



# MULTNOMAH LAWYER

MULTNOMAH BAR ASSOCIATION

100TH ANNIVERSARY

Lawyers associated for justice, service, professionalism, education and leadership for our members and our community.

1906 - 2006

November 2006 Volume 52, Number 10



## 2007 Legislative Session: Opportunity for Better Funding of Our Justice System

By Peter H. Glade, MBA President.

As I write this column in October, I can only guess at what the November election will bring. As you read this edition of the *Multnomah Lawyer*, you probably already know the results. Given the number of ballot measures, judicial contests and other races for political office that will

significantly impact the future welfare of our justice system, the political and fiscal landscapes could be radically changed. Whatever the election results, the upcoming legislative session will be the next major challenge for those committed to the stewardship of our justice system.

It should come as no shock that the challenge is funding. The State Court Administrator cannot obtain any more money to run the system than the legislature provides. The legislature controls the budget. The new legislature convenes after the first of the year, but the preparation for the battle for funding has already begun. And, depending on the election results, we may be scrapping for a piece of an even smaller pie than currently anticipated.

Of course, there are many worthy candidates for budget consideration. I am a big fan of adequately funded schools, roads, health and welfare services, environmental control, wildlife and forest management, state parks, law enforcement and many of the other services provided by the State. However, since I am writing in the *Multnomah Lawyer* and the MBA's mission includes support of Oregon's justice system, I will focus on some of the major challenges we face and the reasons why you should do all you can to help secure adequate funding for that system.

**Salaries.** A recent national survey of state court trial judge compensation ranked Oregon 49th out of 50 states. There are those who contend that, depending on how one values retirement and other benefits, the results are not quite that bad. I find this argument provides little comfort. We are lucky to have attracted the quality of judges that we have, but continued toleration of such inadequate compensation puts the ability to recruit and retain excellent judges at great risk.

Our appellate judges also fall on the low end of the spectrum, so we face the same problem with all of our courts. Similarly, the staffing of the courts has suffered from financial neglect. Reasonably compensated judges will not be able to cope with their case loads unless they have the staffing necessary to support courthouse operations, to manage their case loads, assist in the courtroom and provide all the other courthouse services required for efficient operations.

**Facilities and Infrastructure.** You may have noticed that despite the efforts of many of our judges, state courthouse technology has not emerged from the 20th century. The Chief Justice and State Court Administrator have identified the modernization of the court system's

technology as a high priority in their draft budget. Again, money is the problem, because technological advances require the investment of substantial sums. Bringing court system technology up to date will promote greater efficiency and convenience.

Yet, it makes no sense to install technological improvements in courthouses that are falling down around those who use them. Multnomah County is not alone in its need for new courthouse facilities. Although the counties retain responsibility for supplying courthouse facilities to the system managed by the state, the Chief Justice has established a task force to quantify the money needed to repair our deteriorating courthouses, and he plans on requesting the legislature to take the same kind of action it took to repair the capitol building when it was damaged by an earthquake in 1993.

The Multnomah County Commissioners have resolved to select a site for the new downtown courthouse by the end of the year. Actually funding the project poses a different set of problems. State involvement could help move the process along, but that would require interest and action on the part of the legislature. Neither the county nor the state will be able to raise the money necessary to build new facilities here unless we can convince the voters of the necessity of spending that kind of money.

**Indigent Defense.** The Court Administrator's budget also includes funds for Oregon's Public Defense Services Commission, which, in turn, contracts for representation of criminal defendants who are without means to hire their own lawyers. In Multnomah County, these services are provided by Metropolitan Defenders and a collection of consortia of private firms and lawyers. In the current biennium, the budget is \$175.8 million. That's a lot of money, but it's not nearly enough. This year, it appears that the budget may fall short by more than \$7.5 million.

More importantly, however, the current budget will not support adequate compensation for these dedicated lawyers who provide constitutionally mandated services in the most difficult cases. The public at large does not appreciate the importance of these services, and the effort to provide public funds to adequately compensate lawyers providing defense to poor defendants accused of heinous crimes has fallen far short of the mark.

Like the risk we run by underpaying our judges, the risk created by failing to set aside adequate funding for indigent defense could have an enormous impact on the whole community. We cannot constitutionally

*Continued on page 4*

## Photos Coming to Online Membership Directory

The MBA is expanding the online membership directory to include photos. We will be working with RCL Portrait Design to photograph all members for the directory.

Photos will be taken at the MBA office and there is no fee to members. A professional portrait photographer will photograph you in several poses. You will be able to view your proofs immediately and select your picture for the directory. You will also have the option of purchasing your portraits for your own use.

For a professional quality and uniform directory, we recommend the following dress. Women: Suit jacket or solid-colored long sleeved blouse. Men: Dark jacket and tie.

Appointments are available the weeks of November 6 and November 13. Please call RCL Portrait Design at 800.580.5562 to schedule your appointment.

We encourage people to use RCL Portrait Design for their photos. But, if you prefer to submit a photo, please email a 143 pixels tall x 107 pixels wide photo to kathy@mbabar.org. Photos need to be 50 kilobytes or smaller. Electronic photos submitted by individuals that do not meet the above format and require customized adjustments may take longer to be added to the directory.

## MBA CLE

To register for a CLE, please see the inserts in this issue or go to [www.mbabar.org](http://www.mbabar.org).

### November

**Monday, November 6**  
**Out Experting the Expert Witness**  
Bill Barton  
George Kirklin

**Tuesday, November 7**  
**Estate Planning**  
Scott Howard  
Merritt Yoelin

### December

**Tuesday, December 5**  
**Second Annual Ethics Tune-Up**  
Mark Fucile

**Wednesday, December 6**  
**Bridging Generations**  
Catherine Brinkman  
Thom Brown  
Jo Smith  
Kelly Struhs  
Valerie Tomasi

**Tuesday, December 12**  
**A Business Case for Diversity**  
Steve Hanamura  
*Note: 2 to 5 p.m.*  
*Worth 3 EOB Credits*

**Wednesday, December 13**  
**Child Abuse Reporting**  
Sylvia Stevens  
*Note: Noon to 1 p.m.*

**Thursday, December 14**  
**Employment Law Update**  
Doug Parker  
Shelley Russell

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An annual subscription is included in member dues or may be purchased for \$20. Letters, award and news items, and announcements are welcome. Articles by members are accepted. All submissions may be edited for length, clarity and style, are published on a space available basis, and at the editor's discretion. Views expressed in articles represent the authors' opinion, not necessarily the MBA's. The publication does not purport to offer legal advice.

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# NEW ON THE SHELF

By Jacque Jurkins, Multnomah Law Librarian.

**THE LAWYERS GUIDE TO BALANCING LIFE AND WORK:** Taking the stress out of success, 2d ed. by George W. Kaufman. Published by the ABA Law Practice Management Section, 2006. (KF297 K38 2006 includes CD)

**THE TRIAL LAWYER:** What it takes to win, 2d ed. by David Berg. Published by the ABA Section of Litigation, 2006. (KF8915 B45 2006 includes DVD)

**FINANCIAL STATEMENT ANALYSIS AND BUSINESS VALUATION FOR THE PRACTICAL LAWYER,** 2d ed. by Robert B. Dickie. Published by the ABA Section of Business Law, 2006. (KF 320 A2 D53 2006)

**THE SUBLEASE AND ASSIGNMENT DESKBOOK:** Legal issues, forms, and drafting techniques for commercial lease transfers, edited by Brent Schaffer. Published by the ABA Section of Real Property, Probate and Trust Law, 2006. (KF593 C6 S83 includes CD)

**TAX, ESTATE, AND LIFETIME PLANNING FOR MINORS,** edited by Carmina Y. D'Aversa. Published by the ABA Section of Real Property, Probate, and Trust

Law, and the General Practice, Solo and Small Firm Division, 2006. (Tax KF750 T38)

**FEDERAL BANKING LAW AND REGULATIONS:** A handbook for lawyers by Harding De C. Williams. Published by the ABA Section of Business Law, 2006. (KF974 D4)

**INTERNATIONAL STOCK PURCHASE AGREEMENTS:** Summaries of international law. Published by the ABA Committee on Negotiated Acquisitions, Section of Business Law, 2006. (KF 1477 I57)

**THE LAW OF MOTOR VEHICLE DEALER BONDS,** edited by William A. Downing and Lisa Jennings-Baroun. Published by the ABA Tort, Trial, and Insurance Practice Section, 2006. (KF3036 A8 L38 includes CD)

**PATENT TRIAL ADVOCACY CASE BOOK** by Joseph M. Potenza, Mark T. Banner, and Christopher J. Renk. Published by the ABA 2005. (KF3113 P68 includes CD)

**INTERNATIONAL LABOR AND EMPLOYMENT LAW:** A practical guide book, edited by Phillip M. Berkowitz and Thomas Muller Bonanni, 2006. (KF3319 I55)

**THE LAW OF LATER-LIFE HEALTH CARE AND DECISION MAKING,** by Lawrence A. Frolick. Published by the ABA Senior Lawyers Division, 2006. (KF3608 A4 F76)

**ART LAW IN A NUTSHELL,** 4th ed. by Leonard D. Duboff and Christy O. King. Published by the West Group, 2006. (KF4288 D82 2006)

**CITIZEN OVERSIGHT OF LAW ENFORCEMENT,** edited by Justina Cintron Perino. Published by the ABA Section of State and Local Government Law, 2006. (KF5399 C58)

**EMINENT DOMAIN USE AND ABUSE:** Kelo in context, edited by Dwight H. Merriam and Mary Massaron Ross. Published by the ABA Section of State and government Law, 2006. (KF559 E45 includes CD)

**TRADE REMEDIES FOR GLOBAL COMPANIES,** edited by Timothy C. Brightbill, Linda S. Chang, and Peggy A. Clarke. Published by the ABA Section of International Law, 2006. (KF6708 D8 T73)

# CALENDAR

For a complete MBA calendar, please visit [www.mbabar.org](http://www.mbabar.org).

## November

**1-3**  
Wednesday-Friday, OSB PLF Seminar – Learning the Ropes  
Visit [www.osbplf.org](http://www.osbplf.org) for details.

**6**  
**Monday, MBA CLE**  
**Out-Experting the Expert Witness**  
See insert or register at [www.mbabar.org](http://www.mbabar.org).

**7**  
Tuesday, General Election Day

**Tuesday, MBA Board meeting**

**Tuesday, MBA CLE**  
**Estate Planning**  
Register at [www.mbabar.org](http://www.mbabar.org).

**9**  
**Thursday, YLS PDE Seminar**  
See insert for details.

**10**  
**Friday, December Multnomah Lawyer deadline**

**14**  
**Tuesday, YLS Board meeting**

**16**  
**Thursday, New Admittee Social at Kell's**

**23-24**  
**Thursday-Friday**  
**Thanksgiving Holiday**

## December

**5**  
**Tuesday, MBA Board meeting**

**Tuesday, MBA CLE**  
**Ethics Tune-up**  
See insert or register at [www.mbabar.org](http://www.mbabar.org).

**6**  
**Wednesday, MBA CLE**  
**Bridging Generations**  
See insert or register at [www.mbabar.org](http://www.mbabar.org).

**8**  
**Friday, January Multnomah Lawyer deadline**

**12**  
**Tuesday, MBA CLE – Diversity and Sound Business Practices**  
See insert or register at [www.mbabar.org](http://www.mbabar.org).

**Tuesday, YLS Board meeting**

**13**  
**Wednesday, MBA CLE**  
**Child Abuse Reporting**  
See insert or register at [www.mbabar.org](http://www.mbabar.org).

**14**  
**Thursday, MBA Brown Bag Discussion – Civil Motions Panel**  
See p. 9 for details.

**Thursday, MBA CLE**  
**Retaliatory Termination**  
See insert or register at [www.mbabar.org](http://www.mbabar.org).

**25-26**  
**Monday-Tuesday, Holiday**

**27**  
**Wednesday, Multnomah Bar Foundation Board meeting**

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# Ethics Focus

By Mark J. Fucile, Fucile & Reising.

## Setting Up Shop, Part 2: Top 10 Ethical Nuts and Bolts of Starting Your Own Firm



Last month we began a two-part series on the ethical nuts and bolts of starting your own firm. In the first half of the Top 10, we looked primarily at transition issues associated with leaving your old firm. In this second half, we'll discuss creating a solid risk management foundation for your new firm. As with last month's topics, each of the points addressed this month is examined in more detail in my chapter on law firm organization and management in the OSB's *Ethical Oregon Lawyer*.

**6. Conflicts and Conflict Systems.** When a lawyer leaves one firm and founds another, the old firm's clients who do not come with the lawyer become the lawyer's former clients for conflict purposes under RPC 1.9. The former client conflict rule allows the new firm to oppose those former clients as long as it does not involve the same or a substantially related matter that the lawyer worked on for those former clients or would not involve using a former client's confidential information against it. When you first open your doors, conflict checking may seem easy because you might not have that many clients. As business develops, however, you will soon need a conflict checking system. There are several software programs available from major vendors. The key is to have one. Conflict systems are a cornerstone of law firm risk management. In fact, the Oregon Supreme Court disciplined a lawyer last year in *In re Knappenberger*, 338 Or 341, 355-56, 108 P3d 1161 (2005), for failing to have an adequate conflict checking system.

**7. Staffing.** Under RPC 5.3, lawyers are responsible for training law firm staff on the firm's ethical obligations. Similarly, partners and other senior lawyers at a firm are responsible for supervising the ethical conduct of junior lawyers at the firm. In recent years, contract lawyers who work with a firm on a temporary or other project-specific basis have become a common fixture for law firms big and small as they try to balance staffing imperatives with overhead. ABA Formal Ethics Opinions 88-356 and 00-420 discuss both the use of and billing for contract lawyers at length. Although RPC 1.0(d) excludes temporary lawyers from the definition of "firm," contract lawyers are subject to the same confidentiality and conflict rules governing other lawyers and can generally be included in a law firm's bill along with other lawyers without triggering the fee split requirements of RPC 1.5(d).

**8. Engagement Letters.** Part of competently representing clients and good law firm risk management is explaining to clients the scope of a given representation, how your fee will be calculated and how your rate may change over the course of a matter. Engagement letters offer a great venue for accomplishing all of these objectives. Developing and using a standard engagement letter, therefore, is an important element of a new law firm's ethical infrastructure.

**9. Calendaring Systems.** Like conflict systems, docket programs that calendar due dates and generate reminders are another key piece of a law firm risk management. Again like conflict systems, several docketing software programs are available from major vendors. And, again like conflict systems, conscientiously using the calendaring program is as important as having one in the first place.

**10. Billing and Trust Accounts.** RPC 1.5 outlines our professional obligations in setting and communicating fees. Providing timely and accurate bills to clients plays a central role in meeting those professional obligations. It's also good business because it enhances the likelihood of being paid. Like conflict and calendaring systems, several major vendors offer time-keeping and billing programs. RPCs 1.15-1 and 1.15-2, in turn, require lawyers who handle client or third party funds to maintain a client trust account. Several OSB ethics opinions, including 2005-117, 2005-151 and 2005-172, address various elements of using trust accounts, including, most importantly, the need to segregate the lawyer's funds in a general business account from client funds in a client trust account. Most major banks in Oregon offer client trust accounts for lawyers.

There are many other pieces to building your own firm ranging from telephones to Web sites to health insurance. The ethical nuts and bolts described in the past two columns, however, provide a solid foundation on which to build the rest of your new firm.

*Mark Fucile of Fucile & Reising handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation. His telephone and email are 503.224.4895 and mark@frllp.com.*

# ANNOUNCEMENTS

## MBA Online Directory to Add Photos

The MBA is expanding the online membership directory to include photos. We will be working with RCL Portrait Design to photograph all members for the directory.

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## MBA Noon Time Bike Rides

Short fast rides with hills. Meet at SW Yamhill and Broadway between Noon and 12:10 p.m. on Mondays and Thursdays. Contact Ray Thomas 503.228.5222 with questions or meet at the start.

## Multnomah County Family Law Group - Upcoming Dates and Speakers

November 20: Tom Hedberg, Policy Manager for Division of Child Support, "Thorny child support issues; revision of guidelines; DCS legislative agenda." December 18: Judge Waller, (New Presiding Family Law Judge), "How to develop a regular channel of communications between the family bench and the family bar." January 22: Robin Wright, "How to handle the 'children attending school' child support issue." Questions or issues may be emailed to mark@kramer-associates.com.

## November Queens Bench Luncheon

On November 14, the speaker will be Mary Chaffin, General Counsel of MercyCorps. The organization works amid disasters, conflicts, chronic poverty and instability and since 1979, it has provided \$1 billion in assistance to people in 82 nations.

Queen's Bench lunches are held on the second Tuesday of the month from 11:45 a.m. to 1 p.m. at Jax Restaurant. The cost is \$12 by cash or check. Payment is accepted at the door. For more information, please contact Barbara Smythe at 503.703.4892 or barbara@barbarasmythe.com, or Nicole DeFever at 503.735.5323 or nicole@defever.com.

## Child Centered Solutions News

This new nonprofit has hired Leslie Abraham as Executive Director and Program Attorney. She will, at the request of the Multnomah County family law judges, represent children when the court is concerned that the needs of children are not being met in divorce cases where neither parent has legal representation. Abraham will use her expertise to draw parents together with medical and mental health professionals to craft the best child-centered plan.

## Children's Relief Nursery Seeks Equipment Donations

This charitable nonprofit organization is seeking donations of fairly new computers. A server, PCs and laptops would be welcome. A four-drawer locking file cabinet is also needed. If your firm is upgrading to a new system, please consider donating your fairly new "old" equipment to this worthy charitable organization. For more information, please contact Executive Director Chris Otis at 503.595.4500 or chrisotis@crn4kids.org.

## 2007 Legislative Session

*Continued from page 1*

prosecute criminals unless they are provided a competent defense. We cannot attract lawyers competent to defend the most difficult cases without providing them with adequate compensation. If we offer inadequate compensation, competent lawyers, no matter how dedicated, will be forced to seek other employment. And if we cannot supply a competent defense, criminal defendants will go free.

All of these financial challenges to the justice system have several common traits. First, they all involve under-funded court operations that depend on the legislature for their budgets. Second, they involve operations and services that are not widely understood or appreciated by the public. Accordingly, when it comes down to dividing up the available funds, the legislature feels little public pressure to find a way to provide the system with an adequate budget.

The MBA, the OSB, other lawyer organizations and individual lawyers and judges have all sought to influence the legislature to recognize that it has a duty to provide sufficient funding for the judicial system, which is, after

all, not a state agency, but an independent, co-equal branch of the government. But, if we really want to put some pressure on our law makers, then we have to start building public understanding and support.

A Public Outreach Task Force was established by the MBA a few years ago to address this need for public education. If you are interested in participating in this organized effort, please contact the MBA.

Even if you do not wish to get involved on that level, speak to your friends, neighbors and clients about these issues, and let them know that unless we all recognize the importance of these elements of the justice system to the health of our community, and unless we communicate the need to give the system high budget priority, we risk a significant and prolonged erosion of our quality of life.

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# Firm Profile: The Miller Nash Story

By Dan T. Cox.

It's no small thing, running a law firm in such a way as to thrive for more than 130 years. No one attorney can live or practice long enough to take full credit. No single case or client can stand alone as the prime example of what makes a firm like Portland's Miller Nash persist. Rather, attention must turn to the overarching qualities that span the history of the firm, connecting generations of attorneys, continually serving the best interests of the clients. It is the culture of the firm, after all, that is arguably most responsible for the firm's longevity and success.

Talk to the senior partners of Miller Nash – one of, if not the oldest firms in the MBA – and a certain theme emerges. Ask them what distinguishes their firm, and the collective answer ultimately centers on the interests of the clients and the collegial nature of their work environment.

“What we have here is a culture of respect and enjoyment,” says managing partner Tom Sand. “Clients and prospective clients tell us with great frequency that Miller Nash was attractive to them because we like each

other. What they're witnessing is an unusual degree of trust, respect and goodwill within the ranks of our partners, our junior partners, our associates and our staff. They understand that teamwork and cooperation will benefit them as we work together on cases and deals.”

The doors opened back in 1873 as Northup & Gilbert, with just two name partners and no support staff. The firm has gone through 20 name changes since then. But a collegial foundation was laid during those horse-drawn days of stern portraits and stiff collars. One that, in the words of commercial litigation partner Denny Rawlinson, “results in bottom-line positives for the client today.” There is a mutually supportive energy in the halls, offices and conference rooms of Miller Nash that people find appealing. A warmth, perhaps. One that's wrapped around a collective work ethic that's always been marked by this trait: When one person is carrying a particularly heavy load, others rush in to assist.

“We succeeded through a combination of loyalty, camaraderie and complete emphasis on satisfying our clients;

making money has never been the main driver,” says retired Norm Wiener, the last of the name partners.

## Humanistic Lawyering Leads to Fascinating Cases

The attorneys of the firm are anything but territorial with one another. Consequently, the firm is adept and nimble at marshaling the right talents for a given situation, being ever mindful not to *overlawyer* matters.

“We're very good at what we do,” says partner and litigator Chris Helmer. “Miller Nash is composed of tough, bright professionals – including very good trial lawyers – who are backed up by a first-rate support team.”

These proud attributes have put the firm in a position to be tapped for some of Oregon's most newsworthy and noteworthy cases. Here are but a few:

### • Timber Bid Rigging in the North Santiam Canyon

With deep roots in the timber industry (Miller Nash began working with Georgia-Pacific in 1951), the firm was hired to defend one of several independent timber companies

based in the North Santiam Canyon east of Salem. The charge by the US Attorney was that these firms had colluded with regard to bids on timber sales in the Willamette National Forest. Norm Wiener was lead attorney on this high-profile case, which reshaped the very nature of logging in Oregon.

### • The Sudden Shutdown of Savings and Loans

In the late 1980s, the firm was hired by the FSLIC (Federal Savings & Loan Insurance Corporation) to shut down and take over several savings and loans that were failing. Miller Nash attorneys went in disguise and unannounced to these institutions, shutting them down on the spot and securing critical documents that provided the basis for suing several officers and directors. The whole affair sent national shock waves throughout the savings and loan industry and eventually led to the bankruptcy of the FSLIC itself.

### • Constitutional Conflict Involving the Bhagwan Shree Rajneesh

The followers of the Bhagwan Shree Rajneesh worked from

*Continued on page 6*

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# MBA Golf Championship Raises Money for VLP

Nineteen teams battled for top honors at the 9<sup>th</sup> Annual MBA Members Golf Championship on September 12 at The Reserve Vineyards and Golf Club. Thanks to our sponsors, tournament participants and the hard work of the MBA Golf Committee Chair Tom Melville and his committee, the event raised approximately \$5,000 for the MBA Volunteer Lawyers Project, managed by Legal Aid Services of Oregon.

The firm low gross winner was Barran Liebman and the firm low net winner was Fred Millard, Attorney at Law. In the open category, the low gross winner was the team of Tom Melville, Jeff Nielson, Mark Twedt and Eric Young. The low net winner was the team of Phil Guthrie, Jeremy Hanson, Matt Hodges and Rob Oliver. The open and firm low net teams and firm low gross team each received a traveling trophy that they will keep until next year's tournament. Congratulations to all!

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We look forward to seeing you next year!



1<sup>st</sup> place low gross firm team Robert Carey and Todd Hanchett. Not pictured: Bradley Tellam and Todd Underwood



1<sup>st</sup> place low net firm team Shawn Abrell, John Roszczyk, Fred Millard and Heidi Gross



1<sup>st</sup> place low net open team Phil Guthrie, Jeremy Hanson, Matt Hodges and Rob Oliver

# Miller Nash

Continued from page 5

his ranch in Antelope, Oregon, to hijack the political process in Wasco County. They attempted to control the vote by recruiting homeless people from Portland to ride a bus to Wasco County to vote illegally. Wasco County citizens and others countered by recruiting out-of-state individuals to come vote against Rajneesheshe candidates. It was a constitutional nightmare. On the advice of Miller Nash's Cliff Carlsen, Secretary of State Norma Paulus ordered voter eligibility hearings to determine the legal residency of voters. The firm's attorneys who were among the two dozen - working pro bono - sworn in as temporary hearings officers and were bused in to The Dalles for two days of hearings in a makeshift "courthouse" at the armory. Ultimately, neither side gained control of the vote. Local officials were elected by valid voters.

### • Tonya Harding v. International Olympic Committee

The firm successfully defended Tonya Harding's right to represent the USA in the Olympics, an honor she had earned by winning the Women's National Figure Skating Championship. Though she was a controversial figure, she prevailed because the US Olympic Committee tried to violate one of its own rules.

### Wanted: A Diversity of Qualities in Associates

Miller Nash's history of success is attributable to the dedicated work of myriad lawyers. Its future is equally connected to the never-ending quest to recruit, develop and retain premier associates, many of whom will achieve partner status and help to perpetuate the firm's legacy. The scrutiny given to candidates goes well beyond the predictable indicators.

"It begins with intelligence, of course," says partner and business attorney Frank Cable. "But grades don't tell the whole story. We favor team players with good personalities, who work hard for the greater good."

Tort and business litigation partner Peter Richter drills down even deeper by identifying the three qualities of a good associate: (1) a penchant for preparation, (2) the imagination necessary to solve problems, and (3) passion for the work.

Beyond that, Miller Nash is enamored of plainspoken associates who possess judgment, common sense, broad interests, excellent people skills, positive predispositions, a willingness to be responsible for their own happiness, a lifelong hunger for self-improvement and an entrepreneurial energy that's in synch with the evolving energy of the firm.

"We've kept the good aspects of traditionalism," says Chris Helmer. "But it's balanced by a desire to move the firm aggressively and decisively forward."

### Points of Pride

Law firms that thrive this long, tend to have more than a few bright spots to mention. Miller Nash certainly does. Such as when partner Cliff Carlsen became the first Oregon attorney to enter Mississippi in the 1960s to help disenfranchised African Americans amid the civil-rights conflict. Two more notable highlights: This was the first Oregon law firm to hire a female associate, and the first to hire an African American attorney.

Miller Nash proudly encourages pro bono work for all lawyers, recognizing a civic duty to assist those who might otherwise go unrepresented. The firm's commitment to community is further evidenced by a firm-wide policy of paid time off for volunteer activities and a generous giving/matching program.

Still, the people of Miller Nash are proudest of their congenial, collaborative work ethos and how it benefits clients. Tom Sand quotes a major client who said, "You may be the last big law firm that still has a genuinely collegial culture."



(L-R) December 4, 1970 – Ralph H. King's 50th Anniversary Celebration  
Front Row: Ralph J. Voss, William Swindells, Ralph H. King, Ivan D. Wood  
Second Row: Gene D. Knudson, David T. Mason, Robert B. Pamplin  
Third Row: Estes Snedecor, R. L. Clark, Frank E. McCaslin, A. R. Morgans



1932 – Miss Timmerman, supervisor of secretarial staff, and three associates

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# AROUND THE BAR



David Markowitz

of only four Oregon attorneys to be named a Best Lawyer for "Bet-the-Company Litigation."

**JIM O'CONNOR**

**Jim O'Connor** has opened his own law and mediation practice. It focuses on helping clients avoid litigation when faced with family and employment problems. He works with organizations and individuals. He may be reached at 3939 NE Hancock St Ste 309, Portland OR 97212, by phone at 503.473.8242, or by email at SolveYourConflict@msn.com. Web site is www.SolveYourConflict.com.



Garrett W. Crawshaw

**LANE POWELL**

**Steven B. Ungar**, firm shareholder, has been appointed by Governor Kulongoski to serve as chair of the Oregon Lottery Commission.

Ungar is also chair of the white collar criminal defense and regulatory compliance practice group at the firm. His practice concentrates on defending individuals and companies facing governmental investigations and prosecutions. He also handles ongoing regulatory compliance matters for business clients.

**Garrett W. Crawshaw** has joined the firm as an associate in the real estate and land use practice group.



Peter Glade



Robert L. Carey

**TONKON TORP**

**Robert L. Carey** has joined the firm as head of the labor and employment practice group. Carey, who has nearly 20 years of litigation experience, represents businesses and executives on a variety of employment law issues and in complex commercial litigation. His work focuses on litigation involving discrimination and wrongful discharge complaints, enforcement of non-competition agreements and departing employee disputes.

**GEVURTZ MENASHE**

The firm is celebrating its 25<sup>th</sup> anniversary. It was founded in 1981 by Ronald I. Gevurtz and **Albert A. Menashe**. The firm has 20 attorneys and is one of the largest firms in the country with a practice dedicated exclusively to family law.

Menashe and **Eric Larson** were both included on the *Oregon Super Lawyers* magazine's list of the state's top 50 super lawyers.



Bill Mehlhaf



Dennis Rawlinson

**MILLER NASH**

The firm's litigation partner **Dennis Rawlinson** has been elected by his peers to the American Board of Trial Advocates (ABOTA), which was founded in 1957 to preserve the civil jury trial. Acceptance to ABOTA requires nomination and election by the group's members. Nominees meet strict guidelines of trial experience and professionalism.

Rawlinson has 30 years of trial experience in state and federal courts in the Pacific Northwest and is a frequent writer and speaker on litigation topics. He is the 2006 president of the OSB and the Division Director for the ABA Section of Litigation.

The Miller Nash firm announced a merger with the central Oregon law firm of Lynch Austin Wilson Hill. The two Lynch Austin offices, in Bend and Prineville, will operate under the Miller Nash name.



Jeff Batchelor

**MARKOWITZ, HERBOLD, GLADE & MEHLHAF**

Four firm lawyers were honored in the in the 2007 guide *The Best Lawyers in America*. **David Markowitz**, **Peter Glade** and **Bill Mehlhaf** were recognized for their work in the area of commercial litigation. **Jeff Batchelor** was listed in two areas: alternative dispute resolution and appellate law. Markowitz was one



Steven B. Ungar

**DUNN CARNEY**

**Kelly J. Martin** and **Sarah A. Badten** joined the firm as associates. Martin will practice business and commercial law and Badten will practice commercial and civil litigation.

**ZIMMER & BUNCH**

**Angela M. Bentz** joined the firm as an associate. The firm continues to emphasize family law.

**LUELLA E. NELSON**

**Luella E. Nelson** was inducted as a Fellow in the College of Labor and Employment Lawyers.

**THE NATHANSON GROUP**

**Jacob Wieselmann** joined the firm to manage its Portland office. He will coordinate litigation management and support services.

*The Around the Bar column reports on MBA members' moves, transitions, promotions and other honors within the profession. Items may be submitted by email to carol@mbabar.org and are edited to fit column format and used on a space-available basis.*

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# Tips from the Bench

By Judge John Wittmayer, Multnomah County Circuit Court.

## Attorney fees requests

Requests for attorney fees are very common and can arise in a number of different circumstances and cases. The procedure for making and objecting to attorney fees requests is in almost all cases governed by ORCP 68. You should read ORCP 68 again whenever you confront this issue.

The procedure for seeking and objecting to attorney fees requests is governed by ORCP 68C(4). If you are seeking an award of attorney fees, this is almost always handled after the General Judgment is entered, and results in a Supplemental Judgment for the attorney fees, if they are awarded. A litigant seeking attorney fees must, within 14 days of the entry (not filing, but entry) of the judgment, file and serve a detailed statement of the amount of attorney fees being sought. The party opposing the request has 14 days to file and serve written objections to the request. There are quite a few appellate cases dealing with this procedure and these deadlines and you should be careful to comply with the rules in this regard.

Statements seeking attorney fees must be "detailed." ORCP 68C(4)(a)(I). Practice tip: be sure to segregate your time entries and include detailed explanations for what service you performed for each time entry. Only with this detail can opposing counsel and the court understand why that time was or was not reasonable.



Likewise, objections to attorney fee requests should be as specific as possible. It is not helpful to the court for an objection to simply state that the amount of time was unreasonable. Objections should direct the court to specific time entries that are objectionable.

If objections are filed to the request for attorney fees, the parties have a right to a hearing on the issue. ORCP 68(4)c. Practice tip: when you send to the judge your request or your objection, always tell the judge if you want a hearing on the issue, or if you want the judge to decide the matter on the written submissions. Rarely is this done, and my assistant has to call the lawyers almost every time and ask this question. And, if you want a hearing, you should tell the judge how long you need on the docket for the hearing and if you plan to present evidence, or simply make arguments based on the written submissions.

## In Memoriam Judge Clifford L. Freeman

Multnomah County Circuit Court **Judge Clifford L. Freeman** died on August 21 after a lengthy battle with cancer. He was instrumental in the development of the county's Community Court, and presided there beginning in 1998. The Community Court deals with crimes that have a direct impact on quality-of-life issues.



Judge Freeman was born June 2, 1944 in Portland and attended Highland Elementary (now Martin Luther King Jr. Elementary) and graduated from Benson High in 1962. He attended the U of O, where he received an undergraduate degree in economics, a master's degree in education, and a law degree.

Judge Freeman served with the Metro Public Defenders from 1979-1988. In the next four years, he worked for the state in various capacities. He served as a juvenile court referee before then-Governor Kitzhaber appointed him to the bench in 1996.

Judge Freeman's friends eulogized him as "A stern and compassionate" judge, who "Devoted his career to breaking the fall of Oregon's most troubled citizens and helping those who strive against tough odds."

Judge Freeman was the 2006 recipient of the Frohnmayer Award, given each year by the U of O Law School Alumni Association. The award recognizes a graduate, faculty member or friend whose public service brings honor to the school.



By Stephen Madkour, Multnomah County Attorney's Office and Court Liaison Committee member.

## Ballot Measure 40

The committee was briefed on the efforts taking place to oppose Ballot Measure 40, which would amend the Oregon Constitution by districting the appellate courts.

Efforts opposing the measure were getting good media support even in rural areas of the state. The polling showed the opposition lagging, but with many voters undecided. The measure received significant financial support from wealthy proponents, including Loren Parks.

The measure politicizes the judicial system in Oregon and represents an entry of special interests into Oregon's judiciary. MBA members are encouraged to visit [www.protectoregoncourts.com](http://www.protectoregoncourts.com). Some local firms that have made generous contributions but the campaign is a long way from meeting its goal of \$1 million. The Oregon Business Association and some prominent local business and organizations are opposing the measure. All members were encouraged to contribute and to assist in helping to get the word out to "Vote No on 40."

## Presiding Court Update

Doug Bray reported that there are three judicial positions vacant at this time - the two positions vacated by Judges Gernant (position 31) and You (position 37), and one which is

vacant due to Judge Freeman's death (position 28). There is a run-off between two candidates for position 31, one candidate is on the ballot for position 37 and nine candidates are on the ballot for position 28.

Bray reported on the status of county court facilities. The County Board of Commissioners continues to wait on the Gresham facility. Regarding the downtown courthouse, the county was involved in a negotiation over the last three months with the owners of the Two Main Place block (immediately east of the Justice Center) for the downtown courthouse facility. That negotiation, which offered a real estate trade, did not result in a transfer of ownership of the property; the county will consider condemnation and other options, including building the new courthouse on the Hawthorne bridgehead, immediately east of the Two Main Place block and overlooking the river and out to Mount Hood. The county owns the Hawthorne bridgehead, but would have to incur an expense to relocate one of the bridge ramps. In January 2007, there will be a new county chair and a new commissioner taking office. With two new members, there may be changes in the board's current positions on both of the proposed new facilities.

## Judicial Brown Bag

The Civil Judges Motion Panel, with the MBA, has scheduled a brown bag lunch for Thursday, December 14, in the Presiding Judge's Courtroom (208) from noon to 1:30 pm. The civil bar is invited to join the judges to informally discuss mutual areas of general interest in civil pleading and practice.

## Judicial Practices Survey

David Meyer mentioned that the subcommittee is making good progress reviewing the survey. It's a rather lengthy undertaking involving redlining, reorganizing and following up with the judges. He believes that the subcommittee will have a draft to present to the committee sometime in December.

## Web site

Mike Merchant asked if members had the opportunity to peruse the MBA Web site. Members thought it was easy to navigate, but that additional links would be helpful. The least visited is the judicial feedback form.

The committee discussed the lack of response to the judicial feedback survey and whether to revisit feedback form and procedure. There has not been a lot of feedback received. The committee agreed to review the form and the process.

## The Joys of Judging

By Robert P. Jones, Former Multnomah County Circuit Court Judge (Deceased).

*This column originally appeared in the 1995 July/August issue of the Multnomah Lawyer.*

- With great dignity you rise to leave the bench, and then realize your robe is caught under the wheels of your chair.
- During a jury trial your mind wanders, suddenly you realize that it is deathly quiet in the courtroom and everyone is looking at you and waiting.
- You spend a weekend reading trial memos and jury instructions. Monday morning, there is a message that the case has been settled.
- Litigators who request a critique of their performance, and afterwards stomp out of your chambers.
- You absent-mindedly address the lawyers at counsel table as "gentlemen" recalling an instant too late that they are all women.
- Your colleagues commiserate with you about your latest reversal, but somehow they fail to convey sincerity.
- You hear the pro tem clerk rap the gavel and loudly announce, "All rise" when you are in the bathroom.
- The surreptitious grin by a cop who, while citing you for jaywalking, discovers you are a judge.
- You accidentally upset the full cup of coffee you had cleverly sneaked on the bench.
- You sneak out of the courthouse at 4 p.m. and run into the presiding judge on the sidewalk.
- Your bladder is bursting, but it's 30 minutes to recess.
- Your spouse holds you personally responsible for all criminal sentences imposed by other judges.
- As a speaker at a PTA meeting, a member of the audience asks why you ruled years ago that nude dancing was legal.
- The moderator at a CLE introduces you as one of the oldest judges in Oregon.



# Remarks by MBA Professionalism Award Recipient

By Susan Hammer.

Thank you.

I am touched and slightly overwhelmed by your generosity.

Thank you, to the officers and members of the MBA and to the MBA Professionalism Committee. This is a great honor.

I'm here today in large because I have persistent and loyal friends, especially Sid Lezak and Ellen Rosenblum. Some four years ago, Sid and Ellen started this project and wouldn't give up. In the meantime, many of you have joined in and written letters. I thank you all very much.

Sid was so happy to learn about this award, just weeks before he died.

He was literally speechless at the time, but he got it. He smiled and became teary-eyed. Thank you for making him so happy.

I'm delighted that my family, extended family and friends are here today - most of whom never even imagined being in a room with this many lawyers - and that they have heard about all the incredible things you do. I only wish these stories were on the evening news.

When Kelly Hagan called to tell me I'd been chosen for this award, he asked me to talk for five to eight minutes. I remembered the last

time I heard an award recipient talk for eight minutes. When she finished, I wished they had picked someone else!

So, I'll just share a few reflections.

First, I want to tell you that the MBA has been close to my heart for my entire professional life.

In addition to Stoel Rives, where I practiced for almost 21 years and learned from great lawyers, the MBA is the neighborhood where I grew up. The MBA was the place where I learned the power of our collective efforts to improve the profession. It is where I made friends from other firms and practice areas, who have added depth, pleasure and friendship to 30 years of practicing law.

Back in the late 80s, when I was an MBA officer, there was a growing concern in the bar about the decline of civility among lawyers. At the MBA, we started sharing war stories and asking, does it really have to be this way?

The MBA convened a group of outstanding lawyers to draft the first Statement on Professionalism. I want to point out that this was before the OSB did so! The committee struggled to commit to paper what it was that we meant when we talked about professionalism. We thought it sounded sort of corny or bland

at first - like a Girl Scout or Boy Scout pledge - but we soldiered on, committed to developing this important idea.

So here we are, 20 years later. Law schools are teaching professionalism, such as my friends who are here today from Willamette University College of Law. They hold a professionalism seminar for first year students before they start law school. Professionalism is a core competence in the practice of law. Today, the MBA Statement on Professionalism hangs in many courtrooms. Together, we changed the norms in our profession.

And that's a good thing because lawyers live with enormous stress, coming from many sources. Multiple clients want first priority and great results at a reasonable price. Our law firms want profitability. The court wants us to meet deadlines, be well prepared and get along. The people in the rest of our lives - the people we live with - want us to show up on time, quit checking our Blackberry, turn off the cell phone, be fully present and in a good mood, be fun and be helpful.

It's no wonder that we sometimes fall short and as a friend of mine says about herself - "I become the kind of person I don't want to have dinner with."

This is where the MBA and this community become so important.

We aren't born knowing how to handle all these competing pressures.

We learn by teaching each other, by good and bad example, how to be true professionals. I have learned from you and continue to learn from you everyday.

The professional relationships we have here, in this neighborhood, this village, allow us to learn and grow. When we behave badly, as we all occasionally do, we can call each other on it or acknowledge our own shortcomings, apologize, do a course correction and do better next time. Because, even though there are 5,000 of us here, there always is a next time.

This thing we have in Multnomah County is the antidote to a decline in professionalism. And, as I mediate with lawyers from other parts of the country, it is clear to me that not everyone has what we have.



Peter Glade congratulates Susan Hammer on receiving the MBA Professionalism Award.

In this community I see lawyers when at their best, bring incredible intelligence, humanity and professionalism to solve complex problems for complex human beings. You are what Abraham Lincoln said lawyers are supposed to be, "healers of human conflict."

Thank you again for this award and for the honor and pleasure of working with you. Although I realize that this is sort of an old lawyer's award - after all, I am nearing that age where I get a discount at the movies and when I ride the bus - I don't plan to retire. I'm still working on finding better ways to resolve legal disputes. I hope there are many, many more years to come.

## Awards Luncheon

The MBA Awards Luncheon held September 20 recognized outstanding volunteers. This year's Professionalism Award winner was **Susan M. Hammer**. In addition to Hammer, 23 outstanding volunteers were recognized. The MBA Award of Merit was given to **Ruth A. Beyer, Thomas M. Christ, Scott Howard, Robert J. Neuberger and Lisa M. Umscheid**. The MBA YLS Award of Merit was given to **Klarice Kolbe, Katie A. Lane and Andrew M. Schpak**. **The Honorable Elizabeth Welch, William F. Schulte and Gary J. Zimmer** were recognized with Distinguished Continuing Legal Education Service awards. **Elizabeth M. Cline, Lori A. Foleen, Michael A. Greene, Don H. Marmaduke, Lynn T. Nagasako, Katherine H. O'Neil and Walter H. Sweek** were given awards for their outstanding service to the MBA 100<sup>th</sup> Anniversary Celebration. Pro Bono Awards were given to **Christopher T. Carson, Sarah J. Crooks, Karen M.W. Knauerhase, Carter M. Mann and Robert E. Nelson**.

Congratulations to all the very deserving award winners!

Thank you to our Awards Luncheon sponsors.

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Photos by Dan Carter.



Pro Bono award winners Sarah Crooks, Karen Knauerhase and Carter Mann. Not pictured: Christopher Carson and Robert Nelson.



MBA Award of Merit recipients, Distinguished Continuing Legal Education Service award recipients and Outstanding Service to the MBA 100<sup>th</sup> Anniversary Celebration award recipients. Back row, L-R: Robert Neuberger, Lisa Umscheid, Thomas Christ. Second row: Scott Howard, the Honorable Elizabeth Welch. Third row: Michael Greene, Elizabeth Cline, Lori Foleen. Front row: Don Marmaduke, Lynn Nagasako, Gary Zimmer. Not pictured: Ruth Beyer, William Schulte, Katherine O'Neil and Walter Sweek.



(L) Catherine Brinkman, YLS President, and Eric Waxler, YLS Past President, with YLS Award of Merit recipients (L-R) Katie Lane, Andrew Schpak and Klarice Kolbe.

## 2007 MBA Professionalism Award Nominations sought

Do you know a lawyer who is a joy to work with, someone who goes above and beyond the minimum professionalism standards? Nominate him or her for the 2007 MBA Professionalism Award.

Past recipients are Raymond Conboy, Thomas H. Tongue, Randall B. Kester, Frank Noonan Jr., Donald W. McEwen, Don H. Marmaduke, Noreen K. Saltveit McGraw, Thomas E. Cooney, John D. Ryan, George H. Fraser, Barrie Herbold, Walter H. Sweek, Daniel E. O'Leary, Mark R. Wada, Sandra A. Hansberger, Robert C. Weaver, Walter H. Grebe and Susan M. Hammer.

Any MBA practicing attorney member, except a member of the MBA Professionalism Committee or the MBA Board of Directors, is eligible to receive this award. Former nominees may be re-nominated. For more information and a nomination form, go to [www.mbabar.org](http://www.mbabar.org).

## MBA Mentor Program

By John Belknap, Smith Freed & Eberhard and YLS Board Member.

**T**eacher. Advisor. Preparer. Wise person.

What do those words mean? According to *Roget's Thesaurus*, all four mean the same thing: "mentor."

If you are a young lawyer who seeks guidance in the profession, the MBA Mentor Program is right for you.

Last year, 48 young lawyers took advantage of the Mentor Program, thanks to generous time commitments from 48 experienced attorneys. Mentees benefited from their mentors' professional and ethical advice, while mentors established connections with the next generation of attorneys.

The first step in joining the Mentor Program is to sign up. However, the Mentor Program involves much more than shuffling paper.

After receiving all the forms, the MBA carefully matches young lawyers with mentors who have similar professional interests. Mentors and mentees attend official Mentor Program events together, and they make time to meet in other contexts.

Past participants see benefits from the MBA's matching process. Diane Gould, a recent mentee, "appreciated the opportunity to get to know [mentor Mark Williams] and hear about his experiences as a lawyer in both a small and solo practice setting."

Most mentees stay in touch with their mentors well after official Mentor Program events have ended. Gould adds, "I feel that Mark and I will remain friends, thanks to the Mentor Program and that I will continue to turn to him for advice and help in the future."

Another mentee, David Eder, notes that he and mentor Pat Birmingham still try to meet for a meal every month. According to Eder, "The most valuable experience was having a reference who wanted to help." As a former participant myself, I can tell you that the Mentor Program is worthwhile. Nearly two years later, I regularly ask my MBA mentor for advice.

After hearing testimonials about the Mentor Program, how can you pass up the opportunity to participate? Sign up for the MBA Mentor Program before the December 1 deadline. It's your best chance to find a teacher, an advisor, a preparer and a wise person all at once.



## Dropout Prevention Program Volunteers Needed

Members are encouraged to volunteer for the MBA's Dropout Prevention Program during the current 2006-07 school year. John McVea, Ryan Steen and Trung Tu are co-chairing the program, which is sponsored by the MBA YLS Service to the Public Committee.

The Dropout Prevention Program provides volunteer attorneys to visit Multnomah County middle and high schools to present a short video and facilitate a discussion with the students. The video features interviews with young convicted felons who have dropped out of school. The felons detail how their decision to drop out of school led to other poor choices, which they ultimately believe is the reason they are now behind bars. After the video, the attorneys engage the students in a discussion about the ramifications of dropping out of school and the benefits of staying in school.

This program makes a huge difference to the lives of Oregon's youth. If you want to give back to the community, with a typical time commitment of only one class period, please join us. Orientation for this year's volunteers is on Monday, November 13, from 5:30-6:30 p.m. at Schwabe Williamson & Wyatt, 1211 SW 5th Ave, 19th floor. Pizza and refreshments will be provided.

If you would like to participate, in this program, please email Trung Tu at [trungt@mcewengisvold.com](mailto:trungt@mcewengisvold.com) with all of your contact information. Please let him know if you plan to attend the orientation or if you are unable to attend but would still like to volunteer. Please email Trung by November 9.

## The New Admittee Survival Guide Easing the Adjustment into Practice

By Andrew Schpak, Barran Liebman and YLS Board Member.

**H**aving attended numerous drop-in socials and other MBA functions for a little over two years now, I can safely say that the three most common questions I hear are: (1) How much does it cost to belong to the MBA? (2) What sort of opportunities for involvement are there? (3) Where can I get more information?

Well, the answers are: (1) It is free for your first year of practice, \$60 for your second year, and then \$100 a year; (2) There are too many to list, everything from pro bono opportunities to CLE planning to organizing networking and social events for young lawyers; (3) The MBA Web site ([www.mbabar.org](http://www.mbabar.org)) and *The New Admittee Survival Guide*.

Two years ago, Kristin Sterling, then chair of the YLS Membership Committee, took the lead in creating the Survival Guide, thanks in part to the help of her committee members and the MBA staff.

The Survival Guide is revised and edited each year to ensure that it contains only the most up-to-date information. It is distributed to all newly-admitted lawyers in Oregon and is also available at many of the MBA YLS events. Last year, in an effort to seek funding for the continuation of the Survival Guide, I applied for an ABA-YLD grant from the Fund for Justice and Education. The ABA-YLD appreciated the fact that the Survival Guide is an important resource that brings together a large amount of pertinent information in one place to help new lawyers transition into practice in the Portland legal community and generously agreed to pay the costs for printing the guide last year. Notably, the ABA-YLD grant program is ongoing, so if you have ideas about possible grants, please contact me for more information about the program.

*The New Admittee Survival Guide* contains a ton of useful information; it describes the benefits of MBA membership,

the opportunities for involvement through MBA YLS committees, information about OSB membership, as well as reciprocity with the Washington, Idaho and Utah state bars, volunteer opportunities and links to all kinds of relevant Web sites.

If you would like more information about opportunities for involvement, the next drop-in social, the ABA-YLD grant program or where you can find *The New Admittee Survival Guide*, please give me a call or send me an email.

Andrew can be reached at 503.276.2156 or [aschpak@barran.com](mailto:aschpak@barran.com).



## YLS September Social

On Thursday, September 21, YLS members celebrated the end of summer with a drop-in social at the Thirsty Lion. The Thirsty Lion generously donated tasty appetizers to the group and approximately 40 young lawyers enjoyed the final vestiges of summer.

The event was a successful kick-off to the new season of drop-in socials. The Membership Committee made a strong showing and brought along friends who were attending their first YLS social. Additionally, many new admittees to the OSB celebrated their first networking social as lawyers, making important connections with other young lawyers.



Young lawyers at the September 21 Drop-in Social.

## MBA Mentor Program

The MBA Mentor program is open to all YLS Members. Sign up for the MBA Mentor program - a six-month program that runs from January through June. Go to [www.mbabar.org](http://www.mbabar.org) for a mentor sign-up sheet or call the MBA at 503.222.3275 and request a form be sent to you.



# Bridging Generations: The Seminar

By Catherine Brinkman, Schwabe Williamson & Wyatt and YLS President.

Surely, you've heard about it. "The Who" sang about it. "Fight Club" characters pondered it. Experts everywhere have studied it. And chances are, it affects your life on some level, nearly every day.

The Generation Gap.

Is there really one? If so, how does it affect your daily life, your career, your employer and your future? How do your peers feel about the practice of law, life priorities and their futures? What do more established lawyers feel about younger attorneys and vice versa?

What can we all do to get along better, work more productively and enjoy the daily and long-term prospects that our hard-fought careers can bring us?

We have answers, and the tools to assist you in understanding workplace dynamics on a generation-to-generation level.

Together, the YLS and the MBA's Managing Partners Roundtable, with the support of the MBA and facilitator Jo Smith, have spent the last year studying the perceived generation gap. Many of you,

specifically 524 Gen X-ers, 636 Baby Boomers and 142 Traditionalists, took a significant amount of quality time to answer our survey this spring, achieving a remarkable 36-38% response rate. In turn, the Generation Gap Task Force has spent a significant amount of quality time with your responses, to bring you the best information we can about issues relating to the generational spread.

Please join us to learn about these issues and more at the **Generation Gap seminar on December 6 from 3-5 pm**. You can't afford to miss it.

## Thank you to the firms who contributed generously to the Generation Gap project

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# Salaries Continue to Increase for Legal Support Staff

By Lauren Harkins, Legal Northwest.

The traditional ethics of working hard and showing up every day are commanding top dollars in the 2006 legal support staff marketplace. To gain a competitive edge and command those top salaries, one must possess a willingness to work, demonstrate longevity and experience and exhibit initiative. Words like loyalty, stability and willingness have become marketable traits for employers and employees alike.

Legal NW is finding an upswing in salaries that firms are willing to pay for, for the right fit. The most significant increase pertains to paralegals with average experience levels. The average salary range increased from \$50,000 to a new high of \$58,000.

As law firms grow, change, regroup and rearrange, Legal NW is also seeing highly qualified legal secretaries and paralegals seeking out new positions in response to firms' evolutions. These candidates

are willing to consider a lateral salary move for traditional guarantees from their employer: a stable work environment and good, old-fashioned appreciation.

Many law firms have stepped up compensation for talented candidates. Those individuals in line for salary increases in 2006 are not merely providing impressive resumes - they are demonstrating a strong and dedicated work ethic as well. The old adage of "suited up and showing up every day" is the standard for earning top dollars in today's legal market.

Legal Northwest is the staffing partner to the MBA and may be reached at 503.242.2414 or info@legalnw.com, www.legalnw.com.

For an up-to-date profile of legal support staff salaries in Portland, see the salary survey insert included in this issue.

# ABA Publications Discount for MBA Members

## Expert Witnesses

This comprehensive, practical guide to the use of experts in litigation explains the law concerning experts, tells how to choose and use them strategically and gives practical techniques for managing or challenging their testimony effectively. In the opening section, editor and principal author Faust Rossi catalogs the principles that every trial lawyer must grasp, analyzes the statutes and cases that illustrate them and tells how to deal with the problems you are likely to encounter in qualifying, entering and objecting to expert testimony. In following sections, leading trial lawyers reveal their tactics and techniques for the selection, preparation, discovery and examination of experts in general and of specific kinds of experts.

The MBA member price for this book is \$88, regularly \$110. We also encourage you to attend the MBA Out Experting the Expert Witness CLE seminar on November 6.

## PRO BONO VOLUNTEERS

Thanks to the following lawyers, who recently donated their pro bono services via the Volunteer Lawyers Project, the Senior Law Project, Community Development Law Center, law firm clinics, the Oregon Law Center, the Nonprofit Project and Attorneys for Youth. To learn more about pro bono opportunities in Multnomah County, check out the Pro Bono Opportunities in Oregon handbook, available at [www.mbar.org/docs/ProBonoGuide.pdf](http://www.mbar.org/docs/ProBonoGuide.pdf).

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The MBA member price for this book is \$111.96, regularly \$139.95. We would also like to remind you about the MBA Estate Planning:

Defective Trusts, Family Limited Entities and Other Ways to Get into Trouble with the IRS CLE seminar on November 7.

To purchase these publications or to see what others have said about them log onto [www.ababook.org](http://www.ababook.org) and enter your member discount source code PAB5EMUL. This discount applies to these or any publications featured on the ABA Web site.

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## Renewing your membership? Don't forget VLP...


The MBA thanks the following members, who gave more than the \$20 "check off" suggested donation to the Volunteer Lawyers' Project (VLP).

Please remember to look for the check off box on your membership renewal form, and be as generous as possible when donating to VLP.

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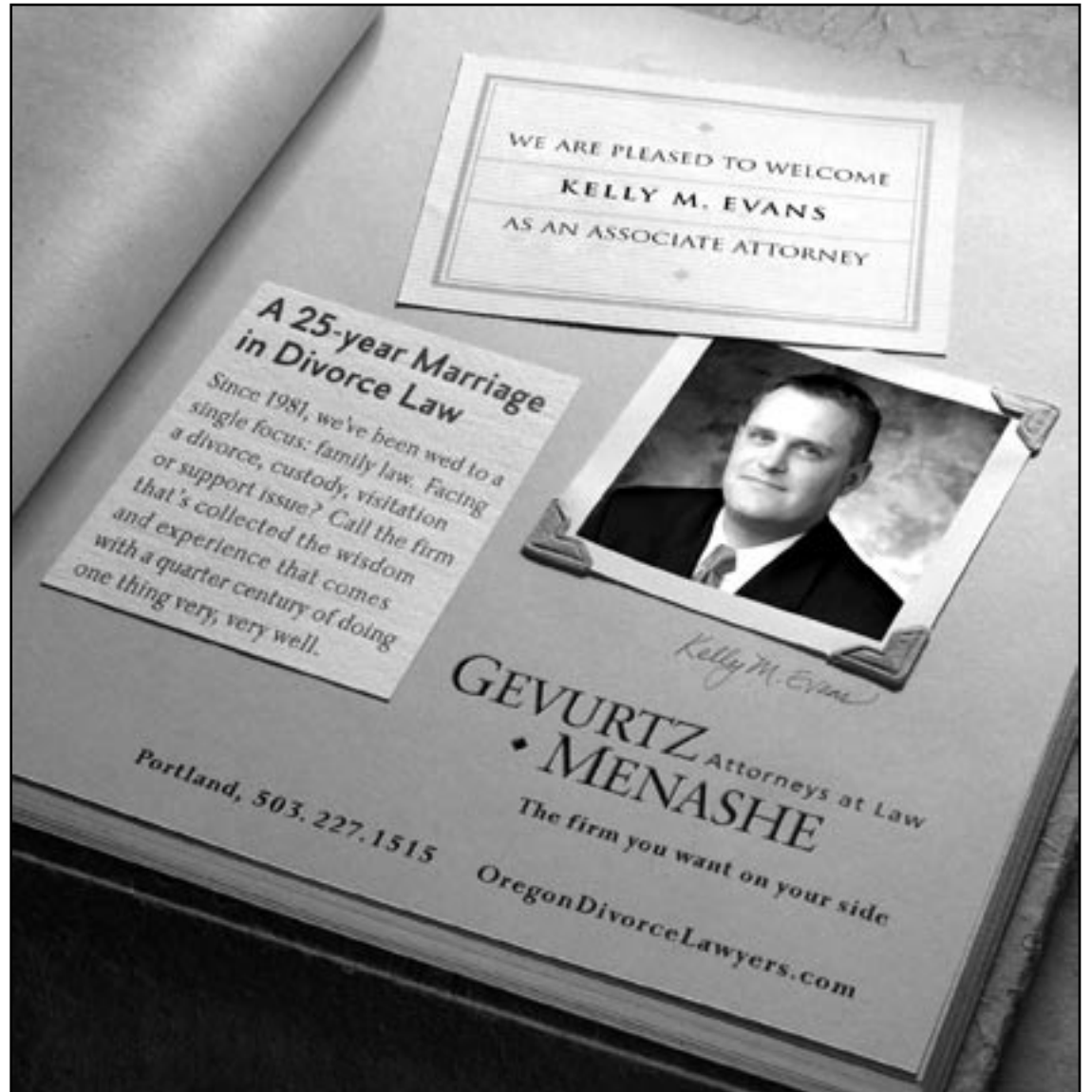


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Mr. Robinson graduated from Tulane University School of Law in 2006 and California Maritime Academy in 1999. He holds a U.S. Coast Guard Unlimited Master's License.

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# MBA 100<sup>th</sup> Anniversary Community Gift Fund Selects Classroom Law Project as First Grant Recipient

The Classroom Law Project (CLP) received a \$25,000 donation from the MBA Foundation 100<sup>th</sup> Anniversary Community Gift Fund in order to develop a "We the People - the Citizen and the Constitution" civics education program at two Parkrose and two Franklin middle and high schools.

At Benjamin Franklin High School, six attorney coaches volunteer to help the 30 students

in teacher Portia Hall's classroom on Monday evenings. Hall and the coaches work with the students in groups of four or five to help them answer questions about the constitution that were prepared by the CLP. The program culminates with a congressional district and then statewide competition in January. A national competition takes place in Washington DC in May.

MBA Member George Zarzana decided to volunteer with the program this year because he was a high school teacher before he began practicing constitutional law. "I want to share my experience about the law with young people," said Zarzana. "I think there is a real need for young people to understand the law and I am passionate about sharing my knowledge."

*George Zarzana and his wife Anne are volunteer coaches for the new Franklin High School Constitution Team.*




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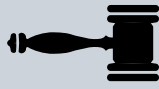


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1906 - 2006

**IP Law – A Retrospective**

Marger Johnson & McCollom attorneys Graciela Cowger, Alex Johnson, Jerry Marger and Alan McCollom contributed to this article.



Alex Johnson

Patent law attempts to harness the power of the idea to promote the country's world wide competitive leadership. It balances rewarding the idea's creator with a limited property right while providing the public with access to the idea.

The US Constitution in article 1, section 8, grants Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." On April 10, 1790, President George Washington signed the bill that codified the US patent system and gave inventors exclusive rights to their ideas.

In the 19<sup>th</sup> Century, patent law became very important, underpinning much of the innovation and investment that made the Industrial Age. By the mid-20<sup>th</sup> century, antitrust law was in vogue and patents were impugned as monopolies. Circuit Courts of Appeals applied disparate standards of patentability that undermined patents.

The Patent Act of 1952 dramatically changed the patent laws. Major changes included a codification of modern patentability requirements (i.e., an invention must be novel and nonobvious to be patentable) and of infringement. But still, courts usually decided patent cases against the patent owner. Patents simply were not considered important to a company's survival.

***"Patents simply were not considered important to a company's survival."***

Recognizing the need to unify patent law across the nation, Congress formed the Court of Appeals for Federal Circuit in 1982, combining the Court of Claims and the Court of Customs and Patent Appeals (CAFC). The CAFC, as it has come to be known, has nationwide appellate jurisdiction for patent cases and other cases of exclusive federal jurisdiction. Practically speaking, the CAFC is the court of last resort since few patent cases are taken up by the Supreme Court. Those cases taken up by the Supreme Court typically deal with critical issues affecting patent law such as determining what constitutes obviousness, clarifying the doctrine of equivalents, and establishing

**MBA Meeting Announcement for December, 1909**

***On invitation of the Entertainment Committee, Judge Thomas O'Day addressed the Association on 'Ethics of Personal Damage Cases.'***

claim construction principles. (The latter two concepts are explained below.)

Formation of the CAFC represented a gigantic shift in patent law. It meant that the tenets of patent law were more uniformly applied on a national scale with no inter-circuit disagreements. Patent owners were suddenly treated as if patents really meant something and they benefited from common law created in a circuit that was more effectively able to understand and deal with complex law and technologies.

As a result, patents became more recognized as important to a company's survival and success. Companies began policing and proactively enforcing their patents, which brought an almost immediate and substantial increase in patent owners' success in litigation. Patent filings increased and spread into new areas of technology, such as computer software and biotechnology.

***"By the early 1990s, there weren't enough patent lawyers..."***

By the early 1990s, there weren't enough patent lawyers to handle the ever-increasing patent legal needs. Companies responded by growing their own. Many set up incentive programs to funnel their own engineers to law school, often requiring them to serve the company as lawyers for a predetermined amount of time after finishing law school. That began the slow and steady increase, now an explosion, in the number of patent practitioners. Shortly thereafter, the litigation fires were fueled further by the dot-com boom when companies' entire values were held in their patent portfolios.

By 1997, another substantial change began to impact patent law, patent owners and patent applicants, when the Supreme Court clarified – and, many would say, limited – the doctrine of equivalents. The doctrine of equivalents holds that a product or process that does not literally infringe upon the literal terms of a patent claim may nonetheless be found to infringe if there is "equivalence" between the elements of the accused product or process and the claimed elements of the patented invention.

The doctrine of equivalents is intended to apply to situations where there is no literal infringement, but liability is nevertheless appropriate to prevent what is, in essence, a pirating of the patentee's invention through minor changes. The classical test for equivalence is whether the accused device "performs substantially the same

function in substantially the same way to obtain substantially the same result." In recent years, the CAFC has been trending toward ever-narrower claim scope. There are also people who are advocating for narrowing, or even eliminating, the doctrine of equivalents.

While the trend toward narrower claim interpretation has continued, the court has become less likely to invalidate claims based on prior art. In other words, decisions since the 1980s have strengthened the presumption that an issued patent is valid. Companies began to appreciate the value of their patent portfolios, and the potential value of acquiring more. In addition, they began to wake up to the defensive reasons for putting together patent portfolios - cross-licensing to reduce the chances that they would infringe patents of others, as well as to generate a revenue stream. On the whole, the rise in patent infringement litigation helped the business world appreciate a patent as both sword and shield.

Technicalities aside, the ultimate question is this: does the patent process - inclusive of the Patent and Trademark Office (PTO) and Court of Appeals for the Federal Circuit - promote innovation and help the US to maintain a leadership position in an increasingly competitive and innovative world?

***"Many think the PTO is producing poor quality patents..."***

Some critics question whether the PTO has really promoted innovation. Many think the PTO is producing poor quality patents although many patent experts would dispute such a generalization. From an inventor's perspective, the process has become overly expensive and complicated. And patent attorneys and clients alike agree that patent litigation - including enforcement and defense - has become prohibitively expensive.

Looking forward, the Patent Reform Act of 2006 is currently pending before Congress. Simultaneously, the PTO is working to change its own procedures. These are important first steps but the jury is still out on the ultimate value and impact these changes - if enacted and implemented - will have on promoting the progress of science and useful arts.

**A Century of Service Historic Pullout: More on the Evolution of Law Practice Areas**

By Judy A. C. Edwards, Executive Director.



The November Multnomah Lawyer historic pullout continues the focus on specific practice areas and how they have evolved over the years. In this issue, you will find an article of purely historic nature, while others present point and counterpoint viewpoints. Articles cover the areas of intellectual property, criminal law and product liability. We look forward to hearing from readers who would be willing to write about other practice areas.

Personal injury was already a topic of discussion early in the MBA's history, as evidenced by the title of the talk given to the membership in 1909. Unknown to us however, is the content of that talk. Our imaginations likely could take us in divergent directions if we speculate on how the talk and subsequent discussion proceeded.

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.

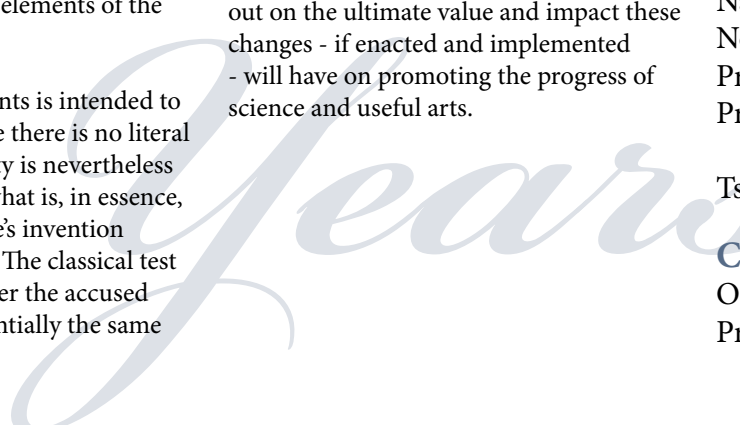
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## The Evolution of Oregon Criminal Law: A Prosecutor's View

By Norman Frink,  
Multnomah County Senior Deputy District Attorney.



The Multnomah County deputy district attorney

leaned across counsel table, and, shaking his fist within inches of the defendant's face, concluded his closing argument by shouting:

"It's a lucky thing for you, Ed Brune, that it was not my wife or son whose life you snuffed out that night during your drunken automobile ride... For had it been my child... I would have killed you myself, you despicable cur..."

The defense attorney's objection was cut off with judge saying, "I will not tolerate any further interruptions when counsel is making his argument and if there is any more of it somebody is going to get hurt."

The jury verdict was guilty of involuntary manslaughter.

Thus, in 1916 in the newly opened Multnomah County Courthouse, the first case of vehicular manslaughter in Oregon, *State v Brune*, ended.

A lot has changed in the years since then.

The time between Brune's conviction and today has been a turbulent one from the perspective of Oregon prosecutors. None of us today would defend the early prosecutor's argument or the judge's response. Most of the developments in Oregon's criminal law in general and for prosecutors in particular (even when they curtailed the power of the prosecution) have been extremely positive. No one would want to return to some of the events and types of prosecutions outlined below. Yet, it has been a rollercoaster ride that in relatively recent times threatened to elevate the rights of the criminal defendant above all other policy goals of the criminal justice system.

*"...it has been a rollercoaster ride..."*

At the time of Brune's trial, criminal law in Oregon was governed by state criminal laws drafted by Matthew Deady, the president of Oregon's 1857 constitutional conventional and Oregon's first federal judge. Those basic statutes, with amendments, remained in effect until the complete revision of the criminal code in 1971. There was no mandatory state bar association (that came over prolonged opposition in 1935) and the voluntary Multnomah Bar Association had only been in existence for 10 years. The Oregon Constitution did contain a bill of rights that was separate from that contained in the United States Constitution, yet no one dreamed that that document contained generalized expansive rights for criminal defendants - indeed it would be almost 50 years before most federal criminal constitutional rights were even held to apply in Multnomah County's criminal courts. In 1914, in part as a result of efforts by a former Multnomah County

deputy district attorney, a fledgling public defender's office had been created in Portland, but it was snuffed out within a year and a half with the Mayor of Portland remarking, "The purpose is to give these people justice. That is work to be performed by the judge it seems to me." Although there were other measures to provide court appointed attorneys over the years, it was not until 1970 that the ACLU and MBA worked to establish a private, not-for-profit corporation called the Metropolitan Public Defender Services, Inc., headed by another former Multnomah County deputy district attorney, to provide counsel for criminal cases in Multnomah County.

Perhaps, an early Multnomah County death penalty case with a special connection to the MBA best illustrates the changes when compared with today's procedures. On November 28, 1908. Portland lawyer James Finch walked into the office of his fellow Portland attorney Ralph Fisher, a volunteer ethics prosecutor for the fledgling MBA. Fisher had prosecuted Finch for a matter that resulted in his disbarment and had recommended against reinstatement. Two shots to Fisher's head were Finch's answer that November afternoon. Finch went on trial eight days after indictment and was hung at the Oregon State Penitentiary 13 months later.

*"Today an average death penalty murder case takes about two years to go to trial..."*

Today, an average death penalty murder case takes about two years to go to trial in Multnomah County. A defendant in such a case usually has two lawyers, an investigator and often a "mitigation specialist." Most such defendants have access to public funds for expert witnesses far beyond what is available to the prosecution. When convicted, they get a direct appeal to the Oregon Supreme Court, a state and a federal post-conviction relief action with appointed counsel and investigators again. Other than those defendants who have given up their right to continued litigation, a death sentence has not been carried out in Oregon since the penalty was reinstated 20 years ago.

It is not only procedural aspects of criminal law that are different. During the first half of the 20<sup>th</sup> century criminal prosecution was used in ways that we would find untoward today to enforce the moral, political, and, even, racial order. In 1916, the founder of Planned Parenthood was convicted in Portland's court of obscenity based on the photograph and descriptions in a family planning pamphlet, although the fine was suspended. In 1934, a communist-backed meeting to protest Portland police conduct led to a speaker being convicted of criminal syndicalism. In 1942, a lawyer was convicted in Portland of violating laws governing the curfew and internment of Japanese aliens and Americans of Japanese descent. Interestingly, two of these cases led to landmark United States Supreme Court decisions voiding criminal syndicalism laws under certain circumstances, but sustaining the forced movement of persons of Japanese descent during World War II.

As the county and the state moved into the second half of the century, the major events of local prosecution took a more traditional turn, but one with, once again,

some national implications. Additionally, these developments reflected badly on the abilities and professionalism of prosecution in Multnomah County.

In the early 1950s, Portland had at least some degree of corruption in its local law enforcement. Exactly what degree may have been is debatable, but what is not debatable is that it led to John and Bobby Kennedy shining the spotlight on Portland through Senate committee hearings that purported to show that Portland was the center of Teamster connected organized crime. *The Oregonian* ran a series of articles that, although they may have distorted or exaggerated the problem, won the paper the Pulitzer Prize and brought the State Attorney General's Office to town - presenting and getting 114 indictments against 41 defendants for alleged corruption. Most of the prosecutions ultimately fizzled, but District Attorney William Langley was convicted of a minor charge and removed from office. The state bar's later failure to sustain disciplinary proceeding against him together with the failure of most of prosecutions struck a seemingly ambiguous note to the whole affair.

What was not ambiguous was that Langley's office lost both major murder trials of the decade, one in which a lawyer's wife may well have been behind the dynamite that killed him in his car at the Columbia Edgewater Golf Club parking lot. That woman, Marjorie Smith (known in the local press as the "Black Widow"), got a change of venue and walked away a free woman.

In 1962 Multnomah County voters finally laid the basis for a professional, stable and competent prosecutor's office by electing George Van Hoomissen district attorney. Together with his successors (Des Connell, Harl Haas and Mike Schrunk) Van Hoomissen built an honest, professional and competent office.

Unfortunately, during those same years the criminal justice system in Multnomah County and Oregon as a whole was taking a darker turn. From the point of view of Oregon prosecutors, the 60s, 70s, early 1980s witnessed several disturbing developments: the effective deincarceration of the penal system until, for example, murderers were serving six or seven years; the unprincipled reading of unintended expansive constitutional privileges into the state bill of rights (a bill of rights drafted by the same civil libertarians that voted to exclude blacks from Oregon); the creation of biased evidentiary rules like the one that allowed a defendant to bring up a witness's prior criminal convictions, but not the prosecution.

It took 20 years of work in both the legislative and initiative arenas and the development of a working relationship between prosecutors and new crime victims' groups to rebalance the system.

In this regard, I note that the *Willamette Law Review* has just sponsored a symposium entitled "Unparalleled Justice: The Legacy of Hans Linde." From a review of the schedule it does not appear that the perspective of most crime victims and prosecutors was presented.

In concluding, let me express a special thanks to Fred Leeson, Phil Stanford and Carolyn Buan, whose books, respectively, *Rose City Justice*, *Portland Confidential*, and *The First Duty* allowed me to reach back beyond my own personal 29 years of experience with the history of the criminal law in Multnomah County and Oregon. Needless to say, my views and mistakes are not theirs.

## MBA 100<sup>th</sup> Anniversary Community Gift Fund

MBA 100<sup>th</sup> Anniversary Community Gift Fund Donors will be listed on a beautiful bronze plaque which will be displayed at the Multnomah County Courthouse, just outside the Presiding Judges' courtroom. To learn more, please contact the MBA at 503.222.3275.

The purpose of the fund is to increase civics education and participation and it will be administered by the newly formed Multnomah Bar Foundation. The MBA kicked off the fundraising campaign by committing \$50,000 to the fund. Listed below are those who have already made their generous donations or pledges.

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## The Fog of War An Historical Perspective on the Oregon Criminal Justice System

By Stephen Houze,  
Attorney at Law.



This article represents one person's view of the criminal justice system from the perspective of a long-time criminal defense attorney. The author's 34 years of criminal practice encompass many of the signal achievements and pervasive failures evident in the search for justice in the state courts of Oregon. This review necessarily touches on matters of philosophical approach and the setting of fiscal priorities. Winston Churchill once said that the true measure of a civilized society is how it treats persons accused of crimes.

*"...the true measure of a civilized society is how it treats persons accused of crimes..."*

In order to sensibly frame the discussion, a few facts are useful. At the risk of oversimplification, certain dates and statistics are noteworthy.

- The Constitution of Oregon was adopted nearly 150 years ago in 1859. Article I, section 15, of the original constitution provided: "Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice."
- In 1963 the United States Supreme Court for the first time recognized a fundamental constitutional right to appointed counsel for indigents facing criminal charges. *Gideon v. Wainwright*, 372 US 335, 83 S Ct 792, 9 LE2d 799 (1963). Prior to the *Gideon* decision, Oregon had, by statute, provided for court-appointed counsel for felony crimes. As discussed below, the actual practice of appointment of counsel in Oregon came under increased scrutiny post-*Gideon*.
- In 1984 the voters of Oregon re-enacted the death penalty.
- In 1989 sentencing guidelines became part of the criminal laws of Oregon, setting out rules which inhibit the sentencing discretion of courts on felony crimes generally.
- In 1995 the voters of Oregon adopted Ballot Measure 11, which provides for mandatory minimum sentencing for a host of felony crimes.
- In 1996, Article I, section 15, of the Constitution of Oregon was amended to reflect a changed public sentiment: "Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation."
- In 1999, Article I, section 43, of the Oregon Constitution enshrined a Victim's Bill of Rights \* \* \* "To ensure that a fair balance is struck between the rights of crime victims and the rights of criminal defendants \* \* \*"

In 1967 an ACLU task force, headed by attorney Barnes Ellis (newly admitted to practice in Oregon in 1964), along with Carl Neil and Millard Becker, sought to review the actual court practices of the appointment of counsel and found it to be appalling. For the most part judges were appointing attorneys from a coterie of lawyers of variable competence, who would gather at the city municipal court each morning, hoping to get a case. According to Barnes Ellis, in an interview for this article, an illustrative and egregious example of the poor quality of the representation provided was a case in which a court-appointed attorney pled his client guilty without ever having met the individual. Fortunately, Ellis was successful in his efforts as an ACLU volunteer lawyer in having the conviction overturned.

*"...decision to create a professional public defender organization..."*

The upshot of the ACLU study was a decision to create a professional public defender organization for the provision of indigent defense services in Multnomah County. The ACLU group obtained a \$15,000 LEAA Crime in the Streets federal grant and hired as the first public defender, Jim Hennings, in 1970. In 1971, funding came from Multnomah County under the enlightened leadership of County Chairperson Don Clark, which continued until 1983 when the State of Oregon assumed the responsibility for the provision of all indigent defense services through the Oregon Supreme Court.

This author began his career in criminal defense as a trial attorney in the newly formed Metropolitan Public Defender in 1972. Over the years, hundreds of other young and dedicated attorneys have worked there as well. That tiny office of a handful of lawyers in 1972 has now grown to more than 60 attorneys with offices in Portland and Hillsboro. Presently, public defender organizations and indigent defense consortia of attorneys now exist throughout the state and provide highly skilled criminal defense representation to indigent clients throughout Oregon.

The past three-plus decades of criminal justice in Oregon and the United States as a whole have been marked by what has been referred to as a "war on crime." As illustrated by changes to the Oregon Constitution and criminal code, various "tough-on-crime" measures have become fixtures in the criminal justice landscape of Oregon.

Oregon's population was 2 million in 1970; 2.6 million in 1980; 2.8 million in 1990; 3.4 million in 2000; and 3.6 million in 2005, less than doubling in 35 years. In the last three and one-half decades, however, Oregon's prison population has increased dramatically. That number has swelled from 3,000 inmates in 1980 to 13,000 in 2006, more than a four-fold increase. In 1985, for example, only 155 women were in prison in Oregon. In 2006, the number is over 1,000. In 1970, Oregon had two prisons. Oregon now has 13 prisons, most constructed in the last decade. More than 30 prisoners are on death row in Oregon. Recidivism, nonetheless, remains high with 30 percent of Oregon prison inmates returning to prison within three years of date of release for new crimes or serious release violations.

The citizens of Oregon have put enormous financial resources into its tough-on-crime measures. Nearly \$400 million went for new prison construction, largely to house Ballot Measure 11 inmates, with additional tens of millions of dollars in annual operating budgets. If only these measures and expenditures could be shown to have yielded commensurate benefits. Instead, the crime rate in Oregon, like the nation as a whole, is seemingly unaffected by these draconian measures. Our criminal justice system has simply become an incarceration system, the population of which remains the marginalized citizens of our society. Thousands are warehoused for years with little discernible impact on crime and its underlying causes.

Recent Oregon Department of Corrections data bears this out. African-Americans and Hispanics disproportionately comprise over 10 and 11 percent of the prison population respectively. Of the total population of 13,000, fully 6,000 inmates have mental health problems severe enough to require treatment that is essentially nonexistent in the Department of Corrections. Approximately 10,000 inmates suffer from moderate to severe drug abuse and addiction. Again, drug treatment is woefully inadequate in Oregon's prisons. Of the total prison population, nearly 20 percent are serving sentences for non-violent and property-related offenses. Two-thirds of the population ranges from 30 to more than 60 years of age. Nearly 5,300 men and women are serving mandatory minimum Ballot Measure 11 sentences, the shortest term of which is 70 months.

*"...fear of crime and new ineffectual tough-on-crime proposals..."*

Even the casual observer of the societal trends in our state can see the handwriting on the wall. Schools are failing to produce educated citizens. Alcohol and drug abuse are still with us in abundance. Mental health services are pitifully inadequate in our communities. Politicians continue to pander to the public by selling the fear of crime and new ineffectual tough-on-crime proposals when crime rates have, on their own, either declined nationally or remained the same. Through the fog of the war on crime over these many years we have managed to create a robust indigent defense structure that toils in an increasingly hostile incarceration-oriented criminal justice system, the end product of which has been to expend hundreds of millions of precious public dollars to build and maintain a flawed and failing solution to our state's endemic maladies of poor public education, many unskilled workers, rampant alcohol and drug abuse, a crisis in mental health services and the continual marginalization of the state's minorities. Unfortunately, it will take more than skilled and dedicated criminal defense attorneys to right the Oregon ship of state.

## A Retrospective on Product Liability in Oregon

By Nancy Erfle, Schwabe  
Williamson &  
Wyatt.



As with the other areas of law previously discussed in this pullout section, the arena of product liability law has changed vastly in the past five decades. Prior to the late 1960s, claims against manufacturers of products were limited to negligence claims or under the then existing Sales Act. In fact, it was very difficult to recover from the manufacturer or original seller of a product for alleged defects in its products.

*"...unreasonably dangerous, the manufacturer is liable for the harms caused by such a defect."*

The 1967 Oregon Supreme Court in *Heaton v. Ford* changed that landscape dramatically by adopting *Restatement (Second) of Torts* Section 402A. The Court held that if a product "is in fact unreasonably dangerous, the manufacturer is liable for the harms caused by such a defect." For the first time, the plaintiff had a strict liability claim directly to the product manufacturer if it could prove that the product was "dangerously defective."

In 1977, the Oregon legislature addressed and adopted a number of statutes directly relating to product liability cases. Several were key to the defense of these claims, including an eight-year statute of ultimate repose and a disputed presumption that a product is not unreasonably dangerous. Two years later, the legislature passed the Product Liability Act adopting Section 402A, defining product liability claims for the future. (ORS 30.900-.920.) The act laid out the elements of strict liability in Oregon, incorporating both the terms of the *Restatement* and importantly, the corresponding comments.

In the 1970s and 1980s, courts struggled with whether to direct their focus on the conduct of the manufacturer or the expectation of the user to find liability. By 1985, the Oregon Supreme Court appeared to have adopted the consumer expectation test to evaluate a manufacturer's liability, although subsequent decisions showed the continued struggle in determining what test to apply. Finally, in the case of *McCathern v. Toyota Motor Corp.*, the Oregon Supreme Court firmly stated that when a plaintiff alleges that a product is in a defective condition, unreasonably dangerous to the user or consumer, the plaintiff must prove that when the product left the defendant's hands the product was defective and dangerous to an extent beyond that which the ordinary consumer would have expected.

*"...to require such a claim be proven by clear and convincing evidence."*

As to punitive damages, often a major component of product liability lawsuits,

(Continues on next page)



## Products Liability: The Path to a Safer Society

By Linda K.  
Eyerman,  
Gaylord  
Eyerman  
Bradley



Products liability means the liability in law of the engineer, designer, manufacturer, retailer and installer to respond in damages for the product-caused injury. Because of products liability law, we live in a safer society where preventable injury and death are no longer acceptable. Only when products liability law fails in its primary purpose, accident and injury prevention, does it move to its secondary purpose, compensation of the injured victim.

**...preventable injury  
and death are no longer  
acceptable.**

Missing from the defense perspective is any recognition of the accident and injury prevention rationale behind the development of products liability law, and any acknowledgment that the restrictions added to Oregon's law in recent years are part of a tort "reform" agenda aimed at limiting the ability of courts and juries to hold wrongdoers accountable for injuries caused by unsafe products and other societal wrongs.

There is no more active battlefield in the war over civil justice than products liability litigation. As attacks on our tort liability system increase, it is important that lawyers, judges, elected representatives and ordinary people understand and fully appreciate the role of products liability law in accident prevention and the creation of a safer society.

**...consumers expect  
manufacturers to use  
foresight and safety  
engineering principles...**

Today, consumers expect manufacturers to use foresight and safety engineering principles to prevent accidental injuries. Compare this to 50 years ago, when industrial machines were sold without guards, fail safe switches or warning signs. There were millions of accidental injuries each year from lawn mowers, appliances, toys and other household products. Use of drugs such as thalidomide, pesticides such as DDT, industrial chemicals and food additives was widespread. Cars did not have seat belts or air bags; farm equipment did not have roll bars; and helmets had only minimal padding. Most consumer products were not subject to government safety regulation and American industry was protected from liability by a tort law which included immunities of every kind, privity requirements, limits on damages and a general unwillingness by courts to impose a duty of care on manufacturers in the design of their products. Professor Prosser's metaphor for these protective rules was a citadel.

Fortunately for consumers, tort law began to change in the late 1950s and early 1960s, thanks to a number of dedicated

lawyers working on the side of injured people, including some great ones here in Oregon, who set about to dismantle this citadel. These lawyers worked tirelessly to eliminate protectionist tort laws and hold corporations, like other citizens, accountable for injuries and deaths which they could have prevented through the use of reasonable care. Change is never easy, but eventually many judges and legislators came to understand that it is socially desirable to have the cost of reasonable accident prevention measures be a part of the cost of manufacture. The industry answer to increasing liability should be safe design, adequate instructions and adequate warnings. Products liability law should make it more profitable to use foresight and safety engineering principles to prevent injuries, than to pay compensation to victims after the injuries have occurred.

And as jury verdicts came in, the accountability principle began to work and industry began to adopt safety measures. The practice of counting sponges at the end of surgery, the use of flash arresters on lighter fluid cans and child-proof caps on drain cleaners are all direct results of tort verdicts. The McDonald's case has been criticized, but after the verdict the company turned down the temperature of its coffee to a level more in line with what consumers expect. An Oregon verdict against a nail gun manufacturer led the defendant and its competitors to promote a safer alternative trigger design. An Oregon settlement included an

**Tort lawsuits also promote  
safety by prompting  
government agencies to  
take action.**

agreement by a major washing machine manufacturer to modify its design by adding an important safety feature. Tort lawsuits also promote safety by prompting government agencies to take action. After a number of jury verdicts and settlements, the government prohibited the use of non-retardant fabrics in sleepwear, banned importation of toxic chemicals and recalled dangerous products including Ford Pinto cars and Firestone tires.

Like other states, it was in the mid-1960s that Oregon courts recognized strict liability claims against product manufacturers and sellers, in addition to negligence and other more traditional tort claims. The legislature codified this common law a decade later. Unfortunately, the path to a safer society is not a straight one, and Oregon law has always had its share of special protections for business and industry. The statute of ultimate repose prohibits Oregonians from bringing a products liability lawsuit if the product is more than eight years old. This is one of the most restrictive laws in the country and a great benefit to out-of-state manufacturers. A damages cap on personal injury cases was held to violate the right to jury trial under the

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Oregon Constitution, but to date a similar cap on wrongful death cases has been upheld, making it difficult to bring an expensive products liability case where the harm caused is death. Punitive damages

are available in Oregon to punish the wrongdoer and deter future misconduct, but the majority of any punitive damages award goes to the State of Oregon with no provision in the statute that the State pay its pro-rata share of attorney fees and costs. On the bright side, while *Daubert* may be the law in federal court, the Oregon courts take the traditional approach of determining the admissibility of scientific evidence using the Oregon Rules of Evidence.

The defense suggests that restrictions on the substantive law of products liability and procedural hurdles are helpful in "creatively and aggressively defend[ing] their manufacturing clients." This is one perspective, but it is important not to lose sight of the main issue: That consumers expect products to be safe, and products liability litigation is effective in keeping dangerous products off the market and out of the hands of unsuspecting consumers.

*Linda K. Eyerman is a shareholder in the Portland law firm of Gaylord Eyerman Bradley, where she represents people who have been seriously injured by defective products and medical malpractice. She is a past Chair of the OSB Products Liability Section and a past President of OTLA. She can be reached at 503.222.3526 or linda@gaylordeyerman.com.*

## Product Liability

(Continued from previous page)

the 1995 legislature modified the product liability provision to require such a claim be proven by clear and convincing evidence. Moreover, the evidence had to establish that the defendant had acted with malice or shown a reckless and outrageous indifference to a highly unreasonable risk of harm.

The Product Liability Act also provides a "safe harbor" provision to the manufacturer of pharmaceutical products. This provision precludes punitive damages if the drug was "manufactured and labeled" in accordance with the requirements of the FDA and is generally recognized as safe and effective "pursuant to FDA guidelines." There are exceptions to this punitive damage safe harbor if it is determined the defendant manufacturer knowingly withheld or misrepresented relevant information about the harm actually suffered from either the FDA or the prescribing physician. While not a bar to claims, it certainly limits the inclusion of certain punitive damage claims against this limited type of manufacturer.

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testimony."**

Two of the major milestones for defending product liability cases came not in the substantive law, but in the procedural aspect of admitting expert testimony and proceeding with a claim for punitive damages. When the Ninth Circuit Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the federal courts took on the role of evidentiary gatekeeper for expert testimony. Although many of those factors had been identified in the 1984 Oregon case of *State v. Brown*, it was not until the Oregon Supreme Court spoke again in *State v. O'Key* that defendants found authority to push trial courts into taking an active role in reviewing and potentially excluding expert testimony prior

to its introduction to the jury. With our very unique Oregon way of trial by ambush, getting a court to address an expert's qualifications or untrustworthy opinion can be tricky, but most defense practitioners believe it is worth their best efforts.

Second, the mid-1990s amendments to the punitive damage statutes require that instead of a plaintiff being allowed to plead a punitive claim in her initial pleading, some proof must be developed before such a claim can be made. The plaintiff by motion must seek to amend to include punitive damages with sufficient admissible evidence to withstand a motion for directed verdict. This procedural requirement at the very least forces a plaintiff to produce some level of admissible evidence before simply stating a punitive claim, which by its nature opens the defendant up to expensive discovery and requires the defense of a claim which may have no basis.

**"...forces a plaintiff to  
produce some level of  
admissible evidence..."**

Product liability practitioners in Oregon will not likely again see the fundamental change to their practice similar to what occurred with the codification of Section 402A. However, changes to other substantive issues such as damage caps, summary judgment standards and procedural hurdles continue to allow defense counsel to creatively and aggressively defend their manufacturing clients.

*Nancy Erfle is a shareholder at Schwabe, Williamson & Wyatt and Chair of its Product Liability Litigation Practice Group. The author gratefully acknowledges the insight and information provided by retired Schwabe shareholder Roland F. (Jerry) Banks. Nancy may be reached at 503.796.2497 or nerfle@schwabe.com.*

## 2006 MBA Awards Luncheon



MBA Board: Back Row L-R, Nancie Potter, Leslie Kay, Kelly Hagan, Christine Meadows, Catherine Brinkman. Front Row L-R, Jeff Crawford, Peter Glade, Thom Brown, Michael Dwyer. Missing are David Ernst, Mike Bloom, Scott Howard, Agnes Sowle, Diana Stuart



YLS President Catherine Brinkman and Past President Eric Waxler