

Oregon  
Court of  
Appeals  
Annual  
Report

2010

Introduction--A Year of Change and Reexamination

Two thousand and ten has been a year of profound change and re-examination for the Oregon Court of Appeals. With respect to change, two of the longest serving, most productive, and influential judges in the court's history, Walt Edmonds and Jack Landau, left the court in 2010. Judge Edmonds has retired, and Judge Landau has been elected to the Oregon Supreme Court. Those two outstanding jurists leave enduring legacies in the annals of the court's work and in the hearts of their colleagues. To fill the vacancies created by their departures, we were fortunate to welcome two energetic and talented new judges to the court, Rebecca Duncan, the immediate past Deputy Director of the Oregon Office of Public Defense Services, and, most recently, Lynn Nakamoto, a civil trial and appellate practitioner with extensive private practice experience. These two individuals will lend the court a depth and richness of professional expertise and diverse perspective reflective of their own work and life experiences.

We also have experienced the loss through retirement of several outstanding members of our support staff team, including Donna Berg, a paralegal with 20 years' experience with the Oregon Judicial Department, and Nancy Livermore and Jan Mackie, two remarkable judicial assistants who each have performed stellar service for the court for a quarter century. The institutional memory that these loyal public servants brought to their work cannot be easily replaced; in fact, in the current budget climate, two of those three staff positions will not be filled.

Those changes have coincided with a concerted effort by the Court of Appeals to re-examine its work and its role in Oregon's justice system. To begin, the Court of Appeals in 2010 assisted the National Center for State Courts (NCSC) in the preparation of a study of the court's workload. The workload study marks the first effort in the nation to systematically assess an appellate court's workload and resource requirements in light of its institutionally adopted performance measures. The study foreshadows NCSC's upcoming report, "Principles of Judicial Administration: Governance, Case Administration, Essential Functions and Funding" (2010). That report sets forth as its first principle of court funding:

"The Judicial Branch should make budget requests based solely upon demonstrated need supported by appropriate business justification, including the use of workload assessment models, identification of essential functions and application of appropriate performance measures."

The workload study lends concrete backing with objective data to the court's 2009 Annual Report. If you recall, in the 2009 Annual Report, I outlined the court's chronic underfunding in the face of an ever-demanding caseload, even though no judges have been added to the court since 1977. This circumstance is due in part to budget decisions that have created an imbalanced system.

For example, substantial numbers of attorneys have been added to the appellate divisions of the office of the Attorney General and the Office of Public Defense Services to process criminal and collateral criminal appeals, which constitute more than 60 percent of our caseload. As a consequence, those offices uniformly produce timely and sophisticated arguments in their cases, requiring the dedication of significant court resources to resolve criminal and collateral criminal cases. The steady increase in the quality, complexity, and volume of that work is exemplified by a single telling statistic: Between 2001 and 2009, the number of appeals per year in which the Public Defender's Office filed briefs on the merits, thus requiring the attention of an entire three-judge panel of the court, rose from 464 to 733--a 58 percent increase. **And that trend was steady and progressive throughout the decade.**

That trend has produced two primary consequences. First, the court resolves a large number of cases without issuing a written opinion. That deprives litigants of the legal guidance they deserve. In addition, it leaves fewer resources for the timely resolution of civil and domestic relations appeals and administrative reviews, all of which are critical to the economic and social well-being of Oregonians. Although there have been insufficient resources to perform a scientifically grounded study of the overall economic impact of delays in the processing of civil appeals in Oregon due to chronic underfunding, those impacts are doubtlessly substantial. By way of illustration, in a recent study prepared on behalf of the Florida State Bar, the Washington Economics Group found that the total annual adverse economic impacts arising from civil court case delays at all levels of the Florida justice system is a staggering \$17.4 billion each year.

The workload study confirms that:

- Despite successful efforts systematically to modernize and improve its internal processes and case-deciding function, including the creation of the Appellate Commissioner's office to process many more cases with the dedication of fewer judicial resources, and an electronic appellate case management system to monitor and assess timeliness and productivity, **the court needs at least three new judges and corresponding staff in order to merely "tread water" with its existing caseload. Even then, the court would continue to fall short of its established objectives for timeliness and quality.**
- "Treading water" will not produce appellate justice that truly meets the needs of Oregon's citizens and businesses. By any objective measure, the court does not have adequate judicial and staffing resources to hear and decide its current caseload in a timely fashion. To compensate, for many years, the court has resorted to the practice of affirming trial court and agency decisions without opinion even though many of those cases would benefit from a written explanation of the court's decision to affirm. Improving the timeliness of decisions and reducing the number of decisions without

written opinions would require adding more judges and staff beyond the number required merely to tread water.

- As the Oregon Court of Appeals enters its fifth decade, it is more important than ever that we openly discuss with you the challenges that the workload study sets forth in stark relief. The court is committed to working with the Legislative Assembly and other stakeholders to make every reasonable effort to continue to deliver quality justice. I outline here three categories of long-term goals in the court's effort to meet those challenges:

**1. ADDITIONAL JUDICIAL AND STAFF RESOURCES:** The simple conclusion is that the court needs additional resources to effectively carry out its functions. However, we are clear-eyed and realistic about the prospects for additional resources. The court is not seeking the full resources that match the needs identified in the workload study.

The Oregon Judicial Department's 2011-13 biennial policy option package request for the Court of Appeals will seek the addition of only three judges and corresponding staff, which is less than what the workload study shows is needed merely to comport with existing case management practices.

In these difficult times, it is more challenging than ever to resolve the many competing demands on increasingly scarce public resources. We also recognize the plight of other critical partners in the justice system. However, each part of the justice system needs to be supported in balance in order to provide justice to Oregonians. That goal requires recognition that some parts of the system, the courts in particular, have not always been funded in parallel but, instead, as the workload study demonstrates, have fallen behind. Although it is tempting in the abstract to make across-the-board budget cuts in times like these, it is not necessarily the course that will best serve Oregonians.

**2. CONTINUED TECHNOLOGICAL ADVANCEMENT:** Technology will be a critical force in moving the court forward in performing its work more efficiently. That comes with a caveat, however. Technology is not a panacea for the conquest of chronic resource shortages and structural problems within the justice system; it requires its own support so that it serves the courts rather than add to the burdens imposed on overworked staff in a declining budget environment. The pursuit of new technology, no matter how desirable, must not occur at the expense of core judicial operations. That risk is very real for courts--like ours--that are forced to accrue budget savings by holding vacant critical staff positions in the face of an unrelenting caseload. As examples, between now and November 2011, the end of the current biennium, three of the court's key personnel, our Executive Manager, a judicial assistant, and our only technical support specialist, will each devote more than 50 percent of their time and services to the Oregon eCourt program. Those costs require us to be ever vigilant that the staff time and scarce funds that we expend on technology are used transparently, accountably, and wisely.

**3. NEW INITIATIVES:** Our commitment to long-term solutions to chronic underfunding requires us to re-examine the allocation of workload and resources within the Oregon Judicial Department and, as pertinent here, between the appellate courts, in a logical, balanced, honest, and mutually supportive way. Among the initiatives deserving consideration are (1) the increased use of voluntary certification by the Court of Appeals of selected appeals to the Supreme Court based on principled criteria that do not undermine the essential error-correcting function of the Court of Appeals as the final decision maker in most appeals; (2) the increased use, where feasible, of two-judge appellate panels to resolve more cases within acceptable timelines; (3) the enactment of an appellate reference judge system similar to the existing statutory system that is employed in some Oregon trial courts, where the parties could hire qualified appellate lawyers or senior judges to decide civil appeals, subject to court review if necessary; and (4) statutory amendments that would equitably and efficiently adjust the workload between the appellate courts by transferring initial jurisdiction of certain cases from the Court of Appeals to the Supreme Court. One example of such a transfer is death penalty post-conviction appeals, which are few numerically but consume enormous resources in the Court of Appeals, while the Supreme Court already has handled the initial direct appeal and is familiar with the original trial court record.

Conclusion

I am sharing with you links to the court's 2009 Annual Report, (<http://courts.oregon.gov/COA/docs/2009AnnualReport.pdf>), the complete workload study, (<http://courts.oregon.gov/COA/docs/ORCOAWorkloadFinalReport.pdf>), and a recent article published by the National Center about the transformative reengineering that our court has undergone. (<http://courts.oregon.gov/COA/docs/COAPerformanceMeasurements2010.pdf>). I hope you find that those documents illuminate how we are striving to maintain the court's standard of principled and efficient decision-making, even with insufficient resources. Please let me know if you have any questions about the contents of the documents. I would be happy to discuss them with you at any time.

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