



THE OREGON JUDICIARY

Part II

Challenges for the 21st Century



LEAGUE OF WOMEN VOTERS® OF OREGON
EDUCATION FUND

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How LWVOR approached this study

During 2006 League members interviewed the Presiding Judge and Trial Court Administrator (TCA) in each of Oregon's 27 judicial districts. The League study committee prepared a questionnaire for Presiding Judges and one for TCAs.¹ We mailed the questionnaires ahead of time to allow the judges and TCAs to prepare for our interview. In each interview we took notes of the interviewee's responses. We summarized the responses in written form and returned the summary to each interviewee for his or her review and correction. The responses, as edited and approved by the interviewees, are a central part of our study.

Among others, the League also interviewed Chief Justice Paul J. DeMuniz of the Oregon Supreme Court, retired Chief Justices Wallace P. Carson, Jr. and Edwin J. Peterson of that Court, Chief Judge David Brewer of the Oregon Court of Appeals, Judge Henry Breithaupt of the Oregon Tax Court, State Court Administrator Kingsley W. Click, and former governors Barbara Roberts and Victor Atiyeh. The League of Women Voters of Oregon is grateful for the information so freely provided by all whom we have interviewed.



Columbia County Courthouse



Clatsop County Courthouse

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Washington County Courthouse

¹ The questionnaires appear on the League's web site (www.lwvor.org/studyreport.htm).

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Jackson County Courthouse

Introduction

Across the nation, state court systems face a wide variety of challenges – from large caseloads and inadequate funding to outside efforts to influence the decision-making process. The judiciary is the most poorly understood and least visible of the three co-equal but separate branches of government. Oregon’s courts face these same challenges.

Following the 2001-2003 legislative session, five special sessions of the Legislature left the Oregon Judicial Department with a record decrease in funding. The funding cuts caused staff reductions, staff salary reductions, and closure of all Oregon state courts on Fridays for several months.

Three ballot measures and two legislative proposals sought to change judicial selection and election in Oregon. Each of those initiatives would have politicized the process of appointing and electing judges or made it easier to remove judges from office. All five efforts failed.

- 2002 – Two ballot measures would have amended the Oregon Constitution: Ballot Measure 21 to require “none of the above” as an alternative on the ballot for each judicial office and Ballot Measure 22 to require

election by district of judges of the Oregon Court of Appeals and justices of the Oregon Supreme Court.

- 2003 – Two legislative resolutions proposed to amend the Oregon Constitution: Senate Joint Resolution 29 to require election by district of justices of the Oregon Supreme Court and House Joint Resolution 42 to require senate confirmation of each person appointed by the governor to fill a judicial vacancy.
- 2006 – Ballot Measure 40, like Measure 22, would have amended the Oregon Constitution to require election by district of judges of the Oregon Court of Appeals and justices of the Oregon Supreme Court.



Morrow County Courthouse

In this two-year study, the League of Women Voters of Oregon has examined the role of the Oregon Judicial Department and some of the issues it faces in the early years of the twenty-first century. The League’s first publication in this study, *An Overview of the Oregon Judiciary*, presented a brief review of the history, structure, and basic functions of the Oregon Judicial Department. This publication further explains the work and the major challenges facing the courts today.

A View of Oregon Trial Courts in 2006

The Oregon Judicial Department (OJD) is the state-funded judicial branch of Oregon government. The OJD consists of the circuit courts (the trial courts), the Oregon Tax Court, the Oregon Court of Appeals (the intermediate court of review), and the Oregon Supreme Court (the highest court of review). While the three levels of the OJD share common characteristics, circuit courts have some that are unique to the work that they do. Oregon's circuit courts are its trial courts of general jurisdiction. That is, trial court judges hear all types of cases, other than tax cases. Although Oregon has 36 counties, it has only 27 judicial districts. Five judicial districts include more than one county. (See Appendix A.) As of January 2007 there are 173 circuit court judges assigned to the judicial districts, from which they are elected.

The judicial districts are diverse in geographical size and population. The 4th Judicial District (Multnomah County) is the smallest in area (465 square miles), has the largest population (672,906), and has the most judges (38). The 24th Judicial District (Harney and Grant Counties) is largest in area (14,756 square miles), has a population of 14,950, and has one judge who divides his time between the courthouses in Harney and Grant Counties. Two other judicial districts have only one judge: the 8th Judicial District (Baker County) and the 26th Judicial District (Lake County). The physical size of a district, its population, and the availability of the services necessary to the work of

the court (e.g., certified interpreters; certified mediators; and drug, alcohol, and mental health services) all affect the ability of the circuit court judges to do their work.

Court Facilities

Among the buildings used by the OJD, the state owns and maintains only the Supreme Court Building and the Justice Building, located on the Capitol Mall in Salem. Those historic buildings house the offices of the justices of the Oregon Supreme Court, the judges of the Oregon Court of Appeals, and their staffs. Both courts hear arguments in the Supreme Court Courtroom on the third floor of the Supreme Court Building, which also houses the Oregon Law Library. The buildings are maintained with money from the state General Fund.



Oregon Supreme Court

There is at least one courthouse in each of Oregon's 36 counties. Some counties have additional court facilities (Multnomah County has a courthouse and four other facilities used by the circuit court). These buildings are the home of the Oregon circuit courts. Ten courthouses that are a century-old are still in use.² Many were built in the 1950s,³ and two were built in the last ten years.

Legislation passed in 1981⁴ requires each county to "[p]rovide suitable and sufficient courtrooms, offices and jury rooms for the court, the judges, other

² Benton (1889), Sherman (1899), Polk (1900), Wheeler (1902), Morrow (1903), Columbia (1907), Clatsop (1908), Baker (1909), Crook (1909), and Wallowa Counties (1909). Janine Robben, "The Courthouse Blues," *Oregon State Bar Bulletin* 65, no. 5 (February/March 2005): 15-16.

³ Ibid. 16.

⁴ Until 1981 the state paid the salaries of circuit court judges, while county governments met all other costs of the circuit court operations within their boundaries. When the costs of those operations increased substantially beginning in the 1960s, the Legislature created a state-funded court system to pay for court operations as well as judges' salaries. That 1981 legislation left the counties responsible for providing and maintaining circuit court facilities.

officers and employees of the court and juries in attendance upon the court, and provide maintenance and utilities for those courtrooms, offices and jury rooms”⁵ for the circuit court within its boundaries.

Counties receive some help from the state for court security costs,⁶ but each county bears the financial responsibility for structural changes in or replacement of its court buildings. Over the years many counties have found it increasingly difficult to meet that obligation. Today many of Oregon’s courthouses are inadequate for the work that they do; or, as in the case of Multnomah County, the 90-year-old courthouse is so vulnerable to earthquake that it is considered life-threatening.⁷ The Multnomah County courthouse not only is seismically unsound but also has massive problems in its plumbing, electrical, heating, and air systems.⁸

A judicial district having the workload to justify additional judges may not receive them without the county’s agreement to provide the courtroom space for additional judges. Clackamas County demonstrated the need by reason of its workload

for at least two more judges, but the county only had the financial resources to construct one additional courtroom and office space for one judge. The Legislature authorized one new judge for Clackamas County. The new judge took office in January 2007, but the court must continue to struggle with a workload in excess of its judicial and staff resources. Renovation of the courthouse to add one courtroom

and judge’s chambers caused relocation of the jury assembly room and law library from the courthouse to a nearby building.⁹

There are only two new courthouses in Oregon. The old Klamath County courthouse was declared unsafe after two earthquakes in 1993 registering 5.9 and 6.0 on the Richter scale. Four years passed before Klamath County voters passed a bond measure and construction began on the new courthouse.¹⁰ The old courthouse in Hermiston was fire-bombed and recently replaced with a state-of-the-art building.¹¹

In only four judicial districts did presiding judges and trial court administrators tell us that their courthouse facilities were adequate for their cur-



Basement records storage.



Six chairs added to a six-person jury box.

5 Oregon Revised Statutes, sec. 1.185.

6 Robben, “The Courthouse Blues,” 9.

7 Ibid., 11.

8 Interview with Douglas Bray, Trial Court Administrator, Multnomah County.

9 Interview with Mari Miller, Trial Court Administrator, Clackamas County.

10 Robben, “The Courthouse Blues,” 10.

11 Interview with William Jones, Trial Court Administrator, Umatilla and Morrow Counties.

Problem Courthouses

When Union County's courthouse was condemned in the 1990s, the circuit court was moved to a hospital building constructed in the 1950s. The court is on the first and third floors of the building. Entry to the court is from the side of the building. Although a solid structure (Presiding Judge Phillip Mendiguren has said that, unlike Multnomah County's courthouse, if an earthquake struck, the Union County courthouse would be the only building left standing), it has pillars in the middle of each courtroom and is not properly organized to handle the day-to-day business of the court.¹² Two bond measures for a new courthouse have been soundly rejected by the voters.¹³

* * *

The sole elevator in the Clackamas County Courthouse is not large enough to accommodate the gurney used by emergency medical technicians to transport a person in a medical emergency. To remove a person from the upper floors, EMTs strap the person to a board rigged to a pulley system and slide the board down the stairway to the first floor.¹⁴

* * *

Grant County's courtroom is located on the top floor of the building. In the summer a single old air conditioner mounted in the wall is too noisy to be used when the court is in session. Instead the room is cooled with a swamp cooler that is on the roof. The swamp cooler is not very effective in extreme summer heat. On those warm days, Presiding Judge William Cramer can see that jurors are not concentrating in the hot, stagnant air and occasionally asks them to take a break and stretch to help them stay awake and attentive to the testimony.

* * *

An eastern Oregon courthouse has no elevator to the courtroom on the second floor of the building. In one case, a wheelchair lift attached to the staircase was inadequate to lift a litigant using a wheelchair. Other measures were taken, but the litigant could not gain access to the courtroom. The presiding judge then moved the trial to a public conference room three miles away from the courthouse.

rent needs. The comments from other judicial districts revealed many problems with courthouse facilities, including lack of space for judges, staff, juries, mediation services, child care, conference rooms, specialty courts, records storage, and security personnel and equipment. Some courts are struggling to fit 12-person juries into courtrooms equipped with only 6-person jury boxes.

Aside from space issues, the aging courthouses have serious heat and air conditioning problems, faulty electrical systems, a need to upgrade to accommodate current technology in courtrooms and elsewhere, insufficient compliance with access requirements under the Americans with Disabilities Act, and inadequate fire protection and fire-warning systems.

In counties with smaller populations, the courts share



Computer equipment on judge's bench.

buildings with county offices. Most often, the court is located on the upper floor of the building. That location limits access for those litigants, jurors, witnesses, and the public who are not able to climb stairs. Elevators are not always reliable and, in at least one courthouse, do not exist. While the courts have a need to secure their premises against weapons, these counties do not want to limit the public's free-

dom of access to the building by setting up security devices at building entrances or by limiting the number of entrances.

Security often presents major problems. Multiple building entrances make it hard to control security. Often defendants in custody must pass through the same hallways used by jurors, victims, and other members of the public because there is no secure passageway through which to move prisoners. Some

¹² Interview with Hon. Phillip Mendiguren, Presiding Judge, Union and Wallowa Counties.

¹³ Robben, "The Courthouse Blues," 9.

¹⁴ Interview with Mari Miller, Trial Court Administrator, Clackamas County.

courthouses have bullet-resistant glass protecting of-fice staff or metal detectors at the door of the court-house or of the courtroom, but there is concern for the safety of the judges, persons in custody, and ev-eryone who works or has business in the courthouse. For example, in the winter of 2006 an angry man drove his pickup truck through the entrance of the Marion County Courthouse.

Most counties do the best they can but, with persis-tent revenue problems, providing “suitable and suffi-cient” courtroom facilities may not be the highest pri-ority. As of 2005 Union County did not attempt addi-tional bond measures for a new courthouse knowing that it would be competing against the schools.¹⁵ At least two bond measures to finance a new courthouse have failed in Clackamas County.¹⁶

In the last 12 years there have been five task forces appointed to deal with the issue of court facilities, but the problems remain. The latest such task force, working in 2006 and 2007, has attempted to involve all interest groups in the process and focused on is-sues such as financing, the meaning of “suitable and sufficient,” and ownership of the facilities. The task force will submit to the Legislature proposed legisla-tion addressing these issues.¹⁷

The Trial Court Administrator and Circuit Court Staff

Trial court administrators and the court staff are as important as the judges to the smooth function-ing of the courts. The 1981 legislation that created Oregon’s state-funded court system made the presid-

ing judge of each judicial district the administrative head of his or her circuit court.¹⁸ The legislation au-thorized the presiding judge of the judicial district to appoint a TCA, with the approval of the circuit and district court¹⁹ judges of the district, to assist with the administrative duties of the court.²⁰ That local con-trol of the circuit courts is balanced by the role of the State Court Administrator who, under the supervision of the Chief Justice, oversees the budget, the person-nel system, and the information technology system used by all the courts.²¹

The 1981 legislation charged the TCA with respon-sibility for the care, custody, and control of court re-cords.²² The Legislature has since added additional statutory responsibilities, including oversight of court security plans and creating and maintaining disaster recovery plans. “In addition to the statutory duties, the trial court administrator’s ultimate responsibility is to ensure that the delivery of services to the court’s customers is carried out in as efficient and as timely a manner as is possible with the resources available.”²³

- TCAs oversee all court staff, with the excep-tion of judicial assistants, who report directly to their judges.
- TCAs manage day-to-day operations of the courts including human resources, budget, re-cords, case flow, jury system, purchasing, and information systems and technology.
- TCAs gather statistics on court processes and report to the state.
- TCAs implement projects the judges request, such as drug court.
- TCAs collaborate with government officials

15 Robben, “The Courthouse Blues,” 9.

16 Interview with Mari Miller, Trial Court Administrator, Clackamas County.

17 Interview with Brian DeMarco, Staff Counsel, Civil Law, Office of the State Court Administrator.

18 Oregon Revised Statutes, sec. 1.002(5).

19 In 1981 district courts in each judicial district handled misdemeanors, violations, and smaller civil claims. The Legislature abolished the district court effective January 15, 1998, and incorporated district court jurisdiction into the circuit court. Interview with Douglas Bray, Trial Court Administrator, Multnomah County.

20 Oregon Revised Statutes, secs. 8.185 and 8.195. Before the 1981 legislation authorized a state-funded TCA in each judicial district, TCAs were working in a few counties. The first TCAs and their staffs were employees of the county in which the particular court existed. David Saari, a Eugene attorney then employed by the League of Oregon Cities, was the first TCA in the state, appointed in 1965 to serve in Multnomah County. In the 1970s Lane, Clackamas, and Marion counties also established the position of TCA. Interview with Douglas Bray, Trial Court Administrator, Multnomah County.

21 Interview with Douglas Bray, Trial Court Administrator, Multnomah County.

22 Oregon Revised Statutes, sec. 8.225.

23 Douglas Bray, Trial Court Administrator, Multnomah County.

and agencies to facilitate operation of the courts. “The TCA is an integral link between the court and the Office of the State Court Administrator, local Bar, adult and juvenile probation departments, local law enforcement agencies, juvenile and adult services providers, and a variety of civic organizations, the public in general, and the media.”²⁴

Some of the state’s TCAs manage multiple courthouse facilities. In addition, in judicial districts with smaller populations, TCAs must be able to perform the same duties as the court’s staff.

Circuit court staff members perform a myriad of duties including keeping the court calendar, jury coordination, data entry, filing, general office work, and customer service. They are also in charge of collections and accounts, and serve as cashiers. Court staff members may have specialized duties, such as family law coordinator, drug court specialist, mediation coordinator, verifier for indigent defense,²⁵ or technical support. In smaller judicial districts, staff members are cross-trained to do all the work that needs to be done.

Court operations personnel require training in court processes and the legal system. Other staff members with special skills include computer technicians, language interpreters, financial recorders, stenographic reporters, drug court coordinators, and family law coordinators. Law clerks must have a law degree.

Staff members are typically trained on the job by another experienced staff member. The State Court Administrator’s (SCA) office offers training programs in Salem and by video or computer. The SCA also arranges Peer Information Exchanges for sharing of “best practices.” Staff training varies from court to court. Nearly all TCAs noted the importance of training but lack both funds and staff time for training away from the court.

About one quarter of the 27 judicial districts reported having sufficient staff to do the necessary work. More than half described their staff situations as “understaffed for the number of cases,” with “too frequent vacancies.” In Tillamook County some staff members agreed to four-day work weeks (nine hours per day) to create salary savings of 10% to be used for supplies. Where there are sufficient staff members to handle the basic courtroom duties and data entry, there are often not sufficient staff members to operate innovative programs such as drug court. Regardless of the challenges TCAs face, TCA Tracey Cordes of Benton County expressed the common sentiment: “The bottom line is that we have no choice but to get the work done and we get it done, largely because our staff are very hard working.”

Case Management in Oregon’s Circuit Courts

In 2005, 611,946 new cases were filed in the circuit courts of Oregon. The most cases filed in a single district (206,388) were filed in the 4th Judicial District (Multnomah County), and the fewest cases filed in a district (857) were filed in the 24th Judicial District (Harney and Grant Counties).²⁶ The circuit courts closed 626,460 cases.²⁷ In the first six months of 2006, 305,380 new cases were filed²⁸ and 309,944 were closed.²⁹

Circuit court judges handle a wide variety of cases, including felonies, misdemeanors, violations, general civil litigation (some examples are contract disputes and personal injury cases), domestic relations cases, family abuse protection orders, juvenile dependency and delinquency cases, civil commitments, probate, landlord-tenant disputes, and small claims. It is a challenge for the judges and staff to manage the large caseload.

24 Candia Friesen, Trial Court Administrator, Polk County.

25 The indigent defense verifier interviews people charged with an offense who cannot afford to hire an attorney. The verifier must verify the financial information supplied by the defendant to determine whether the defendant qualifies for appointment of counsel under the indigent defense application and contribution program.

26 OJD, Office of the State Court Administrator, Table 1 – *Cases Filed Trend Data (2005)*.

27 OJD, Office of the State Court Administrator, Table 2 – *Cases Terminated Trend Data (2005)*.

28 OJD, Office of the State Court Administrator, Table 1 – *Cases Filed Trend Data (January through June 2006)*.

29 OJD, Office of the State Court Administrator, Table 2 – *Cases Terminated Trend Data (January through June 2006)*.

In all districts, judges balance time deadlines mandated in criminal cases and in juvenile dependency cases with trying to dispose of civil cases, some of which also have deadlines that the court must accommodate (for example, landlord-tenant disputes).³⁰ All presiding judges responded that they are getting by. Common comments were that they are “right on the edge” or “barely” managing to get by.

As the state continues to grow, courts will need more judges and increased staffing. Washington County with 14 judges and Clackamas County with 11 judges have large populations that continue to grow. Presiding Judge Thomas Kohl (Washington County) reported projections that, in 10-15 years, Washington County will have more residents than Multnomah County, which now has 38 judges.

Deschutes County is a fast-growing community where the court is struggling with its current staffing and judges. As TCA Ernest Mazorol explained, “Staff turnover has left us unable to keep up with a changing and increasing population. With the population growth, we have more murders, disputes over water rights, and drug use (especially meth) which impacts personal and domestic abuse as well as property crimes.” Presiding Judge Michael Sullivan commented, “Within a few years we won’t be able to handle it any longer.”

The likelihood of a conflict of interest with a party to the litigation creates problems for circuit courts with few judges. As Presiding Judge David Hantke (Tillamook County) observed, when conflicts occur “we must ask a judge from another district to handle the matter which, in turn, adversely affects that judge’s schedule and disposition of cases in that judge’s district as well.”

Some judicial districts have special problems that add to their caseload and affect case management. For example, Marion County, as the seat of state government, faces many complex governmental legal challenges. Multnomah County has the largest caseload of all the judicial districts, including many complex civil actions and class action cases. Other judicial districts are affected by the presence of a state prison, an Indian reservation, or areas of high poverty. Some judicial districts do not have enough local language interpreters.



Large caseloads may result in delay in disposition of cases. In Josephine County, where a recent study of judicial resources determined the court is in need of a fifth judge, Presiding Judge Lindi Baker noted that scheduling delays have caused criminal defendants to seek dismissal of charges for lack of a speedy trial. “Delay in resolving cases,” she said, “also impacts child custody cases, as children need permanency, security, and a safe home.”

Courts have developed a variety of techniques to better manage the large caseloads. For example, the largest district, Multnomah County, relies on 15 non-elected referees³¹ who work as pro tem judges.³² Multnomah County has also “taken a number of shortcuts that result in hearings lasting much shorter times than would be optimal” (Presiding Judge Dale Koch).

Rural judicial districts have few judges, great distances to travel for all who are involved in hearings and trials, and few attorneys willing to represent indigent defendants in criminal cases. Such districts are able to manage their caseloads by developing systems to overcome the handicaps of distance. They

30 OJD, *Oregon Standards of Timely Disposition in Oregon Circuit Courts*.

31 The 15 referees account for 12.5 FTE (full time equivalent) positions. “FTE” means one person working a 40-hour week.

32 For an explanation of the terms referee and pro tem judges, see Appendix C.

use closed circuit TV to connect judges, lawyers, and litigants for court hearings and trials. About 35 to 40 times a year, Presiding Judge William Cramer (Harney and Grant Counties) continues a trial into the night to avoid extending the trial into another day. Presiding Judge Lane Simpson (Lake County) has held court on Saturday and for longer hours during the week. Both judges are the only judges in their judicial districts.

Rural judicial districts also rely on local courts³³ to carry some of the burden. The single circuit court judge and the staff in each of Baker and Harney County circuit courts benefit from their local justice courts which hear traffic, misdemeanor, small claims, and forcible entry and detainer (evictions from real estate) cases. The same is true for the two-judge circuit court in Malheur County. Those types of cases generate large workloads which the judges and small circuit court staff in each county would have difficulty handling.

Jurisdiction of local courts over certain types of cases also creates concern. Seven eastern Oregon counties (Sherman, Gilliam, Wheeler, Morrow, Malheur, Grant, and Harney) have boards of county commissioners called *county courts*. Each has a county *judge* who chairs the county commission and performs some limited judicial functions. County *judges* do not need to be lawyers. Oregon law gives county judges authority to hear juvenile matters.³⁴ One presiding judge expressed serious concern that a non-lawyer is allowed to handle matters involving a very complex area of the law that may have consequence for juveniles. Municipal courts in Wasco, Polk, and Clatsop Counties hear driving while under the influence of intoxicants (DUI) violations that are committed within the city limits. Like juvenile matters, this practice raises a concern

that DUI violations are matters of such consequence that they should be heard in the circuit courts.

Disposition of Criminal Cases

Presiding judges identified many issues they face when disposing of criminal cases, but the following were mentioned most often.

Judges consistently said the greatest concern was the difficulty of securing, or the inability to secure, treatment for drug abuse, alcohol abuse, and mental health problems.

Judges reported the enormous impact of methamphetamine addiction with its devastating effects on families, particularly children, and the crimes committed in the community to support the addiction. Some counties offer drug treatment in their jails, but presiding judges noted that a substance abuser, without treatment after release from jail, will re-offend. Addicted offenders are often held in jail facilities pending acceptance into publicly-funded residential programs. Not all communities have treatment programs.

The capacity of local jails often determines how long defendants will be held in custody for pending court appearances, for probation violations, or to serve a sentence for an offense. Only a few counties have adequate jail capacity. Some counties operate their jails at less than full capacity because they cannot afford to fully staff a jail facility, sometimes renting beds to other county corrections departments.

Criminal cases place the greatest demand on the court calendar and delay trials of civil cases. The OJD has set a goal of 120 days for the timely disposition of 90% of criminal cases.³⁵ Interviews revealed

33 Oregon has three types of locally funded courts that are not part of the Oregon Judicial Department: county courts, justice courts, and municipal (city) courts. The Oregon Judicial Department has no responsibility for local courts.

34 Oregon Revised Statutes, secs. 3.260 and 3.265 and 5.020. County judges in Gilliam, Sherman, Wheeler, and Morrow Counties have authority to hear juvenile cases.

35 OJD, *Oregon Standards of Timely Disposition in Oregon Circuit Courts*. "Felony—90 percent of all felony cases should be adjudicated or otherwise concluded within 120 days from the date of arraignment.... Misdemeanor—90 percent of all misdemeanors, infractions and other nonfelony cases should be adjudicated or otherwise concluded within 90 days from the date of arraignment...."

difficulties meeting this deadline due to caseload, crime lab delays, and failure of the defendant to appear in court for a hearing or trial. Releasing a defendant from custody prior to trial contributes to the failure to appear in court. Dockets are filled with jury trials that are cancelled at the last minute because of a defendant's failure to appear or a last-minute negotiated settlement between the district attorney and defense counsel.

Presiding judges reported that fairness and balance in sentencing is a positive objective, but that sentencing guidelines are restrictive and limit judges' discretion. For offenses governed by Measure 11,³⁶ judges have no discretion in sentencing. Judges commented about the unfair effects of Measure 11 and were concerned that it has made sentencing a tool to be used by the District Attorney in plea negotiations, giving the District Attorney the power to decide both the charge and the penalty. Sentencing guidelines, as set forth by the Oregon Criminal Justice Commission,³⁷ allow for aggravating and mitigating factors and past

criminal history. Measure 11 does not consider criminal history and does not allow any variance in the predetermined sentence for the felonies it specifies.³⁸

Sentencing may involve restitution payments, fees or fines. One presiding judge commented on the pressure to assess and collect fines and restitution, but noted that a judge has to consider the ability of the defendant to pay. He posed the question: "How do you impose a fine when the defendant has no money?" The responsibility for collecting fines from people who do not have the ability to pay was cited by trial court administrators as a time-consuming and often fruitless task.

Probation officers monitor offenders for compliance with the terms of their probation and report any violations to the court. A number of judges reported insufficient funding and personnel for probation services, particularly in DUII and misdemeanor cases. Judges observed that probation is much more cost-effective than jail.

What is Working?

Effective Techniques in Case Management

"Courts in Oregon, and this court, are at a transition point in their interaction with society. Trials account for only 2 percent of total case dispositions. Judges no longer just try cases. Judges spend most of their time these days assisting parties, who have brought their dispute before the court, to reach a resolution of their disagreement in a context that gives the resolution legal finality and certainty. While a trial may be necessary to resolve a dispute, judges work hard to ensure that the parties have explored all other viable means to settle the matter – including a session with a judge who can give them an assessment of the merits of the competing claims (such a judge is then barred from sitting on the case). Today's judges understand that the resolution of disputes is their core function."

—Douglas Bray, Trial Court Administrator, Multnomah County.

Alternative Dispute Resolution

Alternative dispute resolution (ADR) saves both the court and the parties to the suit some of the expense and time of a trial. The three types of ADR are arbitration, mediation, and settlement conferences.³⁹

Arbitration in civil cases claiming under \$50,000 is mandated by statute. Presiding judges reported using mediation primarily in three types of cases: small claims, domestic relations (except in cases of domestic assault), and child custody. Settlement conferences (conducted by a judge other than the judge assigned to the case) are widely used in civil cases.

36 A ballot measure passed by voters in 1994, Measure 11 required mandatory minimum sentences for specified felonies committed by persons 15 years old and older.

37 Oregon Criminal Justice Commission, Oregon Sentencing Guidelines.

38 Oregon Revised Statutes, secs. 137.700-137.712. A summary of Oregon's sentencing laws can be found at <http://www.oregon.gov/CJC/SentenceLawSum.shtml>

39 For a description of the various types of ADR, see League of Women Voters of Oregon Education Fund, *An Overview of the Oregon Judiciary* (2006), 14. <http://www.lwvor.org/documents/OverviewORJudiciary2006.html>

Benton, Lane, Malheur, Polk, Sherman, and Umatilla Counties use settlement conferences in criminal cases.

Presiding Judge Charles Luukinen (Polk County) described his experience working as the pretrial settlement conference judge in two murder cases, one in Umatilla County and one in Sherman County. Settling each of those cases avoided the difficulties of finding impartial jurors for a notorious case in a small county and of taking jurors away from their jobs for a long trial. The settlement also saved the county the costs of litigation and related costs.

The success of ADR is due to a number of factors, presiding judges said. ADR gets the parties in a lawsuit to communicate. Once they achieve a settlement, the parties are more likely to abide by it because they have worked out the issues themselves. Presiding Judge John Collins (Yamhill County) observed that ADR is particularly appropriate for domestic relations cases involving “parents who must overcome difficult feelings ... and be able to cooperate and collaborate for the best interest of their children.” He has found that the adversarial process of a trial works counter to that result.

Although the cost of ADR is low relative to the costs of a trial, presiding judges reported that the expense of ADR remains a problem for low-income people. Availability of professional arbitrators and mediators in remote judicial districts with small populations is also a problem.

Concern exists that the extensive use of ADR to dis-

pose of cases may be “a comment on the sufficiency of the system”⁴⁰ and lead to a “public perception that too many cases are being settled without going to court.”⁴¹

Half the presiding judges are looking for additional ways to use ADR. Presiding Judge Sullivan (Deschutes County) would like to add additional ADR but needs “more resources and more room.” “This is the wave of the future,” he said.



Clackamas County Courthouse

The Value of “Problem-Solving” Courts

The Report of the American Bar Association (ABA) Commission on the 21st Century Judiciary, *Justice in Jeopardy*, acknowledges the changing role of trial judges in the nationwide movement to problem-solving courts.⁴² The first such court was Dade County, Florida’s drug court, which opened in 1989. Specialized courts now address other chronic problems such as mental illness and domestic violence.

Problem-solving courts also promote increased trust and confidence in the justice system for people who had previously shown dissatisfaction with the operation of the courts.⁴³ Such evidence caused the Commission to conclude that, “By making judges more visible and active ‘problem solvers’ in their communities, such courts have the potential to reduce public alienation from the courts – particularly in communities of color where such alienation is ... commonplace.”⁴⁴

40 Hon. Steven Maurer, Presiding Judge, Clackamas County.

41 Hon. Michael Sullivan, Presiding Judge, Deschutes County.

42 American Bar Association, *Justice in Jeopardy, Report of the Commission on the 21st Century Judiciary* (Chicago: American Bar Association, 2003), 48.

43 Ibid., 49.

44 Ibid., 67.

Drug Court

Drug court is a specialty court that guides substance-abusing offenders through a comprehensive program of treatment, drug testing, and supervision using immediate sanctions and incentives to force offenders to deal with their substance abuse problem.⁴⁵ The ABA Commission's report notes that traditional safety nets such as family no longer exist for many offenders, and traditional sentencing merely recycles substance abusers back onto the streets where they continue to commit crimes to support their addictions.⁴⁶ Nationally, drug courts have proved to be an effective way to reduce repeat offenses committed by substance abusers.⁴⁷

Presiding judges noted that drug court is time-consuming and may disrupt the flow of cases on the docket, but those problems are outweighed by the positive effects of drug court on the participants, the resulting benefits to their families, and reduced crime in the community.

Multnomah County's drug court, established in 1991, is the second oldest drug court in the nation. A 2003 cost-benefit evaluation of this court found that the total cost per drug court client was less than the cost of processing a substance-abusing offender through the

court system in the traditional way.⁴⁸

The OJD and the Oregon Department of Human Services (DHS) jointly sponsor drug court programs in 25 counties. Information prepared by DHS reports that "of 1,869 drug court graduates between January 1, 2001 and June 30, 2005, 1,677 (90%) had no new misdemeanor or felony charges in an Oregon Circuit Court in the year after" their graduation from the program.⁴⁹ Most judges and legislators are convinced that drug courts are cost effective and worth the investment of money and staff time. Grants often pay for additional staff time and treatment resources.

Federal grants funding drug courts in Benton, Marion, Malheur, and Multnomah Counties were due to terminate in 2005. The Oregon Legislature added drug court funding for those four courts to the OJD budget in 2005 and allocated \$2.5 million to the Oregon Criminal Justice Commission to award grants for drug court programs in other counties along with funds to develop, administer, and evaluate drug court programs.⁵⁰

Mental Health Court

As of December 2006, Clackamas, Coos, Deschutes, Lane, Marion, and Yamhill Counties have mental



Baker County Courthouse Lobby

45 National Association of Drug Court Professionals, *Facts on Drug Courts*.

46 American Bar Association, *Justice in Jeopardy*, 49.

47 National Drug Court Institute, *Drug Court Benefits*.

48 Shannon Carey and Michael Finigan, "A Detailed Cost Analysis in a Mature Drug Court Setting: A Cost-Benefit Evaluation of the Multnomah County Drug Court" (Portland, Oregon: NPC Research, July 2003), II.

49 Oregon Department of Human Services, *Drug Courts: Facts and Figures*.

50 The larger grants were awarded to Jackson, Deschutes, Marion, and Washington to build new infrastructure for adult drug courts. Benton, Jefferson/Crook, Josephine, Klamath, Lane, Linn, Lincoln, Umatilla, and Union received grants for adult drug courts; some grants were for expanded programs. Marion also received funds for Family Dependency Court and for Juvenile Drug Court. Washington received funds for Juvenile Drug Court. Deschutes received funding for a Family Drug Court Program. (Family drug court clients are parents with children; some children are in the custody of the court and in state or relative placements.) Oregon Criminal Justice Commission, Drug Court Program.

health courts. Mental health courts operate in the same way as drug courts. Eligible offenders work with the judge, prosecutors, mental health professionals, and social workers. Presiding judges reported that these courts succeed in treating the offenders and reducing recidivism. An obstacle is funding for mental health services.

Family Law Court

All circuit courts handle family law cases. In Multnomah County and other large districts, judges may be permanently assigned to family law duties. In smaller districts judges handle a mix of family, civil, and criminal cases. In one-judge districts, the judge handles all cases involving the family.

Legislation adopted in 1993 allowed any judicial district to create a family court department with the approval of the Chief Justice of the Oregon Supreme Court.⁵¹ The goal of family court is to coordinate before a single judge all matters relating to one family (e.g., separation and dissolution of marriage proceedings, criminal proceedings involving domestic violence or other crimes between family members, juvenile dependency or delinquency matters, guardianship of minors, and proceedings to commit a mentally ill person).

In that year the Legislature created the Task Force on Family Law to develop a new family conflict resolution system to foster healthier relationships

between the parties and more civilized conflict resolution during the divorce process. 1995 legislation allowed circuit courts to establish an education program designed to inform parents about the emotional impact of family restructuring on children.⁵² In 1997 the Legislature mandated the provision of services to families involved in domestic relations or other family court proceedings.⁵³ Each judicial district was required to establish a Local

Family Law Advisory Committee and to develop a plan to coordinate services to families.⁵⁴ In 1997 then Chief Justice Wallace P. Carson, Jr. appointed the Oregon Family Law Services Commission to devise a plan for delivering family law services to low and middle-income Oregonians.⁵⁵

Commercial Court

In November 2006 the OJD started its first commercial court in Lane County. In commercial court experienced judges are assigned to handle complex civil litigation matters such as class action cases, product liability cases, and securities transactions cases. Parties to cases in Lane

County and parties to cases in other counties may apply to have their case heard in Lane County's commercial court. It is anticipated that assigning complex civil litigation to judges experienced in such cases will not only expedite resolution of those cases but also free other judges to dispose of criminal and civil cases on the regular docket.⁵⁶



Benton County Courthouse

51 Oregon Revised Statutes, secs. 3.405-3.423.

52 Oregon Revised Statutes, secs. 3.425.

53 Oregon Revised Statutes, secs. 3.430-3.440.

54 Oregon Revised Statutes, secs. 3.434.

55 OJD, *State and Local Family Law Advisory Committees: An Overview*, 2000.

56 Interview with Brian DeMarco, Staff Counsel, Civil Law, Office of the State Court Administrator.

Suggestions for Change in Court Structure

A number of judges recommended adding three judges to the Oregon Court of Appeals. Of the 39 states that have intermediate courts of appeal, the Oregon Court of Appeals ranks first or second among those courts in its workload.⁵⁷

Presiding judges and TCAs expressed a need for additional circuit court judges and for pro-tem judges or referees to handle matters such as small claims and traffic cases. In the past, funding for new circuit court judicial positions depended largely on the political influence of legislators. Retired Chief Justice Edwin J. Peterson recognized the importance of finding a better way to evaluate the need for new judges.⁵⁸ He appointed a committee known as the Joint Committee on Trial Court Judicial Resources. Its members include members of the Oregon State Bar and judges of the Oregon Circuit Court.

Circuit court judicial districts seeking an additional judicial position apply to the Committee. The district must show that there is a need for an additional judge and that the request has the support of the county board of commissioners. The Committee receives data prepared by the State Court Administrator's office showing the predicted need for judges in each judicial district, based on case filings. To assess

the need for new judges the Committee relies on a judicial workload assessment model developed in 1999 by the National Center for State Courts (NCSC) for the Oregon Circuit Courts. That model accounts for the workload of all judicial activities to determine the average amount of judicial time needed to process one case. For each year the Committee reviews, it applies the NCSC model to the case filing statistics to prioritize the need for new judicial positions. The Committee holds hearings in Salem and makes recommendations for new circuit court judicial positions. The recommendations are made part of the OJD budget submitted to the Governor and the Legislature. A new circuit court judge position comes with three funded staff positions.

There is a significant delay from the time the need is established until the judge elected to the new circuit court position takes the bench. For example, using 2003 case filing information, the Committee recommended four new judicial positions to the 2005 Legislature, which created four new judicial positions with funding to start in January 2007.

The presiding judges agreed that the current trial court structure is working well.

Access to the Courts and Fair Treatment for Those Who Use the Courts

Every day circuit court judges and staff serve customers of the court who do not know what is expected of them, who do not speak English, who do not understand the law, who cannot afford a filing fee, or who cannot afford a lawyer.

Who Are Our Judges?

Oregon circuit court judges are not very ethnically

diverse. Presiding judges reported three Hispanic judges; one judge with some Native-American background; and one judge who is a member of the Klamath tribe. Few judges speak any language other than English. Four speak Spanish and one judge speaks French. The most diverse group is in Multnomah County. Among the 38 judges are five who are openly gay or lesbian, two African-Americans, and two Asians.⁵⁹ One judge in

⁵⁷ Oregon Judicial Department, *The Oregon Court of Appeals, 2005 Report*, 1.

⁵⁸ Interview with Tim Willis, Chair, Joint Committee on Trial Court Judicial Resources.

⁵⁹ Two of these judges, an African-American and a Korean-American, were appointed by Governor Kulongoski in February 2007.

Washington County is Asian-American.

Women are fairly well represented in Oregon circuit courts. Many of the counties with few judges have at least one woman, and Multnomah County has 16 women judges. Nine of the 27 districts have no female judges.

Probably the greatest number of circuit court judges have backgrounds as district attorneys or have worked in a district attorney's office. Others come from private practice, many with backgrounds in criminal defense.

Most presiding judges thought that the lack of diversity among them has little or no effect on the quality of the services provided by the courts. The judges make a strong effort to give everyone a fair hearing without regard to such characteristics as race, national origin, sexual orientation, or economic status. Presiding Judge Luukinen (Polk County) stated, "The judge has to decide whether the individual on trial has a good case or not. The decision must be clear and based on facts, not race.... It is not necessary to be part of a minority group either ethnic or otherwise to understand and be prepared to deal with persons who have cultural or ethnic differences." Many noted the use of interpreters to assist those who do not speak English. Presiding Judge Simpson (Lake County) offered that the lack of diversity does affect his court because of the lack of a qualified interpreter in the district.

A few judges did express some concerns about racial and cultural diversity. Despite many efforts for outreach, the court in Jackson County has been largely unsuccessful in making a meaningful connection with the large Hispanic community in the area. The presiding judges in Multnomah and Clackamas

Counties believed that the lack of diversity on the court might cause a public perception that minorities do not receive fair treatment. Presiding Judge Koch (Multnomah County) stated, "It has been a problem recruiting African-American and Hispanic-American candidates for judicial office because, compared to the amount of compensation those lawyers can or do earn in the private practice of law, judicial salaries

are low." Judges and staff receive training to recognize and deal with problems caused by lack of diversity; judges make an effort to learn about the cultures that they serve. In several of the smaller districts, judges commented that there is little diversity in the population they serve.

Presiding Judge Luukinen (Polk County) was concerned about escalating

fees that price some people out of the court system.

Accommodations for Those Who Do Not Speak English

In its May 1994 report, the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Justice System, chaired by retired Chief Justice Peterson, described problems that racial and ethnic minorities experience in dealing with the courts and in the justice system. A basic problem was the failure of the courts to provide assistance to those who do not speak English. Following that report, then Chief Justice Carson appointed a committee to implement the Task Force's recommendations. In its January 1996 report, the committee stated:

"The promise of 'equality before the law' is an empty one unless the context for its fulfillment exists. **Equal justice presupposes access.** For example, a non-English-speaking person without a qualified interpreter or the benefit of translated forms will not understand the court's



Clatsop County Courthouse

orders, cannot properly analyze her options, cannot communicate her position to the judge and may not even seek the court's aid because she is unaware of her options. **Access requires understanding.** For the non-English-speaking person, the key to understanding is found in linguistically compatible information about the judicial system and the courtroom experience."⁶⁰ (Original emphasis.)

Language continues to be a common barrier in the circuit courts in 2006. Presiding judges and TCAs in 21 judicial districts raised the issue of communication in a language other than English. Certified interpreters are needed during court proceedings; bilingual staff members are needed to communicate with non-English speakers about other court business.

Legislation passed in 1993 authorized the State Court Administrator to develop a program to certify interpreters for non-English speaking parties or witnesses and for disabled parties or witnesses.⁶¹ That same year the OJD made the AT&T Language Line available to the circuit courts. The Language Line provides services of certified interpreters 24 hours a day via a conference call or a speakerphone call. The State Court Administrator intended for courts to use the Language Line during nontraditional work hours and for uncommon foreign languages. The Language Line was not intended to replace live interpretation.⁶² Some counties, however, reported using the service for in-court interpreter services. Some courts reported using the Language Line for transacting business at the service counter.

Several judicial districts have significant problems

securing the services of the certified interpreters that they need:

- Marion County needs interpreters of Marshallese. It is expensive to fly interpreters from the Marshall Islands.
- Umatilla and Morrow Counties use contract Spanish interpreters almost every day. Those interpreters come from some distance at a cost of \$35 per hour, plus travel expenses.

That cost is a problem for the courts' budgets. Local people do not become certified interpreters because of the high cost of the certification process.

- Linn County shares the services of one interpreter with Benton County.
- There is no qualified interpreter in all of Lake County.

Ten respondents reported a need for more bilingual staff. Many report active, but unsuccessful, recruitment efforts. The greatest need is for staff who speak Spanish.

Access to the Courts for Those Who Cannot Afford a Lawyer

Many people who cannot afford a lawyer turn to legal aid. Legal Aid Services of Oregon (LASO) has 12 offices with a staff of 110, including 55 lawyers, serving 35 of Oregon's 36 counties. There are three other similar legal aid organizations in the state. Legal aid attorneys handle only civil matters, not criminal cases. No fees are charged for the services provided. Demand for their services far exceeds their ability to satisfy it. The Oregon Legal Needs Study done in 2000 revealed that the needs of low-income people for civil legal services are met less than 20% of the time.⁶³



Douglas County Courthouse

60 Oregon Judicial Department, Office of the State Court Administrator, *Progress Report of the Oregon Supreme Court Implementation Committee, A Commitment to Fairness* (Salem, 1996), 18.

61 Oregon Revised Statutes, secs. 45.272 to 45.297.

62 Oregon Judicial Department, *Progress Report of the Oregon Supreme Court Implementation Committee, A Commitment to Fairness*, 24.

63 Tom Matsuda, "The Justice Gap in America," *Multnomah Lawyer* (January 2006): 12.

Legal aid clients qualify for services based on their income. Using 125% of the Federal Poverty Income guidelines as the criterion, a family of four needs an annual income of \$25,000 or less to qualify. Roughly 600,000 people – about one-sixth of the population of the state – are eligible for legal aid services. There is one legal aid attorney for every 6,600 people eligible for legal aid services in Oregon. In the general population of Oregon, there is one lawyer for every 340 people.⁶⁴

Thomas Matsuda, Executive Director of LASO, reported that the experience of legal aid attorneys in Oregon courts has been mixed.

“Legal aid attorneys believe that people should be treated equally in the legal system regardless of income. Today’s reality is that the legal system requires a lawyer to navigate through it. It is much harder to navigate our legal system without legal representation.... Most judges and court staff understand this and operate accordingly. Some in the legal system view poor people as a nuisance. For people who represent themselves this makes a huge difference. The outcome can be a life-changing event.”⁶⁵

For example, a victim of domestic violence may not receive the necessary protection from further abuse without the aid of a lawyer.

Publications to help low-income people understand the courts and the laws can be effective for those who can advocate for themselves. LASO has some materials available for people who need them, including materials available through the Internet. However, self-advocacy can be difficult for some Oregonians who are most vulnerable, such as the elderly or disabled. Mr. Matsuda recognized the importance of lawyers in private practice who not only represent indigent clients pro bono (without charge) but who also contribute to support funding of legal aid services through the Campaign for Equal Justice. Those lawyers, Mr. Matsuda said, “see the necessity of preserving the rule of law and countering any bias against people because they are poor.”⁶⁶

Many people who cannot afford a lawyer’s services appear in court pro se, that is, they represent themselves in court. All judicial districts deal with pro se litigants. Most frequently it is in domestic relations matters that parties will attempt to present their own cases without the assistance of an attorney. Estimates of those appearing pro se in domestic relations matters ranged from a low of 25% to a high of 90%.

People appear pro se in other types of cases such as small claims, landlord-tenant matters, traffic matters, game violations, a small percentage of other civil litigation, and a very few defendants in criminal cases.

Appearing pro se presents problems for both the litigants and the judge. Presiding Judge Schiveley in Jackson County observed that “Without legal counsel, pro se parties are often stymied....” Presiding Judge Richard Barron (Coos and Curry Counties) described the problem: “Many of the people just do not understand the process of presenting evidence, and it is not the judge’s role to help them because it might be viewed as being partial to one side or the other.” Presiding Judge Koch in Multnomah County described the judge’s dilemma: “There is a delicate line a judge walks when dealing with a pro se litigant: you do not want to help or advocate for the litigant but, instead, you want to level the playing field.” He said that judges are receiving more training to do that work.

Pro se litigants also impair court efficiency. Presiding Judge Donald Hull (Hood River, Wasco, Wheeler, Gilliam, Sherman Counties) commented: “Much delay is caused because people unrepresented by lawyers do not bring the necessary information and documents with them to court. Judges must draft judgments for the litigants.”

The courts have made efforts to assist pro se litigants, directing them to the forms they must complete, while always being careful not to give legal advice. Thirteen presiding judges reported that their courts offered such assistance. Marion County initiated the first pro se assistance program, but smaller judicial districts may not have funding for support staff to

64 Ibid.

65 Interview with Thomas J. Matsuda.

66 Ibid.

serve pro se litigants.

All the presiding judges understand the important role the judge plays in presiding over a case involving pro se litigants. It is an extra burden but, in the end, the judges “spend the time necessary to help [the pro se litigants] understand what’s going on.”⁶⁷

The Juvenile Rights Project (JRP) has a public defense contract with the state to represent children and youths in juvenile proceedings in Multnomah County. JRP handles 3,500 cases per year for chil-

dren and their families who cannot afford to hire a lawyer.⁶⁸ Ninety-nine percent of children whom JRP serves are under 18 years old, and the numbers are more heavily weighted towards younger children. Many cases come to them when the baby is days old because there are drugs in the child’s system. Many of the abused or neglected children JRP is appointed to represent are under the jurisdiction of juvenile court because of mandatory child abuse reporting laws. JRP’s helpline receives approximately 900 calls per year.⁶⁹

Suggestions to Improve Oregonians’ Access to Justice

Presiding judges offered the following recommendations to improve Oregonians’ access to justice:

- Increased funding for legal aid
- More assistance in the courthouse for people of different cultural, economic, and ethnic backgrounds
- Court facilities that are fully accessible for people in wheelchairs and walkers, and that make accommodations for people with impaired vision or hearing
- More and better-paid judges and staff to assist in resolving disputes
- Access to courts regardless of financial means
- Secure court facilities and improved security infrastructure
- Additional staff and interpreters to serve the increasing Hispanic population
- Translation of more court forms into Spanish
- More referees and pro tem judges to speed the resolution of cases
- More mediators in family law
- Outreach to educate elementary, middle, and high school students about the role of the judiciary.

Funding the Oregon Judicial Department

Funding for the OJD is shared by the state General Fund and the 36 counties. The OJD budget includes salaries for all judges and staff of the Oregon Supreme Court, the Oregon Court of Appeals, the Oregon Tax Court, all circuit courts, the State Court Administrator and her staff, librarians, accountants, interpreters, and some other employees. The Chief Justice of the Oregon Supreme Court submits a biennial budget to the Governor, which is included in the Governor’s State of Oregon budget proposal. The Legislature’s Public Safety Subcommittee of

the Joint Ways and Means Committee reviews the budget, which can be reduced or increased. The final budget is approved by the Joint Ways and Means Committee near the end of the session.

As discussed under “Court Facilities” (above), each county has the statutory responsibility to provide “suitable and sufficient” facilities for the circuit court located in its boundaries. Counties bear the costs of maintenance and security for court facilities. Costs for jails and transportation of prisoners are also cov-

67 Hon. Thomas Kohl, Presiding Judge, Washington County.

68 Juvenile Rights Project at <http://www.jrplaw.org/>

69 Interview with Julie McFarlane, Supervising Attorney, Juvenile Rights Project.

ered by counties. Cuts in county budgets have adversely affected the operation of the courts.

Comparisons of the OJD budgets for 2001 through 2005 are presented in Appendix B of this report. After cuts in the two prior biennia, some increases were made in 2005-2007, but were not sufficient to raise salaries or to provide adequately for increased workloads. On November 30, 2006, the Oregon Emergency Board, which is charged with assisting state departments experiencing funding problems between legislative sessions, denied the request of the OJD for emergency funding to alleviate fiscal problems for the last six months of the 2005-07 biennium.

Most judges and court administrators in Oregon are concerned about the level of funding from both the state and the counties. State funding cuts in the past two biennia have affected the hiring of law clerks and staff. Some presiding judges reported up to 50 percent turnover in staff because of low salaries. Staff positions may be left vacant for a period of months to accrue “salary savings” for another purpose not covered by the budget. To meet the need for additional judges, some districts create referee positions (identified by one presiding judge as “gray market judges”). Several presiding judges commented that “the state expects judges to do more with less” while caseloads are continuing to grow. Because of insufficient funding, even today, some courthouses are not meeting the required standards of the Americans with Disabilities Act.

Presiding judges expressed the sentiment that the Legislature treats the courts “like a poor stepchild.” Statements made during legislative hearings on the OJD budget suggested to judges that the Legislature wanted the courts to collect more money to support their work. This was underscored by one judge who noted that the courts use payment plans, collection agencies, and the Department of Revenue to collect unpaid fines. Courts cannot keep fees and charges

paid to the courts because, under current law, such revenue reverts to the state’s General Fund rather than to the OJD.

The courts are the apex of the criminal justice system and interact with many inter-dependent agencies. The State of Oregon funds the Department of Justice; the District Attorney for each district; the Oregon State Police forensic services; the Public Defense Commission attorneys; the Department of Corrections prisons and Parole and Probation; the Oregon Youth Authority facilities and community placements; and the Department of Human Services child welfare, mental health and alcohol and drug treatment services. Since the courts rely on their services, funding cuts in those agencies’ budgets impact the effectiveness of the courts.

In its *Justice in Jeopardy* report, the ABA Commission on the 21st Century Judiciary recommends establishing standards for minimum funding of judicial systems.⁷⁰ “Minimum funding standards” the report explains, “means isolating core functions that a judiciary and the judicial system must perform and the critical services it must provide for the benefit of lawmakers confronting hard choices when crafting state budgets. ... [M]inimum funding standards can assist judges and legislators in establishing the floor below which state budgets must not go if the judicial system’s core mission is to be preserved.”⁷¹

The ABA Commission further recommends “that the judiciary’s budget be segregated from that of the political branches and that it be presented to the legislature for approval with a minimum of nontransferable, line itemization.”⁷² Specifically, the Commission “urges states to abandon the antiquated practice of folding the judiciary’s budget request into that of the executive branch and giving the executive branch power to adjust the judiciary’s appropriations request before it is acted upon by state legislature.”⁷³

70 American Bar Association, *Justice in Jeopardy*, 83.

71 Ibid.

72 Ibid., 84. In Oregon, the Chief Justice prepares the budget of the OJD and submits it to the Governor. Although the Governor does not have budgetary authority over the OJD, law requires the Governor to submit to the Legislature a balanced budget for the state. For that reason, the Governor can suggest across-the-board cuts to the OJD budget. See Governor’s Recommended Budget 2007-09, Judicial Branch. http://www.oregon.gov/DAS/BAM/docs/Publications/GRB0709/K_Judicial_Branch.pdf

73 American Bar Association, *Justice in Jeopardy*, 84.

Judicial Compensation

There is consensus among members of the Oregon judiciary that their level of compensation is too low. Their position is supported by national figures placing Oregon's judicial compensation at 50th in the nation for general jurisdiction courts (trial courts), 38th of 39 states that have intermediate appellate courts, and 50th among state supreme courts. The National Center for State Courts regularly gathers information about the salaries of judges and state court administrators. Its *Survey of Judicial Salaries* provides comparative analysis and serves as the primary record of state judicial salaries.⁷⁴

Of the 13 western states, Oregon ranks second to last in salaries paid to its circuit court judges.⁷⁵

Almost every presiding judge in the 27 judicial dis-

tricts cited the problem of low salaries as a serious detriment to attracting enough qualified applicants for judicial openings. Judicial vacancies are now often filled by younger, less experienced lawyers for whom the judicial salary exceeds what those lawyers can earn in private practice. Many judges are struggling with the decision to continue serving as judges in view of the economic cost to their families. One circuit court judge commented that "the judge is often the lowest-paid person in the courtroom."

There is a proposal before the 2007 Legislature for a commission to set the salaries of all elected state officials. The ABA Commission endorses establishing an independent commission to set judicial salaries.⁷⁶

Selection of Judges

To balance independence and accountability of the judiciary, various methods of selecting judges have evolved. In the earliest years of our nation, the governors of the states generally appointed state judges. During the first half of the nineteenth century, many states established partisan elections as the method of judicial selection on the theory that all governmental positions should be filled by popular vote. By the end of the 19th century, many states had shifted to nonpartisan elections to reduce the influence of political machines. In 1940 Missouri adopted a method of selection, originally proposed in 1913 by the American Judicature Society, involving appointment by the governor based on recommendations of a nominating commission and subsequent "retention elections." That method is now often referred to as the Missouri Plan.

Current methods of selecting judges for state courts vary significantly from state to state and sometimes from one level of court to another within the same state. Four principal methods of selecting judges are in use:⁷⁷

- Merit selection with a nominating committee (with or without retention elections)
- Appointment without nominating committee
- Partisan election
- Nonpartisan election.

Many states use a combination of methods with different approaches for initial selection, retention or filling of mid-term vacancies. In a retention election the sitting judge's name appears on the ballot, uncontested. Voters cast a "yes" or "no" vote to retain or not to retain the sitting judge.

74 National Center for State Courts, *Survey of Judicial Salaries*, Vol. 31, No. 1 (July 2006): 11.

75 Ibid., 8-10.

76 American Bar Association, *Justice in Jeopardy*, 84.

77 Kilpatrick Stockton LLP, *The Selection of State Court Judges: Review of Primary Methods and Principal Implications*, Report to The Alabama Appleseed Center for Law and Justice (Kilpatrick Stockton LLP, 2002), 4.

Judicial Elections⁷⁸

Thirty-nine states conduct judicial elections with 87% of all state judges nation-wide facing election. One third of appellate judges and ten percent of trial court judges face only retention elections.⁷⁹ Twelve states⁸⁰ employ nonpartisan elections for initial selection of judges at all levels. Five additional states⁸¹ select judges at some level by nonpartisan election. Six states⁸² use partisan elections for initial selection at all levels of the judiciary, and four others⁸³ use partisan elections for some or all of their trial court judges. Louisiana is the only state using a special election to fill mid-term vacancies.

Merit Selection

Twenty-four states use merit selection with a nominating committee for initial selection of judges at some level of their judiciaries. Nine additional states use merit selection to fill some or all mid-term vacancies. Some states have a single committee for all levels of the judiciary. Other states have multiple commissions, sometimes one for each trial court district. The committees are generally composed of a mix of lawyers and non-lawyers and sometimes judges. The body responsible for appointing the committee members varies widely from state to state.⁸⁴ These committees evaluate and recommend several candidates to the governor or legislature. In most states using this system the governor chooses whom to appoint. The governor must choose the nominee from the candidates proposed by the nominating committee in most cases. Some states allow the governor to request additional recommendations. Several states

require confirmation of the governor's appointment by one or both houses of the legislature. All 24 states use this method for their appellate courts, but some use partisan or nonpartisan elections for some or all of the trial courts. Most merit selection states have retention elections. The period of service before the first retention election is usually short, ranging from the next general election to three years after appointment. Later retention elections are more widely spaced.

Appointment without Election

Some states use variations on the federal system of appointing judges without any election. In four states⁸⁵ appointments are made without a requirement that the nominee be proposed by a nominating committee. Other states use a merit selection system. Again, governors make most of these appointments. In South Carolina and Virginia, the legislature chooses the judges. Terms vary from life or to age 70 to as few as seven years, but generally judges are eligible for reappointment.

In most states, justices at the highest appellate level are selected statewide, but several states⁸⁶ select these judges from judicial districts. Some mid-level appellate court judges are also selected by districts.⁸⁷ Other states⁸⁸ have multiple appellate courts serving different parts of the state.

Oregon's Method of Judicial Selection and Election

In Oregon, voters elect judges for six-year terms to the state courts in nonpartisan elections.⁸⁹ In ef-

78 The statistics on methods of judicial selection in the various states is taken primarily from the American Judicature Society, *Judicial Selection in the States, Appellate and General Jurisdiction Courts* (Des Moines: American Judicature Society, 1986-2004, updated January 2004).

79 National Center for State Courts, *Call to Action, Statement of the National Summit On Improving Judicial Selection* (Williamsburg, Virginia: National Center for State Courts, 2002), 12.

80 Arkansas, Georgia, Idaho, Kentucky, Michigan, Mississippi, North Carolina, North Dakota, Ohio, Oregon, Washington, and Wisconsin.

81 Arizona, Florida, Indiana, Oklahoma, and South Dakota.

82 Alabama, Illinois, Louisiana, Pennsylvania, Texas, and West Virginia.

83 Indiana, New York, Kansas, and Tennessee.

84 American Judicature Society, *Judicial Merit Selection: Current Status* (Des Moines: American Judicature Society, 2003).

85 Maine, New Jersey, New Hampshire, and Virginia.

86 Louisiana, Illinois, Nebraska, and Oklahoma, for example.

87 Wisconsin and Illinois, for example.

88 Ohio, New York, Texas, and Washington.

89 Judicial elections were partisan contests from 1859 to 1931. Paul J. DeMuniz, "Politicizing State Judicial Elections: A Threat to Judicial Independence," *Willamette Law Review* 38, no. 3 (Summer 2002): 367.

fect the Oregon system is a hybrid one, since the Governor may appoint a qualified person to fill mid-term vacancies. An announcement of judicial vacancies on the Multnomah County (4th Judicial District) bench states:

Governor Kulongoski fills judicial vacancies based on merit. He encourages applications from lawyers with a wide variety of backgrounds and experiences. The Governor's Office will ask the Multnomah Bar Association's Judicial Screening Committee to assist with the review process.⁹⁰

Similar screening committees are used in other judicial districts. At the appellate level, the Oregon State Bar's Board of Governors' Committee on the

Judiciary conducts "a due diligence review process of the applicants for this vacancy and provide[s] information about each applicant to the Governor's Office."⁹¹ The Governor's Screening Committee – a group assembled by the Governor – interviews the final candidates. (Prior governors have at times used polls from local bar associations as a tool in selecting judges, since attorneys are most familiar with potential candidates. Governor Kulongoski does not use them.) For both appellate and circuit court positions, the appointee must run for a full term in the next general election. In September 2005, 75% of Oregon's sitting state judges had reached the bench by gubernatorial appointment to fill mid-term vacancies.⁹² To fill temporary vacancies (e.g. illness or conflict of interest), the Oregon Supreme Court may select any qualified person as a judge pro tempore.

Judicial Selection and Judicial Independence

Several factors in the selection of today's state judges have led to concern about threats to judicial independence and damage to the public's perception of the judiciary:

Campaign Contributions. Judicial elections, particularly those for state supreme court judges, have become increasingly expensive, requiring judicial candidates or those acting on their behalf to raise large sums. Large contributions from special interest groups (e.g., business groups, lawyers, and medical groups, etc.) can lead to real or perceived influence on judicial decision-making.

Campaign Speech. The 2002 US Supreme Court decision in the case of *Republican Party of*

*Minnesota v. White*⁹³ intensified a trend toward increasingly contentious judicial contests. By a 5-4 majority, the high court ruled that an "announce" clause in the state's Judicial Code of Conduct violated First Amendment rights to free speech. The clause forbade judicial candidates from "announcing" their views on controversial issues that might come before them on the bench. Commenting on this decision, Luke Bierman, director of the Institute for Emerging Issues at North Carolina State University, writes:

"Likewise, the 2002 Supreme Court decision in *Minnesota Republican Party v. White* [sic] and its progeny that eliminated some restrictions on judicial campaign speech have con-

90 Notice of Judicial Vacancy, November 10, 2006.

91 Notice of Judicial Vacancy, November 15, 2006. The full notice reads:

"The Committee on the Judiciary of the Oregon State Bar Board of Governors will conduct a due diligence/review process with an in-depth review of each application and candidate. It will include contact with people in the community who are familiar with the qualifications of the candidate, the needs of the court, the needs of the community, and the needs of the particular bench, and it will also include queries based on any particular direction given from the Governor. All candidates will be interviewed by members of the Committee. Designees of the Governor's Office and invited members of the Legislature will also participate in the process. The Committee's review is intended to provide the Governor with relevant, reliable and descriptive information to better inform his appointment decision. Upon completion of its review of the candidates, the Committee will submit a background summary of all the candidates to the Board of Governors. The board will then determine the final list of candidates to submit to the Governor."

92 Interview with then Chief Justice Wallace Carson.

93 536 U.S. 765 (2002).

tributed to a judicial campaign environment that mirrors the worst examples of legislative and executive elections. Judicial candidates are called upon to describe their views on controversial issues without regard to the facts or law of particular cases. They are empowered to characterize others in shameless ways in pursuit of electoral success and encouraged to employ the worst campaign tactics in order to win. While these developments allow more information into the free exchange of ideas, they do so at the cost of undermining the differences that have contributed to the judiciary's success as an independent branch of government."⁹⁴

Retired U.S. Supreme Court Justice Sandra Day O'Connor, who wrote a concurring opinion in the case to emphasize her objections to election of judges,⁹⁵ recently commented that she might be rethinking her stand on judicial speech limits, but not her dislike of judicial elections.

The Supreme Court's decision in *Republican Party of Minnesota v. White* has led to additional decisions limiting the ability of states to regulate judicial campaign conduct. For example, in *Weaver v. Bonner*, the Federal Court of Appeals for the Eleventh Circuit struck down several provisions in the Georgia Code of Judicial Conduct. The court interpreted the *White* decision as freeing judicial campaign candidates to personally solicit campaign contributions.⁹⁶

Unpopular Decisions. Incumbents may be targeted for decisions unpopular with the public even though those decisions may be made in conformance with

law. Also, incumbents may feel pressure to bow to public opinion in deciding controversial cases near to the time of an election.

Oregon's Experience. In Oregon, the years following the change to nonpartisan elections in 1931 saw few contested elections for the appellate courts, and campaigns "remained largely apolitical. Judicial candidates were reserved and conscientious in their campaign tactics."⁹⁷ Oregon Supreme Court judicial campaigns began to become more "political" in the late 1950s with increased attacks on candidates' personal qualifications. In 1976 voters approved a constitutional amendment that authorized Supreme Court discipline of judges and judicial candidates who violated rules of judicial conduct established by the Supreme Court.⁹⁸

Until 1998, however, Oregon campaign attacks concentrated on the candidates. With the candidacy of Bob Tiernan in that year, the attacks shifted to the institution of the court itself, with reports of Tiernan publicly criticizing the Supreme Court as "too liberal" and campaigning with a "Tough on Crime" platform.⁹⁹

Campaign financing also escalated at this time, with Tiernan receiving nearly \$200,000 from three individuals.¹⁰⁰ In 2000 Supreme Court candidate Greg Byrne received contributions from some of the same individuals.¹⁰¹ That race and other court of appeals and supreme court elections have also seen contributions from special interests who, through their TV or radio ads or fliers sent to voters, suggest that the candidate will support a particular point of view, if elected.¹⁰² In 2006, Supreme Court candi-

94 Luke Bierman, "Courts Are Different."

95 Justice O'Connor's concurring opinion states, "the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."

96 *Weaver v. Bonner*, 309 F.3d 1312, 1321 (11th Cir. 2002). The American Judicature Society noted that some are using the *Weaver* decision to advocate for public financing of judicial campaigns.

97 DeMuniz, "Politicizing State Judicial Elections," 378.

98 Oregon Constitution, art. VII, sec. 8 (amended 1976). The Oregon Code of Judicial Conduct can be found at <http://www.osbar.org/rulesregs/cjc.htm>

99 DeMuniz, "Politicizing State Judicial Elections," 383; Steve Suo, "Tiernan Plans to Follow Election Rules," *The Oregonian*, March 12, 1998, B1, at B10.

100 DeMuniz, "Politicizing State Judicial Elections," 383.

101 *Ibid.*, 384.

102 *Ibid.*, 384-385; Garrett Epps, "The Price of Partisan Judges," *The Oregonian*, May 5, 2002, C1.

date Jack Roberts received \$150,000 from American Justice Partnership,¹⁰³ a national organization supporting business efforts to limit lawsuits. His opponent, Virginia Linder received support from lawyers, unions, and others, but in smaller individual contributions.¹⁰⁴ The 2006 election set new records for financing of Oregon Supreme Court races, with Roberts raising \$738,115 and Linder \$332,965 in the primary and general elections. Including contributions for the third candidate in the primary election, more than \$1.4 million was raised.¹⁰⁵

The unsuccessful recall attempt against Circuit Court Judge Mary Mertens James because of her ruling declaring Measure 37 unconstitutional demonstrates the vulnerability of incumbents to removal for an unpopular opinion. In Oregon, all public “officers” are subject to recall after serving six months in office. All that is required is a petition by 15% of the “number of electors who voted for Governor in the officer’s electoral district at the most recent election at which a candidate for Governor was elected to a full term” stating the reasons for the recall demand. The Oregon Constitution places no restrictions on the reasons for recall: an officer may be recalled for any reason. If the officer does not resign within five days, a special election must be held within 35 days to determine whether the officer will remain in office.¹⁰⁶

In Oregon, threats to judicial independence posed

by campaign fundraising occur in elections to the circuit court as well. A number of presiding judges expressed discomfort with campaign fundraising. Judges are not permitted to raise campaign funds personally but instead must use a fundraising committee. Nevertheless, there may be real or perceived pressure placed on parties who may appear in the court or, conversely, real or perceived pressure on the elected judge who may face actual or potential contributors and supporters in the courtroom. Presiding Judge Gregory Baxter (Baker County) noted:



Polk County Courthouse

“It is a somewhat uncomfortable idea to think that in a contested race, I would have to raise money and campaign and then be expected and required to be a neutral and detached judge over legal disputes with the same people I just sought money from and campaigned amongst. Those two expectations seem to develop natural conflicts.”

To avoid the appearance of influence by supporters, several of the interviewed presiding judges used their own money to finance their campaigns or sought funding only from family or close friends. Most Oregon circuit court judges face uncontested elections, reducing the need to raise significant campaign funds. Contested elections, when they occur, can be expensive. Some fear that the cost of a campaign may discourage good candidates from seeking judicial office.

103 Jack Roberts for Oregon Supreme Court, Electronic Filing Report, Summary Statement of Contributions and Expenditures (October 26, 2006).

104 Ashbel S. Green, “Linder leads Roberts in fight for court,” *The Oregonian*, November 8, 2006.

105 Ashbel S. Green, “Linder Slips by Roberts for high court,” *The Oregonian*, November 9, 2006.

106 Oregon Constitution, art. II, sec. 18. For legislators, the recall process can begin anytime after five days of the first session after election.

The Pros and Cons of Methods of Judicial Selection and Suggestions for Improvement

Each method of judicial selection has its own set of problems and advantages.

Election of judges, supporters believe, make judges more accountable to the public. Those who support partisan elections say that such elections provide “cues” to a candidate’s ideology. Acknowledging that many believe that a wholly appointed judiciary is the answer to the potential threats to judicial independence and impartiality, the National Center for State Courts (NCSC) notes that there has been little movement in this direction. The NCSC advocates the use of nonpartisan judicial elections, whether they be contested or retention elections.¹⁰⁷

Opponents of judicial elections believe that, whether partisan or nonpartisan, elections expose judges to the threats to independence discussed above. In addition, voter participation in judicial elections is usually very low because of the lack of information available to the voter.¹⁰⁸ While the U.S. Supreme Court decision in *Republican Party of Minnesota v. White* declared that states may not forbid judicial candidates to “announce” their views on controversial issues, it did not deal with “pledges and promises” clauses recommended by the ABA and included by many states in their codes of judicial conduct. Under such provisions, judges and judicial candidates may not promise to rule in a specific manner on issues that may come before them in court.¹⁰⁹ A number of presiding judges commented that limitations on what a judge can say while campaigning, while wise, made it difficult for voters to know anything about the candidate. Therefore elections may be won on the basis of name familiarity or position on the ballot.

Partisan elections tend to be more subject to negative campaigning and the influence of special interest groups. They also can reduce the public’s respect for and confidence in the judiciary.¹¹⁰

Retention elections, a characteristic of the Missouri Plan of merit selection, avoid some of the difficulties of partisan and nonpartisan elections, particularly in the area of campaign finance. With no opposition candidate, elections tend to be less expensive. The threat of censure because of unpopular, although correct, decisions remains, and special interest groups may exert pressure to remove a judge from office. In its study, *Justice in Jeopardy*, the ABA expressed the opinion that, because the electorate does not know whom the Governor would appoint as a replacement, “dissatisfaction must run relatively high before a serious campaign to remove a judge will emerge.”¹¹¹

Appointment of judges as a method of selection also has its supporters and opponents. Appointed judges need not raise money or campaign. Supporters of judicial appointment also feel that appointed judges are more independent and better qualified. Opponents suggest that the method is “elitist, compromises the accountability of judges to the public, promotes political favoritism and cronyism, and is less likely to produce a diverse group of judges who reflect the relevant communities.”¹¹²

Merit selection, as described previously, is an effort to get around the possible problems of judicial appointment. In this method, an independent nominating committee evaluates possible candidates and presents a list of approved candidates to the ap-

107 National Center for State Courts, *Call to Action, Statement of the National Summit on Improving Judicial Selection*, 7-8.

108 “It is...not uncommon to see less than 20 percent of the electorate voting in judicial races and as much as 80 percent of the electorate unable to identify the candidates for judicial office.” American Bar Association, *Justice in Jeopardy*, 28.

109 Oregon’s Code of Judicial Ethics contains a “pledges and promises” provision, JR 4-102: “With respect to any election or appointment for judicial public office, a judicial candidate shall not knowingly: ... (B) Make pledges or promises of conduct in office that could inhibit or compromise the faithful, impartial and diligent performance of the duties of the office...”

110 Kirkpatrick Stockton LLP, *The Selection of State Court Judges*, 6.

111 American Bar Association, *Justice in Jeopardy*, 76.

112 Kilpatrick Stockton LLP, *The Selection of State Court Judges*, 5.

pointer, who must select the appointee from this list.¹¹³ The ABA recommends that such a commission be a “credible, neutral, nonpartisan, diverse deliberative body or commission.”¹¹⁴ Judges appointed in this system may be appointed for varying terms and subject to reappointment or to retention election. Supporters of this method believe it produces the most highly qualified and independent judges. Opponents say that this method has the same problems as other methods of appointment because the commission members may have ideological biases or favorites.

Length of term in office is another factor to consider in the selection of judges. A longer term of office reduces some of the negative pressures of campaigning and raising money. It also reduces the pressure to avoid decisions that might be unpopular with the electorate or reappointing body. Also, the work of a judge has a substantial learning curve, especially in smaller judicial districts where judges must face the full range of issues. In states with retention elections, the first retention election is often after a fairly short interval, although subsequent retention elections are usually at longer intervals. In states such as Oregon with mid-term appointments to fill vacancies, judges often must face an election at the next general election. The six-year term held by Oregon judges is fairly typical. The ABA prefers a commission-based selection system and “a single lengthy term of at least 15 years or until a specified age.”¹¹⁵ If a retention system is used, the ABA recommends that the election be held after a fairly short term in office to avoid the dangers of unpopular decisions. The NCSC, however, recommends that appointees to vacant judicial positions “serve a substantial period in office

before initial election.”¹¹⁶ NCSC also suggests that states with relatively short judicial terms consider lengthening them. Both the NCSC and the ABA note that the need for a good mechanism for removal of a judge for judicial misconduct is especially important when terms in office are long.

Presiding judges expressed a variety of views about the current method of judicial selection in Oregon. Eight judges, mostly from predominantly rural counties, had no suggestions for improving the system or said that the current system is adequate. A number of judges suggested that the governor should make more use of recommendations from bar association committees or some other merit selection committee when making judicial appointments. Many stressed that such selections must be honorable, non-political, and nonpartisan. Three judges expressed interest in some form of the Missouri Plan, and another felt that the concept of reconfirmation in a retention election after expiration of a judge’s term should be explored. Former Governor Barbara Roberts, a member of the *Justice in Jeopardy* study group, felt that the call for a longer term made the most sense of all the study’s recommendations. A longer term, possibly a single twelve-year term, might take some of the pressure off judges once they are elected. She questioned whether commissions could be truly nonpartisan because members still bring their positions. She also questioned how people were selected for commissions in the first place and what could make them more qualified to choose candidates than the methods used now. She cautioned that, when proposing changes, the changes should be a true improvement and not a mere façade.¹¹⁷

113 While Oregon governors have sought to select appointed judges for merit using input from the Oregon and local bar associations in the form of reviews by judicial committees or bar polls, this input is not binding on the governor. In Multnomah County, judicial candidates submit their names to the Multnomah County Bar Association. The Association then sends five names to the governor, who does his or her own screening. In the recent past, only one candidate chosen by the governor was not on this list. Interview with Hon. Dale Koch, Presiding Judge, Multnomah County.

114 American Bar Association, *Justice in Jeopardy*, v.

115 Ibid., 70.

116 National Center for State Courts, *Call to Action, Statement of the National Summit on Improving Judicial Selection*, 8.

117 Interview with Governor Barbara Roberts.

Financing of Judicial Campaigns

“While there are many threats to judicial independence, one of the more pervasive problems is the nature and cost of running for the bench. ... Judges should not be elected because they favor a particular industry, philosophy or stand on crime. They cannot campaign on a platform, nor should they be elected as representatives of a particular interest.

Unfortunately, though, due to the cost of campaigning for a seat on the bench, judicial candidates are forced to turn to others for support. ... A detrimental consequence of this is the erosion of public trust and confidence that the judicial branch can and does perform its duties with neutrality and impartiality, without regard to prevailing trends or outside influences.”¹¹⁸

In efforts to reduce the appearance of impropriety created by large contributions, 39 states regulated financing of judicial campaigns in some way as of 2002.¹¹⁹ Faced with the escalating costs of judicial campaigns, in 2002 the ABA completed an in-depth study of public financing of judicial campaigns. Recognizing the prohibitive expense of extending such financing to the lower courts, the ABA recommended adoption of public funding for contested elections in the highest state courts and some intermediate level appellate courts. The findings concluded:

“[T]he Commission recommends that states which select judges in contested elections finance judicial elections with public funds, as a means to address the perceived impropriety associated with judicial candidates accepting private contributions from individuals and organizations interested in the outcomes of cases those candidates may later decide as judges.”¹²⁰

In 1995, Texas was the first state to fully regulate judicial campaign contributions. Among the provisions:

- Contributions from individual contributors are limited for an election with the amount allowed relating to the size of the district in which the election is held.
- Contributions may only be accepted during specified election periods.

- For a law firm, once the contributions reach six times the limit allowed for individual contributions, future contributions by firm members are limited to \$50 each.
- Political action committee contributions are also limited.
- Candidates are encouraged to adopt voluntary expenditure limits.¹²¹

In 1999, the ABA amended its Code of Judicial Conduct to provide rules to be followed by judicial candidates receiving contributions from lawyers and urged states to adopt them:¹²²

- A prohibition on judges appointing attorneys to positions when the attorney has contributed above a certain dollar amount to the judge’s campaign
- A requirement that judges be disqualified from cases when they learn that one of the attorneys before them has made campaign contributions in excess of a set amount
- A regulation requiring judges to refrain from political activity while in office
- A rule requiring judicial disclosure of all sources of campaign contributions.

Wisconsin has provided partial public funding of state Supreme Court candidates since the late 1970s. The system, relying on \$1 taxpayer check-offs, has been under-funded with taxpayer participation drop-

118 American Bar Association, Standing Committee on Judicial Independence, *Report of the Commission on Public Financing of Judicial Campaigns* (Chicago: American Bar Association, 2002), 1.

119 National Center for State Courts, *Call to Action, Statement of the National Summit on Improving Judicial Selection*, 64.

120 American Bar Association, *Report of the Commission on Public Financing of Judicial Campaigns*, 64.

121 National Center for State Courts, *Call to Action, Statement of the National Summit on Improving Judicial Selection*, 65.

122 *Ibid.*, 66. The ABA Code of Judicial Conduct is an advisory recommendation because the ABA is a private organization without government authority. It is only when a governmental body (e.g., a state supreme court or legislature) adopts an ABA recommendation (directly or with changes) that any direct legal effect arises from such a recommendation. The ABA’s recommendations are often given great credit because of the high level of thought and deliberation from which the recommendations arise.

ping from 19.9% in 1979 to 8.1% in 1998. In 2002, North Carolina adopted the first full public financing system, using mostly a \$3 taxpayer check-off. A great effort was made to raise public awareness of the program so that the judicial campaigns for Supreme Court and Court of Appeals would be adequately funded. The system worked quite well in the 2004 elections with 14 of 16 candidates applying for public funding and 12 ultimately qualifying.¹²³

Oregon has a long history of efforts to limit campaign contributions and expenditures with the first measure passed by voters in 1908. In 1975, the Oregon Supreme Court declared both campaign contribution and expenditure limits unconstitutional. In addition, a 1976 U.S. Supreme Court decision in the case *Buckley v. Valeo* indicated

that spending limits require a higher level of constitutional scrutiny, and since that time most spending limits have been ruled unconstitutional.¹²⁴ Voters passed a statutory initiative in 1994, Ballot Measure 9, again setting contribution limits. The Oregon

Supreme Court in 1997 found the contribution limits unconstitutional and ruled that the Oregon Constitution would have to be amended if such limits were to be consistent with it. Two ballot measures in the 2006 general election sought to re-impose limits. While the limits passed, the required constitutional amendment failed. All of Oregon's efforts at cam-

campaign finance reform have been aimed at the legislative and executive branches, with no effort to address campaign financing of judicial campaigns.



Sherman County Courthouse



Josephine County Courthouse



Klamath County Courthouse

123 Deborah Goldberg, Sarah Samis, Edwin Bender, Rachel Weiss, and Jesse Rutledge, *The New Politics of Judicial Elections 2004* (Washington, DC: Justice at Stake Campaign, 2004), 38-39.

124 "Campaign Finance Reform in Oregon," League of Women Voters of Oregon, 2004, 1. For a detailed examination of campaign finance reform in Oregon, see this publication at <http://www.lwv.or.org/documents/CFR2004.pdf>.

Importance of a Fair and Impartial Judiciary

“Courts are community problem-solvers.... Any group you can name has a stake in the strength and integrity of the judiciary. The most difficult problems of our society are laid at the steps of the courthouse.”¹²⁵
– Hon. Paul J. DeMuniz, Chief Justice of the Oregon Supreme Court

Presiding judges agreed that central to the courts’ work is the ability of judges to make decisions based upon the facts of the case before them and upon the applicable law, independent of the pressure of public opinion and special interests. As Presiding Judge J. Burdette Pratt (Malheur County) put it, “Judges’ decisions are based on the law, not on community

opinion.” It is a defining characteristic of American courts.

The judiciary resolves disputes and is also the guardian of our rights. We all have a stake in our fair and impartial judiciary. Judge Henry Breithaupt observed, “Judicial independence is not a doctrine to protect judges. It is a doctrine to protect citizens.”¹²⁶

Conclusion

This report has described existing threats to the Oregon’s judiciary including insufficient funding, outdated court facilities, understaffed courts, low judicial salaries, inadequate numbers of judges, rising costs of judicial campaigns, the increasing role of special interests in judicial elections, unjust criticism of unpopular decisions, and more. In light of those threats, presiding judges stressed the need for public education about the role of the judiciary.

There is an urgent need to encourage respect for the judiciary’s role as the third, and co-equal, branch of government; to protect the judiciary from efforts that would politicize the courts for the benefit of a few, to the detriment of the many; to preserve our fair and impartial judiciary; and to ensure that it has the resources necessary to protect individual rights and to ensure everyone a day in court. Now it is Oregon’s job to decide how to address these issues.



Crook County Courthouse



Tillamook County Courthouse

125 Barbara Smythe, “Chief Concerns,” *Oregon State Bar Bulletin* 66, no. 9 (July 2006): 9.

126 Interview with Hon. Henry Breithaupt, Judge of the Oregon Tax Court.

Oregon Judicial Districts

Judicial District	County	Location of Courthouse(s)	# of Judges	Square Miles	Population
1	Jackson	Medford	8	2801	194,515
2	Lane	Eugene	15	4620	322,959
3	Marion	Salem	14	1200	302,135
4	Multnomah	Portland	38	465	672,906
5	Clackamas	Oregon City	11	1879	361,300
6	Umatilla Morrow	Pendleton, Hepner, Hermiston	5	5280	85,682
7	Hood River Sherman Gilliam Wasco Wheeler	Hood River Moro Condon The Dalles Fossil	4	6696	49,350
8	Baker	Baker City	1	3089	16,500
9	Malheur	Vale	2	9926	32,000
10	Union Wallowa	La Grande Enterprise	2	5195	31,554
11	Deschutes	Bend	7	3055	130,500
12	Polk	Dallas	3	745	64,000
13	Klamath	Klamath Falls	6	6125	64,600
14	Josephine	Grants Pass	4	1641	78,350
15	Coos Curry	Coquille Gold Beach	6	3277	84,100
16	Douglas	Roseburg	5	5071	101,800
17	Lincoln	Newport	4	992	45,000
18	Clatsop	Astoria	3	843	36,000
19	Columbia	St. Helens	3	687	45,000
20	Washington	Hillsboro	14	727	472,600
21	Benton	Corvallis	3	679	80,500
22	Jefferson Crook	Madras Prineville	3	4782	40,200
23	Linn	Albany	5	2297	104,900
24	Grant Harney	Canyon City Burns	1	14,756	14,950
25	Yamhill	McMinnville	4	718	88,150
26	Lake	Lakeview	1	1125	24,900
27	Tillamook	Tillamook	2	1125	24,900

Oregon Judicial Department Budgets

Judicial Department (OJD) -- Agency Totals*

	2001 -03 Actual	2003-05 Legislatively Approved	2005-07 J Governor's Recommended	2005-07 Legislatively Adopted
General Fund	222,154,156	237,654,982	249,762,817	271,530,503
Other Funds	17,424,895	30,775,154	23,510,763	23,641,495
Federal Funds	1,189,291	2,333,247	892,247	1,390,110
Other Funds (NL)	0	5,949,864	8,220,055	8,220,055
Total Funds	\$240,768,342	\$276,713,247	\$282,385,882	\$304,782,163
Positions	1,992	2,023	2,079	2,029
FTE	1,778.79	1,841.73	1,888.96	1,851.25

*The Public Defense program is responsible for providing legal counsel to indigent persons at the trial court level. This program, which was part of the Judicial Department, was transferred to the Public Defense Services Commission on July 1, 2003. In order to accurately reflect changes to the Judicial Department budget over time, the table above excludes all public defense expenditures, including administrative and support services.

Increases in the OJD budget since the 2001-2003 Legislative session are due to the normal business of the courts and do not include an increase in judicial salaries.

A General Explanation of Appointed Non-Elected Judges, Pro Tem Judges, and Referees

A number of judicial districts use Plan B judges, senior judges, pro tem (short for pro tempore, i.e., temporary) judges, or referees to help manage their caseload:

Plan B judges are retired judges who receive a larger retirement accrual package if they give 35 days of service as a judge per year for five years after their retirement date.

Senior judges have completed their service for the Plan B or other retirement plan, and return to work, earning a daily rate of pay based upon the salary of a circuit court judge.

Attorneys approved to be pro tem judges submit their application and are screened locally, approved by the Supreme Court, and appointed per the statute governing such appointments. Theirs is a contract arrangement. They are paid a daily rate, based upon the salary of a circuit court judge.

Some attorneys volunteer their services to act as pro tem judges. They must also be appointed by the Supreme Court but are not paid for their services.

Referees are authorized by statute. A referee with pro tem authority is hired as a referee and appointed as a pro tem to have judicial authority. A referee with pro tem judicial authority is a state employee and is paid the salary of a referee, not the salary of a circuit court judge.



Marion County Courthouse

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Interviews

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Circuit Courts of Oregon:

Presiding Judges Interviewed in 2006:

Hon. Lindi L. Baker
Hon. Richard L. Barron
Hon. Gregory L. Baxter
Hon. Mary Ann Bearden
Hon. John L. Collins
Hon. William D. Cramer, Jr.
Hon. David W. Hantke
Hon. Robert J. Huckleberry
Hon. Donald W. Hull
Hon. Dale R. Koch
Hon. Thomas W. Kohl
Hon. Paul J. Lipscomb
Hon. Charles E. Luukinen
Hon. Steven L. Maurer
Hon. Rick J. McCormick
Hon. Phillip A. Mendiguren
Hon. Robert C. Millikan
Hon. George W. Neilson
Hon. Philip L. Nelson
Hon. J. Burdette Pratt
Hon. Steven B. Reed
Hon. Garry L. Reynolds
Hon. Mark S. Schiveley
Hon. Lane W. Simpson
Hon. Michael C. Sullivan
Hon. Locke A. Williams
Hon. Cameron F. Wogan

Trial Court Administrators Interviewed in 2006:

Jim Adams
Bryant J. Baehr
Pamela J. Barton
Amy Bonkosky
Gary Brandt
Douglas Bray
Tracey Cordes
David Factor
Candia Friesen
Susan Hill
Jary Homan, Supervisor, Wallowa County
Ed Jones
William C. Jones
Nancy Lamvik
Jessie M. Larner
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Iaine Radabaugh
Donald Smith
Charles Wall
Tammy L. Wheeler

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