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 5

OREGON APPELLATE ALMANAC

2010

A delicious selection of organic, locally-sourced, and antibiotic-free-range articles, summaries, commentaries, and calendars for the Oregon Appellate Practitioner, prepared and served by the Appellate Practice Section of the Oregon State Bar

Maître D' & Editor: Jeff Dobbins

OREGON APPELLATE ALMANAC

VOLUME 5 – 2010

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2010

MENU OF OFFERINGS

SPECIALS OF THE DAY

NUTRITIONAL SUPPLEMENTS

DESSERT

EDITOR'S NOTE

I'd like to extend my thanks to all the authors of the material in this year's Almanac for the investment of time and thought into their work, and for their patience in awaiting its final production. Any delay in final production of this Fifth Edition of the Almanac is solely my own. Thank you to all the members of the Appellate Section, and the appellate judges of the state, who continue to help make this such a marvelous state in which to practice appellate law.

One advantage of issuing the Almanac so late in the year is that I can use this opportunity to invite all readers to the Willamette Law Review's Panel on Oregon Statutory Interpretation, to take place at Willamette University College of Law on January 27, 2011, at 5:00 p.m. The lead speaker for the symposium will be Abbe Gluck of Columbia University, who has written two recent law review articles on the fascinating topic of statutory interpretation methodologies as positive law, with a particular focus on Oregon (see Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine, 120 Yale L.J. - (forthcoming May 2011); The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualim, 119 Yale L.J. 1750 (2010)). Joining her will be former Deputy AG Pete Shepherd, and our most recently elected Oregon Supreme Court Justice, Jack Landau, whose own academic and judicial work on Oregon interpretation is well known throughout the country. I'm looking forward to participating in the event, and hope to see everyone there.

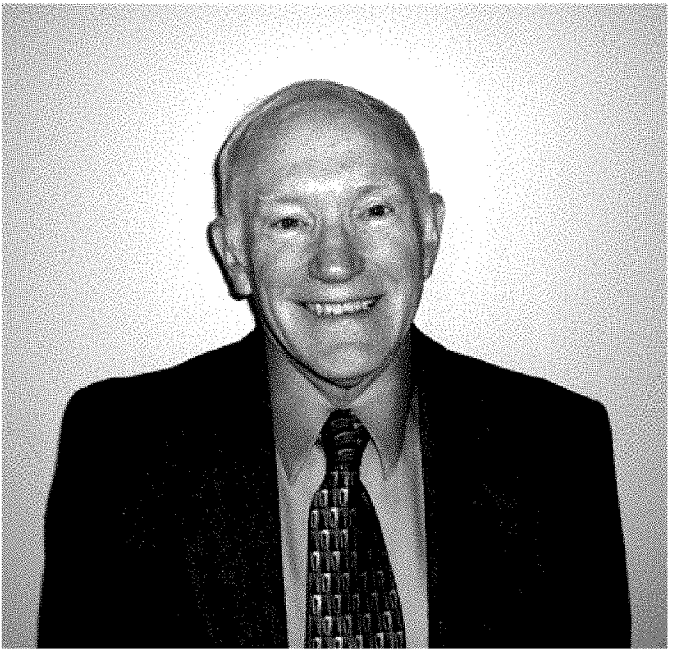
Jeff Dobbins
Willamette University College of Law

IT'S NOT TOO EARLY TO THINK ABOUT NEXT YEAR

Do you want to see your name in print? If you have an article or note, a screed, a funny or poignant story or anecdote that might be of interest to members of the Appellate Practice Section (or that you just want to get off your chest), send it to next year's editor, Harry Auerbach, at Harry.Auerbach@portlandoregon.gov. We're looking for submissions by February 1, 2011.

APPETIZERS

DEDICATION:
HON. WALTER I. EDMONDS, JR.



The Appellate Practice Section of the Oregon State Bar dedicates this 2010 issue of the Appellate Almanac to Judge Walter I. Edmonds, Jr., who retired from the Court of Appeals on December 31, 2009, after 21 years on the Court. Judge Edmonds was appointed to the Court in 1989, and was reelected to that position in 1990, 1996, 2002, and 2008. The appreciations that follow represent only one small part of the gratitude that the section and its members have for Judge Edmonds' long service to the State of Oregon.

JUDGE WALT EDMONDS: AN APPRECIATION

By Jack L. Landau

On December 31 of last year, my colleague and friend Judge Walter Edmonds retired after 21 years of service on the Oregon Court of Appeals. His tenure on the Court of Appeals was the longest in the court's 40-year history. And his influence on the court will be felt for many years more.

Walt Edmonds joined the court in 1989 after a distinguished career as a circuit court judge, district attorney, and trial attorney in private practice. A native Oregonian, Walt grew up in the Roseburg area and graduated from Roseburg High School in 1961. He attended Linfield College and, after briefly considering a career in journalism, decided to attend the Willamette University College of Law. Following graduation in 1967, Walt packed everything he owned into his 1957 Ford and moved to Madras, where he had been offered a job as an associate with a solo practitioner.

Within the year--and at the ripe age of 25--Walt was appointed Jefferson County District Attorney. Walt earned a reputation as a hands-on DA. Literally. He regularly rode along with local sheriff's deputies and, on more than one occasion, personally wrestled suspects into submission to the authorities.

Walt's work as the county DA caught the attention of Redmond attorney Ron Bryant, who offered him a job as an associate and, later, partner in the firm of Larkin & Bryant. During Walt's years at the firm, he tried cases throughout central and eastern Oregon before such judicial notables as John Copenhaver, J.R. "Doc" Campbell, and Robert Foley--the latter two of whom, coincidentally, later served on the Oregon Court of Appeals.

In 1975--and at the remarkably young age of 32--Walt was appointed to the 11th Judicial District Circuit Court, which at the time covered six entire counties (Deschutes, Gilliam, Grant, Wheeler, Jefferson, and Crook). For the next 14 years, he "rode circuit" and tried cases throughout central Oregon. Then, in 1989, Governor Neil Goldschmidt appointed him to the Oregon Court of Appeals.

Throughout his 21 years on the Court of Appeals, Walt worked on Department 3 (known as "Green Department" for the green cover sheets that are placed on draft opinions from that department), one of the court's three-judge panels. From 1999 until his retirement, Walt served as the presiding judge on that panel.

During his tenure on this court, Walt was one of the most hard-working and productive judges in its history. He authored nearly 2,000 opinions, including over a hundred concurrences, an even larger number of dissents, and hundreds of *per curiam* opinions.

Walt has the distinction of being one of the court's most influential judges as well. Among the opinions that he authored for the court are such familiar cases as *Clarke v. OHSU*, *Williams v. Phillip Morris*, *Waddill v. Anchor-Hocking*, and *O'Donnell-Lamont and Lamont*, to name only a few of his most recent opinions, each of which served as a solid foundation for important and far-reaching Supreme Court precedents.

I find it interesting to observe in Walt's opinions a couple of themes. First, there is Walt's careful attention to details. Particularly in statutory construction cases, his opinions tend to reflect a concern for the faithful--sometimes almost literal--adherence to the wording of the legislation. But it would be a mistake to think that this approach to statutory construction is merely mechanical; rather, it is a product of Walt's deeply felt concern that we judges respect the will of the legislature. Second, there is Walt's interest in history and its influence on his approach to constitutional cases. Walt took seriously the Oregon Supreme Court's admonition in *Priest v. Pearce* that we must attempt to reconstruct the intentions of the framers of the Oregon Constitution, regardless of where those intentions lead us today. Again, this approach to constitutional interpretation was not based on a wooden historicism; rather, it was based on Walt's profound concern that we judges respect the will of the people who adopted the state's constitution.

Walt's influence goes well beyond his published opinions, though. And I think that, if anything, this is what we who worked with him on the Court of Appeals are going to remember most--and miss most--about him. What I am referring to is how Walt has served as an example to us all.

Walt was demanding--of himself and of his colleagues. This was not because Walt wanted to be difficult. It was because he never forgot that, behind each case and each set of briefs, there are real people and real businesses waiting for our decisions, as well as practicing lawyers and trial judges looking to us for guidance in determining how the law will work in future cases.

I do not know anyone who so carefully and thoroughly--even relentlessly--prepared for oral argument and opinion conference, reading and rereading briefs, preparing written summaries for his panel and staff, preparing and evaluating draft opinions, and reading and summarizing opinions approved to go down. Walt wanted every decision to be correct, and clear, and useful, and to bring credit to the court. That is true, by the way, whether or not it was his opinion. (In that regard, it's perhaps worth noting that, based on my unscientific survey of our records, Walt referred more opinions to full court than any other single judge.) I confess that I occasionally grumbled at Walt's memos, in which he outlined his concerns about an opinion or an issue. But I do not hesitate to acknowledge that his efforts made me a better judge, and I dare say that each and every one of my colleagues would say the same. We are all better for Walt's efforts.

Walt was an independent and fearless judge. If he thought an issue was important, he staked out a position in writing and adhered to it whether it was joined by nine other judges or none. A number of those dissents, as it turned out, proved the basis for a reversal by the Oregon Supreme Court. *Burge v. Palmateer*, *Schmidt v. Mt. Angel Abbey*, and *State v. Stoneman* are only a few examples from the many that could be cited.

At the same time, although Walt could be stubborn, his stubbornness never failed to yield to a deeper commitment to the truth and to a fair and accurate application of the law. I can recall once when I was a member of Walt's panel and submitted a draft opinion with which Walt disagreed. He dissented on one ground, and I replied and kept the majority. Walt submitted a second dissent on a different ground, and I replied and kept the majority. This went on for the better part of a couple of months until one day Walt came into my office and said rather sheepishly: "If you want to jump up and down and swear at me and pull out what remains of my hair, I will understand, because I now think I understand why your original opinion was correct. I'm

ready to vote with it." I was grateful for his vote, to be sure. But as I look back on the occasion, I am even more grateful for Walt's example of grace and humility.

Fortunately for all of us, Walt's retirement does not mean that he will disappear. He plans to continue working as a senior judge, providing assistance to both the Court of Appeals and to trial courts around the state in the coming years. We will all benefit from his enduring influence and his example of careful and conscientious commitment to the work of the courts.

WALTER EDMONDS: JUDGE AND MENTOR

By Former Law Clerks to Judge Walter Edmonds

When a judge retires, we often speak of his or her legacy to a particular court, or to the law. No less important, and perhaps even more important at the Oregon Court of Appeals, is the impact a judge has on the new lawyers who come to the court as judicial clerks. Most of these clerks are recent law school graduates, and the judge becomes the first real example of how to conduct one's self in the legal profession. What a clerk learns in that clerkship profoundly affects his or her conduct throughout the rest of his or her legal career.

Judge Walter Edmonds quietly mentored and guided each of his clerks. He was first and foremost an example of integrity, hard work, and kindness. In drafting opinions, he was thorough, methodical, and painstakingly attentive to the potential effects that his words would have on the body of appellate law. But this is not all he represented to his clerks, for Judge Edmonds is a deeply religious man, and for many of his clerks, he was an important example of how to be true to the law and still be true to one's faith.

Today, we share some of the messages that Judge Edmonds' clerks have shared in tribute to him:

"I will always be grateful that I had the opportunity to work for Judge Edmonds my first two years out of law school. He was a kind and patient teacher, and guided me carefully through the demanding work of the court. His work ethic is amazing and inspiring--I will never forget the heavy bags of briefs he took home every night, and even on vacation. I also appreciated the way he was always teaching: during pre-argument conferences when he would ask the clerks about the issues raised in each case, during post-argument conferences when he would talk about the arguments the attorneys had made, and even during oral arguments, when he would educate the attorneys by patiently helping them, with perceptive questions, to improve their reasoning. I credit Judge Edmonds with helping me greatly improve my writing and analytical skills, and giving me a strong foundation for the rest of my career. He is an extraordinary role model for what it means to be a lawyer, and I can't thank him enough for that!" ***Shannon Terry***

"When I talk to people about my clerkship, I am often reminded of how unique that opportunity was. It is a rare thing to have a job in which your employer has such an interest in your development and success as a professional. The opportunity to engage in the intellectual debates and critical thinking underlying the judicial process was an invaluable experience for me. Moreover, I truly enjoyed and benefited from my interactions and collaboration with the other judges and the staff at the court.

"I will be forever grateful to you for the opportunity to work with you at the court. I hope that it comes as no surprise to know that when I talk about my time working for you, my description generally includes the words respect, integrity, intelligence, and kindness. With such an accomplished career, it may be difficult to fully appreciate the extent of your influence, especially with respect to clerks. As just one of the many individuals impacted by you over the years, I hope that you realize how far-reaching your influence has been, and I hope that it is something that gives you a sense of pride as you look back on your career." ***Jennifer Gingrich***

"I began my clerkship for Judge Edmonds in 1992. For me that was two houses, three children, and many billable hours ago. However, I still happily remember those years in great detail; riding the elevator to the third floor, conversations with staff, debates with clerks, hours of research, opinions written and published, opinions written and rejected. I could write about the training I received from Judge Edmonds, in writing, analysis, and advocacy--all of which would be true and have greatly impacted my career. I could write about my friendship with Judge Edmonds, which has lasted many years. But in addition to all these, I left the Oregon Court of Appeals with something greater that I received from Judge Edmonds--a sense of vision.

"It was written long ago that without a vision, my people perish. Judge Edmonds has lived his life with a compelling sense of vision. You cannot spend any significant time with him without feeling it and coming to understand it. That vision permeates everything he does. He would share with me the importance of not only becoming a great lawyer, but also a great person. Because of Judge Edmonds, I left the Oregon Court of Appeals with a clear vision about my role as a lawyer, an advocate, a professional, and also as a community member,

a husband, and a father. I look back at that time and marvel at how shaped one can become in just two years in the hands of a master." ***Steven D. Bryant***

"Thank you for giving me an opportunity to clerk for you. I know I was not the traditional clerk, as I had worked in Japan before arriving at the Oregon Court of Appeals. I truly appreciate and value the experience I gained while working at the Court and specifically for you. You were able to help me hone my writing skills and to understand how to write persuasively and conclusively. I am now working as the Chief Intellectual Property Counsel at Carrier Corporation and I believe that part of the reason that I have advanced to this position is the experience that I gained while working for you at the Oregon Court of Appeals. Thank you so much for being an awesome teacher and mentor!" ***Lisa Bongiovi***

"Hard to believe it's been over 20 years since you hired John Bachofner and me as your first clerks at the Court of Appeals. I often think back fondly on my time working for you, and I wish you the very best." ***Sim Rapoport***

"I am deeply grateful for your insightful leadership during my 1990-92 service as one of your judicial clerks. By way of an informal survey that I have conducted during the last 20 years, I can safely say that I am one of a small number of people who truly enjoyed law school. I share this anecdote with you, because my work for and with you was even more rewarding and enlightening than my years in school. I often have told my family and colleagues that you were my foremost legal writing instructor. My co-workers are fond of saying that they can see my unique writing style a mile away, thanks to you. Your calm, respectful, and rational approach to oral discourse also has profoundly influenced how I approach a wide range of situations, legal and otherwise. I credit you (and Judge Joseph, bless him) for helping me to develop written and oral advocacy into highly useful talents that have blessed me professionally and personally (an arguably unintended consequence of this experience is that I very liberally use the 'red pen' to edit other people's documents, something that is not always entirely welcome!).

"While my memories of the specific cases that we worked on together have faded from my mind's eye, the impressions of your integrity,

thoughtfulness, intelligence and humor remain vivid. Much of the wisdom that you shared with me then took root years after I left the court. For example, I cannot hear the phrase, 'let's agree to disagree,' without thinking of you. I have used this saying to gently diffuse any number of potentially contentious conversations, at work and at home. Thank you for being such an effective role model for me and for our profession." ***Jo Anne Long***

"I am privileged to have clerked for you and received much more from the clerkship than you did. I have appreciated your tireless devotion to the bench and bar here in Oregon. Your Godly wisdom and advice is always welcome, and I count it a privilege to be mentored by you." ***Dan Schanz***

"I can't think of a better way to have started my legal career (as short as it has been!) than with you as a guide and mentor. I learned from you to be thorough in my analysis of a case and I learned what an intermediate appellate body is really all about. Most important to me, you showed me that it is important to stand up for what I believe is right and to never be ashamed of one's beliefs--even if they are not popularly-held beliefs. Your example in that regard has helped me in many of my roles in life." ***Laura Walhood***

"My two years working for you have proved to be the best possible training years for my ongoing work in the law. I am (now) very thankful for your "bleeding" red ink. It taught me how to write and analyze better. I'm sure you will be missed by the court--probably more than they know." ***Jill Smith***

"I'll always be grateful to Judge Edmonds for hiring me fresh out of law school and giving me such a wonderful beginning for my legal career. It was an invaluable way to learn about many areas of law and find out how judges analyze cases and make decisions. That job also provided an opportunity to work with great editors. Perhaps most importantly, I learned a lot about integrity and ethics from Judge Edmonds." ***Karen Lundberg***

"To me you have always been legend. As a young girl in Central Oregon, you were The Judge--the judge who was well known in Christian circles and maintained the respect of those beyond those circles. You were also the 'the judge' that propelled me into a desire to be a lawyer myself.

"From the very first day [of my clerkship], you treated me with respect and patience. You were confident in me so I became confident in my work. And so it was every day over the many years I worked for you. I loved working for you!

"While it was rare, I enjoyed hearing you tell stories of being a young prosecutor in Prineville, of your heroic escapades as a trial judge and your early days on the Court of Appeals. Once when you gave a tour to students, you pointed to the wall of books in your room and told them that our work was in them. I have held on to that tangible aspect of my work at the court ever since. Role-model, employer, mentor and friend, you remain legend to me." ***Ginger Fitch***

Congratulations on your retirement, Judge Walter Edmonds, and thank you for all your contributions to the court and its community over the years!

APÉRITIF

2009 STATE OF THE COURT OF APPEALS

INTRODUCTION--THE OREGON COURT OF APPEALS AT 40

In July 2009, the Oregon Court of Appeals passed a major milestone: Forty years of service to the citizens of Oregon. Established by statute in 1969 as a five-judge court that was created to help relieve the burgeoning caseload of the Oregon Supreme Court, the Court of Appeals has evolved into a workhorse of the Oregon judicial system.

It has been my practice to report each year to those who follow the work of the Court of Appeals. The focus of the court's annual report varies each year. This report, written at the end of the most recessionary decade in the nation's economic history, addresses three interrelated topics. First, what is the court's current workload and how has it evolved throughout the years? Second, how can the court improve its institutional efficiency in challenging economic times, when, if anything, the public's need for timely justice is more pressing than ever? And, third, how can the court best ensure public trust and confidence in relationship to institutional performance? A discussion of the first issue will set the stage for the other two.

Before delving into those topics, I would like to acknowledge two additional milestones. First, on December 31, 2009, the Honorable Walter Edmonds, the longest-serving judge in the court's history, retired from the bench. We have honored, and will continue to honor, his service to the court in other forums, but it is appropriate to remark here that Judge Edmonds has left an enduring legacy. His countless contributions to this court's work, including a peerless work ethic, rigorous analytical skill, and an overarching commitment to quality decision making, transcend the multitude of outstanding opinions that he has authored. It has been a great honor for Judges Edmonds' colleagues and friends at the court to have served with him. Our regret is tempered by the prospect of his future service as a senior judge with the court and the appreciation that he has well earned the next chapter of his life and the many fulfilling opportunities that it will bring to him and his family. I speak for all his colleagues in thanking him and wishing him well.

Second, on January 7, 2010, Governor Ted Kulongoski announced the appointment of Rebecca Duncan to the Oregon Court of Appeals to fill the vacancy created by Judge Edmonds' retirement. We echo the comments that the Governor made in announcing Judge Duncan's appointment to the court:

> "Rebecca Duncan is an outstanding appellate lawyer with significant criminal and constitutional law experience, making her eminently qualified to serve on the Court of Appeals[.] Her familiarity with the volume and substance of the work before this court means she can hit the ground running and make immediate and meaningful contributions to one of the hardest working courts in the country."

We are very grateful to the Governor and his staff for their strong support of the mission of the Court of Appeals, as reflected by the timely and auspicious appointment of Judge Duncan. She will be an excellent judge and a wonderful addition to our court.

A. THE WORKLOAD OF THE COURT OF APPEALS: THEN AND NOW

A quarter century ago, then-Chief Justice Edwin Peterson and the late Chief Judge George Joseph wrote separate, but intertwined, articles for the *Oregon State Bar Bulletin*. The primary focus of both articles was the seemingly perennial debate over the validity and necessity of the Court of Appeals' practice of affirming without opinion (AWOPing) trial court and administrative agency decisions. Both jurists defended the practice against criticism. My purpose here is not to revisit that debate. Rather, I am struck, based on the subtexts of both articles that, at least superficially, little has changed with respect to the core workload and production of the Court of Appeals in the span of a full generation. A few illustrations will make the point. According to the articles, in 1983, the Court of Appeals closed 3,423 cases, including 2,073 case dispositional decisions (after briefing and consideration by at least three judges), and it issued 544 authored opinions. Adjusted for current case-counting standards (113 of those opinions were two pages or less in length and, thus, in 2009 would be counted as *per curiam*, not authored, opinions), the number of authored opinions in 1983 was 431. In 2009, the court closed 3,609 cases, issued 2,173

case dispositional decisions, and issued 503 authored opinions. By any accepted measure, the court was then, and remains now, one of the busiest, most productive, and most overworked, appellate courts in the nation.

But, on closer examination, significant changes have occurred over that period. In 1983, the court produced a very high number of opinions that were fewer than four pages long. By today's case-counting standards, the court produced at least one hundred more *per curiam* opinions and fewer AWOPs than it did in 2009. On the other hand, in 2009, the court's opinions filled at least 500 more pages than they did in 1983. The upshot is that the court today is producing fewer short opinions and more and significantly longer authored opinions than it did earlier in its existence. Those of us who have examined this trend view it as a product of increasingly complex and sophisticated appellate practice, especially in criminal and collateral criminal matters, which, in response, has required greater elaboration in written opinions. The net effect has been a greater demand for rigorous and sophisticated analysis layered on an already crushing caseload.

What is perhaps most remarkable is that the number of judges on the court--ten--remains the same as it did in 1983 and, indeed, has not changed since 1977. The Chief Justice's description in his 1983 article of the effect that the court's workload had on its judges was striking and remarkably candid. Referring to the judges of the Court of Appeals, he said:

> "Man, do they work hard. They read briefs, opinions and other materials at every opportunity. They are serious about their work. Unfortunately, they have little else to be serious (or happy or sad or grateful) about, for they have time for little else.
>
> "But they are tired. And a little discouraged. And unhappy. There is no evidence--not a shred--that their lot will improve. They can confidently expect that the demands of their jobs will continue, unabated, until they retire . . . or die . . . or leave office. If I were a judge on the Court of Appeals, I'd end my misery and quit. They could earn twice as much and work half as hard in private practice.

"I have scratched my head and said to myself, 'Why do they do it?' I don't know but we're lucky to have them."

Strong words, indeed, and yet they ring true. Even so, every one of my colleagues, like our predecessors, is extremely grateful for the privilege of serving the public as a member of the Court of Appeals. We will not quit, either from discouragement or overwork, but the time for stoicism is long past. The question, more fundamentally, is what kind of appellate justice system do Oregonians, as heirs to a free society that is subject to the rule of law, want to have? Justice will inevitably suffer when it is chronically underfunded. In the Oregon appellate court system, the dysfunction of inadequate funding has long required the court to compensate by producing a high number of decisions with no visible reasoning whatsoever, namely, AWOPs. In a society built on respect for public justice, all judicial decisions should be transparent and visibly reasoned, even if only in a short opinion. But, even short opinions, to be written and analyzed correctly and with clarity, require a substantial resource investment, one we cannot afford with any hope of keeping reasonably current on our caseload in light of chronic resource shortages.

Beyond AWOPS, the court has coped over the years by ceding to requests for lengthy extensions of time in briefing, especially in criminal and prisoner appeals. When it takes, as it often did a few years ago, ***several years*** to brief a run-of-the-mill criminal appeal, everyone--victim, defendant, and society--suffers from the delay of closure and justice. This adaptation to dysfunction, although less visible than the AWOP, is even more insidious. But there is more. After they are fully briefed, cases sometimes wait six months or more before they are submitted to the court for oral argument, not to mention adjudication. In the meantime, real people are waiting too long for decisions that affect their lives, while our judges and staff struggle to keep up as best they can.

The problems that I have described are not unique to Oregon. They are symptoms of a national phenomenon, exacerbated by the budget crises that presently face almost all state courts. But many states have done a better job of acknowledging the critical status that courts occupy in a free society, especially in tough times. In Colorado, for example, the state intermediate appellate court receives on average roughly three-quarters of the number of cases filed each year in the

Oregon Court of Appeals. However, after that court conducted a workload study in 2005, the Colorado legislature increased the size of the court from 16 to 22 judges, plus corresponding staff, in its next regular session. What that means--and the trend is by no means unique to Colorado--is that a court with fewer appeals than the Oregon Court of Appeals has more than double the numbers of judges and staff to manage its caseload than its counterpart in Oregon.

As many of you know, with the assistance and stewardship of the National Center for State Courts, we are in the process of conducting a similar workload study for the Oregon Court of Appeals. There can be little doubt that the study will confirm what we already know, and what the Chief Justice knew in 1983. The question is, what will be done about it? With the support of Chief Justice Paul De Muniz, who has made this issue a priority, we anticipate that we will ask the 2011 Oregon Legislature for at least one additional three-judge panel for the court, plus corresponding staff. In tough economic times that may not happen, but, if it does not, it will not be for lack of effort. This takes me to my next point, that is, what must the Court of Appeals do to deliver justice in the most efficient way possible in these difficult budgetary times?

B. EFFICIENCY MEASURES: SAVINGS WITHOUT SACRIFICING JUSTICE

(1) Budget Background and Legislative Changes

In light of budgetary challenges resulting from significant shortfalls in the current biennium, in 2009, the Court of Appeals developed a legislative package designed to enable the court to ensure meaningful appellate review in light of chronically inadequate resources.

The Legislative Assembly was responsive to the challenges facing the court and enacted our proposed legislation with few alterations. After passing both houses, the bill comprising those changes--SB 262--was signed by the Governor on June 4, 2009. In that bill, the legislature amended ORS 2.570 to allow the court, as needed, to decide cases in two-judge panels (with a third judge added to break a tie vote) or use up to two pro tem judges in cases decided by three-judge panels. In addition, the bill amended ORS 19.415 to permit the court to exercise *de novo* review on a discretionary basis, in much the

same way that the Supreme Court currently employs that standard. This amendment reflects the reality that we can no longer afford being one of the few state appellate courts that provides universal *de novo* review of trial court decisions in equity cases.

SB 262 contained an emergency clause, and the amendments to ORS 2.570 are presently effective. Under section 3 of SB 262, however, the amendments to ORS 19.415 apply only to cases in which a notice of appeal is filed after the effective date of the act.

The Court of Appeals has adopted temporary amendments to the Oregon Rules of Appellate Procedure (ORAPs) in connection with the amendments to ORS 19.415. The ORAP amendments may be viewed online at http://tinyurl.com/denovoamendments. Among other things, those amendments set out a nonexclusive list of items that the court may consider when deciding whether to exercise its discretion to engage in *de novo* review. As temporary amendments, those amendments will go through the next regular cycle of the Oregon Rules of Appellate Procedure committee, in the spring of 2010, and will be open to public comment before becoming permanent. The court hopes that the permanent amendments will be improved both by comments submitted by members of the bar and by some experience with SB 262 and the temporary amendments in practice. Comments on the amendments may be directed to ORAP Committee staff liaison Lora Keenan, lora.e.keenan@ojd.state.or.us or Oregon Court of Appeals, 1163 State Street, Salem, Oregon 97301-2563.

In addition to changes relating to *de novo* review, the court also has changed, or has initiated changes to, four other critical court processes and structures.

(2) Reduction in Oral Argument Time for Civil Cases

On December 23, we announced the adoption of temporary amendments to ORAP 6.15. Under these amendments, all cases set for oral argument in the Court of Appeals will be allotted 15 minutes per side. Under an unchanged provision of the rule, requests for additional time must be made by written motion filed at least seven days before the time set for argument. The Chief Judge Order 09-10, adopting and setting out the amendments, may be viewed online at

http://tinyurl.com/cjo0910. The amendments are effective February 1, 2010, and will expire on December 31, 2010, if not adopted as permanent amendments.

(3) Reductions in Brief Length Limits and Adoption of Word Count Measure

In addition, we have submitted proposed changes involving brief length and length counting protocols to the Oregon Rules of Appellate Procedure Committee. The purpose of the changes is to reduce brief lengths to a word count limit that is the equivalent of 35 pages for appellant's, respondent's, and combined opening briefs, and 10 pages for reply briefs, using the permissible font types and a 14-point font size. Requests for over-length briefs will be decided by the Chief Judge in accordance with the current ORAP procedure. The proposal is consistent with briefing protocols in the Ninth Circuit Court of Appeals, and it would place our brief length limits in the median of limits for intermediate appellate court limits nationally. If and when these amendments are adopted, they may be viewed on the Oregon Judicial Department website at http://www.courts.oregon.gov, under "Court Rules."

(4) Changes to Protocol for Requesting Oral Argument

We also have proposed an ORAP amendment that would change the current opt-out oral argument system to an opt-in system. Although oral argument would remain universally available in appeals where all sides are represented by counsel, the notion is to ask parties to consciously decide whether oral argument would add value to the decisional process by requiring them to ask for it before it is set, rather than to waive oral argument after it already has been set. We would continue to set all attorney-represented cases for submission on a date certain, and we would have argument on that date for any cases where oral argument has been requested in accordance with the proper procedure. Cases not argued would be taken under advisement or decided as is now done. To effect these changes, we are submitting a proposed revision to ORAP 6.05 to the Committee for consideration and comment. Again, if and when adopted, this revision may be viewed on the Oregon Judicial Department website at http://www.courts.oregon.gov, under "Court Rules."

(5) Restructuring of Motions Department

Finally, we have streamlined the court's Motions Department. As discussed above, the 2009 Legislative Assembly amended ORS 2.570 to allow the Chief Judge of the Court of Appeals to order that a department of the court consist of two judges unless a third judge is necessary to break a tie vote by the department. Senate Bill 262, § 1 (2009). By Chief Judge Order 09-07, dated October 12, 2009, and effective January 1, 2010, Motions Department membership has been reduced from three to two judges, consisting of the Presiding Judge and another judge. The second judge will rotate out of the assignment periodically so as to give other judges an opportunity to participate in decisions involving the thousands of substantive motions that are filed with the court each year. The order may be viewed online at http://publications.ojd.state.or.us under the heading "Order Restructuring the Court of Appeals Motions Department."

Summary

These are just some of the difficult decisions that we have made and will continue to confront. As always, the judges and staff of the Court of Appeals will do everything we can to provide the best possible work in the circumstances. In the meanwhile, we must, and will, do a better job of explaining our role in a justice system that works and has the respect of the public. And, that requires us to be accountable, to continue to work hard, and to be transparent in our decisions and processes. That brings me to the final subject of this report: process improvement and institutional performance of the court.

C. APPELLATE COURT PERFORMANCE MEASUREMENT: TRANSFORMING PROCESSES AND BUILDING TRUST

Historically, courts have not found change easy. Courts are institutions whose hallmarks have been consistency, stability, predictability and, sometimes, isolation. But the acceleration of cultural and technological change in society in the last generation has created a different dynamic, one that has required us to justify and explain ourselves in new ways. Among other challenges, courts have struggled to keep up with the private sector in the development of functional technological support for their work. They also have been caught in a resource bind, where the demands of their traditional

case-deciding role are in competition with the need to reach out to external stakeholders to explain the importance of public justice in a free society.

Apropos of those developments, in 2004, the Oregon State Bar created a task force to study Oregon's state appellate courts. Although the resulting report was generally positive in its appraisal of the Oregon Court of Appeals, it identified resource-driven delay in resolving cases and a lack of communication and transparency in internal processes as two areas where improvement was needed. Those concerns were legitimate and, frankly, they mirrored our own concerns.

Since then, the court has taken several steps to address those issues. First, we have updated our internal processes in conjunction with the implementation of a new computerized case management system, in the process eliminating numerous redundancies and archaic case and file handling practices. *The Oregon Court of Appeals Internal Practices 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. Copies of the Guidelines may be obtained online at the court's web page on the Oregon Judicial Department's website at: http://tinyurl.com/practicesguidelines.

Second, we have implemented an electronic Appellate Case Management System, which 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.

Third, and in harness with the Appellate Case Management System, the court has undertaken a performance measurement project that will help us to be more transparent and accountable. Through that project, we have identified three core values in the planning and performance of our work. The first is quality: fairness, equality, clarity, transparency, and integrity of the judicial process. The second is the resolution of cases in a timely and expeditious manner. And the third, but not least, is the cultivation of public trust and confidence, which fundamentally flows from the first two values. In order to measure its achievement of those values, the court has adopted the following four key performance measures.

MEASURE 1. APPELLATE BAR AND TRIAL BENCH SURVEY

Definition

The percentage of members of the Oregon appellate bar and trial bench who believe that the Court of Appeals is delivering justice, both in its adjudicative and other functions.

Purpose

Trust and confidence in the judicial process are enhanced when a court demonstrates that it adequately considers each case and resolves it in accordance with the law. That involves balancing the expeditious resolution of a case with thoughtful review of its unique facts and legal complexities in the context of the parties' assignments of error and arguments, as well as existing precedent. Trust and confidence in the judicial process are also enhanced when a court is accessible. Physical access is important, but a court user's perception of the broader sense of accessibility also is influenced by the court's procedures and fees and by the effectiveness of the court's communication with its stakeholders about court procedures, operations, and activities. Oregon's trial court judges and its appellate bar are uniquely positioned to assess accessibility to the court and whether the court is fulfilling its responsibility to consider each case and resolve it in accordance with the law. Their responses about how well they believe the court is fulfilling its duties are an indicator of the court's quality.

Method

This performance measure was obtained by survey using a simple self-administered questionnaire. Survey respondents were asked to rate their agreement with the survey items on a scale from "strongly agree" to "strongly disagree." The survey items derived primarily from the performance standards applicable to every state appellate court system articulated in the *Appellate Court Performance Standards* (1995) and the *Appellate Court Performance Standards and Measures* (1999) by the Appellate Court Performance Commission and the National Center for State Courts.

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. The survey was administered confidentially and analyzed automatically via the Internet using an inexpensive online survey service. The results were reported and analyzed based on generalized categories concerning the nature of a respondent's contact with the court (e.g., appellate attorneys' frequency of contact with the court).

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 of ten reported that the Court of Appeals treats them with courtesy and respect. A lesser percentage of respondents, approximately two out of three, indicated 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.

MEASURE 2. ON-TIME CASE PROCESSING

Definition

The percentage of cases disposed of or otherwise resolved within established time frames.

Purpose

Appellate court systems should resolve cases as expeditiously as possible. Although all litigants want their appeals resolved quickly, adequate review of an appeal requires careful consideration by the court. Thus, on-time case processing is a balance between the time needed for review and the court's commitment to expedite the issuance of a decision. By resolving cases within established time frames, the court enhances trust and confidence in the judicial process.

Unlike Measure 3, Clearance Rate, which focuses on clearance rates broken down by appellate case type--that is, civil, criminal, collateral criminal, juvenile, and agency/board--this measure focuses on (1) specific case types and subtypes with particular benchmarks for issuance of case dispositional decisions and (2) a "composite category" for all remaining case type-subtype combinations. In conjunction with Measure 3, this measure is a fundamental management tool that helps the court assess the length of time that it takes to issue a case dispositional decision once a case has been submitted.

Method

This measure is used to determine the percentage of cases in which the court issued its first case dispositional decision within established time frames from the date that the case was submitted to the court. The measure requires information about the actual time between the date that a case is first submitted to the court and the date that the court issues its earliest case dispositional decision that is not later withdrawn.

Much of the information that is needed to make the calculations that underlie this measure is obtained from the Appellate Case Management System. For each resolved case, the system is queried to determine the number of days between the filed date of the earliest docket entry that reflects the submission of the case to the court and the filed date of the case dispositional decision docket entry.

For purposes of calculating the percentage of cases in which a case dispositional decision was issued within established time frames, benchmarks are necessary. Although some benchmarks find their origin in statutes and rules, the court has established specific benchmarks for calculation purposes. For any case type or subtype

not having a specific statutory or rule-based benchmark, the court has adopted a 180-day residual benchmark.

For each resolved case, the number of days calculated is compared to the established case type-subtype benchmark to determine whether the case was resolved within the established benchmark. For each of the case type-subtype categories listed above, a percentage is calculated--that is, the number of cases resolved by the benchmark in the category divided by the total number of resolved cases in the category. This measure is reviewed each quarter and at the end of each calendar year.

MEASURE 3. CLEARANCE RATE

Definition

The ratio of outgoing cases to incoming cases expressed across all case types and disaggregated by case type--that is, civil, criminal, collateral criminal, juvenile, and agency/board.

Purpose

A court should regularly monitor its productivity in terms of whether it is keeping up with its incoming caseload. At least in the short term, it is quite possible for a court to dispose of cases that it hears in a timely manner, as indicated by Measure 2, On Time Case Processing, and yet fail to keep up with the cases filed. That is so because a mandatory review court like the Oregon Court of Appeals has no control over the number of cases that it must consider. An indicator of whether a court is keeping up with its incoming caseload is the ratio of case disposition or clearance ratio--that is, the number of cases that are disposed of in a given period of time divided by the number of case filings in the same period.

Although mandatory review courts have no control over the number of cases filed, ideally they should aspire to dispose of at least as many cases as are filed. If a court is disposing of fewer cases than are filed, a growing inventory and backlog are inevitable. Knowledge of clearance rates for various case categories over a period of time can help suggest improvements and pinpoint emerging trends, problems, and inherent resource limitations. The initial result of taking the

measure can serve as a baseline, answering the question, "Where are we today?" Successive measures can show how the rate of case disposition is changing over time compared against the baseline measure. Such trend measures can quickly highlight clearance levels over time and answer questions such as, "How have we been doing in our delay reduction efforts over the last 12 months or several years?"

Method

This measure requires information about the number of incoming and outgoing cases broken down by case type during a given period of time. Unlike Measure 2, which concerns the court's disposition of cases within established time frames and focuses on several specific case type-subtype combinations, the information in this measure is disaggregated only by case type--that is, civil, criminal, collateral criminal, juvenile, and agency/board--and not by the various case subtypes.

To determine the number of incoming and outgoing cases during the reporting period, data is generated from the Appellate Case Management System. The clearance rate for each category is calculated by dividing the number of outgoing cases by the number of incoming cases. Finally, to obtain a clearance rate for all case types, the total number of incoming cases in all case types is divided by the total number of outgoing cases.

MEASURE 4. PRODUCTIVITY

Definition

The number of cases resolved by the Court of Appeals broken down by decision form--that is, signed opinions, *per curiam* opinions, AWOPs (affirmances without opinion), and case dispositional orders.

Purpose

An appellate court should ensure that each case is given due consideration, thereby affording every litigant the full benefit of the appellate process. However, not all cases require the same time and attention to achieve this standard. And, the particular form that the court's decision takes does not necessarily determine whether this standard has been met. For example, some cases, particularly those involving unique facts or legal issues of first impression, may require

greater written analysis than others, resulting in full, signed written opinions. Some cases are sufficiently similar on their facts to others already decided by our appellate courts that the legal analysis applied in those cases can be assumed to apply without the need for extensive discussion or analysis. This is one reason that a case may be affirmed without any written opinion. In other cases, a mere reference to precedent on the same or a similar point is helpful, but more than that is not necessary. An opinion issued *per curiam* is an example.

Method

This measure requires information about the number of case dispositional decisions issued by the court for a given period of time (e.g., each year, quarter, month, week) disaggregated by four decision forms (i.e., signed opinions, *per curiam* opinions, AWOPs, and case dispositional orders). A "signed opinion" is a majority opinion that is longer than two pages in slip opinion format. A "*per curiam* opinion" is an unsigned majority opinion that is two pages or less in length in slip opinion format. An "AWOP" is an unsigned decision indicating that the court is affirming a case without writing an opinion that explains the court's reasoning. A "case dispositional order" is one that disposes of the case.

This measure focuses on information for each decision form category as well as information across categories. The number of case dispositional decisions in each decision form category is reported, as is the court average per judicial officer--that is, the number of case dispositional decisions divided by the number of judicial officers.

CONCLUSION

For 40 years, the court has set and maintained a standard of judicial excellence--of principled and efficient decision making--in service to the people of Oregon. Today, the court faces new challenges, perhaps more daunting than any in our history. But challenge begets opportunity for greater service. Through this report, I have outlined for you the ways that we continue to embrace that opportunity.

David V. Brewer
Chief Judge
Oregon Court of Appeals
February 1, 2010

Court of Appeals Comparative Statistics 2003 - 2009							
	2003	2004	2005	2006	2007	2008	2009
Adoptions	1	3	3	4	5	5	3
Criminal	1120	1519	1571	1562	1356	1384	1588
Criminal Stalking	NA	NA	NA	NA	1	4	2
Civil	487	432	418	405	388	402	365
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	29
Civil Other Violations	NA	3	11	9	6	15	17
Civil Stalking	NA	5	25	19	25	16	19
Civil Traffic	NA	15	30	35	31	36	39
Domestic Relations	218	195	176	159	187	185	176
Domestic Relations-Punitive Contempt	NA	NA	NA	NA	5	7	8
Habeus Corpus	93	80	85	81	84	78	48
Mandamus	0	1	0	0	0	0	
Juvenile	74	0	1	0	0	0	
Juvenile Delinquencies	11	42	38	32	30	24	31
Juvenile Dependencies	8	62	65	64	80	125	100
Juvenile Terminations	75	72	79	65	67	44	55
Probate	15	20	23	18	8	31	19
Post Conviction	249	387	550	334	291	236	225
Traffic	96	160	109	88	90	72	87
Administrative Review	231	217	200	193	232	212	324
LUBA	43	29	36	21	26	34	29
Parole Review	157	116	86	175	103	49	65
Workers' Compensation	214	181	120	116	102	110	79
Mental Commitment	88	115	126	94	102	83	71
Columbia River Gorge Commission	NA	NA	NA	NA	1	1	0
Rule Challenge	NA	NA	NA	2	1	13	9
Other	0	0	0	2	38	17	2
Total Filings	3180	3677	3801	3517	3312	3220	3417
Opinions Issued	344	351	400	420	400	436	503

FILED: November 13, 2009

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In re
Recipient of University of Oregon
Jaqua Distinguished Alumnus Award, 2009

Lane Co. Circuit Court
0911-01234
A14411

Kelly Helt, Former Clerk, argued the cause *ex parte*

Before Brewer, Chief Judge, he, and himself.

Affirmed.

BREWER, C.J.

My friends. Let me start by giving you all the covered wagon trip across the prairie. Defendant was speeding and was stopped by Johnny-at-the-rat-hole police officer, who wrote him a ticket. Then, chumming for reasonable suspicion, the officer asked defendant whether he had any contraband with him and whether the officer could search the car. Defendant knew that he was playing with fire and didn't want to get his hands blown off, or anything else, so he consented. At trial, defendant moved to suppress the evidence resulting from the search, but the trial court was agnostic on the issue and couldn't get its tires all pumped about it.

On appeal, defendant makes six assignments of error. But, there's only one with clover that we can really mow. So we'll just pick that low hanging fruit before we die the death of a thousand paper cuts.

Defendant argues that the officer unlawfully extended the stop when he questioned defendant about unrelated matters. He's pushing against an open door. We agree that the officer got too much candy for that nickel.

The state argues that defendant has been lying in the tall Johnson grass and did not raise the issue before the trial court. We think that

the state's argument is sounding a lot like bullshitting around the water cooler. Defendant's argument was there, big as lights.

The state also argues that the error was harmless and that we should save what we can when we can. It says that we're shooting at mosquitoes with an elephant gun. Again, the state's argument is one bubble off plumb. When we ask ourselves, is the justice we're doing here rough or is it right? Our answer is: The railroad hit Bill; the railroad oughta pay; goodbye.

Clerk's Note: Congratulations to Oregon Court of Appeals Chief Judge David Brewer, who received the 2009 University of Oregon Jaqua Distinguished Alumni Award on November 13, 2009. The text of this opinion was presented by Brewer's former clerk, Kelly Helt, at the award ceremony.

SOUP & SALAD

SELECTED PUBLISHED DECISIONS OF THE OREGON SUPREME COURT 1/1/09 TO 6/30/10 ON MATTERS OF APPELLATE PROCEDURE AND PROCESS

(Summaries Initially Appeared in 2009-2010 Willamette Law Online: www.willamette.edu/wucl/wlo)

2008-09	2009-10	2010-11
Editor-In-Chief:	Editor-In-Chief:	Editor-In-Chief:
Jenny Lillge	Faith Morse	Chris Moore
Oregon Editors:	**Oregon Editors:**	**Oregon Editors:**
Dane Hansen	Chris Vandenberg	Kathleen Thomas
Emily Pringle	Peter Straumfjord	Terisa Page

CRIMINAL LAW / STATUTORY GROUNDS FOR APPEAL

State v. Baker
No. S055809 (2/12/2009)
http://www.publications.ojd.state.or.us/S055809.htm

HOLDING (Opinion by Kistler, J.): A defendant who pleads guilty may claim on direct appeal that his or her sentence is unconstitutionally disproportionate to his or her crime.

The state charged Defendant with numerous counts of Sexual Abuse in the Second Degree and Incest. In accordance with a plea agreement, Defendant pleaded guilty to five counts of each crime. The court sentenced Defendant to 180 months for sexual abuse and 30 concurrent months for incest. On appeal, Defendant argued that the sentence for sexual abuse was not proportional to the offense, as the Oregon Constitution requires. The State moved to dismiss, arguing that Defendant's challenge did not fall within the statutorily permissible grounds to appeal a guilty plea. The Court of Appeals agreed with the State and dismissed the appeal. Defendant petitioned the Oregon Supreme Court for review of that ruling. The statute governing the scope of direct appeal after a guilty plea allows Defendant to challenge a sentence that is "unconstitutionally cruel and unusual." The Supreme

Court reasoned that, in 1985, when the Oregon Legislature enacted the laws governing the scope of plea appeals, the U.S. Supreme Court had incorporated a proportionality requirement into the 8th Amendment ban on cruel and unusual punishment, and the Oregon Supreme Court had done the same for the Article 1 Section 16 of the Oregon Constitution. Because the Legislature was on notice that proportionality was part of the constitutional ban on cruel and unusual punishment, the Court may infer its intent to include proportionality as a permissible ground on direct appeal. Reversed and Remanded. [Summarized by Justin Rothboeck]

PAROLE AND POST-PRISON SUPERVISION / APPELLATE PROCEDURE / PRESERVATION

O'Hara v. Board of Parole
No. S055839 (3/5/2009)
http://www.publications.ojd.state.or.us/S055839.htm

HOLDING (Opinion by Balmer, J.): In an administrative proceeding, providing enough information to demonstrate that testimony will be relevant is sufficient to preserve the issue of the relevance of the testimony.

Petitioner O'Hara allegedly violated the conditions of his post-prison supervision. During a parole violation proceeding, the hearing officer denied Petitioner's request to call witnesses, including parole officers, Petitioner's girlfriend, and Petitioner's friend, concluding that with the exception of one parole officer, the witnesses' testimony would not be relevant. Petitioner responded that the witnesses' testimony was relevant because the witnesses were present during Petitioner's arrest and he indicated for the record how his girlfriend would testify if she were permitted to do so. The Court of Appeals affirmed without opinion. On appeal, Respondent argued that Petitioner failed to preserve the relevance issue because he did not make an offer of proof or provide a theory of admissibility. The Supreme Court found that because administrative hearings are less formal than litigation, Petitioner's provision of enough information to demonstrate that the testimony would be relevant was sufficient to preserve the relevance issue. Reversed and remanded. [Summarized by Jacey Liu.]

CRIMINAL LAW / PRESERVATION

Farmer v. Baldwin
Case No.: S055187A (3/26/2009)
http://www.publications.ojd.state.or.us/S055187A.htm

HOLDING (Opinion by Durham, J.): "Under ORAP 5.90, a petitioner may present a question of law to this court by means of an attachment to a *Balfour* brief filed in the Court of Appeals, when the attachment serves as Section B of said brief, and the petitioner incorporates that same brief by reference into his petition for review."

Farmer appealed his murder conviction to the post-conviction relief court which denied his claims. Farmer's state-appointed attorney, unable to find a meritorious claim, filed a *Balfour* Brief in the Oregon Court of Appeals which affirmed without opinion. As required by *Balfour*, the attorney attached Farmer's claims for appeals as a Section B attachment. After the Oregon Supreme Court denied review, Farmer filed for a federal writ of habeas corpus including attachment B of the *Balfour* brief in his petition. The Ninth Circuit certified a question to the Oregon Supreme Court to determine if the reference to the Section B attachment in his habeas claim was sufficient to allow the petitioner to present a federal question under the Oregon Rules of Appellate Procedure. Relying on ORAP 5.90, the Court focused on the relaxed standard of sufficiency and a *Balfour* brief petitioners' lack of legal training in determining that reference to such a brief is sufficient to allow a claim to proceed. [Summarized by Michael Sperry]

CRIMINAL LAW / PRESERVATION

State v. Steen
No. S055691 (4/16/2009)
http://www.publications.ojd.state.or.us/S055691.htm

HOLDING (Opinion by Walters, J.): Where the record clearly shows that counsel deliberately chose not to object to admission of hearsay evidence, a claimed error will not be reviewed.

Defendant Steen and the State agreed to a brief bench trial procedure in which the arresting officer presented evidence, including hearsay evidence, regarding the defendant's alleged acts. Defense council did not object to any hearsay evidence presented during the

trial. The defendant was sentenced to the jurisdiction of the Psychiatric Security Review Board. The Court of Appeals analyzed whether defense counsel's failure to object to preserve the claim of error for the admissions of hearsay evidence at trial was reviewable or was subject to an exception to the rule of preservation. The Supreme Court held that since the record clearly showed that the defense counsel agreed to the trial procedures, and as a matter of strategy deliberately chose not to object to the hearsay evidence. The Court of Appeals should not have reviewed the claim of error, nor conducted its analysis of the exception to the rule of preservation. Affirmed. [Summarized by Tim O'Donnell]

CIVIL PROCEDURE / REENTRY OF JUDGMENT EXTENDING TIME TO APPEAL

State of Oregon v. Ainsworth
No. S055558 (7/23/09)
http://www.publications.ojd.state.or.us/S055558.htm

HOLDING (Opinion by Linder, J.): Where the trial court sent a judgment to the wrong attorney and the window for appeal lapsed as a result, the trial court retains authority to reenter judgment in order to cure a procedural irregularity but not solely to extend the time for appeal.

The Court of Appeals dismissed an appeal by a mother who did not receive proper notice that judgment had been entered against her for contempt of court for failure to pay child support to her former husband. The Supreme Court reaffirmed the *Far West* case which held that a trial court "has no inherent authority to set aside one judgment and enter another 'for the sole purpose of extending the time for appeal'." The Supreme Court then considered the *Stevenson* case which allowed the trial court to reenter judgment because it was done to cure "a prejudgment procedural irregularity." The Supreme Court determined the same factual issue was present in this case because by the court's failure to serve the mother with the proposed judgment for her contempt charge, she lacked the procedural opportunity to object to the judgment before its entry. For this lack of procedural opportunity, the Supreme Court determined the Court of Appeal erred in dismissing the appeal as the trial court properly exercised its authority in reentering the opinion. Reversed and remanded.

Justice Durham wrote a concurring opinion and was joined by Chief Justice De Muniz and Justice Gillette. [Summarized by Ashley Hartmeier.]

CIVIL PROCEDURE / FORM OF LIMITED JUDGMENT / APPEALABILITY

Interstate Roofing, Inc. v. Springville Corp.
No. S056441 (10/1/09)
http://www.publications.ojd.state.or.us/S056441.htm

HOLDING (Opinion by Linder, J.): To contain a concluding decision, the absence of the word "adjudged" is not a jurisdictional defect for a limited judgment.

The Court of Appeals had ruled that the language of a limited judgment, based both on the judgment itself and the context of the record, was not sufficient to qualify as dismissing a claim or rendering judgment. The Supreme Court held that under Oregon's statute regarding the duty of judges with respect to the form of judgment document (ORS 18.052) and the rules of civil procedure, a trial court must determine that there is no just reason for delay. However, this need not be memorialized on the record. A court need only state summarily its determination on a document with the title "limited judgment." There is no requirement for particular words that must be used. As long as a document is titled as a judgment, sufficient words of adjudication exist to make that judgment appealable so long as the judgment document renders a decision on the claim. In addition, this can only be determined based solely on the limited judgment itself. Affirmed in part and reversed in part. [Summarized by Joshua A. Pops]

POST-CONVICTION RELIEF / APPEALABILITY OF MERITLESS CLAIMS

Young v. Hill
No. S056820 (10/1/09)
http://www.publications.ojd.state.or.us/S056820.htm

HOLDING (Opinion by Linder J.) Per Oregon's statute regarding post-conviction relief petitions (ORS 138.525), those failing to state a claim are meritless, and a judgments dismissing them as meritless are not appealable.

After defendant was convicted of computer crime he filed a petition for post conviction relief stating that the indictment in his case had not alleged a crime. Specifically, the indictment alleged that defendant accessed a computer to defraud by making Oregon identification cards, but it did not expressly include that they were fake identification cards. The trial court dismissed defendant's petition "for failure to state a claim upon which relief may be granted" The Court of Appeals affirmed the dismissal. The Supreme Court also affirmed, because the trial judge's holding amounted to qualifying the petition as meritless in conjunction with part of the statute regarding petitions for post conviction relief (ORS 138.525)"a judgment dismissing a meritless petition is not appealable." The decision of the Court of Appeals is affirmed. The appeal is dismissed. [Summarized by Peter Straumfjord]

CRIMINAL PROCEDURE / WAIVER OF RECONSIDERATION DEADLINES PENDING USSC DECISION

State v. Hagberg
Case No.: S054997
http://www.publications.ojd.state.or.us/S054997a.htm

HOLDING (Opinion by Gillette, J.): A party waiting for an authoritative ruling from the U.S. Supreme Court satisfies the "good cause" standard required for the Oregon Supreme Court to exercise its discretion and waive the deadline for timely filing for reconsideration.

Hagberg was convicted of multiple sexual offenses, including two counts of rape. The trial court ordered the two rape sentences to be served consecutively. The Court of Appeals upheld the consecutive sentences, but the Oregon Supreme Court reversed. The Court relied on its ruling in *State v. Ice*, 346 Or 45, 204 P3d 1290 (2009) and held that consecutive sentences are unconstitutional unless explicitly imposed by the jury. At the time, *State v. Ice* was under review by the U.S. Supreme Court, which reversed. The state petitioned for reconsideration in light of the new ruling. The state incorrectly assumed that the mandatory 14-day time period to file for reconsideration was suspended while the precedent was under review. The Court however, reserved the right to waive any of its own rules for "good cause" and held that seeking reconsideration based on an authoritative ruling

satisfied this standard. Former opinion withdrawn, judgment of the Court of Appeals and circuit court affirmed. [Summarized by Paul Binford]

CRIMINAL PROCEDURE / STATUTES TRUMP ORAP

State v. Harding
Case No.: S057103 (12/17/09)
http://www.publications.ojd.state.or.us/S057103.htm

HOLDING (Opinion by De Muniz, C.J.): When state statutes and rules of procedure created pursuant to the statutes conflict, the statute, being the higher authority, will govern the rule.

The state sought review of a Court of Appeals ruling vacating part of the defendant's sentence. The defendant filed an appeal by first class mail five days after the statutory deadline for filing an appeal. Under ORS 138.071 if an appeal is filed by registered or certified mail, the date of the mailing counts as the date of filing for purposes of meeting the statutory deadline. The Oregon Rules of Appellate Procedure allow for filing by mail, without specifying the method of mailing, as long as it is done in accordance with the governing ORS provisions. Since the defendant filed after the deadline and not in accordance with the statute, the Supreme Court ruled that the appeal was not timely filed, and thus the decision of the Court of Appeals must be abandoned for lack of jurisdiction. The petition for review is dismissed. The decision of the Court of Appeals is vacated, and the judgment of the circuit court is affirmed. [Summarized by Paul Binford]

CIVIL PROCEDURE / PRESERVATION / REQUEST FOR REBUTTAL

Charles v. Palomo
Case No.: S057493 (2/19/10)
http://www.publications.ojd.state.or.us/S057493.htm

HOLDING (Opinion by Balmer, J.): A plaintiff's mere request for a rebuttal is sufficient to preserve any such claim and a plaintiff has no need to expand or explain particular reasons for his argument.

Charles was injured in a motor vehicle crash with Palomo and sued for damages. During the trial, Charles requested a rebuttal to Palomo's

closing argument which the trial court denied. The jury then returned a verdict for Palomo. Charles appealed, arguing that the trial court had wrongly denied his request to rebut Palomo's closing argument. The Court of Appeals affirmed, finding that Charles had failed to preserve the issue. The Supreme Court found that Charles did preserve the issue by making the trial court aware of his request to exercise his right to rebut. The Supreme Court held that the mere request for a rebuttal is sufficient to preserve any such claim without the need for further explanation or expansion. The decision of the Court of Appeals is reversed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings. [Summarized by Nick Castellano]

APPELLATE PROCEDURE / AWARD OF COSTS TO BOARD OF PAROLE PERMITTED

Blacknall v. Board of Parole
No. S056861 (3/8/2010)
http://www.publications.ojd.state.or.us/S056861.htm

Oregon law does not prohibit the Court of Appeals from awarding costs and disbursements to the Board of Parole, unless the petitioner timely moved to dismiss the petition.

(Durham, J.) This appeal arises from an order which denied parole to Blacknall. Before this issue came before the Court of Appeals, Blacknall was granted parole. The Court of Appeals dismissed Blacknall's petition as moot and awarded costs and disbursements to the Board, to be paid by Blacknall. Blacknall appealed, arguing that ORS 144.335(12) barred the Court of Appeals from allowing the Board's costs. Affirming the Court of Appeals decision, the Supreme Court held that ORS 144.335(12) insulates petitioners from an award of costs if they dismiss their petition within sixty days after being served with a copy of the record. Blacknall did not timely dismiss his petition, therefore it is within the Court of Appeals' authority to award costs and disbursements to the Board. Affirmed. [Summarized by Kevin M. Moore]

APPELLATE PROCEDURE / LIMIT ON APPEALABILITY OF DENIAL OF MOTION TO COMPEL ARBITRATION

Snider v. Production Chemical Manufacturing, Inc.
No. S056494 (4/29/2010)
http://www.publications.ojd.state.or.us/S056494.htm

DISPUTE RESOLUTION – A trial court order denying a petition to compel arbitration is only reviewable by interlocutory appeal pursuant to ORS 36.730.

(Kistler, J.) Snider worked for Production Chemical Manufacturing, Inc. (PCM) as its national sales manager. PCM terminated Snider's employment on Jan. 30, 2005. A week later, Snider filed suit against PCM for breach of contract. Trial was scheduled for Oct. 6, 2005, and then postponed at the request of PCM. On Oct. 12, 2005, PCM filed a petition to compel arbitration. The trial court denied the petition, and the case went to trial on Jan. 17, 2006. A jury found for Snider, and PCM appealed. PCM assigned error to, among other things, the denial of its petition to compel arbitration. The Supreme Court held that ORS 36.730 is the exclusive means for appealing orders denying a petition to compel arbitration. PCM only had thirty days to appeal the order denying arbitration, but waited until after the judgment had been entered. The legislature intended to avoid costly trials, thus, orders denying arbitration are not reviewable post-judgment. Affirmed. [Summarized by William A. Chambers]

Interested attorneys may subscribe to the Willamette Law Online Summaries via the WLO web site at http://www.willamette.edu/wucl/wlo. Professor Vincent Chiapetta is the faculty advisor to WLO.

SELECT OREGON COURT OF APPEALS OPINIONS ON APPELLATE PROCESS AND PROCEDURE FROM JANUARY 2009 – JULY 2010

By Jona Maukonen, Harrang Long Gary Rudnick P.C.

INITIATING AN APPEAL

The time for filing a petition for review is not tolled by a motion to PUC to set aside a default.

PUC v. VCI Co., et al, 231 Or App 653 (Nov 4, 2009). PUC entered a final order finding VCI in default for failing to respond to a PUC complaint and ordering VCI to pay $203,392. VCI filed a "motion to set aside default." PUC did not rule on that motion. Almost four months after PUC's order, VCI filed a petition for judicial review. The Court of Appeals dismissed the petition for judicial review as untimely. The court held that the motion to set aside default is not the equivalent of a petition for reconsideration and accordingly the time for filing a petition for judicial review was not extended beyond the 60-day deadline applicable to petitions for judicial review of an agency decision.

If a party appealing a juvenile court proceeding wants to rely on ORS 419A.200(5) to file a late notice of appeal, he or she must move for leave to file a late notice of appeal within 90 days.

State ex rel Juvenile Dep't of Mult. Co. v. M.U., 229 Or App 35 (June 10, 2009). Mother appealed a judgment establishing dependency jurisdiction and disposition with respect to her daughter. Mother's notice of appeal was mailed to the appellate court and was received 3 days after the 30 day deadline for filing. The lateness of the notice of appeal was not discovered by the Court of Appeals until after oral argument. In response to the court's order to show cause why the appeal should not be dismissed as untimely, mother moved for leave to pursue a late appeal pursuant to ORS 419A.200(5). The court held that mother could not rely on that statute because she failed to move for leave to file a late notice of appeal within 90 days of the judgment as required by the statute. The court accordingly dismissed mother's appeal.

Where the State, through a judicial department, is party to a proceeding, serving the State Court Administrator is sufficient.

UBA Building Services Inc. v. Davis, 228 Or App 450 (May 20, 2009). Plaintiff prevailed in the trial court. The trial court entered a supplemental judgment in favor of the State of Oregon for defendant's unpaid first appearance fee. Defendant appealed from that supplemental judgment. The State moved to dismiss the appeal, arguing that it had not been served with the notice of appeal. The Court of Appeals denied the State's motion, holding that by serving the notice of appeal on the trial court administrator and by filing the original with the State Court Administrator, defendant satisfied the service requirements of ORS 19.250(1)(b) and (c).

A respondent must file a cross-appeal (not cross-assign error) when an argument on appeal seeks reversal of the judgment.

Capital Credit & Collection Services, Inc. v. Armani et al., 227 Or App 574 (April 22, 2009). Plaintiff sued to collect on a student loan guaranty. Defendant asserted counterclaims for violation of three different sections of the Fair Debt Collection Act. The trial court struck one of defendant's three counterclaims. The jury found for defendant on her two remaining counterclaims. Plaintiff appealed asserting various arguments. Defendant cross-assigned error to the trial court's dismissal of the one counterclaim. The Court of Appeals affirmed and refused to consider defendant's cross-assignment of error because it should have been raised as a cross-appeal. The court explained that defendant's contention needed to be raised by cross-appeal because, if successful, it would require a reversal of the judgment and remand for trial of the claim. The Oregon Supreme Court denied review. *Capital Credit & Collection Services, Inc. v. Armani et al.*, 346 Or 589 (July 29, 2009).

RECORD ON APPEAL

The party with the burden on an issue must designate all the necessary parts of the record.

Farhang v. Kariminaser, 232 Or App 353 (Dec 9, 2009). Plaintiff sought reconsideration of the Court of Appeals' decision which affirmed the trial court's judgment awarding him $120,000 for defendant's

failure to make loan payments, but denied him prejudgment interest. Plaintiff's sole assignment of error was the failure to award pre-judgment interest. The trial court denied prejudgment interest because there was a factual dispute about when defendant made his last payment on the loan and whether some of the payments were for principal or interest, and the verdict form did not ask the jury to resolve those issues. On appeal, plaintiff designated only a limited portion of the record. On reconsideration, he argued that there is no record nor any argument before the Court of Appeals that the date of the last payment was different than what plaintiff argued in his briefs and that if his "designation of the record omits evidence that might run counter [to] his argument, the burden is on [defendant] to designate a supplemental excerpt of the record." The Court of Appeals allowed reconsideration but adhered to its decision to affirm the judgment without prejudgment interest, explaining that plaintiff had the burden to show the trial court erred and accordingly it was his burden to ensure that the record demonstrated there was no dispute of fact. The limited record designated by plaintiff failed to do so.

ISSUES OF JUSTICIABILITY

After judgment is entered, a ruling by the trial court that does not alter the original judgment cannot be appealed.

State v. Portis, 233 Or App 841 (Jan 20, 2010). Defendant was convicted of multiple counts of identity theft. While defendant was serving her sentences, the legislature increased the potential amount of good time credits available. The trial court held a hearing to determine if defendant was eligible for an increase in good time credits and determined she was not. The court entered a supplemental judgment providing that defendant "may not be considered" for increased good time credits. Defendant appealed. The Court of Appeals dismissed the appeal, holding that it lacked jurisdiction because the denial of eligibility for additional good time credits does not alter the original judgment. The Supreme Court subsequently allowed review and then dismissed defendant's petition for review as moot based on another legislative change. *State v. Portis*, ___ Or ___ (July 29, 2010).

A case may (or may not) become moot while on appeal.

State v. Peterson, 229 Or App 546 (July 15, 2009). The State appealed from the dismissal of an indictment for robbery, assault and felon in possession of a firearm. The trial court dismissed the indictment with prejudice when the State was unable to proceed to trial as scheduled because it could not locate a key witness. The State appealed, arguing the trial court abused its discretion in dismissing with prejudice rather than without. An issue arose regarding appellate jurisdiction after the trial court entered an amended judgment and that issue took some time to resolve. The State filed its brief just days before the three-year statute of limitations for the charged offenses ran. The Court of Appeals dismissed the appeal as moot because, even if the State was successful, it would not be able to refile the charges.

Bleeg et al v. Metro, 229 Or App 210 (June 24, 2009). Metro appealed multiple corrected general judgments awarding plaintiffs just compensation pursuant to Measure 37. On December 5, 2007, the trial court entered a general judgment that awarded plaintiffs over $14 million. The next day, Measure 49 became effective. Then, on December 7, the trial court entered corrected general judgments that added a money award to the judgment for each plaintiff. Those judgments included a notation that they were *nunc pro tunc* to December 5. Metro appealed, raising a number of arguments. The Court of Appeals held that the case was not justiciable. The court explained that plaintiffs' Measure 37 claims were ongoing at the time Measure 49 took effect and Measure 49 superseded Measure 37 so that the trial court's judgments were not viable.

State ex rel English v. Multnomah Co. et al., 227 Or App 419 (April 15, 2009). English obtained a final judgment under Measure 37 for $1.15 million against the County. The County initially appealed the judgment but then it dismissed its appeal and issued an order describing the regulations that applied to English's property and the process for developing the land. The County refused to pay the judgment, maintaining it had discretion to pay or not. English filed an action seeking a writ of mandamus to compel the County to satisfy the judgment. The trial court dismissed the writ agreeing with the County that paying the judgment was discretionary. English appealed. On appeal, the County argued that the appeal was moot because of Measure 49. The Court of Appeals held that the case was not moot

because by the time Measure 49 became effective, the judgment on English's Measure 37 claim was final. The Court of Appeals also held that the County had no discretion in whether to pay the judgment. The court reversed and remanded with instructions to issue a peremptory writ directing the County to pay the judgment. The Oregon Supreme Court affirmed. *State ex rel English v. Multnomah Co. et al.*, 348 Or 417 (June 17, 2010).

In re Marriage of Kim, 227 Or App 136 (April 1, 2009). The parties divorced and as part of the dissolution the court ordered the husband to turn over to the wife his interest in a store they had jointly owned. Some years after the divorce, husband began working in the store believing that the wife would sell it to him. The wife apparently did not share his understanding and initiated contempt proceedings arguing that husband had violated the dissolution judgment. The trial court found that husband had not violated the judgment. It also found that wife had "entered into a separate contract with [husband]," but that "[t]here was no sale of the business" by wife to husband. Husband, although he prevailed, appealed, challenging the trial court's finding about there being no sale of the business. Husband argued that the issue was not fully litigated, that the court's finding was unnecessary dicta and that the finding could have a preclusive effect in another action brought by wife against him. The Court of Appeals dismissed, holding that the case was moot because while the appeal was pending, a final judgment was entered in the other litigation. Therefore, the trial court's finding could not have a preclusive effect.

Attorney fees can prevent a case from becoming moot (and entitlement to those fees must be supported by the record).

Menasha Forest Products Corp. v. Curry Co. Title, Inc., et al, 234 Or App 115 (March 3, 2010).

Plaintiff sought a declaration that it would not be liable to Transnation Title Insurance Company if Transnation sued plaintiff for failure to provide good title, as it threatened to do, with respect to property that plaintiff sold to another party. Plaintiff took the position that if Transnation had to pay a claim to the purchaser of the property because of plaintiff's failure to convey good title, plaintiff would not be liable to reimburse Transnation. Rather, the escrow company who performed a faulty title search, Curry County Title, would be liable. Plaintiff filed the declaratory judgment action against

both Transnation and Curry County Title. The trial court determined the case was not ripe, entered judgment in favor of defendants, and entered a supplemental judgment awarding approximately $31,500 in attorney fees. On appeal, defendant argued that the case was moot because plaintiff had prevailed in a suit to reform title and so there was no basis on which the title company would be seeking to recover from plaintiff. The Court of Appeals held the appeal was not moot because the decision of whether to award attorney fees is based on who was the prevailing party at the trial court and therefore, the Court of Appeals decision will have a practical effect on the rights of the parties to the controversy. The Court of Appeals determined that the trial court was correct in concluding that plaintiff's claim was not ripe.

However, the Court of Appeals vacated the attorney fee award and directed the trial court enter an award of $2,500. The Court of Appeals explained that defendants had sought fees based on the escrow agreement between plaintiff and Curry County Title which provided for prevailing party fees. Contrary to the trial court's conclusion, the contractual provision was limited to fees actually expended or incurred by Curry County Title, not those paid by Transnation. Curry County Title was required to indemnify Transnation for attorney fees that it incurred; however, absent evidence that Curry County Title committed misconduct, failed to comply with applicable rules or misapplied funds, the indemnification was limited to $2,500. The Court of Appeals explained that the party seeking fees has the burden of proving entitlement and defendants did not establish that Curry County Title was required to cover more than $2,500 of the attorney fees; accordingly that was the only amount they could recover.

MOTIONS ON APPEAL

The Appellate Commissioner has all the authority the Chief Judge delegates.

Bova v. City of Medford, ___ Or App ___ (July 21, 2010). Plaintiffs prevailed at trial, obtaining a limited judgment requiring the City, so long as it provides health care insurance for its current employees, to provide health care insurance for those retired City officers and employees who elect to purchase such insurance. The City appealed the decision and sought a stay from the trial court, which was denied. The City then sought review of that decision. The Appellate Commissioner

notified the parties that he intended to hold oral argument and asked the party to address specific issues. The City objected to the Appellate Commissioner deciding the motion for stay, arguing that he lacked authority to decide the motion and asking that the motion be decided by the Court of Appeals in the first instance. The Commissioner denied that motion and the City sought reconsideration. The Commissioner referred the motion for reconsideration to the Court of Appeals' motion department. The motion department affirmed the Appellate Commissioner's decision. The court explained that the Chief Judge could delegate to the Appellate Commissioner the authority to decide a motion and that decision on a motion to stay was procedural, even though it may require the decision-maker to construe or apply legal authorities or to apply principles of law to the facts of a case.

The court will dismiss a defendant's cross-appeal when the State voluntarily dismisses a criminal appeal.

State v. Bellar, 231 Or App 80 (Sep 30, 2009). The State charged defendant with multiple counts of encouraging child sexual abuse. Defendant moved to suppress evidence discovered after a computer technician working on defendant's computer found images of child pornography and in a subsequent search of his home. The trial court granted defendant's motion in part and denied it in part. The State appealed and defendant cross-appealed. Subsequently, the State dismissed its appeal, stating that it had determined it would be more expeditious to re-seize the evidence with a new search warrant than pursue the appeal. The Court of Appeals determined that under the Oregon Supreme Court's decision in *State v. Shaw*, 338 Or 586 (2005), interpreting ORS 138.040, it was required to dismiss defendant's cross-appeal. The Oregon Supreme Court denied review in this case. *State v. Bellar*, 348 Or 291 (May 13, 2010).

PRESERVATION & PLAIN ERROR

Preservation. Preservation. Preservation.[1]

Wilson v Walluski Western Ltd. et al., 226 Or App 155 (Feb 25, 2009). Plaintiff appealed after a jury found in favor of defendants on

1 These are only two of the many, many, many cases where the Court of Appeals held that an argument was unpreserved and declined to reach it.

plaintiff's disability discrimination claims. Plaintiff argued on appeal that the trial court erred in instructing the jury that even if it found These are only two the many, many, many cases where the Court of Appeals held that an argument was unpreserved and declined to reach that defendants had a discriminatory motive in firing plaintiff, the jury could find for defendant if they found that the defendant would have fired plaintiff anyway. Plaintiff argued the instruction was erroneously overbroad or incomplete because such a finding would not have absolved defendant from all liability; it merely would preclude plaintiff from recovering certain relief. Defendant did not assert that plaintiff's argument was unpreserved. However, the Court of Appeals held that plaintiff had not preserved his argument because he did not "state with particularity" any objection to the challenged jury instruction as required by ORCP 56 H(2).

Van der Vaarte v. SAIF, 228 Or App 337 (May 13, 2009). Claimant sought review of the Worker's Compensation Board's conclusion that his injuries, which he sustained in a fight with a coworker in the employer's parking lot, did not occur "in the course of" his employment. On appeal, among other things, claimant contended that the board should not have considered that his employer had a rule against workplace violence in analyzing whether claimant sustained the injuries in the course of his employment. The Court of Appeals held that claimant had not preserved that argument. SAIF argued before the Board that claimant was engaged in a "prohibited activity" when he sustained his injuries and so the claim was not compensable. Claimant had argued to the board that the "prohibited activity" analysis was inapplicable, because there was no evidence that he was aware of the rule, that he was not in the workplace when the injuries occurred, and that he had not been fighting. The argument claimant made on appeal was not made to the Board. The Oregon Supreme Court denied review. *Van der Vaarte v. SAIF*, 347 Or 44 (2009).

The Court of Appeals will not adhere to preservation rules where the party had no practical ability to object.

State v. Selmer, 231 Or App 31 (Sept 23, 2009). Defendant was charged with, tried for, and found guilty of unlawful possession of heroin, but the trial court entered judgment for unlawful possession of methamphetamine. Nothing in the record suggested this was an intentional entry of an incorrect judgment. On appeal, the State

objected to correction of the error because it was unpreserved. Defendant argued he had no practical opportunity to preserve the error because he could not have predicted the court would enter an incorrect judgment. The Court of Appeals held that, because of defendant had no practical ability to object, the normal rules of preservation did not apply. The Court of Appeals vacated and remanded for entry of corrected judgment. The Oregon Supreme Court denied review. *State v. Selmer*, 347 Or 608 (2010).

The trial court's failure to make required findings is not "plain error" absent a request for such findings.

In re Marriage of Polacek, 232 Or App 499 (Dec 16, 2009). In a domestic relations case, father moved for a modification of a section of the stipulated dissolution judgment that specified he was permitted parenting time with his children "only as recommended by the children's therapist" and that he could only request a hearing to challenge parenting time after participating in at least four months of individual psychotherapy. The trial court denied father's motion to modify the judgment. On appeal, among other things, father asserted an unpreserved challenge to the court's refusal to establish a parenting plan for father without first making a finding that parenting time would endanger the health or safety of his children as required by ORS 107.105(1)(b). The Court of Appeals declined to consider father's argument as plain error, explaining that if the need for findings is brought to the attention of the trial court, the matter may easily be remedied and the need for appellate review avoided. The Oregon Supreme Court denied review. *In re Polacek and Polacek*, 348 Or 414 (2010).

The Court of Appeals will exercise its discretion to reach plain error in some circumstances, but not others.

State v. Ryder, 230 Or App 432 (Aug 26, 2009). Defendant was convicted of multiple crimes arising from his conduct at the Oregon Zoo. The Court of Appeals rejected without opinion all but one of defendant's assignment of error. Defendant's convictions on Counts 6 and 12, second-degree assault and unlawful use of a weapon, arose from concurrent conduct against the same victim. The State conceded that it was error of law not to merge the two counts. The court exercised its discretion to reverse the unpreserved plain error for three reasons:

(1) the error would result in an additional felony conviction, (2) there was no strategic reason for defendant's failure to object, and (3) the burden on the judicial system to amend and resentence was minimal.[2]

State v. Toquero, 228 Or App 547 (May 27, 2009). Defendant was convicted of 11 sex offenses. At sentencing, the prosecutor told the court that the mandatory minimum sentence on five of those crimes was 75 months. The correct mandatory minimum for those crimes was 70 months. Defense counsel did not object, and defendant was sentenced to a total of 325 months. On appeal, defendant argued that the trial court committed plain error in imposing 75 month sentences for the five crimes. The Court of Appeals held that it was plain error but declined to consider the argument because it determined from the trial court's actions that it would likely impose the same sentence on remand.

SCOPE OF APPEAL AFTER REMAND

On remand from LUBA, and appeal after remand, a party can only raise new, unresolved issues relating to the remand.

Friends of Metolius v. Jefferson County et al, 230 Or App 150 (Aug 5, 2009). Petitioner sought judicial review of a final order of LUBA affirming Jefferson County's adoption on remand from an earlier LUBA proceeding of a comprehensive plan map that designated Camp Sherman as an unincorporated community. Petitioners argued that there is a lack of substantial evidence that the adopted map accurately represents what the County designated as Camp Sherman. The Court of Appeals held that petitioners could not seek review of that issue because it was decided by the County before LUBA's remand, not on remand. When LUBA remands a case for further proceedings, the parties are limited (below and on appeal) to new, unresolved issues relating to those remand instructions.

2 In the last 18 months, the Court of Appeals only exercised its discretion to reach plain error in criminal cases. It did not do so in any civil cases.

ALTERNATIVE BASIS FOR AFFIRMANCE

A party can only prevail on an alternative basis for affirmance if he or she meets the Outdoor Media test.

State v. Nix, 236 Or App 32 (June 23, 2010). The trial court suppressed evidence discovered during a warrantless search of the data in a cell phone after determining that the search was not justified as a search incident to arrest. On appeal, defendant asserted, as alternative bases for affirmance, two arguments that a cell phone cannot be searched incident to arrest because of the nature of cell phones and data storage. The Court of Appeals held that the search was valid and declined to address defendant's alternative bases under the test set out in *Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 659-60 (2001), because if defendant had made those arguments at trial, the State could have presented substantial, contrary evidence.

An appellant can prevail on appeal only if it challenges every potential basis for affirmance.

State v. Rivera-Negrete, 233 Or App 96 (Dec 30, 2009). The trial court granted defendant's motion to suppress evidence as the result of both an unlawful stop and unjustified search. The State appealed, arguing that the search was valid because the officer had objectively reasonable concern for his safety to justify a pat down. The State did not challenge the trial court's conclusion that defendant was stopped without reasonable suspicion. The Court of Appeals affirmed because the trial court's order contained an unchallenged basis for affirmance.

INVITED ERROR

Even if the trial court erred, the Court of Appeals will not reverse if the party alleging the error invited that error.

State v. Cervantes, 232 Or App 567 (Dec 23, 2009). Defendant allegedly ingested methamphetamine during her pregnancy. After her child was born, the State charged her with multiple crimes including causing another person to ingest a controlled substance and unlawful application of a controlled substance to a minor. The defendant demurred to the charges, arguing that her conduct did not fall within those offenses. The trial court allowed the demurrers and the State appealed. On appeal, the Court of Appeals determined that the trial

court erred in granting the demurrers because it relied on evidence that the State expected to present at trial (rather than limiting its analysis to the facts alleged in the indictment). However, the Court of Appeals determined that it could not reverse the trial court's decision because both parties had invited the trial court to follow that erroneous procedure.

SUPREME COURT PRECEDENCE

The Court of Appeals will follow Supreme Court precedent – even old cases.

Deatherage v. Johnson, 230 Or App 422 (Aug 19, 2009). Plaintiff appealed from a limited judgment dismissing her common-law claim for wrongful discharge. Plaintiff had alleged that her employer fired her in retaliation after she contacted Oregon OSHA to report health and safety violations at her employer's place of business. The trial court dismissed plaintiff's action, holding that the common law tort of wrongful termination is not available to a plaintiff who has an adequate statutory remedy and the Oregon Supreme Court held in *Walsh v. Consolidated Freightways*, 278 Or 347 (1977), that a statutory remedy exists. On appeal, plaintiff argued that the Supreme Court's decision in *Walsh* was 32 years old and that its underlying logic had been seriously undercut. The Court of Appeals held that it is bound by *Walsh* until the Supreme Court repudiates or modifies its holding in that case.

POST-APPEAL ISSUES: PREVAILING PARTY & ATTORNEY FEES

Attorney fees: Use an expert when appropriate and be specific in objecting.

State ex rel English v. Multnomah County, 231 Or App 286 (Oct 7, 2009). English appealed a judgment dismissing an alternative writ of mandamus seeking to compel the County to satisfy a Measure 37 judgment for $1.15 million. The Court of Appeals reversed and remanded to the trial court for issuance of a peremptory writ of mandamus directing the County to pay the judgment. English sought to recover her attorney fees. The Court of Appeals noted that English

had provided expert testimony supporting her request and that the County had not provided any expert affidavit in support of its position. Rather, the court explained, the County pointed to some examples of billing entries that it contended were for excessive amounts of time and hourly rates but then "implicitly invited [the court] to comb the identified entries throughout the billing statement to determine whether and how they support the County's position." The court declined to do so and determined that the fees were reasonable. The court noted that the County's actions had prolonged the litigation. The court awarded English attorney fees of $191,289.30.

Attorney representing him or herself in a public records case is not entitled to attorney fees.

Colby v. Gunson, 229 Or App 167 (June 17, 2009). Appellant Colby is an attorney who represented himself in a public records case. Colby sought autopsy and laboratory test reports from the State Medical Examiner. The trial court held that the records were exempt from disclosure pursuant to ORS 192.502(9)(a), which allows nondisclosure of records that are privileged or confidential under Oregon law. The Court of Appeals remanded for further proceedings to determine whether another exemption to the obligation to disclose the records might apply. Colby then sought attorney fees and costs on appeal. The Court of Appeals held that where an attorney representing himself prevails in a proceeding under the public records law, he is not entitled to attorney fees pursuant to ORS 192.490(3) because an "attorney fee" in the statute includes only a charge by an attorney that a separate entity is obligated to pay. The Oregon Supreme Court accepted review, *Colby v. Gunson*, 347 Or 533 (Jun 21, 2010), so stay tuned.

It is not always easy to tell who has prevailed on appeal.

Hennessy v. Mutual of Enumclaw Ins. Co., 229 Or App 405 (July 1, 2009). Defendant sought reconsideration of the Court of Appeals' decision, arguing that because the court reduced the amount of plaintiff's recovery by 97.5%, defendant, not plaintiff, should have been designated as the prevailing party on appeal. Plaintiff, an insured, sued defendant, her insurer, after it refused to cover damage to her property caused by stucco separation from the cement walls. The trial court determined the damage was covered by the insurance policy and awarded plaintiff approximately $99,000 in damages. On

appeal the Court of Appeals affirmed that there was coverage for the stucco dislodging but reduced the damages to $2,469.68. The Court of Appeals designated plaintiff as the prevailing party on appeal. Attorney fees are available to an insured who prevails in litigation for insurance coverage pursuant to ORS 742.061. The Court of Appeals allowed reconsideration and adhered to its former decision. The court explained that the policy behind ORS 742.061 strongly counseled against designating defendant as the prevailing party where plaintiff established that she was entitled to coverage and maintained a favorable judgment.

Hamlin v. Hampton Lumber Mills, 227 Or App 165 (April 1, 2009). Plaintiff sued defendant for employment discrimination. A jury awarded plaintiff $6,000 in economic damages, no noneconomic damages, and $175,000 in punitive damages. Defendant appealed and challenged only the punitive damages award, arguing that (1) plaintiff did not present evidence sufficient to support the award, and (2) even if a punitive damages award was appropriate, the amount awarded by the jury was excessive. The Court of Appeals determined that the evidence was sufficient to support an award of punitive damages but that the maximum amount permissible under due process limits was $24,000. The Court of Appeals designated defendant as the prevailing party on appeal. Nonetheless, plaintiff filed a petition for attorney fees and costs. Defendant also filed for costs. The Court of Appeals concluded that it had erroneously designated defendant the prevailing party. The court explained that defendant had argued on appeal that the maximum amount of punitive damages should be 1-2 times the actual damages. The Court of Appeals did not reduce the punitive damages that much; it reduced the punitive damages to 4 times the economic damages. The court concluded that defendant had not obtained what it sought on appeal and plaintiff succeeded in keeping a punitive damage award even though it was reduced. The court held plaintiff was the prevailing party and awarded him his costs and attorney fees. The Oregon Supreme Court accepted review of the underlying decision of the Court of Appeals. *Hamlin v. Hampton Lumber Mills*, 346 Or 157 (April 8, 2009).

SURVEY OF UNITED STATES SUPREME COURT DECISIONS OF THE OCTOBER 2008 TERM

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

In its October 2008 Term, reversing its recent trend of deciding fewer cases every year, the United States Supreme Court disposed of 92 cases by written decision, including two which simply dismissed certiorari as improvidently granted. The biggest development of the year was the retirement of Justice Souter, and President Obama's nomination of Judge Sonia Sotomayor, of the Second Circuit, to replace him. We include as a post-script to this survey a brief description of the opinions this "wise Latina woman"[1] authored in her first Term on the Court.

ADMINISTRATIVE LAW

In Administrative Law, it generally was a good year for Federal agencies, and a bad year for the Courts of Appeals. The exception (and a mild one at that) was Immigration. In *Negusie v. Holder*, 555 U.S. ___ L.Ed.2d (2009), the Court reversed the Board of Immigration Appeals, but it did so by deciding that the agency had more authority than the agency thought it had. The Court held that the persecutor bar to relief under 8 U.S.C. § 1101(a)(42) does not preclude the BIA from deciding whether an alien, whose assistance in persecution was compelled, could seek relief as a refugee.

In *Nijhawan v. Holder*, 557 U.S. ___ (2009), the Court held that, to remove an alien for an aggravated felony based on the alien's conviction of a crime of fraud or deceit involving loss to the victims exceeding $10,000 under 8 U.S.C. § 1101(A)(43)(M)(i), it was not necessary that the amount of loss be an element of the offense, only that the conviction was for a crime of fraud or deceit and that the loss to the victims in fact exceeded $10,000.

1 Her own words, for the benefit of any reader who spent the summer of 2009 under a rock.

The only immigration case that can be counted as a true "loss" for the agency is *Nken v. Holder*, 555 U.S. ___ (2009), where the Court held that traditional factors for granting stays, and not the demanding standard for injunctions in 8 U.S.C. § 1252(f), govern the Courts of Appeals' authority to stay an alien's removal pending judicial review.

Aside from the immigration cases, the Court decided in favor of the agencies in seven out of eight cases, reversing only in *Burlington Northern v. United States*, 556 U.S. ___ (2009) (see Ninth Circuit review, below), and reversed the Circuits in all eight cases. It was a particularly unsuccessful year for environmentalists, who lost all five environmental cases before the Court this Term. Private enterprises only benefitted in three out of the five agency cases in which they were involved. Those three were all in environmental cases: *Burlington Northern v. United States*; *Coeur Alaska v. SEAC*, 557 U.S. ___ (2009); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. ____ (2009). Private enterprise lost in *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. ____ (2009), and in *United States v. Eurodif S.A.*, 555 U.S. ___ (2009).

In addition to the four environmental cases from the Ninth Circuit summarized below, the Court reversed the Second Circuit and held that the EPA properly relied on cost-benefit analysis in determining the best available technology for new cooling water intake systems, and in providing cost-benefit, site-specific variances from its standards for large, existing facilities. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. ____ (2009).

The other administrative law cases involved review of decisions of the Federal Communications Commission, the Veterans' Administration and the Commerce Department. *In Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. ____ (2009), the Court upheld the FCC's explanation of its decision departing from its past practice and interpreting the statutory ban on "indecent" language to forbid broadcasting of expletives even when the offensive words are not repeated. In *Shinseki v. Sanders*, 556 U.S. ____ (2009), the Court rejected the Federal Circuit's more generous "harmless error" test for review of the VA's notice errors, holding that the requirement of 38 U.S.C. § 7261 that the Veterans Court "'take due account of the rule of prejudicial error' requires the Veterans Court to apply the same kind of 'harmless-error' rule that courts ordinarily

apply in civil cases." In *United States v. Eurodif S.A.*, 555 U.S. ___ (2009), the Court upheld the Commerce Department's treatment of uranium enrichment contracts as sales of foreign merchandise, rather than sales of services, and held that the Department properly subjected those contracts to anti-dumping tariffs.

CIVIL PROCEDURE

The Court decided four preemption cases; only in one of them did it find a complete preemption. In *Polar Tankers, Inc., v. City of Valdez*, 557 U.S. ____ (2009), the Court held that Valdez's personal property tax on oil tankers violated the Constitution's equal tonnage clause, Article I, section 10, clause 3. In *Cuomo v. Clearing House Assn.* LLC, 557 U.S. ___ (2009), the Court held that the National Bank Act did not pre-empt a State from enforcing its fair-lending laws through demands for records, and that the Comptroller General's regulation purporting to preempt such enforcement was invalid. The State Attorney General was preempted from issuing subpoenas on his own authority, as opposed to by obtaining a judicial warrant. In two cases involving tort actions brought by consumers, the Court found the actions were not preempted. In *Altira Group, Inc., v. Good*, 555 U.S. ___ (2008), the Court held that neither the Labeling Act nor FTC action preempted a state-law fraud action arising out of manufacturers' false claims that "light" cigarettes were safer. In *Wyeth v. Levine*, 555 U.S. ___ (2009), the Court held that federal law did not preempt a state tort claim alleging that Phenergan's label did not contain an adequate warning about the IV-push method of administration.

Plaintiffs alleging they were victims of foreign or domestic government terror fared less well. In *Iran v. Elahi*, 556 U.S. ___ (2009), the Court held that, in return for partial compensation from the United States, Elahi waived his right to attach a judgment in favor of Iran in another matter to satisfy his own judgment against Iran. In *Iraq v. Beatty*, 556 U.S. ___ (2009), the Court held that the federal courts lacked jurisdiction of plaintiff's claims against Iraq, because, when President Bush validly made inapplicable to Iraq all provisions of law that apply to countries supporting terrorism, that included the state sponsor of terrorism exception to immunity in the Foreign Sovereign Immunity Act. And, in *Ashcroft v. Iqbal*, 556 U.S. ___ (2009), the Court adopted a heightened pleading standard for all

civil actions under Fed. R. Civ. P. 8(a), requiring a plaintiff to allege sufficient factual matter, which, accepted as true, states a claim for relief which is plausible on its face. The Court held that "plausibility" is more than "possibility" but less than "probability." "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." So, District Courts will now be called upon to be gate-keepers, subjectively assessing the "plausibility" of a plaintiff's claims. The Court held that Iqbal's complaint alleging that the former Attorney General and former FBI Director unconstitutionally subjected him to harsh conditions of confinement on account of his race, religion or national origin, failed to meet this standard of "plausibility."

The Court decided two cases construing the Federal Arbitration Act. In *Arthur Andersen LLP v. Carlisle*, 556 U.S. ___ (2009), the Court held that the courts of appeals have jurisdiction to review interlocutory denials of stays to enforce arbitration, and that a litigant who was not a party to the arbitration agreement can force arbitration if the relevant state contract law allows that party to enforce the agreement. In *Vaden v. Discover Bank*, 556 U.S. ___ (2009), the Court held that, where the underlying claim was a "garden-variety, state-law-based contract action," a federal question arising under an actual or potential defense or counterclaim did not give the district court jurisdiction to compel arbitration.

In *Carlsbad Technology, Inc., v. HIF Bio, Inc.*, 556 U.S. ___ (2009), the Court held that an order remanding a case to state court, after declining to exercise supplemental jurisdiction over state-law claims under 28 U.S.C. § 1367(c), was not a remand for lack of subject matter jurisdiction, and, therefore, that 28 U.S.C. § 1447(d) did not bar judicial review of the remand order.

In *CSX Transportation Inc., v. Hensley*, 556 U.S. ___ (2009), the Court held, in a Federal Employers' Liability Act action, that a plaintiff, who sued for damages alleging that the railroad caused him to contract asbestosis, itself a non-cancerous condition, was entitled to a jury instruction that he could recover damages for his fear of contracting cancer in the future, if that fear was genuine and serious, and that the trial court's refusal of that instruction was reversible error.

In *Atlantic Sounding Co., Inc., v. Townsend*, 557 U.S. ___ (2009), the Court held that, under maritime law, an injured seaman could recover punitive damages for his employer's willful failure to pay maintenance and cure.

In *Kansas v. Colorado*, 556 U.S. ___ (2009), the Court held that, in cases of original jurisdiction in the Supreme Court, the Court would follow 28 U.S.C. § 1821(b), and limit the amount recoverable for witness fees for expert witnesses to $40 per day.

In *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. ___ (2009), the Court held that the West Virginia Supreme Court of Appeals deprived Caperton of due process of law, when one of the justices, who had received extraordinary campaign contributions of approximately $ 3 million from an individual who was Massey's chairman, chief executive officer and president, denied Caperton's motion that he recuse himself, and participated in a decision by which the court subsequently reversed a substantial damage award that Caperton had received at trial.

In *Travelers Indemnity Co. v. Bailey*, 557 U.S. ___ (2009), the Court held that the 1986 reorganization plan for the Johns-Manville Corporation, adopted by the bankruptcy court, which enjoined certain lawsuits against Manville's insurers, barred actions against Travelers, one of Manville's insurers, even if those actions were based on allegations either of Travelers' own wrongdoing or of its misuse of information obtained from Manville. The Court further held that the finality of the bankruptcy court's order barred a challenge to the enforceability of the injunction.

The appellate wonk case of the year was *United States ex rel Eisenstein v. City of New York*, 556 U.S. ___ (2009). Ordinarily, a party has 30 days in which to file a notice of appeal under FRAP 4. However, when the United States is a party, the time is 60 days. In *Eisenstein*, the Court held that, when the United States declines to formally intervene in a *qui tam* action under the False Claims Act, 31 U.S.C. § 3729, the United States is not a "party," and the 30-day limit applies.

CIVIL RIGHTS

First Amendment

The Court decided three First Amendment cases this Term. Two of them, *Locke v. Karass*, 555 U.S. ___ (2009), and *Ysursa v. Pocatello Educ. Assn.*, 555 U.S. ___ (2009), involved labor unions. In *Locke*, the Court held that the First Amendment permits local unions to charge nonmembers (who are required to make "fair share" payments) for what the local contributes to national litigation, if: (1) the national litigation is of a kind that would be chargeable if it were local; and (2) the local reasonably expects other locals to contribute to its own similar litigation if and when it happens. In *Ysursa*, the Court held that the First Amendment does not require Idaho to permit the use of payroll deductions for contributions to labor PACs.

In *Pleasant Grove City v. Summum*, 555 U.S. ___ (2009), a unanimous Court held that the placement of permanent memorials in City parks, even when those monuments are privately funded and donated, constitutes "government speech," and the City has no obligation under the First Amendment to allow all comers to place their monuments in its parks.

Section 1983

There were six decisions in cases brought under the Civil Rights Act, 42 U.S.C. § 1983. In *District Attorney v. Osborne* the Court held that the Due Process Clause did not give a convict a claim under 42 U.S.C. § 1983 based on the prosecutor's refusal to give him access to DNA evidence for the purpose of subjecting it to more discriminating testing than was performed at the time of his conviction.

In *Fitzgerald v. Barnstable School Committee*, 555 U.S. ___ (2009), a unanimous Court held that Title IX, which prohibits sex discrimination in education and contains its own enforcement provisions, does not preclude an action under § 1983 alleging unconstitutional sex discrimination in schools.

In *Haywood v. Drown*, 556 U.S. ___ (2009), the Court held that a New York statute, which divested the State's trial courts of jurisdiction of suits seeking money damages from corrections officers, could not, under the federal Supremacy Clause, divest those courts of jurisdiction

of § 1983 actions against corrections officers. Justice Thomas, joined by the Chief Justice and by Justices Scalia and Alito, dissented.

In *Pearson v. Callahan*, 555 U.S. ____ (2009), a unanimous Court held that the procedure that it had mandated in *Saucier v. Katz*, 533 U.S. 194 (2001), for analyzing whether a defendant is entitled to qualified immunity "should not be regarded as an inflexible requirement," and that the District Courts may choose to address the prongs of the qualified immunity test (whether the facts viewed in the light most favorable to the plaintiff would make out a constitutional violation; and whether the right asserted to have been violated was "clearly established" so that a reasonable official would have known he or she was violating it at the time he or she acted) in either order. In another qualified immunity decision, in *Safford Unified School Dist. v. Redding*, 557 U.S. ___ (2009) the Court held that, in the absence of grounds to suspect presence of drugs, the search of a student's underwear was unconstitutional, but that the official who ordered the search was entitled to qualified immunity from student's suit.

In *Van de Kamp v. Goldstein*, 557 U.S. ___ (2009), the Court held, in a case in which a plaintiff whose conviction was overturned on habeas sued the prosecutor under 42 U.S.C. § 1983, that the prosecutor was absolutely immune on claims alleging failure to train, failure to supervise and failure to establish information system regarding impeachment of informants.

Voting Rights

There were two critical cases under the Voting Rights Act. In *Bartlett v. Strickland*, 556 U.S. ____ (2009), the Court, in a 5-4 decision, held that the Act does not override the North Carolina Constitution's "whole county" provision, which precludes that State's legislature from dividing counties when drawing legislative districts. Justice Thomas, joined by Justice Scalia, concurred, expressing the view that the Voting Rights Act simply does not provide for "vote dilution" claims under any circumstances.

In *Northwest Austin Mun. Utility Dist. v. Holder*, 557 U.S. ___ (2009), the Court held that the District was entitled to seek relief from preclearance under the "bailout" provisions of the Voting Rights Act, even though the District did not register its own voters. By so

construing the Act, the Court avoided the substantial question as to the constitutionality of the preclearance requirements. The Chief Justice's opinion for the Court strongly suggests that the draconian remedies of Section 5 of the Voting Rights Act may no longer be justifiable constitutionally, in light of the Act's success in remedying voting rights discrimination. But the Court stopped short of declaring Section 5 unconstitutional. Justice Thomas, however, would have decided the constitutional question and would "hold that § 5 exceeds Congress' power to enforce the Fifteenth Amendment."

Employment Discrimination

In *14 Penn Plaza LLC v. Pyett*, 556 U.S. ____ (2009), the Court held that a collective bargaining agreement provision that required arbitration of ADEA claims was enforceable. In *Gross v. FBL Financial Services, Inc.*, 557 U.S. ___ (2009), the Court held that, unlike in Title VII claims, an ADEA disparate treatment claims requires proof of "but-for" causation, *i.e.*, that plaintiff would not have been subject to the adverse employment action except for his age.

In *Crawford v. Metro. Gov't. of Nashville*, 555 U.S. ___ (2009), the Court held that Title VII's "opposition clause" provides a claim for retaliation based on employee's speaking out on discrimination by answering questions in the employer's internal investigation of the underlying discrimination claim.

In perhaps the most controversial decision of the Term, in *Ricci v. DeStafano*, 557 U.S. ___ (2009), a divided Court held that the City of New Haven, Connecticut, violated the Title VII rights of white and Hispanic firefighters when it discarded the results of a promotional examination because of a statistical racial disparity in the results of the examination. The Court rejected New Haven's rationale that, had it not done so, it would have been subjected to suit by minority firefighters for adopting a practice that had a disparate impact. A number of the white and Hispanic firefighters involved made a dramatic appearance at now-Justice Sotomayor's confirmation hearings over the summer.

ERISA

There was a single ERISA decision this Term, *Kennedy v. Plan Administrator*, 555 U.S. ___ (2009), where a unanimous Court held: that the employee's former spouse's waiver of ERISA benefits did not

violate the anti-alienation provisions of the statute; but that, because it was not included in a QDRO (qualifying domestic relations order), and because the spouse did not follow the Plan's provision for disclaiming interests, the Plan Administrator correctly ignored the waiver and paid the spouse the benefits in accordance with the Plan documents.

Indigenous Peoples

In *Hawai'i v. Office of Hawai'ian Affairs*, 556 U.S. ___ (2009), a unanimous Court held that Congress has not stripped Hawai'i of its authority to alienate its sovereign territory, notwithstanding claims of indigenous Hawai'ians that the Apology Resolution adopted by Congress in 1993 did just that.

In *Carcieri v. Salazar*, 555 U.S. ___ (2009), the Court held that, because the Narragansett Tribe was not under federal jurisdiction when Congress enacted the Indian Reorganization Act, the Secretary of the Interior lacked authority to take land in trust for the Tribe. In *United States v. Navajo Nation*, 556 U.S. ___ (2009), a unanimous Court held that United States had not consented to suit by the Navajo Nation for damages for an alleged breach of the Secretary's fiduciary duties regarding royalty rates in coal leases negotiated by the tribes.

CRIMINAL LAW AND PROCEDURE

In *Arizona v. Gant*, 556 U.S. ___ (2009), the Court held that police may not search a vehicle incident to arrest after the occupant has been secured and cannot gain access to the interior of the vehicle, unless it is reasonable to believe that evidence of the offense for which the occupant has been arrested may be found in the vehicle. In *Arizona v. Johnson*, 555 U.S. ___ (2009), a unanimous Court held that, during a lawful traffic stop, police may pat down a driver and any passengers if there is a reasonable suspicion that they may be armed and dangerous. In *Corley v. United States*, 556 U.S. ___ (2009), a 5-4 Court ruled that 18 U.S.C. § 3501 narrows, but does not discard, the rule in *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957), rendering inadmissible a confession given after unreasonable delay in bringing the defendant before a magistrate.

In *Herring v. United States*, 555 U.S. ___ (2009), the Court held that, if an officer reasonably believes that there is an outstanding arrest

warrant, but that belief is due to a negligent bookkeeping error by another police employee, evidenced seized incident to the arrest is not subject to exclusion, even though the arrest itself was in violation of the Fourth Amendment. In *Kansas v. Ventris*, 556 U.S. ___ (2009), the Court held that the defendant's incriminating statement given to a jailhouse informant planted in violation of the Sixth Amendment was admissible at trial to impeach the defendant's conflicting testimony. In *Montejo v. Louisiana*, 556 U.S. ___ (2009), a 5-4 Court overruled *Michigan v. Jackson*, 475 U.S. 625 (1986), and held that a represented defendant's uncounseled waiver of *Miranda* rights is not longer to be presumed to be invalid; on remand, the defendant was entitled to assert that he had invoked his right to counsel under *Edwards v. Arizona*, 451 U.S. 477 (1981).

In *Melendez-Diaz v. Massachusetts*, 557 U.S. ___ (2009), a 5-4 Court held that admission of certificates, in lieu of live testimony, by laboratory analysts that the matter seized by the police was cocaine violated the defendant's Sixth Amendment confrontation rights. Justice Scalia wrote the opinion for the Court, joined by Justices Stevens, Souter, Thomas and Ginsburg. Justice Kennedy, joined by the Chief Justice and by Justices Breyer and Alito, dissented.

In *Puckett v. United States*, 556 U.S. ___ (2009), the Court held that a forfeited, or non-preserved, claim that the Government has violated the terms of a plea agreement is subject to the plain-error standard of review under Rule 52(b) of the Federal Rules of Criminal Procedure. In *Rivera v. Illinois*, 556 U.S. ___ (2009), a unanimous Court held that, if all seated jurors are qualified and unbiased, a state trial court's erroneous denial of a defendant's peremptory challenge to the seating of a juror does not require automatic reversal of the defendant's conviction. In *Vermont v. Brillon*, 556 U.S. ___ (2009), the Court held that trial delays sought by defendant's appointed lawyer are attributable to the defendant, and not to the State, at least in the absence of delay caused either by the trial court's failure to appoint replacement counsel "with dispatch," or of delay caused by an institutional breakdown in the public defender system, neither of which was present in this case.

In *Yeager v. United States*, 557 U.S. ___ (2009), the Court held that, where the jury acquitted the defendant on some counts and hung on others, Double Jeopardy precluded retrial on the hung counts, if

the jury, in returning verdicts of acquittal, necessarily determined the absence of an element critical to conviction on the hung counts.

In *Abuelhawa v. United States*, 556 U.S. ___ (2009), a unanimous Court held that using the telephone to make a misdemeanor drug purchase does not "facilitate" a felony sale of those drugs. In *United States v. Hays*, 555 U.S. ___ (2009), the Court held that, to convict defendant of possession of a firearm by a felon convicted of misdemeanor domestic violence, the Government had to prove that the defendant had been convicted of a crime of violence, and that the victim was "domestic," but the existence of the domestic relationship did not have to be a discrete element of the predicate crime. In *Boyle v. United States*, 556 U.S. ___ (2009), the Court held that, to convict a defendant of a charge involving an "association-in-fact" enterprise under RICO, the association-in-fact had to have an "ascertainable structure," but that an instruction framed in that precise language was not necessary. The Court held that defendant's jury was properly instructed.

In *United States v. Denedo*, 556 U.S. ___ (2009), the Court held that an Article I military appellate court has jurisdiction to entertain a petition for writ of error *coram nobis* to challenge its earlier, and final, decision affirming a criminal conviction.

Sentencing

In *Chambers v. United States*, 555 U.S. ___ (2009), a unanimous Court held that, Illinois' "failure to report" is not a "violent felony" under the Armed Career Criminal Act. In *Dean v. United States*, 556 U.S. ___ (2009), the Court held that the 10-year minimum sentence under 18 U.S.C. § 924(c)(1)(A) applies if a gun was discharged during a violent or drug trafficking crime, whether the discharge was intentional or accidental. In *Flores-Figueroa v. United States*, 556 U.S. ___ (2009), a unanimous Court held that, in order to subject a defendant to the two-year aggravated identity theft enhancement, the Government had to prove that the defendant knew that the identification he used belonged to an actual person.

In *Moore v. United States*, 555 U.S. ___ (2008), the Court, in a *per curiam* decision, held that the district court should have considered whether to consider the crack/powder cocaine sentencing disparity as permitted under *Kimbrough v. United States*, 552 U.S. ___ (2007).

In *Spears v. United States*, 555 U.S. ___ (2009), also *per curiam*, the Court held that, after *Kimbrough*, district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with the Guidelines. In *Nelson v. United States*, 555 U.S. ___ (2008), in another *per curiam* disposition, the Court held that the sentencing judge improperly applied a presumption of reasonableness to a sentence within the Guidelines.

In its only Oregon decision of the Term, the Court, in *Oregon v. Ice*, 555 U.S. ___ (2009), held that the Sixth Amendment does not preclude judges from finding the facts necessary to the imposition of consecutive sentences.

Habeas

In *Bobby v. Bies*, 556 U.S. ___ (2009), the Ohio Supreme Court, in rejecting Bies's challenge to his death sentence, characterized him as having "mild to borderline mental retardation." After the United States Supreme Court decided, in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment prohibits execution of the mentally retarded, Bies sought a writ of habeas corpus. The Sixth Circuit held that the Ohio Supreme Court had definitively determined that Bies was mentally retarded, and, therefore, he was entitled to a sentence of life imprisonment. The United States Supreme Court reversed, and held the Ohio courts were not precluded from holding a hearing to determine whether or not Bies was, in fact, mentally retarded.

In *Harbison v. Bell*, 556 U.S. ___ (2009), the Court held that a lawyer appointed under 18 U.S.C. § 3599 to represent a state prisoner in filing a federal petition for habeas corpus was authorized by § 3599 to represent the prisoner in state clemency proceedings. The Court rejected the Government's argument that the § 3599(e)'s express authorization to "represent the defendant in . . . proceedings for executive or other clemency as may be available to the defendant" applied only to federal clemency.

In *Jiminez v. Quarterman*, 555 U.S. ___ (2009), the Texas Court of Criminal Appeals granted Jiminez the right to file an out-of-time appeal, but his conviction was affirmed. After unsuccessfully pursuing state post-conviction relief, Jiminez filed a federal habeas action. The District Court held the action time-barred, because it held that

the 1-year limitation of AEDPA was not tolled during the pendency of Jiminez's out-of-time appeal. The Fifth Circuit denied Jiminez a Certificate of Appealability. The United States Supreme Court reversed, and held that the state conviction became "final," for purposes of AEDPA, "when the out-of-time appeal granted by the Texas Court of Criminal Appeals became final."

In *Cone v. Bell*, 556 U.S. ___ (2009), the Court held that Cone's *Brady* claims were neither procedurally defaulted nor waived; although the withheld information was irrelevant to his challenge to his conviction, the Court reversed for a determination as to whether the State's withholding of the information affected the outcome of the penalty phase of Cone's trial.

The Court reversed the Ninth Circuit in three habeas cases: *Hedgpeth v. Pulido*, 555 U.S. ____ (2008) (Error in jury instruction is not "structural"; on collateral review, flaw must have "substantial and injurious effect" on verdict in order to entitle petitioner to relief); *Knowles v. Mirzayance*, 556 U.S. ____ (2009) (State's rejection of ineffective assistance of counsel claim did not violate clearly established law; even under *de novo* review, lawyer's performance did not fall below objective standard of reasonableness); *Waddington v. Sarausad*, 555 U.S. ___ (2009) (State court's rejection of challenge to jury instructions was a reasonable application of Supreme Court precedent).

CASES ON REVIEW FROM THE NINTH CIRCUIT

The Court issued decisions in sixteen cases from the Ninth Circuit, reversing in fifteen. The Circuit did have one champion on the Court in Justice Ginsburg, who voted to affirm the Ninth Circuit in twelve of the sixteen cases, joining the Court in reversing only in *Knowles v. Mirzayance*, 556 U.S. ___ (2009), *Pacific Bell Telephone Co. v. Linkline*, 555 U.S. ___ (2009), and *Ysursa v. Pocatello Educ. Assn.*, 555 U.S. ___ (2009). (See below for descriptions).

Ninth Circuit Affirmed

- *Forest Grove School Dist. v. T.A.*, 557 U.S. ___ (2009) (In a suit under the IDEA, parents who enrolled child in private special education, but who had not previously obtained

special education services from District, which did not consider their son "disabled", were entitled to recover tuition from District.)

Ninth Circuit Reversed

Habeas Corpus

- *Hedgpeth v. Pulido*, 555 U.S. ____ (2008) (Error in jury instruction is not "structural"; on collateral review, flaw must have "substantial and injurious effect" on verdict in order to entitle petitioner to relief)

- *Knowles v. Mirzayance*, 556 U.S. ____ (2009) (State's rejection of ineffective assistance of counsel claim did not violate clearly established law; even under de novo review, lawyer's performance did not fall below objective standard of reasonableness)

- *Waddington v. Sarausad*, 555 U.S. ___ (2009) (State court's rejection of challenge to jury instructions was a reasonable application of Supreme Court precedent)

Civil Rights

- *AT&T v. Hulteen*, 556 U.S. ____ (2009) (Pension benefits calculated under accrual rate providing less credit for pregnancy leave prior to enactment of Pregnancy Discrimination Act did not violate Title VII)

- *District Attorney's Office v. Osborne*, 557 U.S. ___ 2009) (Due Process Clause did not give a convict a claim under 42 U.S.C. § 1983 based on the prosecutor's refusal to give him access to DNA evidence for the purpose of subjecting it to more discriminating testing than was performed at the time of conviction)

- *Horne v. Flores*, 557 U.S. ___ (2009) (Control of education should be returned to state and local officials as soon as violation of federal law remedied; court should inquire broadly into whether changed conditions show program now complies with Equal Education Opportunity Act)

- *Safford Unified School Dist. v. Redding*, 557 U.S. ___ (2009) (In absence of grounds to suspect presence of drugs, search of student's underwear was unconstitutional, but official who ordered search was entitled to qualified immunity from student's suit under 42 U.S.C. § 1983)

- *Van de Kamp v. Goldstein*, 557 U.S. ___ (2009) (Plaintiff, whose conviction was overturned on habeas, sued prosecutor under 42 U.S.C. § 1983; prosecutor was absolutely immune on claims alleging failure to train, failure to supervise and failure to establish information system regarding impeachment of informants)

- *Ysursa v. Pocatello Education Assn.*, 555 U.S. ___ (2009) (First Amendment does not require Idaho to permit use of payroll deductions for contributions to union PACs)

Environment

- *Burlington Northern v. United States*, 556 U.S. ___ (2009) (Shell not liable for remediation costs, as an "arranger," because it did not take intentional steps to dispose of a hazardous substance; District Court properly apportioned Railroads' share of remediation.)

- *Coeur Alaska v. SEAC*, 557 U.S. ___ (2009) (Army Corps of Engineers, rather than EPA, issues permits for discharge of slurry; Corps permit did not violate the Clean Water Act)

- *Summers v. Earth Island Inst.*, 555 U.S. ___ (2009) (After the parties settled their immediate dispute, there was no standing to challenge the Forest Service's regulations, and, hence, no basis for a nation-wide injunction, because there was no live dispute over concrete application of the regulations)

- *Winter v. NRDC*, 555 U.S. ___ (2008) (In the absence of any evidence that any marine animals had been harmed, the Ninth Circuit erred in upholding an injunction against the Navy's sonar training)

Civil Litigation

- *Iran v. Elahi*, 556 U.S. ___ (2009) (In return for partial compensation from the United States, Elahi waived his right to attach a judgment in favor of Iran against a third party, in order to satisfy partially his judgment against Iran)

- *Pacific Bell v. Linkline*, 555 U.S. ___ (2008) (Plaintiff could not pursue an antitrust claim based on "price-squeeze," where the defendant had no obligation to sell to the plaintiff in the first place)

POST-SCRIPT: THE YEAR OF SONIA SOTOMAYOR

I am so late in producing this review, that the Court already has completed its work for the 2009-10 Term. While a complete review of those cases must await next year's Almanac, by way of apology, I offer this brief summary of the opinions Justice Sotomayor authored in her first year on the Court. Justice Sotomayor wrote fifteen opinions: eight for the Court, two concurrences and five dissents. Of the 92 written dispositions the Court had in the Term just completed, if we subtract the *per curiam* opinions and the cases in which Justice Sotomayor did not participate, she appears to have produced her fair share of opinions.

Of the eight opinions Justice Sotomayor wrote for the Court, four were for a unanimous Court, one was 7-1 (with Justice Stevens dissenting and Justice Alito not participating); two were 7-2 (Justices Stevens and Kennedy dissenting in one, and Justices Kennedy and Alito dissenting in another); and one was 6-3 (Justices Alito, Thomas and Ginsburg dissenting). All of these decisions were statutory construction cases, and in several of them Justice Scalia wrote concurring opinions to rail against the use of legislative history in the construction of statutes and rules. The decisions were:

Mohawk Industries v. Carpenter: Justice Sotomayor's first opinion, for a unanimous court, with Justice Thomas filing a concurring opinion. The District Court ordered Mohawk Industries to disclose certain confidential materials on the ground that Mohawk had waived the attorney-client privilege. The Court of Appeals dismissed the appeal for want of jurisdiction. Per Justice Sotomayor, "The question before us is whether disclosure orders adverse to the attorney-client

privilege qualify for immediate appeal under the collateral order doctrine. Agreeing with the Court of Appeals, we hold that they do not. Postjudgment appeals, together with other review mechanisms, suffice to protect the rights of litigants and preserve the vitality of the attorney-client privilege." The Court recognized two "other review mechanisms": interlocutory appeals certified pursuant to 28 USC § 1292(b); and, "in extraordinary circumstances—i.e., when a disclosure order 'amount[s] to a judicial usurpation of power or a clear abuse of discretion,' or otherwise works a manifest injustice—a party may petition the court of appeals for a writ of mandamus." Justice Thomas's concurring opinion would abandon the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, which permits review of "a small set of prejudgment orders that are 'collateral to' the merits of an action and 'too important' to be denied immediate review."

Wood v. Allen: A 7-2 decision. Writing for the Court in a habeas case, with Justices Stevens and Kennedy dissenting, Justice Sotomayor wrote that the Court did not need to address the question on which it had granted cert, *i.e.*, the extent to which there was a conflict between two provisions of AEDPA regarding review of factual determinations made by the State courts, because "the state court's factual determination was reasonable even under petitioner's reading of §2254(d)(2) [which allows federal courts to grant relief if the state court made 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding'], and therefore we need not address that provision's relationship to §2254(e)(1) [which places on the petitioner 'the burden of rebut-ting the presumption of correctness [of State court factual determinations] by clear and convincing evidence']." The determination in question was whether the petitioner's trial counsel made a strategic decision to forego investigating evidence of petitioner's mental deficits for potential mitigation in the penalty phase of his capital murder trial.

Milavetz, Gallop & Milavetz PA v. United States: Writing for a unanimous Court, with Justices Scalia and Thomas each concurring in part of the opinion and writing concurring opinions, Justice Sotomayor wrote that lawyers are "debt relief agencies" under BAPCPA when they provide bankruptcy assistance to consumer debtors, and that the Act's provisions prohibiting them from advising their clients either "to incur more debt in contemplation of filing [bankruptcy] or to pay an

attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title," and requiring them to disclose in any advertising their status as debt relief agencies and that they "help people file for bankruptcy relief under the Bankruptcy Code," did not violate the lawyers' First Amendment rights. Justice Scalia's concurrence, as he consistently does, took the Court to task for its reliance on legislative history in its construction of the statutes. Justice Thomas does not believe "that there is any basis in the First Amendment for the relaxed scrutiny this Court applies to laws that suppress nonmisleading commercial speech."

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA: Another 7-2 decision, with Justices Breyer and Scalia concurring with opinions, and Justices Kennedy and Alito dissenting. This case presented "the question whether the 'bona fide error' defense in §1692k(c) applies to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. We conclude it does not." Justice Breyer wrote to highlight the conundrum faced by lawyers facing personal liability, but pointed out that they can ask for advisory opinions from the FTC, and will have a defense to liability if they receive them and act in accordance with them. Justice Scalia wrote again to criticize going beyond the plain text of the statute to discern the legislative intent (in this case, both by imputing knowledge and intent to the Congress based on three court of appeals decisions construing similar language in a different statute, and by resorting to Justice Scalia's favorite bugaboo, legislative history). Justice Kennedy, joined by Justice Alito, would have held that a good faith mistake of law is still a good faith mistake entitling the defendant to a defense under the statute.

Hui v. Castaneda: In *Bivens v. Six Unknown Fed. Narcotics Agents*, the Court held that a person may sue a federal employee directly for injury caused by constitutional violations arising out of the performance of the employee's duties, at least when there is no statute that provides a direct remedy. In *Hui*, writing for a unanimous Court (no other opinions of any kind), Justice Sotomayor explained that 42 USC § 233(a), which makes the Federal Tort Claims Act remedy against the United States the exclusive remedy for any personal injury caused by a Public Health Service officer or employee while acting in the scope

of employment, precluded the plaintiffs from bringing a *Bivens* action against the PHS officers and employees who plaintiffs claim violated their decedent's Fifth, Eighth and Fourteenth Amendment rights by providing inadequate medical treatment while he was in the custody of Immigration and Customs Enforcement. Despite the emotional appeal of the case, the Court was "mindful of the confines of our judicial role," and that it was "required . . . to read the statute according to its text." Because that text "plainly precludes a *Bivens* action against petitioners for the harms alleged in this case," the Court reversed the Ninth Circuit's contrary judgment.

Carr v. United States: A 6-3 decision, with Justice Scalia concurring with an opinion, and Justice Alito, joined by Justices Thomas and Ginsburg, dissenting. This case dealt with the reach of SORNA, which has three elements: a person (1) required to register as a sex offender; who (2) travels in interstate commerce; and (3) knowingly fails to register or update a registration. The question was whether a person could be convicted under this statute if his travel in interstate commerce predated the enactment of SORNA. Writing for the Court, Justice Sotomayor held that criminal liability under SORNA cannot be predicated on such pre-enactment travel. For the third time, Justice Scalia wrote to chastise Justice Sotomayor's reliance on legislative history, but otherwise concurred in the opinion and judgment. Justice Alito, joined by Justices Thomas and Ginsburg, would have held that the statute plainly applied to interstate travel that occurred before its enactment, and, in a footnote, argued that such a construction would not have rendered the statute an unlawful *ex post facto* law.

Krupski v. Costa Crociere, SpA: Another unanimous decision, again with Justice Scalia concurring with an opinion. This was a civil procedure question, regarding whether an amendment to the complaint that changed the party or the name of the party could "relate back" to the original complaint, so that it would be timely under the statute of limitations. The Eleventh Circuit had held that plaintiff's amendment did not relate back because she knew or should have known the name of the proper defendant before she filed her complaint, and, alternatively, because she had unduly delayed in seeking to amend. The Court, through Justice Sotomayor, held "that relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or its

timeliness in seeking to amend the pleading. Accordingly, we reverse the judgment of the Court of Appeals." As usual, Justice Scalia wrote to except to the use of legislative history, in this case the Notes of the Advisory Committee, to determine Congress's intent in adopting Fed R Civ P 15(c)(1)(C).

Dillon v. United States: 7-1, with Justice Stevens dissenting and Justice Alito not participating. The question was whether *United States v. Booker*, which rendered the United States Sentencing Guidelines advisory, applied to proceedings under a statute which permits a trial court to modify a term of imprisonment after it has been imposed, if the sentencing range for that offense subsequently has been lowered by the Sentencing Commission. The applicable Commission policy statement instructs courts not to reduce the term of imprisonment below the minimum of the new range, except to the extent the original term was below the then-applicable range. In *Dillon*, the question was whether that policy statement was merely advisory. The Court, through Justice Sotomayor, held that it was not. Justice Stevens dissented because he believed the Court's holding "is unfaithful to *Booker*"; is "on dubious constitutional footing, as it permits the Commission to exercise a barely constrained form of lawmaking authority"; and because "it is manifestly unjust."

Justice Sotomayor's concurring opinions included:

Astrue v. Ratliff: Justice Thomas wrote the opinion for a unanimous court, holding that attorney fees awarded under the Equal Access to Justice Act were payable to the litigant, rather than to his attorney, and that, therefore, they were subject to a Government offset to satisfy a pre-existing debt the litigant owed to the United States. Justice Sotomayor, in an opinion joined by Justices Stevens and Ginsburg, agreed that the result was mandated by the text and precedent, but that the result was contrary to the purpose of the statute, likely was neither contemplated nor specifically intended by Congress, and, essentially, urging the Congress to amend the statute to fix the problem.

Doe v. Reed: This was the case in which the Court held that disclosure, under Washington's public records law, of referendum petitions in general would not violate the First Amendment, but left open the possibility that, under the particular facts and circumstances relating to the petition at hand, which sought to refer to the voters

an act of the Washington Legislature extending certain benefits to same-sex couples, the plaintiffs might be able to make a showing that disclosure would violate their First Amendment rights. Only Justice Thomas dissented, but Justices Breyer, Alito, Sotomayor, Stevens and Scalia all filed concurring opinions. Justice Sotomayor, in an opinion joined by Justices Stevens and Ginsburg, wrote to warn "that any party attempting to challenge particular applications of the State's regulations will bear a heavy burden[,] [e]ven when a referendum involves a particularly controversial subject and some petition signers fear harassment from nonstate actors."

Finally, Justice Sotomayor wrote dissenting opinions in:

Berghuis v. Thompkins: Justice Sotomayor authored the dissenting opinion in this 5-4 decision in which the Court held that Thompkins had validly waived his *Miranda* rights when he voluntarily responded to officers' questions after first having remained essentially silent for almost three hours, until the officer asked him if he believed in God. Justice Sotomayor, joined by Justices Stevens, Ginsburg and Breyer, would have held that under clearly established law, Thompkins's statements should have been suppressed because the State failed to establish that he effectively waived his Miranda rights.

Graham County Soil and Water Conservation District v. Wilson: The question here involved the False Claims Act, which authorizes private *qui tam* actions against persons who make false or fraudulent claims for payment from the United States. Under the FCA, however, there is no private right of action if the information already has been disclosed publicly in a "congressional, administrative or Government Accounting Office report, hearing, audit, or investigation." The Court, through Justice Stevens, held that that bar applied if the "administrative" report, audit, or investigation was state or local. Justice Sotomayor, joined by Justice Breyer, dissented, arguing that, in context, the statute only precluded relief if the information already had been disclosed in a federal context.

Granite Rock Co. v. Teamsters: The Court, through Justice Thomas held: (1) that a dispute about whether a CBA was validly formed during a strike was a matter for the District Court to decide, even though the CBA had an arbitration clause; and (2) that there was no cause of action available to the employer based on the international union's

alleged tortious interference with the CBA. Justice Sotomayor, joined by Justice Stevens, concurred in the latter holding, but dissented from the former, arguing that the parties agreed to arbitrate the no-strike dispute, including the Local's ratification-date defense.

Kawasaki Kisen Kaisha LTD v. Regal-Beloit Corp.: Is a railroad that transports a shipment of goods within the United States, which shipment originated outside the United States and was subject to a foreign bill of lading that specified Tokyo as the venue for all disputes, subject to suit in the United States under the Carmack Amendment to COGSA? No, says the Court, through Justice Kennedy. Yes, says Justice Sotomayor, in an opinion joined by Justices Stevens and Ginsburg, unless the railroad can show that it properly contracted out of Carmack.

Skilling v. United States: The Court, through Justice Ginsburg, held that former Enron executive Jeffrey Skilling was not deprived of a fair trial by prejudicial pretrial publicity and community prejudice, but that he could not properly be convicted of conspiracy to commit "honest services" wire fraud, because his alleged misconduct entailed no bribe or kickback. Justice Sotomayor, joined by Justices Stevens and Breyer, agreed with the "honest services" holding, but would also have granted relief on the fair trial claim, because the "District Court's inquiry lacked the necessary thoroughness and left serious doubts about whether the jury empaneled to decide Skilling's case was capable of rendering an impartial decision based solely on the evidence presented in the courtroom."

SELECTED PUBLISHED DECISIONS OF THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT 1/1/09 TO 6/30/10 ON MATTERS OF APPELLATE PROCEDURE AND PROCESS

(Summaries Initially Appeared in 2009-2010 Willamette Law Online: www.willamette.edu/wucl/wlo)

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CIVIL PROCEDURE / ANTI-SLAPP MOTIONS / APPELLATE REVIEW OF DENIAL OF MOTION IN OREGON

Englert v. MacDonell No. 06-35465 (01/07/2009)
Before Circuit Judges Tallman and Clifton, and District Judge Korman

Opinion (Korman): The complaint in this case alleged that the defendants had denigrated the qualifications of the plaintiff in the field of blood pattern analysis. The defendants submitted an "anti-SLAPP" motion under ORS 31.150, which creates a procedural defense to civil actions where the action can be dismissed at the pleading stage without prejudice based on the unlikelihood that the plaintiff will prevail on the merits. The district court declined to dismiss the case on the anti-SLAPP motion, and the defendants appealed. The Ninth Circuit considered the question of whether it had jurisdiction to consider the denial of an anti-SLAPP motion. The Ninth Circuit held that it did not have jurisdiction. The Ninth Circuit reasoned that the denial of an anti-SLAPP motion was not a final judgment which leaves nothing for the lower court to do but execute

the judgment. The Ninth Circuit found that the denial allowed the case to proceed to final judgment. The Ninth Circuit also held that the denial of the motion did not fall within the collateral order doctrine because the court was not convinced that no interlocutory review would foreclose later appellate review. The plaintiffs finally argued that the statute entitled them to avoid the burden of a trial, a right that they would lose without appellate review. The Ninth Circuit compared the Oregon statute with the analogous California statute. Finding that the California statute provided for appellate review, while Oregon's did not, the Ninth Circuit held that the Oregon legislature intended not to provide for such review and that the plaintiffs were not entitled to avoid the burden of a trial. DISMISSED. [Summarized by Matt Sorensen]

CONTRACTS / ARBITRATION / REVIEW OF ARBITRATION AWARDS

Comedy Club, Inc. v. Improv West Associates
No. 05-55739 (01/29/09)
Before Circuit Judges Farris, Gould, and Senior District Judge Duffy for the Southern District of New York

Opinion (Gould): Comedy Club, Inc. (CCI) contracted with Improv West Associates (Improv) to obtain a nationwide exclusive license to use Improv's trademarks. CCI later breached the contract, which resulted in an arbitration award. CCI appealed the district court's confirmation of the arbitration award. The Ninth Circuit held that the arbitration of equitable claims did not exceed the language of the contract. Utilizing California contract law principles, the Ninth Circuit found that the contract was capable of two different reasonable interpretations, but found for Improv because of the federal presumption in favor of arbitration. The Ninth Circuit next held that the arbitrator exceeded his authority in issuing two permanent injunctions, because the injunctions bound persons beyond the scope of the arbitrator's authority. The Ninth Circuit also adopted the Eighth Circuit's "completely irrational" standard in reviewing arbitration awards and held that it was rational for the arbitrator to enforce a restrictive covenant found in the contract, because the decision "drew its essence from the agreement" between CCI and Improv. The Ninth Circuit narrowed the covenant not to compete, however, finding that the arbitrator's award was in manifest

disregard of the law, because it was overly broad and could be narrowed to exclude CCI from operating only in areas that could adversely affect Improv. AFFIRMED IN PART, VACATED IN PART, AND REMANDED. [Summarized by Michael Buchanan]

CIVIL PROCEDURE / INTERLOCUTORY APPEALS / COLLATERAL JURISDICTION AND WRITS OF MANDAMUS

United States of America v. Antonio Romero-Ochoa
No. 08-30251 (02/05/09)
Before Circuit Judges Breezer, M. Smith and Tallman

Opinion (M. Smith): Romero-Ochoa (Romero) was indicted by a grand jury for unlawful reentry into the US after being convicted of an aggravated felony. Romero challenged the nature of the felony, claiming that it was not aggravated. The trial court refused to rule on the issue, deciding to address the question during sentencing, if reached. The Ninth Circuit held that it did not have jurisdiction over Romero's interlocutory appeal. Both arguments raised by Romero, collateral jurisdiction and a writ of mandamus, were without merit. Collateral jurisdiction requires three elements: the order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." None of the elements were met in this case. A writ of mandamus is an extraordinary remedy, and the facts and circumstances of this case do not merit grant of a writ. The use of the writ is limited to cases of abrogation of judicial duty, and here the judge wrote a reasoned analysis of his decision. DISMISSED. [Summarized by Faith Morse]

CIVIL PROCEDURE / ATTORNEY'S FEES / ATTORNEY'S FEES ALLOWED FOR OUT-OF-STATE LAWYER NOT ADMITTED PRO HOC VICE

Winterrowd v. American General
No. 07-56541 (02/17/09)
Before Circuit Judges Rymer and M. Smith, and District Judge Korman

Opinion (M. Smith): Plaintiffs (Winterrowd) appealed a judgment by the district court denying attorney's fees to an Oregon lawyer who assisted on a California case before a federal judge,

but who was not licensed in California and did not request to be admitted pro hoc vice for this action. Other attorney's fees were allowed, and the underlying matter settled prior to the appeal. The Ninth Circuit reversed the denial of fees, and held that because the rules which govern federal courts are independent of those governing state courts, California's local rules do not govern practice in federal courts. The Oregon attorney would have been admitted to practice in California pro hoc vice as a matter of course and his conduct "did not rise to the level of appearing before the district court." The attorney's role was similar to that of litigation support or a consultant. These individuals are essential to the litigation process but do not appear before the court. The Ninth Circuit held that when local counsel acts as a "filter" through which all the out-of-state attorney's work comes, and local counsel is subject to the discipline of the courts, the out-of-state attorney functions as an unlicensed person such as a student law clerk and the conduct does not constitute the practice of law. This approach is consistent with California law. As such, the Oregon attorney may recover fees for services rendered. AFFIRMED in PART, and REVERSED and REMANDED in part. [Summarized by Faith Morse]

CIVIL PROCEDURE / POST-VERDICT MOTIONS / JUDGMENT AS MATTER OF LAW AND MOTION FOR A NEW TRIAL (PRESERVATION)

Tortu v. Las Vegas Metro. Police
No. 06-16663, (03/03/09)
Before Circuit Judges Hug, Kleinfeld, and N. Smith

Opinion (Hug): Christopher Tortu filed a complaint claiming unreasonable force by the officers during his arrest. He claimed officers used force three different times during his arrest after trying to board a plane without permission. The jury dismissed the charges against two of the officers but found the third officer guilty of excessive force and awarded Tortu $175,000 in compensatory damages and $5,000 in punitive damages. The third officer, Engle filed a Rule 50(b) motion for judgment as a matter of law and a Rule 59 motion for a new trial. The district court granted both motions, and Tortu appealed this decision. The Ninth Circuit found that Engle was barred from making a 50(b) motion because he had not

filed the required 50(a) motion at the close of evidence or before the case was submitted to the jury. Furthermore, the Ninth Circuit found that the Rule 59 motion was improperly granted because (1) the jury's decision was not against the clear weight of the evidence, (2) the requirements to establish qualified immunity was not met, and (3) in light of the evidence, there were not excessive damages in the judgment. The Ninth Circuit concluded that the evidence supported the verdict and that the district court abused its discretion in granting Engle a new trial. REVERSED AND REMANDED. Partial concurrence and partial dissent by Judge N. Smith. [Summarized by Megan Banks]

CIVIL PROCEDURE / NOTICE OF APPEAL / TECHNICAL ERROR ON A NOTICE OF APPEAL WILL NOT BAR JURISDICTION IF FIND INTENT TO APPEAL AND LACK OF PREJUDICE

Le v. Astrue
No. 07-55559 (03/10/09)
Before Circuit Judges Callahan and Ikuta, and Judge Shadur, Senior Judge for the Northern District of Illinois

Opinion (Ikuta): Le applied for and was refused disability insurance benefits by the Commissioner of the Social Security Administration. The district court denied Le's motion for summary judgment and granted the Commissioner's motion for summary judgment. However, Le's notice of appeal to the Ninth Circuit stated he was appealing from an "order denying plaintiff's motion for summary judgment". The Ninth Circuit reviewed to determine whether the noncompliance with Federal Rule of Appellate Procedure 3(c) here was a jurisdictional bar to review. The Supreme Court has held that a litigant has complied with the rule if "the litigant's action is the functional equivalent of what the rule requires." The Ninth Circuit applied a two-part test to determine if Le's technical error was a bar to his appeal. First, whether intent to appeal the district court's grant of opposing party's summary judgment could be fairly inferred and opposing party had notice of issues on appeal; and second, whether the error would prejudice the other party. Because Le's appellate brief stated intent to appeal the district court's grant of the Commissioner's motion the Ninth

Circuit found intent to appeal. Further, the Ninth Circuit held that the Commissioner was not prejudiced by the notice of appeal's technical error because the Commissioner was able to fully brief issues raised by Le's challenge. Therefore the Ninth Circuit held both that they had jurisdiction and that the Rules of Appellate Procedure required the court to construe the notice of appeal as encompassing the district court's entire disposition. AFFIRMED. [Summarized by Patricia Goodell]

CIVIL PROCEDURE/ SUBJECT MATTER JURISDICTION/ WHETHER REQUESTING REMOVAL IS A BAR TO RAISING JURISDICTIONAL ARGUMENT ON APPEAL

International Union of Operating Engineers v. County of Plumas
No. 07-16001, (03/20/09)
Before Circuit Judges S. Thomas, Paez, and Judge Walker, Chief District Judge for the Northern District of California.

Opinion (Thomas): After the County of Plumas (Plumas) laid off five employees, the International Union of Operating Engineers (Union) brought suit claiming the layoffs were a pretext for disciplinary terminations, not for budgetary reasons as claimed. Union then filed to compel arbitration under both federal and state statutes and in response Plumas filed a notice of removal to district court which was granted. The district court granted Union's motion to compel arbitration. On appeal, Plumas now argues that the district court lacked subject matter jurisdiction over the matter. Generally, courts do not want to encourage gaining an advantage by using one theory and then using an incompatible theory for another advantage, but there is nothing precluding Plumas from challenging the subject matter jurisdiction on appeal. The Ninth Circuit looked at the statutes and what is meant by 'arising under federal jurisdiction', namely that federal law is at issue, and found that federal law does not arise in this case. The Court found that the district court lacked subject matter jurisdiction as the federal statutes do not apply in this case and therefore the order compelling arbitration must be vacated and action returned to state court. REVERSED and REMANDED with INSTRUCTIONS.[Summarized by Megan Banks]

CONSTITUTIONAL LAW / ARTICLE III / STANDING AND RIPENESS

Colwell v. Department of Health and Human Services
No. 05-55450 (3/18/09)
Before Circuit Judges H. Pregerson, W. Fletcher and M. Berzon

Opinion (Fletcher): In 2003 the Department of Health and Human Services (HHS) implemented a policy guideline which Colwell and other plaintiffs believed would force them to hire interpreters for their patients with Limited English Proficiency. Plaintiffs, physicians, brought a pre-enforcement suit alleging that the guidelines violated the Administrative Procedure Act's (APA) notice-and-comment procedure under 5 U.S.C. § 553 among other issues. The district court granted summary judgment to HHS holding that the plaintiffs did not have standing and that the suit was not ripe. The Ninth Circuit ruled that the plaintiffs satisfied the three-part standing test by showing that; they had or will suffer an injury in fact; that there was a causal connection between defendants and the anticipated injury; and that the injury is redressable by a favorable judgment. The Court also ruled that Colwell had shown constitutional, but not prudential ripeness. Constitutional ripeness requires a concrete legal issue not mere abstraction, which the Court held was satisfied through establishing standing. However, the Court ruled that because the guidelines application was ambiguous it would be very difficult to determine if it violated the APA. Judgment AFFIRMED.[Summarized by Timothy Tyson]

CIVIL PROCEDURE / JURISDICTION OF APPEALS / REQUIREMENT OF FINALITY OF AN ORDER

Plata v. Schwarzenegger
Nos. 08-17412, 08-74778 (03/25/09)
Before Circuit Judges Schroeder, Canby and Hawkins

Opinion (Canby): The duties of health care in California prisons were forced into a receivership in 2001. The district court, ordered the State to transfer $250 million to the receiver or to appear at a contempt hearing. The State appealed the order arguing that it violated California's 11th amendment immunity. In addition, it also requested a mandamus to stop the order because

it "contemplate[d] further proceedings" which would make the order not final. The State primarily argued that the district court's order was a final order and therefore appealable. The Ninth Circuit disagreed because it anticipated further proceedings; if the order was not followed, a contempt hearing would commence and would produce an appealable issue. However, until a ruling on contempt occurs, the order is not final. The appeal was dismissed for lack of jurisdiction. In addition the Ninth held that the extraordinary circumstances required for a writ of mandamus were not present. Appeal DISMISSED and Petition for Writ of Mandamus DENIED. [Summarized by Timothy Tyson]

CIVIL PROCEDURE / SUBJECT-MATTER JURISDICTION/ NO APPELLATE REVIEW WHERE SOLE GROUND IS TO PRECLUDE LITIGATION ELSEWHERE

Tur v. You Tube, Inc.
No. 07-56683 (4/21/09)
Before Circuit Judges O'Scannlain, Rymer and Wardlaw

Opinion (*per curiam*): Robert Tur, a helicopter journalist, sued YouTube, a popular online video sharing service, for copyright infringement in the Central District of California. YouTube moved for summary judgment based upon the safeharbor provision of the Digital Millennium Copyright Act, which the district court denied. Shortly thereafter, Tur, hoping to join a putative New York class action against YouTube that raises similar issues, moved to dismiss his case. The district court granted Tur's motion to dismiss without prejudice. YouTube appeals from both the grant of the motion to dismiss and the denial of summary judgment. In a memorandum disposition filed concurrently with this opinion, the Ninth Circuit affirmed the dismissal order. YouTube claimed that because a reversal of the district court's denial of summary judgment would have a preclusive effect on Tur's claims in the New York litigation, the case is not moot. The Ninth Circuit held that mootness is jurisdictional, thus it is circular to argue that a case is live because resolving it may produce a preclusive effect, because it may produce such a preclusive effect only if it is live. In conclusion, the Ninth Circuit stated that when the case on appeal has been dismissed, a party may not obtain appellate review of an earlier order if the sole ground of subject-

matter jurisdiction is that resolution of that order might preclude litigation elsewhere. DISMISSED.[Summarized by Charlie Doty]

CIVIL PROCEDURE / APPELLATE JURISDICTION / IRREPARABLE CONSEQUENCES REQUIREMENT FOR INTERLOCUTORY APPEALS

Buckingham v. Gannon
No. 08-35059 (04/22/09)
Before Circuit Judges Rawlinson and B. Fletcher, and Chief Judge Kozinski

Opinion (*per curiam*): This is an interlocutory appeal of an order disapproving a class action settlement. Plaintiffs were employee retirement plan participants of the Montana Power Company. Defendants were the directors of Montana Power Company and the plan trustee. The agreement was a settlement of a retirement plan dispute brought under the Employee Retirement Income Security Act (ERISA). The Ninth Circuit has the jurisdiction to hear interlocutory appeals under 28 U.S.C. § 1292(a) only if the order disapproving class action settlements meets three requirements: it must (1) effectively deny an injunction; (2) have irreparable consequences; and (3) be properly addressable only by an immediate appeal. Here, the order failed to meet the second requirement. The Ninth Circuit held that the rejection of the settlement did not create "irreparable consequences" as it did not deny the parties their ability to conclude the dispute on mutually agreeable terms. The district court refused the specific combination of terms in this agreement; but the parties were free to renegotiate and submit a new settlement. Moreover, since there was no proof that the fiduciary liability insurance policy offered the only source of available settlement funds, the Ninth Circuit denied that the litigation of the case would squander the insurance policy and create serious harm. Continued litigation expense is not a sufficient basis for "irreparable consequences." The Ninth Circuit dismissed the appeal for lack of jurisdiction. It also refused the alternative request for a writ of mandamus because the district court's order "did not constitute 'usurpation of judicial power or a clear abuse of discretion.'" DISMISSED. [Summarized by Erin Dawson]

IMMIGRATION LAW / JURISDICTION / APPELLATE JURISDICTION LIMITED TO FINAL ORDERS OF REMOVAL

Alcala v. Holder
No. 04-70983 (4/28/09)
Before Circuit Judges Wardlaw, Bea, and R. Smith

Opinion (Bea): Alcala was unlawfully present in the U.S. when he applied for asylum in 1993. He returned to Mexico and upon attempting to unlawfully reenter the U.S. on March 18, 2000, he was removed through expedited proceedings. He unlawfully reentered the U.S. shortly thereafter. In 2000, his asylum application was rejected and a hearing set for July 2002. In 2001, he married a U.S. citizen who filed a visa petition for an alien relative. At the 2002 hearing, the government entered evidence of his previous expedited removal and moved to dismiss the proceedings it initiated following the denial of asylum so it might reinstate the previous removal order. The Immigration Judge (IJ) dismissed the proceedings without adjudicating Alcala's applications for relief. The Board of Immigration Appeals (BIA) affirmed the dismissal and Alcala appealed to the Ninth Circuit to review the BIA order and to reopen the 2002 proceedings. The Ninth Circuit held that it had no jurisdiction because the authorizing statute limits it to review of final orders of removal. Since the 2002 proceedings against Alcala were dismissed, the only final order of removal Alcala could appeal was the March 18, 2000 order; however, Alcala was time-barred from appealing that decision. The Ninth Circuit also held that when the government does take action to reinstate the March 18, 2000 removal order, Alcala will be entitled to whatever judicial remedies are afforded to an alien in reinstatement proceedings. PETITIONS DISMISSED.[Summarized by Russ Kelley]

WRIT OF MANDAMUS / COLLATERAL ORDER DOCTRINE / DANGEROUSNESS CERTIFICATION

United States v. Godinez-Ortiz
No. 08-50337 (04/29/09)
Before Circuit Judges Trott, Kleinfeld, and Fisher

Opinion (Trott): Godinez-Ortiz, a Mexican citizen, was charged for attempting to reenter the United States after a previous deportation. He was subsequently found to be incompetent to stand trial and was admitted to the Federal Medical Facility in Butner (FMC-Butner). The district court ordered FMC-Butner to evaluate Godinez-Ortiz under 18 U.S.C. § 4246 to determine whether he should be detained for dangerousness. Godinez-Ortiz appealed and petitioned for a writ of mandamus seeking to set aside the district court's order. The Ninth Circuit held that it had jurisdiction based on the collateral order doctrine because: 1) the district court's order conclusively determined the disputed questions of whether the court may commit Godinez-Ortiz for the purpose of the dangerousness evaluation; 2) the issue of the evaluation was separate from the charge of attempted reentry; 3) the order was effectively unreviewable on appeal. The Ninth Circuit also held that the director at FMC-Butner can decide whether or not to issue a dangerousness certification. Additionally, the Ninth Circuit stated that temporary commitment of a person to a Federal Medical Facility is necessary to enable a director to conduct an evaluation and to determine if a dangerous certification must be filed. Lastly, the Ninth Circuit held that a writ of mandamus is inapplicable to this case because Godinez-Ortiz has other means of obtaining requested relief and the order is not clearly erroneous as a matter of law. AFFIRMED. Petition DENIED.[Summarized by Ritz Emi Torres (JCD)]

CIVIL PROCEDURE / INTEREST AND COSTS / DATE OF ACCRUAL OF INTEREST AND LIABILITY OF PARTIES FOR COSTS OF APPEAL

Baker v. Exxon Mobil
No. 04-35182 (06/15/2009)
Before Circuit Judges Schroeder, Kleinfeld and Thomas.

Opinion (Schroeder): The Supreme Court reduced the Baker's initial punitive damage 90% from $5 billion to $507.5 million,

holding that punitive damages must follow a 1-1 ratio of awarded compensatory damages. The Supreme Court did not address either the issue of interest or cost. Federal Rules of Appellate Procedure 37(b) gives the Appellate Court discretion to allow interest to run from either the original or remitted judgment date. The first issue was whether the interest on the $507.5 million should be assessed at the time of the original judgment in 1996 or instead, from the date of the remitted court decision in 2008. In *Planned Parenthood of Columbia/ Willamette Inc. v. Am. Coal. of Life*, 518 F.3d 1013 (9th Cir. 2008) the Ninth Circuit held that interest should ordinarily be computed from the date of the original judgment date, when the evidentiary and legal basis for the award were meaningfully ascertained—in this case 1996. Exxon argued that the appellate costs should be proportionate to the reduction in punitive damages. The Ninth Circuit, noting that Exxon's proposed result would only invite increased and wasteful litigation, held that where each party wins something, they are to bear their own costs. Applying that holding, the Ninth Circuit determined that because Exxon owed Baker $507.5 million, and Baker's punitive damages were reduced by 90%, each side won something and thus each must bear their own litigation costs. REMANDED for entry of final judgment. Kleinfeld, J., Concurring in Part and Dissenting in Part.[Summarized by M. Nels Johnson]

CIVIL PROCEDURE / ARBITRATION / REVIEW OF ARBITRATION AWARDS

Leonard Bosack v. David Soward
No. 08-35248 (07/23/09)
Before Circuit Judges Canby, Jr., Thompson, and N. Randy Smith.

Opinion (Thompson): Leonard Bosack and Sandy Lerner entered into arbitration with their former financial manager, David Soward. The purpose of the arbitration was to resolve multiple disputes surrounding the business dealings between the three parties. Due to the length and complication of the claims the arbitration was done in stages with 5 interim awards and one final award. The results of the interim awards were mixed, and Bosack moved district court to vacate awards 4 and 5 as well as the final award. The district court denied the motion and confirmed the final award, which incorporated the interim awards. Bosack appealed the decision as to

interim awards 4 and 5 as well as the portion of the final award that incorporated interim awards 4 and 5. Bosack specifically claimed that the arbitration panel: (1) violated Rule 46 of the Commercial Arbitration Rules of the American Arbitration Association and the functus officio doctrine, (2) the panel manifestly disregarded the law, and (3) the appealed awards were completely irrational. The Ninth Circuit: (1) Adopted the Eighth Circuit's view and held that the functus officio doctrine only applies to final arbitral awards, and held that the panel did not redetermine the merits of award 3. (2) Manifest disregard of the law only occurs when an arbitrator recognizes the applicable law and then ignores it, and that the arbitration panel's conduct was not in manifest disregard of the law. (3) An arbitration award may only be vacated for being completely irrational if the award fails to draw it's essence from the agreement, and that the awards were based on the agreement. AFFIRMED. [Summarized by Todd Smith]

REMEDIES / INJUNCTIVE RELIEF / PARTY CLAIMING MOOTNESS BEARS BURDEN OF PROOF IN VOLUNTARY CESSATION EXCEPTION CASES

Rosemere Neighborhood Assoc. v. United States Environmental Protection Agency
No. 08-35045 (09/17/09)
Before Circuit Judges Tashima, Thomas, and B. Fletcher

Opinion (Tashima): Rosemere Neighborhood Association (Rosemere) filed an administrative complaint with the Environmental Protection Agency (EPA). After significant delays by the EPA, Rosemere filed an injunctive action in district court to force a conclusion to the EPA's review. Shortly thereafter, the EPA issued its findings. The EPA then sought to dismiss the action in district court on grounds of mootness. Because it intended to re-file its administrative action with the EPA, Rosemere asserted that the current matter did not fail for mootness. In the alternative, Rosemere alleged that the voluntary cessation exception applied. The district court disagreed and dismissed the case. Rosemere appealed. To begin, the Ninth Circuit stated that the voluntary cessation exception to mootness does apply unless the agency shows that it is unlikely that it will relapse back to the unlawful behavior. Here, the Ninth

Circuit determined that the EPA could demonstrate either (1) that it was unlikely Rosemere would bring further administrative actions, or (2) that the EPA would meet the imposed deadlines. Because Rosemere stated that it planned to file another complaint, and the EPA had failed to prove that Rosemere would not encounter future delays, the EPA was unable to show that it would not return to its previous behavior. In addition, Rosemere had produced evidence that the EPA had not met any deadlines in recent years. This information further bolstered the Ninth Circuit's determination that Rosemere's action was not moot. REVERSED and REMANDED.

CRIMINAL PROCEDURE / INTERLOCUTORY APPEALS / COLLATERAL ORDER RULE

United States v. Samueli
No. 08-50417 (09/24/09)
Before Circuit Judges Fernandez, Gould, and District Judge England

Opinion (Gould): Samueli appeals two district court orders alleging that he lied to the Securities and Exchange Commission (SEC) in violation of 18 U.S.C Sec. 1001. As part of a criminal proceeding Samueli initially denied any wrongful conduct, then admitted to knowingly making a false statement to a SEC officer. He then pled guilty and entered into a plea bargain where he would be charged for making false statements to the SEC but not charged for securities fraud. The District Court waited to for the pre-sentence report to accept the plea bargain; when it finally was ready, both parties objected to it. The court then rejected the plea bargain but Samueli did not withdraw his guilty plea and instead appeals 1) the order rejecting his requests to review his objections to the pre-sentence report and 2) the rejection of his plea bargain. The Ninth Circuit first held that his appeal to revisit his pre-sentence objections is untimely and dismissal is mandatory. The Ninth Circuit continued to explain that an interlocutory appeal with respect to rejection of a plea bargain is inappropriate; rejected pleas may only be appealed after a final judgment has been entered. Samueli argues that his appeal should be granted in light of the collateral-order doctrine. Under this doctrine an order is immediately appealable if 1) it conclusively determines the disputed question, 2) resolves an issue completely separate from the merits and 3) is effectively unreviewable an appeal from a final judgment. The Ninth Circuit

held that Samuleli's appeal failed all three prongs and thus denied jurisdiction over the appeals. DENIED.[Summarized by Noel Kersey]

CRIMINAL PROCEDURE / SENTENCING / THE RECORD MUST BE SUFFICIENT ENOUGH TO AFFORD MEANINGFUL REVIEW OR A SENTENCE WILL BE VACATED AND REMANDED

United States v. Bragg
No. 08-10221 (09/23/09)
Before Circuit Judges Noonan, Berzon, and N.R. Smith.

Opinion (Noonan): The United States appealed Bragg's sentence after pleading guilty to filing false tax forms. The U.S. argued the record created during the sentencing of Bragg was not sufficient to afford meaningful review of the sentence imposed by the trial judge. The Ninth Circuit found four areas in which there may be an available appellate issue for the U.S., but held there was not a sufficient record made by the trial court during the sentencing proceedings to make any sort of meaningful review of the sentence. The Ninth Circuit held that while the trial court judge has wide latitude in sentences available, and the decision will be insulated from scrutiny from the appellate level, there must be a record sufficient to provide meaningful appellate review. Without a record that provides and opportunity for meaningful review, the sentence must be vacated and remanded. VACATED and REMANDED. Dissenting opinion by Smith. [Summarized by Michael Sperry]

IMMIGRATION LAW / DEFERENCE TO BIA / AGENCY INTERPRETATION OF STATUTE FOR TIMELINESS OF APPEALS

Irogoyen-Briones v. Holder
No. 07-71806 (09/29/09)
Before Circuit Judges Siler Jr., Smith Jr., and Kleinfeld

In November 2003, Irigoyen-Briones was charged with removability as an alien present in the United States. Irigoyen-Briones admitted the allegations and conceded removability in December 2003. In October 2004, Irigoyen-Briones filed an application for cancellation of removal or for voluntary departure,

these motions were denied in December 2006. A notice of appeal was filed on January 18, 2007. The notice was dismissed as being untimely being due no later than January 17, 2007. Irigoyen-Briones filed a motion for reconsideration with the Board of Immigration Appeals (BIA) which denied the motion finding that the BIA lacked the authority to extend the filing time for an appeal. Irigoyen-Briones appealed the BIA's decision. The Ninth Circuit held that the governing statute was ambiguous and as such the agency's interpretation of the statute is entitled to substantial deference. The Ninth Circuit then held that the BIA's interpretation of the statute that the BIA lacked authority to extend the time for filing an appeal was reasonable and not an abuse of discretion. AFFIRMED. [Summarized by Todd Smith]

IMMIGRATION LAW / MOTION TO RECONSIDER / COURT OF APPEALS DO NOT HAVE JURISDICTION OVER CHALLENGES TO THE EXERCISE OF ROUTINE DISCRETION

Turcios v. Holder
No. 05-72258 (09/29/09)
Before Circuit Judges Kleinfeld and M. Smith, and 6th Circuit Judge Siler

Opinion (Siler): Turcios, a lawful permanent resident of the United States, was convicted for crimes relating to a controlled substance and a crime involving moral turpitude. Turcios admitted his convictions and conceded removability. The Immigration Judge ordered him removed and assigned a date by which any appeal must be submitted. Turcios's counsel delivered a notice of appeal via Federal Express one day before the appeal was due. Because of severe weather problems, the notice of appeal was received four days late. The Board of Immigration Appeals (BIA) dismissed the appeal as untimely. Turcios filed a motion to reconsider explaining that the severe weather was the cause of the tardiness. The BIA denied the motion to reconsider, finding that the explanation did not expose an error of fact or law. The Ninth Circuit held that the denial of Turcios's motion to reconsider is an exercise of routine discretion by the BIA and the Court did not have jurisdiction. The Ninth Circuit found that the REAL ID Act does not confer jurisdiction to the Courts of

Appeals for challenges to the exercise routine discretion by the BIA. Additionally, the Ninth Circuit held that Turcios did not raise any constitutional challenges or any questions of law as contemplated by the REAL ID Act. Petition DISMISSED. Dissenting opinion by Kleinfeld. [Summarized by Ritz Emi Torres].

BANKRUPTCY LAW / NINTH CIRCUIT JURISDICTION / STANDARD FOR FINAL ORDERS

Congrejo Investments v. Mann
No. 08-15027 (11/05/2009)
Before Circuit Judges Wallace, O'Scannlain, and Kleinfeld

Trustee Diane Mann appealed an order from the Bankruptcy Appellate Panel (BAP) denying a motion for summary judgment. Congrejo argued the Ninth Circuit did not have jurisdiction because the order from the BAP was not a final order. The Ninth Circuit noted case law provides a more liberal standard as to what constitutes a final order in the context of bankruptcy. Recognizing a Supreme Court decision casting doubt on the validity of the current Ninth Circuit approach, the Ninth Circuit reviewed whether or not the standard for the finality of orders in bankruptcy should be the same as all other litigation. The Ninth Circuit did not overturn the standard for finality of orders established by prior Ninth Circuit case law for bankruptcy litigation, holding the finality of the order in the present litigation fails even the more loose standard criticized by the Supreme Court. APPEAL DISMISSED. [Summarized by Michael Sperry]

CIVIL RIGHTS / SEC. 1983 CLAIM / DENIAL OF SUMMARY JUDGMENT ON QUALIFIED IMMUNITY NOT APPEALABLE AFTER TRIAL, BEFORE FINAL JUDGMENT

Padgett v. Loventhal
No. 08-16720 (November 20, 2009)
Before Circuit Judges Schroeder, Berzon and Strom

(Opinion Per Curiam) Padgett brought a Sec. 1983 claim against Wright for a violation of his First Amendment rights. Wright filed for summary judgment citing qualified immunity. The district

court denied his motion and Wright appealed under the collateral order doctrine. The trial court concluded the appeal was frivolous, however, and proceeded to trial. A jury found Wright liable. Before entry of final judgment, Wright argued the interlocutory appeal from the denial of summary judgment. Denials of summary judgment are not appealable except for a district court's denial of qualified immunity because it is immunity from the suit, not a mere defense to liability. Because the trial had already happened, there was no compelling justification to consider the interlocutory appeal, particularly when Wright's qualified immunity argument focused on a question of fact already decided by a jury, rather than a question of law. While Wright could challenge the denial of his motion through an appeal after entry of final judgment, he could not maintain the interlocutory appeal on qualified immunity issues once the trial had occurred. DISMISSED.[Summarized by M. Nels Johnson (JCD)]

HABEAS / APPELLATE JURISDICTION / FAILURE TO PRESERVE ASSIGNMENT OF ERROR

Robinson v. Kramer
No. 07-55611 (12/09/09)
Before Circuit Judges Gould, Bea, and Judge Molloy, U.S. District Judge for the District of Montana

Opinion (Bea): Robinson appeals a denial of his habeas petition on the grounds he was not allowed to proceed as his own attorney in his California state trial for possession of cocaine base. In disposing of Robinson's request to terminate the representation of his counsel, the state trial court erroneously treated the request as *Marsden* Motion (to substitute counsel). However, Robinson's only assignment of error on direct appeal was that the length of his punishment violated the Eighth Amendment. Robinson raised the self-representation issue for the first time in his federal habeas proceedings. The district court stayed the proceedings to allow Robinson to exhaust his state-law post-conviction remedies on that claim. In the subsequent state court proceedings, Robinson only challenged the state trial courts denial of his "*Marsden* motion." The California Supreme Court denied Robinson's petition for habeas relief. Finding that the California Supreme Court did not unreasonably apply federal precedent regarding the denial of a *Marsden* motion, the district court denied Robinson's petition. On

appeal, Robinson for the first time raised a *Faretta* claim—that he had been denied his Sixth Amendment right to represent himself. The Ninth Circuit held that because Robinson both failed to exhaust his Faretta claim in state court and failed to raise the issue in his habeas proceedings, that his Faretta claim was not cognizable on appeal. AFFIRMED.[Summarized by Michael Sperry]

CRIMINAL PROCEDURE / PRE-TRIAL COMPETENCY ORDER / REVIEWABILITY OF FINDING UNDER COLLATERAL ORDER DOCTRINE

United States v. No Runner
No. 08-30449 (12/30/2009)
Before Chief Circuit Judge Kozinski and Circuit Judges Fisher, and Paez

Opinion (Fisher): No Runner appealed the district court's decision that she was competent to stand trial for charges of involuntary manslaughter, theft, and assault resulting in serious bodily injury. Although the finding was a non-final order, No Runner argued that the Ninth Circuit had jurisdiction to review the decision under the collateral order doctrine. The Ninth Circuit held that the doctrine did not apply here because the competency order decision failed two of the three conditions necessary to permit appeal from an otherwise interlocutory order. The decision failed to meet the first condition because the court's decision did not "conclusively determine" the issue of No Runner's competency, a question that could be raised later by either No Runner or the court at any time. The decision also failed the third condition because it was not "effectively unreviewable upon appeal from a final judgment." No Runner remained free to appeal the court's decision at the conclusion of the trial, and the Ninth Circuit rejected Runner's contention that holding the trial at all would violate an alleged right not to be tried if incompetent, holding such a right not to exist under Supreme Court precedent. DISMISSED.[Summarized by Daniel Peterson (JCD)]

CRIMINAL PROCEDURE / DUE PROCESS / OUTRAGEOUS GOVERNMENT CONDUCT CLAIMS MUST BE RAISED IN PRE-TRIAL MOTION TO DISMISS (PRESERVATION)

USA v. Masauli
No. 08-50062 (01/11/2010)
Before Circuit Judges Hall, Silverman, and Judge Conlon, District Judge for the Northern District of Illinois

Opinion (Silverman): A special agent of the Bureau of Alcohol, Tobacco, and Firearms, asked an informant to inform him of any possible home robberies. The informant put the agent in contact with Diego Osuna-Sanchez's crew consisting of 3 individuals including defendant, Uiese Mausali. Before they committed the robbery, ATF agents emerged and took them into custody. Defendant was found guilty, and because of his prior felony convictions, he qualified for the statutory mandatory minimum of life imprisonment. Defendant appeals his conviction on the grounds that the government violated his due process rights by directing the entire criminal enterprise and promoting violent crimes. Outrageous government conduct claims involve alleged "defects in the institution of the prosecution itself of questions of law that the district court should decide before trial." The Ninth Circuit refused to reach the merits of this argument because Masauli waived this claim for purposes of appeal. The Ninth Circuit noted that its holding was consistent with the Second, Third, and Eight Circuits who require a defendant to assert this defense prior to trial pursuant to Fed. R. Crim. P. 12(b). Though relief from waiver may be granted, it requires the defendant to "present a legitimate explanation for his failure to raise the issue in a timely manner." The Ninth Circuit held that defendant knew of the claim for six months prior to trial and therefore did not have a legitimate explanation for his failure to raise the issue pre-trial. AFFIRMED. [Summarized by Akeem Williams]

CIVIL PROCEDURE / CLASS ACTION / RIGHT TO APPEAL A DENIAL OF CERTIFICATION AFTER SETTLEMENT OF PERSONAL CLAIMS

Narouz v. Charter Communications, LLC.
No. 07-56005 (01/15/2010)
Before Circuit Judges Rymer and M. Smith, and District Judge Korman

Opinion (Smith): Narouz filed a number of employment claims against Charter Communications, both as a representative of a class action with common claims and with additional individual claims. One and a half years after litigation began the two parties entered into mediation, reaching a settlement agreement soon afterwards. The settlement stipulated that Narouz would drop his individual claims for payment of $60,000 while retaining his interest in class claims pending certification of the class and the settlement agreement by the district court. Both parties moved for certification but the district court denied the motions, tersely explaining its denial as based on its inability to ascertain a class. Narouz appealed the denial of certification of the class and the settlement agreement and motions to strike and ex parte application. The Ninth Circuit held that Narouz retained enough interest in the class settlement to appeal the denial of certification. It also held that the interlocutory appeals were not sufficiently ripe for jurisdiction. Lastly, the Ninth Circuit held that the district court's denial lacked sufficient reasoning to review for abuse of discretion and remanded to a different district court judge. VACATED, and REMANDED to a DIFFERENT DISTRICT JUDGE.[Summarized by Jesse Burgess]

ADMINISTRATIVE LAW / APPEAL OF ADMINISTRATIVE DECISION / JURISDICTION FOR APPEAL

United Farm Workers of America. v. Administrator, Environmental Protection Agency
No. 08-35528 (01/26/10)
Before Circuit Judges Pregerson, Noonan, and Bea

Opinion (Noonan): United Farm Workers of America ("UFWA") challenged in federal district court an Environmental Protection Agency ("EPA") decision allowing limited continued use of the

pesticide Azinphos-Methyl ("AZM"). The manufacturers of AZM filed an intervening motion to dismiss for lack of jurisdiction, which the district court granted. The Ninth Circuit affirmed this decision, holding that the proper court of jurisdiction was the Court of Appeals. In so holding the Ninth Circuit noted that under FIFRA, 7 U.S.C. § 136n(a), the district court has the jurisdiction to review decisions made by the Administrator of the EPA "not following a hearing", but the Court of Appeals has jurisdiction when the decision has been made "following a public hearing." The Ninth Circuit rejected UFWA's contention that the word "public" altered the meaning of "hearing" in the statute. The Ninth Circuit cited precedent concerning the statutory construction and the logical conclusion that if "public" did alter "hearing", then certain actions of the Administrator following a "hearing" would have no review available. AFFIRMED.[Summarized by Daniel Peterson (JCD)]

CIVIL PROCEDURE / QUI TAM ACTION / TIMELINESS OF APPEAL WHEN THE U.S. DECLINES TO INTERVENE

Haight v. Catholic Healthcare West
No. 07-16857 (02/04/10)
Before Circuit Judges Fletcher, Canby and Graber

Opinion (Graber): Haight filed an appeal 51 days after the entry of a grant of summary judgment for Catholic Healthcare West in a qui tam action for false and misleading facts in an application for animal research. The U.S. declined to take the action over and Haight continued to prosecute in the U.S.'s place. Relying on Ninth Circuit case law, Haight filed a notice of appeal within the 60-day period allowed for the U.S to file a notice. While the appeal was pending, the U.S. Supreme Court decided a case holding in qui tam actions, if the U.S. declined to take over the action, the 60-day period was not applicable, but rather the 30-day period required for notices of appeal when the government is not a party. Haight argued several Federal Rules of Civil Procedure (FRCP) allowed the Ninth Circuit to extend or waive the 30-day limit as to grant them appellate jurisdiction. The Ninth Circuit held there was no way under the FRCP to extend the period beyond the 30 days because all other applicable time limits from the FRCP had also run or, in the alternative, notices of appeals were excepted from extension. Because the Ninth Circuit could not extend the time for Haight to file her

notice, they did not have jurisdiction and had to dismiss the appeal. DISMISSED. [Summarized by Michael Sperry]

CRIMINAL LAW / JUDICIAL REVIEW / STANDARD OF REVIEW

United States v. Nevils
No. 06-50485 (3/19/10)
Before Chief Judge Kozinski, Circuit Judges Rymer, Thomas, Silverman,Fisher, Gould, Tallman, Rawlinson, Clifton, M. Smith Jr., and Ikuta

Opinion (Ikuta): Nevils was found asleep in an apartment with a machine gun and a handgun on him. He was later convicted of being a felon in possession of firearms and ammunition. Nevils appealed the conviction on two grounds. First, Nevils argued that the government failed to prove every element of the crime. Nevils' second claim was that the court failed to consider analogous state sentences. On appeal, the Ninth Circuit determined that the proper standard of review involved reviewing the evidence was in a light most favorable to the prosecution, and then asking whether any reasonable trier of fact to find the essential elements of the crime. Using this standard (rather than Nevils', which would require viewing the evidence in the light most consistent with innocence), the Ninth Circuit held that there was evidence that would permit a rational juror to find that Nevils knew that he possessed the firearms. The Ninth Circuit then reviewed the sentencing decision for plain error and held that a federal district court is not required to consider state sentencing disparities and did not commit plain error in failing to do so. AFFIRMED. Summarized by Todd Smith]

CIVIL PROCEDURE / PERSONAL JURISDICTION / COLLATERAL ORDER DOCTRINE

James Thompson v. Clayton Frank
No.08-16982 (3/30/10)
Before Circuit Judges Fernandez, Hawkins, and Thomas

Opinion (*per curiam*): James Thompson, a Hawaii state prisoner, is serving a life sentence without possibility of parole, and other concurrent sentences for conviction of multiple accounts of sexual assault, and kidnapping. Thompson filed a 28 U.S.C. § 2254 habeas

corpus motion, which the district court ordered stayed because Thompson's claims were not yet exhausted in state court. The State of Hawaii and other respondents appealed the order, alleging that a court of appeals had jurisdiction over the present case pursuant to the collateral order doctrine. However, the Ninth Circuit rejected this argument and concluded that the doctrine did not apply because the appellants failed to show that the order was unreviewable on appeal from final judgment. DISMISSED. [Summarized by Julie Hong]

WRIT OF MANDAMUS / STANDARDS FOR GRANT

In Re Jordan
Decided: 06/01/10
No. 09-72379
Circuit Judge Pregerson for the Court; Circuit Judges B. Fletcher and Graber

WRIT OF MANDAMUS: No writ of mandamus will issue to compel the District Court to act where the District Court has not clearly erred and where petitioner has failed to demonstrate that there are no other adequate means of achieving relief. Petitioners sought writ of mandamus requiring the U.S. District Court for the Central District of California to order the return of certain motorcycles seized during criminal investigation. The Ninth Circuit held that the district court had not clearly erred in refusing to order the return of the motorcycles because the Ninth Circuit had not addressed that legal issue and the other circuits were split on the question. Further, the Ninth Circuit held that petitioners had not demonstrated that they had no other adequate means to recover the motorcycles because litigation in the civil judicial forfeiture action was still available to them, another statutory remedy was available, and they would not suffer greater than normal harm in the absence of immediate relief. WRIT DENIED. [Summarized by Russ Kelley]

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SPECIALS OF THE DAY

WHITHER ANOTHER METHOD?

By Robert M. Wilsey[1]

We are witnessing a unique moment of fluidity in the opinions of the Oregon Supreme Court. The methods by which the court interprets language, established in a quintet of cases decided between 1992 and 1997, appear to be under active reconsideration.[2] Indeed, little more than a year ago the court removed the cornerstone of the quintet, *PGE v. Bureau of Labor & Industries*, which had governed the interpretation of statutes since 1993, and replaced it with a new methodology set out in *State v. Gaines*.[3] And while *Gaines* itself was a watershed, it now appears that the court is poised to reconsider another part of the quintet, opening the possibility of a second dramatic change in how the Oregon Supreme Court approaches the interpretation of language.

On January 21, 2010, the court allowed review in *Bresee Homes Inc. v. Farmers Ins. Exch.*, an otherwise routine case involving the interpretation of an insurance policy.[4] Since 1992 the interpretation of insurance contracts has been governed by *Hoffman Construction v. Fred S. James Constr. Co.*, which set forth a three-step method by which the court first looks to the plain meaning of the text and then, if there is an ambiguity, to the whole text of the insurance contract. If the ambiguity persists after those first two steps, the court then construes the ambiguity against its drafter, the insurance company.[5]

The Court of Appeals applied this method in *Bresee* and concluded that the policy, read as a whole and in light of exclusions included within it, did not provide coverage. The court, following its own line

1 Clerk to Chief Judge Brewer, Oregon Court of Appeals. This article, which was drafted while the author was employed at Smith Freed & Eberhard, P.C., represents the opinion of the author only, and none of his past or current employers. A somewhat different version of this article appeared in the October 2010 *Oregon Bar Bulletin*.

2 The "Quintet" consists of *PGE v. Bureau of Labor & Indus.*, 317 Or 606, 859 P2d 1143 (1993) (statutes); *Hoffman Construction v. Fred S. James Co.*, 313 Or 464, 836 P2d 703 (1992) (insurance contracts); *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997) (contracts); *Ecumenical Ministries v. Oregon Lottery Comm.*, 318 Or 551, 871 P2d 106 (1994) (initiated constitutional amendments and laws); *Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992) (interpretation of the Oregon Constitution).

3 346 Or 160, 206 P3d 1042 (2009).

4 227 Or App 587, 206 P3d 1091 (2009), review granted, 347 Or 543 (2010).

5 *Hoffman*, 313 Or at 469-471.

of cases decided under *Hoffman*, rejected extrinsic evidence offered by the insured to explain the meaning of the policy, instead resolving the question purely as a matter of law.[6] So far, so good: So far, just like *Gaines*. *Gaines* was also an otherwise routine case, albeit in the statutory construction context, and in that case the Court of Appeals, following the line of cases decided under *PGE*, also rejected extrinsic evidence, in the form of legislative history, offered by the defendant to explain the meaning of a statute.[7] And like the allowance of review in *Gaines*, the Supreme Court's allowance of review in *Bresee* is remarkable in its breadth; indeed, the third and fourth issues on review strike to the heart of the *Hoffman* method: whether provisions in an insurance policy should be interpreted independently, or whether a policy should be interpreted as a whole, and whether extrinsic evidence may be introduced to create an ambiguity, or otherwise submitted to the fact-finder.[8]

The parallels between the *PGE* method and the *Hoffman* method are also striking: both are three step methods for the interpretation of language, both are primarily concerned with what types of evidence of meaning can be used to resolve ambiguities in that language, and both begin—and, in the case of *Hoffman*, end—within the four corners of the document. Perhaps the most significant parallel is the treatment of extrinsic evidence under both methods. Prior to deciding *Gaines* the Oregon Supreme Court, when applying the *PGE* method, rarely resorted to legislative history to resolve ambiguities[9] in the text and since the decision in *Gaines* there has been a marked increase in the amount of legislative history appearing in the court's opinions. This parallel makes the grant of review in *Bresee*, coming so soon on the heels of the court's decision in *Gaines*, all the more interesting.

What is behind the recent decisions of the court to reconsider its methods? In *Gaines* the answer was clear: in response to years of criticism of the *PGE* paradigm for its perceived hostility to legislative

6 227 Or App at 593-94.

7 *State v. Gaines*, 211 Or App 356, 360 n 2, 155 P3d 61, adh'd to as modified on recons., 213 Or App 211, 159 P3d 1291, *rev'd*, 346 Or 160 (2009).

8 Oregon Supreme Court, *Media Release*, January 21, 2010 page 2 *available in PDF at* http://www.ojd.state.or.us/sca/WebMediaRel.nsf/Files/01-21-10_Supreme_Court_Conference_Results_Media_Release.pdf/$File/01-21-10_Supreme_Court_Conference_Results_Media_Release.pdf (accessed March 15, 2010).

9 See Robert M. Wilsey, *Paltry, General & Eclectic: Why the Oregon Supreme Court Should Scrap PGE v. Bureau of Labor & Industries*, 44 Willamette L. Rev. 615, 619-620 and n. 11-14 (2008) (collecting what few cases cited legislative history).

history. The Legislature amended ORS 174.020 in 2001[10] and *Gaines* represented the first case squarely presenting the question of what that amendment accomplished. The answer is not so clear with *Bresee*. Neither the rule that an insurance policy be construed as a whole nor the bar on extrinsic evidence is rooted in a statute. Although support for both rules could arguably be found in the first sentence of ORS 742.016 which provides, in part, that "every contract of insurance shall be construed according to the terms and conditions of the policy," the language of that statute has remained unchanged since 1917.[11] The *Hoffman* methodology is best seen as a creation of the court, representing the court's choice of a particular interpretive methodology.

In the absence of a statutory change, what factors could be leading the court to reconsider the *Hoffman* methodology in *Bresee*? The most readily apparent reason is that, with regard to the bar on extrinsic evidence, the court is confronting a rule developed most extensively in the Court of Appeals. Although the court in *Hoffman* did not mention extrinsic evidence—neither endorsing nor foreclosing its consideration—extrinsic evidence was not one of the sources of meaning the court identified as part of the three-step methodology. In a string of cases beginning with *Andres v. American Standard Ins. Co.*, the Court of Appeals, relying on *Hoffman's* command that the interpretation of an insurance contract is "a matter of law," began rejecting extrinsic evidence when offered as relevant to the meaning of policy terms.[12] This marked a reversal of that court's earlier stance that it could consider extrinsic evidence where the policy was first found to be ambiguous but nonetheless, the court in *Andres* made clear that it considered extrinsic evidence to have been outside the *Hoffman* methodology since the method's inception, even though such evidence could be considered in the interpretation of other kinds of contracts.[13]

If the Supreme Court reverses the Court of Appeals in *Bresee* and allows the consideration of extrinsic evidence, it will mark a distinct

10 Amended by Laws 2001, ch. 48, § 1.

11 *See, e.g., Hoffman*, 313 Or at 469 (relying on ORS 742.016); see L. 1917, ch. 203, § 12.

12 205 Or App 419, 424-25, 134 P23d 1061 (2006); *see also Rhiner v. Red Shield Ins. Co.*, 228 Or App 588, 208 P3d 1043 (2009) (same).

13 *See, e.g., Protection Mut. Ins. Co. v. Mitsubishi S.A. Corp.*, 164 Or App 385, 397-98, 992 P2d 479 (1999), *rev den*, 330 Or 331 (2000) (noting that extrinsic evidence could be considered where policy is ambiguous).

shift in the *Hoffman* methodology, going beyond a mere reversal of the lower court's case. The methodology's silence regarding extrinsic evidence distinguishes it not only from the method of contract interpretation adopted in *Yogman v. Parrot*, but also from the *PGE* method, even as subsequently altered by *Gaines*. After all, legislative history was at least recognized under the *PGE* method. Under *Hoffman*, by contrast, extrinsic evidence appears to merit no consideration at all, so to consider allowing (or requiring) its consideration would be a particularly significant change. And the grant of review in *Bresee* goes further than either *PGE* or *Yogman* when it asks whether extrinsic evidence, "particularly that which can be characterized as an admission," may be introduced to *create*—to create, not explain—an ambiguity. Answering this question in the affirmative would not simply place *Hoffman* on the same footing as *Yogman* with regard to extrinsic evidence. Under *Yogman*, a contract must first be ambiguous before extrinsic evidence may be considered.[14] The court's question in *Bresee*, if answered in the affirmative, would allow otherwise unambiguous language to be *rendered* ambiguous by extrinsic evidence whenever a court interprets an insurance contract. Given the well known third-step in *Hoffman*, an extrinsically created and otherwise unresolved ambiguity will result in the insurance contract being construed against its drafter. This is methodology with teeth.

There is little to indicate why the court would consider departing from the rule that insurance contracts be interpreted as a whole. Application of the rule has not been marked by dissension in the Court of Appeals, nor has any of the court's own cases indicated dissatisfaction with the notion that an insurance policy, like any other document, should be read as a whole. Indeed, application of the rule determined the outcome *Hoffman* itself as well as major cases following *Hoffman* in which the court explained and reaffirmed the methodology.[15] And, as would be the case with removing the bar on extrinsic evidence, reading each provision of an insurance contract discretely will likely result in more of such contracts being held ambiguous, and thus interpreted against their drafters, because many parts of insurance policies—particularly endorsements—are comprehensible only in light of the main policy that they are intended to modify.

14 *Yogman*, 325 Or at 364.

15 *Hoffman*, 313 Or at 472-473; *see also, e.g.*, *Holloway v. Republic Indemnity Co.*, 341 Or 642, 653, 147 P3d 329 (2006).

Perhaps the impetus toward altering the *Hoffman* methodology is part of a larger undertaking by the court to move away from the rigid, three-step, analytical constructs adopted between 1992 and 1997, not because those constructs no longer work, but because the court considers them unnecessarily constraining. Methodology not only drives judicial decision making, it also drives judicial opinion writing and the three-step methods can be conceived of as outlines for use by appellate judges in crafting opinions of the court. So conceived, it is possible that the move away from rigid methodologies reflects the changing composition of the court itself. With the retirement of Justice Gillette, no members of the court that decided *Hoffman* will remain on the bench, and the court now includes several justices with extensive experience on the Court of Appeals in the years following the introduction of the methods set out in the quintet. Perhaps the shared experience of these justices in crafting opinions of the court within the confines of sequential, three-step methods has led them reconsider the value of such rigid methodologies.

If so, what would a post-*Hoffman* world look like? Although the possible consequences of abandoning the *Hoffman* methodology can seem daunting, the statutory construction opinions post-*Gaines* provide some support for the notion that continuity rather than revolution is the more likely outcome. Since *Gaines* was decided in 2009 the court has regularly considered legislative history and in no case has that legislative history overridden the clear language of the statutory text, in context. Despite the language of the grant of review in *Bresee* regarding extrinsic evidence, even if the court were to answer that question in the affirmative, the court would still be hard-pressed not to give decisive weight to the plain language of an insurance policy. Said another way, although opinions under *Bresee* may read differently, the results are likely fall within the mainstream of opinions decided under *Hoffman*, just as the results in cases decided under *Gaines* have tended to follow cases decided under *PGE*.

Whatever the practical outcome, the court's willingness to reconsider its methods raises interesting, and fundamental, questions about the direction of appellate law in Oregon. What method will be reconsidered next? The richly doctrinal constitutional analysis under Article I, sections 8 and 9, as set out in *State v. Robertson*[16]

16 293 Or 402, 649 P2d 569 (1982).

and *State v. Hall*,[17] or the nominally "originalist" constitutional method of *Priest v. Pearce*,[18] as applied in *State v. Ciancanelli*[19] and *Smothers v. The Gresham Transfer*?[20] Indeed, it would seem that if relaxing methodological strictures is what the court is up to, then constitutional analysis is the next natural step. But, however, there are important differences between the methods in *PGE* and *Hoffman* and the method in *Priest*. The *Priest* method defines what is important and in what order it will be considered—it does not exclude evidence of intent so much as it direct where the emphasis is to be placed. Indeed, no one reading the court's "originalist" opinions in *Ciancanelli* or *Smothers* could fault the court for *not* considering virtually every type of evidence that it could muster.[21] So perhaps *Gaines* and *Bresee* are bookends: each opening up the inquiry to evidence that was previously excluded and resulting, if not in altered outcomes, than at least in more comprehensive discussions of the possible meanings of the text. Whatever the result in *Bresee*, and wherever the Court decides to go next, these are interesting times.

17 339 Or 7, 115 P3d 908 (2005).

18 314 Or 411, 840 P2d 65 (1992).

19 339 Or 282, 121 P3d 613 (2005).

20 332 Or 83, 23 P3d 333 (2001).

21 *See, e.g.*, Jack L. Landau, *Hurrah for Revolution*, 79 Or L Rev 793, 837-839 (2000) (setting out variety of evidence considered probative of framer's intent).

A CALL FOR JUDICIAL ABROGATION OF TWO THIRD-LEVEL MAXIMS OF STATUTORY CONSTRUCTION

By Cody Hoesly

Oregon courts should abolish two third-level maxims of statutory construction: the maxim whereby they construe an ambiguous statute as the legislature would if faced with the issue, and the maxim whereby they adopt the "reasonable and just" meaning as opposed to the "absurd and oppressive" one. Both maxims are poor attempts to hide the fact that the court is deciding the case based on its own policy preferences behind the mask of fidelity to the legislature's supposed policy preferences or those of all "reasonable and just" people. Both maxims also generally result in ***ad hoc*** instances of judicial lawmaking, rather than the establishment of and adherence to clearly-defined, broadly-applicable policy principles. Accordingly, both maxims constitute an affront to democratic norms of transparency and rule of law.

As the reader is likely aware, Oregon courts follow a three-tiered, formalistic approach to resolving disputes about the meaning of contractual and statutory provisions. Under the first two tiers of that approach, the court first seeks to ***interpret*** the provision by analyzing its text, related provisions and authorities, basic assumptions about how people use language, and any other evidence of the drafters' intent, including the circumstances preceding (and sometimes following) the provision's creation. If all evidence of the drafters' intent proves ambiguous, then Oregon courts turn to the third tier of the approach and apply maxims of ***construction***, whereby they impose a meaning on the provision simply because they need to resolve the case. *See State v. Gaines*, 346 Or. 160, 171-72 (2009) (discussing three-tiered approach).

The formalistic three-tiered approach is animated by the courts' concern that their opinions be seen as faithful to the drafters' intentions, instead of to the courts' own policy preferences. That is a worthy concern, and a good reason why Oregon courts only resort to third-level maxims when all evidence which might possibly bear on the drafters' intent has been considered and found ambiguous.

The flip side of the coin, however, is that, by the time Oregon courts resort to third-level maxims, they are no longer seeking to *interpret* the provision at issue, *i.e.*, they have no idea what the drafters intended. Instead, they are seeking to *construct* a meaning for the provision based on someone else's intentions – their own.

Oregon courts have been very transparent about this when it comes to contract construction. There is no maxim pretending that the court is construing the contract as the parties would have. And, while other courts have followed the maxim that ambiguous contracts should be construed in a fair and reasonable way, *see* E. Allan Farnsworth, Contracts 459 (4th ed. 2004) (so noting), I have not found any Oregon decision applying that maxim.

Instead, Oregon courts have adopted maxims which embody clear policy choices, including several that construe ambiguous contractual provisions in favor of the party who would generally be considered the weaker one. See *State v. Watters*, 211 Or. App. 628, 639 (2007) (against drafter; in favor of Indians); *Andres v. Am. Std. Ins. Co.*, 205 Or. App. 419, 424 (2006) (in favor of insured); *Fitzgerald v. Neal*, 113 Or. 103, 110 (1924) (in favor of unpaid surety but against paid surety); *see also* Farnsworth at 460 (against party represented by lawyer). Other third-level maxims adopted by Oregon courts promote other favored policies, including freedom of commerce, see *Berry v. Lucas*, 210 Or. App. 334, 340 (2006) (in favor of common commercial practice); *Yogman v. Parrott*, 325 Or. 358, 365-66 (1997) (against restrictive covenants on use of land); holding wrongdoers accountable, see *Hoskins v. Inspector, LLC*, 154 Or. App. 136, 141 (1998) (against immunity for one's own negligence); and the arbitration of disputes, see *Portland Fire Fighters' Ass'n v. City of Portland*, 181 Or. App. 85, 96 (2002) (in favor of arbitration under collective bargaining agreement). Oregon courts also assume that parties intend to draft contracts which will not be unenforceable because they violate the law. *See Miller v. Gold Beach Packing Co.*, 131 Or. 302, 310-11 (1929) (in favor of lawful purpose).

Many of those same policies can be found in the maxims which Oregon courts apply when construing statutes. Some maxims promote the general policy of favoring the disadvantaged. *See Strader v. Grange Mut. Ins. Co.*, 179 Or. App. 329, 337-38 (construe remedial statutes liberally); *Cuff v. Dep't of Public Safety Stds. & Training*, 217 Or.

App. 292, 298 (2007) (construe remedial statutes retroactively but substantive statutes prospectively); *cf. Lanig*, 154 Or. App. at 675-77 (construe constitutional provisions prospectively). Numerous others promote additional policy choices the courts have adopted. *See, e.g., Buell v. State Accident Ins. Comm'n*, 238 Or. 492, 498 (1964) (promote judicial review and fair administrative procedure); *Wheaton v. Kulongoski*, 209 Or. App. 355, 363 (2006) (avoid requiring that useless acts be done); *State v. Lanig*, 154 Or. App. 665, 674 (1998) (avoid construction that might render statute unconstitutional); *cf. Lanig*, 154 Or. App. at 674 (avoid construction that might render state constitutional provision violative of federal constitution).

However, the maxim that Oregon courts employ above all others when faced with an ambiguous statute is the one whereby they interpret the statute as the legislature would if faced with the issue. *See, e.g., State v. Branam*, 220 Or. App. 255, 263 (2008) (applying that maxim). There is a fundamental problem with that maxim: it pretends to be a tool of *interpretation* instead of a tool of construction. All of the sources for discerning the legislature's purpose – text, context, and legislative history – are considered at the first and second levels of the analysis. If those sources reveal a legislative purpose, then resort to *Branam's* third-level maxim is unnecessary. Alternatively, if those sources do not reveal a legislative purpose, then the court cannot legitimately claim to be pursuing that purpose through *Branam's* third-level maxim; the court must instead be pursuing its own purpose. That is *construction*, not *interpretation*.

The maxim also leads to instances in which Oregon courts inappropriately describe as third-level analysis that which is properly recognized as first- or second-level analysis. For example, the court in *PGE v. BOLI*, 317 Or. 606 (1993), was wrong to describe ORS 174.030 (which requires courts to interpret ambiguous statutes in favor of natural rights) as a third-level maxim. Even if ORS 174.030 is a merely a tiebreaker for otherwise ambiguous statutes, it is nonetheless first-level legislative context for their *interpretation*, not third-level judicial policy for their construction; that is because the legislature itself has expressed its intention regarding how ties should be broken when it comes to natural rights. For the same reason, the court in *Carrigan v. State Farm Mut. Auto Ins. Co.*, 326 Or. 97 (1997), was wrong to apply ORS 731.016 (which requires liberal interpretation

of insurance statutes) as a third-level maxim. Similarly, the court in *Windsor Ins. Co. v. Judd*, 321 Or. 379 (1995), was wrong to apply the "do what the legislature would do" maxim at all – it should instead have applied ORS 731.016 at the first level of the analysis. As a final example, the court in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or. 451 (1994), was also wrong to apply the "do what the legislature would do" maxim when it sought harmony with the law of other jurisdictions; because the legislative history in that case specifically indicated a preference for such harmony, the case actually was resolved solely on the basis of first- and second-level evidence, not third-level judicial maxims.

A second common maxim also attempts to mask the court's own policy choices. Under that maxim, the court must adopt a reasonable or just construction, not one that is absurd or oppressive. *See State v. Vasquez-Rubio*, 323 Or. 275, 282-83 (1996) (reasonable, not absurd); *McAlmond v. Myers*, 262 Or. 521, 540-41 (1972) (just, not oppressive). Although that maxim invokes the notion of an objective "right answer" – one that all "reasonable and just" people would agree on – it is, in fact, ultimately based on the court's own subjective notions about what is reasonable and just.

A lack of transparency is not the only problem with the two maxims just mentioned: they also disserve the rule of law. When a court pretends that it is merely following the legislature's policy choice or the choice of all "reasonable and just" people, instead of its own choice, it is likely to give an *ad hoc* rationale for its decision instead of a principled one which can broadly apply to other, similar cases. That is unfortunate because, while it is perfectly fine for the court to set policy alongside the legislature, it is nonetheless vital that the policy be clearly laid out. That way, if the legislature disagrees with the policy, it may alter or abolish it. That is what the legislature has done with at least one maxim which Oregon courts used to employ. *See Bailey v. Lampert*, 342 Or. 321, 327 (2007) (noting that legislature abrogated rule of lenity).

It is understandable that Oregon courts are more concerned about the appearance of fidelity to the drafters' intent when construing a statute, as opposed to a contract. But that is no excuse for pretending the courts are not setting policy through third-level maxims; after all, the legislature drafted an ambiguous statute. Moreover, the cases

currently resolved under the two maxims I attack here could also be resolved under other maxims which are more broadly applicable. For example, the court could have decided *Weidner v. Or. State Penitentiary,* 319 Or. 295 (1994), by applying a maxim in favor of easily-applied procedural rules.

I am not the only one who has faulted the maxims of "do what the legislature would do" and "adopt the reasonable and just meaning." *See* Jack L. Landau, *Some Observations About Statutory Construction in Oregon*, 32 Willamette L. Rev. 1, 59-66 (1996) (criticizing those maxims for similar reasons); Steven J. Johansen, *What Does Ambiguous Mean? Making Sense of Statutory Analysis in Oregon*, 34 Willamette L. Rev. 219, 247-51 (1998) (same). But neither Landau nor Johnasen made a clear call for their abolition. I am. Because those maxims disserve democratic norms of transparency and rule of law, they should be abolished. And the courts need not wait for the legislature to do it; they can do it themselves, as they have with at least one other maxim they came to disagree with. *See Olcott v. Rogge Wood Prods., Inc.*, 146 Or. App. 264, 267-68 (1997) (noting judicial abrogation of maxim that derogation from the common law should be avoided). At minimum, Oregon courts can avoid using the maxims until such time as they are abolished.

NUTRITIONAL SUPPLEMENTS

THE OREGON SUPREME COURT

By Phil Schradle, Lead Staff Attorney

The Supreme Court is Oregon's court of last resort and exists by virtue of Article VII (Amended) of the Oregon Constitution. The Supreme Court has the ultimate responsibility for interpreting Oregon law. The court's decisions with respect to Oregon constitutional, statutory, administrative, and common laws are not subject to further judicial review, except by the United States Supreme Court to ensure consistency with federal law.

Cases come before the Supreme Court in a variety of ways, and jurisdiction is conferred by both the Oregon Constitution and by statute. The Court primarily is a court of appellate review, reviewing the decisions of lower courts and other bodies, but it also has original jurisdiction in some types of cases. In addition, the law mandates that the Supreme Court hear certain types of cases. Other cases the Supreme Court decides are before the court because the justices have exercised their discretion and determined that the matters present important questions of Oregon law.

Constitutional Jurisdiction. When voters adopted Article VII (Amended) of the Oregon Constitution in 1910, they provided the Supreme Court with constitutional authority to exercise discretionary original jurisdiction in mandamus (involving the exercise of public duties), quo warranto (concerning the right to hold a public office) and habeas corpus (questioning whether incarceration is lawful) proceedings. The court typically receives approximately 100 such petitions every year. The court considers all of these cases, but accepts only a small percentage to decide on the merits. The Constitution also imposes mandatory original jurisdiction to consider any challenges to the decennial reapportionment of legislative districts.

Statutory Jurisdiction. The primary work of the Supreme Court is to perform its legislatively authorized discretionary review of decisions of the Oregon Court of Appeals. Cases in which a disappointed litigant in the Court of Appeals files a petition seeking review actually present two questions to the court; the first is the decision whether to allow review; and the second is the decision on the merits of the questions presented if review is allowed. Each of those decisions is significant,

and the court devotes substantial resources toward considering whether a particular petition for review presents an important question for adjudication. On average, the Supreme Court decides between 800 and 1,000 petitions for review each year. In 2009, the court decided over 1,000 petitions for review. The court also has the discretionary authority to consider certified questions of Oregon law from other courts (typically from either Oregon's United States District Court or from the United States Court of Appeals for the Ninth Circuit) and certified appeals from the Oregon Court of Appeals.

The Supreme Court also has a substantial docket of statutory cases of mandatory review. On the appellate side of the court's mandatory caseload, the court hears:

- Automatic reviews in cases where the death penalty was imposed (an average of five such reviews are filed each year, but the cases are complex and extensively briefed);
- Appeals from the Oregon Tax Court (an average of six cases annually);
- Appeals involving certain types of labor disputes (infrequent);
- Reviews of administrative siting decisions for prison, energy production, and waste disposal facilities (infrequent, but complex);
- Reviews in lawyer discipline and admission matters (an average of 50 cases annually);
- Reviews involving questions of judicial fitness and disability (an average of one per year); and
- Specific cases or issues that the legislature has directed the Supreme Court to consider (challenges to the 2003 PERS legislation for example).

On the original jurisdiction side of the court's mandatory caseload, the court considers a variety of election-related petitions, including ballot title review proceedings and challenges to Voters' Pamphlet explanatory and fiscal impact statements. On average, mandatory cases account for between 30 to 40 percent of the court's annual decisions.

Finally, either by legislative direction, or the court's own policies, a number of the case categories described above are considered and decided on an expedited basis. These cases include death sentence review proceedings, election law matters, attorney and judicial discipline cases, mandamus petitions and labor and facilities siting cases.

Administrative Responsibilities. Sitting at the apex of Oregon's third branch of government, the Supreme Court has been assigned significant regulatory responsibilities relating to the administration of Oregon's judicial system. The court, for example, is responsible for appointing, among other positions, pro tempore and senior judges, members of the Board of Bar Examiners (lawyer admission), and members of the Bar Disciplinary Board (lawyer discipline). The Supreme Court also has substantial rulemaking responsibilities. The court reviews and approves a variety of rules affecting the practice of law, including amendments to the Rules of Professional Conduct (lawyer ethics), the Rules of Appellate Procedure, the Rules for Admission of Attorneys, the Oregon State Bar Rules of Procedure, and the rules governing Mandatory Continuing Legal Education for Oregon lawyers.

The administrative and regulatory elements of the court's workload fall most heavily on the Chief Justice, who, in addition to managing the Supreme Court, is the administrative head of Oregon's unified court system. As such, the Chief Justice is responsible for appointing the Chief Judge of the Court of Appeals, the presiding judge of the Tax Court, the presiding judges for each of Oregon's 27 judicial districts, and the State Court Administrator. The Chief Justice also approves the unified biennial budget for the operating expenses of all the state courts.

Workload Distribution and Case Processing. The Supreme Court considers the judicial matters before it en banc, with all seven justices participating in the decision (unlike the Court of Appeals, which decides many of its cases by three-judge panels which are subject to additional review). The Supreme Court does so primarily because it is Oregon's court of last resort. It is critical that each justice – unless recused from the case – fully contribute to this final expression of Oregon law. En banc consideration applies not only to the opinions that the court issues, but also to the petitions and substantive motions

that the court decides. The court receives approximately 750 motions each year, a substantial percentage of which are not substantive in nature. Non-substantive motions, such as for extensions of time, are decided by the Chief Justice or his designee, in coordination with Appellate Court Records staff.

Petitions for review and substantive motions are assigned on a rotation basis to one of the associate justices for preparation of a memorandum discussing the petition, motion, or other matter, and providing the justice's recommended disposition. After a case has been accepted for review and oral argument has occurred, the Chief Justice assigns the case to a particular justice for the purpose of writing an opinion. The court sits in conference usually two or three times each month to consider the opinion drafts and other matters that are pending before the court. The conferences usually take place over two days. Finally, the court holds a monthly public meeting at which it addresses the rulemaking and other non-adjudicatory matters described above.

The court generally holds oral arguments every other month, beginning in January each year, though it often sets oral arguments specially when there are matters that warrant particularly expedited treatment. The court usually sets the date for oral argument at the time the court allows review in cases on its discretionary review docket. Oral arguments are almost always scheduled for 30 minutes argument for each side (an hour total). The court hears oral arguments en banc. The court usually hears oral arguments in the Supreme Court courtroom in Salem, though the court does travel each year to hear oral arguments elsewhere (generally at a law school, college or high school).

Opinions of the Oregon Supreme Court are normally issued on Thursdays within one or two weeks after the conference at which the opinions were approved. In cases where there are extraordinary circumstances involved – e.g. impending election timelines, emergency mandamus relief requested – the release date of an opinion may be on a day of the week other than Thursday. A media release that includes notice of the court's disposition on the merits and summaries of all authored opinions is available on the Oregon Judicial Department website at 8:00 a.m. on the opinion release date. (Click on the "Supreme Court Media Releases" link at

http://www.courts.oregon.gov/Supreme/index.page). The court's opinions are also available through the "Supreme Court Opinions" link at that website. Finally, the court's oral argument calendar for the upcoming months is also available through the "Supreme Court Calendar" link at that same website.

OREGON SUPREME COURT 2009 STATISTICS

2009 STATISTICS

Total Number of Filings: 1229
Total Number of Petitions for Review Filed: 1062
Total Number of Petitions for Review Allowed: 55
Total Number of Opinions Issued: 77

SELECTED CASE TYPES OF PETITIONS FOR REVIEW FILED

(not all case types included)

Criminal
(appeals, post-conviction, habeas corpus and parole): 842
General Civil: 83
Domestic Relations: 18
Juvenile (dependency, delinquency, and termination of parental rights): 39
Agency Review: 20
Workers' Compensation: 9
Land Use: 10
Mental Commitment: 4
Probate: 4

ORIGINAL PROCEEDINGS

Mandamus Filed/Allowed: 60/2
Habeas Corpus Filed/Allowed: 8/0
Quo Warranto Filed/Allowed: 0/0

OTHER PROCEEDINGS

Ballot Measure: 29
Tax: 1
Certified Questions: 2
Death Penalty: 0
Professional Regulation: 62

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.)

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 two or 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. On occasion, in an effort to manage an accumulation of criminal and prisoner litigation appeals, the court will add an additional hearing day to its monthly oral argument calendar to hear arguments in those case categories.

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 about 10 cases for argument each day. 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.

Effective February 1, 2010, arguments in all cases are scheduled for 30 minutes total argument time (15 minutes per side). The appellant or petitioner may reserve five minutes of time for rebuttal. Requests for additional time for argument must be made by written motion filed no later than seven days before the date set for argument.

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 response to budget reductions, the court has curtailed its school sittings schedule. The court held arguments at

the University of Oregon in January but has not scheduled any other arguments outside Salem in 2010.

CONFERENCES: Like the Supreme Court, the Court of Appeals conducts its adjudicatory business at regularly scheduled private conferences. The primary purpose of those conferences is to consider draft opinions that have been circulated to the participating judges by a set deadline preceding each conference date. Each merits department typically meets twice each month for conference.

The court's motions department meets once a month. Certain motions are required by statute to be heard by a panel of judges; 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.

All ten judges meet once a month at "full court conference." The purpose of that 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.

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. (Click on the "CoA Media Releases" link at http://www.courts.oregon.gov/COA/index.page.)

OREGON COURT OF APPEALS
CASES FILED 2009

Total 3,426

Selected case types (not all case types included)

Criminal
(including appeals, habeas corpus,
post-conviction relief, and parole) 1861

General Civil 365

Domestic Relations (including adoption) 176

Agency Review (not including
workers' compensation or land use) 324

Workers' Compensation 79

Land Use 29

Juvenile (including dependency, delinquency,
and termination of parental rights) 186

Mental Commitment 71

FED 29

Probate 19

Opinions Issued 2006 - 2009

2006 420

2007 400

2008 436

2009 503

CHANGES TO THE OREGON RULES OF APPELLATE PROCEDURE

By Lora E. Keenan

The Oregon Supreme Court and Oregon Court of Appeals have authority to make rules "necessary for the prompt and orderly dispatch of the business of the court." ORS 2.120; ORS 2.560(2).The courts have exercised that authority jointly to promulgate the Oregon Rules of Appellate Procedure (ORAPs). The rules traditionally are amended and republished biennially, effective January 1 of each odd-numbered year, and so a new package of proposed permanent ORAP amendments is in the pipeline for 2011. In addition, the courts have recently adopted some temporary amendments to the format requirements for briefs. This article outlines those temporary amendments, describes the ORAP Committee and the permanent amendment process, and highlights some of the proposed permanent amendments that are coming your way in 2011.

Temporary Amendments to Rules on Brief Format and Length

Although the rules are subject to a biennial review and amendment process, the courts also may adopt temporary amendments at any time. ORAP 1.10(3). Temporary amendments generally sunset on December 31 of the even-numbered year following their issuance and become permanent by going through the next biennial amendment process. Temporary amendments are announced in the courts' media releases and are published in the Oregon Advance Sheets and online.

This spring, the courts adopted temporary amendments to rules governing the format of briefs. Briefs must now (1) use a minimum type size of 14 point (if proportionally spaced type is used), (2) comply with a word-count length limit instead of the former page-length limit, and (3) include a certificate of compliance with the type size and brief length requirements. Those temporary amendments apply to all cases initiated in either court on or after July 1, 2010. The courts intend to make those temporary amendments permanent as of January 1, 2011.

- ***Type size and style*** (ORAP 5.05(4)(f)) You may use either proportionally spaced or uniformly spaced type, although most judges prefer reading proportionally spaced type. The *style* of proportionally spaced type must be either Times New Roman or Arial--the courts adopted that requirement in 2008 and it has not been changed. The ***size*** of proportionally spaced type must now be a minimum of 14 point; this is a change from the previously acceptable 13 point. The minimum type size applies to both the text and footnotes.

- ***Brief length*** (ORAP 5.05(2); ORAP 12.10(6)) Brief length will now primarily be measured in words, not pages. In the Supreme Court, the new word-count limits are intended to be roughly equivalent to the previous page-length limits: The limits in most cases are 14,000 words for opening, responding, or combined briefs and 4,000 words for reply briefs; the limit in death penalty cases is 28,000 words. In the Court of Appeals, the new word-count limits are intended to result in shorter briefs than under the previous page limits (down from 50 pages to about 35 for principal briefs and from 15 to about 10 pages for reply briefs): The limits are 10,000 words for opening, responding, or combined briefs and 3,300 words for reply briefs. In both courts, briefs are subject to page limits under two circumstances: (1) Supplemental briefs continue to be subject to a five-page length limit; and (2) those without access to a word-processing system that provides a word count may comply with alternative page-length limits for all briefs.

- ***Certificate of compliance*** (ORAP 5.05(2); Appendix 5.05-2) An attorney (or unrepresented party) must sign a certificate of compliance for each opening, responding, combined, or reply brief. The attorney must certify (for proportionally spaced type) that the type size is not less than 14 point. The attorney must also certify the number of words in the brief and that the brief complies with the applicable word-count limit. (Those without access to a word-processing system that provides a word count instead must certify compliance with the applicable alternative page limit.) New Appendix 5.05-2 illustrates the form of this certificate.

The ORAP Committee

The courts rely on the ORAP Committee to review and develop proposals to amend, add to, and improve the rules. The committee currently is chaired by the Honorable Thomas Balmer of the Oregon Supreme Court. The voting members of the committee in 2010 consist 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, seven other appellate practitioners--including a designee of the Appellate Practice Section--and a trial court administrator. Nonvoting members include a Court of Appeals staff attorney, a Supreme Court staff attorney, the Appellate Commissioner, and the Appellate Court Administrator.

The committee typically meets several times during the spring of each even-numbered year; in 2010, the committee met three times between January and May. The rule changes approved by the committee, together with an invitation for comments, are scheduled to be published in June in the Oregon Advance Sheets and online. After the courts and the public review the proposed amendments, the committee will review comments received and will make adjustments to the proposed amendments. Once the rule changes are adopted by the courts, they will be published in the Oregon Advance Sheets and online. Unless otherwise specified in the order memorializing their adoption, all changes to the rules adopted during this cycle will be effective on January 1, 2011.

2010 Proposed Amendments

Changes to the rules are proposed by judges and court staff, committee members, other practitioners, and *pro se* parties. The committee began its 2010 cycle with about 40 agenda items, ranging from suggestions to decrease the number of certain documents that must be filed with the courts to changes that would affect briefing and oral argument in many cases. This article outlines several of the proposed amendments that the committee has considered and submitted for the courts' consideration.

As of the writing of this article, the ORAP Committee had finished its spring meetings for this cycle and proposed amendments were about to published for public comment. Because it is possible that the final amendments will differ from what is described here,

practitioners are advised to consult the ORAP page of the Oregon Judicial Department website, <www.tinyurl.com/ORAPpage>, which provides links to the most current published version of the rules, to proposed amendments, and to temporary amendments.

- ***Filing by electronic means*** (ORAP Chapter 16) In 2008 and 2009, the courts adopted temporary rules and amendments governing electronic filing in the appellate courts. Those temporary rules and amendments are proposed to become permanent effective January 1, 2011, with several additional amendments: (1) The electronic signature requirement of ORAP 16.40(2) will be amended to allow use of an electronic symbol intended to substitute for a signature (*e.g.*, a scan of a handwritten signature or "s/"); (2) ORAP 16.45, governing electronic service, will be amended to require that all electronically filed documents be accompanied by a proof of service that includes certification of service on all parties, including those served by eService.

- ***Type size and word-count for briefs and petitions for review / responses*** (ORAP 5.05, 9.05, 9.10, and 12.10) As described above, the courts have adopted temporary amendments increasing the minimum type size and changing to a word-count length limit for briefs. The courts propose to make those temporary amendments permanent effective January 1, 2011. In addition, effective January 1, 2011, the Supreme Court intends to adopt a word-count limit of 5,000 words for petitions for review and responses to petitions for review.

- **De novo *review in the Court of Appeals*** (ORAP 5.40 and 5.45) Under 2009 amendments to ORS 19.415, the Court of Appeals has discretion in most equity-type cases to decide whether to try the cause anew upon the record or to make one or more factual findings anew upon the record (hereinafter "to conduct *de novo* review"). 2009 Senate Bill 262, § 2. The legislature made those amendments to ORS 19.415 applicable only to cases in which a notice of appeal was filed after June 4, 2009. In July 2009, the Court of Appeals adopted temporary amendments to ORAP 5.40 and ORAP 5.45 to set out a process for parties to request that the court exercise its discretion to conduct *de novo* review;

those temporary amendments are proposed to become permanent effective January 1, 2011. The amendments indicate that such requests are disfavored. If made, however, such a request is to be included in the statement of the case in the appellant's opening brief. To inform and assist the bar and the public, the Court of Appeals included in the rule a nonexclusive, nonbinding list of factors that the court considers to be relevant to deciding whether to conduct *de novo* review.

- ***Oral argument in the Court of Appeals Opt-in system*** (ORAP 6.05; Appendix 6.05) Oral argument will no longer be automatically set in all represented cases in the Court of Appeals. Parties will be notified of the submission date for their case and will have 28 days to file a request for argument; timely requests for argument will be granted. New Appendix 6.05 illustrates the form of the request for oral argument.

- ***Time for argument*** (ORAP 6.15) Effective February 1, 2010, the Court of Appeals adopted temporary amendments to ORAP 6.15(1) and (2) that make the time for oral argument in all cases 15 minutes per side. Those amendments are now proposed to become permanent effective January 1, 2011.

- ***Court of Appeals Appellate Commissioner program*** (ORAP 7.55, 7.15, and 9.05) The Court of Appeals inaugurated its Appellate Commissioner program in March 2008. Temporary ORAP 7.55 and related amendments to ORAP 7.55 and ORAP 9.05 that implemented that program are proposed to become permanent effective January 1, 2011. In addition, several amendments to ORAP 7.55 are proposed: (1) Generally, claims in requests for reconsideration that address legal issues already argued by the parties or addressed by the court are disfavored. *See* ORAP 6.25(1)(e). ORAP 7.55 will be amended to indicate that such claims are not disfavored when seeking reconsideration of a decision of the Appellate Commissioner. (2) Generally, a decision of the Appellate Commissioner is not subject to a petition for review in the Supreme Court until a party has received a decision on reconsideration from the Chief Judge or the

Motions Department. *See* ORAP 7.55(4)(b); ORAP 9.05(1). ORAP 7.55 will be amended to provide an exception: When the Appellate Commissioner makes a determination of appealability under ORS 19.235(3) and designates it as a summary determination as provided by ORAP 2.35(3)(a), the Appellate Commissioner's order is subject to a petition for review in the Supreme Court.

Number of documents to be filed

- ***Supreme Court***
  The number of copies to be filed in the Supreme Court will be reduced from original plus nine to original plus eight for the following rules: ORAP 7.10(3)(b)(i) (motions or responses to motions); ORAP 5.85(2)(c) (memorandum of additional authorities); ORAP 11.05(4)(d) (petition for writ of mandamus); ORAP 11.10(1) (response to mandamus petition); ORAP 11.30 (ballot title review petition, response, reply); ORAP 11.35 (reapportionment review).

- ***Court of Appeals***
  The number of copies to be filed in the Court of Appeals will be reduced from the original plus five to the original only for ORAP 13.05(5)(c) (costs objection, reply).

- ***Email addresses*** (ORAP 2.05 and other rules) Attorney email addresses will be required on all filings.

How You Can Be Involved

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

Thank You to Committee Members

The courts appreciate the time and effort of the members of the committee, each of whom demonstrates a sincere interest in improving appellate practice in the Oregon state courts and

a cooperative approach to working with the variety of interests represented on the committee. In addition to the members of the 2010 ORAP Committee listed below, several members who recently completed service on the committee deserve recognition and thanks: the Honorable Walter Edmonds, Mary Williams, Sarah Troutt, Judi Baker, and Melanie Hagan.

2010 ORAP COMMITTEE ROSTER

Voting Members

Hon. Thomas A. Balmer, Associate Justice, Oregon Supreme Court (Chair)
Hon. Rives Kistler, Associate Justice, Oregon Supreme Court
Hon. David Brewer, Chief Judge, Oregon Court of Appeals
Hon. Timothy J. Sercombe, Judge, Oregon Court of Appeals
Jerry Lidz, Solicitor General, Department of Justice, Appellate Division
Peter Gartlan, Chief Defender, Office of Public Defense Services
Wendy M. Margolis (OSB Appellate Practice Section designee)
J. Michael Alexander
Keith M. Garza
Lindsey H. Hughes
George W. Kelly
Margaret Leek Leiberan
James N. Westwood
Mari L. Miller, Trial Court Administrator, Clackamas County Circuit Court

Nonvoting Members

Stephen Armitage, Staff Attorney, Oregon Supreme Court
Lora Keenan, Committee Counsel, Staff Attorney, Oregon Court of Appeals
Jim Nass, Appellate Commissioner
Becky Osborne, Appellate Court Services Director

DESSERT

2009 ALMANAC CONTENDERE WINNER

The winner of last year's trivia quiz was 2011 Section Executive Committee Chair Harry Auerbach, who sent his correct answers in to the Quiz within days of receiving his copy of the 2009 Almanac. Accusations of insider trading should be directed to Chair-Elect Auerbach and 2009 Editor Judith Giers.

2010 ALMANAC CONTENDERE

The Oregon Supreme Court celebrated its 150th anniversary in December 2009. In celebration of that event, we offer the following trivia questions regarding the Justices of the Court. Please send your answers by email to next year's editor, Harry Auerbach, at Harry.Auerbach@portlandoregon.gov.

1) Who was the first Justice of the Supreme Court to have been born within the boundaries of what is now the State of Oregon?

2) How many Justices were not born in the United States or its territories?

3) How many Justices have been, or would be, deans of Oregon Law Schools?

4) Who holds the record for the longest service on the Oregon Supreme Court? (Who is in second place?)

5) Which year(s) on the Court were most likely to have seen its members take particular interest in the success of Jayhawk sports?

6) Who were the last five Justices who, either prior to or after their election to the Supreme Court, had also won a statewide elective office (other than a position on the Court of Appeals?)