A Century of Service

MULTNOMAH BAR ASSOCIATION

100TH ANNIVERSARY

1906 - 2006

A Short and Recent History of Alternative Dispute Resolution in Multnomah County and Oregon

By Susan M. Hammer.

Once upon a time, or so I've been told, lawyers just went out for a beer or picked up the phone and settled their cases without the involvement of a third party. The bar was small and collegial. The cost of litigation was less significant. And, I'm told, it usually happened right before trial.

So if all that's true, whatever could have motivated the growth and acceptance of mediation? Probably first on the list is the cost of litigation. Court congestion is probably second. A larger bar, less collegiality and the perceived decrease in professionalism among lawyers is next. Last, but not least, I think there was and still is a yearning for a more satisfying way for lawyers and clients to solve legal problems.

So let me take you back about 20 years. At that time there was a surge of activity in Multnomah County, in Oregon and in other parts of the country related to Alternative Dispute Resolution (ADR). In 1986-87, the MBA established the first ADR committee, chaired by Elaine Hallmark. The committee was charged with creating a directory of individuals and organizations interested in providing mediation and arbitration services. Although most of us listed had little, if any experience as mediators or arbitrators, we were interested in learning by doing. It was a start.

About that same time, the Federal Bar Association created an ADR Committee and the OSB formed an ADR Committee, both chaired by Sid Lezak. It was an OSB *Committee,* not a section. As the legitimacy and acceptability of ADR as a practice area grew, it became a section. The OSB recognized the "Lawyer Serving as Mediator" through the current Oregon Rule of Professional Conduct, 2.4, and the previous Disciplinary Rules.

In 1986, dispute resolution professionals inside and outside of the legal profession joined together to form the Oregon Mediation Association (OMA). Attorney/mediators found the OMA to be a collegial forum for learning with and from dispute resolution professionals from different backgrounds and experiences.

In 1987, the State of Oregon became involved in promoting ADR. The State Legislature formed a Dispute Resolution Advisory Council to develop legislation that would support the development of ADR in Oregon. Governor Goldschmidt appointed Sid Lezak to Chair the Council. The legislation it developed created the Oregon Dispute Resolution Commission, which, under the leadership of Elaine Hallmark, went on to establish the first stable funding for community dispute resolution centers throughout the state and Oregon's first public policy dispute resolution programs. Shortly thereafter, several of the state administrative agencies developed ADR programs.

The growth and acceptance of ADR continued to manifest in many forms throughout the late 80s and 90s. Over time, the Multnomah County Circuit Court developed one of the most comprehensive mediation service systems available in Oregon, including civil cases, small claims, FED cases, domestic relations, adult criminal and juvenile criminal. The mediation program for civil cases supplemented the mandatory arbitration program for claims under $50,000.

The federal courts also were also initiating changes. By the early 90s, Judges Donal D. Sullivan and Elizabeth Perris started a mediation program in bankruptcy court. The US District Court adopted a local rule addressing ADR and developed a directory of lawyers who were willing to serve as volunteer mediators.

In the late 80s and early 90s, more attorneys were choosing mediation and arbitration as their professional focus and some were actually making a living at it. The American Arbitration Association and the Arbitration Service of Portland, founded by Jim Damis, already had a presence in Portland. Others sprung up: The United States Arbitration & Mediation Service, Sue Porter, principal; Confluence Northwest, Elaine Hallmark, Mary Forst and Theresa Jensen, principals; and the Institute for Conflict Management, Sam Imperati, principal, to name a few. Most of the lawyers who jumped in the ADR profession with both feet supplemented their unpredictable incomes by providing training to the many wannabe mediators. A number of lawyers took the training and started mediating as part of their law practice. The base of experience among neutrals increased, as did their level of acceptance among lawyers and judges. The quality of advocacy in mediation improved as attorneys better understood the process. The law schools developed curriculum in ADR and some offered enhanced degrees.

These are some of the changes that created the foundation for our current ADR services. There have been a few setbacks, such as the de-funding of the Oregon Dispute Resolution Commission in the 2003 legislative session, although the public policy program has continued

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MBA Meeting Announcement

"OCTOBER TWENTY-SIX NINETEEN ELEVEN TO MEMBERS...Judge L.R. Webster will give a 20 minutes' talk 'On the Evils of Divorce.' "

Three Pivotal Oregon Employment Cases in the Last Century

By Elizabeth McKanna, McKanna Bishop et al.

The MBA's request for an article on the three most significant employment cases in the last century presented an intriguing question, particularly because an attorney who represents employers was also selecting three cases. (Please see the next page.) Jeff Jones completed his article first, but I chose my cases before peeking at his article. Not surprising is the fact that the three cases I selected establish important rights for employees, while the cases chosen by the employers' counsel define, but also narrow, employees' rights.

Nees v. Hocks - Wrongful Discharge

We both selected *Nees v. Hocks*, a 1975 case which created a new tort, wrongful discharge. Our views, however, seem to be from different ends of the telescope. He sees this case as one that "crystallized the employment at-will doctrine under Oregon law." From plaintiffs' perspective, the concept had thrived since its creation around 1877, by Horace C. Wood in his treatise, *Master and Servant* § 136 (2d ed. 1877). Historically, it was defined as: "[employers] may dismiss their employees at will...for good cause, for no cause or even for cause morally wrong, without being thereby guilty of a legal wrong." *Sheets v. Knight*, 308 Or 220, 229 (1989)(citation omitted).

Prior to its creation, employees were considered hired for a year. Horace Wood reasoned that equity must exist between employer and employee: employees may quit for any reason, so employers must be able to let employees go for any reason, even a "morally reprehensible" one. This rationale has always struck me as patently ridiculous. Of course, employees can quit without being sued - the Thirteenth Amendment, prohibiting involuntary servitude established that right. Employers, however, did not want any liability for ending an employment relationship and, in Oregon, until the *Nees v. Hocks* decision, they enjoyed great freedom under this "American Rule." The Oregon Legislature did create the Bureau of Labor and Industries (BOLI) in 1949, to protect employees from being subjected to certain unlawful employment practices. ORS 659.040. The relief was limited to the administrative processes of BOLI; no private court action was available. Nevertheless, Oregon was a pioneer in this respect.

In 1974, the Supreme Court decided *Nees v. Hocks*, allowing an employee to challenge her discharge for wanting time off to serve on a jury. The court concluded that "there can be circumstances in which an employer discharges an employee for such a socially undesirable motive that the employer must respond in damages for any injury done." As a part of this historical account, credit should be given to the pioneers who refused to accept the employment at-will barrier. Elden Rosenthal and the firm of Pozzi, Wilson & Atchison represented plaintiff *Nees* before the Supreme Court.

Holien v. Sears, Roebuck and Co. - Obtaining an Adequate Remedy

As a result of *Nees v. Hocks*, there was a small crack opened in the thick door blocking employees from seeking relief from wrongful termination. Gradually judges, not willing to turn a blind eye to such repugnant conduct, created exceptions to the long-standing at-will rule. In 1977, the Oregon legislature, at the

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A Century of Service Historic Pullout: Evolution of Law Practice Areas

By Judy A. C. Edwards, Executive Director.

The October *Multnomah Lawyer* historic pullout focuses on specific practice areas and how they have evolved over the years. Please watch for more practice specialty articles in the November issue. In this pullout issue, you will find that some authors have provided a purely historic account, while others presented point and counterpoint viewpoints and others, a personal musing about how their particular area has changed.

The quote at the center top of this page provides an inkling of the prevailing attitudes at a time well before the idea of specializing in family practice emerged. And of course today we have no-fault laws. The concept of certified specialty areas came up in the mid-1970s, but it erupted into a major controversy within the Oregon legal community. Ultimately, the proposal was rejected. Some of the OSB committees evolved into sections in 1977, under the banners of "Estate Planning and Administration," "Family and Juvenile Law," "General Practice," "Labor Relations Law," "Patent & Trademark Law" and "Real Estate and Land Use Law." Today, a few of those sections have been sunsetted; others have had name changes and new sections have been added. The latest count on the OSB Web site reveals that 39 sections exist today.

We thank all who contributed to this issue and we hope our readers enjoy reading it. If you would like to share your thoughts on any part of this pullout, we welcome your comments and suggestions.

Three Seminal Cases in Oregon Employment Law

By Jeffrey D. Jones, Barran Liebman.

Nees v. Hocks: Employment At-Will and Wrongful Discharge

The cornerstone of employment law in the United States is the common law doctrine of employment at-will. Oregon courts contemplated employment at-will as early as 1894, *see Christensen v. Pacific Coast Borax Co.*, 26 Or 302, and began using the term "at-will" around 1916, *see Doolittle v. Pacific Coast Safe & Vault Works*, 79 Or 498. However, not until 1975, 50 years later, did the Oregon Supreme Court synthesize the doctrine of employment at-will into the succinct legal principle so familiar to the Oregon Bar. That year, the Oregon Supreme Court decided *Nees v. Hocks*, 272 Or 512, which held that "in the absence of a contract or legislation to the contrary, an employer can discharge an employee at any time and for any cause and an employee can quit at any time and for any cause; such termination by employer or employee is not a breach of contract and ordinarily does not create a tortious cause of action."

> ***"...the tort of wrongful discharge."***

Nees crystallized the employment at-will doctrine under Oregon law, but at the same established the most important exception to this broad rule: the tort of wrongful discharge. The tort of wrongful discharge first announced in *Nees* prohibits Oregon employers from discharging employees for reasons or from motives that interfere with important public policies and private statutory rights. In *Nees*, for example, the court found that discharging an employee for serving jury duty was a "socially undesirable motive" contrary to the community's interest in promoting a jury system. Since *Nees*, Oregon courts have found unlawful the discharge of an employee for reporting health and safety violations, for refusing to make false or defamatory statements, for insisting that an employer comply with state or federal law, for filing workers' compensation claims, for resisting discrimination and for engaging in union activity.

Patton v. J.C. Penney: Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress was just an "emerging tort" when *Patton v. J.C. Penney*, 301 Or 117 (1986) was decided. The case greatly clarified the circumstances under which an employer's actions constituted "outrageous conduct" or "an extraordinary transgression of the bounds of socially tolerable conduct." In particularly illustrative language, *Patton* held that while much conduct by employers may be "rude boorish, tyrannical, churlish and mean," normally those actions are not "outrageous in the extreme" as would be required to support an IIED claim. *Patton* solidified and substantially raised the burden of proof for IIED claims, meanwhile reinforcing the expanse of the employment at-will doctrine. In revisiting the latter, the *Patton* court held that "an employer may discharge an employee for any reason, absent a contractual, statutory or constitutional requirement," and that in the case at bar the "fire at will" doctrine entitled the employer to terminate an employee just for maintaining a personal relationship with a co-worker outside of the workplace.

> ***"...fire at will..."***

Though later in time, *McGanty v. Staudenraus*, 321 Or 532 (1995) is on par with *Patton* in importance for IIED claims in Oregon, for it redefined the intent element of IIED to require a desire to inflict emotional distress or that emotional distress is the substantially likely result of the actor's conduct. Before *McGanty*, Oregon law spared plaintiffs the burden of proving intent provided they could establish a "special relationship" between themselves and the defendant, such as an employer-employee relationship. *McGanty* did away with "special relationships" as a substitute for proving intent, making IIED a true "intentional" tort. After *McGanty*, special relationships bear only, but importantly, upon the characterization of a defendant's conduct as extreme or outrageous, not on whether the defendant intended to cause emotional distress.

McGanty v. Staudenraus: Intentional Interference with Economic Relations

McGanty is a pivotal case in Oregon employment law for still another reason. To state a claim for intentional interference in economic relations, a plaintiff must allege: (1) the existence of a professional or business relationship (which could include, e.g., a contract or a prospective economic advantage); (2) intentional interference with that relationship; (3) by a third party; (4) accomplished through improper means or for an improper purpose; (5) a causal effect between the interference and damage to the economic relationship; and (6) damages. The tort was intended to protect contracting parties against interference in their contracts from *outside* parties, it standing to reason that a party to a contract cannot be liable for interference in the same.

Plaintiff in *McGanty* advanced the novel argument that her employer Metropolitan Agencies could be held liable for intentional interference in her contract with it, because Staudenraus, a Metropolitan supervisor whom McGanty accused of sexual harassment, had improperly interfered with that economic relationship. The issue before the court was whether Staudenraus was a "third party" for purposes of an intentional interference of economic relations claim. Relying on the doctrine of *respondeat superior*, the court held that when an employee is acting within the scope of employment and the employer, as a result, breaches a contract with another party, that employee is not a third party for purposes of the tort of intentional interference with economic relations. Because plaintiff has already admitted that at all material times Staudenraus was acting within the scope of his employment, as a matter of law she became unable to sufficiently plead the third-party element of intentional interference with economic relations.

The *McGanty* holding that an employee acting within the scope of employment is not a third party for purposes of intentional interference with economic relations closed the door on a theory of cause of action that, if successful, would have been available to any plaintiff alleging employment discrimination by an employee of a company. The decision also created a Faustian bargain for plaintiff's attorneys: for to seek relief under McGanty's theory a plaintiff would have to allege that the offending employee was acting outside the scope of employment, a pleading that would substantially limit, and often bar entirely, numerous other employment law claims that depend upon an employee's acting within the scope of employment.

Much of Oregon state employment law is patterned after federal law, e.g., Oregon discrimination law in relation to Title VII, or substantively restricted by it, e.g.,

> ***"Much of Oregon state employment law is patterned after federal law..."***

Fair Labor Standards Act, National Labor Relations Act, Employee Retirement Income Security Act. In the interstices where Oregon courts remain free to make state employment law, few cases have shaped employer and employee rights in Oregon more than these.

Jeffrey D. Jones is an attorney at Barran Liebman representing management in employment litigation and providing advice in employment law matters. He may be reached at jjones@barran.com.

Early Federal Land-Grant Law Protecting Married Women

By Dave Hercher, Miller Nash.

There were no federal laws protecting women from the debts of their husbands in the early decades of America's existence. Federal land grant statutes adopted before 1850 generally granted land only to men and restricted their wives' right to inherit the property free of claims of their husbands' creditors, abrogating common-law coverture rights of men to manage their wives' land. Most US states and territories, by contrast, adopted married women's property acts between 1835 and 1850, which protected land owned by married women from their husbands' creditors. Federal lawmakers considered it an issue of the states. But that changed under political pressure during the mid-century migration west.

Settlers began traveling The Oregon Trail in the 1830s, and the first wagon train left Missouri in 1845. This westward migration to the Oregon Territory (which included modern-day Oregon, Washington, Idaho and parts of Montana, Wyoming and British Columbia) was largely responsible for prompting federal law to catch up to state law. The resulting federal legislation was the Oregon Donation Act of 1850 (also known as the Donation Land Claim Act of 1850, 9 Stat. 496 (1850)).

The act granted to single white male settlers of public lands in the Oregon Territory who resided upon and cultivated public land for four consecutive years 320 acres of land. If married, the man and his wife could receive 640 acres of land, "one half to himself and the other half to his wife, to be held by her in her own right." Act § 4

There was considerable national clamor about the land rights of women prior to the act. But the lack of a clear national policy meant that the trend toward greater protections for women was slow. Yet there was a consensus national desire to give agricultural families a firm economic foundation by distributing unencumbered land in places like The Oregon Territory. Plus, the role of women in society was gaining status as they became better educated, and women's service groups cultivated a more sympathetic environment for women's land rights.

Much credit for passage of the act is due to Samuel R. Thurston, the first delegate from the Oregon Territory to the US House of Representatives. Although Thurston had no vote in Congress and probably didn't write the act, he probably worked hard on it and lobbied vigorously to include specific language in that afforded debt protection to women. In a letter to members of the House in the late spring or early summer of 1850, Thurston wrote:

> "The feature of the bill securing one-half of the land to the wife, is deemed to be just. The law of 'homestead exemption' is fast becoming the doctrine of the day. This provision is merely the same law in substance. Besides, emigrating to Oregon from the States, places the female beyond the reach of her kindred and former friends; and it is certainly no more than right to place some little means of protection in her own hands. But the object is to produce a population, and this provision is an encouragement of the women to peril the dangers and hardships of the journey."

Thurston's sympathy for women's rights converged with other historical factors to support passage of the act:

- A perceived need to attract women to the Oregon Territory;
- The practice of giving larger land grants to married men than single men;
- The attempt of Oregon's provisional government to distribute land without congressional authority;
- The slow growth of the homestead movement, which didn't gain full strength until 1862; and
- A need for land legislation in newly acquired territories

The final version of the act granted married women the right to take title to land, but it lacked the precise language Thurston sought affording women debtor protection. The marked-up bill in the National Archives has hand-written marginal notes of language that, had it been adopted, would have abrogated the common-law right of a husband to manage his wife's land.

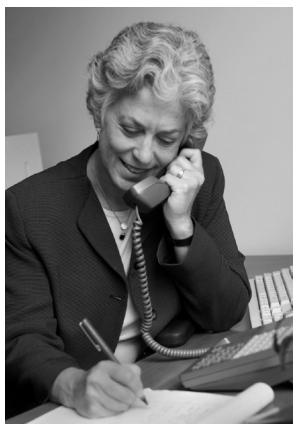
Although Thurston may be viewed as a supporter of women's rights, he opposed permitting free African-Americans into the Oregon Territory (reflected in the act's application only to whites), as well as ratification of a treaty with the Clatstop and Nehalem tribes along the Oregon coast.

Thurston died in 1851, and Thurston County, Washington, was named after him at its creation in 1852.

Bibliography: Chused, *The Oregon Donation Act of 1850 and Nineteenth Century Federal Married Women's Property Law*, 2 Law & Hist. Rev. 44 (1984); http://en.wikipedia.org/wiki/Samuel_R._Thurston.

Family Law – Low Income Needs

By Robin J. Selig, State Support Unit Attorney, Oregon Law Center.



I worked at the Multnomah County Legal Aid Services office, now the Multnomah County Office of Legal Aid Services of Oregon (LASO), from 1984 until 2004, when I moved to the Oregon Law Center. When I started, attorneys in the family law unit were filing hundreds of divorces and custody cases a year for low-income Multnomah County residents. As the problem of domestic violence became more visible in our community and funding diminished, however, we realized that full representation of low-income clients in these cases on a first-come, first-serve basis was not the best use of scarce resources. Consequently, the office began, and continues to give priority to victims of domestic violence and their children who need legal assistance to achieve safety, stability and a degree of financial independence.

To victims overwhelmed by horrific violence and awful poverty, legal help can make an enormous difference. Without representation, our clients would have to face their batterers alone in, what is for them, an unfamiliar and frightening setting - the courtroom. A lawyer can make the difference between the entry of orders that appropriately take into account the safety of victims and their children and reduce the probability of future abuse and those that do not. Without a lawyer, victims may have difficulty articulating to a judge that abuse has occurred or may be unable to overcome their fear and appear in court at all. Providing legal representation to survivors of domestic violence ensures access to justice and increases the likelihood of equitable outcomes for them and their children.

Our attorneys have been involved in numerous efforts to assure that the community wide response to domestic violence is effective. From helping start the Multnomah County Family Violence Coordinating Council to serving on the local Family Law Advisory Committee and testifying in the legislature when asked, legal aid lawyers have shared their expertise in this area to make certain that the system and our laws, especially the Family Abuse Prevention Act, are models for addressing and reducing domestic violence.

Despite this focus on the legal concerns of survivors of domestic violence, the family law needs of other low-income clients have not been ignored. We have worked on other issues fundamental to the low-income community – improving agency establishment and enforcement of child support and establishing the right of indigent parents to appointed counsel in contested adoptions. Legal aid attorneys, together with many community partners, have worked locally and state wide to increase the availability of self-help remedies and the assistance of volunteer attorneys. The Family Law Home Page of the Oregon Judicial Department and LASO's Pro Se Assistance Project reflect these collaborations. LASO also created a Web site for clients, www.oregonlawhelp.org, and supported the placement of family law facilitators in Multnomah County.

As diversity has increased in Multnomah County, we have been challenged to respond to the needs of clients who speak a variety of languages and have vast cultural differences that are relevant in family law matters. To that end, our lawyers have become skilled at finding witnesses who can explain cultural issues and ensure accurate interpretation.

The one thing that has not changed in the last 25 years is the tremendous need of the low-income community for family law representation. When practicing at LASO, I rarely carried my business cards. Business is something that office has never lacked.

Domestic Relations Practice

By Ron Gevurtz, retired from Gevurtz Menashe et al.

My memory of the domestic relations practice begins in 1961 when I took over as Supervising Attorney of the Legal Aid Committee of the MBA. About 85% of the clients needed family law services.

The fault system was in effect. All divorces had to be presented with the client in person. You either had to recite or prove that the other spouse had been guilty of "Cruel and inhuman treatment rendering life burdensome and unbearable." Later, as a result of case law, you had to add "...impairing and endangering your health." It was the period of lurid testimony and gray, grainy photos.

There were individual attorneys doing family law, but to my knowledge, no one limited his or her practice to this field. Domestic relations law was looked upon by other lawyers as glorified social work and they did all they could to deny they were domestic relations lawyers.

A few lawyers handled most of the large asset cases. The ones I remember so well were Jack Kennedy, Walter Evans, Cliff Powers and Pat Hurley. They made it clear, however, that they were not domestic relations lawyers, even later when some of their practices were little else. Some cases were handled by partners in big firms if it was an established client. They were afraid to refer them for fear of losing a business client.

The judges of those days will stay in our minds forever. Carl Dahl, Virgil Langtry, Jean Lewis, Harlow Lenon. The social climate has changed too. I remember Judge Lenon, after being chastised by lawyers for referring to people living together as "shacking up," came on the bench and in an appropriate case and with a smile on his face saying, "Oh, a residential courtship."

Over the years the practice has become much more sophisticated. When my partner (Albert Menashe) and I began our firm in 1982, to my knowledge, there was no other firm publicizing that its practice was limited to family law. We began with four lawyers and have had as many as 20.

Other firms then followed, until now there are a number who limit their practice. Referrals come from other firms as they no longer have to worry about losing clients. They previously did not like to take a chance of a bad family law result with a good business client so it was a perfect fit.

The practice has become more of a combination of skills. Today's domestic relations lawyer must be part business lawyer, mediator, trial lawyer, advocate and negotiator. He or she must have a working knowledge of many occupations and be able to employ property and business appraisers, accountants and expert witnesses ranging from therapists to actuaries. Lawyers must have a working knowledge of pension plans, tax consequences, parenting plans etc. The practice is a difficult one, as much of the law falls in gray areas. There are very few circumstances that are clear cut.

Domestic relations lawyers today can stand with their heads held high and have great pride in what they do.

Family Law (No Longer Law-Lite)

By Jody Stahancyk, Stahancyk Kent et al.

Family law was once seen as more social service than legal service. It was thought that anyone who could stomach tears and tempers could practice family law. Not only was family law seen as a lesser form of law, until the early 80s, Multnomah County family law judges were not a part of the general trial bench. Judges and lawyers who specialized in family law were rumored to not adhere to the rules of evidence or civil procedure.

The uniting of the General Trial and Domestic Relations benches (1981 Or Laws ch 215), lifted the curtain on these misperceptions regarding family law. This change shone a light of clarity on the sophistication and creativity necessary to be a family law practitioner.

Family law requires practitioners and judges to be experts in virtually every form of law, i.e. Real Estate, Taxation, Business, Legal Strategies Trusts and Estates, Pensions, Mediation and Litigation, all the while dealing with tears and tempers. Family law lawyers it seems are smart, strong, crafty leaders. The judges of Multnomah County seem to agree, as the Presiding Judge, Dale Koch, is a family law lawyer and judge who now leads the entire Multnomah County Bench and Bar.

ADR in Multnomah County and Oregon

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through Portland State University and the community programs have continued through the University of Oregon. Most of the mediation services in our state, both public and private, have continued to grow because of attorney and client satisfaction.

One local general counsel for an international company recently said, "Gone are the days of recreational litigation." Clients are returning to attorneys who help them solve problems as quickly and as efficiently as possible. An increasing number of attorneys recognize the benefits of mediating before filing a lawsuit. There is less concern that a willingness to enter into early mediation is a sign of weakness. Although we do not have accurate statistics on the number of mediations in Multnomah County, it appears that mediation is used by most litigators at least occasionally and by some, frequently.

So, what can we expect in the future? This is a subject for another time but I will make a few predictions.

ADR has passed through its infancy and childhood; it's now in its adolescence. Although I'm hopeful that it will mature in a way that serves the public in even better ways, I believe there are both opportunities and threats on the horizon. The first threat is the over-institutionalization of the process, treating mediation as just one more obligatory step in the litigation process. The magic of mediation that comes from flexibility, creativity, and custom design could be lost, leading to cookie-cutter settlement conferences. Another threat comes from the blossoming of "instant mediators," who lack training and experience and leave clients and attorneys with less than a positive experience.

The primary opportunities come from growing acceptance of mediation, the creative and skilled individuals entering the field and the groundbreaking research and writing that is being done about how people resolve their differences. All bode well for the continuing growth of ADR in Multnomah County and Oregon.

Susan M. Hammer is a Portland mediator. As President of the MBA, she was instrumental in establishing the first MBA Committee on ADR. She is listed in the Best Lawyers in America for Alternative Dispute Resolution, 2005-2007.

Three Pivotal Cases

(Continued from first page)

urging of various individuals, including then-Representative Kulongoski, finally provided a private cause of action for employees who claimed they were victims of unlawful employment practices. A complaint to BOLI had been intended to be the exclusive source for relief, but the administrative process sometimes dragged on for three or four years. Thus, the avenue to court was created. A curious limitation on remedies, however, was placed in the statute. BOLI could award general damages if the employee sought relief solely through the administrative process; the remedies for an employee in court, however, were limited to equitable relief - reinstatement, back pay and attorney fees.

In 1984, plaintiff Gale Holien pursued a private right of action, alleging sex discrimination in the form of sexual harassment. She also asserted a common law wrongful discharge claim, alleging that "because she resisted her supervisor's sexual advances she was given poor evaluations, was denied pay raises and finally discharged." *Holien*, 298 Or at 80. The briefing in the Supreme Court gives some sense of the importance of this new prong to the tort of wrongful discharge - asserting an employment-related right to resist unlawful conduct. There were eight amicus curiae briefs filed by groups such as the ACLU, the AFL-CIO, the OEA, the Oregon Women's Political Caucus and OTLA in support of the plaintiff's position by lawyers such as Charles Merten, Henry Drummonds and Elden Rosenthal. Over 50 employers and employer associations filed briefs in support of the employer, represented by Mark Wagner, Paula Weiss (now Barran) and Larry Amburgey. In the end, the plaintiff prevailed. The court found there was no legislative intent to preclude

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Land Use and Property Rights

By Peter Livingston, Schwabe Williamson & Wyatt.

Land use law determines how we live, how we interact with others and how we affect our environment. Whether our world is beautiful or dross, lively or dull, convenient or inconvenient, expensive or reasonable depends on the form and location of development. Where land use regulation in Oregon is concerned, it is essential to understand three things.

1. Oregon's Land Use Regulations are Constitutional

Land use regulation developed in the early twentieth century as an extension of nuisance law. Since land use regulations interfere with an owner's right to use property, often to the owner's immediate financial detriment, court challenges to zoning began almost immediately. In *Village of Euclid v. Ambler Realty*, 272 US 365 (1926), the US Supreme Court rejected the argument that a zoning argument is invalid because it violates the constitutional rights of the property owner under the guise of the police power.

...an extension of nuisance law.

Since then, there has been an ongoing struggle between the advocates of land use regulation and their opponents, the advocates of individual property rights. In *Pennsylvania Coal Company v. Mahon*, 260 US 393 (1922), the Supreme Court decided, "If a regulation goes too far it will be recognized as a taking." In *Penn Central Transportation Co. v. New York City*, 438 US 104 (1978), the court acknowledged that what constitutes a taking for purposes of the Fifth Amendment "has proved to be a problem of considerable difficulty." The court established a model of ad hoc balancing of various aspects of a regulation's character and effect, which has been declared dead more than once, but which was revived by *Palazzolo v. Rhode Island*, 533 US 606 (2001). The rule is now that courts "properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred," but "the salience of these facts cannot be reduced to any 'set formula.'"

In 1919, the Oregon legislature authorized cities to undertake land use regulation, and in 1923, cities were authorized to make zoning decisions in accordance with a well considered plan. Starting in 1947, counties were required to make zoning decisions based on a comprehensive plan. In 1973, the legislature adopted legislation establishing the statewide planning goals and the Department of Land Conservation and Development, which administers the statewide land use planning program, working with local governments.

In *Dodd v. Hood River County*, 317 Or 172, 855 P2d 608 (1993), the petitioners claimed that because of land use regulation prohibiting the construction of a dwelling on forestland, the value of their land had been dramatically reduced, resulting in a taking under the Oregon Constitution, Article I, Section 18. The court rejected the claim, relying on the holding in *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 609, 581 P2d 50 (1978): Where a zoning designation allows a landowner some substantial beneficial use of his property, the landowner is not deprived of his property nor is his property 'taken.'

2. How Property Should be Regulated is a Societal Choice

Since both the federal and state constitutions allow land use regulation short of a constitutional taking, what laws are adopted within the very limited constraints imposed by the courts is solely a policy decision. It is up to the legislature (or the voters through an initiative process) to determine what the balance between individual and community needs should be. The extent to which government should regulate property is the proper subject of ongoing debate.

3. "Property Rights" is a Term that Has Yet to be Clearly Defined

Ballot Measure 37 has triggered a debate over the meaning of "property rights." To some extent, property rights are a zero-sum game, with winners and losers. The intellectual starting point of Oregon's land use program is that the community should have a say in how property develops, because ultimately the entire community will benefit from wise use of resources. That view, which is clearly constitutional, depends upon the notion that society, as well as an individual owner, has property rights. The intellectual starting point of Ballot Measure 37 is that individual property rights should be absolute. That view, which is historically novel, requires compensation whenever regulation reduces property values. While the government could, in theory, compensate individual property owners for all reductions in property value due to regulation, no one expects that will happen, since it would destroy the state's finances. If compensation supported by taxpayers is required, regulation becomes impossible. The challenge that lies ahead is how to compromise seemingly irreconcilable positions to arrive at sensible policy.

...society, as well as an individual owner, has property rights.

Developing an appropriate approach will take more than the misleading, simplistic, inadequate discussion, backed by fatuous commercials on both sides, which occurred prior to the passage of Measure 37. Many questions must be asked and answered. For example, what does it mean to support "property rights," when what one property owner does affects the value of neighboring properties? Who should receive compensation? Just the individual whose desires are frustrated? What about the neighbors whose property values are reduced when an individual asserting "property rights" develops his property for a use incompatible with their existing or expected uses? If compensation is to be paid, who should pay it? Should it be the taxpayers through the government? Should property owners pay the government when regulations or infrastructure improvements increase the value of their property? Would there even be property rights if there were no government to protect them? Doesn't that suggest that the people, acting through the government, should be able to decide what property rights they want to protect, subject only to constitutional limits? Is it practical to hire dozens of people to calculate on an ongoing basis the economic effects of regulation on individual property owners? Why should people be paid to obey regulations affecting land when they are not paid to obey other regulations? Are overreaching planners a problem? Who is really behind the individual property rights movement in Oregon? Why is this debate even happening here now, when land use regulation has been around for decades, the state's economy is booming and people are flooding in from other states to enjoy the Oregon lifestyle?

The combination of Oregon's land use planning program and Measure 37 has resulted in an incoherent, incompatible set of objectives and continuing litigation. A land use practitioner must assist the client through this minefield. The 2005 legislature passed Senate Bill 82, which created the four-year review of land use regulation called the "Big Look" task force. The task force, whose Web site is www.lcd.state.or.us/LCD/BIGLOOK/index.shtml, is composed of present and former public officials, individual property rights advocates and persons engaged in resource-based businesses. The task force is charged with studying and making recommendations on:

1. Oregon's land use planning program in meeting the current and future needs of Oregonians in all parts of the state;
2. respective roles and responsibilities of state and local governments in land use planning; and
3. land use issues specific to areas inside and outside urban growth boundaries and the interface between areas inside and outside urban growth boundaries.

...incoherent, incompatible set of objectives and continuing litigation.

The public response to present circumstances and, perhaps, the recommendations of the task force will determine how the state looks and feels in years to come.

Peter Livingston is a shareholder at Schwabe, Williamson & Wyatt. He may be reached at 503.796.2892 and plivingston@schwabe.com.

Three Pivotal Cases

(Continued from previous page)

a common law wrongful discharge claim under the Oregon anti-discrimination law; in fact, there was no basis to believe the legislature was even aware that a common law remedy existed at the time the statute was enacted. The comprehensive remedy provided by wrongful discharge was necessary because the anti-discrimination laws "fail to capture the personal nature of the injury done to a wrongfully discharged employee...." *Holien*, 298 Or at 97. (Note: the federal anti-discrimination law was finally amended in 1991, following the Clarence Thomas hearings, to include compensatory and punitive damages. Oregon law has yet to take this step.) In 1984, however, the seed for a whole new field of claims prohibiting discharge for asserting an employee-related right to resist discrimination in the workplace, sprouted with the issuing of the Holien decision.

Bratcher v. Sky Chef, Inc. - Constructive Discharge

The third case served a critical purpose, even though it has been overruled, in part. *Bratcher v. Sky Chefs, Inc.*, 308 Or 501(1989), along with *Sheets v. Knight*, 308 Or 220 (1989), established constructive discharge as a basis for a wrongful discharge claim. As employee rights evolved, employers were cautioned to use care in firing employees, particularly those who had filed a discrimination complaint, sought workers compensation benefits, or reported safety violations. Employers would suggest the employee resign, but the implication, and sometimes the directive, was "resign or be fired." Other times, employers simply made the conditions of employment so intolerable, that the employee was left with no option but to quit.

In both instances, prior to 1989, the employer could argue no wrongful discharge claim could stand because the critical element of any wrongful discharge, a "discharge" from employment, was missing. Then, in *Bratcher*, an employee brought suit because she was subjected to a sexually hostile work environment and, when she complained, she suffered further harassment and retaliation, making the situation so hostile she had no choice but to quit. Richard Busse brought the case in federal court, but the questions of whether Oregon recognized her quitting as a "constructive discharge" and whether that could constitute a common law wrongful discharge claim were certified to the Oregon Supreme Court. The court's recognition of a constructive discharge opened the door further for a huge number of employees who simply could not endure the mistreatment until they were fired.

The two cases chosen by my defense colleague, *McGanty v. Staudenraus* and *Patten v. J.C. Penny*, define and narrow other torts important in the employment arena. However, they pale in comparison to the wide tunnel that was burrowed out by the tort of the wrongful discharge tort. I look forward to the twenty-first century with hope that new paths may emerge by the energy and creativity of new lawyers wanting to represent employees. I am sure defense counsel will be watching too and ready to suggest parameters for any new employee protections created by the courts.

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