



THE OREGON COURT OF APPEALS

2005 REPORT

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I. INTRODUCTION

The business of the courts is conflict resolution. We approach our work with a clear understanding that we cannot expect everyone to agree with all of our decisions. Nevertheless, we aspire to perform the vital work with which we are entrusted in a way that inspires public confidence and understanding, and to work collegially and respectfully with all persons and entities who are affected by our work. In furtherance of those goals, we offer this report, which is intended to help make the work and people of the Court of Appeals more visible and understandable to the Bar, the other branches of government, and the public.

II. STRUCTURE AND FUNCTIONS

The Oregon Court of Appeals is a 10-judge intermediate appellate court, the members of which are elected statewide. With the exception of a limited number of appeals that go directly to the Oregon Supreme Court, most notably death penalty cases, ballot title cases, lawyer discipline matters, and tax court cases, the Court of Appeals receives every appeal or judicial review taken from Oregon's trial courts and administrative agencies. Litigants in Oregon have a general right to appeal decisions from those bodies to our court, and our doors are open to them. If a party is unhappy with a decision made by our court, the party may seek review of that decision by the Supreme Court, which has discretion whether to accept the case for review. On average, the Supreme Court reviews approximately six

percent of our decisions each year.

Thirty-nine states have intermediate appellate courts, and the Oregon Court of Appeals generally ranks first or second among those courts in terms of workload. Over the past 10 years, the range of appeals filed per year in our court has been between 3,200 and 4,600. The Appendix to this report shows the number of filings in 2005 and gives an idea of the mix of cases that come before the court.

Over the years, our case mix and volume have been fairly steady, subject to three notable exceptions. First, we often have an increase in appeals after the end of a legislative session, when the meaning of a new statute is at issue. In 2003, for example, Oregon House Bill 2646 comprehensively overhauled the form and content of trial court judgments. In the aftermath of its passage, we received a number of appeals that presented substantial legal issues of first impression regarding its meaning. We had to decide those cases quickly so that the trial bench and bar would have a better understanding of how to structure their judgments.

Second, our workload can be affected by decisions of the federal courts. For example, over the past three years, the United States Supreme Court has greatly affected felony sentencing in Oregon with its *Apprendi*, *Blakely*, and, most recently, *Booker* decisions. In addition, in its *Crawford* decision, the United States Supreme Court substantially limited the permitted uses of hearsay evidence in criminal cases. Those decisions arise under the United States Constitution, and Oregon's courts are required to follow them. In those cases,

as it often does, the United States Supreme Court spoke in a broad outline but left many issues undecided. As a result, there has been an increased volume of criminal appeals in Oregon that have presented numerous complex sentencing and evidentiary issues, requiring prompt published opinions from both of Oregon's appellate courts. When cases like *Blakely* and *Crawford* are decided, we have no choice but to divert our resources to expedite the decision-making process in cases involving sentencing and evidentiary issues, to assure the integrity of our criminal justice system.

Third, our workload can be indirectly affected by budgetary issues. For example, due to an indigent defense budget shortfall during the last part of the 2001-03 biennium, the trial courts lacked funding necessary to appoint counsel in criminal cases during that period, and our criminal appeals fell in 2003. As those cases were processed in 2004 and 2005, however, our criminal appeal numbers have increased. Thus, funding issues also can create volatility in the volume of appellate cases.

To meet the demands of its workload, our court sits in three panels (also called "departments") of three judges. The Chief Judge is not a member of any panel, but may substitute for any member of a panel who is not available or who has a conflict of interest on a case. Each panel has a presiding judge and two additional members. On average, each panel hears oral arguments three days per month. On each sitting day, between 12 and 30 cases are argued, or submitted to a panel for decision without argument. Generally, we also schedule an additional oral argument day each month to hear various types of fast-track

cases--that is, those cases that statutes, appellate rules, or the court's internal practices require us to expedite. Primary among those case types are appeals involving juvenile dependency, termination of parental rights,¹ land use,² workers' compensation,³ and certain felonies.⁴ Cases are assigned at random to each panel for argument and decision.

Our judges come from many different backgrounds. Some of us were trial judges, some were government lawyers, and others came from private practice. We each regularly participate in all of the varied types of cases that fall within the court's jurisdiction. Before oral argument, each judge on the panel reads the briefs that have been filed in the cases, and each panel member participates in the argument. Before and after each argument session, the judges meet to discuss the issues in the cases. After argument, the judges decide whether the case requires a written opinion. If one or more of the judges believes that the trial court or agency decision may have been erroneous or otherwise presents a question requiring a written opinion, the case is taken under advisement, and the presiding judge

¹ In juvenile and termination of parental rights cases, we advance hearings and decisions under the Oregon Rules of Appellate Procedure and our own internal practices. ORAP 10.15.

² We are required by statute to hear LUBA cases within 49 days of transmittal of the record, and we are required by statute, in the absence of good cause, to decide those cases within 91 days after submission. ORS 197.850(7); ORS 197.855(1).

³ We are required by statute to give workers' compensation review precedence over other cases, except those given equal or greater priority by the legislature. ORS 656.298(8).

⁴ When a felony defendant is in custody, we are required by statute to decide the case within 180 days after submission. ORS 138.261(3).

assigns the case to a panel member for the preparation of a written opinion.

Many of the cases that come before us are controlled by existing precedent or otherwise do not present issues that necessitate a written discussion of law or fact. In such cases, the judges often decide after oral argument that the case should be affirmed without a written opinion or simply by reference to the controlling case. We understand that every party would like to receive a written explanation of the reasons for the court's decision. However, at any given time, each of our judges is working on approximately 25 to 30 cases that have been assigned to him or her for a written opinion. The court's heavy workload and the need to decide cases expeditiously necessitates a strict sheparding of scarce resources. With those considerations in mind, if the judges on a panel decide to affirm a case, and if all three judges agree that a written opinion would not be helpful to the parties, the trial bench, or the Bar, the case is affirmed without a written opinion. If the panel decides to issue a written opinion, the judge to whom the case is assigned drafts the opinion and circulates it to the other judges on the panel, the Chief Judge, and the court's staff attorneys. Twice each month each panel meets in conference with the Chief Judge and the panel's staff attorney to discuss the drafted opinions. At least two judges on the panel must agree with the opinion for the panel to adopt it. A judge who disagrees may file a dissenting opinion. However, the judges often use conference time to work out such differences and to flesh out potential problems with an opinion. The frequency of face-to-face meetings improves the quality of these discussions and helps to ensure that opinions are well-reasoned and consistent with

precedent and that, whenever possible, the court speaks with one voice.

If a judge outside the panel from which an opinion originated believes that the opinion is incorrect, that judge can refer the opinion to the full court, where a vote is taken whether to take the case for full court review. The full court meets in conference once a month and, over the course of a year, considers about three percent of the court's published opinions. The full court conference model is another means of assuring that our decisions are internally consistent, which is critical to the operation of a large and busy appellate court. It also reduces the Oregon Supreme Court's need to resolve inconsistencies in our decisions, as that function is part of our own internal review process. This is an advantage over the model that exists in some states, where panels of the intermediate appellate courts sit in separate geographical districts and have no method of harmonizing their decisions. In those jurisdictions, the highest court must resolve conflicts in regional decisions; unless and until they do so, the decisional law in one region may differ from the decisional law in other regions.

We continue to work hard to decrease the processing time for cases before our courts. After a case has been fully briefed, it is scheduled for oral argument in approximately 90 days. There are exceptions, though, especially when the court has a large number of pending fast-track appeals. When that happens, other types of cases, usually civil cases, may lag somewhat behind. Once a case is submitted for decision, a written decision generally is published within three to four months. As the Appendix to this report shows, for the past

three years, the court has steadily increased its volume of written opinions.

One of our greatest concerns in regard to timeliness arises out of the large number of motions filed in our pending cases. Our court decides about 1,500 motions per month. Although many are routine, some are complex and take considerable time to resolve. For example, some motions involve important jurisdictional, constitutional, or statutory interpretation issues; motions for stays of trial court and agency decisions often involve review of substantial records. To properly address such motions and to keep our docket moving, the court has a separate Motions Department, in which three of our judges serve in addition to performing their other duties. The Motions Department meets once a month to decide complex motions, and, throughout the month, the members of the Motions Department individually review and decide large numbers of more routine motions.

III. SPECIAL PROGRAMS

In 2005, the court inaugurated or continued several programs to carry forward our mission. First, we continued our highly successful appellate settlement conference program. Each year, 100 to 150 civil, domestic relations, and workers' compensation cases settle through this unique mediation program. Cases are carefully screened, and our settlement rate in those selected for the program--approximately 67 percent--is among the highest in the nation. The feedback from participants is positive. We are convinced that an effective case settlement program reduces litigation costs to the parties, engenders public trust and confidence, and helps us decide our remaining cases more expeditiously.

Second, we have continued our outreach program of hearing oral arguments in schools throughout Oregon. We recognize our role as a statewide court, and we believe that the court's work should be accessible and understandable to the public. To that end, since 1998, our court has regularly heard arguments in schools across the state, and judges have spent time in the classroom talking to students and other citizens about the importance of the rule of law and how our government works. During 2005, we traveled to schools in McMinnville, Roseburg, Bend, Hood River, Canby, Pendleton, and Sweet Home. Please let us know if you would like to schedule a court session in your community.

Third, we have developed and implemented a "trading benches" program with the Oregon trial courts, through which judges from our court periodically sit as trial judges in the circuit courts, and trial judges sit with our court. This program promotes a better understanding between the courts. We believe that better communication about our respective decision-making processes ultimately will reduce the incidence of reversible error on appeal.

Fourth, in an effort to promote better communication and understanding between the legislative and judicial branches, the court held meetings and information exchange sessions with legislators during the 2005 legislative session. Members of both the House and Senate Judiciary Committees and their counsel also attended oral arguments in several cases so as to become better acquainted with the court's practices and work model.

Fifth, in order to increase our awareness of issues involving incarcerated

parents and their children, our judges and staff attended a program at Coffee Creek Correctional Facility in Wilsonville. Understanding the circumstances of populations affected by our decisions gives important context to our decision-making. We appreciate the effort of Department of Corrections Director Max Williams and the staff of Coffee Creek in putting together an illuminating program.

Finally, all of our judges, and many of our staff attorneys and law clerks, are active in the Bar and devote many hours to Bar activities by presenting legal education programs and writing articles for legal publications on the wide range of subjects that fall within the court's jurisdiction.

IV. A YEAR OF CHANGE

2005 was a year of change for the Oregon Court of Appeals. Some of those changes involved our members and staff. After our stalwart Chief Judge Mary Deits retired in November 2004, the Oregon State Bar fulfilled its function of providing public input into the appointment process by evaluating the 18 candidates who applied for the vacancy. In May, the Governor appointed Judge Deits's replacement to the court, Judge Ellen Rosenblum, an outstanding trial judge from the Multnomah County Circuit Court. Judge Rosenblum joined Department 1 and already has made significant contributions to the court's work. In addition, our long-time Department 3 staff attorney, Robert Bulkley, retired and was replaced by Jeff Schick, a fine lawyer who previously practiced with the Portland firm of Davis Wright Tremaine.

Sadly, two of our senior judges passed away in 2005. Judge Kurt Rossman died on April 7. Before he joined the Court of Appeals, Judge Rossman served as a trial judge in Yamhill County. He was elected to the district court in 1965, and, in 1966, Governor Hatfield appointed him to the circuit court bench, where he served for 16 years. In 1982, Governor Atiyeh appointed him to the Court of Appeals. Judge Rossman served on our court for more than 12 years, retiring at the end of his term on December 31, 1994. Kurt was one of the most prolific writers in our court's history. He authored 909 opinions, more than 800 of them majority opinions. But, if you knew Kurt well, those are mere statistics. Despite his elevation to the appellate bench, Kurt was, and always remained, a trial judge at heart. He was an unpretentious and humble person, a champion of the underdog whose spirited opinions came straight from his heart and always managed to capture the common sense of the case. On June 17, our court held a memorial service for Judge Rossman, at which many of his friends and colleagues shared memories with each other and Judge Rossman's family.

Then, on October 18, Judge Herbert Schwab, the first Chief Judge of the Court of Appeals, died at age 89. Chief Judge Schwab served this court from its inception in 1969 until his retirement in 1981. Judge Schwab's entire career was devoted to public service, including membership on the Portland School Board, service on the Multnomah County Circuit Court bench, service, at varying times, as mayor and municipal judge of Cannon Beach, and many community activities. The judges of our court attended a memorial service

for Judge Schwab in Portland on November 2.

V. THE HORIZON: COURT OF APPEALS PROJECTS AND GOALS

Every busy institution must take time to engage in strategic planning. That is especially true for our court, which must work efficiently to take advantage of modern technology and business practices, despite overarching funding limitations. To that end, we have adopted a significant number of projects and goals that embody our priorities. Some of these projects and goals can be achieved in the short term; others are more ambitious and will require more time to accomplish. We want to share our broad vision so that we can work together to serve the public and the Bar in performing the functions that have been entrusted to us. With that preface, here is a current snapshot of our institutional plan.

(1) At the initiation of the Department of Administrative Services, our offices in the Justice Building in Salem are currently undergoing a major renovation for structural integrity. The planning process began in 2004, and the renovation itself will not be completed until late 2006. This complicated process involves our court making three partial moves and working on two different floors of the building for approximately 18 months. Our goal is to ensure a safe and smooth renovation process for our staff, the court, and the public without a sacrifice in our level of service.

(2) We are in the process of developing and implementing a computer application for a modern Appellate Court Management System (ACMS) that will enable us to create and use statistical reports relating to court performance. This will help us to better

serve the public by improving our ability to identify and resolve inefficiencies, respond more quickly to external reporting requirements, streamline our decision-making process for motions, and automate the creation of some court documents. It will also create the potential for future system add-ons that we currently cannot afford, such as electronic filing and document management. The court's personnel investment for this project includes the full-time commitment of one staff attorney for the next 15 months and a significant time commitment from the Chief Judge and other court members and staff.

(3) In conjunction with our case management project, we have undertaken to develop and apply meaningful appellate court performance measures in consultation with specialists from the National Center for State Courts. That process begins with a strategic planning process during which we will identify key court goals and values, including the development of better communication, understanding, and accountability with external stakeholders, better internal problem solving processes, and more efficient allocation of scarce resources. We have obtained grants for the project that will make its out-of-pocket cost to the court negligible.

(4) We are also performing a court-wide internal process analysis to improve the distribution of work among judges and court staff. That analysis includes the following:

(a) a study, in partnership with Willamette University Law School, of the internal practices of intermediate appellate courts across the nation that will analyze those courts' staffing, workload, and decisional models in aid of our own long-term strategic

planning initiative;

(b) an examination of our internal processes to more efficiently use our professional legal staff in the opinion production process;

(c) implementation of a judicial assistants' satisfaction and work flow improvement project that is intended to modernize our administrative staff processes, eliminate workload redundancies, and optimally utilize our judicial assistants' talents;

(d) reexamination and documentation of our court's internal processes in conjunction with the foregoing initiatives. We plan to publish those processes in 2006.

(5) Optimization of our use of retired judges. Former Chief Judge William Richardson, former Chief Judge Mary Deits, and Senior Judge Joe Cenicerros, formerly of Multnomah County Circuit Court, have performed valuable service for the court since the beginning of 2005 in a landmark program that has leveraged our overall court productivity to a new level. Those judges read briefs and hear oral arguments with regular court panels on an average of two days per month. The retired judges participate in the decisions of cases that are affirmed without opinion on the day of argument, but they do not remain on the panel in cases that are taken under advisement after argument. For the latter, the regular panel member resumes participation in the case. This system allows each regular judge who is replaced on a panel significant additional time to devote to opinion writing. We believe that this program, among other innovations, has helped increase the court's number of published opinions in 2005 above previous years, despite the existence of a vacant judicial position for

more than half of 2005. The program also allows the court to take advantage of the institutional memories, wisdom, and talents of our senior judges, so as to maintain and promote long-term court values among our current judges.

(6) We are vitally concerned with the decision-making process for appeals arising out of Oregon's juvenile courts. To that end, we are setting up a committee of external and internal stakeholders to analyze our work in this critical area of our jurisdiction.

(7) We are also concerned with the length of time for processing of criminal appeals, which is mostly due to extensions of time for briefing requested by the parties to those cases. Our long-term goal is to shorten the average cumulative length of extensions of briefing time by helping publicize the crisis in resource shortages that plague the offices of the Attorney General and Public Defender, as well as the private Bar, which, in turn, drive these unacceptable delays in brief filing in criminal appeals. In addition, we are using a collaborative approach in addressing the problem of delay by (a) designating lead cases on recurring legal issues so as to reduce the need for extended briefing in related cases; (b) holding continuing legal education programs for criminal law practitioners to improve briefing practices; and (c) adopting court practices that will allow the parties to brief cases more efficiently without losing quality.

(8) Our goals must always include fostering public understanding of our work. To that end, we will continue to

(a) maintain and improve the court's program of hearing cases in the

schools;

(b) maintain and improve our appellate court settlement conference program;

(c) maintain and improve bench-bar relationships through committee outreach;

(d) further develop and implement our "trading benches" program with the Oregon trial courts;

(e) continue and improve our interactions with the legislature, including lunch visits and oral argument observation; regular communication with legislators and legislative counsel; and participation in task forces in matters of mutual concern, such as the juvenile appeals process.

(9) Although, by national standards, our court operates at a high degree of efficiency, we are receptive to further change that, without sacrificing decisional quality, will make us more efficient in the performance of our work. We are committed to openly addressing the institutional and resource-driven barriers to more timely and transparent decision-making, by (a) reexamining the court's decision-making model, including the effectiveness of the full court conference process, the use of oral argument, and other practices that may affect productivity; (b) studying the adequacy of the court's performance of its error-correcting function, including whether we are providing a proper mix of published opinions and affirmances without opinions; and (c) establishing more regular communication with the Bar and other stakeholders to seek their input regarding the effectiveness of the court's decision-making model.

VI. CONCLUSION

As explained in the introduction to this report, the Court of Appeals is committed to performing its work in a way that inspires public confidence and understanding, and to working cooperatively and respectfully with all persons and entities who are affected by our decisions. This report is part of that commitment. The court intends to issue periodic reports on its work and to periodically provide the Bar and public with additional information that will help keep our lines of communication open and clear.

Dated February 8, 2006.

David V. Brewer
Chief Judge
Court of Appeals

Appendix
OREGON COURT OF APPEALS
Cases Filed 2005

Total

3,801

Selected case types (not all case types included)

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

2,401

General Civil

418

Domestic Relations (including adoption)

179

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

200

Workers' Compensation

120

Land Use

36

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

182

Mental Commitment

126

FED

35

Probate

23

Opinions Issued
2003-2005

2003
344

2004
351

2005
400