actions. However, the act of missing a single appointment with a probation officer alone was not enough to sustain the inference that the defendant sought to evade the court's jurisdiction. Therefore, the dismissal of defendant's appeal was not warranted.

Statutory interpretation: definition of "firearm"

State v. Briney (S055567), 345 Or 505, __ P3d __ (December 31, 2008)

In the last criminal case for the year, the court overturned the defendant's conviction for carrying a concealed firearm because the particular non-functioning pistol he was carrying was not "readily capable of use as a weapon" and therefore does not fall within the statutory definition of the term "firearm."

The defendant was caught carrying a pistol with a broken firing pin. Testing confirmed that the pistol would not be capable of firing without installing a functioning firing pin. The necessary pins were not available in any gun stores in the area at the time the defendant was arrested, but they were available over the internet, and could also be shipped overnight. The evidence also showed that it would take only a few minutes for someone familiar with guns to install the firing pin. So, in order to get the defendant's pistol in a functioning condition, it would have taken at least 24 hours to get the necessary part, and a few minutes to install it.

To fall within the statutory definition of a "firearm," a gun must be "readily capable of use as a weapon." The court focused on the construction of "readily capable." A pistol lacking a working firing pin was clearly "capable" of being used as a weapon in the sense of "susceptible or open to being affected," so long as the firing pin could be replaced.

The state argued that "*readily* capable" suggests relative promptness and ease, rather than immediate capability. In support of this contention, the state pointed to the use of "*presently* capable" later in

the same statute, a phrase which, by contrast, implies temporal immediacy.

The court declined to draw that particular distinction, noting that the definition of "readily" is broad enough to include a temporal requirement. The question, rather, was whether the term encompasses the 12- to 24-hour period that would have been necessary for the defendant to acquire and install a functioning firing pin. To resolve this issue, the court looked to the history of the prohibition against concealed weapons. Since 1925, the relevant statutes include an exception that specifically provides that firearms carried "openly in belt holsters are not concealed within the meaning of this section." From this, the court concluded that the legislative policy behind the prohibition was not to bar carrying firearms in general or to protect against their use. Rather, its aim was to enable people to ascertain whether someone is armed. If public notice that a person possesses a weapon is the purpose of the prohibition, this suggests that the proper interpretation of "readily capable" requires that the firearm be either operational or promptly able to be made operational at the time the person carrying the weapon concealed it.

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A HIGHLY SELECTIVE (*EVEN ARBITRARY*) OVERVIEW OF CIVIL CASES DECIDED BY THE COURT OF APPEALS IN 2008

By Meagan Flynn, Preston, Bunnell & Flynn

TRAPS TO AVOID

Be sure to confer. Really.

Anderson v. State Farm, 217 Or App 592 (2008)

The plaintiff appealed from the trial court's grant of the defendant's motion to dismiss under ORCP 21A(3) (another action pending for the same cause). The Court of Appeals reversed because the defendant failed to confer with plaintiff before filing the motion, as required by UTCR 5.010, despite the fact the motion certified that defendant had conferred. The court explained that the language of UTCR 5.010(1) and (3) unambiguously require that the motion be denied if the parties have not conferred. The Court rejected the defendant's argument that non-compliance could be excused as futile. The Court also held that UTCR 1.100, which allows parties to be excused from compliance with the rules for good cause, does not permit the trial court to excuse a failure to confer. The court did not address the argument that extraordinary circumstances could justify denying relief from non-compliance because there was no indication of such circumstances on the present record.

Don't wait until after the judgment to argue that court's findings on equitable claim were controlled by jury's findings on other claims.

Wilmoth v. Ann Sacks Tile and Stone, Inc., 217 Or App 592 (2008)

After the jury found for the defendant on the plaintiff's sexual-orientation discrimination claims, the court found for the plaintiff on her statutory retaliatory-discharge claim and issued an injunction. The defendant argued in a motion for new trial and on appeal that the jury's findings should have determined the equitable claim as well, but the

Court of Appeals held that the argument was not preserved. That argument could not be raised for the first time in a motion for new trial.

Read those proposed judgments carefully.

Kirschenman v. Elias, 222 Or App 327 (2008)

The trial court issued a general judgment that included a provision denying an award of attorney fees and costs even though the parties had not yet submitted fee and cost statements. The defendants could not argue on appeal that the ruling was premature because they needed to have raised their objection to the fee and cost language before the judgment was entered.

And limited judgments especially

Interstate Roofing, Inc. v. Springville Corp. 217 Or App 412, *on reconsideration* 220 Or App 671 and 224 Or App 94, *review allowed* 345 Or 417 (2008)

A document labeled "Limited Judgment" that used the phrase "it is so ordered," rather than the word "adjudged," and that did not recite that "there is no just reason for delay" was still final and appealable as to one of the claims purportedly resolved in the document. The Limited Judgment document contained conclusions of law – under the heading of "findings" – that two of the claims were invalid but that the plaintiff was entitled to a money judgment in excess of $300,000 on its breach of contract claim. The document set out the contract claim award in a separate money award section, in the form prescribed by ORS 18.042, and concluded with the phrase "IT IS SO ORDERED."

The Court of Appeals concluded that "a judgment that otherwise complies with the form-of-judgment requirements of ORS chapter 18 is not invalid merely because it does not use the word "adjudged" in the adjudicatory part of the judgment document," and the court emphasized that ORS 18.052(1) now provides that the judgment document need not reflect the "no just reason for delay" determination as long as the title of the judgment document indicates that it is a limited judgment. In the Limited Judgment at issue, the presence of the money award section for the breach of contract damages demonstrated that the trial court intended conclusively to dispose of the breach of contract claim. However, the mere recitation that the other claims were invalid and "it is so ordered" was not sufficient to establish that the

trial court intended conclusively to dispose of the other two claims. Thus, the defendant's appeal from the limited judgment, which was not filed until after entry of the general judgment, was untimely as to the contract claim but timely as to the other claims addressed in the limited judgment.

Carefully phrase that cover letter

Werbowski v. Red Shield Ins. Co., 221 Or App 271 (2008)

The plaintiffs argued on appeal that the trial court erred in awarding attorney fees to the defendant without holding a hearing on the plaintiffs' objections. But the Court of Appeals concluded that the plaintiffs invited the error by asking the trial court to contact them "should a hearing be necessary" on the objections.

Get those requested instructions into the record.

Vance v. Teplick, 219 Or App 542, *review den.* 345 Or 416 (2008)

After the Court of Appeals refused to consider a challenge to the denial of a proposed jury instruction because the instruction turned out to be missing from the record, the plaintiff sought reconsideration and leave to supplement the record to include the jury instruction. However, the court refused, announcing that evidence that was not part of the appellate record "will not be entertained for the first time on reconsideration."

If an instruction is wrong, object to it.

Mays v. Vejo, 224 Or App 426 (2008)

When the defendant did not object to instructing the jury in a personal injury case that if the jury awarded economic damages it was also required to award some non-economic damages, that statement became the law of the case. The defendant could not argue on appeal – as an alternative basis for affirming the verdict of $1 in non-economic damages – that this was a case in which the facts justified an award of economic damages alone.

And don't wait too long to object.

Peitsch v. Keizer, 219 Or App 114 (2008)

When plaintiffs' counsel participated with defense counsel in craft-

ing the jury instruction the court gave on causation and then proffered that instruction to the court without expressing any reservation or objection until after the jury had been fully instructed and had commenced its deliberations – and even then did not "cogently present" to the trial court the deficiencies raised on appeal, plaintiffs did not preserve for review their claim that the instruction was erroneous.

AGENCY

Ratification of agreement

Lemley v. Lemley, 221 Or App 172 (2008).

The Court of Appeals held that the defendant demonstrated the intent to ratify a settlement agreement, which she claimed her attorney lacked authority to enter on her behalf, when she failed to repudiate the settlement until after she had accepted the benefits. The court also rejected the argument that the attorney's lack of written authority to enter the settlement agreement (which transferred interest in property) made the agreement void pursuant to the "statute of frauds," because the part performance took the agreement out of the "statute of frauds."

Declaration supposedly on behalf of employer.

East County Recycling, Inc. v. Pneumatic Const., Inc.,
214 Or App 573 (2007)

In this action for breach of express warranty for a baling machine, the plaintiff opposed summary judgment with an affidavit from the person who negotiated the purchase, which said that he was expressly told by an (unnamed) representative of the defendant that the baler was suitable for use outside and that he relied on that representation in making the purchase. The Court of Appeals agreed that the statement of the unnamed representative was not hearsay because it was being offered to show that an affirmation relating to the baler constituted a basis of the parties' bargain. However, the court explained that the common-law rules for determining whether the statement could be admitted as a statement of the defendant are consonant with the analysis under OEC 801(4)(b)(D) for hearsay statements of a servant or agent. The court adopted what it described as the "uniform rule" that, where an employee is not identified by name or responsibilities, the employee's declaration is inadmissible as a declaration on behalf

of the employer unless, from the circumstances of the declaration, it is possible to infer that it concerns a matter that is within the scope of the employee's authority.

ANIMAL LAW

Parker v. Parker, 223 Or App 137 (2008)

On the undisputed facts that the plaintiff brought his horse to the defendant's property, that the defendant's dog rushed toward and barked at the horse, and that the horse then ran off into a steel fence, sustaining ultimately fatal head injuries, plaintiff was entitled to judgment as a matter of law on his claim under ORS 609.140(1). The statute, which provides for a "cause of action" for double damages when livestock have been damaged by being injured, chased, wounded or killed by any dog, creates statutory liability for which no mental state was required. The statute also contains no exception for livestock injured while on the dog's property.

APPEALABILITY

Order setting aside default

Mary Ebel Johnson, P.C. v. Elmore, 221 Or App 166, *review den.* 345 Or 301 (2008)

An order setting aside the default judgment against the defendant was appealable under ORS 19.205(3) as an order made after the general judgment and affecting a "substantial right." It affected a "substantial right" because, before the trial court set aside the default judgment, the plaintiff had an enforceable judgment for the full amount of her claim, but after the default was set aside, the plaintiff would need to incur the expense of litigation in order to pursue her claim to judgment.

ARBITRATION REQUIREMENTS

Express waiver of jury trial not required to enforce mandatory arbitration provision.

Hays Group, Inc. v. Biege, 222 Or App 347 (2008)

In this action by the employer alleging breach of a confidentiality and anti-solicitation agreement, the Court of Appeals held that mandatory arbitration provisions in an employment contract can be enforceable even without a term in the contract expressly waiving the right to jury trial. The court emphasized that Oregon courts are "reluctant to declare contractual provisions '*per se*' unconscionable."

Interlocutory appeal required to challenge denial of arbitration

Snider v. Production Chemical Mfg., Inc., 221 Or App 593, *review allowed* 345 Or 417 (2008)

After the trial court denied the defendant's motion to compel arbitration of this contract dispute, the defendant allowed the case to proceed to a judgment on the merits and then raised the denial of arbitration on appeal. The Court of Appeals held that appeal from the denial of a motion to compel arbitration must be taken by interlocutory appeal within 30 days, rather than in an appeal from the eventual judgment on the merits. The defendant's appeal of that ruling was, thus, untimely, and the court lacked jurisdiction to review it.

THE ALL-IMPORTANT ATTORNEY FEE

Award of attorney fees in "trial de novo" following court-annexed arbitration

Werbowski v. Red Shield Insurance Company, 221 Or App 271 (2008)

When ORS 36.425(4) says attorney fees are available against a party whose position has not improved in a "trial de novo" following court-annexed arbitration, the statute does not mean there must be a trial. It refers to the whole proceedings after the cause returns to circuit court, whether or not that proceeding ultimately resolves through a trial or at an earlier stage. So when the defendant prevailed on summary judgment following the plaintiff's request for "trial de novo," it prevailed for purposes of recovering attorney fees under ORS 36.425(4).

General judgment is not final as to its award of attorney fees when amount of fees is left for later determination

Mathews v. Hutchcraft, 221 Or App 479 (2008)

A general judgment awarding attorney fees in an amount to be

determined later was not final as to the award of fees. "[W]hen *any issue* regarding attorney fees or costs remains undetermined at the time of the entry of the general judgment, that judgment is not final, at least as to the matter of attorney fees and costs." Thus, even though the determination to award fees was part of the general judgment, the petitioner could not challenge that determination without appealing from the supplemental judgment that determined the amount of fees.

Objections to fees get evidentiary hearing.

Morgan v. Goodsell, 220 Or App 329 (2008)

The Court of Appeals reviewed for the second time an award of attorney fees to the prevailing defendant home-owners' association in this breach of fiduciary duty case. The first time, the court had remanded because the trial court failed to apportion the attorney fee award between legal services for the association defendant, which was entitled to fees, versus legal services for the individual defendants, who were not entitled to recover fees. On remand, the trial court adjusted the award but refused to conduct an evidentiary hearing on the plaintiffs' objections. The Court of Appeals again reversed, explaining that ORCP 68 C(4)(c)(i) clearly contemplates an evidentiary hearing when objections under ORCP 68 C(4)(b) are made to a statement seeking attorney fees.

DAMAGES – RECOVERING FOR NON-ECONOMIC LOSS

The "lapsed" coverage exception to denying economic damages to uninsured drivers

Hill v. Null, 224 Or App 345 (2008), *review den.* 346 Or 157 (2009)

The plaintiff was injured while driving his father's uninsured car and did not have his own policy of insurance. The plaintiff argued that he should not be precluded from recovering non-economic damages under ORS 31.715, which applies to most uninsured motorists, because he had recently borrowed other vehicles that were insured and, thus, should meet an exception for certain drivers whose insur-

ance has lapsed within the preceding 180 days. The court held that, even if this was the kind of insurance coverage contemplated by ORS 31.715(6), the plaintiff did not meet the exception because he had not become uninsured due to a "lapse" in coverage.

Nominal award does not satisfy requirement that jury award some non-economic damages

Mays v. Vejo, 224 Or App 426 (2008)

When the jury returned a verdict of only $1 in non-economic damages, this did not comply with the general requirement that the jury must award some noneconomic damages when it awards economic damages. The nominal award was "no damages at all," and the jury should have been instructed to return to their deliberations.

DAMAGES – COLLATERAL SOURCE

Medicare write-offs are not admissible and do not reduce amount plaintiff can recover as cost of necessary medical care.

White v. Jubitz Corporation, 219 Or App 62, *review allowed,* 345 Or 175 (2008)

The plaintiff was injured on the defendant's premises and received medical care for which medicare paid the bills at its reduced rate. Defendant appealed from the verdict against it in this personal injury action, arguing that the trial court should have granted its *motion in limine* and post-verdict motions aimed at preventing the plaintiff from recovering the portion of medical bills that her providers "wrote-off" after medicare paid its reduced rate.

The Court of Appeals held that a plaintiff can recover the portion of medical costs that has been written off because the write-offs are "subjective, nonmonetary losses" that are "reasonable charges necessarily incurred" by the plaintiff and thus "economic damages" under ORS 31.710(2)(a). The Court interpreted the phrase "reasonable charges necessarily incurred" to mean "those charges to which a plaintiff becomes liable or subject when the plaintiff received treatment, without regard to amounts that a medical provider subsequently writes off."

The Court also held that "amounts later written off by a medical provider are collateral source benefits as contemplated by ORS 31.580,"

and thus the fact of the writ-off is not admissible. Finally, the Court held that the write-offs are considered "federal Social Security benefits" that under ORS 31.580(1)(d) cannot be deducted from the plaintiff's award. The Court reasoned that the phrase "encompasses all benefits flowing from the Social Security program, including Medicare."

Oregon Health Plan write-offs cannot be used to reduce jury award.

Cohens v. McGee, 219 Or App 78 (2008)

The Oregon Health Plan (OHP), is Oregon's Medicaid program, Medicaid is a Federal Social Security Program and, thus, the OHP write-offs are a "Federal Social Security Benefit" governed by the limits described in *White*.

EMPLOYMENT LAW ISSUES

Common-law wrongful discharge

Handam v. Wilsonville Holiday Partners, LLC, 225 Or App 442 (2009)

The Court of Appeals reversed a jury verdict for common-law wrongful constructive discharge because the court concluded that, when the plaintiff reported to his supervisor that he was aware of OLCC violations by co-workers and potential immigration violations, the plaintiff was not engaging in a job-related right or carrying out an important societal obligation.

Accumulated sick leave

Funkhouser v. Wells Fargo Corp., 224 Or App 308 (2008), *review den.* 346 Or 115 (2009)

The Court of Appeals held that bank employees did not have a vested right to use accumulated sick leave beyond the life of their original contract, and, thus, the employer could institute a new contract eliminating the vested sick leave without breaching the original contract.

EXPERT TESTIMONY

Disagreement on the validity of "chemical sensitivity" diagnosis was no basis to exclude opinion of a qualified expert.

Kennedy v. Eden Advanced Pest Technologies, 222 Or App 431 (2008)

The plaintiff, who had been diagnosed with chemical sensitivity, sued the defendant pesticide company alleging illness from exposure to chemicals. After the trial court excluded the testimony of plaintiff's medical causation experts, the jury returned marginally favorable verdicts for plaintiff but found that plaintiff suffered no resulting damages. The Court of Appeals rejected the trial court's reliance on the opinion of the defendant's expert that "chemical sensitivity" is a medically invalid illness. As the Court held, "When qualified experts disagree about the validity of medical diagnoses or other scientific evidence, judges are in no better position to resolve that dispute than are juries. * * * In Oregon, we trust juries to be able to find the truth in the classic 'battle of the experts.'"

IMMUNITY

Payment of camping fee did not allow plaintiff to avoid application of recreational immunity statutes to claim for injury while riding trails.

Coleman v. Oregon Parks and Recreation Dept., 221 Or App 484, *review allowed* 345 Or 503 (2008)

After paying a fee to camp at a State Park, the plaintiff was seriously injured while riding his mountain bike on trails at the park that were open for use without a separate fee. The Court of Appeals held that the claim fell with the scope of the immunity granted under ORS 105.682 and ORS 105.688 to those opening their land for free public use because the camping fee paid by the plaintiff applied only to the more specific recreational activity of camping and was not a fee for using the trails.

Port of Portland is not an "arm of the state"

Norgaard v. Port of Portland, 223 Or App 543 (2008)

Applying the "arm of the State" analysis set out in *Johnson v. SAIF Corp.*, 343 Or 139 (2007), the Court of Appeals determined that the Port of Portland does not share in the state's sovereignty for purposes of immunity from federal law. The plaintiff could maintain his claims based on federal maritime law against the Port.

INSURANCE COVERAGE

Constructive control of vehicle not enough to make car-jacker an "operator" of an uninsured vehicle for purposes of UM coverage.

Rogozhnikov v. Essex Insurance Company, 222 Or App 565 (2008)

A taxi passenger who put a gun to the driver's head and directed his actions before shooting him was only exercising constructive control of the taxi and did not become the "operator" of an uninsured vehicle for the purposes of making the driver's death one covered by the uninsured motorist insurance described in ORS 742.504. The court held that the term "operator" in the statute means a person exercising actual physical control over the vehicle.

No PIP benefits for insured hit by bicycle after crossing street to look in her car.

Takata v. State Farm, 217 Or App 454 (2008)

The plaintiff applied for benefits under her personal injury protection (PIP) after she was struck by a bicycle while walking across the street from her car to her home. She had previously parked and unloaded some items from her car, then returned to see what was left and was crossing back to her house when she was hit. The Court of Appeals held that the injury was not a "consequence or effect of any use of the vehicle," as the Supreme Court has said PIP benefits require, because "other than in a pure 'but for' sense, nothing about plaintiff's use of the car enhanced the likelihood that she would suffer an injury because of being struck by a cyclist."

"Unexpected and unintended" provision in "occurrence" definition put burden on insured.

ZRZ Realty Co. v. Beneficial Fire and Cas. Ins. Co., 222 Or App 453 (2008), *adh'd to as modified on recon.* 225 Or App 257 (2009)

The plaintiff sought to recover costs related to environmental clean-up at the Zidell scrap metal site under general liability policies covering damages the insured became legally obligated to pay because of an accident resulting in property damage that is "unexpected and unintended" from the standpoint of the insured. Among various fact-specific determinations, the Court of Appeals also addressed the burden of proof for the kind of "unexpected and unintended" provisions

in the plaintiff's policies. The Court held that the requirement, when set out in a policy as part of the definition of an event that will trigger coverage, is part of the grant of coverage, rather than an exclusion, and thus the burden of proving that the loss was unexpected and unintended is on the insured.

MANDAMUS PROCEEDINGS

State ex rel. Dewberry v. Kulongoski, 220 Or App 345, *review allowed* 345 Or 381 (2008)

The Court of Appeals held that mandamus proceedings are not governed by the ORCP 29 requirement for joinder of necessary parties because mandamus statutes specify "a different procedure"; under ORS 34.110 to 34.130, the only required parties to a mandamus are a "relator" and a "defendant" and it is incumbent upon other, potentially adversely affected persons to *intervene* in the proceeding. Thus, the relator, who was pursuing mandamus against the governor for entering a compact with the Confederated Tribes to allow a casino was not required to join the Confederated Tribes as a party to the mandamus proceeding.

NEGLIGENCE

Obviousness of hazard did not make harm unforeseeable as a matter of law, and but-for causation could be established by circumstantial evidence

Magnuson v. Toth Corporation, 221 Or App 262, *review de.* 345 Or. 415 (2008)

The plaintiff purchased a lot in the defendants' development and a new manufactured home that the defendants were to obtain and install on the lot. The defendants gave the plaintiff permission to move into the home before the installation was complete and installed temporary steps outside two of the three exterior doors on the home. The plaintiff fell when she opened the third door, which had no temporary steps. She sued in negligence, and the trial court granted summary judgment because the plaintiff knew the door had no steps, could not say why she fell and did not testify that the presence of steps would have made a difference. However, the Court of Appeals reversed, emphasizing that the plaintiff's knowledge of the hazard was a factor in determining

comparative fault but did not preclude a finding that the plaintiff's fall was the type of harm that was within the scope of the risk created by defendants' alleged negligence. The court also emphasized that it was not necessary for the plaintiff to present direct evidence that she fell due to the defendants' negligence and that the circumstantial evidence created a genuine issue of material fact regarding but-for causation.

Finally, the court rejected the defendant's argument that the absence of a contractual obligation to install temporary steps meant it owed no duty to protect plaintiff because the contract between the parties did not prevent the plaintiff from bringing a claim for negligent conduct not governed by the contract.

Even with special relationship, scope of duty still governed by foreseeability

Miller v. Tabor West Investment Co., LLC, 223 Or App 700 (2008)

The plaintiff in this case appealed from a summary judgment on his claims of negligence against his landlord for injury at the hands of a third party. The Court of Appeals rejected the argument of the defendant that the special relationship both defined and limited its liability, making foreseeability irrelevant. A special relationship may establish the existence of a duty of care, under *Fazzolari,* but the *scope* of the duty will still be governed by considering the harms to the plaintiff that were reasonably foreseeable. In the context of the landlord-tenant relationship, the "relationship imposes on a landlord an affirmative duty to take reasonable steps to warn or otherwise protect a tenant from 'foreseeable unreasonable risks of physical harm' posed by another tenant, whether on or off the premises." However, the court concluded that no evidence would permit a finding that the harm was foreseeable.

Alleging causation in a medical malpractice case requires more than statement that different treatment "may" have made difference.

Moser v. Mark, 223 Or App 52 (2008)

The trial court properly dismissed the plaintiff's medical malpractice case under ORCP 21 A for failure to state a claim. The plaintiff alleged that, after being treated by the defendant doctor for back pain for 18 months, and repeatedly being denied an MRI to look for a source of pain, the plaintiff switched to a new physician, who im-

mediately scheduled an MRI that showed three bulging discs, a degenerative disc, foraminal stenosis and arthritis. But as to causation, the plaintiff alleged only that an earlier MRI by the defendants "may" have revealed bulging discs. This did not satisfy the requirement that a medical negligence complaint allege "circumstances which rendered the failure harmful."

ORCP 54E

Determination whether plaintiff beat ORCP 54 E offer is made without counting sanction awarded by court under ORCP 46 C, but sanction is not precluded by failure to beat offer.

Elliott v. Progressive Halcyon Insurance Company, 222 Or App 586 (2008), *review den.* 346 Or 65 and 346 Or 157 (2009)

The plaintiff in this uninsured motorist claim obtained a damage award of $8,509.64 at a jury trial, following a court-annexed arbitration in which the plaintiff was awarded a lower amount. But the plaintiff had rejected the defendant's $10,000 offer of judgment, under ORCP 54 E. The trial court imposed a sanction against the defendant of $1,200 under ORCP 46 C, for refusing to admit facts that the plaintiff later proved at trial, and also awarded the plaintiff prevailing party costs and disbursements. The Court of Appeals held that the sanction should not be counted in determining whether the plaintiff beat the ORCP 54E offer; the comparison must be based on adding the ultimate jury award plus the costs to which the plaintiff was entitled through the date of the offer. Because the only cost to which plaintiff would have been entitled at the point of the offer of judgment was the $275 fee awarded under ORS 20.190 for prevailing without trial, the ORCP 54E offer cut off the plaintiff's right to costs and fees.

However, the limitation on post-offer costs and fees does not prohibit recovering a sanction under ORCP 46 C because the purpose of that sanction is to reimburse expenses, not to award a cost to a prevailing party.

SPECIAL MOTION TO STRIKE, ORS 31.150

Denial of a special motion is reviewable only if limited to purely legal issues

Staten v. Steel, 222 Or App 17 (2008), *review allowed* 345 Or 618 (2009)

The defendant maintained a website aimed at shutting down a local strip club and posted photos and obnoxious commentary about the plaintiff (a patron). The plaintiff prevailed on claims for intentional infliction of emotional distress and invasion of privacy. On appeal, the defendant argued that the trial court should have granted the special motion to strike he filed under ORS 31.150, which permits a defendant who is sued over certain actions taken in the public arena to have a questionable case dismissed at an early stage. The Court of Appeals held that the denial of a special motion to strike will be reviewed on appeal only if it is limited to purely legal issues. And this one wasn't.

The court also identified some primary differences between a special motion to strike and a motion for summary judgment. In a special motion to strike, the moving party must show only that the nonmoving party's claim arises out of one of the actions that the statute describes, which can sometimes be shown on the pleadings alone. This showing shifts the burden to the nonmoving party to establish a *prima facie* case that is sufficient to show that there is a probability that it will prevail. The Court described this burden as "potentially much heavier than merely establishing the existence of a disputed issue of fact." In addition, the trial court may need to weigh the evidence to determine if the nonmoving party met its burden. However, a successful motion only results in dismissal without prejudice.

Special motion to strike must be filed before answering.

Horton v. Western Protector Insurance Company, 217 Or App 443 (2008)

The procedural history of the case is convoluted – lawyer fails to use client's settlement proceeds to reimburse insurance company for PIP benefits paid to client, insurance company sues lawyer for conversion, lawyer sues insurance company for wrongful use of a civil proceeding, insurance company answers and then gets lawyer's case dismissed on a "special motion to strike," lawyer appeals. But the legal significance is straightforward: the legislature intended that a special motion to strike be filed before the answer because ORS 31.150 says the motion is "treated as a motion to dismiss under ORCP 21A." The insurer's motion should have been denied as not timely.

STATUTES OF LIMITATIONS

Malpractice claim against criminal attorney accrued once grant of post-conviction relief was effectively final.

Abbott v. DeKalb, 221 Or App 339, *review allowed* 345 Or 415 (2008)

When the state failed to seek review of the Court of Appeals' decision affirming the grant of post-conviction relief to the plaintiff, the plaintiff should have known that he was exonerated of the crime, and, thus, that he had been harmed by his lawyer's negligence. The plaintiff's decision to seek review of the (mostly) favorable Court of Appeals opinion did not delay the time for the statute of limitations to begin running even though it delayed entry of a final judgment exonerating him.

Two-year limitation on pursuing UM/UIM claims is not subject to minority tolling but is waivable by insurer.

Wright v. State Farm Mutual Automobile Insurance, 223 Or App 357 (2008)

The plaintiff, a minor, filed an action against his Uninsured Motorist carrier five years after he was injured. Shortly before filing suit, the plaintiff's attorney had notified the insurer of his claim and received a letter declaring that the insurer was accepting coverage and consented to binding arbitration if agreement on the amount of benefits could not be reached. The Court of Appeals first held that the minority tolling statute, ORS 12.160 does not extend the two-year statute of limitations specified in ORS 742.504(12)(a). However, the court also held that the two-year limitation is not a condition of coverage and, thus, may be waived like contract provisions generally. The court reversed the grant of summary judgment and remanded because a reasonable trier of fact could find that State Farm's letter was a waiver of its right to enforce the two-year limitation.

"Essentially surreptitious" masturbation in plaintiff's presence not "child abuse" for purposes of extended limitations statute; no evidence to find vicarious liability as to sodomy by a second priest.

Schmidt v. Archdiocese of Portland in Oregon, 218 Or App 661, *review allowed* 345 Or 381 (2008)

The plaintiff's claims of sex abuse against a former priest, the Mt. Angel Abbey, and the Catholic Archdiocese of Portland for alleged incidents during the 1950's were not covered by the extended statute of limitations provided in ORS 12.117.

In the first incident, the plaintiff alleged that as a freshman in high school he was summoned to the priest's office and observed the priest engaging in conduct under his cassock that the plaintiff was convinced was masturbation. The Court first concluded that the alleged masturbation incident did not constitute an incident of "cruelty to the child" or "sexual exploitation of a child," the two potentially applicable categories of conduct covered by the extended limitation of ORS 12.117. After observing that the term "cruelty to the child" has a several possible meanings, the Court determined that the legislature intended the phrase to refer to "a narrow range of extreme or severe conduct" and that the alleged masturbation incident did not fit this category. The Court described the incident as "essentially surreptitious" conduct that did not involve the plaintiff because the evidence was that the plaintiff did not actually see that the priest's hand was touching his genitals or that he reached sexual climax and was not propositioned to join the priest or prevented from leaving the room.

The Court also concluded that the incident did not constitute "sexual exploitation of a child" as used in ORS 12.117 because the court determined the phrase is addressed to conduct involving actual sexual contact between the perpetrator and victim or conduct by an actor that is directed at causing a child to participate in sexual contact or exhibition.

The Court finally held that there was no basis for vicarious liability for an alleged assault by a second priest, who is now deceased, because there was not evidence of the priest establishing any kind of relationship of trust with the plaintiff or the plaintiff's family prior to the alleged assault.

No discovery rule for contract claims

Waxman v. Waxman & Associates, Inc., 224 Or App 499 (2008).

The six-year statute of limitations for contract claims, ORS 12.080, does not incorporate a discovery rule.

Failure to correct harm did not create a continuing tort.

BoardMaster Corp. v. Jackson County, 224 Or App 533 (2008)

Plaintiffs' claims for negligent discontinuation of electrical service were barred by the statute of limitations for claims against a public body, ORS 30.275(9), because the discontinuation and subsequent refusal to order restoration of electrical service was not a continuous tort. Defendant's failure to correct the allegedly negligent termination of service "does not turn a discrete and separately actionable act" into a continuing tort.

CRIMINAL CASE REVIEW
OREGON COURT OF APPEALS, 2008

By Marc D. Brown

The fact that always jumps out at me when I sit down and sort through the past year's Court of Appeals criminal law opinions is just how many opinions the court issues each year. This year, I present my top nine Court of Appeals opinions. The criteria are highly random and probably colored by the fact that I come at the cases with a public defender's jaundiced eye. In other words, I have no doubt that I am biased but I am honest about my bias. Does honesty make my bias any better? Probably not. Mainly, I chose cases that I found interesting, whether due to the facts, the legal issue, or some less tangible reason. I did not include cases that are currently on review at the Supreme Court because those will be covered in the next Oregon Supreme Court Review. Finally, the cases appear in no specific order. So, here are my arbitrary top nine Court of Appeals opinions for 2008 presented in no specific order whatsoever. Could it be more helpful?

As is generally the case in a typical year, the Court of Appeals had many issues involving driving under the influence of intoxicants (DUII) on its docket in 2008. One of the more interesting issues involved the parameters of the right to a reasonable opportunity to contact an attorney before deciding whether to take a breath test. [Disclaimer: your humble author represented the defendant in a couple of those cases]. The appellate courts have long held that a person arrested for DUII has the right to a reasonable opportunity to speak to an attorney in private before deciding whether the take a breath test, so long as the person makes such a request. In *State v. Sawyer*, 221 Or App 350, 190 P3d 409 (2008), the defendant made such a request, and the officer told the defendant that he could use a telephone but did not tell the defendant that he could speak in private. The defendant told the officer that "I would rather wait." The Court of Appeals held that defendant's statement was not a waiver of the right to consult with an attorney because the officer failed to tell the defendant that he could speak in private. The court concluded that the waiver was not valid because a waiver must be a relinquishment of known rights and defendant did not know he had the right to speak in private.

In *State v. Carlson*, 225 Or App 9, 199 P3d 885 (2008), the court held that the police officers failed to provide the defendant a reasonable opportunity to call an attorney for two reasons. First, the court held that the evidence in the record indicates that the officer did not know how to use the telephone, and the defendant's hands were handcuffed. Second, as with *Sawyer*, the officer had not informed the defendant that he could speak to an attorney in private. As a result, the court concluded that the results of the breath test should have been suppressed.

However, in *State v. Hunt*, 225 Or App 51, 200 P3d 165 (2008), the court held that the officer did provide the defendant a reasonable opportunity to consult with an attorney and his waiver of that right was valid. In *Hunt*, the defendant requested to speak to an attorney several times. After informing the defendant that she was starting the 15 minute observation period, the officer told the defendant to go ahead and use the telephone, gesturing to a room adjacent to the breathalyzer room. Defendant waived his right. The court held that, although the officer did not tell the defendant he could speak in private, the telephone was in an enclosed room with a door. The court concluded that it was obvious that the defendant would be able to make the call in private.

In *State v Panduro*, 224 Or App 180, 197 P3d 1111 (2008), the state appealed from a trial court denial of its motion *in limine* to admit evidence of the defendant's uncharged misconduct. The defendant filed a motion to dismiss the case on the ground that it was moot because he had been deported from the United States. Under the defendant's argument, the state's appeal was moot because it was uncertain whether he would ever return to the United States or be brought to trial. That uncertainty deprived the court's decision in the case of any practical effect on the rights of the parties. The defendant also argued that, because it was uncertain whether the state would extradite him or whether he would return to the United States, he had been deprived of his rights to counsel and to a speedy trial. The Court of Appeals denied the defendant's motion to dismiss, holding that the defendant presented no evidence of a denial of speedy trial or his right to counsel. Furthermore, the court explained that the defendant may return to the country at some point and, at that point, the ruling will have a practical effect. On the merits, the court reversed the trial

court's denial of the state's motion, holding that the evidence in question was relevant.

In a ruling on failure to register as a sex offender, the court held that the state failed to prove venue. In *State v. MacNab*, 222 Or App 332, 194 P3d 164 (2008), the defendant assigned error to the trial court's denial of his motion for a judgment of acquittal on the ground that the state did not offer evidence that his failure to report occurred in the county where the charge was brought. The state argued that it presented evidence that the defendant lived in the county in question one year before the offense occurred and two years after the offense occurred and it is reasonable to infer that the defendant continued to live in the county during the entire time at issue. The court dubbed the state's argument one of "residential inertia – - that, in the absence of evidence to the contrary, we may safely assume that people do not move." The court rejected that argument, explaining that the record does not indicate that the defendant owned the houses he lived in or where he worked during the time in question. As a result, the court would not infer that the defendant lived in the county during the time period in question.

In a fairly routine jury instruction case, the dissent departed radically. In *State v. Hogevoll*, 223 Or App 526, 196 P3d 1008 (2008), the court held that a hunter can exceed his or her bag limit when they have met the bag limit and take possession of an animal killed by someone else. All in all, nothing too radical. However, in his dissent, Judge Sercombe actually cited to a dictionary other than Webster's Third International. Not only did he acknowledge the existence of such upstarts as the Oxford English Dictionary and The Random House Dictionary of the English Language but he actually *gasp* quoted from those dictionaries. Beware, this could begin a dangerous slide. First a citation to the OED is slipped in and everyone looks the other way. But all will soon realize that the OED was a gateway dictionary. It will not be long before the court begins quoting Wikipedia. A dangerous step has been taken.

On a lighter note, the Court of Appeals made it safe for the citizens of Oregon to ride a bike while carrying a ninja sword. In *State v. Turner*, 221 Or App 621, 191 P3d 697 (2008), the issue was whether an officer had reasonable suspicion to stop the defendant for carrying a concealed weapon. The incident took place during a Critical Mass

bicycle rally to promote cycling as an alternative means of transportation. An officer assigned to patrol the rally, rode next to the defendant and saw three or four inches of a sword handle wedged between the defendant's back and his backpack. The officer testified that, based on his training and experience, he had no doubt that the object was a sword or something similar. While riding alongside the defendant, the officer asked him, "What's sticking out of your neck?" The honest defendant replied that it was a ninja sword. At the officer's request, the defendant stopped. The officer then removed the sword and discovered a second ninja sword. The officer arrested the defendant for carrying a concealed weapon based on the discovery of the second sword.

At trial, the defendant moved to suppress the evidence of the sword. The trial court denied the motion. The defendant appealed. First, the court held that the officer stopped the defendant when he ordered the defendant to stop. Then, the question was whether the officer had reasonable suspicion that the defendant was carrying a concealed weapon at the time he conducted the stop. The court held that the officer did not have a reasonable belief because he could readily identify the item as a sword based on his observations. The lesson here is to keep the handle of your ninja sword visible at all times when riding your bicycle.

In *State v. Cox*, 219 Or App 319, 182 P3d 259 (2008), the defendant asked the court to determine what the legislature meant by the term "change of residence" for purposes of the sex offender registration statutes. The state charged defendant with failure to register as a sex offender. To convict, the state must prove that a defendant knew of the reporting requirements and failed to report a change of residence within 10 days of a change of residence. In this case, the defendant left his residence and stayed in a friend's motor home for two nights followed by a motel room for two nights and the Mill Casino parking lot for two or three additional nights. Ultimately defendant moved to the M'Ocean Trailer Park and, 25 days after leaving his prior residence, police cited him for failing to report a change of residence.

At trial and on appeal, the defendant argued that the state failed to present sufficient evidence that he failed to report within 10 days of changing his residence. The defendant argued that the dictionary definition (Webster's, of course) of the verb "change" is "to switch to another." The court did not agree, explaining:

> "At the outset, we pause to note that, when resorting to a dictionary, it is important to keep in mind the part of speech of the word in dispute. When the statutory term consists of a word in its noun form, it is not necessarily helpful to consult definitions of the word in its verb form, and vice versa."

The court then noted that defendant did just that, relying on the definition of the verb "change" rather than the noun, the form used by the legislature. The noun "change," the court notes, means "a shift in relation to surroundings (as to a different place, situation, course, level)." The court concluded that the term "change of residence" referred to the date of moving out of the current residence not the date of moving into a new residence. As a result, the statute required the defendant to register within 10 days of moving out of his residence, which he failed to do.

Finally, rounding out my top nine, the court held that bad housekeeping is not a basis for either the community caretaking or the emergency aid doctrine exceptions to the warrant requirement. In *State v. Goodall*, 219 Or App 325, 183 P3d 199 (2008), the issue was whether the trial court erred in denying the defendant's motion to suppress evidence related to a warrantless search of a home. Factually, two detectives went to the defendant's home to investigate a complaint of drug activity. As the detectives approached the house, they say over a dozen bags of rotting garbage with flies circling the open bags, the detectives also saw mold growing on the inside of a large window. The detectives knocked on the door and the defendant answered. After some discussion regarding the defendant's sleeping six-month old child, the defendant consented to allowing the detectives to enter the doorway to talk. The odor of garbage and feces in the house overwhelmed the detectives. They observed electronic components and debris lying on the floor, dirt ground into the carpet, and general disarray. When the defendant retrieved her son from another room, he appeared a "little dirty" but happy and in overall good health.

The detectives asked the defendant for consent to search her home. She refused. They told her that, under their community caretaking responsibilities, they had a right to search the home without the defendant's consent. The detectives conducted a search of the home and noted similar dirty conditions, including debris and many soiled diapers. In addition, the court found a "big glass bong" for smok-

ing marijuana. Ultimately, the child was taken into protective custody and the defendant was arrested and charged with first-degree criminal mistreatment and endangering the welfare of a minor.

The defendant and co-defendant moved to suppress evidence obtained during the warrantless search of the home. The trial court denied the motion and the defendants appealed. On appeal, the defendant argued that no emergency existed because the detectives could have taken the child into protective custody without searching the house. By taking the child into custody, the detectives would have ended any emergency.

The court noted that the community caretaking statute, ORS 133.033 provides that an officer can remain on the premises when it "reasonably appears necessary" to "prevent serious harm" to any person. However, the statute further provides that those actions cannot be "expressly prohibited by law." Therefore, the court explained, "the constitutional prohibition on warrantless searches, subject to limited exceptions, acts as a limitation on an officer's actions under ORS 133.033." After defining key terms of the statute, the court concluded that "the text of the statute expresses the intent that police action in remaining on the premises be one that is logically unavoidable or absolutely needed to accomplish the goal of preventing serious harm to a person or to property." Further, the court concluded that "ORS 133.033(2)(a) authorizes those actions logically required to keep serious harm from happening." Therefore, in light of the requirement that actions under the community caretaking statute cannot be expressly prohibited by law, the court held that "when an officer's actions--logically intended to keep serious harm from happening to a person or property--include a warrantless search of a home, the search must fall within one of the constitutional exceptions to the warrant requirement."

The court explained that the emergency aid doctrine is one of the exceptions to the warrant requirement. The emergency aid doctrine applies only when four conditions are met:

> "(1) the police have reasonable grounds to believe that there is an immediate need for their assistance for the protection of life; (2) there is a 'true emergency,' that is, the circumstances giving rise to the officer's belief that action is necessary must actually exist; (3)

the search is not primarily motivated by an intent to arrest a person or seize evidence; and (4) the officer reasonably believes that, by making the warrantless entry, the officer will discover evidence that will alleviate the emergency."

The court explained that "[f]or a true emergency to exist, there must be an identifiable potential victim of a life-threatening incident, an identifiable potential perpetrator of a dangerous act, or both."

The court observed that the detectives here did not need to search the residence to find the child, the only individual in need of protection, because the child was in the defendant's arms when she was speaking with the detectives. Any true emergency could have been alleviated by taking the child into protective custody. In other words, the search of the home did nothing to ameliorate, hinder, or stop the identified harm to the child. As a result, the court concluded that the detectives' warrantless search of the house was not reasonably necessary to prevent serious harm to the child and the conditions of the emergency aid doctrine were not satisfied.

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HEAVY LIFTING

2008 OREGON COURT OF APPEALS ANNUAL REPORT

INTRODUCTION

The Court of Appeals is Oregon's intermediate appellate court. By statute, the Court of Appeals is charged with deciding nearly all the civil and criminal appeals taken from Oregon's state trial courts and nearly all the judicial reviews taken from state agencies and boards in contested cases. Created by statute in 1969, the court does not exercise jurisdiction under the constitution; instead, its jurisdiction is established by the legislature. Whether measured against the number of appeals taken by population or the number of appeals taken by judge, the Oregon Court of Appeals consistently ranks as one of the busiest appellate courts in the nation. Over the past decade, the Court of Appeals has received approximately 3,200 to 4,000 filings per year. The information contained in this narrative is merely a summary of the court's structure, workload, and projects. More detailed information is posted on the court's web page on the Oregon Judicial Department's website at:

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

WORKLOAD DISTRIBUTION

The Court of Appeals has ten judges. To meet the demand of its substantial workload, the court is divided into three departments (or "panels") of three judges each for the purpose of considering cases. In addition, there is another three-judge department--consisting of one judge from each of the other three panels--that sits separately for the purpose of addressing substantive motions filed in appeals or judicial reviews. The Chief Judge of the court sits as a nonvoting member on each of the court's four departments and participates in their deliberations. That participation, which is in addition to the Chief Judge's administrative and other responsibilities, permits the Chief Judge to act as a substitute voting member on any panel when one of the other judges cannot participate (due to a conflict of interest, for example) and also helps to ensure consistency in the decision-making of the various panels. Before a panel releases an opinion in a case, the proposed opinion is circulated to all the court's judges, and the court then

may elect to consider the case *en banc* (by the full ten-judge court), which happens in approximately two percent of the court's cases.

CASE PROCESSING

An appeal or judicial review can result in a dismissal short of a decision on the merits for a number of reasons: A party may voluntarily dismiss the case due to settlement or for some other reason, there can be jurisdictional problems, or there can be a failure to prosecute. All but a handful of dismissals arise before the case is submitted for decision. Over time, the statistics translate roughly ("roughly" because a case may be dismissed in a year other than the year in which it was filed) into a 35-50 percent dismissal rate.

With regard to those cases that proceed to a resolution on the merits, most cases are submitted for decision after oral argument; a small percentage is submitted on the written briefing alone. Cases are assigned to a department on a random basis. Each department hears oral arguments on an average of three days each month; oral arguments are heard year-round. In addition, the court adds "fast track" cases to each of its regular oral argument calendars. "Fast track" cases are those matters that the legislature or the court has determined require expedited consideration. Primary among those cases are appeals or judicial reviews involving juvenile dependency, termination of parental rights, land use, workers' compensation, and certain felony charges or convictions. Finally, in an effort to manage an accumulation of criminal and prisoner litigation appeals, the court in 2008 added a further hearing day to its monthly oral argument calendar, in which the court hears an additional 35 appeals in those case categories.

Before oral argument, all three judges assigned to the case read the parties' briefs, perform whatever preliminary legal research may be in order, and meet together to discuss the case. After oral argument, the judges re-evaluate the case in light of the parties' oral advocacy and review the record of the case as appropriate. If, based on all those considerations, each of the three judges agrees that (1) none of the parties' arguments will result in the decision below being vacated, reversed, or modified, and (2) a written opinion would not benefit the parties, bench, or bar, then the panel will issue a decision affirming the ruling on appeal or review without opinion. Such decisions normally are is-

sued within a few weeks of submission.

For matters in which a written explanation of the court's decision is appropriate, the presiding judge assigns the case to a judge for preparation of an opinion. Once prepared, the draft opinion is circulated to the other judges of the panel and the Chief Judge, and the proposed decision is discussed at a regularly scheduled conference that the Chief Judge also attends. As noted above, once the panel has agreed on a resolution for the case, which may or may not include a concurring or dissenting opinion by one of the panel's judges, the final draft of the opinion(s) is circulated to all the other judges to determine whether the case will be considered by the full court.

The Court of Appeals historically has issued between 350 and 400 written opinions each year, or 35 to 40 opinions per judge. At any one time, each judge usually has an active list of between 25 and 30 cases that have been assigned to that judge for a written opinion to be produced. Judges generally work on drafting opinions in the oldest cases first, but prioritize the "fast track" cases for which the legislature or the court has required expedited consideration. Through a strong team effort, the court has worked diligently to improve its productivity over the past several years. In 2008, the court issued 436 authored opinions, the highest number issued in more than a decade.

INTERNAL PROCESSES: PUBLICATION AND ASSESSMENT

The court is committed to improving communications with the bench, the bar, the other branches of government, 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 through 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 several thousand motions annually and how cases

may be referred to its nationally recognized Appellate Settlement Conference Program. The court hopes that, by providing these insights into its internal workings, its work will be more accessible and its rules and procedures easier for litigants to follow.

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. To that end, the court recently sponsored and supported a study group that examined the best practices of state intermediate appellate courts across the nation. The court hopes and expects 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. As the court changes its practices, it will modify the Guidelines to reflect those changes.

Copies of the Guidelines may be obtained online at the court's web page on the Oregon Judicial Department's website at:

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

APPELLATE CASE MANAGEMENT SYSTEM/ ECOURT PROJECT

The Court of Appeals has implemented a new automated Appellate Case Management System, a key component of the Chief Justice's vision for an "electronic courthouse." Virtually all components of the Appellate Case Management System are now up and running. The system has contributed to increased processing efficiency by providing functions such as:

- Automated case tracking and data entry.
- Document generation through the use of predefined templates.
- Data tracking and automated statistical report generation.

In addition, the new Appellate Case Management System has streamlined case processing functions by providing a common shared platform that is used by both the Court of Appeals and the Appellate Court Records Section.

The court also has embarked on an eCourt project that will allow external users to file documents electronically in the first quarter of 2009 and that, within the next two years, will permit staff to manage many of the court's critical documents electronically. In addition, by mid-2009, the court hopes to implement a new financial management system that will provide updated management of all case-related financial transactions.

APPELLATE PERFORMANCE MEASURES

The Court of Appeals Performance Measures Design Team, which began meeting in the fall of 2005, has finalized the court's success factors and accompanying core performance measures. The court's success factors are:

- 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.

The court's core performance measures are:

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.

- On-Time Case Processing: The percentage of cases decided or otherwise resolved within established time frames.
- Clearance Rate: The ratio of outgoing cases to incoming cases expressed as an average across all case types and disaggregated by case type--civil, criminal, collateral criminal, juvenile, and agency/board.
- Productivity: The number of cases resolved by the Court of Appeals disaggregated by decision form--that is, signed opinions, per curiam opinions, affirmances without opinion, and dispositive orders.

As our first formal effort to measure the quality of the court's work, in the spring of 2007, the court invited attorneys and judges involved in circuit court cases on appeal in which any case dispositional decision was entered between July and December 2006 to complete an anonymous online survey. 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 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 web page on the Oregon Judicial Department's website:

http://www.ojd.state.or.us/courts/coa/BenchBarSurvey07.htm/

During the Appellate Case Management System phase-in, the design team's extensive work on the case processing, clearance rate, and productivity measures resulted in the development of standard reports that will provide appellate case data to assist the court in evaluating its progress with respect to those performance measures. Those standard reports have been carefully tested for data integrity and were implemented in January 2009.

On a going forward basis, the Performance Measures Design Team will monitor and analyze information captured by the performance measure reports and will apply that information to enhance the court's productivity, the quality of its work, and its management and leadership capabilities. In addition, the design team will continue to identify future performance goals.

COURT IMPROVEMENT COMMITTEE

In August 2008, the Court of Appeals created a Court Improvement Committee made up of five judges and a staff attorney. The goal of this committee has been to explore ways the court can perform its work more efficiently within its existing resource base and to consider longer-term solutions for dealing more effectively with the court's caseload. To that end, the committee has sought to evaluate current practic-

es and procedures and identify methods to improve caseload management and productivity. The committee is currently evaluating briefing and oral argument conventions, as well as the use of staff attorneys, law clerks, and externs, and is pursuing potential funding for a workload study to be conducted by the National Center for State Courts.

CHRONIC RESOURCE SHORTAGES AND CRIMINAL CASE MANAGEMENT PROJECT

As noted above, several of the core performance measures of the Court of Appeals, as identified by the Performance Measures Design Team, involve the timely processing of cases. The most pressing case processing concern that the court faces is an increased backlog of cases that are fully briefed but not yet scheduled for oral argument. In the past twelve months, that backlog has roughly doubled. The primary reason for the increase is that the court has substantially decreased maximum permitted briefing times in criminal and prisoner litigation appeals--which comprise more than half of the court's caseload--and accordingly cases in those categories are being briefed much more quickly than they historically have been. In past years, because of inadequate staffing resources, the lawyers representing the parties in such cases sometimes required up to two years per side to brief appeals. The 2007 Legislative Assembly approved funding to add appellate lawyers to the staffs of the Attorney General and the Office of Public Defense Services in order to enhance the timely completion of their work, including briefing. As a consequence, over the past eighteen months, the Court of Appeals has been able to reduce by more than half the briefing time and overall number of motions for extensions of time in criminal and related cases.

However, the court's judicial and staffing resources have not been increased to respond to shorter briefing times. As a consequence, the resource shortage, and corresponding potential for delay in the processing of criminal and related cases, has shifted from the lawyers to the court. The court has not sat idly by in the face of these events. In order to assist in processing its criminal case load, the court has assigned 1.7 staff attorneys to work exclusively on criminal cases. To directly address the increased backlog of cases, the court has added two additional criminal and prisoner litigation argument days to its monthly calendar, increasing the number of cases that the court hears

each month by approximately 70. Adding those additional argument days is a huge increase in workload for an already overworked ten-judge court to undertake without an additional infusion of resources. But the court has done so in keeping with its commitment to maintain accountability to the public and to openly confront the resource shortages that limit the efficiency of our public justice system. Although those measures will help the court stay more current in the short run, they are not sustainable at the court's present resource levels. Before the court implemented the measures in the fall of 2008, the court already was hearing and deciding more cases than it did five years ago, with roughly the same amount of resources that it had then.

To place the foregoing discussion in context, it is clear that the Oregon Court of Appeals is substantially underfunded compared to other intermediate appellate courts in the United States. A recently published study showed that the Oregon Court of Appeals was last in budgeted resources per-case nationally among intermediate appellate courts that are similarly structured. For example, the Colorado Court of Appeals, our counterpart intermediate appellate court in that state, has roughly 25 percent fewer annual appeals than does our court, but it has more than twice the number (22) of judges and corresponding staff resources to perform its work.

The core function of the Court of Appeals, that is, the disposition of appeals from trial court and agency decisions, is personnel-driven. It depends on the timely and concerted work of too few judges, staff attorneys, law clerks, judicial assistants, a single administrator, and the staff of our appellate mediation program. Thus, any reductions in the court's personnel budget would significantly impair the court's ability to function properly in many critical areas of its case load, including its review of time-sensitive juvenile dependency and termination of parental rights decisions.

APPELLATE COMMISSIONER PROJECT

In 2008, the court reorganized the Office of Appellate Legal Counsel into an Appellate Commissioner's Office. The goal of the 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. The commissioner has authority to decide motions,

own motion matters, and cost and attorney fee matters arising from cases not decided by a department. Parties may move for reconsideration of a decision of the appellate commissioner, resulting in review of the decision by either the Chief Judge or the court's Motions Department. The appellate commissioner position is modeled on commissioner positions found in the State of Washington appellate courts, except that the Oregon appellate commissioner does not have authority to decide any cases on their merits.

SPECIAL PROGRAMS

Appellate Settlement Conference Program. The Court of Appeals has continued to utilize its highly effective mediation program, which has allowed parties to resolve on a mutual and voluntary rather than judicial basis between 100 and 150 civil, domestic relations, and workers' compensation cases each year. The settlement rate for cases entering the program has been approximately 70 percent, one of the highest in the nation.

Statewide Oral Argument Sittings. The judges of the Court of Appeals continue to hold court sessions in schools throughout Oregon, making the process of justice both more understandable and more accessible to the public.

Trading Benches Program. The court has developed and implemented this program in coordination with Oregon's circuit court judges. Through the program, trial judges periodically sit *pro tempore* on the Court of Appeals, and appellate judges perform judicial work for the circuit courts. With a better understanding of the work that the other judges perform, it is expected that the incidence of reversible error will be reduced.

COMPARATIVE STATISTICS

The following chart shows comparative statistics for the Court of Appeals for the years 2003-08:

Court of Appeals Comparative Statistics 2003-2008

	2003	2004	2005	2006	2007	2008
Adoptions	1	3	3	4	5	5
Criminal	1120	1519	1571	1562	1356	1384
Criminal Stalking	NA	NA	NA	NA	1	4
Civil	487	432	418	405	388	402
Civil Injunctive Relief	NA	0	1	0	0	0
Civil Agency Review	NA	1	13	12	24	9
Civil FED	NA	22	35	27	29	28
Civil Other Violations	NA	3	11	9	6	15
Civil Stalking	NA	5	25	19	25	16
Civil Traffic	NA	15	30	35	31	36
Domestic Relations	218	195	176	159	187	185
Domestic Relations – Punitive Contempt	NA	NA	NA	NA	5	7
Habeas Corpus	93	80	85	81	84	78
Mandamus	0	1	0	0	0	0
Juvenile	74	0	1	0	0	0
Juvenile Delinquencies	11	42	38	32	30	24
Juvenile Dependencies	8	62	65	64	80	125
Juvenile Terminations	75	72	79	65	67	44
Probate	15	20	23	18	8	31
Post Conviction	249	387	550	334	291	236
Traffic	96	160	109	88	90	72
Administrative Review	231	217	200	193	232	212
LUBA	43	29	36	21	26	34
Parole Review	157	116	86	175	103	49
Workers' Compensation	214	181	120	116	102	110
Mental Commitment	88	115	126	94	102	83
Columbia River Gorge Commission	NA	NA	NA	NA	1	1
Rule Challenge	NA	NA	NA	2	1	13
Other	0	0	0	2	38	17
Total Filings	**3180**	**3677**	**3801**	**3517**	**3312**	**3220**
Opinions Issued	344	351	400	420	400	436

Beginning in 2004, the Court of Appeals refined its tracking of certain broad categories of case filings. For example, before 2003 the category "juvenile" had included both delinquency and dependency proceedings. Now each type of filing is reported separately.

CONCLUSION

I hope that this report will be of interest and assistance to those who follow the work of the Oregon Court of Appeals. My colleagues and I are grateful for the opportunity to maintain open and frank communications with all justice system stakeholders as we work in partnership to improve the delivery of public justice services in Oregon. Our function--providing first-line appellate justice in reviewing trial court and agency decisions--is a relatively small part of that system, but a critical one that affects the lives of Oregonians throughout the state. In order to gain, and maintain, public trust and confidence, we must perform our work productively and efficiently within our dedicated resource base and, above all, we must adhere to the rule of law in doing so. If you have any questions about our work that are not adequately addressed in this report, please do not hesitate to contact me at david.v.brewer@ojd.state.or.us, or Oregon Court of Appeals, 1163 State Street, Salem, Oregon 97301-2563.

David V. Brewer, Chief Judge
Oregon Court of Appeals
February 2, 2009

THE APPELLATE SETTLEMENT CONFERENCE PROGRAM

By Judy Henry

In 1995, the Court of Appeals began an Appellate Settlement Conference Program, (the "Program") which is a mandatory mediation program in the Oregon Court of Appeals and a voluntary mediation program in the Oregon Supreme Court. The Program is run by the Director, Judy Henry, and has a staff attorney, Barb Gazeley, and judicial assistant, Cheryl Alex. Both Judy and Barb work part-time.

The Program focuses on general civil, domestic relations and workers compensation cases. However, any type of case will be accepted outside those categories if the parties request the assistance of the Program. In the last three years, the Program has mediated a few highly screened termination of parental rights cases with some positive results. Nevertheless, due to the significant resources demanded by these cases, the Program is only taking one or two of those cases each year.

With respect to the typical mediation caseload of the Program, 2008 was a very successful year. The Program had its highest settlement rate that averaged 70%. While the Program is mandatory, a significant amount of screening takes place. Nevertheless, the vast majority of cases that settled were cases in which one or both parties indicated that settlement would not occur. As a result of our intervention, the Program has settled approximately 25% of the Court of Appeals' civil caseload.

Many of the civil cases that were settled involved multiple parties and complex issues. These are the cases that are typically labor intensive and require significant resources. A settlement of one of these cases frees up the court to work on several other cases.

In a nutshell, once a Notice of appeal is filed, a case is pre-screened for eligibility. If a case has any jurisdictional defect, it will not be referred to the Program until the defect is cured. The Program typically will not take cases with restraining or stalking orders or pro se cases. Once an initial determination of eligibility is made, the case is referred to the Program. At referral, the case is abated for up to 120 days, and

Appellant and/or cross appellant is required to complete and return an Appellate Settlement Conference Statement Form. Upon receipt of the Form, Barb begins her screening process. Typically, the attorneys for both parties are communicated with to determine feasibility of settlement. If the case is determined by the Program staff to be a good candidate for mediation, the case is formally accepted into the Program and a mediator is assigned. The mediation is scheduled at a mutually convenient date and each party pays the mediator pursuant to ORAP 15.05 (7).

If a case is determined not to be a good candidate for mediation, it is removed from the Program and the appeal is immediately reactivated. If a case fails to settle at mediation, it too, is removed from the Program and the appeal reactivated.

Generally, motions are also abated unless a request is made to hear the motion. The parties can call the Director who will then request that the court hear the motion while the case is being scheduled for mediation.

Due to difficulties in coordinating schedules, often mediation sessions do not take place until near the end of the abeyance period. If a case is settled but the parties need more time to document a settlement, the Director may grant an extension for as long as reasonably necessary to implement a settlement. The Program gives litigants significant flexibility in order to resolve their cases short of an appellate opinion. It also provides an opportunity for a quicker, more economical and creative resolution to the parties' dispute.

The procedures for the Program are set forth in Oregon Rules of Appellate Procedure (ORAP) 15. 05, et. seq., and the OSB Publication, Arbitration and Mediation.

Contact information for the Program is as follows:

Judy Henry (503) 986-6417

Barb Gazeley (503) 986-6427

Cheryl Alex (503) 986-5874

2009 AMENDMENTS TO THE OREGON RULES OF APPELLATE PROCEDURE

By Lora Keenan (Staff Attorney, Oregon Court of Appeals)
and Melanie Hagan (Staff Attorney, Oregon Supreme Court)

INTRODUCTION

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

Since about 1985, the courts have relied on the ORAP Committee to review and develop proposals to amend, add to, and generally improve the rules. The voting members of the committee in 2008 consisted of two judges from each court, the Solicitor General from the Oregon Department of Justice, the Chief Defender from the Office of Public Defense Services (OPDS), seven other appellate practitioners, and a trial court administrator. Nonvoting members included a Court of Appeals staff attorney, a Supreme Court staff attorney, the Appellate Commissioner, and the Appellate Court Administrator.

The committee met five times between January and May 2008. The proposed rule changes approved by the committee were then published with notice of proposed rulemaking in the Oregon Advance Sheets. The committee met again in September 2008 to make additional adjustments in response to comments received. The rule changes were then submitted to all the members of both courts for adoption. In October 2008, the Chief Justice and Chief Judge signed orders officially adopting changes to the ORAPs effective January 1, 2009. Those changes were published in 2008 volume 25 of the Oregon Advance Sheets and may be viewed online at www.publications.ojd.state.or.us/RULE137.htm (October, 2008 – Order Adopting Amendments to 2009 ORAP).

The courts also adopted several temporary amendments in 2008 and early 2009 that will be reflected in the version of the ORAPs published in early 2009. Those temporary amendments are covered in this outline.

2009 AMENDMENT HIGHLIGHTS

This outline covers the major changes that went into effect on January 1, 2009, but it is *not* exhaustive. Consult the published amendments for a complete version of the changes. The published 2009 permanent amendments are available in volume 25 of the 2008 *Oregon Appellate Courts Advance Sheets* and online at and may be viewed online at www.publications.ojd.state.or.us/RULE137.htm (October, 2008 – Order Adopting Amendments to 2009 ORAP).

CRIMINAL APPEALS

Notice of Appeal in Guilty Plea (et al.) Cases -- ORAP 2.40(2)

This amendment streamlines the process in cases in which a defendant may file a delayed notice of appeal pursuant to ORS 138.071(5). Instead of a separate notice of appeal and motion for delayed appeal, the amended rule allows for a single "Notice of Appeal; Motion -- File Late Appeal." That document must indicate that the delay in filing the notice of appeal was attributable to the need to identify a colorable claim of error. The motion will be deemed granted if not opposed by the state within 14 days; however, the state may move for reconsideration if it misses that deadline.

Supplemental *Pro Se* Briefs -- ORAP 5.92(2)

A provision was added requiring supplemental *pro se* briefs to identify assignments of error, *i.e.*, questions or issues to be decided on appeal that specify the rulings being challenged. This is similar to the general description of assignments of error in ORAP 5.45(3).

Expedited Appeal of Certain Pretrial Orders -- ORAP 10.25

(Note: updated wording for this rule was adopted by temporary amendment reflected in Chief Judge Order 08-14, dated December 30, 2008)

This new rule implements the requirement of ORS 138.261 that

the Court of Appeals expedite certain state's pretrial appeals when the defendant is in custody on felony charges: appeals from orders dismissing or setting aside the accusatory instrument and appeals from orders suppressing evidence. The new rule includes the following provisions: (1) As with other expedited cases, the caption of each filing is to include "EXPEDITED APPEAL UNDER ORS" and the number of the statute. (2) Each brief has a 35-day deadline. (3) Requests to extend briefing deadlines or reset oral argument are strongly disfavored. (4) Preargument motions will not toll time for other deadlines. *See also* ORAP 12.07 (similar provision for the Supreme Court).

Automatic Review in Death Sentence Cases -- ORAP 12.10(5)

This amendment removes the requirement that a party in a death penalty case apply to the Supreme Court for an order allowing the transcription of jury selection proceedings. Now, jury selection proceedings will be transcribed as a matter of course.

JUVENILE APPEALS

Record on Appeal -- ORAP 10.15(3)

ORAP 10.15(3) generally relates to the record on appeal in juvenile cases. It previously specified that in two categories of proceedings (permanency and termination of parental rights) the appellant was allowed to initially designate only transcripts of the respective proceeding but could then move to supplement the record with transcripts of previous related proceedings. The amendments (1) make the subsection applicable to two additional categories of proceedings (disposition and dispositional review); (2) make the subsection applicable to exhibits as well as transcripts; and (3) allow a respondent, as well as an appellant, to seek to include additional transcripts or exhibits.

BRIEFS

Typeface Style -- ORAP 5.05(4)(f)

Briefs using proportionally spaced type now must use one of two typeface styles: Times New Roman or Arial. (The rule continues to require 13-point minimum typeface size for text and footnotes when proportionally spaced typeface is used.)

Number of Copies (Court of Appeals) -- ORAP 5.10(1)

The amendment decreases from 20 to 13 the number of copies of briefs that must be filed initially in the Court of Appeals. If the Supreme Court ultimately allows review, seven additional copies will be required to be filed. (Note: The rule continues to require fewer copies of briefs in particular specified types of cases.)

Statement of the Case -- ORAP 5.40(1), (2)

This amendment requests that the statement of the nature of the action or proceeding and relief sought, ORAP 5.40(1), and the statement of the nature of the judgment and trial, ORAP 5.40(2), be made "without argument." Like other elements of the statement of the case (questions presented on appeal, ORAP 5.40(6); summary of facts, ORAP 5.40(8)), these elements are to be presented in a nonargumentative fashion.

Claim of Error -- ORAP 5.45(1), (6)

Please see "TERMINOLOGY CHANGES, Claim of Error" below.

Briefs Containing Confidential Material -- ORAP 5.95(1), (6)

ORAP 5.95 generally provides a procedure for filing confidential and redacted versions of briefs containing material that is confidential or exempt from disclosure. The amendment exempts from those requirements briefs in the following categories of cases: adoption, juvenile dependency (including termination of parental rights), juvenile delinquency, and mental commitment. The courts treat records in those categories of cases as confidential, and allow only parties to those cases to inspect them, so no purpose is served by requiring briefs in those types of cases to comply with the general redacted brief requirements of ORAP 5.95.

MOTIONS

List of Commonly Used Motion Titles -- Appendix 7.10-1

This list has been updated. The courts may update this list between publication dates of the ORAPs; please consult the Oregon Judicial Department website and click on "Rules" to check to see if there is an updated motions title list.

Number of Copies -- ORAP 7.10(3)

This subsection was reorganized; no changes to the numbers of copies were made. Parties should file only an original of these motions: extension of time, consolidation, permission to file reply briefs or extended briefs, appellants' or stipulated motions to dismiss. For all other motions, file the original and nine copies for cases in the Supreme Court or the original and one copy for cases in the Court of Appeals.

Motions Arising from Settlement / Responses to Same -- ORAP 7.45(2)

Captions of motions to dismiss and motions to determine jurisdiction (and responses thereto) must now indicate when the motion arose from arbitration, mediation, or settlement required or offered by a court. The appellate courts now generally collect filing fees in connection with certain motions and responses (*i.e.*, when a respondent files a motion to dismiss or any party files a motion to determine jurisdiction). However, the courts may not collect fees when those motions arise from arbitration, mediation, or settlement. Providing that information in the caption of the motion and response will assist the courts in determining whether to collect the fee.

Whether To File Your Motion in the Supreme Court or the Court of Appeals -- ORAP 9.30

This rule was substantially reorganized with the intent to clarify when motions should be filed in each court and to discourage filing motions in the Court of Appeals once a case is in a posture in which the Supreme Court may act. In particular, motions should be filed in the Supreme Court once any of the following has been filed in that court: a petition for review, a motion for extension of time to file a petition for review, a motion to hold the case in abeyance for another case already in the Supreme Court. Each court may (and will) transfer to the other court a motion that it determines should have been filed in the other court, and the Chief Justice and Chief Judge will confer in close cases.

Minimum Typeface Size -- ORAP 7.10(1)

Please see "NUTS AND BOLTS, Typeface Size and Style" below.

Court of Appeals Appellate Commissioner -- ORAP 7.55, 7.15, 9.05

Please see "TEMPORARY AMENDMENTS" below.

CONFIDENTIAL INFORMATION

Appellate Court Designation of Confidential or Sealed Material -- ORAP 3.07(8)

This section was amended to make explicit that an appellate court may designate material as not subject to inspection, either on its own motion or on a party's motion. The rule applies to either material that is submitted to the appellate court but was not submitted to a trial court or to material that was submitted to the trial court but was not designated confidential by the trial court.

SUPREME COURT-SPECIFIC RULES

Response to Petition for Review -- ORAP 9.10(1)

This amendment addresses situations in which a party opposes review but, if the Supreme Court grants the petition for review, would like the Supreme Court to review questions not raised in the petition for review. The rule now explicitly allows that a response to a petition for review include a "contingent request" for review of a particular question in the event that the Supreme Court grants the petition for review. This amendment does not mean that a response is expected or necessary.

Briefs on the Merits on Review -- ORAP 9.17(5)

This amendment makes permanent a temporary amendment that went into effect May 1, 2007. Pursuant to this amendment, a PDF copy of merits briefs in the Supreme Court must be emailed. This rule also applies to direct appeal cases (ORAP 12.05), mandamus proceedings (ORAP 11.15), and Bar matters (ORAP 11.25). Parties who file briefs using the eFiling system are exempt from ORAP 9.17(5).

Mandamus: Initiating a Mandamus Proceeding -- ORAP 11.05

This rule was substantially reorganized, but generally contains

the same requirements for mandamus petitions filed in the Supreme Court. One new requirement, however, is that the caption reflect when the party filing a mandamus petition also seeks a stay of the trial court proceedings. In those cases, the caption must state "STAY REQUESTED."

Stay Pending Action by the Supreme Court of the United States -- ORAP 14.10(2)

ORAP 14.10 governs stays pending action by the United States Supreme Court, and explains which Oregon appellate court should decide whether a stay should issue. This amendment specifies that the Supreme Court decides when to issue a stay when the Supreme Court has allowed the petition for review and has vacated and remanded for further proceedings. This amendment is meant to clarify the procedure, not to make a substantive change to the procedure.

LAND USE

Addition of Certain Cases from LCDC and CRGC to Rules Governing Land Use Cases -- ORAP 4.60 to 4.72

By statute, the Court of Appeals must expedite judicial review of certain orders of the Land Conservation and Development Commission (LCDC) and the Columbia River Gorge Commission (CRGC). The preexisting ORAPs relating to judicial review of orders of the Land Use Board of Appeals (LUBA) have been amended to incorporate expedited review procedures for those LCDC and CRGC cases. The amendments include the following provisions: (1) As with other expedited cases, the caption of each filing is to include "EXPEDITED APPEAL UNDER ORS" and the number of the statute. (2) The rules provide deadlines for transmission of the record and filing of briefs. Because the pertinent statutes vary, so do the deadlines. Consult the rules for the deadlines applicable to each case type. (3) The rules limit continuances and tolling. Again, due to the variation among the pertinent statues, those limits vary by case type.

Cross-Petitions (LUBA and Specified LCDC Cases) -- ORAP 4.68(1)(b), (2)

In 2007, ORAP 4.66 was amended to add seven days to the time period within which opening and answering briefs must be filed in

land use cases. ORAP 4.68(1)(b) now has been consistently amended to add seven days to the time period in which a cross-petitioner's opening brief combined with a respondent's answering brief may be filed. (That is, the deadline for a respondent's answering brief is now the same regardless of whether it includes an opening brief on cross-petition.) In addition, ORAP 4.68(2) has been amended to require that a cross-respondent's answering brief be filed and served so that the Administrator and all other parties actually receive the brief no later than one business day after it is due.

NUTS AND BOLTS

Acceptable Carriers for Filing and Service -- ORAP 1.35(1)(d), (2)(b)

NOTE: These changes do not affect filing and service of notices of appeal, which are governed by statute.

The rules previously contemplated filing and service by hand delivery or first-class mail. The rules continue to contemplate those methods, but now also contemplate filing and service by a type of mail other than first class or by third-party commercial carrier. If the alternative method is "at least as expeditious as first-class mail" the document will be considered filed or served when it is dispatched to the carrier. The changes reflect (1) that the U.S. Postal Service no longer accepts first-class mail of more than 13 ounces (and briefs often weigh more) and (2) that it has become common business practice to utilize third-party commercial carriers.

Filing Address for Supreme Court and Court of Appeals

Please see "TERMINOLOGY CHANGES, Appellate Court Administrator" below.

Typeface Size and Style -- ORAP 1.35(6), 5.05(4)(f), 7.10(1)

13-point minimum size (all filings): New ORAP 1.35(6) establishes minimum typeface size for the text and footnotes of all filings: 13 point for proportionally spaced typefaces and 10 characters per inch for uniformly spaced typeface. ORAP 7.10(1) reiterates that requirement for motions and responses to motions.

Times New Roman or Arial style (briefs): ORAP 5.05(4)(f) now specifies that briefs using proportionally spaced type must use one of two typeface styles: Times New Roman or Arial.

TERMINOLOGY CHANGES

Several terminology changes were made to the rules on a global basis. None of the terminology changes were intended to create changes in substance or procedure.

Brief Designations -- *Passim*

The rules now more consistently refer to briefs using the brief type (*e.g.*, "opening" or "answering"). Depending on the context, the filing party (*e.g.*, "appellant's" or "respondent's") may also be indicated. For example, ORAP 3.40(5)(a) now refers to "appellant's *opening* brief" and ORAP 5.55(1) now refers to "respondent's *answering* brief."

Time Periods -- *Passim*

The rules were previously inconsistent in connection with wording of time periods when there is a triggering event and a subsequent deadline. The rules now consistently use "after" instead of "of" in such circumstances. (Note: Both the Federal Rules of Appellate Procedure and the Oregon Rules of Civil Procedure use "after" almost exclusively in similar constructions.) For example, ORAP 2.45(2)(c) now sets a deadline "within 10 days *after*" (not "of") a triggering event.

Appellate Court Administrator -- ORAP 1.15(3) and Others

Consistently with statute, the State Court Administrator has delegated authority to the Appellate Court Administrator to act as clerk of court for the Supreme Court and Court of Appeals. On a practical level, mail addressed to the State Court Administrator is not always directly routed to the Appellate Court Records Section, the proper location for filing. Accordingly, the definition of "Administrator" in ORAP 1.15(3)(a) is now "*Appellate* Court Administrator" and other references in the rules have been changed consistently. Note in particular that the appendices illustrating certificates of service now indicate "*Appellate Court Administrator, Appellate Court Records Section*" in the filing address. (The remainder of the filing address remains the same. In-person filings also continue to be accepted at the same location.)

Practitioners should adjust their certificates of filing accordingly.

Claim of Error -- ORAP 5.45(1), (6)

To reflect that it is the *claim of* error that must be preserved, not the error itself, terminology was changed in two provisions of ORAP 5.45.

Corrected or Supplemental Judgment -- ORAP 8.28

This rule was updated to conform with statutory terminology.

TEMPORARY AMENDMENTS

Court of Appeals Appellate Commissioner -- ORAP 7.55, 7.15, 9.05

(effective date: October 15, 2008)

available in volume 23 of the 2008 *Oregon Appellate Courts Advance Sheets* and online at www.publications.ojd.state.or.us/CJOrder0810.pdf (October 1, 2008 – Order Adopting Temporary Rule and Amendments to the Oregon Rule of Appellate Procedure: Appellate Commissioner Program)

New ORAP 7.55 contains procedures related to the Court of Appeals Appellate Commissioner program, which was inaugurated in March 2008. The rule outlines the types of matters that the Appellate Commissioner has authority to decide. The rule also outlines the procedure for seeking reconsideration of an Appellate Commissioner decision. Requests for reconsideration of Appellate Commissioner decisions will be considered initially by the Appellate Commissioner, who has authority to grant the request to modify or reverse the original result. However, if the Appellate Commissioner would deny the request (or grant the request and affirm the original result), the request will go to the Chief Judge or the Motions Department for decision. Decisions of the Appellate Commissioner are not subject to petitions for review in the Supreme Court, but decisions of the Chief Judge or the Motions Department on reconsideration of decisions of the Appellate Commissioner are subject to petitions for review in the Supreme Court.

Deadlines for *Amicus Curiae* Briefs in Cases Before the Supreme Court on Direct Appeal or Review -- ORAP 8.15(5), (6)

(effective date: January 1, 2009)

Available in volume 3 of the 2009 *Oregon Appellate Courts Advance Sheets* and online at www.publications.ojd.state.or.us/RULE144.htm (January 7, 2009 – Amended Order Adopting Temporary Amendments to the Oregon Rule of Appellate Procedure (ORAP 8.15))

This temporary amendment clarifies that deadlines related to *amicus curiae* briefing in ORAP 8.15(5) apply to cases before the Supreme Court on review from the Court of Appeals. This amendment also creates a new ORAP 8.15(6), applicable to *amicus curiae* briefing in cases before the Supreme Court on direct review or direct appeal or in original proceedings.

Expedited Appeal of Certain Pretrial Orders -- ORAP 10.25

(effective date: January 1, 2009)

available in volume 3 of the 2009 *Oregon Appellate Courts Advance Sheets* and online at www.publications.ojd.state.or.us/RULE143.htm (December 30, 2008 – Order Adopting Temporary Amendments to the Oregon Rule of Appellate Procedure (ORAP 10.25))

This temporary amendment updates the wording of the 2009 regular amendment to this rule. Please see "CRIMINAL APPEALS, Expedited Appeals of Certain Pretrial Orders" above.

Filing by Electronic Means -- ORAP 16.03 to 16.60

(effective date: February 2, 2009)

available in volume 5 of the 2009 *Oregon Appellate Courts Advance Sheets* and online at www.publications.ojd.state.or.us/RULE148.pdf; www.publications.ojd.state.or.us/RULE149.pdf; www.publications.ojd.state.or.us/RULE150.pdf (January 28 and 29, 2009 – three related orders adopting temporary amendments and charges)

These temporary amendments govern eFiling in the appellate courts. Most documents, including petitions for review, briefs, motions, and letters, are now accepted via electronic filing in both the Supreme Court and the Court of Appeals. Additionally, in some cases, documents that have been eFiled can also be electronically served using the eFiling system.

ADDITIONAL INFORMATION

WOW! I LOVED THIS ARTICLE AND I WANT TO HAVE THE RULES AVAILABLE ALL THE TIME -- CAN A MERE MORTAL LIKE ME OBTAIN A COPY?

But of course. No desk of any Oregon appellate lawyer is complete without an updated edition of the ORAPs occupying a prominent position, preferably near your copies of volumes 1 through 4 of the *Oregon Appellate Almanac*. If somehow you lack your own personal copy of the ORAPs, you can obtain both the rules and the classy red binder that houses them from the Oregon Judicial Department's Publications Section at (503) 986-5934.

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

If your office has a representative on the committee, please contact him or her about suggesting a change to the rules. Otherwise, please submit ideas for improving the ORAPs to the Appellate Practice Section designee to the committee, Wendy Margolis, at (503) 323-9000 or margolis@cvk-law.com; to committee staff Lora Keenan at (503) 986-5660 or lora.e.keenan@ojd.state.or.us; or to any one of the committee members listed on the next page.

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

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

2008 ORAP COMMITTEE ROSTER

The Supreme Court and Court of Appeals extend their thanks to the appellate practitioners who contributed their time and expertise to the work of the 2008 ORAP Committee. (Please note that job titles and firm designations below are as effective during the 2008 term of the committee.)

VOTING MEMBERS

Hon. Thomas A. Balmer, Associate Justice,
Oregon Supreme Court (Commitee Chair)

Hon. Rives Kistler, Associate Justice, Oregon Supreme Court

Hon. David V. Brewer, Chief Judge, Oregon Court of Appeals

Hon. Walter I. Edmonds, Judge, Oregon Court of Appeals

Mary H. Williams, Solicitor General, Department of Justice

Peter Gartlan, Chief Defender, Office of Public Defense Services

J. Michael Alexander, Swanson Lathen Alexander, Salem

Keith M. Garza, Attorney at Law, Milwaukie

George W. Kelly, Attorney at Law, Eugene

Sarah R. Troutt, McClinton & Troutt PC, Salem

Wendy Margolis, Cosgrave Vergeer Kester LLP, Portland

Lindsey H. Hughes, Keating Jones Hughes PC, Portland

James Westwood, Stoel Rives LLP, Portland

Mari Miller, Trial Court Administrator, Fifth Judicial District,
Oregon City

NON-VOTING MEMBERS

Judi Baker, Acting Supervisor, Appellate Court Records Section

Melanie Hagan, Staff Attorney, Oregon Supreme Court

Lora Keenan, Staff Attorney, Oregon Court of Appeals

James W. Nass, Appellate Commissioner

Rebecca Osborne, Appellate Court Administrator

ELECTRONIC FILING IN THE OREGON APPELLATE COURTS

By Lora Keenan (Staff Attorney, Oregon Court of Appeals) and Melanie Hagan (Staff Attorney, Oregon Supreme Court)

As of early 2009, both the Oregon Supreme Court and Court of Appeals accept documents for filing via the appellate electronic filing system. The electronic filing (eFiling) system allows attorneys who are authorized to practice law in Oregon to file most documents and pay filing fees electronically. As of early 2009, more than 150 attorneys have registered to use the appellate eFiling system, and the courts have received more than 300 electronic filings.

With the appellate courts' new technology comes new procedural rules. Effective February 2, 2009, the appellate courts adopted the current version Chapter 16 of the Oregon Rules of Appellate Procedure to govern eFiling procedures.[1] Below is a summary of Chapter 16 as it now reads. The complete version of Chapter 16 is available in the 2009 version of the ORAPs or online at www.publications.ojd.state.or.us/rules.htm.[2]

Under Chapter 16, if an attorney wants to use the appellate eFiling system, that attorney must have a current email address on file with the Oregon State Bar, must complete a registration form, and must complete the online tutorial. ORAP 16.10. After completing the registration process, the attorney will receive a username, set a password and can then begin to eFile documents with the appellate courts. ORAP 16.10. Documents that are to be eFiled with an appellate court must be in portable document format (PDF). ORAP 16.15. The eFiled document must be searchable, must be able to be copied and pasted, and, to the extent practicable, must comply with other formatting requirements contained in the Oregon Rules of Appellate Procedure. ORAP 16.15. If a document cannot be converted to PDF (for example, if an appendix or excerpt of record includes an oversize document), then an eFiler must file that particular document conventionally. ORAP 16.30. The eFiler may note, in the "comments" box located on

1 Earlier versions of Chapter 16 were adopted by the Chief Justice to govern eFiling in the Supreme Court only.

2 Any updates to Chapter 16 will be available at that site also.

the eFiling screen, that an accompanying oversized document will be filed conventionally.

Attorneys using the eFiling system must pay any applicable filing fees (or submit a motion to defer or waive filing fees) at the time of electronic filing. ORAP 16.20. At that time, if applicable, the courts will also collect a document recovery charge to offset the cost incurred by the courts in making the necessary number of printed copies. ORAP 16.20. The amount of the recovery charge is based on the type of document eFiled.

The eFiling process consists of two steps: (1) submission of a document electronically by the eFiler; and (2) acceptance of the document by the appellate court. Both steps must occur for a document to be considered "filed" by the court. ORAP 16.25. The eFiling system will automatically send a notification to the eFiler via email upon receipt of the document by the eFiling system. After reviewing the document, the Appellate Court Records Office will send a different notification to the eFiler via email when a document submitted for electronic filing has been accepted or rejected. ORAP 16.25. If the court accepts the document for filing, the eFiling system will affix to the document the date that the electronic filing system received the document; that date will become the filing date of the document. ORAP 16.35. The filing deadline for any document filed electronically is 11:59:59 p.m. in the time zone in which the court is located on the date by which the document must be filed. ORAP 16.35.

Generally, eFiled documents need not contain physical signatures. Instead, the username and password constitute the signature of the eFiler for filing purposes. ORAP 16.40. The document must, however, contain a signature block that includes the printed name of the eFiler. ORAP 16.40. There are additional requirements for documents that must be signed by persons other than the eFiler. ORAP 16.40.

Electronic service via the eFiling system is now available in already-existing cases where another party is represented by an attorney who is a registered user of the eFiling system. ORAP 16.45. Electronic service is not available, however, for self-represented parties or for documents that initiate a case in either the Court of Appeals or the Supreme Court. ORAP 16.45.

For more information on eFiling, please visit the Oregon Judicial Department's website at www.ojd.state.or.us/onlineservices/efile/index.htm.

MISSING PERSONS/CASES

THE MYSTERIOUS DISAPPEARANCE OF *PGE*

By Hon. Jack L. Landau

In the world of entertainment, an individual comes along every so often who is so remarkable, so immediately identifiable as to become known by a single name. Think Cher. OK, forget Cher. Think Elvis, Bono, Madonna, Prince. In the world of the law, the same thing occurs with respect to a rare breed of appellate court decisions. *Marbury*, *Gideon*, *Brown*, *Terry* are a few that easily come to mind. Some attain even higher status, becoming such immediately recognizable doctrinal shorthand as to be converted to a verb, as in the case of *Miranda* and its transitive counterpart, "*Mirandize*."

In Oregon, one of the few appellate court decisions to be so widely and immediately recognizable is *PGE*. The reference, of course--"of course," that is, to anyone who did not recently join the bar from Iceland--is to *PGE v. Bureau of Labor and Industries*, the mother of all opinions about the rules of Oregon statutory construction. The Oregon Supreme Court's *PGE* opinion is, in fact, the single most frequently cited decision in the state's history. As of this writing, it has been cited in more than 1,300 cases. I am not aware of another appellate court decision that comes close.

It may come as some surprise, then, to learn that, in *Vaughn v. First Transit, Inc.*, the Supreme Court's most recent statutory construction decision, *PGE* is not mentioned. Nor was the case cited in either of the two statutory construction decisions that the court issued two weeks before that. In *State v. Baker*, decided two weeks earlier, the court again issued a statutory construction opinion without reference to *PGE*. In fact, in the past year, *PGE* all but vanished from Oregon Supreme Court case law rather suddenly and with no explanation.

What are we to make of the mysterious disappearance of this once-ubiquitous case? I submit that there is both more and less to the disappearance than meets the eye. To understand why that is so, we need to go back to the beginning and recall the origins of Oregon's most-cited appellate court decision.

Once upon a time--specifically, before 1993--no one paid much attention to statutory construction. Sure, there were plenty of statutory construction decisions out there. But no one was thinking about the rules of statutory construction in any systematic way. As a result, the case law was, shall we say, messy. In one case, the Supreme Court would say that it is inappropriate to examine legislative history in the absence of an ambiguity in the wording of the statute; yet, in another case, the court would resort to such history without mention of the word "ambiguity." In one case, the court would say that statutory construction "is not done by consulting dictionary definitions of words"; yet, in another case, the court would rely exclusively on dictionary definitions. In one case, the court would conclude that it lacked constitutional authority to rewrite the wording of a statute in order to avoid an absurd result; yet, in another case, the court would do precisely that. In the face of such conflicting case law, lawyers like me adopted a sort of cooked-pasta strategy to litigating statutory construction cases: We would throw anything we could find--rules, history, dictionaries--at the courts in the hope that something would stick.

In 1993, the Oregon Supreme Court cast its searching glance at that state of affairs and found it wanting. It decided to bring a measure of order to the chaos that was the law of statutory construction. It did so in *PGE v. Bureau of Labor and Industries*.

At issue in *PGE* was the interpretation of a relatively obscure provision of the state parental leave statute. Why the court selected that case for its reexamination of the law of statutory construction was not revealed. But, make no mistake, the court used the case as a vehicle to set matters straight about the law. Justice George Van Hoomissen's opinion set out a virtual restatement of the law of statutory construction in Oregon.

In brief, the court said that the overriding goal of statutory construction is the ascertainment of legislative intent, determined by means of a three-step analytical sequence. The first step is to examine the text in context in the light of rules of construction that bear on "how to read the text," that is, rules pertaining to assumptions about ordinary meaning, word order, grammar, and the like. If the legislature's intentions are "clear" from that first-level inquiry, the court said, the task is completed. "If, but only if, the intent of the legislature is not clear from the text and context inquiry," the court explained, may the

examination proceed to a second step, that is, an analysis of the legislative history. If that analysis makes clear the legislature's intentions, the court instructed, the task is completed. If, and only if, the analysis of the legislative history is not fruitful, the court said, is it appropriate to proceed to a third and final step, the resort to "general maxims of statutory construction."

As the saying goes, "there is nothing new under the sun." In a sense, *PGE* was no exception. Everything in the decision could be supported by references to existing case law; what the court did in *PGE* was simply take the existing rules of statutory construction and organize them into three piles. Nevertheless, the decision was quite remarkable. The court did more than just put the existing rules into three groups. For the first time, it *ordered* the rules into a *sequence* of analysis, limiting the extent to which you could move from one group of rules to the next. Of particular importance in that regard is the fact that the court held that, if textual analysis clearly reveals what the legislature intended, there can be no resort to legislative history. That represented a rather marked departure from earlier cases.

In the following several years, the bench and bar was to learn just how significant and emphatic that departure would be. Citing *PGE*, the Supreme Court's statutory construction decisions became overtly more textual in emphasis, often involving careful, word-by-word, phrase-by-phrase exegesis that turned on rules of punctuation, the difference between definite and indefinite articles, verb tenses, grammar, syntax, "doctrines" like the rule of the "last antecedent," and ordinary dictionary definitions of statutory terms. Citations to *Webster's Third New International Dictionary*, in fact, became nearly as frequent as citations to *PGE* itself.

At the same time, the court found less and less of a need to resort to legislative history as it increasingly resolved statutory construction disputes at the first level. By my count, in the ten years before *PGE*, the court cited legislative history just shy of 200 times, while, in the ten years after *PGE*, the number fell to 50. Clearly, either statutes quite suddenly were being drafted with greater precision, or the court was making a statement about its commitment to a text-oriented method of analysis. Consistently with that new textualist emphasis, the court also expressly disavowed any interest in arguments based on equity, policy, or absurd or unreasonable results. Statutes, the court explained, may

be unambiguously absurd; in such cases, they will be enforced according to their terms.

We on the Court of Appeals did not catch on right away. Sometimes, we issued opinions without reference to *PGE*. The Supreme Court did not fail to notice. In fact, more than one member of the court informed me that whether we cited and applied *PGE* was regarded as an unwritten criterion for evaluating whether to grant review of a case. In *Panpat v. Owens Brockway Glass*, for example, we addressed the question whether a wrongful death action was subject to the exclusive remedy provision of the state workers' compensation statute. We said yes, based on an examination of the text in context, but without citing *PGE*. The Supreme Court reversed, complaining that we had addressed the issue "without reference to *PGE v. Bureau of Labor and Industries*."

Occasionally, some members of the Court of Appeals grumbled about what they--alright, *we* (I was an occasional offender)--perceived as artificial constraints imposed by the textually oriented post-*PGE* case law. In *Young v. State of Oregon*, for example, the majority concluded that the unambiguous text of the overtime compensation statute made no provision for an exception for "white collar" state managers, even though the absence of the exception was occasioned by an inadvertent drafting error. Judge Rick Haselton offered an impassioned concurrence, complaining that"[t]his case is just the latest, if perhaps the most egregious, of a series of cases in which fidelity to *PGE* has driven our court to patently silly results." The Supreme Court denied review.

PGE took some critical hits in the law reviews, as well. Professor Steve Johansen suggested that the Supreme Court's approach to statutory construction was "unnecessarily complex, arbitrary, and a little fanciful." Rob Wilsey complained that *PGE* "adds little or no value to statutory interpretation" and, instead, amounts to a "failed attempt to inject mechanical predictability" into what is essentially a matter of judgment. I wrote a couple of articles questioning some of the premises of the *PGE* court's organization of the rules of statutory construction. In one, I examined where we get the idea that the object of statutory construction is "legislative intent," which the Oregon courts assume refers to the actual, subjective intentions of the legislators who enact bills into law. In *PGE*, the Supreme Court cited ORS

174.020, which does say that the object of statutory construction is "legislative intent." But the court never examined what the legislature intended when it referred to "legislative intent." I did, and found that it is debatable whether the nineteenth-century legislature that originally enacted that statute would have shared the modern understanding of "intent" reflected in *PGE*, which I suggested creates something of a conundrum: If you do a *PGE* analysis of the statute that is cited as the justification for *PGE*, you will find that the legislature that enacted that statute did not intend to require the rules that the court adopted in *PGE*. The academic criticism, however, had little apparent impact. (In response to my article about legislative intent, I received a call from one member of the Supreme Court who told me, "Jack, get a life.")

Meanwhile, the legislature itself started to chafe at the apparent reluctance of the courts to examine legislative history in their more text-oriented post-*PGE* opinions. Especially frustrating to a number of legislators was the Supreme Court's opinion in *Jones v. General Motors*. The question in that case was whether certain amendments to ORCP 47 altered the standard for granting summary judgments. The Court of Appeals said yes, based on what the court regarded as conclusive evidence of such an intent found in the legislative history. The Supreme Court disagreed, holding that the text of the amendments was not capable of being read to have altered the existing summary judgment standard. Having concluded that the text was unambiguous on the point, the court refused even to consider the legislative history that the Court of Appeals had found dispositive.

In the sort of coincidence that only happens in real life, the person who coordinated the assembly of the legislative history during the enactment of the amendments at issue in *Jones* was one of my former law clerks, Max Williams, who was then working as counsel for the House Judiciary Committee. After the Supreme Court issued its opinion in *Jones*, Max got elected to the Oregon House of Representatives and, ultimately, was appointed chair of the House Judiciary Committee. One of Max's pet peeves was the fact that the Supreme Court had not considered the legislative history in *Jones*. In response, he introduced a bill that he thought would prevent such an occurrence in the future. The bill was enacted by the legislature in 2001. As enacted, it provides that, "[t]o assist a court in its construction of a statute, a party may offer the legislative history of the statute," and the court "shall give the weight to

the legislative history that the court considers to be appropriate."

The response of the court to the legislation was underwhelming. Mostly, the Supreme Court (and the Court of Appeals, I should add) ignored it. I noted in *State v. Rodriguez-Barrera* that I wasn't sure what the legislation really means--if I am not mistaken, parties always have been able to *offer* legislative history to the courts. It's not as if *PGE* required statutory construction briefs to come with sealed sections for second- and third-level analyses, accompanied by the instruction: "Open only in the case of an ambiguity."

But, in the meantime, something began to happen in the Supreme Court. Without fanfare or explanation, the court seemed to back off from its earlier adherence to the rigid sequence that *PGE* requires. In some cases, the court resorted to legislative history even without identifying an ambiguity in the wording of the statute in dispute. In *Bobo v. Kitzhaber*, for example, the court addressed the meaning of the kicker statute by starting a citation to *PGE* for the proposition that "[i]n determining the legislature's intent, we look initially to the text and context" of the statute. Then, after citing the text of the statute, the opinion immediately launched into a detailed examination of the legislative history, with no mention of ambiguity. Similarly, in *Roberts v. SAIF*, the court examined the text of the statute at issue, reached a conclusion as to its meaning, and then added that "[a] review of the legislative history confirms that that was the legislature's intent," without mentioning any ambiguity. And, even more interesting, in *Mabon v. Wilson*, the court held that it was satisfied that there was *no* ambiguity in the statute and then said "we nonetheless look to the history of the statute to determine whether that history undercuts in any way our preliminary assessment of the meaning" of the statute. (Makes me wonder what the court would have done if it had found that the legislative history *did* undercut what it had concluded was the plain and unambiguous meaning of the statute. What then?)

Then, around two years ago, something else started to happen: Citations to *PGE* began to disappear from the Supreme Court's statutory construction decisions. Not that the disappearance was complete. The case still is invoked on occasion, just not very often. In the majority of the statutory construction cases, *PGE* no longer is mentioned.

Is there any significance that we should attach to this disappear-

ance? In my view, the answer is both yes and no.

I think it is clear that something is going on in the Supreme Court in statutory construction cases. Most obviously, the court is starting to look at legislative history without first establishing the existence of ambiguous statutory wording. That simply cannot be reconciled with *PGE*, which you may recall said "if, but only if" there is an ambiguity may the courts resort to legislative history. I do not know whether the passage of the 2001 legislation had anything to do with the court's apparent change of heart. In that regard, it may be worth noting that, last year, the court granted a petition for review in *State v. Gaines* (an otherwise unremarkable criminal case in which the Court of Appeals rejected the defendant's statutory construction argument without discussion) and specifically asked the parties to brief the question whether the 2001 legislation "requires the Oregon courts to consider evidence of legislative history presented by a party when engaging in *PGE* analysis." Stay tuned.

Having said that, I would not read too much into the fact that the court has merely ceased citing a particular case. The fact is that, although it no longer refers to *PGE*, the court's recent statutory construction opinions look pretty much like most of its post-*PGE* opinions. That is to say, the opinions continue to reflect careful textual analysis, often relying on ordinary dictionary meanings of words and often invoking familiar rules of punctuation, grammar, and syntax.

That is also, as it turns out, the publicly expressed view of at least one member of the Supreme Court. At an Oregon Law Institute CLE program on statutory construction not long ago, Justice W. Michael Gillette was asked to comment on the court's continuing commitment to *PGE*. In a fascinating response, he explained that, for a number of years, the court "cited *PGE*, and cited it, and cited it to explain what we were doing." But the time had come, he added, to put the decision out to pasture. "Most of God's children are aware of it now. Extra trees need not be sacrificed by our continued citation to it."

Personally, I regard these developments as good things. Although I think that the analysis that the court articulated in *PGE* was less than perfect, the decision has been subject to some unfair criticism, based on a sort of literalistic caricature of the Supreme Court's decision. As I suggested in a concurring opinion in *Young v. State of Oregon*, "*PGE*

cannot be blamed for everything," for example, Britney Spears, global warming, and the inability of courts to redraft statutes to make them say what we think they should say. To the extent that the decision has become a sort of lightning rod, continued citation to it becomes more distracting than helpful. But the fact remains that the careful attention to text--and, in particular, the interpretive limitations imposed by text--that *PGE* requires is a good thing and forces needed rigor in Oregon statutory construction cases, whether we cite the case or not.

Still, the unexplained artificiality of the sequence of analysis under *PGE* should be abandoned. I have never understood why a court ever would refuse to examine *any* evidence of legislative intent. Whether such evidence is able to make a difference--because of its vagueness or unreliability or because of the limitations of what the wording of the statute reasonably may bear--is another matter. But I can conceive of no justification for a court not even taking the evidence into consideration. So I welcome what appears to be the Supreme Court's willingness to reexamine that aspect of *PGE*.

In the meantime, I may stop citing the case myself, although I may find that a hard habit to break. After all, it's the only case the complete citation for which I can recite--regional reporter and jump cites included--from memory.

Post script: Well, as the saying goes: Timing is everything. Two weeks after I wrote this article, the Oregon Supreme Court issued its opinion in *State v. Gaines*, in which the court held that the 2001 amendments to ORS 174.020 indeed altered the *PGE* template. I suppose I have the comfort of knowing that, in writing the piece, I wasn't far off-base. Perhaps more about that in next year's Almanac. In the meantime, the real question will be whether the courts will cite *Gaines* as much as they cited *PGE*.

* * *

IN MEMORIAM: APPELLATE LEGAL COUNSEL

December 4, 1972, to March 7, 2008

By Jim Nass

Perhaps Oregon's Sesquicentennial is an appropriate occasion for the Appellate Practice Section's Almanac to mark the demise of a unique position in the annals of appellate courts: the (appellate) legal counsel position.[1] The position was unique in that it provided legal services for both the Oregon Supreme Court and Court of Appeals and, during the 36 years that the position existed (almost a quarter of the entire time in which Oregon has been a state), only two individuals have served in the position.[2]

It appears from a review of the directory for the Council of Appellate Staff Attorneys, an organization of legal staff for state and federal appellate courts, that no other state with an intermediate appellate court has had legal staff providing legal services for both the state's intermediate appellate court and the state's supreme court. Certainly, no legal staff person serves both a federal circuit court and the United States Supreme Court.

David Gernant served as Legal Counsel for the Oregon Supreme Court and Court of Appeals from December 4, 1972, when the position was created, to May 13, 1983; Jim Nass served as Appellate Legal Counsel from June 22, 1983, to March 8, 2008, when the position ended.

DAVID GERNANT

1 1 Originally, the position title was "Legal Counsel." Subsequently, as explained later in this article, the position became "Appellate Legal Counsel." The primary duties of the position remained the same: to make recommendations to the Chief Judge of the Court of Appeals for disposition of motions filed in that court, and to make recommendations for disposition of original proceedings (mandamus, habeas corpus, and quo warranto) in the Supreme Court, as well as attorney fees and costs claims in both courts.

2 David Gernant was the first person to fill the position. Gernant subsequently became Judge Gernant, serving two plus terms on the Multnomah County Circuit Court bench. Judge Gernant has retired from the bench; he is presently living in Washington, D.C. and is available to return to federal government service. For additional information about Judge Gernant, see hhtp://www.linkedin.com/pub/dir/david/gernant. Jim Nass is the other person to fill the position. Nass is now serving as Appellate Commissioner for the Court of Appeals.

David Gernant was working for the Department of the Interior in Washington, D.C., in September 1972 when he came to Portland for interviews, following up on letters he had written to various city officials. During that visit, Gernant became aware of a new "legal counsel" position with Oregon's Supreme Court[3] and hastily sent in his resume and a writing sample. Gernant telephoned Judge Loren D. Hicks, then State Court Administrator,[4] from a pay phone in Portland to set up an interview. Impressing Judge Hicks during the interview, and impressing then-Chief Justice Kenneth O'Connell with his writing sample, Gernant was hired for the position.[5]

Although the position title was "Legal Counsel," there was the small matter of Gernant not being admitted to the practice of law in Oregon at the time he was hired. Gernant could not take the Oregon bar examination until July 1973; so, the decision was that he should carry the title of "Legal Deputy" until such time as became admitted to the practice of law.

The occasion of the reporting of the July 1973 bar examination results created an awkward situation, inasmuch as Gernant had sat for that bar examination. Gernant was not supposed to see any of the bar results but inadvertently did – and his name was not on the list of those recommended for admission. Gernant spent an anxious hour or two before Judge Hicks explained to him that, although he had passed the bar examination, he was not yet eligible for admission because the Admissions Office had not received his certificate of good standing from the Washington, D.C., bar.

Curiously, with few exceptions, the process for reporting bar results to the Supreme Court and to applicants has not changed much for at least the last 36 years. When Gernant served as legal counsel, the Bar Admissions director (then Marlyce Gholston) would bring computer print-outs to the court and court staff would review those results to confirm who passed the bar examination and who had not, and

3 Before creation of the legal counsel position, Joseph A. Guimond, Deputy Clerk (later, Deputy State Court Administrator) and ex officio reporter of the Oregon Reports, handled original writ and other Supreme Court matters. His son, Joseph C. Guimond practiced in Marion County and is now serving as a Marion County Circuit Court judge.

4 "Judge" because, before becoming State Court Administrator, Loren Hicks had served as a Marion County Circuit Judge, albeit, briefly, having been defeated in the election after his gubernatorial appointment.

5 Beginning pay was $12,000 per year, Gernant reports, with no trace of bitterness or regret.

who was eligible for admission on character and fitness grounds and who were not. Then, as now, the list of those who had passed the bar examination was taped to the marble wall at the south entrance to the Supreme Court Building at 2:00 in the afternoon.

There have been two important changes since then: Now the date and time of the availability of the results are announced in advance, and the bar examination results also are posted on the Bar's web site. As a result, the Supreme Court Building no longer is the scene of the histrionics on Bar results release day that ensued from the crowd of applicants maneuvering to get a look at the results posted on the wall, followed either by yells of delight, or groans (or crying) of despair, depending on the applicant and the result.

Gernant reports that one time, in the mid-seventies, there were eight paired mistakes because of a mixup in the Bar's tabulation of results--four applicants who passed were told that they had failed, and four who failed were told that they passed. One pair was even husband and wife. That led to a Supreme Court argument and formal decision, albeit, apparently not published. It was easy to correct the mistake for those who had in fact passed but been told they had failed. It was not so easy to justify withdrawing the formal notification of "pass" from those who had in fact not passed; but the court did that, apparently with Tongue, J . dissenting.

The legal counsel position during David Gernant's time also was responsible for "calling the roll" during the bar admission ceremony in the House of Representatives chamber. To encourage the applicants to pay attention throughout the calling of the roll, Gernant arranged to have the names announced in random order.

In Gernant's time, the duties of the legal counsel position included assisting the Records Section staff serving as clerks of the court for the Supreme Court and Court of Appeals in resolving the myriad procedural questions that arise in the course of administering appellate courts.[6] The position also included serving as legal counsel to the State Court Administrator.

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6 6 Gernant reports that his duties included assisting often some of the more difficult customers at the front counter. That is consistent with Nass's experiece. Nass reports that, during his second interview, then-Chief Justice Berkely Lent described being legal counsel as including the willingness 'to serve as the designated hostage when the crazies showed up at the counter."

One of the more interesting aspects of the legal counsel position during Gernant's tenure is that, other than the typed Supreme Court's conference results, which is not a public document, the only documentation of the court's decisions on matters that originated in Gernant's office was a letter from Gernant to counsel for the parties informing them of the court's disposition.[7] The same practice was followed with respect to then-Chief Judge Schwab's decision on motions filed in the Court of Appeals.[8]

Gernant resigned his position on May 13, 1983,[9] to pursue a distinguished career as an appellate practitioner in Portland before securing an appointment to the Multnomah County Circuit Court in 1993 and his election and re-election to that office.

JAMES NASS

Nass's application for employment as the Oregon appellate courts' legal counsel began much like Gernant's: On the date applications for the position were due, Nass became aware of the position and hastily submitted his resume and a writing sample. Unlike Gernant, however, Nass was certain that he had not impressed either then-Chief Justice Lent or then-Chief Judge George Joseph during the interview, and was happy that he was gainfully employed as a staff attorney for the Workers' Compensation Board. Nass was surprised when Chief Justice

7 Gernant claims that the Supreme Court and the Chief Judge (or the Court of Appeals' Motions Department) "invariably" followed legal counsel's recommendations. In my experience, that's true, if "invariably" means almost always.

8 Gernant reports that at some point in the early 1980's, a visiting appellate judge from Chicago stopped by to see how the court did business. The visiting judge was astonished (to put it mildly) that the appellate courts' formal decisions on original writ, motions, attorney fees and costs, and similar matters were simply memorialized only in letters signed by legal counsel; no orders, no judge's signature. It was at that point, that both the Chief Justice and the Chief Judge began to consider changing how such decisions would be documented and reported to the parties.

9 Gernant's otherwise distinguished career as Legal Counsel for the Oregon appellate courts is marred only by an unconfirmed rumor that on one warm day when Gernant had his office window open, one of many squirrels that populate the grounds entered through the opening and savagely attacked Gernant, sending him fleeing from his office. As far as can be determined, the squirrel was not a party to any case in which Gernant would have sent a letter denying relief, so the squirrel's motive is unclear. Indeed, there is doubt whether the incident happened at all; Gernant himself denies any memory of such an event.

Lent's judicial assistant telephoned to schedule a second interview,[10] and even more surprised when, thereafter, he was offered the position.

When Nass began work in 1983, the legal counsel position description was essentially the same as when Gernant was in that position, the primary difference being that the decision had been made to begin issuing orders signed by either the Chief Justice or the Chief Judge to show the disposition of petitions for writs decided by the Supreme Court, motions decided by the Chief Judge, and attorney fees and costs matters decided by both courts. Although Supreme Court orders continued to be terse, Chief Judge orders disposing of motions, in some instances, began to include some explanation of the dispositions.

Like Gernant, initially Nass's duties included serving as legal counsel to the State Court Administrator's office. In 1981, the Oregon Legislature decided that the state should take over operation of the circuit courts that theretofore had been operated by the several counties in Oregon. The legal issues that arose in the wake of that decision required considerably more resources. Eventually, Linda Zuckerman was hired as "Legal Counsel" to the State Court Administrator; at that point, Nass's position title was modified to "Appellate Legal Counsel."

Another, more substantive change, is that then-Chief Judge Joseph created the "Motions Committee" of the Court of Appeals. The Motions Committee, subsequently denominated the Motions Department when Judge Kurt Rossman became presiding judge, was responsible for deciding contested attorney fee and cost matters in the Court of Appeals and also deciding motions referred to it by the Chief Judge. Chief Judge Joseph's practice,[11] was to refer to it more complex motions, motions for which the perspective of a former trial judge might be valuable,[12] and motions raising appellate procedural issues that might warrant disposition by published opinion. Appellate legal counsel had

10 The other finalist for the position was then-Marion County private practitioner Clayton Patrick. Clay Patrick had served on the board of directors for Marion County Legal Aid Services during the time that Nass was employed by that office.

11 That practice was continued thereafter by Chief Judge William Richardson, Chief Judge Mary Deits, and Chief Judge David Brewer.

12 The Motions Committee, later Motions Department, consisted of one judge from each of the other three standing departments and, by happenstance or design, always included at least one judge who had been a circuit court judge before becoming a member of the Court of Appeals.

the privilege of participating in Motions Department conferences.

When Nass became appellate legal counsel, there was an Oregon Rules of Appellate Procedure Committee made up of Supreme Court justices, Court of Appeals judges, and a couple of practitioners. That committee met periodically to consider and propose changes to the Oregon Rules of Appellate Procedure. Over the years, the composition of that body has grown to include substantially more members, and the process for considering and making changes to the Oregon Rules of Appellate Procedure has become more complex. The process now followed is akin to the process for creating or amending state administrative rules, and includes publication of proposed amendments and the opportunity for public comment. It also includes substantially more elaborate documentation of matters that come before the Committee. Initially, appellate legal counsel was assigned to serve as staff person to the Committee. In 2005, that responsibility was re-assigned to one of the Chief Judge's staff attorneys, Lora Keenan, ably assisted by Supreme Court Lead Staff Attorney Melanie Hagan, and Supreme Court judicial assistant Julie Forbes.

Like Gernant, Nass's duties included preparing memoranda for the Supreme Court regarding petitions invoking the original jurisdiction of the court, as well as substantive motions filed in that court, and bar admission and discipline matters. As the work load of the Supreme Court and Court of Appeals increased, the Supreme Court eventually hired several additional staff attorneys to whom was transferred the responsibility for handling original jurisdiction matters, substantive motions, and similar matters in that court.[13] Appellate Legal Counsel retained, however, the role of serving as liaison between the Oregon State Bar's Admissions Office and the Supreme Court, and reviewing draft Supreme Court opinions.

During the time that Nass served as appellate legal counsel, he also was assigned the role of media contact person in the event that newspaper, television, or radio reporters had questions about appellate cases. Mercifully, from Nass's perspective (and probably from the

13 That process was given much aid and comfort by then-Supreme Court Lead Staff Attorney Keith Garza, who was of the view that having one person working for both the Surpreme Court and the Court of Appeals rendered that person a "walking conflict of interest." Garza, perhaps jealous of Nass's position in the appellate courts, consistently connived behind the scenes to reduce Nass's power base.

point of view of the media representatives themselves), that role was greatly diminished in 1998 when Supreme Court and Court of Appeals opinions began to be published on the Judicial Department's web site, the same day the opinions were released. No need for media representatives to talk to a horse's ass when they can get the information they seek from the horse's mouth.

Also during the time that Nass served as appellate legal counsel, he began serving as a part of the Judicial Department's legislative team, both suggesting, and testifying in support of, legislation to address appellate procedure problems, and reviewing legislation generally for potential impact on the appellate courts.

When David Brewer became Chief Judge of the Court of Appeals, he was in a position to do something about two problems that had vexed the court for some time: Disposition of contested attorney fee and cost matters, and a backlog of undecided substantive motions. The first problem Chief Judge Brewer addressed by assigning contested attorney fees and cost matters to the department that had decided the case. Chief Judge Brewer's concern about the backlog of substantive motions led him to consider the practice of the State of Washington appellate courts' employing commissioners to decide motions and other matters. After carefully reviewing how the Washington appellate courts established and used their appellate commissioners, and the legal authority to establish commissioner positions under both Washington law and Oregon law, Chief Judge Brewer established an Appellate Commissioner Program. Chief Judge Brewer signed the orders creating the Appellate Commissioner Program and appointing Nass as Appellate Commissioner on March 8, 2008.

Thus ended the Appellate Legal Counsel position; may it rest in peace.[14]

14 That process was given much aid and comfort by then-Supreme Court Lead Staff Attorney Keith Garza, who was of the view that having one person working for both the Surpreme Court and the Court of Appeals rendered that person a "walking conflict of interest." Garza, perhaps jealous of Nass's position in the appellate courts, consistently connived behind the scenes to reduce Nass's power base.

HISTORY & GEOGRAPHY

Editors Note: The annual softball game between the Court of Appeals and the Supreme Court, like the civil war game between the Ducks and the Beavers, is an athletic contest of near-Olympian skill and passing-Olympian ego. Every time the Court of Appeals wins it demonstrates which court is truly the "inferior" court. When the Supreme Court wins, it's a fluke. The trophy, a moth-eaten stuffed weasel, reflects the glory of the title and is prominently displayed by the holder. At the time I clerked the weasel was in its natural environment, the Court of Appeals, and was prominently displayed on the shelves opposite the elevator doors where visitors could not miss it. Keeping that trophy was important. It still is.

When I began my clerkship, Judge Richardson explained to me that I was hired in spite of my softball skills, whereas Supreme Court clerks were hired because of their softball skills. I played third base, where I could do the least damage. Then rookie judge Paul De Muniz played short stop – and third base if the ball went anywhere near me. Richardson pitched, Rosemary (Richardson's boss) played catcher, Diets was on second, Edmunds was the fastest guy and the strongest arm in the outfield. I forget who played for the Supreme Court – mostly ringers I think.

The opinion below relates to the 1984 contest between the COA and the SCt – long before my time. Before my first game in 1990, Judge Richardson, author of the opinion and official scorekeeper, gave me a copy to read to help me understand the importance and illustrious traditions of the game. I have kept that copy ever since in my "funny file." With Judge Richardson's kind consent, I am pleased to publish this historic opinion in the 4th Appellate Almanac. I hope you enjoy it.

STATE COURT SYSTEM APPEALS BOARD

Hans Linde and
Supreme Court of Oregon (aka)
"Harmless Errors"

Petitioners,

v. AB-84-48

Oregon Court of Appeals (aka)
OR APP;
W. L. Richardson, Official Scorekeeper,

Respondents.

Appeal from Official Scorekeeper W. L. RICHARDSON

Argued and submitted July 27, 1984, 11 p.m.

Robert Wright, Noti, argued the cause for petitioners. With him in the briefs were Albin Norblad and Richard M. Nixon, Salem.

John The Baptist argued the cause for respondents. With him in the briefs was Edwin J. Peterson, Salem.

Amicus Curiae brief filed by Elizabeth J. Reynolds for the Oregon Government Ethics Commission. With her in the briefs was Father Archibald Diocese.

Before Richardson, Chairperson.

RICHARDSON, C.

Affirmed.

RICHARDSON, C.

Petitioners appeal a ruling of the official scorekeeper that a contested matter resulted in a tie. They contend that they had sustained their burden of proof by a substantial margin and that they therefore were the prevailing party. Respondents advance a number of arguments in support of the final ruling.

FACTS:

The Board makes the following findings of fact: (1) A contested case proceeding (AKA softball game) was held between petitioners "Harmless Errors" and respondents "OR APP" on July 27, 1984. Both parties were well represented by members of the Oregon State Bar or bars (some of whom were lawyers). (2) During the proceedings it was stipulated that the prevailing party would be determined by the total number of participants who crossed home plate consistent with local, national or international rules. (3) It was also stipulated that the contested case would terminate at the end of seven innings. (4) At the close of the proceeding, a pro tempore scorekeeper (who was a member of petitioner "Harmless Errors") announced that petitioners had scored 15 runs and "OR APP" had scored 7. (5) During the contest respondent "OR APP," through various of its representatives, objected to certain scores and certain rulings of the several unofficial referees. (6) A trophy, awarded annually to the prevailing party, was entrusted to Wallace P. Carson, a minor member of petitioners, in trust pending resolution of the protest lodged by respondents with the official scorekeeper. (7) The official scorekeeper resolved the protest by declaring that several of the runs scored by petitioners were unlawful and held that the numerical score was tied. Because petitioners had the burden of proof he held that respondents "OR APP" had prevailed.

OPINION:

Respondents first challenge the standing of petitioner Linde to appeal the ruling. They contend that he was neither adversely affected nor aggrieved by the ruling. He was, however, in the neighborhood and expressed concern. Under Jefferson Landfill v. Marion Co., 297 Or 28 (1984), that is sufficient to confer standing.

Respondents next contend that the Board does not have jurisdiction of this appeal because, under ORS 183.482, judicial review of contested cases is in the Court of Appeals. The Board has jurisdiction to rule on its jurisdiction and jurisdiction

to rule on the merits if it rules that it has jurisdiction of the appeal. The Board has jurisdiction, because this is an intramural contest in which the petitioners, led by the Chief Justice, attempted to discipline respondents, its employees. See Judicial Department Personnel Rules 9 & 10.

The Amicus, citing several passages from the Bible, suggests that this contested case involving members of the brotherhood is rife with conflict of interest. The Board notes that there was very little interest generated by the contest and any appearance of impropriety is negated by the maxim "de minimus non curat lex."

Petitioners contend that the scorekeeper improperly imposed the burden of proof on petitioners and utilized a clear and convincing standard in place of the more traditional standard of proof by what happened in fact. The burden of proof was properly allocated for two reasons. First, pursuant to OEC 40.105, the party asserting a contention has the burden of proving it. Petitioners, through the Chief Justice, continually asserted that petitioners would prevail by scoring the most runs. Consequently, the burden of proving that contention rests with petitioners. Second, under OEC 40.135(w), a thing once proved to exist continues as long as is usual with such things of that nature. In the previous annual contest between the parties, respondents substantially prevailed and were declared the better team. This condition continues to exist in the nature of things until the contrary is established. OEC 40.135(w) establishes a presumption that must be overcome by the party contesting its validity.

The scorekeeper applied the appropriate burden of proof, i.e., by clear and convincing evidence. Ordinarily in civil matters a party may prevail by establishing the pleaded contentions by a preponderance of the evidence. However, the courts of this state have recognized that a higher degree of certainty is demanded by public policy when the results of the contested proceeding is to impose an abusive label on the adverse party. That public policy is particularly appropriate to this type of proceeding. Respondents, although members of a co-equal branch of government, are considered to be an inferior court when compared to petitioners or by petitioners.

Additionally, petitioners continue to meddle with the respondents' opinions, thereby creating fractured egos and contributing to lowered morale and even lower performance. The potential result of

this contested case could be to label one or the other party as inferior in fact. The public has a right to expect maximum performance from its courts and should not have to accept reduced performance due to intramural strife. Requiring petitioners to establish their claim to being the better team by clear and convincing evidence (or even the facts) meets the admirable goal of elevating the egos and morale of respondents.

In addressing the various rulings of the scorekeeper, the Board must first determine whether the contest proceeded under the state or federal constitutions. Petitioners contend that they can prevail under the state constitution, but not under the federal counterpart. They contend, therefore, that the state constitution is applicable. Respondents argue that they perceive no difference between the two bodies of basic law. They also contend that, because one of the participants is a member of the Washington State Bar, the contest has aspects of interstate commerce, and so relevant national law applies. The Board finds that these arguments have equal merit and will therefore apply the different bodies of law alternatively.

The scorekeeper disallowed three scores of petitioners under local law. Those scores were made during a hurried application of the infield fly rule. Respondents contend that that rule was invalid, because it was adopted contrary to the APA. ORS 183.335. Petitioners concede that the rule was not validly adopted but contend that it was a harmless error and the resultant scores should not be voided. However, the Board finds that respondents were misled to their detriment during the contest. When the situation arose where the rule would ordinarily apply, respondents stopped playing and sought a ruling from petitioners as required by ORS 2.120. Petitioners delayed ruling until the runs had scored. Consequently, the scorekeeper did not err in disallowing the runs.

The scorekeeper disallowed four runs scored during the fourth inning. As the Board understands the ruling, it was based on the First Amendment to the United States Constitution and the following uncontested facts. After the last of the contested runs crossed home plate, respondents' manager said, "That was one run this inning." Wallace Carson, of petitioners, said, "So help me, God, we made four runs." The contest was between two divisions of the judicial department and played on a publicly supported field attached to a public school.

The First Amendment demands a complete separation of church and state. Petitioners' invocation of the diety as an arbitrator of the score is clearly contrary to the First Amendment. When a member of the superior court of the judicial department clearly and flagrantly violates respondents' First Amendment rights, redress commensurate with the violation is demanded. The scorekeeper appropriately disallowed the four runs placed on the unofficial score sheet as a direct result of the constitutional violation.

The next ruling appealed by petitioners was the voiding of one other run purportedly scored by a member of petitioner. The scorekeeper opined that, if the burden of proof was by a preponderance of the evidence, a simple mathematic designation would have validated that score. However, he ruled that, because the burden was by clear and convincing evidence, he was required to use a qualitative as well as a quantitative analysis. The score at issue was allegedly made when the batter hit the ball between the legs of two of respondents' members and it rolled onto an adjoining field. This allowed the batter an untrammeled route completely around the bases and across home plate. Petitioners argue this is a "home run." That term is a term of art. It originally was coined when the batter hit the ball with such force that it went over the wall enclosing the playing field and was therefore unplayable. The "home run" rule should not apply when its historical bases are not applicable. In this instance the ball rolled to a point a considerable distance from the fence and was therefore playable. Petitioners do not contend otherwise, nor do they assert that any limitation period prevented respondents from continuing to chase the ball. Because this hit was far from the quality of the traditional "home run," the scorekeeper acted within his discretion in disallowing the score.

The scorekeeper correctly ruled that the score was equal and that, because petitioner had the burden of proof, respondents prevail on the issue of which party fielded the better team. It was conclusively established during the 1983 season that respondents were the better team. That condition is presumed to continue until the converse is established. It was not.

Petitioners' last ditch argument is based on equitable estoppel. They claim that, after the record was closed, it accepted the trophy, cheered, consoled the allegedly vanquished respondents and attended the victory party as the winner. They argue that, because they relied to

their detriment on the score as recited by the pro tempore scorekeeper and the award ceremony, respondents are estopped from contesting the score. A party may not profit by its own folly or illegality. "Knavery in the guise of innocence is knavery nonetheless." The perception of the public that reality is skewed by hyper technical rulings of the judicial system is based on a misconception. The judicial branch and its various limbs have a solemn duty to uphold the basic rights of the common man by halting the unscrupulous advances of the government. Softball is basic to the American way of life, and in order to enhance the pristine reputation of that way of life the Board has a duty to require the highest court to adhere to the law. See Lent v. ERB, 63 Or App 400, 664 P2d 1110, rev den 295 Or 617 (1983), Circuit Court v. AFSCME, 295 Or 542, 669 P2d 314 (1983). If protection of this American pastime must come at the expense of perceived reality--so be it. Contra Venitatem Lex Nunquam Aliquid Permittit."

Petitioners argue in the alternative that, if the scorekeeper properly disallowed certain scores, he made an error in recalculating the final score and hence misdesignated the respondents as prevailing parties. Petitioners contend that the proper formula for determining the final outcome is explicitly set forth in Sanford v. Chevrolet Div., 292 Or 590, 642 P2d 624 (1982). They contend that Sanford allows for quantitative analysis without resort to subjectively qualitative considerations. The Board recalculated the score utilizing the Sanford criterion. It compared respondents' opportunity to score touchdowns pursuant to NFL rules with petitioners' opportunity to score under NBA rules. The resultant score was 49 for respondents and 14 for petitioners. The Board concludes that it will not follow the dicta in Sanford, because it appears to be contrary to legislative intent.

The more appropriate formula, and the one applied by the official scorekeeper, is "explicated" in Smith and Smith, 290 Or 675, 626 P2d 342 (1981). That formulation not only requires exactitude in calculation of the parties' relative resources, but also allows for a final equitable result based on considerations for children. Respondents specifically won this one for the little nipper.

Affirmed. Costs to respondents.

As Chairperson of the Appeals Board, I certify that all members present voted in favor of this decision.

W.L.Richardson,
Chairperson

Dated: _____

Members Present
W.L. Richardson

THE ODYSSEY OF JAMES THE SECOND BECOMING JAMES THE THIRD: A STORY OF EVIL INCARNATE

By Jim Nass

The day began like any other really. Or so I thought at the time. On reflection, I now realize that omens presented themselves portending my encounter with the evil that was to come. To my eternal regret, I failed to heed those omens and therefore failed to gird myself for the battle that was to come.

In my office, when I work at my computer, as I was that morning, I sit with my back to the door. My office sometimes is like Grand Central Station, with my staff dropping off or taking back files and papers, Records Section staff doing likewise, the mail clerk dropping off mail, and so on. So, partly by nature and partly from the need to survive, I have trained myself to ignore those potential interruptions and concentrate on my work. On this occasion, that was to lead to my downfall.

From time to time, I need to come up for air, as it were, and I allow myself to be distracted by the comings and goings of staff members. So it was, on that day, at that moment, I thought I saw somebody – or, as I now realize, something – entering or leaving my office. I partially turned and, out of the corner of my eye, I saw, or, more accurately, sensed, what I can only describe as a dark, cloud-like mass, of sorts, swirling at the entrance of my office. At that precise moment, I experienced an otherworldly coldness that chilled me to the bone, precipitating an involuntary shiver deep in my soul.[1]

After the briefest of moments, the cloud dissipated and the chill departed with it, and, seeing no one, I turned back to my computer, thereby turning my back on what was about to befall me. Was that a

1 Others to whom I have related this story have pointed out that the so-called dark cloud likely was the product of early morning sun filtering through the trees outside my office casting ever moving shadows about my office, or perhaps a reflection from a vehicle passing by in the street. At least one person has pointed out that it was a Monday morning and that the Supreme Court Building, an old building with an ancient heating system, always feels cold on Monday mornings. These people have no sense of mystery nor, apparently, the need to tell a good story, so I rejected their explanations out of hand.

noise I heard, or did I merely sense something that attracted my attention? I turned to face the door again. The dark cloud that had exited so mysteriously before began to reappear. It was followed by a form that is burned into my memory forever; I shall call it "Stephen".[2]

I must needs describe this "Stephen" for you, dear Reader, for you to appreciate how heinous he is. "Stephen" has been a Supreme Court staff attorney for many years, and I never suspected the depth of the evil that lurked within him. He presents as a 30-something, or maybe, now 40-something, gentleman, of blonde hair and slight build. Typically he wears slacks, dress shoes, and a dress shirt (often with the sleeves rolled up) and a conventional tie. He has perfected the air of a bookish fellow, far more interested in arcane law books and obscure theories of law than much of anything else. This so-called "Stephen" has further gilded that lily with photographs and childish works of art, which he claims are those of his young daughter, carefully posed about his desk and office. As I now realize, he has successfully feigned being a person of modest good humor, a family man, easy to work with, and an all round pleasant fellow.

If only others knew what I now know about him.

I must now abandon, temporarily, the train of thought I have, perforce, pursued thus far, and begin another. I trust that you, dear Reader, will bear with me.[3]

As I recount in another piece published in this self-same *Almanac*, I served, for many years, as Appellate Legal Counsel for the Oregon Supreme Court and Court of Appeals. *See In Memoriam*: *[Appellate] Legal Counsel December 4, 1972, to March 7, 2008*. As detailed in that work, I was the second person to have served in that role, David Gernant, now retired Circuit Court Judge David Gernant, having been the first. At this point, I must confess to being of fragile ego, for I have

2 I shall call the form "Stephen" because, as it turns out, that is his name. The form was Stephen Armitage (or, at least, that is what he calls himself), one of the Supreme Court staff attorneys. Others to whom I have related this story have suggested that the dark cloud that presaged "Stephen's" entrance to my office likely was just his shadow. They are sad victims of self-delusion.

3 In writing, tempo is important; equally important in a faux academic work is at least a modicum of footnotes. A cursory review of this piece reveals the passage of several paragraphs without a footnote. It ineluctably follows that, to maintain the tempo of the piece and to continue its veneer of a scholarly work, I must insert this footnote.

long been very troubled by having not been either the only, or at the least, the first appellate legal counsel. Very troubled, indeed, vexed to the point of distraction, one might say. The good Judge Gernant can claim the honor of being the very first legal counsel for the Oregon appellate courts (and to have been a judge to boot). As for myself, I can make neither claim; at best, I am James the Second, Second-Hand Jim, or whatever other pejorative term one may wish to use.

Thus, it happened that I was overwhelmed with joy, my faith in the world renewed, when the Chief Judge of the Court of Appeals, in March of 2008, appointed me as Appellate Commissioner! (As also recounted in my other work, *In Memoriam*.) As far as anyone knew, I was the first appellate commissioner in the State of Oregon. The very first! James the First. At last, my claim to such fame as that event might impart.[4]

I return now to the original strand of my epistle. Oblivious to the events about to unfold, when "Stephen" made his entrance into my office, I greeted him as I always have done. On this occasion, however, he seemed far more animated than his usual bookish manner would allow. Another omen that I ignored, at my peril. At that point, catching me totally unawares, Stephen proceeded to flash a metaphorical dagger and plunge it deep into my gut: He claimed that, in the course of conducting legal research on another topic, he had discovered that, in fact, there had been two, count 'em, two previous appellate commissioners. See *History of the Oregon Judicial Department, Part 2: After Statehood*, by Stephen P. Armitage (published online at www.oregon.gov/SOLL/OJD_History/HistoryOJDPart2TOC.shtml). A lass and a lack, I was NOT the first appellate commissioner for the State of Oregon, but, oh my God, the third. Not the First; not even the Second; but the Third!!!

In retrospect, I believe that I would not have suspected "Stephen's" evil motive had he not announced his news with obvious delight. Stephen and I having worked together for so many years, he must have been aware that I clung to the "honor" of being the first, and only, appellate commissioner like the survivor of a sinking ship clings to any bit of flotsam that may save his wretched life. He must have known

4 Some cynics have attempted to point out that, in fact, the event imparted little or no fame whatsoever and that only a person with a pitiful sense of self-worth would take such pride in the appointment. I have, of course, ignored them, too. What do they know?

that his news would cut me to the quick. But he twisted the dagger left and right as if to disembowel me as he went on and on and on about what he had discovered. With his furtive, beady eyes, he watched my every move, likely to see if his news was having the desired effect. He obviously wanted me to lay bare my soul, to destroy me, as it were.

I would have none of it. I feigned mild interest in the news. But, the truth is: I could scarcely catch my breath, and it took every ounce of strength in my body to draw myself up and look at the law books that "Stephen" thrust under my face. I see now that he literally wanted to rub my face in it, for me to see in raw, undeniable print, incontrovertible proof that other appellate commissioners had preceded me.

After bounding around my office for what seemed like an interminable period of time, alternatively cackling like a witch and howling like a hyena, "Stephen" finally left my office.[5] Exhausted from pretending to be interested in "Stephen's" announcement, I collapsed into my chair, mind reeling, emotions raw, soul in turmoil. I was no longer The Only One, no longer The First. I was but a former Second, and, now, a lowly Third. Was my life worth living?

After about an hour or so, I would hazard, I had regained enough composure to turn my attention, however feebly, to my computer and to my work. At least, I thought to myself, I still have my work. Surely that has some value. Yes, that will be my life raft now! I have my work! I will muster whatever pride and dignity I can from going through the motions every day, day in, day out.

Frankly, with the benefit of time that heals all wounds, if the foregoing was all there was to the story, I believe I could have given "Stephen" the benefit of the doubt. I could have come to believe that, in good faith, he discovered information that he thought would be of interest to me and he shared it with me as any responsible and sincere co-worker would.

But, as it turns out, "Stephen" was not through. Oh, no, he had more. It was not enough to plunge the dagger deep into my vital organs, to twist it left and right. No, he returned, this time bearing yet more law books. He took fiendish delight in pointing out that the

5 Other staff going in or out of, or by, my office, claim they did not see "Stephen" bounding about nor did they hear any howling. Obviously, "Stephen's" otherworldly powers include the ability to show one persona to me and another to passers-by.

previous Supreme Court appellate commissioners had been given the authority to decide appeals on their merits, and that their decisions were reported in the *Oregon Reports*. Of course, he knew that my powers were limited to deciding mere motions and own motion matters, and none of my decisions would be published anywhere. Of course he knew that.

And so it was that he again wielded his metaphorical dagger (or was it a sword, a scimitar perhaps? I don't now remember) and plunged it deep into my body again and again, spewing allegorical blood everywhere. I floundered about, seeking to hang on to whatever small spark of life might remain in my soul. Thus, we were locked in mortal combat that went on for hours.[6] Mercifully, because I work out and "Stephen" does not, I was able to withstand his onslaught. Eventually tiring, "Stephen" slithered out of my office, presumably to slink back to his lair to lick his wounds, for I was able, with the aid of various and sundry plastic toys and brass objects that populate my office, to inflict some damage on Old Lucifer myself.

It is now months later as I recount these events. Time has indeed healed most wounds. I have reconciled with being James the Third.[7] But I now keep a very wary eye on "Stephen," or whatever he is calling himself these days.[8]

In case you were not paying attention, Jim Nass is our Appellate Commissioner, 3d, although the first many of us have ever known, and was formerly Appellate Legal Counsel, 2d, for the Oregon Supreme Court and Court of Appeals.

6 Witnesses subsequently reported that "Stephen" was in my office for, at most, 10 minutes, and that they saw neither dagger, scimitar, nor blood. The adage is true: There are none so sight-impaired as those who will not see.

7 I take some small pleasure in the fact that, apparently, those predecessors of mine were eventually appointed to the Supreme Court when it was expanded from five to seven members, but lost when they ran for election.

8 Beelzebug, Abbadon, and Iblis, being amongst the pantheon of names attributed to him over the centuries.

JUDICIAL DEVELOPMENTS IN RUSSIA

By Paul J. De Muniz, Chief Justice
Oregon Supreme Court[1]

A reader opening this issue of the *Appellate Almanac* may be surprised to see an article about the Russian judicial system.[2] After all, most Americans, even informed ones, were aware only that the Soviet Union had come apart in the early 1990's and that, since that time, the Russian Federation has been struggling with its democratic reforms and free market economy.[3] Until the summer of 2008, there were only a few newsworthy events about our government's relationship and attitude toward Russia, such as a statement by President George W. Bush in 2001. At that time, when asked if Russia could be trusted, President Bush answered, referring to Russian President Vladimir Putin, "I looked the man in the eye. I was able to get a sense of his soul." Apparently, Colin Powell, then Secretary of State, had a different take. When the President mentioned his remark to Powell, Powell reportedly replied, "Mr. President, I looked into President Putin's eyes and I saw the KGB." President Bush made a further statement in 2006, during a press conference following the G8 Summit in St. Petersburg. Referring to private meetings with President Putin, President Bush stated that he had told his friend "Vladimir" to stop suppressing Russia's democratic reforms. Putin's reply was, "I'll take the democracy we have here in Russia over that one you['ve] got in Iraq any day."

However, Russia's incursion into Georgia in the summer of 2008 and the interruption of gas supplies to Europe have had the effect of generating renewed interest in that mysterious place we know as Russia. This new heightened interest in Russia is long overdue. What appears to be unknown to the average American, and apparently to many of our governmental leaders is that, today, the Russian Federa-

1 The author gratefully acknowledges the contribution to this article by Vadim Bourenin, J.D., Oregon State Bar member, Oregon Supreme Court law clerk, former lead counsel for the Constitutional Supervision Committee of Tajikistan, and professor of civil and environmental law at the Tajik State University Law School.

2 This article is adapted from a presentation at the 2008 Kenneth J. O'Connell Conference at the University of Oregon.

3 The 1990's were very difficult for the average Russian, when the ruble crashed twice – once in 1992, after President Boris Yeltsin released state price controls, and again in 1998. As a result, many Russians lost their life savings, whether their money was in a bank or under a mattress.

tion is the world's largest country, has more natural resources than any country in the world, has one-fifth of the world's precious metals, has one-third of the world's natural gas, and has an estimated 17 to 25 percent of the world's oil. During the first part of 2006, Russia bypassed Saudi Arabia as the world's leading producer of oil.[4]

Soaring oil revenues have improved the quality of life for the average Russian and allowed some Russian companies to expand westward, buying companies in other countries, including one here in Oregon.[5] However, Russia has not avoided the current global economic crisis. By some accounts, the global economic crisis has hit Russia harder than many other regions of the world,[6] and former President Putin's characterization from early in his presidency -- "We are a rich country of poor people" -- remains as true today as it was at the time it was made.[7] Although a middle class has started to emerge in places like St. Petersburg and Moscow, the gap between a few outrageously rich and the majority of the population living at or just above the poverty level has grown even wider. There is, throughout the country, criminality and corruption, crumbling infrastructure and housing, a run-down health care system, and the highest rate of HIV outside of Africa. Despite those very difficult problems, Russia's control of a significant portion of the world's energy has again propelled Russia to the forefront of the world stage. In other words, Russia is again a player on the international stage, and its power and worldview must again be considered as America formulates its international policies. Given Russia's renewed status in the world, it is appropriate to take some time to focus on the state of Russia's commitment to the impartial enforcement of the rule of law and the development of an independent judiciary. Oregon has a special interest in Russia's rule of law development, in that Oregon's legal community has established a

4 *See US Department of State Country Background Notes, Russia, 2008*, available at http://www.state.gov/r/pa/ei/bgn/3183.htm.

5 *Russian Steel Producers Ready to Sweep U.S. Market*, Russia-InfoCentre , August 28, 2008, available at http://www.russia-ic.com/business_law/in_depth/799/.

6 According to recently released government figures, Russia's real unemployment rate passed 6 million in January 2009, taking the percentage of those without work to eight percent. *See* T. Wall, *For Richer, for Poorer*, Moscow News, No. 6, 2009.

7 Despite the fact that the number of billionaires in Moscow exceeds the number of billionaires in New York, the average wage in Russia as of December of 2008 was still only 20,587 rubles ($643) per month, with 74 percent of population earning even less than that meager number. RF State Committee on Statistics 2008 Report, available at http://www.gks.ru/bgd/free/B08_00/IssWWW.exe/Stg/d12/1-00.htm.

productive relationship with the legal community of Sakhalin Island in the Russian Far East, exchanging visits between Russian and Oregon judges and lawyers, and helping lawyers and judges in Sakhalin and throughout the Russian Far East to get a better grasp of jury trials, juvenile courts, and other issues in their quest to build a new Russian legal system.

Let me begin with some recent history. The current constitutional framework for the judicial branch of the Russian government was established in 1993. As I noted, the 1990s were turbulent times in Russia. The transition to a market economy was accompanied by a sharp rise in crime and open gang warfare, combined with the inability of law enforcement to combat it. During that period, the Russian judicial system suffered from low pay and pitiable work conditions, leading to an exodus of judicial personnel who were unable to deal with the difficult circumstances.[8] Boris Yeltsin, the first President of Russia elected by popular vote, came to power in the early 1990s with a national program of reform that encompassed not only liberal democracy and a market economy, but also legal order, individual freedom, and civic nationhood. All those concepts are reflected in the Constitution that Yeltsin championed during his first presidential campaign and that was approved by popular vote in December 1993.

The 1993 Constitution of the Russian Federation (hereafter Russian Federation Constitution) is a remarkably comprehensive document, containing provisions touching on almost every aspect of Russian life. For the purposes of this article, I want to identify some of those provisions that are intended to describe a constitutional representative democracy that is committed to rule-of-law ideals and to an independent judiciary:

1. Article I states that "Russia shall be a federal rule of law state with the republican form of government."

2. Article 15(1) mandates that "[t]he Constitution * * * shall

8 *See* Resolution of the IV (Extraordinary) Congress of Judges of the Russian Federation. Available at http://www.ssrf.ru/ss_detale.php?id=1. The fact that the Council of Judges of Russia had to file an official demand with the Attorney General of Russia to file charges against the Minister of Finance of Russia, because the latter single-handedly ordered a 26% cut in the financing of the judicial branch in 1998, speaks volumes of the state of affairs in the judiciary at that time. *See Council of Judges of the Russian Federation: History, 1996-2000.* Available at http://www.ssrf.ru/second.php?columnValue=2.

have supreme legal force and direct effect, and shall be applicable throughout the territory of the Russian Federation."

3. Article 10 establishes a separation of the legislative, executive, and judicial branches and confirms that the powers of each shall be independent.

4. Article 120 confirms the independent status of the judiciary, by stating that "judges shall be independent and shall obey only the constitution of the Russian Federation and federal law."

5. Article 125 expresses the power of judicial review, granting the judicial branch the power to declare acts of another branch of government void and unenforceable.

6. Article 128(8) states that judicial proceedings shall be conducted based on adversarial principles and equality of parties.

7. Finally, Article 17 guarantees basic rights and liberties in conformity with the commonly recognized principles and norms of international law and declares that those rights are inalienable. [9]

I now turn to a description of the Russian judicial system. The judicial branch, as described in the Russian constitution, is comprised of three court systems: the Constitutional Court, the courts of general jurisdiction, and the arbitrazh (commercial law) courts. Those three court subsystems, though comprising a united system, do not intersect.[10]

The Constitutional Court of the Russian Federation is based on the European model of constitutional justice, in which a separate court has exclusive jurisdiction over all matters that involve the interpretation of the Russian Federation Constitution. That court is invested

9 Constitution of the Russian Federation. Available in English at http://www.constitution.ru/en/10003000-01.htm.

10 *See* "*O Sudebnoi Sisteme*" (*On the Judicial System*), Federal Constitutional Law No. 1, 1996 (last amended in 2005), available in English at http://www.legislationline.org/documents/action/popup/id/4255.

By incorporating international norms and laws contained in treaties such as the International Covenant on Civil and Political Rights and the European Council's Convention for the protection of Human Rights and Fundamental Freedoms, the Russian Federation Constitution is intended to ensure that Russian citizens will enjoy the right against self-incrimination, the presumption of innocence, and the right to an open and public trial by a competent, independent and impartial tribunal as provided in the treaties. That provision supplies the grounds on which Russians seek review of Russian court decisions in the European Court of Human Rights.

with the power of judicial review, and it has jurisdiction to determine the constitutionality of a law or regulation.[11] Some readers may recall the outcry some years ago when former President Putin announced that the 89 regional governors would no longer be elected by popular vote, but would be appointed by the Executive Branch. That law was challenged in Russia's Constitutional Court. The Constitutional Court eventually ruled that the new law did not violate the Russian Federation Constitution.[12]

The general jurisdiction courts make up Russia's largest court system in the judicial branch, with about 30,000 judges and magistrates.[13] These courts, which include military courts, are subordinated to the Supreme Court. General jurisdiction courts adjudicate civil and criminal cases and include district courts (which serve every urban and rural district), regional courts, and the Supreme Court. Each of the courts in the jurisdiction, including the Supreme Court, may function as a trial level court. Decisions of the lower trial courts can be appealed[14] to the immediately superior court, unless a constitutional issue is involved. The Russian Federation Constitution permits jury trials in certain criminal cases. In the first six months of 2008, general jurisdiction courts handled at the trial level more than 18 million cases (271 jury trials, more than 4,778,000 civil cases, and more than 2,624,000 administrative law cases).

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11 Only a limited circle of state bodies have the right to approach the Court and seek its ruling on the interpretation of the Russian Federation Constitution. Citizens may only challenge regional or federal normative acts before the Constitutional Court if they can establish admissibility.

12 *See* RF Constitutional Court Judgment #13п of December 21, 2005, available at http://ks-portal.garant.ru:8081/SESSION/S__K4EHaYbm/PILOT/main.html.

The court, in the first years of its existence, issued a number of opinions that held unconstitutional then-President Yeltsin's edicts. In October 1993, Yeltsin issued an edict suspending the court's functioning. It resumed work after the new Russian Federation Constitution was adopted in 1993. *See generally*, *Istoria Konstitutsionnogo Suda Rossiiskoi Federatsii* (*History of the RF Constitutional Court)*, available at http://www.ksrf.ru/Info/History/Pages/default.aspx

13 Magistrates form an integral part of the system of courts of general jurisdiction, although they are considered to be regional, rather than federal, judges. Magistrates are professional judges, with the same status and responsibilities as federal judges, although with lower salaries. They handle small civil disputes and petty administrative and criminal offences. Appeals against decisions of magistrates go to district courts, the decisions of which are final. In each district, there may be several magistrates.

14 The Russian judicial system utilizes both appellate and cassation procedures. The higher courts also are vested with the power to accept at their discretion cases for so called supervisory review (*v poryadke nadzora*).

The third court system, which is the newest and, perhaps, most dynamic, is the arbitrazh (commercial law) court system.[15] The arbitrazh courts have exclusive jurisdiction over all business bankruptcy matters, disputes between business entities, and disputes between business entities and government agencies (such as regulatory and taxing authorities). In my view, the success of the arbitrazh courts is vital in promoting the public's confidence in the courts and to the growth of a market economy in Russia.

With the exception of the service of justices for the Russian Federation Constitutional Court, the Russian Federation Supreme Court, and the Russian Federation Supreme Arbitrazh court, which requires Federal Council (higher chamber of Russia's Parliament) approval, the Russian Federation President at his sole discretion appoints the judges of the lower courts for an initial three-year term, and then on reappointment for a life term. All judicial candidates, including candidates for the highest courts, are sifted through Judicial Qualification Commissions in each of Russia's constituent regions.[16] Two-thirds of the members of those qualification commissions are judges; the remaining one-third are public members.[17] It is difficult to determine the effectiveness of the vetting process, because the commissions do not publish their recommendations.

International scholarship regarding the success of free market economies in developing democracies recognizes the importance of the structural role of the judicial branch of government. In other words, it is the impartial enforcement of economic and property rights by impartial independent courts – rather than the substantive law – that is the key to the development of a democratic free market society. That is so, because improvements in substantive law make little difference in the absence of an effective and independent judiciary that impartially enforces the rule of law.

15 Arbitrazh courts form a system with jurisdiction over commercial disputes that arise, as a rule, between business entities (legal persons). Those courts must not be confused with courts of arbitration (*treteiskie sudy* — third-party adjudication courts) that have not been established by the State.

16 The law establishes age threshold, education, professional experience and other requirements for the candidates. *See Zakon "O Statuse Sudei v Rossiiskoi Federatsii" (RF Act "On Status of Judges in the Russian Federation")*, 1996 available in English at http://www.legislationline.org/documents/action/popup/id/4369

17 Public members are required to have a legal education. State or municipal officials or members of the defense bar may not be members of the qualifications commissions.

Each Russian president has proclaimed an understanding of the connection between economic success and a strong, independent, and impartial judicial system.[18] President Putin, when he became the president of Russia in 2000, announced that judicial reform would be one of his administration's top priorities. He acknowledged that judicial reform was a necessary part of Russia's transition to a free market economy because Russia needed a judicial system that potential investors viewed as independent and impartial.

Russia has now had more than 15 years to develop the kind of independent judicial branch of government necessary to the impartial enforcement of the rule of law and to advance its free market economy. Unfortunately, the commitment to impartial enforcement of the rule-of-law through the creation of an independent judiciary requires more than the words in the constitutional provisions that I identified earlier. In general, we would all agree that the commitment to the rule of law also embodies a set of practices and attitudes that reveal how a society balances justice, fairness, and authority. In my view, the attempt over the last 15 years to establish an independent, impartial, dependable, and transparent judicial system in Russia has floundered, and, as a result, Russia's market economy has been exceedingly slow to develop. Of course, Russia's economy has grown in that time; however, that is due primarily to its excessively high oil and gas revenues.

Speaking specifically to the formation of the judiciary as an independent branch of government, the commonly held view is that, despite the Russian Federation Constitution and the Russian President's public pronouncements and attempted judicial reforms, Russia's judicial system has failed so far to operate impartially and dependably, and has failed to garner the public's confidence.

A popular Russian joke states that the Russian society constantly ponders over two questions: "Who is at fault?" and "What has to be done?" It is now joined by foreign counterparts. Since the formation of the Russian Federation and the adoption of the 1993 constitution, legal and economic scholars have studied Russia's legal and economic system

18 For example, President Yeltsin proclaimed that "the judiciary is not a ministry or agency, but is as much a part of the foundation of a state as legislative or executive branches are." B.N. Yeltsin. 1994 Annual Address to the Federal Assembly. Available at http://www.ssrf.ru/ss_detale.php?id=1.

in some depth – asking "who is at fault" and "what has to be done."[19] Because much has been said and written on the subject already, the remarks that I offer – which concern factors that have inhibited the development of Russia's independent judiciary and its intended democratic free market economy – are offered humbly and modestly.

First, I think that we often do not understand how deeply we are affected by our past. Seventy-five years of Soviet totalitarianism, in which a culture of deceit and graft flourished, is difficult to shake. The *New York Times* has reported that Russians paid $3 billion in bribes in 2005, more than the central government collected in taxes that year. [20]

I would like to share just a couple of stories that have been told to me personally to illustrate the depth of the graft penetration. In May 2006, I discussed this very issue with a successful Russian business man in a jazz club in Moscow. He told me that, earlier that year, he had managed to make an appointment with a high-ranking government official (a ministry level, retreaded communist, as many of them still are) to discuss a certain permitting process that was under the official's authority. About two weeks before the scheduled meeting, the businessman was contacted by someone in the official's office. The caller asked whether he intended to keep the appointment, because the office had not received confirmation. He responded, "Yes, I intend to be there. I confirmed in writing some time ago." But the caller persisted. "No, you have not actually confirmed." This back and forth went on until, eventually, the caller explained that confirmation of the appointment required a $40,000 cash payment.

On another earlier trip, this time to the Russian Far East in 2003, I noticed a new, very expensive home (most Russians live in apart-

19 *See e.g.,* William Burnham, Peter B. Maggs, and Gennady M. Danilenko, *Law and Legal System of the Russian Federation*, (3d Edition, 2004); also P. Solomon & T. Foglesong, *Courts and Transition in Russia* (2000, Boulder, CO and Oxford: Westview); Gordon B. Smith, *Reforming the Russian Legal System*, 1996.

20 Steve Lee Meyer, *Pervasive Corruption in Russia Is Just Called "Business."* The New York Times, August 13, 2005.

In 2008, Russia dropped down to 143rd place in the "perceived corruption" ranking by Transparency International. The Untied States, by comparison, occupies the 20th place. James Rood, *Russian Bribery Tops $33 Billion a Year*, ABC News, July 14, 2008, available at http://abcnews.go.com/Blotter/Story?id=5366427&page=1. For a more detailed discussion of bribery in Russia, *see Bribery and Blat in Russia: Negotiating Reciprocity from the Middle Ages to the 1990s (Studies in Russian & Eastern European History),* (S. Lovell, A. Ledeneva, A. Rogachevskii ed., Palgrave Macmillan, 2001).

ments) and asked to whom it belonged. At that time, there was no mortgage financing to speak of in Russia. My companion indicated that it belonged to a city official, who had earned the equivalent of $12,000 per year. That situation can be found all over Russia. Not many people seem to be shocked anymore that the wife of the mayor of Moscow made the *Forbes* list as the eighth richest woman in Europe with a net worth of more than $4 billion,[21] or that the chief criminal investigator in the country is charged with bribery.[22] A culture of bribery and graft is a Soviet legacy that plagues Russia today. [23] President Medvedev recently characterized the problem as becoming a threat to national security and created a special commission to tackle the problem.[24] However, many of my Russian friends believe that it will take at least two generations for the insidious problem to abate.

Second, in my view, Russia privatized too fast, selling off state assets – gas, oil, banks, press, radio and television – at bargain-basement prices and before the regulatory mechanisms (such as an SEC equivalent and banking regulations), necessary in any free market, were fully in place. As a result, incestuous relationships between governmental leaders and corporate directors proliferated, permitting the open and blatant seizure of public property described by some as "piratization."[25] By 1996, seven men (in a country of 145 million people) owned 50 percent of the country's assets. Naturally, such a redistribution of what once was considered common property has caused a very strong negative public reaction. That negative sentiment emerges in Russia a number of ways: aversion to the word "reforms"; support for government

21 http://www.gazeta.ru/photo/2828777.shtml.

22 *Top investigator fired for taking bribes*, RIA Novosti, April 22, 2008.

23 Some scholars opine that the roots of the culture of graft go much deeper down. "Bribe-taking is mentioned in Russian chronicles as early as the 13th century. The first attempt at legislative measures against corruption was made in the middle of the 15th century by Ivan III, the founder of the centralized Russian state. Since then, corruption and the state have been moving through Russian history hand in hand. The strengthening and growth of state machinery and its functions always resulted in an increase in bribery, and even the authorities' strictest measures against it never led to even a temporary positive effect." G. Bovt, *The Best-Laid Plans Fighting Corruption in Russia a Battle Lost Before It Has Begun*, Russia Profile, September 10, 2007, available at http://fbird.com/assets/Fighting%20Corruption%20in%20Russia%20a%20Battle%20Lost%20Before%20it%20has%20Begun__9202007175846.pdf.

24 *Russian President Medvedev Signs Package of Anti-Corruption Laws*. RIA Novosti, December 25, 2008, available at http://en.rian.ru/russia/20081225/119175337.html.

25 *See generally*, M. Goldman, *The "Piratization" of Russia: Russian Reform Goes Awry*, (Routledge, April 30, 2003).

actions, regardless of how egregious, against the nouveau rich, if those actions are carried out under the banner of returning back the "piratized property"; and the complimentary beliefs that the state must undertake decisive steps to push to regain its positions and that the courts must play a role in defending the state's (although not necessarily the public's) interests.

Mikhail Khodorkovsky's case is an example of those actions and sentiments at work. Khodorkovsky was one of those seven richest Russians, who ended up owning *Yukos Oil*, the largest private oil company in Russia. A few years ago, he was arrested on the steps of his private jet somewhere in Siberia and has not been free since. Western political leaders, instead of being outraged, have tended to treat the selective tax evasion and fraud charges brought against Khodorkovsky as the exception -- the rare case driven by politics and personality -- and not the rule.[26] At the time of Khodorkovsky's arrest and the de facto seizure of *Yukos* by the government, the company was producing 20 percent of Russia's oil. In 2004, *Yukos*' three main production units were sold at bargain prices, eventually ending up with the governmental oil giant, *Rosneft*.[27]

Third, only a very weak property registration system was in place when state property was privatized in Russia. Although it does exist now, it is extremely difficult for anyone (the public), other than Russian law enforcement, to gain access to the registration system. In the United States, we take for granted that all real property and any personal property of consequence is registered and easily accessible in some data bank. When you obtain a judgment in America, you can generally obtain access to any assets that the debtor has. No free market economy can thrive without a complete system of property registration. Because that has not been a priority in Russia, the enforcement of economic rights (through written contracts) and property rights is inhibited and discourages international investment. In other words, even when an economic dispute is reduced to judgment through the courts, the judgment likely is unenforceable through the seizure of

26 The Russian Federation Attorney General's office just reported that it finished an investigation of a second case against Khodorkovsky and his colleague Lebedev, charging them with embezzlement of state-owned stock, appropriating oil, and money laundering. The case has been filed with one of the district courts in Moscow. *Jailed Russian Tycoon Faces NewTrial*, France Press, February 17, 2009.

27 *Putin aide slams Yukos sell-off*, BBC News, December 28, 2004.

property. Judgments in Russia are enforced and collected through a separate bailiffs' service. Russian law has no provision for a debtor's examination, and court records, for the most part, are not open for public inspection. Currently, only about 50 percent of the civil judgments in Russia are ever enforced, and the government's current reform plan does not aim to achieve enforcement of all judgments, settling instead at 80 percent by the year 2011.[28]

I now specifically turn to what is happening in Russian courts. Under the Soviet system, judges were mere functionaries, because all the power resided in other spheres --in criminal cases, for example, it resided with the prosecutors. Unfortunately, not much has changed in the criminal courts, despite adoption of the Russian Federation Constitution and the new criminal code and criminal-procedure code that were intended to transfer power to the courts and to implement an adversarial system.

With regard to criminal cases, which are the bulk of cases in the general jurisdiction courts, the conviction rate for criminal cases tried by professional judges (solely or in panels of three) is 99 percent. That figure is not a surprise, given that one out of every ten Russian judges is a former police investigator and one in every nine is a former prosecutor -- individuals with a continued perception of their role as defender of State interests.[29] However, in those cases tried to a jury,[30] the acquit-

28 That number includes the judgments against the state itself. The situation is so disturbing and embarrassing that the European Court on Human Rights directed Russia to set within six months an effective remedy for redress and suspended proceedings on all new applications, in which the applicants complained solely of non enforcement or delayed enforcement of domestic judgments ordering monetary payments. *Burdov v. Russia*, 33509/04 Eur. Ct. H.R. (2009)

29 Moreover, the latest amendments to legislation intended to strengthen independency and accountability of the judges lists service in law enforcement and prosecutorial offices as preferred law experience when recommending for a judgeship.

30 Jury trials are allowed in the most serious cases, generally those falling to the trial level jurisdiction of the regional (rather than district) courts. Recently, a number of crimes – terrorism, hostage-taking, armed insurrection, sabotage and civil disturbances – were excluded from jury trial jurisdiction. RF Criminal Procedure Code, Art. 31, as amended.

tal rate is about 15 percent.[31] Jury trials make up only eight percent of the criminal cases, and, because the prosecutor can appeal from a jury acquittal, verdicts are overturned on appeal more than half the time.[32] In some cases, prosecutors have eventually obtained a guilty verdict after two or three jury acquittals and subsequent appeals.

As mentioned earlier, in my view, the most important court system in Russia with regard to the development of a free market economy and economic prosperity is the arbitrazh court system. The arbitrazh courts handle tax matters, bankruptcy, business-to-business disputes, shareholder disputes, environmental cases, and all kinds of complicated business matters. However, a majority of the arbitrazh judges work in dilapidated conditions and lack even rudimentary courtrooms in which to hold their hearings. Although I have great respect for the arbitrazh judges that I know, the reputation of that court for fairness, impartiality, and independence is not maturing as is necessary to facilitate the Russian public's confidence in its courts.

One reason that that is so is the continued improper influence, political or otherwise, of the executive branch of government. As I mentioned previously, the President appoints every single lower court judge in the country, from Moscow down to the most remote village in Sakhalin. In fact, the President appoints each judge twice – the second

31 Recently, a jury acquitted four defendants in the high profile case of the murder of Anna Politkovskaya, a prominent journalist who frequently criticized the Putin administration's handling of the war in Chechnya. Investigation of the case, which lasted a few years, has not uncovered the principals of the crime. Nevertheless, four men – one former FSB (FBI equivalent) and three Chechen men – were charged as accessories. The trial in the Moscow military tribunal was not free of controversies with the presiding judge often changing his mind on conducting proceedings in open or closed sessions. In the end, after the prosecution could not present its key evidence (a certain videotape) the jury acquitted all four defendants. The outcome caused an outcry of criticism from different layers of the Russian society, with many stating that the judiciary was failing again, because the crime is still unresolved. *See Otpustili Sluchainykh Lyudei (Happenstance People Are Releeased)*, Gazeta.ru, February 19, 2009.

I think that this case, actually, should be considered a step forward in Russia's quest for a truly adversarial system: the court (jury) played the role of an arbiter, not a prosecutor, as so often happened in the past and still happens. Although, the outcome of the trial gave a black eye to the law enforcement agencies' ability to solve the crime (given that they had description, videotape and fingerprints of the killer), the outcome (and it may be not final, *see* fn. 30, *supra*), as it relates to courts, deserves some praise.

32 The "double jeopardy" provision in the Russian Federation Constitution guarantees freedom from being convicted twice for the same crime, not freedom from being tried twice on the same charge. RF Constitution, Article 50.

time on reappointment after the initial three-year term. Undoubtedly, many opportunities to exert influence over judicial candidates exist for the executive branch bureaucrats who handle the appointment process.

Further, not only does the President appoint the whole judicial corps, he also appoints presiding judges in the majority of the courts, and he "suggests" to the members of the country's top three courts who should chair the respective highest judicial body, thus creating a strong vehicle for perpetuating the influence of the executive branch over the judiciary. Unlike in the United States, presiding judges in Russia sign judicial performance reports and play a significant role in initiating disciplinary procedures against judges and, subsequently, chair the courts in which the disciplinary measures may be appealed. Thus, it is not beyond the imagination that rank-and-file judges have an incentive to try to avoid conflicts with a presiding judge and will heed "friendly advice" on how to resolve a case.

Finally, the President, not the legislature, determines the compensation levels of the judiciary. Judges also depend on the whims of the executive branch in receiving some of the other forms of compensation for their work (*e.g.*, residence, health insurance and other benefits). All that, undoubtedly, could create at least an appearance of executive branch control over judiciary.

Unfortunately, it is not only an appearance. In 2007, retired Constitutional Court Justice T. Morschakova publicly told then-President Putin and the media about pervasive interference with judicial decision making: "Any decision in any case may be dictated to a judge. It may be any bureaucrat at any level. The system does not protect a judge from that . . . A judge does not have a feeling that he/she serves the Law. Lately, more and more judges are guided by self-preservation motives rather than by desire to protect one's rights."[33] In 2008, similar accusations related to particular cases were made by a justice of the Supreme Arbitrazh Court and other judges.[34] Even more disturbing is the number of Russians who think that there is nothing abnormal in that situation. In a recent poll, 37 percent of those polled opined

33 *Putin: Many People Are Doing Their Time Unjustly and That Smells of 1937*, NEWSru. Com, January 11, 2007, available at http://palm.newsru.com/russia/11jan2007/vvp.html.

34 *Judge Testified About Pressure from Kremlin*, BBC, May 13, 2008, available at http://news.bbc.co.uk/hi/russian/russia/newsid_7397000/7397999.stm

that the courts should be subordinated in one way or another to other branches of government.[35]

A recent case in the United States demonstrates the kind of political interference in court cases that can occur in Russia by "influential insiders." *Films by Jove v. Berov*[36] is a case from the Eastern District of New York. The plaintiff, Jove, entered into a licensing arrangement with *Soyuzmultfilm*, purportedly the successor to the Soviet-era State Film Studio. Relying on the licensing agreement, Jove invested $3 million to restore, update and revoice animated films. In a copyright infringement case, Berov, a Russian video distributor from New York, claimed that *Soyuzmultifilm* was not the legal successor to the Soviet State Film Studio and thus not the owner of the copyrights capable of legally transferring them. Ultimately, the U.S. District Court refused to credit a decision from the Supreme Arbitrazh Court about who was the legal successor to the Soviet State Film Studio, because there was substantial evidence that representatives of the Ministry of Culture, the Prosecutor General, and others had met with Supreme Arbitrazh Court representatives to discuss the needed management of cases involving the preservation of state interests. The U.S. District Court concluded that (1) those meetings had as their purpose a concerted attempt on the part of the various Russian executive branch officials to assert state property interests that they thought were improperly transferred to private ownership without adequate compensation, and (2) the Supreme Arbitrazh Court was strongly influenced, if not coerced, by the efforts of those officials to promote alleged state interests. The court concluded that the expropriation of the property by an act of a foreign sovereign is unquestionably against the public policy of the United States.[37]

A similar scenario is playing out on the Island of Sakhalin, where there are six multinational oil and gas ventures, with foreign investment over $100 billion. The Russian government no longer agrees with the terms of the Production Sharing Agreements that it negotiated a decade ago with *Shell*, *Exxon*, and other multi-national corporations,

35 The proponents of independence of judiciary made up only slight majority – 40 percent. Fund "Public Opinion" Poll, December 12, 2008, available at http://bd.fom.ru/report/map/d082322.

36 *See Films by Jove, Inc. v. Berov*, 250 F. Supp. 2d 156 (E.D.N.Y. 2003).

37 *Id.*

at a time when oil was only $10 per barrel. However, the Russian government is not arguing that the agreements are void because of fraud or some other legal theory; rather, it argues that the agreements are not lucrative enough for Russia and that Russian state companies therefore should have a larger share. Recently, *Royal Dutch Shell* "voluntarily" reduced its share in one of the Sakhalin projects by 25 percent.[38]

As previously mentioned, former President Putin publicly stated that he understood the connection between a strong, independent judiciary, capable of impartially enforcing economic and property rights, and a fully functioning market economy. As President, Putin did raise judicial salaries significantly and built more than 500 new courthouses, including a state of the art courthouse in Moscow. On a logistical level, the situation has improved significantly. However, today, Russians still have a dim view of their court system. In a poll taken in 2008, Russians were asked, "Do you trust Russian judges?" – 56 percent answered, "No." When asked, "Would you turn to the courts to protect your rights?" – 47 percent answered, "No," and 42 percent, "Yes."[39] Nevertheless, there has been an increase in the number of cases filed by individuals against state agencies: in 2007, about 70,000 cases were filed against the police, with total claims of 29 billion rubles. Business entities increasingly are using the arbitrazh courts to dispute tax or other state agency decisions. The polls that I have mentioned showed an interesting tendency – the younger generation (up to 35 years of age) has a more positive view of the judicial system than the older one. The statistical data of the European Court of Human Rights also provides interesting numbers. That court reports that the number of applications lodged and accepted with that court against Russia grew from 3,989 in 2002 to more than 9,400 in 2007. The "Russian share" of the complaints pending in that court since 1998 makes up 26% of the court's total docket.[40] Although that data seems to confirm

38 Andrew E. Kramer, *Shell cedes control of Sakhalin-2 to Gazprom*, International Herald Tribune, December 21, 2006.

39 Public Opinion Fund, *Otnoshenie k Sudebnoi Sisteme. Opros Naseleniya (Attitude Towards the Judicial System. Population Poll)*, 06.12.2008, available at http://bd.fom.ru/report/map/d082322.

40 That growth may be explained, in part, because the European court does not fully recognize the supervisory review stage in Russia, deeming the decision final after the cassation court rendered its opinion. However, that leads to a situation in which decisions from the intermediate – regional – courts are being appealed directly to the European court, thereby avoiding the highest courts of Russia, where many of them should have been resolved.

that Russians are dissatisfied with their judicial system and seek justice elsewhere, it also permits the conclusion that, despite their generally negative attitude toward the courts, Russians are increasingly willing to use the courts as a means of conflict resolution. In other words, given the right changes, Russians may likely want to litigate their claims closer to home than Strasbourg.

So, can Russia's judicial system become the truly independent, co-equal branch of government as described the Russian Federation Constitution? I think that the answer is "Yes. Someday. But do not expect it to happen tomorrow or even next year." The system continues to be a work in progress: over the last 15 years, there has been much done to strengthen the independence of the judiciary and to promote the Russian public's confidence in the independence and impartiality of Russian courts. A newly created Judicial Department -- under the Supreme Court of Russia, rather than as part of the executive branch -- now handles the logistics of the courts' work. Judge's salaries and other benefits have been raised significantly, making judicial service a more appealing career choice. At the same time, the laws have been amended to require public financial disclosures for judges and members of their families.[41] The World Bank funded loans in 2007 both to improve the Russian property registration system and to promote other judicial reforms in Russia. In an attempt to promote transparency in the administration of justice, informational services are being created in the majority of the courts with the goal of maintaining up-to-date information on the status of the cases pending in those courts.[42] More than 260 regional courts now have modern video conferencing capabilities;[43] many courts are being equipped with audio

41 ***See "On Amendments to Miscellaneous Laws of the Russian Federation Related to the Enactment of the Federal Law "On Combating Corruption,"*** RF Federal Law of December 25, 2008 N 274-FÇ.

It is not a trivial moment for public perception of transparency of the judicial system. As it exists right now, the system of compensation is rather hard for regular citizens to understand – in addition to a regular rate of pay, there are increases for rank, experience, remoteness of the area, and other benefits. As a result, judges themselves occasionally have difficulty explaining their compensation.

42 A special bill devoted to openness and transparency in the administration of justice has been stuck in the legislature since 2006, despite direct demands by President Dimitry Medvedev to enact it without delay.

43 Ironically, the correctional service officials in Siberia, where Mikhail Khodorkovsky serves his sentence, suggested conducting his second trial using video conferencing. *See Video Transport for Khodorkovsky*, Gazeta.ru, February 19, 2009., available at http://www.gazeta.ru/politics/2009/02/18_a_2945088.shtml.

recording systems, promoting more accurate records in Russian judicial proceedings.

Those are definitely positive changes; however, more can be done without generational waiting periods and significant costs. For example, diversification of public representation on the judicial qualification commissions (including members of the defense bar, nongovernmental organizations, and the Ombudsman's office), combined with setting precise standards and procedures for the functioning of those commissions, could reduce the judges' vulnerability to external pressure. Regular publication of the results of judicial discipline cases would help to increase accountability of the judicial corps to the public. Limiting the terms of the chairmanship for the presiding judges, along with the establishment of objective criteria for appointment to the position, such as experience, seniority, etc., could limit the presiding judges' undue influence over regular judges.

In May of 2008, Russia's new President, Dmitry Medvedev, convened a high-level meeting to discuss the much-needed improvement of Russia's judicial system. In his opening statement to the work group, President Medvedev stated:

> "Our main objective is to achieve independence for the judicial system.
>
> * * * To move in this direction, we need to consider a range of issues associated with preparing a series of measures aimed at eliminating the miscarriage of justice. As we all know, when justice fails[,] it often does so because of pressure of various kinds, such as surreptitious phone calls and money – there is no point in beating around the bush."[44]

Medvedev recently reiterated his commitment to those ideas at the All-Russian Congress of Judges and promised to support the judiciary even in a time of crisis.[45] President Medvedev, a former law professor himself, apparently like his predecessors Putin and Yeltsin, recognizes the need to strengthen the independence of the Russian judiciary. That is a significantly positive development. However, slo-

44 D. A. Medvedev, *Opening Address at a Meeting to Discuss Improving the Judicial System*, May 20, 2008, available at www.Kremlin.ru or http://www.cdi.org/russia/johnson/2008-100-2.cfm.

45 D. A. Medvedev, Speech at the VII All-Russian Congress of Judges, December 2, 2008, available at http://www.supcourt.ru/news_detale.php?id=5559.

gans are not enough to achieve a society grounded in the impartial enforcement of the rule of law. Instead, it requires the commitment of the Russian leadership and the Russian elite to live by the rule of law, and the constant demand of the citizenry to have equal access to fair and impartial courts.

THE WRITE STUFF

FOOTNOTE FRACAS

By David Olsson, July 2009

I recently reread Judge Landau's excellent *Footnote Follies*, in the 2006 *Oregon Appellate Almanac*. In his essay, Judge Landau laments the overuse of substantive footnotes—footnotes that contain substantive material—but does not remark on an alternative use of footnotes: the citational footnote. The citational footnote—one that merely contains reference material—offers a solution for the loss of clarity caused by inline citation—cites within the body of the text. Judge Landau observes that footnotes pose a threat to good legal writing but I hope he will agree that, used as a substitute for inline citation, they can preserve and improve clarity.

While I agree with Judge Landau's view on substantive—or "talking"—footnotes, opinions vary. Some writers use footnotes to place funny or superfluous text. Texas bankruptcy Judge Leif Clark, for example, demonstrated his fondness for the form, responding—in a footnote—to a party's motion by quoting from the movie *Billy Madison*:

> *Mr Madison, what you've just said is one of the most insanely idiotic things I've ever heard. At no point in your rambling, incoherent response was there anything that could even be considered a rational thought. Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul.*

Judge Clark went on to say: "Deciphering motions like the one presented here wastes valuable chamber staff time, and invites this sort of footnote."

Unfortunately, most writers don't limit their use of footnotes to funny movie quotes. As Judge Landau observes, substantive footnotes are distracting and hinder the readability of legal writing. The same is true of inline citation. But, think what you will about footnotes, the use of legal citation of some kind is necessary to legal writing. Cites may hinder brevity, clarity and harmony in writing, but they do establish the underlying authority for our assertions. Our reader can—and should—confirm that our critical arguments are backed by controlling or persuasive authority. But first our reader should understand what it

is we are trying to say. All too often, inline citation gets in the way of that important task.

Consequently, a growing group of legal writers—writers who note the disadvantages of talking footnotes and inline legal citations—endorse the idea of improving the clarity of one's writing by eliminating substantive footnotes and then using footnotes for placing citations. In many ways, this practice improves the quality of legal writing.

This practice, however, has proved surprisingly controversial. For instance, when Judge Woodard, of the Louisiana 3rd Circuit Court of Appeal wrote an otherwise unanimous opinion using citational footnotes, Chief Judge Ducet wrote a concurring opinion condemning the practice. His objection? Citational footnotes are not good "Bluebook" form.[1]

Other luminaries involved in this literary dust up include legal writing scholar Bryan Garner and U.S. Court of Appeals Judge Richard A. Posner, whom the Journal of Legal Studies describes as the most-cited legal scholar of all time. Garner cites one of Judge Posner's passages as an example of how the most eye-catching characters in a paragraph—the numbers and italicized letters that are integral parts of inline citations—can numb the brain:

> A law that grants preferential treatment on the basis of race or ethnicity does not deny the equal protection of the laws if it is (1) a remedy for (2) intentional discrimination committed by (3) the public entity that is according the preferential treatment (unless, as is not argued here, the entity has been given responsibility by the state for enforcing state or local laws against private discrimination, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-92, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989) (plurality opinion)) and (4) discriminates no more than is necessary to accomplish the remedial purpose. *E.g., Shaw v. Hunt*, 517 U.S. 899, 909-10, 135 L. Ed. 2d 207, 116 S. Ct. 1894 (1996); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224, 235, 237-38, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1987) (plurality opinion); *Chicago Firefighters Local 2 v. City of Chi-*

1 *Ledet v. Seasafe, Inc.*, 783 So.2d 611 (La.App. 2001).

> *cago*, 249 F.3d 649, 654-655 (7th Cir. 2001); *Billish v. City of Chicago*, 989 F.2d 890, 893 (7th Cir. 1993) (en banc); *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000). Whether nonremedial justifications for "reverse discrimination" by a public body are ever possible is unsettled. *Hill v. Ross*, 183 F.3d 586, 588 (7th Cir. 1999); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998); *Brewer v. West Irondequoit Central School Dist.*, 212 F.3d 738, 747-49 (2d Cir. 2000); *Wessmann v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998). This court upheld such a justification in *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), but the Fifth Circuit has stated flatly that "non-remedial state interests will never justify racial classifications." *Hopwood v. Texas*, 78 F.3d 932, 942 (5th Cir. 1996). The Supreme Court will have to decide the question eventually (maybe it will do so next term in the Slater case, cited below, in which certiorari has been granted), but it is of no moment here, because the County has not advanced any nonremedial justification for the minority set-aside program.[2]

Even without the colorful hyperlinks that an online researcher might see in the above passage, it is difficult to imagine any reader following the thread of Judge Posner's thoughts. Did you? Or did the clutter put you off entirely.

Inline citations cause many other problems. For instance, they cause sentences and paragraphs to become long and unwieldy. Consider the following paragraph, containing 409 words:

> The subfactors here do not point clearly in one direction. Certain attributes of SEPTA under state law weigh against immunity. Under its enabling statute, SEPTA has (1) a separate corporate existence, 74 Pa. Cons.Stat. § 1711(a); (2) the power to sue and be sued, *id.* § 1741(a)(2); and (3) the power to enter into contracts and make purchases on its own behalf, *id.* § 1741(a)(8), (9), (12), (18), (20), (21), (22), (24), (25). Other attributes support immunity: (1) its enabling statute provides that SEPTA "shall in no way be deemed to be an instrumentality of any city or county or other municipality or engaged in

2 *Builders Assn. of Greater Chicago v. County of Cook*, 256 F.3d 642, 643-44 (7th Cir. 2001).

> the performance of a municipal function, but shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof," *id.* § 1711(a), and "shall continue to enjoy sovereign and official immunity, as provided [by the statutory provisions that comprise and pertain to the Pennsylvania Sovereign Immunity Act]," *id.* § 1711(c)(3); (2) SEPTA has the power of eminent domain, *id.* § 1741(a)(13); and (3) SEPTA is immune from state taxation. As noted in *Bolden*, 953 F.2d at 820, Pennsylvania state courts have recognized SEPTA to be a Commonwealth agency to which the Pennsylvania Sovereign Immunity Act applies. *See, e.g., Jones v. SEPTA*, 565 Pa. 211, 772 A.2d 435, 444 (2001) (holding SEPTA immune in a tort case because the case did not fall within an exception to the Sovereign Immunity Act); *Feingold v. SEPTA*, 512 Pa. 567, 517 A.2d 1270, 1276-77 (1986) (finding that SEPTA is "an agency of the Commonwealth" against whom "it would be inappropriate to assess punitive damages"). In other contexts, however, Pennsylvania courts have declined to treat SEPTA as the Commonwealth. *See, e.g., Fraternal Order of Transit Police v. SEPTA*, 668 A.2d 270, 272 (Pa.Commw.Ct.1995) (holding "that for purposes of determining jurisdiction, SEPTA is a local agency and not a Commonwealth agency"); *SEPTA v. Union Switch & Signal, Inc.*, 161 Pa. Cmwlth. 400, 637 A.2d 662, 669 (1994) ("Because SEPTA is financially independent of the Commonwealth and its operations are not statewide, we conclude that the General Assembly did not intend SEPTA to be the Commonwealth for purposes of the Board Claims Act."); *Fisher v. SEPTA*, 60 Pa.Cmwlth. 269, 431 A.2d 394, 397 (1981) ("We do not believe that the Legislature intended SEPTA to be a Commonwealth agency in the traditional sense or for SEPTA employees to be considered Commonwealth employees for purposes of other legislative enactments.").[3]

Stripped of its inline citations, the paragraph contains fewer than half the words and becomes manageable:

> The subfactors here do not point clearly in one direction. Certain attributes of SEPTA under state law weigh against immunity. Under its enabling statute, SEPTA has (1) a separate cor-

3 *Cooper v. Southeastern PA Transp. Authority*, 548 F.3d 296, 307 (Fed. 3rd Cir. 2008).

> porate existence, (2) the power to sue and be sued, and (3) the power to enter into contracts and make purchases on its own behalf. Other attributes support immunity: (1) its enabling statute provides that SEPTA "shall in no way be deemed to be an instrumentality of any city or county or other municipality or engaged in the performance of a municipal function, but shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof," and "shall continue to enjoy sovereign and official immunity, as provided [by the statutory provisions that comprise and pertain to the Pennsylvania Sovereign Immunity Act;" (2) SEPTA has the power of eminent domain; and (3) SEPTA is immune from state taxation. As noted in *Bolden,* 953 F.2d at 820, Pennsylvania state courts have recognized SEPTA to be a Commonwealth agency to which the Pennsylvania Sovereign Immunity Act applies. In other contexts, however, Pennsylvania courts have declined to treat SEPTA as the Commonwealth.

By isolating the text, however, we have revealed the passage's repetitive and unimaginative sentence structure. Such a structure is a byproduct of inline cites. The presence of large amounts of citational text prevents the effective use of subordinate clauses and clarity comes at the cost of monotony:

> NEPA requires that, "to the fullest extent possible," all federal agencies shall prepare an EIS when considering proposed activities "significantly affecting the quality of the human environment." 42 U.S.C. § 4332; *Robertson,* 490 U.S. at 348, 109 S.Ct. 1835; *see also Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1212 (9th Cir.1998) (threshold question in NEPA challenge is "whether a proposed project will `significantly affect' the environment, thereby triggering the requirement for an EIS" (quoting 42 U.S.C. § 4332(2)(C))). An agency may first prepare a less exhaustive EA to determine whether an EIS is necessary. 40 C.F.R. § 1508.9; *Nat'l Parks & Conservation Ass'n v. Babbitt,* 241 F.3d 722, 730 (9th Cir.2001). An EA is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI]." 40 C.F.R. § 1508.9(a). "Because the very important decision whether to

> prepare an EIS is based solely on the EA, the EA is fundamental to the decision-making process." *Metcalf v. Daley,* 214 F.3d 1135, 1143 (9th Cir.2000). An EA is sufficient if it provides enough "evidence and analysis for determining whether to prepare an [EIS] or a [FONSI]." *Anderson v. Evans,* 371 F.3d 475, 488 (9th Cir.2004). Federal regulations encourage agencies to tier their environmental analyses in order to streamline and focus the review process. 40 C.F.R. § 1502.20 ("Whenever a broad [EIS] has been prepared . . . the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action.").

Stripped of its citations (and quotes and brackets), the monotony becomes obvious:

> NEPA requires that, to the fullest extent possible, all federal agencies shall prepare an EIS when considering proposed activities significantly affecting the quality of the human environment. An agency may first prepare a less exhaustive EA to determine whether an EIS is necessary. An EA is a concise public document that briefly provides sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI. Because the very important decision whether to prepare an EIS is based solely on the EA, the EA is fundamental to the decision-making process. An EA is sufficient if it provides enough evidence and analysis for determining whether to prepare an EIS or a FONSI. Federal regulations encourage agencies to tier their environmental analyses in order to streamline and focus the review process.

Further, even short sentences become confusing when combined with inline citations:

> Congress has vested the Secretary of Labor or her delegate with exclusive authority to "administer[ ] and decide all questions arising under" the FECA, 5 U.S.C. § 8145, and federal courts are barred from exercising judicial review over such decisions, id. § 8128(b). Because the FECA is an "exclusive" remedy, id. § 8116(c), it deprives federal courts of subject-matter

> jurisdiction to adjudicate claims brought under the FTCA for workplace injuries that are covered by the FECA. *See Granade v. United States*, 356 F.2d 837, 840 (2d Cir.1966), cert. denied, 385 U.S. 1012, 87 S.Ct. 720, 17 L.Ed.2d 549 (1967).

Finally, sometimes a reader can hardly tell how many sentences there are or where they begin:

> The courts have also considered how the element of "consent" should be defined under § 881(a)(7). Some courts have adopted a broad definition, concluding that an owner consents to illegal drug use on its property if it fails "to take all reasonable steps to prevent illicit use of premises once [it] acquires knowledge of that use." *141st Street*, 911 F.2d at 879; *see also United States v. One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496, 1505 (11th Cir.1992) (adopting the same definition of "consent" under § 881(a)(7)). Other courts and scholars have criticized this standard. *See United States v. Lots 12, 13, 14 & 15, Keeton Heights Subdivision, Morgan County, Ky.*, 869 F.2d 942, 947 (6th Cir.1989) (stating that § 881(a)(7) imposes "no requirement that a person who claims the status of an 'innocent owner' establish that he has done all that he could reasonably be expected to do to prevent the proscribed use of his property"); Robert E. Blacher, *Clearing the Smoke from the Battlefield: Understanding Congressional Intent Regarding the Innocent Owner Provision of 21 U.S.C. § 881(a)(7)*, 85 J. of Crim. Law & Criminology 502, 526 (1994) (stating that, "as the statute is written, claimants ought to be able to demonstrate a lack of consent simply by showing that they gave no express approval to the illegal activity"). Again, the Tenth Circuit has not yet addressed the proper definition of consent under the innocent owner defense set forth in § 881(a)(7).[4]

The above examples demonstrate a lack of clarity in legal writing that—because it hinders the reader and compromises understanding—can be fatal to a persuasive piece. Worse, though, is where inline citations disconnect a *writer* from his ideas. In those instances, even if a reader understands us perfectly, the content of our writing has suffered from our own fragmented concentration. As Garner puts it, "it

4 *U.S. v. Lot Numbered One (1) of Lavaland Annex*, 256 F.3d 949 (10th Cir. 2001).

doesn't really matter whether readers can negotiate their way through eddies of citations—because, on the whole, writers can't."[5]

When writers get distracted by the citations they include in their text, proper development of their reasoning all too often falls by the wayside. For instance, consider the following paragraph from a recent appellate brief, where the author seems to have mistaken parentheticals for prose:

> These facts do not support a legal conclusion that defendant abandoned the property. Compare, Belcher, (defendant in a fight at a tavern, flees the scene leaving his wallet behind; property is abandoned) and State v. Rounds, 73 Or App 148, 698 P2d 71, rev den 299 Or 663 (1985) (defendant who left backpack on private property and was away for 15 minutes had not abandoned the pack); Pidcock, (defendant did not abandon the property until after the police had opened the briefcase).

Or this one, where quotation takes the place of argument:

> Unlike probable cause to arrest, "[t]he legislature has not defined the term probable cause to search[.]" *State v. Anspach,* 298 Or 375, 380, 692 P2d 602 (1984). Probable cause is based on the totality of circumstances presented, *State v. Arana, 165* Or App 454,456-7, 998 P2d 688 (2000), and must be determined from the four comers of the affidavit. *State v. Russell,* 293 Or 469,474,650 P2d 79 (1982). "When addressing probable cause issues in cases where a warrant was issued, [the courts] confine [their] analysis to a 'common-sense view of the affidavit' filed by the police officer." *State v. Moylett,* 313 Or 540, 552, 836 P2d 1329 (I 992), *quoting State v. Coffey,* 309 Or 342, 346, 788 P2d 424 (1990). "The probable cause requirement means that the facts upon which the warrant is premised must lead a reasonable person to believe that seizable things will probably be found within the location to be searched." *Anspach,* 298 Or at 380-81. The facts set out in the affidavit in support of the search warrant here lead a reasonable person to believe seizable evidence probably would be found on defendant's person.

5 Bryan Garner, *Garner on Language and Writing*, 476 (ABA 2008).

See how much more clearly the latter paragraph can make its assertion when the text is limited to the expression of the writer's reasoning and is not confused by the many references to the authority underlying it:

> Probable cause to search—as opposed to probable cause to arrest—has not been defined.[6] Instead, probable cause is based on the totality of circumstances presented.[7] And when addressing probable cause issues in cases where a warrant was issued, courts confine their analysis to a "common-sense view of the affidavit" filed by the police officer.[8] Probable cause means that the facts upon which the warrant is based must lead a reasonable person to believe that seizable things will probably be found within the location to be searched.[9] As explained below, the facts set forth in the affidavit in support of the search warrant here lead a reasonable person to believe seizable evidence probably would be found on defendant's person.

What about the words of the court, quoted in the first version? In that paragraph, the quotes are not persuasive, but merely discursive. If the argument requires a discussion about the facts of a cited case or the reasoning of a court, the use of citational footnotes encourages the writer to actually engage in that discussion, rather than merely using a quote or a parenthetical. In the case of a paragraph like the one above, citational footnotes make clear the fact that, without revision, the argument does not really examine related cases in any meaningful way. Given the chance to remedy that, one's writing can be clearer and more persuasive.

The examples above give an indication of the advantages of placing citations in footnotes. Sentences are shorter and more readable, yet offer better opportunities for using subordinate clauses and varied structure. Paragraphs are more coherent. Poor writing is exposed and can be remedied. And, finally, readers—and writers—can focus on ideas and narrative.

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6 *State v. Anspach,* 298 Or 375, 380, 692 P2d 602 (1984).

7 *State v. Arana, 165* Or App 454,456-7, 998 P2d 688 (2000), *State v. Russell,* 293 Or 469,474,650 P2d 79 (1982).

8 *State v. Moylett,* 313 Or 540, 552, 836 P2d 1329 (I 992), *quoting State v. Coffey,* 309 Or 342, 346, 788 P2d 424 (1990).

9 *Anspach,* 298 Or at 380-81.

For the time being, however, footnoted citations may be verboten in Oregon appellate briefs. Because—though Bryan Garner reports that a majority of the judges he speaks to in every state prefer footnoted citations,[10] and while I am not aware of any Oregon appellate directive that prohibits them—The Bluebook tells us to put our cites in the text, and appellate courts in Oregon endorse The Bluebook. Further, while the Oregon Supreme Court occasionally uses citational footnotes,[11] I have found none in Court of Appeals opinions. Consequently, until the old-school Bluebook (yes, you can still find underlined case names, brought to us by the manual typewriter, in The Bluebook) moves beyond its traditional view of footnotes, brief writers may feel restrained in their use of citational footnotes. And as entertaining as it might be, it seems unlikely that the Oregon appellate courts will provide us with official guidance—or a spat—like that of the judges of the Louisiana 3rd Circuit Court of Appeal.[12] But until one of those things happens—or perhaps until Judge Landau or his colleagues offer less formal guidance in publications such as this one—we are likely to have to continue to slog our way through inline citations and suffer their ill effects on the quality of legal writing.

Inline citations compromise legal writing in many ways, causing longer, less interesting sentences and paragraphs, diminishing readability and disconnecting readers and writers from the ideas and narrative of the writing. Footnoting citations helps to create clearer, more interesting sentences and paragraphs, encourages deeper analysis of relevant precedent and helps readers to stay engaged with a writer's ideas. Objections to footnoted citations are often *pro forma*, standing more for defense of a tradition than for real advantages of the embedded citation form. I, for one, hope that footnote citations are in the future of Oregon appellate writing.

10 Bryan Garner, *Garner on Language and Writing*, 482 (ABA 2008).

11 *See e.g. Hughes v. PeaceHealth*, 344 Or 142, 148 n 6 (2008); *In re Fitzhenry*, 343 Or 86, 90, 91 n 3, 5 (2007); *State v. Cook*, 340 Or 530, 535 n 2 (2006).

12 *Ledet*, 783 So.2d 611.

MY FIRST ORAL ARGUMENT

By Casey Gillham, 2L student at UO Law School

Editor's Note: Casey's oral argument experience did not turn him off appellate advocacy. He won a place on the school's team and competed in the National Appellate Advocacy Competition team in 2009.

The oral argument at the University of Oregon School of Law is a rite of passage for its students. Like the first semester of finals, the oral argument serves as a kind of collective experience. Although each of us presents individually, we feel deeply that we are in it together. Not only does the experience tie you to your current classmates, it also binds you to every former student who has sweated through their clean pressed shirts before entering "the room." Regardless of where a graduate is from or the type of law she practices, we can share the excitement and stress associated with getting up and saying, "May it please the Court" for the first time.

Before entering law school, I had never heard an appellate argument. Not only had I never heard an appellate argument, but I didn't really understand what one was. During the first days of my Legal Research and Writing class with Professor Suzanne Rowe, I assumed that the section on oral advocacy would teach us the skills needed to persuade a jury that an individual charged with a crime was either guilty or innocent.

My first experience with appellate oral advocacy came when the Oregon Court of Appeals held a session at the law school. I sat in the back of the school's courtroom and watched several well-dressed attorneys stand up and present their cases. Each of them appeared relaxed and confident, easily answering the questions tossed out by the judges. None of them appeared to need notes or get stumped by a legal line of inquiry. Thirty-minutes in, I was beginning to think my professors might have been a little melodramatic about the difficulty of getting up in front of an appellate court. It looked pretty straightforward, and how hard could it be…really? After all, I had some experience with public speaking. You do a little prep work, answer some questions, and you're done. No sweat.

Fortunately, Professor Rowe was wise to naïve (i.e. arrogant) students like me. She announced in the next class that all students would

be splitting up into teams of four to practice their oral arguments. As one student presented, the other three would serve as judges. The session would be recorded and we would be required to critique our performance. Again, no sweat.

Except that I was an utter disaster. I was flummoxed by the questions of my peers, and I did not answer a single question succinctly or coherently. The panel of student judges seized on the weaknesses in my argument and wouldn't let go. By the end of the allotted time, I was relegated to reading my outline verbatim, afraid to make eye contact.

The practice session was a painful, but important lesson. The attorneys that argued before the Appellate Court were so good that they made the process look easy, not the other way around. I was embarrassed by my own overconfidence and scared to death of the idea of presenting to real lawyers and judges. My fellow classmates had blown my argument out of the water. What would professionals do? I imagined a public embarrassment rivaled only by something involving tabloid headlines and felony charges.

From that point on, I took copious notes whenever Professor Rowe spoke about oral advocacy. I listened to oral argument excerpts on the United States Supreme Court website. I anticipated as many questions as I could and wrote out detailed answers. I worked diligently to learn the three points of my argument inside and out. I revisited the record daily and reviewed important cases. I wish I could say that I was preparing to thrive, but the truth is that I knew I had to work this hard just to survive.

Finally, the big day came. Dressed in my new suit, I waited outside the courtroom with my classmates and our tutor, Tom. The tension was overwhelming, but Tom did an excellent job of eliciting a smile or two (and keeping us from bolting out the nearest exit). Compulsively, I went over my opening again and again – "Mr. Chief Justice, May it please the court. My name is Casey Gillham and I represent the appellant..." I knew that if I flubbed the opening, it would be tough for me to recover. After what seemed like an eternity, Professor Rowe came out of the courtroom and smiled, "Okay, we're ready for you, Casey." I didn't want to go. I suddenly felt light headed, ill, and like I'd rather go have my toenails removed. But instead of turning and running, I stood up and followed Professor Rowe.

As I approached the lectern, I took a deep breath. My knees were literally shaking but, thankfully, my voice was not. The judges asked insightful questions, but I was now knowledgeable enough about the case to enter into a discussion. I even did an admirable job of answering a couple of questions I had not anticipated. What seemed an eternity of anticipation, became a lightning flash of experience. No sooner had I taken the lectern than my time was up. I sat down, exhausted, but with a sense of accomplishment.

Professor Rowe and the volunteer judges were all very kind with their feedback and critiques. One judge said I had done a good job of treating my argument as a discussion with the court, but I had committed the faux pas of referring to the court as "you guys" (I guess I was feeling a little too comfortable, after all). Another judge stated that she liked my pacing. Professor Rowe mentioned that it was obvious I had done a lot of preparation. The best compliment came from my wife, though. She said, "You made it look easy."

APPELLATE CALENDARS & STATISTICS

OREGON SUPREME COURT
PUBLIC CALENDAR FOR 2009

The following is the public calendar for the Oregon Supreme Court. The calendar is tentative and subject to change. The dates for oral argument, however, rarely change. In 2009, the court will hear argument in January, February, March, May, June, September, and November. The court may set additional argument dates for certain expedited or significant cases that arise during the year.

Consistently with past practice, the court will hold public meetings once per month in 2009. Business conducted at public meetings includes approval of pro tempore, senior and reference judges, approval of various rules, and various other administrative and regulatory tasks. Public meetings are generally held on Wednesdays 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 2009

1 – New Year's Day Holiday
6 – Conference
6 – Public Meeting
13, 14, 16 – Oral Argument
19 – Martin Luther King, Jr. Holiday
20, 21- Conference

FEBRUARY 2009

3, 4 – Conference
4 – Public Meeting

9 – Oral Argument
16 – President's Day Holiday
24, 25 – Conference
25 – Oral Argument

MARCH 2009

2, 3, 5- Oral Argument
17, 18 – Conference
18 – Public Meeting
31 – Conference

APRIL 2009

1 – Public Meeting
1 – Conference
14, 15 – Conference

MAY 2009

5- Conference
5 – Public Meeting
11, 12, 13, 18 – Oral Argument
25 – Memorial Day Holiday
27, 28 – Conference

JUNE 2009

9, 10 – Conference
10 – Public Meeting
10, 11 – Oral Argument
30 – Conference

JULY 2009

1 – Conference
1 – Public Meeting
3 – Independence Day Holiday
21, 22 – Conference

AUGUST 2009

13, 14 – Conference (tentative)
13 – Public Meeting (tentative)

SEPTEMBER 2009

7 – Labor Day Holiday
9, 10 – Conference
10 – Public Meeting
14, 15, 17, 18 – Oral Argument
29, 30 – Conference

OCTOBER 2009

13, 14 – Conference
14 – Public Meeting
19 – Oregon Judicial Conference
28 – Conference

NOVEMBER 2009

2, 3, 5, 6 – Oral Argument
11 – Veterans' Day Holiday
17, 18 – Conference
18 – Public Meeting
26 – Thanksgiving Holiday

DECEMBER 2009

1, 2 – Conference
2 – Public Meeting
15, 16 – Conference
25 – Christmas Holiday

THE OREGON COURT OF APPEALS CALENDAR

By Lora E. Keenan

Unlike the Oregon Supreme Court, the Oregon Court of Appeals does not set an annual calendar in advance. Instead, the Chief Judge and the four Presiding Judges meet early each month to set the oral argument and internal conference schedule for three months hence. (For example, March dates are set in December, April dates are set in January, and so on.)

This article first describes the general practices of the Court of Appeals related to its calendar, followed by any alterations to those practices adopted by the court in light of budget reductions implemented during the close of the 2007-09 biennium. (By the time that the *Almanac* went to press, the Chief Justice had rescinded the March 2009 order closing the courts on Fridays. Although the number of furlough days for staff had at that time been reduced, furloughs were not eliminated; as a consequence, some adjustments to the Court of Appeals usual calendar practices were still necessary during the close of the 2007-09 biennium.) Depending on the budget approved for the courts for the 2009-11 biennium, the court's calendar practices after July 1, 2009, may vary from what is described in this article. Please consult the Oregon Judicial Department website, www.ojd.state.or.us, for updated information.

ORAL ARGUMENT: The court is divided into three merits "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. Each Court of Appeals merits department hears oral arguments on an average of three days each month; oral arguments are heard year-round.

One day of oral argument per month has traditionally been devoted to criminal cases in which the defendant is represented by the Office of Public Defense Services. In addition, in an effort to manage an accumulation of criminal and prisoner litigation appeals, the court in 2008 started adding two further hearing days to its monthly oral ar-

gument calendar, in which the court hears an additional 70 arguments in those case categories.

To respond to budget reductions at the end of the 2007-09 biennium, the Court of Appeals reduced the number of argument days on its April and June dockets, including one day of argument in April that would have been devoted to argument in criminal and prisoner litigation appeals.

Oral argument for a particular case is generally scheduled several months after the last brief has been filed. Certain types of cases (for example, judicial review in land use cases and termination of parental rights appeals) are expedited and will be heard sooner after they are "at issue." The court adds some of those "fast track" cases to each of its regular oral argument calendars.

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 panel compositions 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's oral argument schedule is available online at http://www.ojd.state.or.us/coadocket.

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 arguments 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 a waiver of argument. If one party chooses not to appear, the other side may still argue the case.

The court usually hears oral argument in Salem. The court does not have its own courtroom, and most often hears arguments in the Supreme Court courtroom, but--when that courtroom is not available--sometimes in the Tax Court courtroom or a room in the Justice Building. For the past several years, the court has traveled about once a month, hearing arguments at a law school, college, or high school. In February 2009, the court heard arguments at the Cascade Campus of Portland Community College.

To respond to budget reductions, the court has curtailed its travel outside Salem for oral argument until the fall of 2009 at the earliest. To fulfill commitments to schools that had scheduled oral argument sessions before the budget reductions, however, the court will hear oral arguments at Clackamas High School in March, at the University of Oregon in April, and at Silverton High School in May.

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 all the judges. Full court conference typically, although by no means always, is held during the first week of the month.

The court's motions department meets once a month. Certain motions are required by statute to be heard by a three-judge panel; other motions are sent to the motions department by the Chief Judge or Appellate Commissioner. In addition, the motions department considers some requests for reconsideration of rulings of the 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. 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. A media release that includes notice of all the week's case dispositions on the merits and summaries of all authored opinions is available on the Oregon Judicial Department website at 8:00 a.m. on the release date. (At www.ojd.state.or.us, select "News" and then "Court of Appeals.")

OREGON SUPREME COURT
2008 STATISTICS

Total Number of Filings: 1230

Total Number of Petitions for Review Filed: 1012

Total Number of Petitions for Review Allowed: 75

Total Number of Opinions Issued: 75

SELECTED CASE TYPES OF PETITIONS FOR REVIEW FILED (not all case types included)

Criminal (appeals, post-conviction, habeas corpus and parole):.....820

General Civil: 86

Domestic Relations: 9

Juvenile (dependency, delinquency, and termination of parental rights):.....29

Agency Review: 18

Workers' Compensation: 6

Land Use:.....6

Mental Commitment:..... 3

Probate:.....3

ORIGINAL PROCEEDINGS

Mandamus Filed/Allowed: 92/16

Habeas Corpus Filed/Allowed: 15/0

Quo Warranto Filed/Allowed: 0/0

OTHER PROCEEDINGS

Ballot Measure:.....12

Tax: 4

Certified Questions:.....3

Death Penalty: 0

Professional Regulation: 89

OREGON COURT OF APPEALS
CASES FILED 2008

TOTAL 3108

SELECTED CASE TYPES (not all case types included)

Criminal (including appeals, habeas corpus, post-conviction relief, and parole): 1830

General Civil: 402

Domestic Relations (including adoption): 185

Agency Review (not including workers' compensation or land use): 212

Workers' Compensation: 110

Land Use: 34

Juvenile (including dependency, delinquency, and termination of parental rights): 193

Mental Commitment: 83

FED: 28

Probate: 31

OPINIONS ISSUED 2006 - 2008

2006 420

2007 400

2008 436

ALMANACIA

2008 ALMANAC CONTEST WINNERS

ALMANAC CONTENDERE 2008 WINNER

As those of you who keep up with important developments in the appellate world know, the 2007 Contendere was won by a NON-OREGON lawyer, Oliver Wendell Brandeis. Mr. Brandeis, on learning of his victory, remarked that he had always found Oregon's appellate lawyers a few steps behind their Washington counterparts and that he was considering setting up shop in Salem as the competition was "weak."

With that stinging indictment ringing in his ears, last year's editor Scott Shorr, urged greater participation and effort on the part of the home team. Dallas DeLuca rode to the rescue, answering correctly all 5 questions related to the history of the Oregon appellate courts. Perhaps not coincidentally, Dallas is a former clerk to Justice Tom Balmer, himself a history buff. We wonder whether there was any collaboration there? If so, we applaud it. Way to go, Dallas!

MOVIE QUOTE AT P. 37 OF 2008 ALMANAC

Last year the Almanac's first editor and our regular (I considered but discarded the modifier "normal") commentator on civil cases from the Oregon Supreme Court, Keith Garza, challenged our readership to match the following quote to the movie:

By Grabthar's hammer, by the sons of Worvan, you shall be avenged!

Jerry Larkin, who apparently shares a love of movies and an excess of free time with Keith, was our winner, correctly identifying the movie as the 1999 blockbuster GALAXY QUEST starring Tim Allen and Sigourney Weaver. Jerry declined the advertised prize of turtle coprolite (30 million year old turtle dung) but enthusiastically sought recognition in this year's Almanac. Good job, Jerry!

THE ALMANAC CONTENDERE: 2009

By Judy Giers

This is a resume builder! Don't miss your chance to put "Winner, 2009 Appellate Almanac Contendere" on your resume. Submit your answers to next year's editor, Jeff Dobbins (jdobbins@willamette.edu) before February 1, 2010:

In this arguably Sesquicentennial year of the Oregon Supreme Court, answer these questions about the court's earliest days (including when Oregon was a provisional government and a territory of the United States):

1. What does "sesquicentennial" mean and does your spell check recognize the word?
2. Who was the first woman tried for murder in Oregon?
3. Who was the first African American advocate before the Oregon Supreme Court and what case did he/she argue?
4. Who created the stained glass ceiling in the courtroom of the Oregon Supreme Court? Has it ever been damaged, and, if so when?
5. What was the original salary of the Chief Justice of the Oregon Supreme Court?

HOW TO BUY THIS BOOK:

You can get your hands on a copy of this book (while supplies last) by contacting the editor, Judy Giers, at Giers Olsson PC, 1430 Willamette Street, No. 562, Eugene, Oregon, 97401, or at jgiers@goappeals.com.

This book is provided free to the members of the Oregon State Bar Appellate Section. To get next year's Almanac, join the section – we are a fun bunch!

CONCLUSION

The fat lady is done singing – you can remove your earplugs.

All the best, Judy Giers