

Oregon  
Court of  
Appeals  
Annual  
Report

2008

## Introduction

The Court of Appeals is Oregon's intermediate appellate court. By statute, the Court of Appeals is charged with deciding nearly all the civil and criminal appeals taken from Oregon's state trial courts and nearly all the judicial reviews taken from state agencies and boards in contested cases. Created by statute in 1969, the court does not exercise jurisdiction under the constitution; instead, its jurisdiction is established by the legislature. Whether measured against the number of appeals taken by population or the number of appeals taken by judge, the Oregon Court of Appeals consistently ranks as one of the busiest appellate courts in the nation. Over the past decade, the Court of Appeals has received approximately 3,200 to 4,000 filings per year. The information contained in this narrative is merely a summary of the court's structure, workload, and projects. More detailed information is posted on the court's web page on the Oregon Judicial Department's website at:

<http://courts.oregon.gov/COA/index.page>

## Workload Distribution

The Court of Appeals has ten judges. To meet the demand of its substantial workload, the court is divided into three departments (or "panels") of three judges each for the purpose of considering cases. In addition, there is another three-judge department--consisting of one judge from each of the other three panels--that sits separately for the purpose of addressing substantive motions filed in appeals or judicial reviews. The Chief Judge of the court sits as a nonvoting member on each of the court's four departments and participates in their deliberations. That participation, which is in addition to the Chief Judge's administrative and other responsibilities, permits the Chief Judge to act as a substitute voting member on any panel when one of the other judges cannot participate (due to a conflict of interest, for example) and also helps to ensure consistency in the decision-making of the various panels. Before a panel releases an opinion in a case, the proposed opinion is circulated to all the court's judges, and the court then may elect to consider the case *en banc* (by the full ten-judge court), which happens in approximately two percent of the court's cases.

## Case Processing

An appeal or judicial review can result in a dismissal short of a decision on the merits for a number of reasons: A party may voluntarily dismiss the case due to settlement or for some other reason, there can be jurisdictional problems, or there can be a failure to prosecute. All but a handful of dismissals arise before the case is submitted for decision. Over time, the statistics translate roughly ("roughly" because a case may be dismissed in a year other than the year in which it was filed) into a 35-50 percent dismissal rate.

With regard to those cases that proceed to a resolution on the merits, most cases are submitted for decision after oral argument; a small percentage is submitted on the written

briefing alone. Cases are assigned to a department on a random basis. Each department hears oral arguments on an average of three days each month; oral arguments are heard year-round. In addition, the court adds "fast track" cases to each of its regular oral argument calendars. "Fast track" cases are those matters that the legislature or the court has determined require expedited consideration. Primary among those cases are appeals or judicial reviews involving juvenile dependency, termination of parental rights, land use, workers' compensation, and certain felony charges or convictions. Finally, in an effort to manage an accumulation of criminal and prisoner litigation appeals, the court in 2008 added two further hearing days to its monthly oral argument calendar, in which the court hears an additional 70 appeals in those case categories.

Before oral argument, all three judges assigned to the case read the parties' briefs, perform whatever preliminary legal research may be in order, and meet together to discuss the case. After oral argument, the judges reevaluate the case in light of the parties' oral advocacy and review the record of the case as appropriate. If, based on all those considerations, each of the three judges agrees that (1) none of the parties' arguments will result in the decision below being vacated, reversed, or modified, and (2) a written opinion would not benefit the parties, bench, or bar, then the panel will issue a decision affirming the ruling on appeal or review without opinion. Such decisions normally are issued within a few weeks of submission.

For matters in which a written explanation of the court's decision is appropriate, the presiding judge assigns the case to a judge for preparation of an opinion. Once prepared, the draft opinion is circulated to the other judges of the panel and the Chief Judge, and the proposed decision is discussed at a regularly scheduled conference that the Chief Judge also attends. As noted above, once the panel has agreed on a resolution for the case, which may or may not include a concurring or dissenting opinion by one of the panel's judges, the final draft of the opinion(s) is circulated to all the other judges to determine whether the case will be considered by the full court.

The Court of Appeals historically has issued between 350 and 400 written opinions each year, or 35 to 40 opinions per judge. At any one time, each judge usually has an active list of between 25 and 30 cases that have been assigned to that judge for a written opinion to be produced. Judges generally work on drafting opinions in the oldest cases first, but prioritize the "fast track" cases for which the legislature or the court has required expedited consideration. Through a strong team effort, the court has worked diligently to improve its productivity over the past several years. In 2008, the court issued 436 authored opinions, the highest number issued in more than a decade.

#### *Internal Processes: Publication and Assessment*

The court is committed to improving communications with the bench, the bar, the other branches of government, and the public about its work. As part of its efforts to fulfill that commitment, the court has prepared a written summary of its internal processes, *The Oregon Court of Appeals Internal Practices Guidelines*. Completed in 2007, the

Guidelines describe the internal workings of the court, from the filing of documents that trigger the court's jurisdiction through the issuance of judgments that end it. Included are descriptions of the organization of the court and its professional and administrative staff, how the court processes various filings at the initiation of an appeal or judicial review proceeding, how the court typically arrives at its decisions, and how it prepares them for publication. It also includes descriptions of how the court processes its several thousand motions annually and how cases may be referred to its nationally recognized Appellate Settlement Conference Program. The court hopes that, by providing these insights into its internal workings, its work will be more accessible and its rules and procedures easier for litigants to follow.

The court is also committed to reviewing its internal practices on an ongoing basis, in an effort to improve its practices to better serve the bench, the bar, and the public. To that end, the court recently sponsored and supported a study group that examined the best practices of state intermediate appellate courts across the nation. The court hopes and expects that the study group's work will meaningfully contribute, both in Oregon and across the nation, to the improvement of intermediate appellate court performance through the systematic sharing of information pertaining to court processes and design. As the court changes its practices, it will modify the Guidelines to reflect those changes.

Copies of the Guidelines may be obtained online at the court's web page on the Oregon Judicial Department's website at:

<http://courts.oregon.gov/COA/InternalPractices.page?>

#### *Appellate Case Management System/eCourt Project*

The Court of Appeals has implemented a new automated Appellate Case Management System, a key component of the Chief Justice's vision for an "electronic courthouse." Virtually all components of the Appellate Case Management System are now up and running. The system has contributed to increased processing efficiency by providing functions such as:

- Automated case tracking and data entry.
- Document generation through the use of predefined templates.
- Data tracking and automated statistical report generation.

In addition, the new Appellate Case Management System has streamlined case processing functions by providing a common shared platform that is used by both the Court of Appeals and the Appellate Court Records Section.

The court also has embarked on an eCourt project that will allow external users to file documents electronically in the first quarter of 2009 and that, within the next two years, will permit staff to manage many of the court's critical documents electronically. In addition, by mid-2009, the court hopes to implement a new financial

management system that will provide updated management of all case-related financial transactions.

### Appellate Performance Measures

The Court of Appeals Performance Measures Design Team, which began meeting in the fall of 2005, has finalized the court's success factors and accompanying core performance measures. The court's success factors are:

- Quality: Fairness, equality, clarity, transparency, and integrity of the judicial process.
- Timeliness and Efficiency: Resolution of cases in a timely and expeditious manner.
- Public Trust and Confidence: Cultivating trust and confidence in the judiciary.

The court's core performance measures are:

- Appellate Bar and Trial Bench Survey: The percentage of members of the Oregon appellate bar and trial bench who believe that the Oregon Court of Appeals is delivering quality justice, both in its adjudicative and other functions.
- On-Time Case Processing: The percentage of cases decided or otherwise resolved within established time frames.
- Clearance Rate: The ratio of outgoing cases to incoming cases expressed as an average across all case types and disaggregated by case type--civil, criminal, collateral criminal, juvenile, and agency/board.
- Productivity: The number of cases resolved by the Court of Appeals disaggregated by decision form--that is, signed opinions, per curiam opinions, affirmances without opinion, and dispositive orders.

As our first formal effort to measure the quality of the court's work, in the spring of 2007, the court invited attorneys and judges involved in circuit court cases on appeal in which any case dispositional decision was entered between July and December 2006 to complete an anonymous online survey. Survey respondents gave the highest marks to the court's treatment of the trial court judges and appellate attorneys involved in the cases on appeal. Nine out of ten believe that the Court of Appeals treats them with courtesy and respect. A lesser percentage of respondents, approximately two out of three, believe that the court handles its caseload efficiently, that the court is accessible to the public and attorneys in terms of cost, and that the court does a good job in informing the bar and the public of its procedures. Overall, four out of five appellate attorneys and trial judges

indicated that the court is doing a good job. The statistical summary is posted on the court's web page on the Oregon Judicial Department's website:

<http://courts.oregon.gov/COA/BenchBarSurvey07.page?>

During the Appellate Case Management System phase-in, the design team's extensive work on the case processing, clearance rate, and productivity measures resulted in the development of standard reports that will provide appellate case data to assist the court in evaluating its progress with respect to those performance measures. Those standard reports have been carefully tested for data integrity and were implemented in January 2009.

On a going forward basis, the Performance Measures Design Team will monitor and analyze information captured by the performance measure reports and will apply that information to enhance the court's productivity, the quality of its work, and its management and leadership capabilities. In addition, the design team will continue to identify future performance goals.

#### *Court Improvement Committee*

In August 2008, the Court of Appeals created a Court Improvement Committee made up of five judges and a staff attorney. The goal of this committee has been to explore ways the court can perform its work more efficiently within its existing resource base and to consider longer-term solutions for dealing more effectively with the court's caseload. To that end, the committee has sought to evaluate current practices and procedures and identify methods to improve caseload management and productivity. The committee is currently evaluating briefing and oral argument conventions, as well as the use of staff attorneys, law clerks, and externs, and is pursuing potential funding for a workload study to be conducted by the National Center for State Courts.

#### *Chronic Resource Shortages and Criminal Case Management Project*

As noted above, several of the core performance measures of the Court of Appeals, as identified by the Performance Measures Design Team, involve the timely processing of cases. The most pressing case processing concern that the court faces is an increased backlog of cases that are fully briefed but not yet scheduled for oral argument. In the past twelve months, that backlog has roughly doubled. The primary reason for the increase is that the court has substantially decreased maximum permitted briefing times in criminal and prisoner litigation appeals--which comprise more than half of the court's caseload--and accordingly cases in those categories are being briefed much more quickly than they historically have been. In past years, because of inadequate staffing resources, the lawyers representing the parties in such cases sometimes required up to two years per side to brief appeals. The 2007 Legislative Assembly approved funding to add appellate lawyers to the staffs of the Attorney General and the Office of Public Defense Services in order to enhance the timely completion of their work, including briefing. As a

consequence, over the past eighteen months, the Court of Appeals has been able to reduce by more than half the briefing time and overall number of motions for extensions of time in criminal and related cases.

However, the court's judicial and staffing resources have not been increased to respond to shorter briefing times. As a consequence, the resource shortage, and corresponding potential for delay in the processing of criminal and related cases, has shifted from the lawyers to the court. The court has not sat idly by in the face of these events. In order to assist in processing its criminal caseload, the court has assigned 1.7 staff attorneys to work exclusively on criminal cases. To directly address the increased backlog of cases, the court has added two additional criminal and prisoner litigation argument days to its monthly calendar, increasing the number of cases that the court hears each month by approximately 70. Adding those additional argument days is a huge increase in workload for an already overworked ten-judge court to undertake without an additional infusion of resources. But the court has done so in keeping with its commitment to maintain accountability to the public and to openly confront the resource shortages that limit the efficiency of our public justice system. Although those measures will help the court stay more current in the short run, they are not sustainable at the court's present resource levels. Before the court implemented the measures in the fall of 2008, the court already was hearing and deciding more cases than it did five years ago, with roughly the same amount of resources that it had then.

To place the foregoing discussion in context, it is clear that the Oregon Court of Appeals is substantially underfunded compared to other intermediate appellate courts in the United States. A recently published study showed that the Oregon Court of Appeals was last in budgeted resources per-case nationally among intermediate appellate courts that are similarly structured. For example, the Colorado Court of Appeals, our counterpart intermediate appellate court in that state, has roughly 25 percent fewer annual appeals than does our court, but it has more than twice the number (22) of judges and corresponding staff resources to perform its work.

The core function of the Court of Appeals, that is, the disposition of appeals from trial court and agency decisions, is personnel-driven. It depends on the timely and concerted work of too few judges, staff attorneys, law clerks, judicial assistants, a single administrator, and the staff of our appellate mediation program. Thus, any reductions in the court's personnel budget would significantly impair the court's ability to function properly in many critical areas of its caseload, including its review of time-sensitive juvenile dependency and termination of parental rights decisions.

### *Appellate Commissioner Project*

In 2008, the court reorganized the Office of Appellate Legal Counsel into an Appellate Commissioner's Office. The goal of the appellate commissioner position is to reduce substantially the amount of time it historically has taken for substantive motions in the Court of Appeals to be decided. The commissioner has authority to decide motions, own

motion matters, and cost and attorney fee matters arising from cases not decided by a department. Parties may move for reconsideration of a decision of the appellate commissioner, resulting in review of the decision by either the Chief Judge or the court's Motions Department. The appellate commissioner position is modeled on commissioner positions found in the State of Washington appellate courts, except that the Oregon appellate commissioner does not have authority to decide any cases on their merits.

### Special Programs

*Appellate Settlement Conference Program.* The Court of Appeals has continued to utilize its highly effective mediation program, which has allowed parties to resolve on a mutual and voluntary rather than judicial basis between 100 and 150 civil, domestic relations, and workers' compensation cases each year. The settlement rate for cases entering the program has been approximately 70 percent, one of the highest in the nation.

*Statewide Oral Argument Sittings.* The judges of the Court of Appeals continue to hold court sessions in schools throughout Oregon, making the process of justice both more understandable and more accessible to the public.

*Trading Benches Program.* The court has developed and implemented this program in coordination with Oregon's circuit court judges. Through the program, trial judges periodically sit *pro tempore* on the Court of Appeals, and appellate judges perform judicial work for the circuit courts. With a better understanding of the work that the other judges perform, it is expected that the incidence of reversible error will be reduced.

### Comparative Statistics

The following chart shows comparative statistics for the Court of Appeals for the years 2003-08:

Court of Appeals Comparative Statistics 2003-2008						
	2003	2004	2005	2006	2007	2008
Adoptions	1	3	3	4	5	5
Criminal	1120	1519	1571	1562	1356	1384
Criminal Stalking	NA	NA	NA	NA	1	4
Civil	487	432	418	405	388	402
Civil Injunctive Relief	NA	0	1	0	0	0
Civil Agency Review	NA	1	13	12	24	9
Civil FED	NA	22	35	27	29	28
Civil Other Violations	NA	3	11	9	6	15
Civil Stalking	NA	5	25	19	25	16
Civil Traffic	NA	15	30	35	31	36
Domestic Relations	218	195	176	159	187	185
Domestic Relations - Punitive Contempt	NA	NA	NA	NA	5	7
Habeas Corpus	93	80	85	81	84	78
Mandamus	0	1	0	0	0	0
Juvenile	74	0	1	0	0	0
Juvenile Delinquencies	11	42	38	32	30	24
Juvenile Dependencies	8	62	65	64	80	125
Juvenile Terminations	75	72	79	65	67	44
Probate	15	20	23	18	8	31
Post Conviction	249	387	550	334	291	236
Traffic	96	160	109	88	90	72
Administrative Review	231	217	200	193	232	212
LUBA	43	29	36	21	26	34
Parole Review	157	116	86	175	103	49
Workers' Compensation	214	181	120	116	102	110
Mental Commitment	88	115	126	94	102	83
Columbia River Gorge Commission	NA	NA	NA	NA	1	1
Rule Challenge	NA	NA	NA	2	1	13
Other	0	0	0	2	38	17
Total Filings	3180	3677	3801	3517	3312	3220
Opinions Issued	344	351	400	420	400	436

Beginning in 2004, the Court of Appeals refined its tracking of certain broad categories of case filings. For example, before 2003 the category "juvenile" had included both delinquency and dependency proceedings. Now each type of filing is reported separately.

## Conclusion

I hope that this report will be of interest and assistance to those who follow the work of the Oregon Court of Appeals. My colleagues and I are grateful for the opportunity to maintain open and frank communications with all justice system stakeholders as we work in partnership to improve the delivery of public justice services in Oregon. Our function--providing first-line appellate justice in reviewing trial court and agency decisions--is a relatively small part of that system, but a critical one that affects the lives of Oregonians throughout the state. In order to gain, and maintain, public trust and confidence, we must perform our work productively and efficiently within our dedicated resource base and, above all, we must adhere to the rule of law in doing so. If you have any questions about our work that are not adequately addressed in this report, please do not hesitate to contact me at [david.v.brewer@ojd.state.or.us](mailto:david.v.brewer@ojd.state.or.us), or Oregon Court of Appeals, 1163 State Street, Salem, Oregon 97301-2563.

David V. Brewer  
Chief Judge  
Oregon Court of Appeals  
February 2, 2009