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

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Volume 6

OREGON APPELLATE ALMANAC

2012

Meagan Flynn, Editor

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WELCOME

Welcome to volume six of the Oregon Appellate Almanac. The almanac is a tradition born in 2006 from the inspiration and dedication of that year's chair of the OSB Appellate Practice Section, Keith Garza. It has continued as a project for each subsequent chair, with significant assistance from other members of the executive committee.

If there is a common theme that emerges from the various articles written for this volume of the almanac, it is a theme of transition. The theme was not so much planned as it is a natural outgrowth of the many changes on the Oregon appellate bench since publication of the last volume. The articles remind us of the significance of what has been lost – from the passing of Justice Roberts and Judge Buttler to the "triple-whammy" retirement of Justices Gillette, De Muniz and Durham. But, as in any good transition, there is also a sense of anticipation and possibility for the work to be done by the many newer judicial faces – those profiled in this volume and those too new to have made the deadline for articles.

This 2012 Almanac was a group effort, made possible by the contribution of last year's section chair, Harry Auerbach, who lined up many of the articles printed in volume 6; by the contribution of the authors, who took the time to write and sometimes re-write their articles; and by the many contributions of the members of the section's executive committee – from editing help to suggestions for content and authors. Special thanks should also go to the Bar liaison for our section, Julie Hankin, for her editing assistance and guidance.

Enjoy!

Meagan Flynn, chair and editor

THE APPELLATE PRACTICE SECTION OF THE OREGON STATE BAR DEDICATES THIS 2012 EDITION OF THE APPELLATE ALMANAC TO JUSTICE BETTY ROBERTS.

JUSTICE BETTY ROBERTS, PIONEERING JURIST[1]

By Honorable Virginia L. Linder and Honorable Martha Lee Walters

Betty Roberts, the first woman to serve on the Oregon appellate bench, died June 25, 2011 at age 88. She left an unprecedented legacy through her personal achievements in Oregon government and by inspiring and encouraging other women to be full participants in civic life.

When Roberts was 30 years old and the mother of four children, she went back to school to become a teacher, a career that she knew was open to women. She started at night school at Eastern Oregon College in LaGrande. Then, when she and her family moved to Portland to support her husband's career, she enrolled at Portland State College. Roberts was a member of the college's second graduating class in 1958.

Roberts began her career outside the home teaching high school social studies in Portland. While teaching, she began work on a master's degree in political science at the University of Oregon in Eugene. Roberts found that there were few women studying political science and that the political science department had never had a female faculty member. When she finished her masters in 1962, Roberts decided that she could better meet her objectives by entering law school. She started night school at Northwestern School of Law—now Lewis & Clark Law School—in 1962. Roberts obtained her JD degree in 1966.

In the meantime, in 1964, Roberts won election to the Oregon House of Representatives. She served two terms there and then, in 1968, won a seat in the Oregon Senate where she was the lone woman Senator. Throughout her legislative career, Roberts championed a

1 Reprinted with permission - the text of this tribute is available on the Supreme Court web site, as well as a video of the tribute to Justice Roberts that was conducted in the Supreme Court Courtroom on February 16, 2012.

broad range of legislative reforms that removed legal disabilities for women.

Oregon had never had a woman on its appellate courts when Governor Straub appointed Roberts to a newly created position on the Court of Appeals in 1977. Roberts was elected to a full six year term on the Court of Appeals in 1978. Then, in 1982, Roberts was again the first when Governor Atiyeh appointed her to the Oregon Supreme Court. Roberts won election to a six year term on that court later in 1982.

Roberts resigned her position on the Oregon Supreme Court in 1986 and took senior status. Thereafter, she helped found the Women's Investment Network-PAC to recruit and support women to run for the legislature, and helped found Oregon Women Lawyers to promote women and minorities in the profession. Justice Roberts pioneered alternative dispute resolution in Oregon and continued to contribute to the legal profession with her highly successful mediation and arbitration work until shortly before her death.

Roberts was the recipient of numerous awards including the Oregon State Bar Association's Award of Merit (1987), the Oregon Women Lawyers' Betty Roberts Award created to recognize lawyers who promote women in the profession (1992) and the Margaret Brent Women Lawyers of Achievement Award (2006), established by the American Bar Association to recognize and celebrate the accomplishments of women lawyers who have excelled in their field and have paved the way to success for other women lawyers.

IN MEMORIAM: JUDGE JOHN BUTTLER

By Francine Shetterly, staff attorney, Oregon Court of Appeals

The executive committee of the Oregon State Bar's Appellate Practice Section honors the life and memory of John Howland Buttler, a distinguished member of the Oregon State Bar and judge on the Oregon Court of Appeals.

John Buttler was born in Bridgeport, Conn., on August 4, 1923, and grew up there. After the bombing of Pearl Harbor, Buttler enlisted in the Navy Air Corps, and served as a fighter pilot in the Pacific Theater aboard the USS Hancock. Colleagues and friends recall harrowing tales of sorties, adventures and near-death experiences both on and off of the aircraft carrier. Buttler received two flying medals for his exemplary service. When the war ended, he completed his undergraduate studies at Dartmouth College and studied law at Columbia University. His love for the outdoors brought him to Oregon in 1951, where he joined the law firm of McEwen Gisvold, then known as Cake, Jaureguy & Tooze. Buttler practiced law with the firm for 26 years, with an emphasis on business law. He and his wife Ann raised five children, and they enjoyed a warm circle of friends with whom they shared many interests.

Buttler made time for community service. He was appointed to the Oregon Board of Parole in 1959 by Governor Mark Hatfield, and served as chair from to 1965 to 1966. He served on the Oregon Board of Bar Examiners from 1966 to 1969. He served on the Oregon State Bar Trial Committee, the Disciplinary Committee for Multnomah County, and the boards of the Portland Habilitation Center, the Portland Junior Symphony, the Portland City Club and the Cedar Hills Community Church.

In 1977, Governor Straub appointed Buttler to the Oregon Court of Appeals, where he served for 15 years. It was a good choice. Judge Buttler had what might be described as the classic "judicial temperament." He was dignified and even-tempered, respectful and courteous, patient yet firm, open-minded and compassionate. But, if there is one consistent quality noted by friends and colleagues, it is that he was a gentleman. As Judge John Warden recalls, "He looked and acted like we think judges ought to look and act," possibly "the

most gentlemanly" member of the court. Always considerate and polite, a harsh word never crossed his lips, even in heat of debate, and his calm and thoughtful demeanor would help to moderate the tone of discussions that might otherwise have turned acrimonious. Judge Buttler would not tolerate rudeness or disrespect.

Judge Buttler quickly earned the respect of litigants, his colleagues and court staff for his intellect, good judgment and work ethic. He was particular about his writing and chose his words carefully, so that his opinions would be correct and readily understood. Chief Judge William R. Richardson recalls that Judge Buttler never tired of tackling tough issues and brought the fresh perspective of a civil practitioner to the court's criminal docket and to constitutional questions. Judge Buttler developed a keen interest in state constitutional law and authored a law review article on the subject. John H. Buttler, ***Oregon's Constitutional Renaissance: Federalism Revisited***, 13 Vt. Law Review 107 (1988).

Chief Justice Paul De Muniz reflected on his good fortune to have been assigned to Judge Buttler's panel when he joined the Court of Appeals in 1990. Judge Buttler, De Muniz says, was "a wonderful man and a wonderful judge." As a veteran of the Vietnam War, Chief Justice De Muniz felt especially privileged to serve with the court's only sitting WW II veteran. He remembered Judge Buttler as "steady, thoughtful and centered on discovering the law" and applying it fairly and objectively, without any preconceived notions. Judge Buttler was never more offended than when the law was co-opted as a tool for injustice. In one of his last appellate decisions, he overturned Ballot Measure 8 (1988), an initiative that enacted a statute prohibiting job protection for state employees based on sexual orientation. ***Merrick v. Board of Higher Education***, 116 Or App 258, 841 P2d 646 (1992).

There were non-law sides to John Buttler. He was a humorous friend and colleague who was gracious as the object of a good joke and who loved to tell a good story. He was an avid fly-fisher, and many a colleague enjoyed lunchtime shopping trips to the local fly shop and tales of ill-fated bicycle fishing trips on the Deschutes. Judge Buttler was pleased the day he discovered bicycle tire tubes that could withstand the seeds of the "puncturevine."

And then there was tennis. Chief Justice De Muniz recalls, "John and I were partners for many years at the Clackamas County Bar tennis tournament hosted by Judge Gilroy. We finished second every year (losing the finals each year). John finally won the tournament when he partnered with Mary (Chief Judge Mary Deits)." And, as Chief Judge Deits recalls, beneath Judge Buttler's gentlemanly exterior was a competitive edge. "It was not until I played as his tennis partner that I saw another side of him. He was a good player and we had quite a bit of success. If we were playing a team that was not as good as we were, I would tend to back off a bit to make it a friendly game. He would tell me to stop that — that I ought to hit the ball as hard as I could right at them. He would smile and laugh when he told me that, but he meant it. He liked to win."

After his retirement from the bench in 1992, Judge Buttler worked for several years in alternative dispute resolution and continued to enjoy his hobbies until his health prevented him from doing so. He passed away in his home on September 27, 2012, after a battle with Alzheimer's.

Judge Buttler lived a life that exemplified commitment to duty and public service. With his passing, Oregon has lost one of its "Greatest Generation" and a champion for justice and the rule of law. He was predeceased by his wife Ann and is survived by his sister Frances Parsons of St. Petersburg, Fla., five children – Suzanne, John Jr., Dana, Elizabeth and Barbara – and three grandchildren.

REFLECTIONS

By Honorable Paul J. De Muniz, Oregon Supreme Court

As my 37 year career as a lawyer and judge comes to a close, I very much appreciate the opportunity to share some thoughts and reflections about my judicial career, and the past, present, and future of Oregon's courts and the legal profession.

Let me begin with an observation about what I believe has been the more enjoyable and likely one of the most important aspects of my service on both of Oregon's appellate courts. Unlike many appellate courts across the country that practice collegiality in name only, I have been privileged to experience true collegiality each day of my 22 years on the bench. So, I want to thank my colleagues on both appellate benches and all of the appellate judges with whom I had the honor of serving. Thank you for sharing with me your intellect, your integrity, your dedication to enforcement of the rule of law, and for your kindness, good humor and friendship.

I next want to acknowledge the lawyers with whom I practiced, those that I opposed in a variety of cases, and those who appeared before me during my tenure on the appellate bench. The commitment of Oregon lawyers to their clients, to professionalism, to access to justice for the poor and the disadvantaged, and to the advancement of the rule of law, has inspired me each day of my legal career. Oregon is truly a special place to practice law.

For six and one half of my twelve years on the Supreme Court I was privileged to serve as the court's Chief Justice. What follows are some thoughts and reflections about the past, the present and the future of Oregon's courts.

During my tenure as chief I was able to visit all twenty-seven judicial districts in Oregon and speak to and with most of the almost 1,700 judicial branch employees. Oregon is indeed extremely lucky to have a judicial branch work force that is exceptionally well trained, dedicated to serving the public, and willing to go the extra mile to get the job done. The public's excellent impression of the Oregon court system (here in Oregon and nationally)[1] is due in great part to

1 In August of 2011, the ***New York Times***, in an editorial on the crisis in state court funding described the Oregon court system as one of the best run court systems in the country.

those dedicated employees working the public counters, answering the phones, working in the file rooms, and working at a multitude of other tasks necessary to make the court system function.

It is the dedication and commitment of the judicial branch work force that has propelled the judicial branch to the forefront in re-engineering our court system (while experiencing significant funding reductions) to make its operations more efficient and provide greater public access to our courts.

In my first State of the Courts address in 2007, I announced our efforts to create this state's largest courthouse — a virtual courthouse that would provide the public with access to court information and records and the ability to transact business with the court system 24 hours a day, 7 days a week.

At that time I said that with Oregon eCourt we could move into the web-based world of today's technology environment. Cases could be filed electronically, fees and fines paid online, case documents and schedules made available online, and our judges could have comprehensive and up-to-date information in making critical decisions about the individuals and families appearing before them. Our courts would no longer need to create, maintain, and store the 50 million pieces of paper that is part of our annual workload.

Today, I am pleased to report that we have fully implemented Oregon eCourt in the Supreme Court and Court of Appeals. We have electronic filing, electronic case management, and electronic content management fully operational in both appellate courts. In the Supreme Court our briefs are contained on our iPads. On one occasion I signed 65 Supreme Court orders remotely from Wallowa County, without printing out a single piece of paper.

We now have implemented a system that permits the public to pay fees and fines online in every county. Since we began that on-line program this year, we have processed more than 43,000 transactions and received on-line payments of more than $4.1 million.

In June 2012, Yamhill County became our first trial court to implement Oregon eCourt with electronic case management, and electronic content management of all court information and records. Electronic filing will soon follow. On December 10, 2012, Linn, Crook,

and Jefferson Counties also implemented the same system changes. Within the next four years Oregon eCourt could be fully operational in every trial court in this state.

Let me offer one final observation about technology and the future of the court system. The younger generations that use technology every day have no patience or time for what is still considered the "court norm" — wading through reams of paper, long delays to get information, much less searching for missing paper files or delayed entry of judgments. They are now used to accessing information, facts and data from their smart phone instantly. Given that reality, courts must be funded so that they can move forward quickly with technological opportunities to support and improve their work processes. Failure to do so has the potential to cast the courts into irrelevancy with the upcoming generations.

I now want to share some thoughts I have about the future of the adversarial system and the legal profession. We all know that the internet has emerged as an integral component of daily American life. New methods of information-sharing have fundamentally altered how people acquire knowledge and communicate with one another. People share and obtain new information instantly, and I am certain that ongoing advances in digital technology will only continue the trend of more access to more information all of the time.

I think it is time to start asking, what is the effect of this enhanced access to information on the traditional adversarial system – a system with rules of evidence designed to protect due process rights and ensure a level playing field, but a system of rules originating as far back as the Roman Empire. Smart phones now provide the opportunity for jurors to conduct their own web-based inquiries and to introduce potentially inaccurate or prejudicial findings to the rest of the jury in deliberations. In addition, social media affords court participants the opportunity to communicate with one another in a different forum, unmonitored and unrestricted by traditional court regulations. These kinds of activities, commonplace in daily life outside the courtroom, have the capacity to create mischief on a constitutional scale. Beyond the difficult challenges of ensuring a fair and ethical process faced by judges, attorneys, and parties to a case, I think the new media also raises a more fundamental question for courts and the legal profession. I would state the issue this way: With greater access to information,

will people continue to believe in the adversarial process or will they come to see it as an incomplete, antiquated approach for arriving at the "truth"?

There is another issue regarding the adversarial system that I think the courts and the legal profession need to meaningfully address.

I think it is time to ask whether our traditional adversarial model actually meets the needs of divorcing and separating families. Today, the adversarial model features drawn out court processes, delays, and huge expenses, all of which intensify conflict between the parties, promote economic instability for divorcing families, and contribute to behavioral, emotional and educational risks for children. It is time to reengineer our family courts in ways that are less adversarial, that encourage continued parental involvement with their children, and that provide for alternative forums and processes outside the court system for resolving parenting issues in a more consensual manner.

Today, in 60 percent of the family law cases nationwide, at least one party is not represented by a lawyer and frequently neither party is represented. It is time to ask whether the parties in these cases are well served, whether their needs and the needs of their children are met when they litigate in hearings controlled by procedures and rules of evidence that they know nothing about. In my view, more relaxed evidentiary rules and procedures could reduce litigant stress and, with experienced, well trained judges, create an atmosphere in which parties believe they have been fairly heard and treated with respect in the judicial system.

Additionally, we might also ask ourselves, what is the appropriate level of judicial involvement and responsibility for review and examination of uncontested divorce agreements? In my view, reducing the court's role in those cases and in other aspects of divorce and separation in the judicial system would likely enable judicial resources to be shifted away from family courts, enabling courts to better perform their core judicial functions during these lean times.

Finally, I want to share some observations about the legal profession today. Like other business and professions, the legal profession has suffered as a result of the recession. Although the need for legal services has increased, the number of people able to pay legal fees has decreased markedly. It is estimated that only 20 percent of those

needing legal services in this county are receiving them. According to the New York Times and the Oregonian, at the same time that opportunities in the legal profession have constricted, new lawyers are leaving law school with mountains of debt.

The reality today is that many new bar admittees are either not employed, are under-employed, or are striking out on their own. I believe that the legal profession has an obligation to "think outside of the box" in an effort to make sure that our new lawyers are properly trained, substantively and ethically, and that we "think outside the box" to match our under-employed and unemployed lawyers with the vast array of unmet legal needs.

Fortunately, Oregon is something of a leader in that regard. One of the causes I championed as Chief Justice was the creation of a New Lawyer Mentoring Program (NLMP) requiring newly admitted lawyers to participate in a one-mentor-one-mentee relationship. This program formalizes a process that for many decades took place organically, through connections forged at law firms and other close-knit bar communities like yours. As our state bar has grown, the process of introducing new lawyers to the legal community, and guiding them through the transition to law practice, has grown more amorphous. The NLMP offers new bar members one-on-one guidance on elements of a highly competent practice, while promoting the professionalism, civility and collegiality that make Oregon among the best places in the country to practice law. The program is now into its second year and, I am pleased to say, thriving.

Let me address another larger social problem affecting the courts. I have written and commented in a number of public forums that the state's highest court stands at the intersection of every important social, political and legal issue in this state. Historically, many of the hallmark laws that define Oregon — its public beaches, the bottle bill, land use planning — were challenged in court and upheld by the Oregon Supreme Court. During my tenure as chief justice, the court has decided the constitutionality of the Legislature's funding level for K–12 education, the constitutionality of Public Employee Retirement System reforms, the constitutionality of campaign finance laws and laws regulating the financial relationship between legislators and lobbyists and constituents, the constitutionality and administration of the death penalty, and hundreds of other cases affecting human

services, public safety, victims' rights, and the enforcement of property and economic rights.

All of the cases I have described profoundly affect the social, political and economic lives of Oregonians. That being so, it is no wonder that special interest groups now see opportunities to influence who serves on a state's highest court.

So far, Oregon has been spared the financial arms race that typifies the funding of judicial election campaigns in many other states. Unfortunately, these judicial campaigns are becoming too political, characterized by exorbitant spending, the involvement of national special interest groups, and a blizzard of misleading attack ads that mask the true interests of the sponsors. Selecting judges through this kind of political process – with its inflammatory rhetoric and demagoguery – erodes public confidence in the impartiality of all judges. Polls consistently show that the public believes that judicial campaign contributions pay off for donors. A 2010 Harris poll found that more than 70 percent of Americans believe that campaign contributions influence courtroom outcomes.

History proves that our constitutional system of government has endured because the public and the other branches of government acquiesce to judicial authority. They have confidence and trust in the impartiality and the independence of judicial decision making – in other words, decision making free of outside political or economic influence. However, the special interest financing of judicial campaigns in states across the country has the potential not just to erode, but to destroy our children's and grandchildren's trust and confidence in our courts.

We should not wait for the nuclear judicial arms race to strike here. That is why I requested, and the Oregon Law Commission agreed, to study judicial selection in this state and to make recommendations for constitutional reform. I am chairing that study group, and I hope our group will provide a unique Oregon solution to this vexing problem that has reared its head in so many other states.

Thank you so very much for the opportunity to share some of my thoughts about our courts and the legal profession. To that end, I want to share a very personal reflection about my privilege to serve on the appellate bench in Oregon for 22 years. In an address to the

Massachusetts Bar in 1900, Justice Oliver Wendell Holmes, Jr., once remarked, "We cannot live our dreams. We are lucky enough if we can give a sample of our best, and if in our hearts we can feel that is has been nobly done." In most cases, I tend to agree with the great Justice Holmes. However, in my case I must take exception. Having the privilege to serve Oregonians on this state's appellate bench and as this state's 41st chief justice, exceeded even my most ambitious dreams.

SOME RECOLLECTIONS, 1972 TO 2012, AND SOME OBSERVATIONS

By Honorable Robert D. Durham, Oregon Supreme Court

The occasion of my impending retirement from the Oregon Supreme Court offers a chance to reflect on some of the significant developments in the law and in society that have occurred over the course of my career. Some events offer lessons that may benefit lawyers and judges in the future. Others simply entertain or amuse. The force of history, however, is omnipresent in the practice of law. We could do well always to approach the solution of modern problems by examining them first through the lens of history.

Look elsewhere for an encyclopedic treatment of the matters mentioned in this piece. This is a reminiscence of personal experiences and observations, offered in no particular order for whatever they may be worth to 21st century Oregon lawyers.

A. MY POINT OF REFERENCE

Our views of society and its problems tend to be shaped by our personal experiences, including our professional training as lawyers. It may be helpful, therefore, to comment briefly on some of my own formative events.

I was born in 1947, just after the close of what is for many the single most significant historical event of the 20th century: World War II. The war caused a terrific loss of human life. However, Americans who survived the war commonly taught their children that the war era was a point of pride for the country's nearly unanimous support for the U.S. military forces and for America's spirit of shared sacrifice for the war effort. 1947 saw the end of sugar rationing, as well as the widespread discharge of many thousands of American women from wartime jobs to "make room" for returning American veterans.

Social change was in the wind in 1947. One of the most significant events in the history of American race relations occurred on April 10, 1947, when Jackie Robinson joined the Brooklyn Dodgers, thus breaking the "color barrier" in professional baseball. Black players previously had played only in the "Negro Leagues" despite the fact that

their superb athletic talents were equal or superior to those of many Caucasian baseball players. Robinson overcame the initial refusal of some teams to play the Dodgers while he was on the field, and he was named baseball's Rookie of the Year. Robinson's achievements on the field overshadowed other significant race relations landmarks in 1947: The naming of Congressman William Dawson as the first Black to head a Congressional Committee, and the admission of the first Black news reporter to the Congressional press gallery.

Television saw its advent in 1947. Television channels began broadcasting for the first time in St. Louis and Detroit, and the first television station west of the Mississippi opened in Hollywood, California. "***Meet the Press***" debuted on NBC and became the longest running single program in television history. Children enjoyed less cerebral fare: "***Kukla, Fran, and Ollie***" and "***The Howdy Doody Show***," debuted in 1947.

1947 was the second year of the phenomenon known as the "Baby Boom." Millions of American veterans returned home from the war and started their families. The resulting explosion in childbearing has created a host of unplanned, unforeseen consequences. For example, approximately 10,000 Americans are now turning age 65 every day. Their needs as senior citizens will pose challenges to America's legal system for decades to come.

I came to adulthood in the 1960s and encountered one of the most polarizing events since the American Civil War: the Vietnam War. Many historical events of the 1960s were shocking or divisive: the assassination of President Kennedy in 1964 (yes, I do remember where I was when I heard the news); the explosion of violence over race relations in the South (church bombings, lynchings, the firebombing of the Freedom Riders bus in 1961; the 1965 Watts (California) riots and later urban riots in Cleveland, Chicago, Newark, and Detroit; the 1969 assassinations of Sen. Robert F. Kennedy and Rev. Martin Luther King, Jr., and associated rioting; and the violent 1968 convention of the Democratic Party in Chicago. But, for me, the Vietnam War caused a tearing of our social fabric and we will feel its effects for generations. That war split the young from the old, urban from rural, "hawks" from "doves," creating a youth culture, known as the "counterculture," that rejected the unquestioning patriotic support for the military and our government that had sustained past American wars.

I entered law school in 1969 in California, when anti-Vietnam protest marches regularly interrupted the lives of students. My first-year final examinations were interrupted by widespread campus demonstrations when President Nixon ordered the bombing of Cambodia. Somehow, we got through it all. However, as I was graduating from law school in June 1972, several political "burglars" were sneaking into the offices of the Democratic National Committee in the Watergate Hotel in Washington, D.C., thus sparking one of the greatest scandals in American history. The Watergate Scandal led to President Nixon's resignation and the indictment, conviction, and incarceration of 43 people, including some of the upper echelon of the Nixon administration.

The United State Senate investigated the Watergate Hotel break-in and, in doing so, shined a public light on the special role of lawyers and judges in exposing wrongdoing by the politically powerful. Senator Sam Ervin, a self-described "country lawyer" and a former associate justice of the North Carolina Supreme Court, chaired the Senate Watergate Committee and conducted the probing examinations of witnesses that exposed the scandal. Chief Minority Counsel Fred Thompson hit a major political nerve when he asked a White House assistant if any recording system operated inside the White House. The answer was "yes." Special Prosecutor and Harvard University law professor Archibald Cox immediately subpoenaed the recording tapes. President Nixon ordered his Attorney General, Elliot Richardson, to fire Cox. Both Richardson and his deputy, William Ruchelshaus, refused, to their enduring credit. But Solicitor General Robert Bork agreed to discharge Cox, and he appointed Leon Jaworski to succeed Cox.

Jaworski sued President Nixon to obtain unedited recordings from the White House taping system. Judge John Sirica sided with Jaworski. In July 1974, the United State Supreme Court issued a dramatic ruling that rejected Nixon's claim of executive privilege and other defenses. Nixon resigned from office two weeks later.

The Watergate Scandal placed the legal profession front and center in the view of American society. The Senate hearings and court proceedings demonstrated that lawyers and judges could be a powerful force to fight political corruption and to get to the bottom of a shocking political scandal. Unfortunately, the scandal also exposed

disturbing ethical lapses on the part of several lawyers inside the White House, including President Nixon.

I witnessed many of the events of the Watergate Scandal and the resulting Senate investigation from my vantage point as a law clerk for Justice Dean Bryson of the Oregon Supreme Court from 1972 to 1974. I started practicing law in Eugene in August 1974, one week after President Nixon resigned.

In retrospect, it is clear to me that the historical events recounted above had a lasting impression on me. From my parents' patriotic dedication to our country, I inherited a high regard for the capacity of our democratic ideals to command the strong respect of the American people. My lesson from the upheavals of our country's racial and political violence, the Vietnam War, and the Watergate Scandal was that Americans must insist that their government, at all levels, shall remain faithful to the rule of law, including those laws that protect the rights of the politically powerless. And I recognized early on that, in our struggle against political corruption and for respect for the rule of law, our legal profession serves as the peoples' vanguard, working at the forefront of our constitutional system in support of the public interest.

Since I began work as a lawyer in 1972, several forces have helped shape our all-important legal profession, including the judicial branch of government. Two deserve comment here.

B. WOMEN AND THE LAW

To say that the legal profession in Oregon in 1972 was "male-dominated" is an understatement. And Oregon was like most places in that respect. As Justice Sandra Day O'Connor has recounted elsewhere, legal jobs for women in that era were mostly secretarial, even for law school graduates. The Oregon State Bar records that, in 1972, there were 3,430 active members, of which 479 (14 percent) were women.[1] No women had ever served on an Oregon appellate court.

1 Oregon's first woman lawyer, Mary Leonard, was admitted to the Bar in 1886, but her admissions process was hardly typical. She had to obtain an act of the legislature to allow women to join Oregon's Bar. She had to obtain a not guilty verdict on charges that she had murdered her husband as revenge for his failure to support her. Finally, she had to convince the Oregon Supreme Court to decline to enforce a residency rule against her; the court had not enforced the rule against male attorney applicants. She succeeded in overcoming each of those challenges.

The judiciary, however, was not an exclusively male institution. In 1972, two women, Jean Lewis and Mercedes Diez, served on the circuit court in Multnomah County. (Judge Diez was appointed to the Multnomah County District Court in 1970 by Governor Tom McCall. She ran for and was elected to a circuit court position in 1972.) Helen Frye served on the Lane County Circuit Court after her appointment in 1971 by Governor McCall.

In 1977, Governor Robert Straub appointed Betty Roberts as Oregon's first female judge on the Oregon Court of Appeals. In 1984, Governor Victor Atiyeh appointed Betty Roberts as an associate justice on the Oregon Supreme Court. Following Betty Roberts' appointments, nine other women have served on the Oregon Court of Appeals. Women today occupy four of the ten judicial positions on the Oregon Court of Appeals. And, following, Betty Roberts, four more women have served on the Oregon Supreme Court; two women currently serve on that court.

The growth in the participation of female attorneys in the Oregon State Bar has been equally impressive. Of the Bar's 14,514 active members in 2012, 4,936 (34 percent) are women. That reflects a tenfold increase in the number of female active attorneys in the Oregon State Bar since 1972.

Today, women lawyers are active in every facet of state government, business, and the practice of law. A few examples illustrate that point. After serving as a judge on the Multnomah County Circuit Court and the Court of Appeals, Hon. Ellen Rosenblum now serves as Oregon's first female Attorney General. Hon. Kate Brown has served as Oregon's Secretary of State since 2008. Hon. Ann L. Aiken serves as the Chief Judge for the United States District Court for the District of Oregon; that position follows her earlier service as a judge on the District Court and the Circuit Court for Lane County. Hon. Nan G. Waller is the presiding judge for the Multnomah County Circuit Court, Oregon's largest trial court system. She is assisted by Chief Criminal Judge Julie E. Franz, Chief Probate Judge Katherine Tennyson, and Chief Family Court Judge Maureen McKnight. Other female presiding circuit court judges include Hon. Kirsten E. Thompson, Washington County Circuit Court, Hon. Jamese Rhoades, Marion County Circuit Court, Hon. Patricia Sullivan, Malheur County Circuit Court, Hon. Lindi Baker, Josephine County Circuit Court, Hon. Mari Garric Trevino, Tillamook

County Circuit Court, Hon. Alta Brady, Deschutes County Circuit Court, and Hon. Jenefer Grant, Columbia County Circuit Court.

Amanda Marshall serves as the United States Attorney for the District of Oregon. Kingsley Click serves as Oregon's State Court Administrator. Sylvia Stevens is the Executive Director of the Oregon State Bar. Countless other women attorneys today lead law firms, legal services organizations and businesses, head up legal aid and poverty law programs, serve on state and local Bar committees and sections, serve as speakers for legal education programs, act as law professors, and provide leadership to a host of pro bono and community service projects and organizations.

In summary, the growing participation of women lawyers in the judiciary, in government, and in business and community activities has fundamentally changed the face of the legal profession in the last 40 years. Judges, governmental officials, clients, civic leaders and lawyers widely assume that women lawyers are every bit the equal of male lawyers in their professionalism, legal knowledge, and competence in legal, political, and business affairs.

Although the attitude of most in the legal profession and the business community regarding women lawyers has changed for the better, law practice today is no bed of roses for women (and men, for that matter). Male and female lawyers face difficulties in trying to have both children and a career in the practice of law. Unless law firms and other employers allow their lawyers to achieve some sensible balance between the demands of family and the pressures of a legal career, they will watch young, talented attorneys walk out the door, seeking professional fulfillment in some other field. Law firms that recognize that fact in their office policies deserve our recognition and support.

C. LAWYERS IN THE LEGISLATURE

Lawyer legislators bring a valuable and unique perspective to their service as representatives and senators in state government. That perspective has nothing to do with party affiliation or superficial political labels. Rather, lawyers tend to understand, from their training in law and legal history, both the substance of our fundamental constitutional law and the reasons why constitutional law has evolved as it has over time. They tend to understand the independent role of the judiciary in our divided government and the obligation of judges,

in some cases, to enforce the law in a manner that may displease political majorities in the legislature and among the state's citizenry. Lawyers tend to appreciate the critical importance of the principles that attend the process of drafting legislation: The need for consistent use of legal terminology, awareness of prior court interpretations of statutes and rules, the scope of constitutional and common law, the rules of grammar and punctuation, the court's careful approach to the interpretation of the state constitutional provisions and statutes, and the like. Finally, lawyers understand and accept the public's critical need for an adequately funded judiciary, for an open court system that functions on a full-time basis, for safe, quiet, well-lit, and accessible court facilities, and for a judicial compensation system that will attract and keep Oregon's most talented lawyers and judges.

Since the 1970s, Oregon's judicial branch of government has encountered unprecedented difficulties in its relationship with the legislature. These have taken a variety of forms, which I will not catalog in detail here. They include budgetary pressures necessitating skyrocketing fees for the filing of pleadings – even for the filing of motions and responses – and the partial closure of courthouses. Oregon's judicial salaries languish near the bottom of judicial compensation rates in the rest of the country. Legislative committee hearings have treated the representatives of the judicial branch to assertions, demands, and questioning that is at times either hostile, rude, or delivered as retaliation for a disfavored court opinion. Judicial department leaders too often must scramble to obtain funding simply to insure the basic safety of the buildings that house our courts.

What has changed to cause these inordinate pressures on our courts? For me, the answer is not the current economic downturn. Oregon has experienced its share of hard times for decades. The answer is not a lack of judicial leadership. Since the 1970s, Oregon's courts have been blessed with a long line of dedicated judicial and administrative leaders.

The answer lies in the decline in the participation of lawyers in the legislative branch of government. Recently, there has been some improvement in this regard. However, there remains a long way to go. For decades before the 1980s, lawyers commonly occupied every seat on the judiciary committees of both the House of Representatives and the Senate. Those committees, as a matter of routine, approved

the budgetary proposals of our Chief Justices with little or no debate. They did so in recognition of and respect for the independence of the judicial branch of government from the legislative branch.

The current paucity of lawyer legislators need not be a permanent condition. Law firms should again recognize, as they did in the 1970s and earlier, that their members' participation in the political system can bring about results that improve their own bottom line and protect their clients' interests. How? By assuring that Oregon will continue to operate a safe, open, and adequately funded system of public courts. If more Oregon lawyers can identify legislative service as an opportunity for professional advancement and a way to satisfy a strong, unmet need for public service, our state courts will again enjoy the political and legislative support that they deserve.

I will conclude by acknowledging that I have enjoyed a special privilege in serving on the Oregon Supreme Court for 19 years and, before that, for over two years on the Court of Appeals. I will continue to support our state judicial system and the cause of law improvement in the future. I have set out above several of the events that helped to shape my own devotion to our third branch of government, all in the hope that those events, and their legal significance, will not be forgotten. As we all know, we can best safeguard our democracy by first appreciating its history.

I wish to express my gratitude for the opportunity to serve with the outstanding judges on Oregon's appellate courts. Their professionalism has been inspiring, and their patience and legal insight have served to make me a better judge. I extend to them my humble thanks.

Finally, I wish to express my appreciation for the support of the law clerks and judicial assistants who have aided me during my years as an appellate judge. Their assistance has been invaluable. Along with a grateful public, I deeply thank them for their dedicated public service.

A TRIBUTE TO: THE HONORABLE W. MICHAEL GILLETTE

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

Mick (who really does insist people call him that) was born in Seattle, Washington, on December 29, 1941. He was raised in Milton-Freewater. 1959 was a good year for Mick, who starred on McLoughlin Union High School's champion basketball team and then made valedictorian of the Class of '59. He went on to Whitman College, in Walla Walla, Washington, where he was freshman class president, and then student body president, before graduating in 1963, ***cum laude***, with honors in both his double major subjects, German and political science. From there, it was on to Harvard Law, where he earned his law degree in 1966.

Mick then returned to Oregon, where he spent all of eight months in the private practice of law (in fairness, that's eight months more than the author has spent), with the firm of Rives and Rogers in Portland. In 1967, he joined the judge factory then known as George Van Hoomissen's Multnomah County District Attorney's Office, where he served the first two of what became 43 years of public service. From 1969 to '71, he served as assistant attorney general for American Samoa, returning to Oregon in 1971 as an assistant attorney general. Mick organized the Consumer Protection Division at DOJ, and served as the division's first chief counsel, from 1971 to 1973. In 1973, he became DOJ's Chief Trial Counsel, and, two months later, Solicitor General of Oregon, in which position he directed all appeals in which the state or any of its agencies was a party in any court in the United States. During his time as Solicitor General, he participated in four cases before the United States Supreme Court.

On September 1, 1976, Governor Straub appointed Gillette, then not quite 35 years of age, to the Oregon Court of Appeals, in an all-star recruiting class, which included Chief Judge George Joseph, Justice Betty Roberts (more on her illustrious life later in this edition), and Judge John Buttler. From 1980 until 1986, Gillette presided over the "Green" panel. In February 1986, Governor Atiyeh appointed Mick to the Oregon Supreme Court, where he served with distinction until he decided to retire when his term expired in 2010. Upon his retirement

from the Court, Mick has returned to the private practice of law, with the Portland firm of Schwabe Williamson & Wyatt.

Mick has been a prolific writer and teacher and has served on numerous nonprofit boards and committees. For many years, he lived his love of basketball (along with teaching and judging) as a referee. The Classroom Law Project named Mick its 1991 Legal Citizen of the Year. In 2006, he received the V. Robert Payant Award for Teaching Excellence from the National Judicial Conference. That same year, Lawdragon named him one of the Top 500 Judges in the United States (along with Chief Justice Carson, Chief Judge Brewer, Ninth Circuit Judge Diarmuid O'Scannlain, U. S. District Judge Garr King, Bankruptcy Judge Elizabeth Perris and Lane County Circuit Judge Lyle Velure). Lawdragon said of Justice Gillette: "One of the smartest legal minds in the state belongs to this distinguished judicial vet." (There is no truth to the rumor that Justice Gillette requested the publication retract the words "one of"). Earlier this year, the Oregon Chapter of the American Constitution Society awarded him its Justice Hans Linde Award for his commitment to individual rights and liberties, genuine equality, access to justice and the rule of law.

Those are the facts, which are all a matter of public record. How do we assess the scope of Justice Gillette's contributions to Oregon appellate jurisprudence? A disciple of Justice Linde, he has been a champion of the development of Oregon's independent interpretation of its own constitution. After having spent almost his entire career in practice representing the interests of the state, as a judge he has not been shy to defend individual liberty against what he judges to be unconstitutional or unlawful interposition by the state. Suffice it to say that, after nearly 35 years, Oregon jurisprudence bears many indelible marks of Justice Gillette's contributions. He has been a prolific writer of opinions, on all manner of cases — if you've got the budget, just do a Westlaw search for them. Space allows me to mention only one here. That is his opinion for the Court in ***Williams v. Philip Morris, Inc.***, 344 Or 45, 176 P3d 1255 (2008). I picked this one because Justice Gillette took on the Supreme Court of the United States. And won.

After Jesse Williams, a life-long smoker of Marlboro cigarettes, died of lung cancer, his widow sued Philip Morris and recovered a jury verdict of $821,485.50 in compensatory damages and $79.5 million in punitive damages. On post-trial motions, the trial court reduced

the award to $500,000 in compensatory damages and the punitive damage award to $32 million. The Oregon Court of Appeals reversed on plaintiff's appeal of the reduction of the jury award and affirmed on Philip Morris's cross-appeal. The Oregon Supreme Court initially denied review. The United States Supreme Court granted ***certiorari***, and remanded for reconsideration in light of its decision in ***State Farm Mut. Automobile Ins. Co. v. Campbell***, 538 US 408 (2003). The Oregon Court of Appeals adhered to its original decision reinstating the jury verdict, and, on review, in an opinion authored by Justice Gillette, the Oregon Supreme Court affirmed. The U. S. Supreme Court again granted ***certiorari*** and again reversed and remanded, holding that, under the Due Process Clause of the 14th Amendment, Philip Morris was entitled to a jury instruction to the effect that it could not use punitive damages to punish Philip Morris for harm it had caused to strangers to the litigation. On remand, the Oregon Supreme Court, in an opinion again authored by Justice Gillette, adhered to its prior decision, on the technical ground that the instruction offered by Philip Morris was legally defective, so that, even if it would have been entitled to a properly proffered instruction, the trial court did not err in refusing to give the instruction Philip Morris actually requested. The United States Supreme Court granted ***certiorari*** for a third time, but, after argument, surrendered, and, on March 31, 2009, rang down the curtain on 12 years of litigation when it dismissed the writ "as improvidently granted." Whether one views the ultimate outcome as a victory for consumers injured or killed by the deceit of unscrupulous manufacturers, or as a vindication of jury verdicts, or as a victory for the independence of the state courts, or as a defeat in the effort to stem the tide of runaway verdicts against easy multi-national targets, the fact remains that Justice Gillette outmaneuvered the United States Supreme Court.

From my first appearance before then-Judge Gillette in the Oregon Court of Appeals (and, in answer to the "question" he posed to me that day, it was my ***second*** appearance before that court), it was immediately apparent that I was in the presence of a tremendous and insatiable intellect. In an era when some appellate judges (no names, please) still treated oral argument as blood sport, Judge Gillette was an enthusiastic, persistent and pointed participant, traits he carried with him, in a ***slightly*** more genteel vein, to the Oregon Supreme Court. He would probe the edges of a lawyer's argument, looking for the

weaknesses, the inconsistencies and the unintended consequences. He would demand a focus on the rule of law, supported by reasoning and authority. He frequently would preface a question with a warning that there was a "hook" in it or that it was a "trick question."

I once was granted permission to argue a case as ***amicus curiae*** before the Oregon Supreme Court. It was a case involving the constitutional implications of standing, and I made an argument (I honestly at this point cannot recall what it was) to which Justice Gillette interposed, "Doesn't that present a problem for you in another case you have pending before this court?" Well, I knew what case he meant, but the lawyer on the other side of that case was not present, so how could I answer the question without engaging in an improper ***ex parte*** communication? All I could think of to say was, "Yes." And he got it. He said, "Ah, yes, the law is whatever the law is, and the consequences will be whatever they will be." Perhaps that sums up Justice Gillette's judicial philosophy about as well as it can be done.

In recent years, Justice Gillette has taken to saying some very kind things about me in public. But I have received no compliment equal to when I heard him refer to me as "my friend."

FRESH FACES ON THE OREGON SUPREME COURT

By Cody Hoesly, Larkins Vacura LLP

The year 2013 will mark the 100-year anniversary of the Oregon Supreme Court's current seven justice composition. It will also feature the third "freshest" Supreme Court bench since 1913. That is, the members of the court will have the smallest number of combined total years on the court except for the periods from 1913 to 1919 and from 1980 to 1991.

Justice Frank Moore sat on the court from 1892 to 1918. He was the longest serving justice in 1910, when the legislature increased the court's membership from three members to five. He was still the longest-serving justice in 1913, when the court's membership expanded to seven members, a composition it has retained ever since. The 1913 court also included Justice Robert Eakin, who began his service in 1907; Justice Thomas McBride, who began his service in 1909; Justices Henry Bean and George Burnett, who began their service in 1911; and Justices Charles McNary and William Ramsey, who began their service in 1913. The combined experience of the justices in 1913 was 35 years, with Justice Moore offering 21 years' worth of experience alone.

In 1918, Justice Moore died in office. By that time, Justices Eakin, McNary, and Ramsey had all left the court as well, and Justice McBride held the position of longest-serving justice at nine years. Justices Bean and Burnett had seven years experience each at that time. Two other justices (Henry Benson and Lawrence Harris) had three years experience each. Justices Charles Johns and Conrad Olson were new to the court in 1918. The combined experience of the justices in that year was 29 years. By 1919, the combined experience of the justices had increased to 35 years, and by 1920, it had increased to 41 years.

Justice McBride served on the court until 1930, and Justice Bean served until 1941. Another justice worth noting is George Rossman, whose 38-year tenure (from 1927 to 1965) is the longest in Oregon's history. The experience of those three justices alone assured that the combined experience of the court continued to increase throughout those years, and that there was always at least one justice with at least

a dozen years' worth of experience on the court at any given time. In 1948, the combined experience of the justices reached its highest point, 101 years, with all justices having served at least six years, and two having served over 20 years.

The late 1970s saw a decline in the combined experience of the justices on the court. In 1977, two long-serving justices (William McAllister and Kenneth O'Connell) left the court. They were replaced by Justices Hans Linde and Berkeley Lent. In 1979, Justice Dean Bryson left the court and was replaced by Justice Edwin Peterson. In 1980, Justices Ralph Holman and Edward Howell left the court. They were replaced by Justices Jacob Tanzer and J.R. Campbell. The other justices in 1980 were Arno Denecke, with 17 years of experience, and Thomas Tongue, with 11 years of experience. That made for a combined experience of just 35 years, the lowest number since 1919.

In 1982, the combined experience of the justices reached its lowest level in the history of the seven-member court: 17 years. In that year, Justices Denecke and Tongue left the court. They were replaced by Justices Wallace Carson and Betty Roberts. At that time, Justices Linde and Lent were the longest-serving, with five years of experience each. Justice Peterson had three years of experience, and Justices Tanzer and Campbell had two years of experience.

Frequent turnover throughout the 1980s and early 1990s ensured that the combined experience of the justices remained relatively low. In 1987, for example, the justices' combined experience reached 45 years, but the 1988 departure of Justices Lent and Campbell reduced that number down to 33 the following year. In 1990, when Justices Linde and Robert Jones left the court, the combined experience of the justices dropped to 27 years.

The next change in the court's composition was the addition of Justice Robert Durham in 1994. He would eventually serve 19 years on the court, most of them alongside Justices Carson and W. Michael Gillette, whose respective 25-year and 26-year tenures combined with Justice Durham's to steadily increase the court's combined experience level. In 2011, when Justice Jack Landau joined the court, the combined experience of the justices was 54 years. Justice Durham was then the longest-serving member, followed by Justices Thomas Balmer and Paul De Muniz, with 10 years of experience each, Justice

Rives Kistler with eight years of experience, Justice Martha Walters with five years of experience, and Justice Virginia Linder with four years of experience.

2013 will see a significant decline in the court's combined experience. With the recent retirements of Justices Gillette, Durham, and De Muniz, the longest-serving member will be Justice Balmer, now with 12 years of experience. The combined experience of the justices will be 37 years, the lowest number in court history except for the periods from 1913 to 1919 and from 1980 to 1991.

This is not to say that the court will lack *judicial* experience. Justices Kistler, Linder, and Landau served a combined 32 years on the Oregon Court of Appeals before moving to the Supreme Court. In addition, when David Brewer joins the Supreme Court in 2013, he will bring with him 13 years of experience on the Court of Appeals and six years of experience as a circuit court judge. Finally, Richard Baldwin, newly elected to fill Justice Durham's seat, has 11 years of experience as a circuit court judge.

But there is something to be said for experience on the Supreme Court itself. It is, after all, its own institution, with its own procedures and traditions. The stability of the court is aided by greater combined experience, and even by the memory of any one long-serving justice. While the relatively low level of combined Supreme Court experience from 1913 to 1919 may be explained by the newness of two of the seven seats, the period from 1980 to 1991 is generally remembered as a divisive period in the court's history. It remains to be seen what effect, if any, the current "freshness" of the Supreme Court will have on its work.

FRESH FACES ON THE OREGON COURT OF APPEALS

By Cody Hoesly, Larkins Vacura LLP

The Court of Appeals was created in 1969 with five judges. In 1973, one more judge was added. In 1977, four more judges were added, for a total of ten. In that entire time, the court has never gone more than three years without gaining a new face. Despite the frequent turnover, however, the Court of Appeals today enjoys one of the "ripest" levels of combined experience in its history. The combined experience of the justices is currently 92 years, and it will be 88 years in 2013.

That is close to the high-point of combined experience the court has enjoyed: 107 years in 2009, which was largely due to the fact that, in that year, six of the ten judges had served for a decade or more. By contrast, the low-point of combined experience for the Court of Appeals was 1977, the year which saw the addition of four new judgeships. The combined experience of the ten judges on the court in that year was only 18 years.

Following 1977, the combined experience of the court grew at a more-or-less regular clip until 1992, when Judges Jack Landau and Sue Leeson replaced Judges George Joseph and John Buttler, who had both served since 1977. That change dropped the court's combined experience level from 74 years in 1991 to 54 years in 1992. After 1992, the court's combined experience level grew relatively stably, reaching 71 years in 1998. In 1999, however, Judge Edward Warren resigned and Judge William Riggs was appointed to the Supreme Court; they were replaced by Judges David Brewer and Rives Kistler. That dropped the court's combined experience level to 51 years, its lowest level since 1984. Since then, the combined experience of the court has steadily increased.

However, the Court of Appeals is likely in line for a decrease in its combined experience level, assuming the legislature funds the three additional seats that it recently authorized.

JUDICIAL PROFILE: JUSTICE JACK LANDAU, OREGON SUPREME COURT

By Hillary A. Taylor, Keating Jones Hughes PC

The workload of the Court of Appeals demands its judges and staff to be efficient, dedicated and invested in order to accomplish the very important work that they do. For nearly two decades, Judge Jack Landau has been synonymous with those concepts. His daily commute to Salem continues but his destination for the past two years has been on the other side of the parking lot.

Running for an open seat on the Supreme Court was not something that Landau planned on. About 10 years ago he put his name in for a seat on Oregon's highest court but did not get it. He moved on and continued to invest all of his professional energies to the dedication of the court he served. After many years and numerous written opinions, he continues to approach every case with fairness, believing that every case must be fully and impartially considered. When Justice Michael Gillette announced his departure from the court, Landau was encouraged by colleagues and friends to run. He thought about it carefully and finally decided to run. He won election in May 2010 with 72 percent of the vote.

Landau has embarked on a challenging journey of defining his place on a new court that varies fundamentally from whence he came. As an intermediate appellate court, the Court of Appeals is an error-correcting court. Quite differently, the Supreme Court is a law announcing court. The roles of the courts and the judges who serve on them are distinct. Landau has authored countless Court of Appeals opinions, some of which undoubtedly criticize Supreme Court precedents, rules of law that as one of the 7 judges on that court he now has the obligation to consider from an entirely different perspective. From our discussion it is apparent and not at all surprising that Landau approaches his work on the Supreme Court with the same vigor, interest, and dedication he gave to the Court of Appeals. He notes that he has worked with almost all of his new colleagues before and feels welcomed by the collegiality of the Supreme Court. He is in a new environment with new challenges, a new docket, and

new expectations. There is no doubt Landau will rise to meet the challenges he sees before him in his new position just as he has done throughout his career.

JUDICIAL PROFILE: JUDGE REBECCA DUNCAN, OREGON COURT OF APPEALS

By Hillary A. Taylor, Keating Jones Hughes PC

Judge Rebecca Duncan was appointed and elected to fill the position vacated by Judge Walter Edmonds who retired in 2009 after 21 years of service. This is a time of transition for Duncan, taking place against a background of an overworked and underfunded judiciary.[1]

I met Judge Duncan in her office in Salem, which was until recently the chambers of Judge Edmonds. It is a visual passing of the torch for Duncan to fill the position and physical space vacated by Edmonds. The history of the office and of the legacy of the man who served is not lost on Duncan. She recognizes that the office she now occupies was home to Oregon's longest tenured Court of Appeals judge and she hopes the success of the office will flow to her over the course of time. A few minutes after I sat down with her we were already engaged in a lively discussion touching on the process of appellate decision-making, the judges who have welcomed her with open arms, and the importance of a strong judiciary to our system of government.

It is apparent that Judge Duncan has all the tools to be an excellent appellate judge. She enjoys research and writing and the "archeological process" of discerning what the law means. With the relatively recent changes to the ORAPs regarding oral argument, I thought it apropos to ask her feelings toward that part of the appellate process. Just as she enjoyed and understood the importance of oral argument as a practitioner, so remains her opinion as a judge. Duncan sees oral argument as an important conversation between the litigants and the court. Duncan cautioned practitioners from reading too much into the bench's response to argument, who asks the questions, or in what order. There is an informal process within the panels regarding how argument is conducted (the presiding judge in most cases acts as such and asks questions first as one would expect).

Judge Duncan is humbled by her position, but she is not apologetic; she sees her ascent to the bench as a natural outgrowth of

1 *See* Oregon Court of Appeals 2011-12 Annual Report, reprinted in this volume.

the work she was doing as the Deputy Director of the Oregon Office of Public Defense Services Appellate Division. Duncan is pleased that the way she perceived the court as a practitioner has proven an accurate portrayal of the court she is now a part of. Every case is fully considered between the judges who act with mutual respect despite the expected disagreements that occasionally arise. Although she speaks humbly of the honor of serving in her position, Oregonians and especially members of the bar should take comfort and feel privileged to have her serving us in this capacity.

JUDICIAL PROFILE: JUDGE ERIKA HADLOCK, OREGON COURT OF APPEALS[1]

By Ryan Bounds, Assistant U.S. Attorney District of Oregon

Judge Erika Hadlock became Oregon's newest appellate judge when Governor Kitzhaber appointed her to the Court of Appeals last July [2011]. Despite her many professional accomplishments as a lawyer, Judge Hadlock's path to the bench was somewhat unconventional. She set out as a young college graduate in pursuit of a career not in the law but in the hard sciences.

Judge Hadlock comes from a family of scientists - her father was an atmospheric physicist at the Hanford nuclear plant in eastern Washington - and she always intended to be a scientist herself. To that end, she resolved early to study at Reed College in Portland, which featured an academically rigorous and hands-on science curriculum.

After initially studying biology, Judge Hadlock ultimately obtained her undergraduate degree from Reed in chemistry. She then began her professional life as a chemist, taking a job with a small firm in Clackamas. Life as a chemist had its rewards - including a trip to Moscow, Russia, in the twilight of the Cold War - but Judge Hadlock came to conclude within a few years that the chemist's life was not for her. Eventually, she recounts, she could no longer avoid the realization that the industrial chemicals with which she worked "smell bad, are bad for you and make your clothes dissolve."

Swapping the hazards of harsh solvents for those of winters in upstate New York, Judge Hadlock matriculated at Cornell Law School in 1988. Already married by then (her husband of 25 years is a sergeant with the Multnomah County Sheriff 's Office), Judge Hadlock focused intently on her studies and on her responsibilities as a managing editor of the *Cornell Law Review*. Those responsibilities were unusually heavy during her tenure: Her volume of the *Law Review* published nine issues - half again as many as usual. The work left her with less time than she would have liked to pursue clinical or externship work while in school, which she commends as a good opportunity

1 Originally published in the ***Multnomah Lawyer*** February 2012, reprinted with permission.

for practical training and community service. Judge Hadlock did take advantage of the opportunity, however, to pursue a certificate in Public Law at Cornell. She knew even in law school that her primary interest was in public service.

Having borrowed heavily to fund her education, Judge Hadlock did not seek government employment immediately after joining the bar. Instead, she joined the litigation group at Bogle & Gates in 1991, where she spent the next four years working primarily on environmental and commercial disputes. The firm gave Judge Hadlock a wide variety of opportunities, including her first chance to work with Bogle & Gates' appellate specialist, Rex Armstrong, who left the firm to join the Court of Appeals in 1994. Judge Hadlock had by then started considering her path to partnership. She became increasingly convinced, however, that she wanted to focus on matters of public concern and probably lacked the entrepreneurial spirit needed for partnership.

In 1995, Judge Hadlock saw an announcement in *The Oregonian* for a vacancy at the Appellate Division of the Oregon Department of Justice, which represents the state in all appellate matters before the state and federal courts. She decided to apply and got the job, despite her admitted dearth of experience in criminal law. Judge Hadlock spent the next three years focusing on civil matters while getting up to speed on the criminal side. She greatly enjoyed being a generalist – something she still enjoys - with the ability to take responsibility for cases across the broad scope of the Appellate Division's docket.

Despite her enthusiasm for the work at the Appellate Division, Judge Hadlock was intrigued by the idea of working as a neutral, rather than as an advocate, and eventually took a job as an administrative law judge for the Oregon Bureau of Labor and Industries, where she handled civil-rights and wage-and-hour claims. Judge Hadlock recalls that the work there was gratifying and "hands on," because the administrative law judge, although a neutral arbiter, often plays an active role in developing the record through questioning witnesses. She spent the following two years helping resolve disputes and developing an expertise in employment law, but she found she missed the opportunities to be a generalist working in broad areas of the law, including the criminal realm. She resolved to return to the Department of Justice as soon as she was able.

In part to burnish her credentials for the next available opening at the Justice Department, Judge Hadlock took advantage of an opportunity to familiarize herself with federal practice by serving as a judicial clerk for U.S. District Court Judge Anna Brown. Judge Brown was quickly impressed with Judge Hadlock's work ethic, writing ability, and dedication to the rule of law. "She is a poster child for the judicial process," Judge Brown recently noted. In her estimation, Judge Hadlock was blessed with "the intellect and ability to express herself clearly" while remaining "very sensitive to the process that trial lawyers and trial judges go through" in creating the record on appeal. Discussing Judge Hadlock's appointment to the Court of Appeals, Judge Brown concluded that Judge Hadlock was "perfectly suited for the job."

In 2001, a vacancy arose at the Appellate Division of the Oregon Department of Justice, and Judge Hadlock seized the chance to return to her old colleagues. With the benefit of her broader experience and additional years of practice, she soon moved into a supervisory role in the office. For several years, Judge Hadlock served on the Appellate Division's management team, working on high-profile appeals and helping to manage budget, personnel, and other administrative matters at the division. She later stepped down from the management team, however, partly with the aim of spending more time back in the courtroom.

Mission accomplished. When she discusses her first few months on the Court of Appeals, Judge Hadlock's enthusiasm is unmistakable. She speaks of the court's judges and staff with deep respect, emphasizing that they are "incredibly hardworking" in their efforts to keep abreast of the court's massive docket. She describes that effort as akin to "trying to keep a flood under control." She acknowledges the task will be all the more daunting once she is able to hear all of the matters in which Oregon itself is a party - which she cannot yet do as a former lawyer for the State.

Still, Judge Hadlock emphasizes, she would not exchange her place on the court for anything. It is "nice," she says, "to be able to see everything the court does." It is a view Judge Hadlock is eager to share. She believes all Oregonians would be better served by improved access to the court and its judges, and she looks forward, for her own part, to reaching out to citizens and members of the bar throughout the state.

JUDICIAL PROFILE: JUDGE LYNN NAKAMOTO, OREGON COURT OF APPEALS

By Jona Maukonen, Oregon Department of Justice, Appellate Division

Judge Lynn Nakamoto is a great fit for the Oregon Court of Appeals. The first time we spoke, just six weeks after Judge Nakamoto took the bench, she already appeared to be comfortable with her new role, keen to do good work and enthusiastic about her position. Now, having been on the bench for a year and a half, her comfort and commitment to doing great work have increased and her enthusiasm has not waned.

Judge Nakamoto grew up in southern California. Her parents, neither of whom attended college, instilled a strong work ethic in each of their four children. Judge Nakamoto excelled in school and went on to prestigious Wellesley College. At Wellesley, philosophy caught her attention immediately. But she developed an interest in law while taking a public interest law course taught by an extremely engaging woman professor. Ultimately, she decided to go to law school.

Judge Nakamoto met her partner, Dr. Jocelyn White, at Wellesley. After graduating, Judge Nakamoto enrolled in New York University School of Law while Jocelyn finished her undergraduate degree and then went on to medical school. After law school, Judge Nakamoto worked as a staff attorney for Bronx Legal Services and Jocelyn finished medical school. After Jocelyn graduated medical school, they moved together to Portland where Jocelyn had her residency at a local hospital. Judge Nakamoto continued in public service, going to work as a lawyer for Marion-Polk Legal Aid. Then she clerked for a summer for U.S. District Court Judge Helen Frye.

In 1989, Judge Nakamoto entered private practice, joining Markowitz Herbold Glade & Mehlhaf. She worked there for 21 years, eventually becoming the managing partner. She was a trial and appellate lawyer, primarily focusing on business and employment litigation. During that time, she and Jocelyn also adopted their daughter, Ellie.

While her position on the bench appears to suit her now, Judge Nakamoto did not set out to become a judge. Many people along the

way had encouraged her to seek a judicial appointment, and after she turned fifty, she decided the time was right to pursue that calling. So, she expressed her interest in the Court of Appeals' vacancy created by Justice Jack Landau's election to the Supreme Court.

Governor Kulongoski appointed Judge Nakamoto to the Court of Appeals on December 7, 2010. She was sworn in on January 7, 2011.

Judge Nakamoto is the first Asian American judge on the Oregon appellate courts. She was motivated to seek an appointment to the court in large part by a desire to see the state appellate courts be more reflective of the Oregon population and to serve as a role model for younger Asian American lawyers. Judge Nakamoto has been conscientious about the need to encourage diversity in the legal profession her entire career. She was a founding member of Oregon Minority Lawyers Association and has been a member of Oregon Women Lawyers, Oregon Gay and Lesbian Law Association, Oregon Asian Pacific American Bar Association and a member and chair of the OSB Affirmative Action Committee. In recognition of her contributions to promoting minorities in the legal profession, Judge Nakamoto was awarded the Judge Mercedes Deiz Award in 2001.

Judge Nakamoto was also motivated to seek a judicial appointment by her commitment to public service and because she genuinely thought she would enjoy the job of an appellate judge. She also understood that her background—particularly her work as a trial lawyer—would be beneficial to the role.

And the bench certainly seems to suit Judge Nakamoto. Shortly after Judge Nakamoto took the bench, her then-twelve year old daughter, Ellie, told her that she looked "more relaxed" since starting her new job. In light of the stress and pressure involved in her judicial role, that statement is very telling. From her first days on the bench, Judge Nakamoto appeared to be at-ease in the position. Perhaps that is because nothing really surprised her about the job. Like a responsible lawyer, she had done her due diligence. She had talked with many people, including appellate judges, prior to seeking the appointment so she had a good sense what the job would entail. She also appreciates that the other judges on the court were thoughtful about making her transition to the bench as smooth as possible.

Judge Nakamoto acknowledges that when she went onto the

bench, she had a lot to learn about criminal law (although she did handle a couple of federal criminal appeal cases while in private practice). She has found however, that because criminal appeals are handled primarily by the Oregon Department of Justice and the Oregon Public Defense Services the briefing is generally well-focused making the issues very manageable.

Ultimately, Judge Nakamoto approaches all cases pretty much the same. She first works to understand the standards of review that apply and builds from there. In addition to tending to the court's business, Judge Nakamoto is interested in making sure that her law clerks have a good experience working for the court. She enjoys the work and relishes the opportunity to grapple with interesting issues every day.

Fitting for an appellate judge, Judge Nakamoto is an avid reader. Jocelyn and their daughter Ellie share her voracity for reading. The family enjoys "book parties" where the three lounge around and read – particularly mysteries.

Judge Nakamoto knew coming into the job that the workload on the Court of Appeals is demanding and that the work itself is not easy. No doubt, she has risen to the challenge.

INSIDE THE OREGON COURT OF APPEALS: ARGUMENTS, CONFERENCES AND OPINION PUBLICATION

By Lora E. Keenan, staff attorney, Oregon Court of Appeals

The court is divided into three merits departments of three judges each, and most often those judges hear arguments and decide cases 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. Acting on legislative amendment of ORS 2.570 in 2009, the court for several years used two-judge panels in a targeted way to help reduce its backlog. Although, as of ***Appellate Almanac*** press time, the court is not scheduling arguments before two-judge panels, the court retains authority to do so as necessary and appropriate.

ORAL ARGUMENT

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.)

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 each month is devoted to criminal cases in which the defendant is represented by the Office of Public Defense Services, with a different merits department hearing these arguments each month.

Cases generally are "at issue" and eligible to be set for argument/submission when a complete record has been received, briefing is complete, there are no pending motions (except motions referred to the merits panel) and all fees have been paid. Cases are typically scheduled to be argued/submitted several months after the last brief has been filed. Certain types of cases (for example, judicial review in land use cases and appeals in termination of parental rights cases) are expedited and will be heard sooner. The court sometimes 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 argument/submission dates and sends it to the Chief Judge. The clerk will typically assign about 10 cases for argument/submission each day. The actual dates and panel compositions 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 consider the case; however, that information is available on the court's website several weeks before argument/submission. The court's oral argument schedule is available online at *www.ojd.state.or.us/coadocket*.

Under Oregon Rule of Appellate Procedure 6.05 (2011), the court has transitioned to an "opt-in" system for oral argument. Under that system, the Appellate Court Records Section sends a notice of submission date instead of the former notice of oral argument. In cases in which the parties are represented, any party may then request argument. In juvenile dependency, adoption and land use cases, parties have 14 days to file and serve a request for oral argument; in all other cases, parties have 28 days to file and serve the request. The request must be in the form specified in ORAP Appendix 6.05. If any party files a timely request for argument, the case will be set for argument on the submission date and all parties may argue.

A party generally will be allowed to reset an oral argument date one time; additional requests are subject to the approval of the presiding judge of the department to which the case has been assigned. All requests to reset oral argument must be submitted in writing to the Appellate Court Records Section, with a copy to opposing counsel. The request must indicate whether any other party opposes the request. Last-minute requests are discouraged. If necessary, however, they may be made by phone to the Appellate Court Records Section, which will consult with the presiding judge. Again, the party making the request must advise the court whether any other party opposes it.

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. In response to budget reductions, the court has curtailed its school sittings schedule.

CONFERENCES

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 10 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 a.m., on the release date. (To view the court's media releases, click on the "Media Releases" link at *www.courts.oregon.gov/COA/index.page/*.) Slip opinions are also available on the Oregon Judicial Department website on the release date. (To view the court's slip opinions, click on the "Opinions" link at *www.courts.oregon.gov/COA/index.page*.

OREGON SUPREME COURT 2011 STATISTICS

Total Number of Filings: 919
Total Number of Petitions for Review Filed: 753
Total Number of Petitions for Review Allowed: 62
Total Number of Opinions Issued: 74

SELECTED CASE TYPES OF PETITIONS FOR REVIEW FILED
(not all case types included)

Criminal
(appeals, post-conviction, habeas corpus and parole): 528
General Civil: 103
Domestic Relations: 15
Juvenile
(dependency, delinquency, and termination of parental rights): .. 38
Agency Review: 14
Workers' Compensation: 10
Land Use: 7
Mental Commitment: 3
Probate: 4

ORIGINAL PROCEEDINGS

Mandamus Filed/Allowed: 62/4
Habeas Corpus Filed/Allowed: 18/0
Quo Warranto Filed/Allowed: 1/0

OTHER PROCEEDINGS

Ballot Measure: 15
Tax: 5
Certified Questions: 1
Death Penalty: 5
Professional Regulation: 51

OREGON COURT OF APPEALS REPORT: 2011-12

By Honorable David V. Brewer, Chief Judge

INTRODUCTION

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 begins with a brief introduction, including a farewell to our esteemed colleague, Judge Ellen Rosenblum, and a welcome to our newest judge, Erika Hadlock, and then it examines the court's effort to identify and implement effective judicial administrative practices and its corollary goal of securing adequate funding to carry out its core functions.

The Court of Appeals is Oregon's intermediate appellate court. By statute, the Court of Appeals is charged with deciding nearly all the civil and criminal appeals taken from Oregon's state trial courts and nearly all the judicial reviews taken from state agencies and boards in contested cases and rule challenges. Created by statute in 1969, the court does not exercise jurisdiction under the constitution; instead, its jurisdiction is established by the legislature. Whether measured against the number of appeals taken by population or the number of appeals taken by judge, the Oregon Court of Appeals consistently ranks as one of the busiest appellate courts in the nation. Over the past decade, the Court of Appeals has received approximately 3,000 to 3,800 filings per year. More detailed information is posted on the court's web page on the Oregon Judicial Department's website at: *http://courts.oregon.gov/COA/index.page*.

With respect to change, one of our accomplished judges, Ellen Rosenblum, retired from active service on the court in May 2011. Judge Rosenblum, who previously had served for many years as a judge on the Multnomah County Circuit Court, came to the court in 2005. She brought considerable experience, wisdom, collegiality, and intellect to her work as an appellate judge, and she will be greatly missed. To fill the vacancy created by her departure, we were fortunate to welcome an energetic and talented new judge to the court, Erika Hadlock, who has ably served the public for many years, including a longstanding tenure as an outstanding advocate in the Appellate

Division of the Oregon Department of Justice. Judge Hadlock brings to the court a depth and richness of professional expertise that reflects her own stellar work and life experience. We warmly welcome her to our court family.

2011: A YEAR OF UNPRECEDENTED CHALLENGE

For 42 years, the Court of Appeals has set and maintained a standard of judicial excellence--of principled and efficient decision-making--in service to the people of Oregon. In 2011, even as it continued that legacy, the court faced a "perfect storm" of unprecedented challenges. Those challenges included, of course, the significant budget reductions that have affected the court, the Oregon Judicial Department, and the justice system as a whole. More fundamentally, however, the court's workload has increased in volume and complexity, while no judges have been added to the court since 1977. Meanwhile, resources have increased in agencies that influence the Court's workload, so that justice system funding is out of balance. In particular, substantial numbers of attorneys have been added to the appellate divisions of the Department of Justice and the Office of Public Defense Services for the processing of criminal, collateral criminal, and juvenile dependency appeals, which make up more than 60 percent of the court's workload.

As a consequence, those offices uniformly produce timely and sophisticated arguments in their cases, requiring the dedication of more resources by the court to the resolution of criminal and collateral criminal cases. This leaves fewer resources for the timely resolution of civil and domestic relations appeals and administrative reviews, all of which are important for Oregonians from economic and societal standpoints. Cases that once would have waited in a lawyer's office for briefing now wait on the court's docket for decision. Despite a highly productive annual output of 471 authored opinions, at the end of 2011, the court still had 366 cases under advisement. Sadly, it is not uncommon in complex civil cases for parties to have to wait for a decision for a year or longer after oral argument, which may be nearly two years from the filing of the appeal and several years from the original trial court decision.

To compound these pressures, the court considers 30 or more land use appeals per year from the Land Use Board of Appeals (LUBA) and the Land Conservation and Development Commission

(LCDC). That body of work includes some of the most complex and resource-intensive cases in the Oregon judicial system, more than half of which must be completed on a legislatively directed timeline by judges and staff who often lack specialized experience in land use law. Concerns such as infrastructure capacity and urban growth boundary pressures, to name only two, aptly demonstrate the intersection of the planning process with the challenges facing today's courts in dealing with complex systems while working with antiquated structures and processes that are no longer adequate to meet those challenges. The Chief Justice recently convened a work group to examine and address those challenges. The objectives of the work group, which included stakeholders representing diverse interests in the land use arena, were to find ways to hasten the reliable finality of land use decisions, and to promote a system where delay is discouraged and local land use decisions are sufficient to withstand appeal the first time around. Among the recommendations that the work group made was that it is critical to add another three-judge panel to the Court of Appeals to improve the timeliness and efficiency of appellate decision-making across the board and, thereby, to derivatively improve the timeliness and efficiency of land use decisions.

WHAT WE HAVE DONE AND WHAT IS NEEDED

The Court of Appeals has worked to modernize and improve its internal processes and case-deciding function through the statutory creation of the Appellate Commissioner's office, the use of two-judge panels, the elimination of universal ***de novo*** review in equity cases, and the adoption of modern business practices which allow the court to process many cases in an efficient manner with the dedication of fewer judicial resources, and to effectively monitor and assess timeliness and productivity. The Legislative Assembly has assisted the court in handling its workload by approving statutory changes needed to implement these efficiency measures. ***Those improvements notwithstanding, merely to "tread water" with its existing caseload, the court needs four new judges and corresponding staff.***

Despite those best-effort measures, the court's ability to perform its essential, historical mission is being incrementally impaired. Even though for more than 90 percent of appellate litigants the Court of Appeals has the final word in their case, no new judges have been added to the Court in 35 years. A groundbreaking workload study that

the National Center for State Courts completed in 2010, examined the court's current workload and how has it evolved throughout the years. The National Center's study concluded that the Oregon Court of Appeals continues to be one of the busiest and most productive appellate courts in the nation. However, by any objective measure, the court has not had enough resources to hear and decide cases in a timely fashion. In fact, the court has only about half the judges and staff of other intermediate appellate courts in the nation with similar caseloads.

ECONOMIC GROWTH AND WELL-BEING REQUIRE ADEQUATE APPELLATE COURT FUNDING

Article I, section 10, of the Oregon Constitution promises Oregonians that "justice shall be administered * * * completely and without delay." Unfortunately, Oregon's appellate justice system increasingly struggles to deliver on that promise. Population growth, budgetary constraints, and an increasing volume and complexity of laws has placed a burden on the court system that has become more than its resources can bear.

The challenges that the court faces affect the ability of Oregonians to get timely decisions when they seek review of business and property dispute decisions, criminal cases involving, among other things, victim's rights issues, countless agency determinations--from workers' compensation to environmental and land use regulation--or the family law and juvenile dependency decisions that go to the core of our social compact. Credible economic impact models persuasively demonstrate the measurable opportunity costs of resource-driven delays and inefficiencies in the judicial system. This is the best way to ration scarce public resources in tough times, because it follows tried and true business models.

One of the linchpins of every free market economy is a court system that is impartial, competent, and timely. The connection between the efficient operation of the judiciary and the economic wellbeing of the community is universally accepted in the economic profession. One of the highest national judicial administration and reengineering priorities is the refinement of credible economic impact models that change the focus of court funding decisions from what it will ***cost*** to adequately fund the courts to what it will ***save*** society

in economic terms if sound funding decisions are made that enable courts to meet their performance benchmarks based on accurate workload assessments.

A recent California study found that the court closures, staff layoffs, and related reductions in capacity caused by $219 million in reductions to the Los Angeles Superior Court (the nation's largest trial court system) from 2009 through 2013 would result in 150,000 lost jobs, $30 billion in lost economic output, and $1.6 billion in lost state and local tax revenue. That study, along with other groundwork that has been done in other states, has helped pave the way toward the development of sound economic models that persuasively document the economic costs of failing to adequately fund the rule of law in our states. The State Justice Institute, the only federal body that provides economic support for the nation's state courts, recently tasked the National Center for State Courts with the development of the first phase of an integrated cost benefit model for criminal cases. That work is now underway, and it will set the stage for a corresponding project for civil cases. The latter project will address both the economic impacts of the courts at the case level as well as rule of law values that result from the level of trust that individuals and organizations place in the economy because of appropriate and reliable enforcement of legal rights and remedies.

The simple conclusion is that the Court of Appeals needs additional resources to effectively carry out its functions. Meeting those needs is a wise investment. Timely, accurate, and final appellate decisions are critical to the economic and social wellbeing of Oregonians. An adequately funded Court of Appeals will help facilitate a statewide economic recovery by expediting the processing of civil and land use disputes with finality, so that property owners, businesses, and individual Oregonians can prudently plan and conduct their lives and economic affairs. I am pleased to report that our partners in the Legislative Assembly have understood and responded to this message. In the recently concluded legislative session, that body approved the addition to the Court of Appeals of an additional three-judge panel as of October 2013. We are profoundly grateful for the wise investment that the legislature made in public justice by enacting HB 4026.

CONCLUSION

Every judge and staff member of the Court of Appeals is grateful to serve the people of Oregon, and we consider it a great privilege to play a meaningful role in our public justice system. We are mindful of the challenges that the Legislative Assembly faces in balancing critical interests as it paves the way to Oregon's future in upcoming legislative sessions. Today, the court faces new challenges, perhaps more daunting than any in our history. But challenge begets the opportunity for greater service. Through this report, as in past years, I have outlined for you the ways that we continue to embrace that opportunity.

One final, more personal note: As many of you know, this will be my final annual report on behalf of the Oregon Court of Appeals. Effective April 1, 2012, Judge Rick Haselton will take the reins as the Chief Judge of the court. The court, its partners, and the people of the State of Oregon will be well served by his leadership. It has been my honor and privilege to serve alongside him and the other members of the court as Chief Judge since 2004. I take this opportunity to thank everyone in the Oregon Judicial Department and throughout the state who have supported me as Chief Judge and who I know will continue to support the mission of the Oregon Court of Appeals.

David V. Brewer
Chief Judge
Oregon Court of Appeals
March 12, 2012

CHANGES TO THE OREGON RULES OF APPELLATE PROCEDURE

Lora E. Keenan, Staff Attorney, Oregon Court of Appeals
Lisa Norris-Lampe, Staff Attorney, Oregon Supreme Court

The Oregon Rules of Appellate Procedure (ORAPs) traditionally are permanently amended and republished biennially, effective January 1 of each odd-numbered year. The Oregon Supreme Court and Court of Appeals have adopted and published a package of permanent ORAP amendments that will be effective January 1, 2013. In addition, as of Almanac press time, some temporary amendments related to Oregon eCourt implementation in the appellate courts are being developed. This article outlines those temporary amendments, describes the ORAP Committee and the permanent amendment process, and highlights some of the permanent amendments that are coming your way in 2013.

TEMPORARY OREGON ECOURT-RELATED AMENDMENTS

In addition to the regular biennial review and amendment process, temporary amendments may be adopted 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. Generally, temporary amendments are adopted when an operational need arises to implement process changes on an expedited basis or when the courts think that experience with interim temporary rule amendments will help inform the ultimate permanent rule changes.

A number of temporary ORAP amendments are being developed in light of process changes flowing from installation in the Supreme Court and Court of Appeals of an Electronic Content Management System--the final component of Oregon eCourt implementation in the appellate courts--and from the corresponding increased use of electronic documents in the appellate courts. As part of Oregon eCourt implementation, the Appellate Court Records Section (ACRS) no longer creates paper files for appellate cases; instead, for new cases initiated in the appellate courts on or after March 1, 2012, ACRS maintains an electronic case file.

The temporary ORAP amendments will streamline case processing in ACRS, more fully realize efficiencies available as a result of Oregon eCourt implementation, and save costs to parties related to filing paper that the courts no longer need.

The temporary ORAP amendments include the following changes:

- For conventional filings (*i.e.*, submitted over the counter or by mail), the number of required copies of numerous documents is being decreased. For example, the number of copies of petitions for review and responses in the Supreme Court is being reduced from twelve to zero, and the number of copies of briefs in the Court of Appeals is being reduced from thirteen to five.

- The original of all conventionally filed briefs must have white paper covers of the same weight as the rest of the brief. This facilitates scanning of the original by ACRS staff to create an electronic version for the court's appellate file and for further use by the court. (If copies of the particular brief are still required, the copies of conventionally filed briefs must still conform to the previous color and weight requirements.) The current email requirement set out in ORAP 9.17(5), relating to Supreme Court briefs, is being deleted.

- Corrections or amendments to previous filings must be made by submitting the entire corrected or amended filing. Previously, the courts had allowed parties to resubmit only the affected page(s). Any conventional copy requirement or eFiling document recovery charge that applied to the initial document again applies to the amended or corrected document.

- A motion or response to a motion and a supporting memorandum of law must be submitted as a single document, not as separate documents.

- A brief or other document that is the subject of a motion for leave to file that is granted, if filed simultaneously with the motion, will be treated as having been filed on the same date as the motion. Relatedly, a response to a memorandum of additional authorities filed simultaneously with a motion for

leave to file is due 14 days after the entry date of the order granting the motion.

- When preparing an eFiling containing multiple parts, the filing must be submitted as a unified, single PDF file, rather than as separate eFiled documents or as a principal eFiled document with attached supporting documents, with only narrow exceptions that are specified in the rules.

- A filing or attachment that includes confidential or sealed material must include in the caption the words "Includes Confidential Attachment" (or "sealed," as appropriate) and must state in the filing the authority by which the attachment is deemed confidential or sealed. Also, a filer may not eFile a document that is sealed by operation of law or court order or -- more typically -- a document that has an attachment containing sealed material.

- Current ORAP 16.60, which, among other things, prohibits eFiling briefs in confidential cases, is being deleted.

- For cases on appeal involving protection orders that fall within the scope of the federal Violence Against Women Act (VAWA), 18 USC §§ 2265(d)(3) and 2266(5), the appellant must state in the notice of appeal that the case is subject to VAWA.

- If an eFiler changes his or her email address, then the eFiler must notify the Oregon Judicial Department Enterprise Technology Division, as directed in an amendment to ORAP 16.10(2)(a)(v).

The courts anticipate that these temporary amendments will be effective by the end of January 2013; they are dependent on system updates that currently are being scheduled. A Chief Justice/Chief Judge Order that sets out these temporary amendments will be posted on the ORAP page of the Oregon Judicial Department website: ***http://tinyurl.com/ORAPpage***.

THE ORAP COMMITTEE

Judges and court staff, ORAP Committee members, other practitioners, and self-represented parties suggest changes to the rules.

The ORAP Committee reviews suggested amendments and develops proposals to amend, add to, and improve the rules. The committee in 2012 was chaired by Chief Justice Thomas Balmer. The voting members of the committee in 2012 included two judges from each appellate court, the Solicitor General from the Oregon Department of Justice, the Chief Defender from the Office of Public Defense Services, five other appellate practitioners--including a designee of the Appellate Practice Section--and a trial court administrator. Nonvoting members included a Court of Appeals staff attorney, a Supreme Court staff attorney, the Appellate Commissioner, and the Appellate Court Administrator.

The committee typically meets several times during the spring of each even-numbered year. In 2012, the committee met three times between January and May. The rule changes approved by the committee, together with an invitation for comments, were published in June with an invitation for public comment. After the comment period, the committee reviewed comments received, made adjustments to the proposed amendments, and submitted the amendments to the courts for adoption. The courts adopted the amendments and published them in the Advance Sheets and online. As noted, these amendments are effective on January 1, 2013.

AMENDMENTS EFFECTIVE JANUARY 1, 2013

This article outlines several of the amendments effective January 1, 2013. The complete package of amendments can be viewed in 2012 Advance Sheets No. 25 and online at ***http://tinyurl.com/ORAPpage***.

- ***Litigant contact information*** (ORAP 1.30, et al.) "Litigant contact information" is defined in ORAP 1.30 to mean (1) for represented parties, the name, bar number, address, telephone number, and e-mail address of the attorney(s) for each party and (2) for self-represented parties, the name, address, and telephone number of each party. Litigant contact information must be included in case-initiating documents and briefs only..

- ***Certificate of filing*** (ORAP 2.05, 4.15) A certificate of filing must be included with notices of appeal and petitions for judicial review. The certificate of filing must specify the date the notice of appeal or petition for judicial review was filed

with the Appellate Court Administrator.

- ***Transcriber motions for extension of time*** (ORAP 3.30) A new provision outlines the procedure for parties to object to transcriber motions for extension of time. Objections are due 14 days after the motion is filed; a late objection will be treated as a motion for reconsideration of the ruling. Objections must be served on all other parties, the transcriber, and the trial court administrator.

- ***Initiation of agency review in the Court of Appeals*** (ORAP 4.15) The rule governing petitions for judicial review of agency orders parallels, as legally appropriate, ORAP 2.05, governing notices of appeal.

- ***Motions to correct the record on judicial review*** (ORAP 4.22) Parties must distinguish motions to correct the record in agency cases (which are to be directed to the agency) and motions seeking review of an agency's disposition of a motion to correct the record (which are to be directed to the appellate court).

- ***Length of combined reply and cross-answering briefs*** (ORAP 5.05) The amendment clarifies that the reply part of a combined reply and cross-answering brief may not exceed the length limit for a reply brief (3,000 words or 10 pages).

- ***Deadline for answering briefs on cross-appeal*** (ORAP 5.80) An answering brief on cross-appeal (either freestanding or combined with a reply brief) is due 49 days after filing of the opening brief on cross-appeal.

- ***Custom briefing schedules*** (ORAP 5.80, 9.17, 11.15) Parties in cases involving a large number of parties, appeals, and/or cross-appeals are encouraged to confer to develop a custom briefing schedule and present that schedule to the court by motion.

- ***Oral argument in the Court of Appeals*** (ORAP 6.05) The amendment clarifies that, when any party requests oral argument, all parties may argue.

- ***Attorney fees after late waiver of oral argument*** (ORAP 6.10) Allowance of attorney fees after late waiver of oral argument is discretionary. The amount of any award is tied to reasonable actions after receiving notice of waiver.

THANK YOU TO COMMITTEE MEMBERS

The courts greatly appreciate the time and effort of the members of the ORAP 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 2012 ORAP Committee listed below, several members who recently completed service on the committee deserve recognition and thanks: Mic Alexander, George Kelly, Keith Garza, Mari Miller, and Jim Westwood.

2012 ORAP COMMITTEE ROSTER

Voting Members

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

Hon. Rives Kistler, Associate Justice, Oregon Supreme Court

Hon. David Brewer, Chief Judge, Oregon Court of Appeals (January – March 2012)

Hon. Rick T. Haselton, Chief Judge, Oregon Court of Appeals (April 2012 – present)

Hon. Timothy J. Sercombe, Judge, Oregon Court of Appeals

Anna Joyce, Solicitor General, Department of Justice, Appellate Division (or designee, this year including Mary Williams)

Peter Gartlan, Chief Defender, Office of Public Defense Services (or designee, this year including Ernie Lannet)

Wendy M. Margolis (OSB Appellate Practice Section designee)

Lindsey H. Hughes

Margaret Leek Leiberan

P.K. Runkles-Pearson

Scott Shorr

Diane Morse, Trial Court Administrator, Marion 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

2012 APPELLATE CASE SUMMARIES

Selected and edited by Lisa E. Lear, Lane Powell PC
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APPELLATE PROCEDURE

August 2011 to October 2012

State v. Banks (A144078) 10/19/2011 (Wollheim, J. for the Court; Schuman, P.J.; Nakamoto, J.); Where a defendant does not preserve an error of law in the trial court, the appellate court determines whether to exercise its discretion in correcting the error.

Defendant's probation was extended to six years from the date of initial sentencing. He argued on appeal that, pursuant to ORS 137.010, five years was the maximum probationary period. He did not preserve this error in the trial court. The state argued that defendant had made a strategic decision to not preserve the error, because it allowed him more time to pay his compensatory fines. Under ORS 137.010(4), a court may order a probationary period of up to six years upon a finding that probation has been violated for a felony. Defendant argued that he was sentenced for a misdemeanor, rather than a felony. The Court of Appeals must decide whether to exercise its discretionary authority and correct the error as a plain error apparent on the face of the record, since defendant did not preserve this error. Here, the Court agreed with the state that defendant may have declined to preserve the error for strategic purposes and thus would not exercise its discretion to correct the error. Affirmed.

State v. White (A144392) 11/02/2011 (Brewer, C.J. for the Court; Ortega, P.J.; & Sercombe, J.); Appeals from supplemental judgments, like appeals from other judgments, must be timely for the Court of Appeals to have jurisdiction.

Defendant was convicted of assault and harassment. The trial court entered a judgment of conviction that contained a monetary award of costs and fees, and required defendant to pay restitution in an amount "to be determined." Defendant timely appealed from that judgment. Two months later, the trial court entered a supplemental

1 See full staff list at end of article.

judgment imposing restitution. Defendant filed an amended notice of appeal from the supplemental judgment, but that notice was not timely filed. Defendant argued on appeal that the trial court erred in imposing restitution by supplemental judgment. The state responded that the trial court properly imposed restitution because defendant failed to timely appeal from the supplemental judgment imposing restitution and, therefore. The Court of Appeals lacked jurisdiction to consider defendant's argument. The Court of Appeals rejected defendant's appeal because he sought relief from the supplemental judgment of restitution, which was not the judgment of conviction from which he timely appealed. Affirmed.

Cruze v. Hudler (A145179) 2/15/12 (Schuman, P.J., for the Court; Brewer, C.J.; & Wollheim, J.); When the Court of Appeals misstates an non-material fact in reviewing a summary judgment, the Court may grant reconsideration without determining what inferences could be drawn from that fact, and simply make a minor correction to the prior opinion to delete the immaterial fact from the opinion.

Defendant Markley petitioned for a reconsideration of the Court's decision in *Cruze v. Hudler*, 246 Or App 649 (2011). The Court allowed the petition to reconsider two contentions. First, Markley contended that he had extensively briefed the legal question of whether plaintiff had a "right to rely", an essential element of common-law fraud, and that the court failed to address those arguments. The Court explained that, in reversing the trial court's granting of summary judgment in favor of the defendant in the earlier opinion, it was implicit that they considered and rejected without discussion Markley's arguments. Second, Markley contended that the Court stated a fact in the earlier opinion not supported by the summary judgment record. The Court determined that the challenged fact was immaterial. It summarized the material facts they relied on, and modified the first opinion by deleting the single sentence that misstated the fact. Reconsideration allowed; former opinion modified and adhered to as modified.

Greenwood Products v. Greenwood Forest Products (S059097) 02/24/2012 (Walters, J. for the Court); The Court of Appeals erred in reversing the trial court judgment where the Court relied on an issue not raised in the trial court and, therefore, not preserved for appeal.

Plaintiff's petitioned the Court to determine whether the Court

of Appeals' determination regarding an asset purchase agreement obligated the defendants to state the cost of their inventory. Greenwood Products Inc. (Greenwood) and Greenwood Forest Products, Inc. (Forest) agreed that Forest would sell their entire nationwide inventory for a percentage above costs to Greenwood. After the agreement was finalized and the record books were reviewed, Greenwood filed an action claiming Forest breached the asset purchase agreement. In the trial court, Greenwood requested and was denied a directed verdict; instead, they received a jury verdict on a contract claim. The Court of Appeals reversed the trial court's ruling denying a directed verdict on the ground that the asset purchase agreement did not require Forest to share the actual cost of their inventory. After considering the record, the Supreme Court held the Court of Appeals' reversal incorrectly relied on the "no obligation" provision of the asset purchase agreement. That issue was not raised in the trial court and, therefore, was not preserved for appeal. Affirmed in part, reversed in part, and remanded.

State v. Debuiser (A145479) 04/04/2012 (Brewer, P.J. for the Court; and Gillette, S.J.); A court does not commit plain error when a plausible inference can be drawn that an objection was not made for tactical reasons.

Defendant was convicted of third degree theft and harassment due to his attempt to steal from a grocery store, and trying to place an employee in a headlock. The lower court imposed a compensatory fine under ORS 137.101, to which he did not object, due to his actions against the employee, despite a lack of evidence in the record of the employee requiring any form of compensation. Defendant appealed, arguing that the lower court committed plain error due the lack of evidence in the record. The Court of Appeals disagreed, reasoning that Defendant's statement during sentencing that he faced a $3,000 fine in another unrelated matter created a plausible inference that the Defendant did not preserve the error for tactical reasons. Therefore, the lower court did not commit plain error. Affirmed.

State v. Lowell (A143776) 04/18/2012 (Ortega, P.J. for the Court and Sercombe, J.; Edmonds, S.J. concurring); An investigating detective's testimony that he believed defendant was lying was an improper comment on defendant's credibility; the trial court's failure to exclude that testimony was plain error and therefore reviewable.

Defendant appealed a conviction for third-degree rape. Defendant argued that the trial court erred in failing to exclude the investigating detective's testimony commenting on defendant's credibility. Defendant did not preserve the error for appeal, but claimed that it constituted plain error. The Court held that the error was plain because the detective's statements were a direct comment on credibility and the Court did not have to select among competing inferences to explain their inclusion. Specifically, it held that defendant's failure to object to the testimony at trial was not a plausible strategic decision. The Court found that the gravity of the error required them to correct it since the trial hinged on the relative credibility of defendant and complainant and the impact of a conviction for a sex crime would be severe and long-lasting. Reversed and remanded.

State v. Kephart (A141148) 04/18/2012 (Ortega, P.J., for the Court; Brewer, J.; and Sercombe, J.); Where the trial court does not make clear whether it concluded that the parties had not stipulated that a certain version of a statute would apply or indicate which version of the statute it applied, and where either issue is raised on appeal, the case is properly vacated and remanded to the trial court.

Defendant appealed his aggravated murder conviction and restitution in the amount of $1,171,994.47 to be paid to the state. Defendant was charged with causing the death of his daughter and pled guilty to aggravated murder. The plea petition provided that the parties agreed and stipulated to the 1989 version of ORS 163.105. The parties also agreed that Defendant would pay restitution for the victim's care and treatment. After the sentencing hearing, Defendant objected to the $1,168,494.47 restitution payable to Department of Human Services. The court, however, imposed the restitution. On appeal, Defendant contended the trial court erred because the parties had agreed that the 1991 restitution statutes would control the court's decision concerning the state's request for restitution. The trial court did not address whether the parties stipulated to the application of the 1991 version of the restitution statutes as part of the plea negotiations, or state what version of the restitution statutes they applied. The trial court should be the forum to address these issues. Vacated and remanded.

Poppa v. Laird (A141724) 07/11/2012 (Armstrong, P.J. for the Court; Haselton, C.J.; and Duncan, J.); The appellant is required to

provide the appellate court with a sufficient record to decide the issues on appeal. The appellate court will not decide issues that were not preserved as an error in the court below.

Poppa, a former employee of Laird, filed a wage claim in small claims court. The jury found in favor of Poppa, but the trial court ruled that Poppa's wrongful use of civil proceedings claim had been filed prematurely. Poppa then filed a new claim for wrongful use of civil proceedings to which Laird did not respond. The trial court issued a default judgment against Laird and held a ***prima facie*** hearing to determine damages, in which it entered a judgment for Laird based on a lack of evidence. The Court of Appeals affirmed the trial court's judgment because Poppa failed to preserve the trial court's error. Additionally, Poppa did not provide the Court with a sufficient appellate record to decide the issues on appeal. Because the prima facie hearing was not recorded, there was no record for appeal and the Court was unable to determine if anything pertinent to the claim occurred during that hearing. Affirmed.

Allen v. Premo (A145367) 08/15/2012 (Schuman, P.J. for the Court: and Haselton, C.J.); Where the Court of Appeals issues a decision of remand, the lower court shall act as if the original proceedings did not occur and a new trial has been ordered.

Allen appealed the post-conviction court's denial of his motion for leave to file a fourth amended petition. On appeal, Allen contends that the court erroneously believed that it was precluded from exercising discretion in deciding his motion. The post-conviction court based its decision on a remand decision by the Court of Appeals, which involved the same parties, and held that the trial court had erred in denying Allen's request to make a statement or testify as to his third amended petition. The Court of Appeals held that the post-conviction court's decision to deny Allen's motion was based on a substantive legal conclusion, which exceeded the scope of the post-conviction court's authority in light of the remand and, therefore, should be reviewed for errors of law. The Court held that when it remands a decision, the lower tribunal should act as though the original proceedings had not occurred and a new trial ordered. Reversed and remanded.

State v. Haynes (S060103) 08/16/2012 (De Muniz, J. for the Court); In order to preserve an issue for appeal with a single word or

phrase, that word must be used in a context that allows the court and the other parties to understand that it refers to a particular legal or factual argument and the essential contours around the full argument.

On appeal from Multnomah Circuit Court. Defendant was alleged to have killed an elderly man in his home in Northeast Portland in 1994 by inflicting multiple stab wounds. In the trial court, the State included a narrative of events that led to Defendant's arrest in Vancouver, WA in an unrelated incident shortly after the murder occurred. At the suppression hearing, the State argued that the incident in Vancouver was relevant to show Defendant's flight from Oregon as part of the continuing course of conduct. The State appealed the trial court's ruling granting Defendant's motion to exclude evidence of prior bad acts and granting in part Defendant's motion to exclude the police interview. On appeal, the State argued that the evidence showed Defendant was within the proximity of the victim's home during the time of the murder and showed Defendant's flight. The Supreme Court held that reference to "flight" was insufficient to preserve arguments relating to the Defendant's flight. In order to preserve an issue for appeal with a single word or phrase, it must be used in a context that allows the court and the other parties to understand that it refers to a particular legal or factual argument. The state's single mention of flight in the context of continuing course of conduct was insufficient to preserve the issue. The Court declined to rule on the state's appeal of the trial judge's order granting in part the defendant's motion to exclude the police interview because the order states that some of the defendant's admissions in the interview are relevant, and leaves open the possibility of objections for the rest. Affirmed.

Assoc. Unit Owners of Timbercrest Condo v. Warren (S059482) 10/18/2012 (Landau, J. for the Court); A motion for reconsideration of a summary judgment does not constitute a motion for a new trial within the meaning of ORS 19.255(2) and ORCP 64.

In front of the trial court, Warren moved for summary judgment, which was granted. Timbercrest then moved for reconsideration of the summary judgment ruling. Prior to the trial court issuing its decision on this motion, the court entered judgment and Timbercrest filed a notice of appeal. Subsequently, the trial court denied Timbercrest's motion for reconsideration, but Timbercrest did not file a new notice of appeal. Warren then argued that Timbercrest's motion for

reconsideration constituted a motion for new trial and, consequently, that Timbercrest's appeal was premature and should have been dismissed for want of timely notice of appeal. The Court of Appeals disagreed, concluding that Timbercrest's motion for reconsideration did not render the appeal a nullity, and that the Court did have jurisdiction over the appeal. After examining case law, legislative history, and statutory text, the Oregon Supreme Court determined that because a summary judgment proceeding is something quite different and distinct from trial itself, Timbercrest's motion for reconsideration was not tantamount to a motion for a new trial under ORCP 64. Accordingly, the timing requirements of ORS 19.255(2) did not control, and Timbercrest's notice of appeal was timely filed. Affirmed and remanded to the Court of Appeals for further proceedings.

CIVIL LAW

August 2011 to October 2012

In re Marandas (S058559) 01/12/2012 (De Muniz, C.J., Durham, J., Balmer, J., Kistler, J., Walters, J., and Landau, J; per curiam); An attorney may refuse to disclose the details of a settlement agreement due to confidentiality concerns if there is a basis in law and fact for such a claim and the actions taken do not prejudice the administration of justice.

Marandas, an Oregon attorney, was previously involved in an action to foreclose an attorney's lien during which he settled with some defendants, but not others, and refused to disclose the settlement details by claiming they were confidential. The Oregon State Bar then charged Marandas with violating several Rule of Professional Conduct and Disciplinary Rules, and the trial panel found that Marandas made misrepresentations as to the confidentiality of the settlement, which caused prejudice to the administration of justice. The panel imposed a three month suspension from the practice of law. On review, the Oregon Supreme Court held in a unanimous per curiam opinion that the Bar failed to prove the charges by clear and convincing evidence, as Marandas did not prejudice the administration of justice and had valid reasons in law and fact for claiming the agreement was confidential. Complaint dismissed.

Parsley v. Oregon (A143347) 03/28/2012 (Duncan, J. for the Court; Haselton, P.J.; and Armstrong, J.); The validity of a circuit court

judgment may not be attacked in a subsequent contempt proceeding. Additionally, a plaintiff is not required to appear at a contempt hearing.

Defendant Snodgrass appealed a circuit court judgment holding him in contempt of court. He argued that his agreement to pay his Oregon Public Employees Retirement System (PERS) benefit to Plaintiff was unenforceable because PERS benefits are unassignable. He also argued that Plaintiff had to be present at the contempt hearing. The Court of Appeals affirmed the circuit court's judgment, which held Defendant in contempt for not complying with the court's order, based on his confession of judgment to instruct PERS to send payments to the Plaintiff's trust. Defendant did not challenge the validity of that judgment and the Court of Appeals found that he could not attack the validity of the judgment in a later contempt proceeding. Defendant next argued that Plaintiff's absence at the contempt hearing did not give him the opportunity to confront her. The Court found no authority that required Plaintiff to be present at the contempt hearing. Affirmed.

Spaid v. 4-R Equipment, LLC (A146613) 09/12/2012 (Brewer, J. for the Court; Armstrong, P.J.; and Duncan, J.); A trial court does not err by declining to award prejudgment interest when the jury does not resolve issues of fact with regard to the award of prejudgment interest, unless the pertinent facts were undisputed.

Spaid appealed the trial court's denial of prejudgment interest on a back pay award. The jury awarded Spaid $200,000 in back pay and benefits and $10,000 in noneconomic damages. The court did not submit to the jury the issue of whether Spaid could recover prejudgment interest and the jury made no findings of fact regarding that issue. The Court of Appeals held that a trial court does not err by declining to award prejudgment interest when the jury does not resolve issues of fact with regard to such an award, unless the pertinent facts were undisputed. Because the amount Spaid would have made after his wrongful discharge and the length of time he would have worked were in dispute, and because the jury did not issue a special verdict regarding prejudgment interest, the trial court did not err in failing to award prejudgment interest. Affirmed.

EVIDENCE

August 2011 to November 2012

State v. Cox (A141564) 02/29/2012 (Armstrong, J. for the Court; Haselton, P.J.; and Sercombe, J.); Testimony of an expert witness regarding the credibility of another witness should not be submitted to the jury when there is a substantial risk of the testimony prejudicing the jury toward a third witness.

Defendant appeals from a conviction of various sexually-related crimes. An expert witness is called to diagnose one of two children giving testimony as being sexually abused. The testimony could not be admitted as a diagnosis, and was instead admitted as witness credibility testimony. Defendant argues that admitting the testimony to the jury was plain error because the testimony of the expert went to the credibility of both children, and prejudiced the jury in determining if either of the children was telling the truth about being abused. The Court held that, without physical evidence of abuse, the expert's testimony as to witness credibility goes not only as to the child diagnosed, but also extended to the other child who testified. By admitting the diagnosis, the trial court committed plain error by creating a substantial risk of prejudice by the jury. Reversed and remanded.

State v. Jasso (A143128) 02/29/2012 (Wollheim, J. for the Court; Schuman, P.J.; and Nakamoto, J.); A party must provide the trial court with an explanation of his or her objection that is specific enough to ensure that the court can identify its alleged error with enough clarity to permit it to consider and correct the error immediately, if correction is warranted.

Defendant appeals his jury conviction for robbery and burglary. Defendant and three others committed a robbery where one of the other men held an Airsoft submachine gun to the victim's head and demanded money, bongs, and marijuana. In Defendant's backpack, police found a drawing of a masked man pointing a gun at a woman and demanding her jewelry. At trial, the State sought to introduce Defendant's drawing, arguing (1) that it was relevant and admissible under OEC 404(4) ("other crimes, wrongs or acts by the defendant"), and (2) that the court was not constitutionally required to balance prejudicial effect against probative value under OEC 403. The trial

court admitted the drawing over Defendant's objection, ruling that it was relevant to show that Defendant's involvement was greater than simply being present at the time of the robbery, and a jury convicted him. Defendant appealed, and the Court held that defendant did not preserve his constitutional argument for appeal. Affirmed.

State v. Kinney (A143099) 05/09/2012 (Armstrong, P.J for the Court; Haselton, C.J.; and Brewer, J.); Despite a defendant's proffered stipulation, evidence may be admissible if it is relevant to prove a fact that is at issue notwithstanding the stipulation. Furthermore, evidence against a defendant is not unfairly prejudicial solely because it is graphic in nature.

Defendant appealed a judgment convicting him of four counts of encouraging child sexual abuse in the first degree and four counts of encouraging child sexual abuse in the second degree. Defendant argued the trial court erred in admitting evidence of videos seized from his computer, despite his offer to stipulate the videos showed sexually explicit conduct with a child and that its creation involved child abuse. The state refused to stipulate to the offer and the trial court admitted the videos as evidence. Defendant appealed arguing his stipulation would have made the evidence irrelevant under OEC 401, 402, and OEC 403 which required evidence to be excluded if the danger of unfair prejudice to defendant substantially outweighed the probative value of the evidence to the state. The Court affirmed the judgment, holding that despite the proffered stipulation, evidence may be admissible if it is relevant to prove a fact that is at issue, notwithstanding the stipulation (here the elements of defendant's knowledge of the content and defendant's purpose in possessing them, neither of which were addressed in the proffered stipulation). Finally, the Court held evidence was not unfairly prejudicial against a defendant simply because it was graphic in nature. Affirmed.

State v. Eumana-Moranchel (S059602) 05/10/2012 (Balmer, C.J. for the Court; En Banc; De Muniz, J., Durham, J., and Walters, J. dissenting); When there is a delay between a DUII arrest and a breath or blood test, the State may offer expert testimony explaining retrograde extrapolation to establish a defendant's blood alcohol content (BAC) was over the limit at the time defendant was driving.

The State appealed the trial court's exclusion of expert testimony that Defendant's BAC was over the legal limit of .08 when he was

stopped for driving erratically, even though Defendant's BAC was .064 – under the legal limit – at the time of the breath test, an hour and a half later. Based on the expert's calculation, called retrograde extrapolation, the expert testified that Defendant's BAC while driving was between .08 and .10, and therefore, above the legal limit. The Court of Appeals reversed the trial court's exclusion, holding that the expert's testimony was admissible because it was "derived, using scientific principles, from a chemical analysis of defendant's breath." Defendant appealed, and the Supreme Court affirmed, holding that the State is permitted to offer the expert's testimony explaining retrograde extrapolation to make the "necessary connection" that Defendant's BAC was over the legal limit at the time he was driving. Affirmed.

State v. Rambo (A143380) 05/31/12 (Brewer, J. for the Court; Ortega, P.J.; and Sercombe, J.); Nonscientific expert opinion evidence based on independently admissible scientific evidence is admissible, as long as the expert is established as qualified through experience and training and does not use scientific language or suggest that his conclusion was based on a scientific method or data collection.)

Officer Johnson, a drug recognition evaluation expert (DRE), administered a 12-step DRE protocol to determine whether defendant was driving under the influence of a controlled substance when she was pulled over for swerving. Johnson was unable to complete one step because Defendant refused to submit a urine sample. A jury convicted Defendant for DUII, reckless driving, and failure to appear on a criminal citation. Defendant appealed, arguing that the trial court erred in admitting Johnson's testimony about the DRE protocol because an incomplete DRE protocol did not constitute scientific evidence. The Court of Appeals, however, agreed with the trial court's reasoning that Johnson was qualified to recognize symptoms of drug impairment based on his considerable training and experience and that the only scientific tests that Johnson relied on were independently admissible. Also, Johnson did not suggest that he reached his conclusions through the application of science. Therefore, Johnson's testimony was properly admitted as nonscientific expert opinion evidence. Affirmed.

State v. Hollywood (A143885) 06/27/2012 (Brewer, P.J. for the Court; and Haselton, C.J.); Testimony of one witness regarding the credibility of another witness is impermissible. The Court further suggests that trial judges should summarily cut off questions that

elicit testimony on the credibility of a witness so that a jury is not contaminated by it.

Defendant appealed his jury conviction. Defendant was charged with one count of first-degree rape and two counts of first-degree sexual abuse of a child. No evidence of physical sexual abuse was found, however an interview performed by a pediatric nurse practitioner led to a diagnosis that sexual abuse had occurred. At trial, the nurse was asked "how" or "why" she was able to make such a diagnosis in this case. With regard to the victim, the nurse testified "there is no lying going on about what she is telling us in this evaluation." On appeal, defendant argued that admitting the diagnosing nurse's testimony was plain error because the testimony contained comments regarding the credibility of another witness. The Court of Appeals agreed, following *State v. Lupoli*, which held that a witness's testimony is impermissible when a witness comments on the credibility or truthfulness of another witness. Furthermore, the Court suggested that the trial judge, ***sua sponte***, should have cut off questions attempting elicit the credibility of a witness before a jury is contaminated by it. Reversed and remanded.

State v. Nichols (A141527) 08/29/2012 (Ortega, P.J. for the Court; Brewer, J.; and Sercombe, J.); Under OEC 702, an expert's testimony, if believed, must be of help or assistance to the jury. When the expert fails to show a connection between the opinion and the testimony to the facts, then the court may use its discretion to exclude it.

Defendant appealed her conviction of murder and other crimes. She assigned error to the trial court, challenging the exclusion of her witness' expert testimony. Specifically, Defendant claims that the expert's testimony would have explained her erratic behavior during the police investigation, and would have been used to show her lack of guilt. When the police interviewed Defendant, she exhibited strange, erratic behavior and inconsistent testimony with other known facts. At trial, Defendant attempted to use her witness' expert testimony to explain that behavior. The State objected to the expert testimony under OEC 401 (relevancy) and OEC 702 (the evidence did not provide assistance to the trier of fact). The test under OEC 702 is "whether the expert's testimony, will be of help or assistance to the jury." The trial court found that Defendant's witness failed to establish the connection between Defendant's diagnosis and the behavior the expert tried to explain. This testimony did not meet the test under OEC 702, and was

therefore excluded. The Court of Appeals held that the trial court did not err in excluding the testimony of the Defendant's mental health counselor. Affirmed.

Warren v. Imperia (A143459) 09/12/2012 (Sercombe, J. for the Court; Ortega, P.J.; and Hadlock, J.); The informed consent of a patient, in a medical malpractice claim, may be excluded from trial because its probative value is outweighed by its prejudicial effect.

Imperia Laser Eye Centers (Imperia) appealed a jury verdict for Warren in a medical malpractice suit. Warren sought treatment for an eye condition and at the suggestion of her ophthalmologist, was treated with conductive keratoplasty (CK), a procedure using radiofrequency, in the hopes that this would correct the eye condition. After the surgery, Warren experienced a host of negative effects and brought a medical malpractice suit against her ophthalmologist and Imperia. Imperia appealed the jury verdict in favor of Warren on the basis that the trial court erred in excluding pre-surgery discussions and documents, regarding the risks and alternatives to the procedure. Imperia argued the evidence was relevant to the issue of proper assessment of Warren before the surgery. The Court of Appeals held that the trial court's exclusion was proper because evidence of informed consent is irrelevant to a claim for negligence and the probative value of such evidence is outweighed by its prejudicial effect under OEC 403.

B.A. v. Webb (A140608) 10/24/2012 (Haselton, C. J. for the Court; Armstrong, P.J.; and Duncan, J.); Under OEC 403, a witness may not comment on the credibility of another witness and a diagnosis of sexual abuse without any physical evidence is not admissible.

Webb appealed the judgment against him granting B.A. monetary damages for the intentional torts of sexual battery of a child and intentional infliction of severe emotional distress. The trial court allowed two expert witnesses to vouch for B.A.'s credibility. Furthermore, the trial court allowed the expert witnesses to provide a diagnoses of child sexual abuse without any corroborating physical evidence. Webb argued that vouching is proscribed by the precedent found in *Middleton* and *Milbradt*. The Court of Appeals agreed and found that OEC 403 prohibits a diagnosis of sexual abuse because the "marginal" value of the diagnoses is outweighed by the risk of prejudice

to the defendant, and was therefore reversible error. Although Webb's assignments of error were not preserved, the Court chose to exercise its discretion to correct the errors. Reversed and remanded.

State v. Bradley (A142466) 11/07/2012 (Brewer, J. for the Court; Schuman, P.J.; and Nakamoto, J.); OEC 803(18a)(b) intends to ensure an opposing party has reasonable time to prepare for trial in response to hearsay statements made by a victim by requiring notice to the opposing party no later than fifteen days before trial. At a minimum, the rule requires identification of the witness or the means that will be used to introduce the hearsay statement as well as the substance of the hearsay statement or how it will be introduced.

Defendant appealed a conviction for fifteen counts of sexual offenses against two children. Defendant argued the lower court erred in denying his motion to exclude one victim's out-of-court statements. OEC 803(18a)(b) intends to ensure an opposing party has reasonable time to prepare for trial in response to hearsay statements made by a victim by requiring notice to the opposing party no later than fifteen days before trial. Defendant argued the State did not adequately provide the notice required by the rule because the notice did not specify which statements the State intended to introduce, nor did it specify the names of the hearsay witness. The Court agreed the notice was insufficient to comply with the rule because it failed to specify the particular statements the State intended to introduce and failed to identify the witness. However, if the evidentiary error was harmless, the judgment would not be reversed. Defendant argued the error was not harmless because the hearsay statements provided more persuasive evidence of his guilt than the victim's trial testimony and allowed the State to bolster the victim's credibility. The Court agreed with the Defendant and held the hearsay statements were not harmless and were erroneously admitted because they could have had an effect on the verdict with respect to that victim. Reversed and remanded for a new trial as to counts 1 through 7, and counts 10 and 11.

State v. Lawson (S059234) 1/29/2012 (De Muniz, J., for the Court); The ***Classen*** Test of eyewitness testimony has been revised. The state must show that the eyewitness has personal knowledge of all the facts to which he will testify, and prove that the identification was rationally based on the witness' first hand perceptions and will be helpful to the trier of fact.

In a consolidated opinion, Defendants in two separate cases challenged the procedures the police used when interviewing witnesses who identified Defendants. In both cases, the trial court and Court of Appeals applied the test set out in ***State v. Classen*** and held that, although the procedure used by the police was suggestive, the proffered identifications had a source independent of the suggestion or were otherwise reliable. The Supreme Court revised the ***Classen*** test, holding that it confused state evidentiary issues with constitutional due process issues, that it was developed before the evidence code was enacted, and that the scientific evidence regarding the reliability of eyewitness testimony required reconsideration of the rule. The proponent of evidence has the burden of showing testimony is admissible under the evidence code, including showing that it is relevant and that the testimony is based on the witness's own knowledge, Further, the evidence may be objected to as unfairly prejudicial. The Court anticipated that the system variables (those surrounding the procurement of an identification) it identified should guide courts in making those determinations, while estimator variables (those surrounding the event in question) will be examined during direct and cross-examination. Reversed and remanded for new trial as to Lawson, affirmed as to James.

State v. Sanchez-Alfonso (S059458) 11/29/2012 (Walters, J. for the Court); Whether evidence is sufficiently reliable to admit under OEC 702 requires an expert to explain the nature of his or her expertise, how the information is gathered, how the information is used in reaching his or her conclusion, and what scientific basis supports each step of that process.

Defendant was convicted of second-degree assault, third-degree assault, and first-degree criminal mistreatment for injuries his girlfriend's young son sustained while in Defendant's care. The State's expert physician testified that the child was abused, and that Defendant was the perpetrator. The Court of Appeals affirmed the convictions. On review, Defendant contended that the trial court erred in admitting testimony from the State's expert physician, identifying Defendant as the perpetrator. The Supreme Court held that the evidence was not admissible under OEC 702 because the physician did not establish that she was an expert at identifying perpetrators of abuse, nor did she explain how any of the injuries alone indicated

that Defendant caused them. Defendant argued that the child's aunt caused the skull fracture, which was the only injury that qualified as creating a "substantial likelihood of death," as required for second-degree assault. The physician's inadmissible testimony dealt with the heart of Defendant's factual theory of the case. The Court also held that the physician's inadmissible testimony could have influenced the other convictions and that this error was not harmless because it was likely to influence the verdict. Reversed and remanded.

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THE ALMANAC CONTENDERE: APPELLATE HAIKU

Lora Keenan, staff attorney, Oregon Court of Appeals

Returning to its artistic roots, *see* 1 *Oregon Appellate Almanac* 311-14 (2006), this year's contendere invites you to engage your literary faculties. Identifying the cases rendered poetically below will entitle the winner to a fabulous but very cheap prize, customized to your choice of major Oregon universities (the selection at the Capitol Gift Shop is not umlimited...). Those who have studied poetry, who write poetry, or who are just plain better educated are encouraged to overlook--or at least keep quiet about--any mangling of traditional rules of meter, form, imagery, etc. That said, many thanks to the other members of the contendere poetry posse: Banksy, Kate Lonborg, Cecil Reniche-Smith, and Rob Wilsey. We are, of course, disqualified from participating in the contendere. For the undisqualified, please contact me with your guesses. The first reader who correctly identifies all the cases will be the winner. Good luck!

1._____

Of my commission
I've been unfairly denied
The court says "tough beans"

2._____

No trial court findings,
But facts go with the holding.
Bring on assumptions.

3._____

Prisoner may escape.
Stock market may fluctuate.
What may be foreseen?

4._____

Trouble at the mill
Where, oh where, is my crankshaft
Farewell, lost profits

5._____

(a special two-verse haiku!)

Teachers, you should know:
Words are sometimes slippery
Enough! Back to work.

The Assembly speaks
But who's to say what's been said?
Depends. Clear enough?

6._____

A preservation onion
Invites the thin slice
Although courts demur

7._____

Hail preservation;
Raise or waive all arguments.
But not for statutes.

8._____

Pool of history--
make a turn to enter it.
The dive, a gainer.

9._____

A new argument.
The record would be the same.
Yo, tipsy coachman!