

OREGON COURTS TODAY AND TOMORROW*

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Court exerted some power over the local courts as the entity responsible for interpreting the Oregon constitution and Oregon statutes, but had little administrative authority over the local courts. That structure changed in 1981 when the legislature enacted legislation unifying the state's court system—shifting fiscal responsibility for the judiciary away from the local governments and placing it almost entirely with the state.¹ Today, the chief justice and

as Supreme Judge was set to end on the adoption of a code of laws.⁵ Establishing a form of judicial government only when confronted by a pressing circumstance bolsters the view that the original settlers of the Oregon Country wanted only the government that they needed. And, in 1841, they didn't need much.

At statehood in 1859, Oregon's Supreme Court was established with four justices, but was increased to five in 1862.⁶ Between 1862 and 1913, the composition of the Supreme Court fluctuated between three and five justices. However, the Court struggled to meet the demands of the people with so few justices and at one point was forced to appoint temporary "commissioners . . . to assist in the performance of its duties and in the disposition of numerous causes now pending and which may hereafter be pending . . ."⁷ Through legislative action, the Supreme Court was increased to seven justices in 1913 and remains at that number today.

The 1913 legislative session produced Oregon's first district court, exercising its authority under Article VII (Amended) of the Oregon Constitution, "vesting the judicial power 'in one Supreme Court and in such other courts as may from time to time be created by law.'"⁸ The district courts were, in large part, a substitute for justice courts in urban areas, having (like justice courts) limited civil and criminal jurisdiction.⁹ By 1997, thirty of Oregon's thirty-six counties had district courts with sixty-three district judges. However, as early as the 1970's, efforts were underway to consolidate the trial courts. In 1998, unable to withstand the mounting pressure for consolidation, the Oregon Legislature abolished all district courts and transferred judicial authority and pending cases to the circuit courts. Without executive appointment or popular election, but by virtue of

5. HINES, *supra* note 3.

6. OR. CONST. art. VII, § 1. See Stephen P. Armitage, *Supreme Court Expanded in History of the Oregon Judicial Department: After Statehood*, available at http://www.oregon.gov/soll/pages/ojd_history/historyojdpart2toc.aspx (last visited Mar. 17, 2014).

7. 1907 Or. Laws ch. 88, short title; see Armitage, *supra* note 6. Armitage writes:

Even the two commissioners were not enough to solve the congested docket, however. The terms of the commissioner would expire in early 1909, but additional cases are being filed *** faster than three Justices, unaided, can speedily hear and determine them. So in 1909, just over 30 years after the Legislature had reduced the Supreme Court from five to three, the Legislature passed legislation again authorizing five justices on the Supreme Court.

Id. (internal quotation marks omitted).

8. Armitage, *supra* note 6.

9. *Id.*

consolidation, all sitting district court judges became circuit judges.¹⁰

In 1969, the legislature created the Court of Appeals to address the overflowing Supreme Court docket and the multitude of criminal procedure issues and cases spawned by the decisions of the Warren Court.¹¹ The legislature initially provided for five judges and limited jurisdiction (criminal, domestic relations, and administrative law), and it added one judge in 1973 and four more in 1977. In 1977, the legislature also removed most of the previously imposed jurisdictional limitations, routing nearly all types of cases through the Court of Appeals. The court operated with ten judges, as one of the busiest appellate courts in the country, until October 2013, when three new judges were seated.

The Oregon court system experienced its most dramatic change in 1981 when the legislature enacted legislation that “ended county funding of trial court operations (both circuit court and district court), replacing it with state funding . . . [and] centralized the administration of the Judicial Department in the hands of the [c]hief [j]ustice of the Oregon Supreme Court.”¹² This change addressed two major problems. First, before 1981, trial court funding depended on the county government’s finances, which resulted in uneven and unpredictable financial support across Oregon’s courts. Second, the trial courts suffered from “inadequate judicial administration, which affected all levels of control.”¹³ With the adoption of the 1981 legislation, the office of the chief justice g[(count9-toe)7.4()Dic jle un9/3Ont9wTc 0.19s464

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During the great recession (2007–09) the Oregon judicial system, like those in most states, suffered significant budget reductions. By January 2011, the state faced a \$3.5 billion deficit, representing one of the largest per capita budget deficits in the nation.¹⁵ The Oregon Judicial Branch budget for 2009–11 was \$37.2 million less than the amount needed to continue services at 2007–09

so guided by four principles: (1) improving litigants' convenience, (2) reducing cost and complexity for litigants, (3) improving litigants' access to justice, and (4) improving case predictability.

As noted earlier, Oregon, like most state courts, is an example of a "loosely coupled organization"—an "organization where individual elements display a relatively high level of autonomy vis-à-vis the larger system within which they exist."¹⁹ As a general rule, the professionals within such organizations operate independently, as do the organizations' work units.²⁰ For state court systems like Oregon, the result is frequently a balkanized organization.²¹ Reengineering the processes used in a decentralized entity like the Oregon court system requires, among other things, "a governance structure that treats a court system more like a single enterprise" than not.²²

One of the ways the branch began moving toward such a system in Oregon was by placing greater emphasis on centralizing judicial staff functions within local courthouses. To do so, however, ran counter to 150 years of judicial culture in Oregon. Traditionally, the

at the Oregon Supreme Court now share duties between multiple chambers under the supervision of a single appellate court manager rather than the court's seven justices. That format, in turn, has allowed the court's judicial assistants to take on tasks directly related to court operations that were previously performed by the appellate records division. Today, the appellate court manager and three judicial assistants do the same work that seven staff members did, and, in addition, perform a great deal of the electronic case management tasks related to the supreme court's docket. The increased flexibility of that work unit, moreover, effectively added the equivalent of two and one half full-time employees to records with no new funding, enabling that department to efficiently handle the increasing case management workload of the Oregon Court of Appeals—Oregon's busiest appellate court.

Based on the Oregon Supreme Court's model, the Multnomah County Circuit Court, Oregon's largest court, was able to adopt a similar strategy: all thirty-eight judicial assistants in that county now operate under the supervision of the trial court administrator and are required to devote twenty-five percent of their time each day to courthouse operations. That strategy resulted in the equivalent of adding at least seven full-time positions to court operations, allowing that court to retain its efficiency despite severe budget reductions. The cultural shift that was initiated in the supreme court has now been implemented throughout most of the Oregon court system.

From a reengineering standpoint, however, the example just described was really only a harbinger of a much larger and bolder shift toward centralized operations that were needed in order to more closely resemble a single enterprise. Centralized docket control, jury management, and payment systems were the next logical steps—all of which the Oregon court system is currently implementing in one form or another.

Centralizing common court operations can, in turn, facilitate further renovation of court governance structures by redistributing and regionalizing state courts and judges to maximize judicial resource management, staffing, and the general delivery of trial court services. One example involves Oregon's prison litigation. Oregon has fourteen prisons scattered throughout the far reaches of the state. By leveraging its technology, the branch has centralized nearly all post-conviction litigation to a special docket that is administered out of the state court administrator's office in Salem, instead of the individual counties. Nearly all of the post-conviction litigation is

handled electronically from Salem, saving millions of dollars in indigent attorney's fees, security and transportation costs, and millions of dollars in paper and postage. Few post-conviction cases remain on a local judge's docket, retired judges preside over all the cases as part of their retirement obligation, and there is no longer a backlog.

For some, case administration means routine court administration and thus has only limited utility in animating court-reengineering efforts.²⁶

motions are prohibited without leave of court.³⁸ The program has proved to be particularly useful in smaller personal injury cases, contract cases, and any similar civil action in which no case participant stands to benefit from protracted litigation. In addition to providing a streamlined path to a jury verdict, the Expedited Civil Jury Program also allows lawyers and judges to gain valuable litigation expertise, helping to ensure that, when needed, Oregon citizens can turn to a large community of seasoned litigation professionals for help.

The branch has also pursued similar measures in more complicated civil matters as part of a program known as the Oregon Complex Litigation Court. The court was first established in 2006 as a pilot project within the state's second judicial district (Lane County).³⁹ Its primary mission was to adjudicate complex litigation unfettered by venue boundaries.⁴⁰ When the program began, litigants throughout Oregon could request a change of venue to the second judicial district to have their cases heard in a specialized forum if their disputes were likely to strain local court dockets.⁴¹ The pilot project was successful and has been expanded statewide.⁴² Litigants no longer need to travel to Lane County. Instead, judges travel to the litigants—a cadre of experienced judges is now available to adjudicate complex disputes throughout the state bringing efficiency, consistency, and predictability to lawyers and litigants.

Regardless of how extensively case administration processes are restructured, Oregon's, like most state court systems, still needs to pursue a final area of court reengineering—*i.e.*, redefining essential court functions and providing services accordingly. Increasingly, court management experts describe redefining essential court functions as legal “triage”: the act of prioritizing and disposing of cases by identifying and using the most issue-appropriate resources.⁴³

38. *Id.* R. 5.150(5).

39. *Oregon Complex Litigation Court: History and Description*, OR. JUDICIAL DEP'T, http://courts.oregon.gov/OJD/docs/courts/circuit/OLC_History_Description.pdf (last visited Jan. 28, 2012) [hereinafter *History*].

40. *Id.* (“[The] program . . . was designed to allow Lane County Circuit Court to handle complex litigation cases from out of county that would have been burdensome to a court’s normal docket.”).

41. *Id.*

42. Or. Chief Justice Order No. 10-066 (Dec. 2, 2010).

43. See Victor E. Flango, *Which Disputes Belong in Court?*, in *FUTURE TRENDS IN STATE COURTS 2010*, at 11 (Carol R. Flango et al. eds., 2010), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1605>.

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Suffice it to say that state court

with little or no security.

Session after legislative session in the 1990s and early 2000s, the legislature ignored the judicial branch's entreaties that most counties were not meeting their statutory responsibilities to provide suitable and sufficient court facilities. The legislative response was that the problem needed to be addressed to the counties, not to the state. Finally, in 2006, in response to a study characterizing the shoddy state of Oregon's courthouses as a "public safety" issue endangering the public and courthouse staff, the legislature agreed to fund a \$1.2 million study of all Oregon court facilities in 2007.⁴⁵ That study, completed in 2008, confirmed that Oregon's courthouses were in dire need of repair, upgrading, or, in some cases, complete replacement.⁴⁶ In turn, the 2009 legislative session authorized the expenditure of \$12 million for immediate repairs to court facilities throughout the state. The 2011 legislative session resulted in the allocation of funds from a new criminal fines bill to assist with county courthouse projects. And, finally, in 2013 the legislature enacted legislation-authorized partnerships between the counties and the state for the repair, upgrade, and replacement of county court facilities.⁴⁷ The first courthouse to be replaced is in Union County, where the circuit court has operated "temporarily" for twenty years in an abandoned hospital.

In 2005, the legislature enacted ORS 1.178, known as the State Court Facilities and Security Account. The funds accumulated in that account are dedicated for the exclusive use of the judicial branch to develop and implement a plan for courthouse security improvement and training, emergency preparedness, distributions to local court facility security accounts, and capital improvement to courthouses throughout the state.⁴⁸

With the funds from that dedicated account, the judicial branch contracted with the National Center For State Courts in 2007 to engage in a detailed security assessment of the Oregon's court

45. Interim Comm. on Court Facilities, Final Report, 75th Sess., at 5-6, 11 (Or. 2009), available at http://www.oregonlegislature.gov/citizen_engagement/Reports/court_facilities_final_report.pdf; STATE OF OREGON, OREGON COURT FACILITIES ASSESSMENT S

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facilities. Their report provided the judicial branch with an appropriate perspective for addressing the branch's security needs and enhancing the court security governance structure.⁴⁹

In 2009, the judicial branch established the Oregon Judicial Department Security Standards for the appellate, tax, and circuit courts of the state, and authorized the implementation of a five-year security plan.⁵⁰ Implementation of that plan has resulted in security, emergency preparedness, and business continuity for all of Oregon's courts; two emergency response trailers that caontinuee[(Imp)12.52p]TJ0.001 Ee2Ml2(i)]TJ]TJ2ur

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was to divide government into different branches.⁵⁸ However, those early models of government did not include a judicial branch.⁵⁹ Montesquieu, Locke, and Harrington all conceptualized tripartite divisions of power, yet none of the three philosophers posited that the judiciary should be a co-equal branch of government.⁶⁰

The American judiciary, however, gained new prominence under the U.S. Constitution. The framers of the Constitution, experienced in British rule, feared the very same power as the philosophers who preceded them. As James Madison wrote: “Ambition must be made to counteract ambition.”⁶¹

The framers believed that the judiciary should be a co-equal branch of government,⁶² but did not view the judiciary as an independent institution and thus failed to incorporate the necessary institutional protections.⁶³ The framers’ motivation to protect the judiciary was twofold.⁶⁴ First, the framers were concerned about judicial independence because colonial judges were under direct control of the King and had no salary protection.⁶⁵ Second, the framers were concerned with the power that state legislatures had over their respective judiciaries.⁶⁶ These fears were subsequently realized during a period of legislative encroachments, causing James Madison to lobby for the judiciary to be a co-equal branch of government.⁶⁷ Patrick Henry and John Marshall joined Madison, and pushed for an independent judiciary capable of protecting itself from any extra-constitutional actions stemming from other branches of government.⁶⁸

As Michael Buenger noted, “[t]he Framers . . . rejected a judiciary whose . . . judgment [] was dangerously subject to unwarranted intrusions by the executive and legislative branches,

58. See Kurland, *supra* note 56, at 595.

59. *Id.*

60. *Id.*

61. *Id.* at 598 (quoting THE FEDERALIST NO

legislative process itself, state judiciaries have become the fora for some of the most vexing political and social issues of our time. Unlike the past, state courts are finding themselves at the center of, and not the periphery of, many divisive political maelstroms.⁷⁸

Until Oregonians truly understand the importance, in their daily lives, of an independent, relevant, and efficient court system, or the Oregon Constitution is amended to guarantee a certain level of funding to the judicial branch, obtaining sustainable funding will remain very difficult to achieve.

There are numerous indicators that suggest the current economic climate is the “new normal.”⁷⁹ Thus, in order to establish a new, resilient state judiciary that is able to thrive in the new normal, the judiciary must disregard the notion that normalcy will return in any predictable, typical sense. Economists have predicted that the recovery from the recent downturn will be slower and more modest than prior rebounds⁸⁰—a potentially devastating result for state judiciaries, as the Pew Center on the States predicts:

Once states get past the immediate crisis of plugging record-high budget gaps, they will confront the likelihood that the recession will impose permanent changes in the size of government and in how states deliver services, who pays for them, and which ones take priority in an era of competing interests.⁸¹

In practical terms, the fear going forward is that stopgap measures taken during the recession are going to become business as usual. Further, any rebound in the economy cannot be relied on to reverse the consequences of severe budget cuts taken during the recovery. While stopgap thinking is indispensable, especially during economic downturns, it must be seve

The financial situation is serious and history requires a meaningful change on a grand scale, resulting in a lasting shift. That shift should come in Oregon in the way of sustainable court funding, which will allow the Oregon judicial branch to continue to leverage technology and implement reengineering strategies in accordance with long term strategies.

Sustainable funding must involve both short and long-term investment in technology. Smart phones, tablets, and other electronic devices have become commonplace with the general public to quickly access documents, email, and a variety of other needs. Oregon's courts are not exempt from the technological revolution of younger generations and to stay relevant, courts must eliminate the old "court norm"—stacks of paper, manual searches, missing files, and delayed orders. Oregon's court system must be funded sustainably so that it can quickly take advantage of technological opportunities that become available—which will not only allow the court system to stay relevant with younger generations, but also improve the public's access to justice—and allow the courts to operate fully and efficiently on less revenue.

In the short-term, Oregon's courts should also seek solutions that make the courts more user friendly for the public by offering access to frequently asked questions and web pages—which would reduce repetitive telephone inquiries or foot traffic—for readily available information. Further, the courts should implement software programs that reduce the need for manual entry of data by court clerks and other personnel. Not only does software free up time for court staff, it also reduces the likely occurrence of human error.

Vital to Oregon's long-term success is an integrated technology approach that can incorporate the major components of electronic filing and payment, electronic document and case management, person-based data, video conferencing, wireless connectivity, and a robust web-based presence. In its most expansive application, an integrated technology system will make support staff and other judicial resources available to attorneys and the public on a virtual 24-7 basis, regionally and worldwide, reducing delay and backlogs in the courthouse. Even a fraction of the system's capabilities would enable streamlined access to complete courthouse information in real-time, offer immediate self-service, and provide options that are not restricted by hours of operation and personnel availability.

In order to implement and realize such expansive changes, Oregon's legislative and executive branches should give judicial

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branch funding the same priority afforded the education of our children, the health of our families, and the public safety of our communities.

B. Use of Technology in the Future

The influence of technology and the use of social media have exploded over the last decade. The ways in which people get news and access information has switched from the traditional “old media,” *i.e.* newspapers and radio, to “new media,” *i.e.* the Internet, social media, video, and text publication.

overwhelming presence on social media sites, “[t]hose ages 65 and older have roughly tripled their pres

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administrative office of the courts, reported successfully using YouTube channels for “public information, education, and community outreach.”⁹⁵ Other uses of YouTube ha

services.¹⁰² Further, the court uses Facebook, Twitter, and YouTube as a way to promote interaction.¹⁰³ On the court's YouTube website, viewers can watch videos about how judges are selected to the bench, self-representation in court, and how to avoid juror misconduct.¹⁰⁴ Many courts across the country have made large strides embracing social media as a means of community outreach. Oregon needs to follow.

C. *Technology in the Courtroom*

The Oregon judicial branch must also move to integrate more technologically advanced courtrooms for judges, attorneys, and juries to use. Not only is technology more readily available, but also "the population of old-school litigators" has diminished and younger generations are appearing more and more in court.¹⁰⁵ The implementation of technology into the courtroom enhances the capabilities of the court to hear testimony, receive evidence, and view documents at a quicker speed, all while maintaining the credibility of the proceedings.¹⁰⁶ As one judicial clerk in Ohio stated:

The new equipment is more than a shiny toy. The Federal Judicial Conference Committee on Automation and Technology has researched the utility of new courtroom technologies, from the perspective of both judges and jurors. The results were markedly favorable. For example, over 90% of the jurors indicated they were better able to see evidence and understand an attorney when

102. *Id.* at 11.

103. THE JUDICIAL BRANCH OF ARIZONA, MARICOPA COUNTY, <http://www.superiorcourt.maricopa.gov> (last visited Feb. 26, 2014).

104. SuperiorCourtAZ, *Merit Selection: How Judges are Appointed in Maricopa County*, YOUTUBE (Feb. 26, 2014), <http://www.youtube.com/user/SuperiorCourtAZ?feature=mhee>.

105. Hon. Herbert B. Dixon, Jr., *The Evolution of a High-Technology Courtroom*, NAT'L CTR. FOR STATE COURTS (2011), <http://www.ncsc.org/sitecore/content/microsites/future-trends-2011/home/Technology/1-4-Evolution-of-high-tech-courtroom.aspx>.

106. See NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT 113-18 (2009), available at http://apps.americanbar.org/abastore/products/books/abstracts/5450060%20chap%204_abs.pdf; Tammi Flythe, *The Courtroom 21 Project: A Light at the End of the Legal Technology Tunnel*, FINDLAW (May 5, 2013), <http://technology.findlaw.com/modern-law-practice/the-courtroom-21-project-a-light-at-the-end-of-the-legal.html>; Martin Gruen, *The World of Courtroom Technology*, THE CTR. FOR LEGAL AND COURT TECH. 1-6 (2003), available at <http://www.legaltechcenter.net/download/whitepapers/The%20World%20of%20Courtroom%20Technology.pdf>.

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counsel used video evidence presentation technology. This finding is in accord with statistics showing that, after three days,

prosecutors in the San Diego County District Attorney's office have begun to utilize the popular new app TrialPad to help present cases in an interesting, interactive way.¹¹⁴ TrialPad, which was named the #1 New Product of 2011 by TechnoLawyer, is a \$90 app sold in the iTunes store, which claims to "make [] your document management more efficient, and your presentation more dynamic."¹¹⁵

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through this kind of political process—with its inflammatory rhetoric and demagoguery—erodes public confidence in the impartiality of all judges. Polls consistently show that the public believes judicial campaign contributions pay off for donors. A 2010 Harris poll found that more than 70% of Americans believe that campaign contributions influence courtroom outcomes.¹²¹

History proves that our constitutional system of government has endured because the public and the other branches of government acquiesce to judicial authority. They have confidence and trust in the impartiality and independence of judicial decision making—namely, decision making free of outside political or economic influence. However, the special interest financing of judicial campaigns in states across the country has the potential not just to erode, but to destroy our children's and grandchildren's trust and confidence in our courts.

Oregon should not wait for the nuclear judicial arms race to strike here. Currently, the Oregon Law Commission is studying judicial selection in this state, and will eventually provide a report to the legislature that may someday provide the basis for constitutional reform.

E. Family Law

Oregon has been one of the nation's leaders in moving away from the adversarial model to a problem solving model in drug courts, mental health courts, and veterans' courts. Although there has been some innovation in Oregon's family courts, it is time to ask hard questions about the structure, operation, tradition, and culture of our family courts.

involvement with their children, and provide for alternative forums and processes outside the court system for resolving parenting issues in a more consensual manner.¹²²

Today, in 60% of the family law cases nationwide, at least one party is not represented by a lawyer and frequently neither party is represented. We need to ask whether the parties in these cases are well served, and whether their needs—and the needs of their children—are met in hearings controlled by procedures and rules of evidence (some of which originated in the Roman Empire) that they know nothing about. More relaxed evidentiary rules and procedures could reduce litigant stress and, with experienced, well-trained judges, create an atmosphere in which parties believe they have been fairly heard and treated with respect.

Finally, judicial leaders might also ask what is the appropriate level of judicial involvement and responsibility for review and examination of uncontested divorce agreements. Reducing the court's role in those cases and in other aspects of divorce and separation would likely enable judicial resources to be shifted away from family courts, enabling courts to better perform their core judicial functions.

V. CONCLUSION

Despite the unprecedented economic challenges Oregon has faced during the last decade, the *New York Times*, in a 2011 editorial,

Second, the branch has worked hard to maintain the public's trust and confidence. The branch has changed century-old traditions to become more efficient, adopted statewide security standards for our courthouses to protect the public and court staff, and diligently emphasized impartiality and the court's limited role to interpret rather than make the law.

Third, the branch has responded to the challenge of continuing to provide quality and timely dispute resolution. It has increased its use of technology, streamlined court processes, and developed specialty courts such as the drug courts and family courts. The branch has also established the voluntary expedited civil jury trial program to resolve smaller economic disputes more quickly—and the statewide complex litigation court to ensure that large, complex cases do not overwhelm the rest of a court's business.

Fourth, the branch has worked hard to collaborate with its justice system partners and stakeholders.

Fifth, the branch has done its best to enhance judicial administration. Despite declining resources, the branch has maintained its commitment to performance measures, management, budgeting, and support for evidence-based practices.

In the end, however, the independence, competency, efficiency, and relevance of the Oregon court system of the future will depend on funding. It is too often said publicly that America's court systems need to be funded at an "adequate" level. Unfortunately, "adequate" funding is usually defined at the barest, most basic level: can a court dispense due process in disposing of the cases before it in a manner that meets the minimum constitutional or statutory muster?

The cornerstone of democracy—the rule of law—cannot survive with this meager mindset as its measuring stick. That dynamic must change. A definition of an "adequate" level of funding for the courts must recognize both the duty of the court system to provide justice without delay and, additionally, it must encompass the responsibility of *sustaining* a viable separate and equal branch of government—the judicial branch.

Finally, the judicial branch must be sensitive to the relationship between technology and the future of the court system. The younger generations that use technology every day have no patience or time for what is still considered the "court norm"—wading through reams of paper, long delays to get information, much less searching for missing paper files or delayed entry of judgments. They are used to

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accessing information, facts and data, from their smart phone instantly. Given that reality, courts must be funded so that they can move forward quickly with technological opportunities to support and improve their work processes. Failure to do so has the potential to cast Oregon's courts into irrelevancy with the upcoming generations.