

**A TRIBUTE TO THE HONORABLE WALLACE P.
CARSON, JR.—INTRODUCTION¹**

CHIEF JUSTICE PAUL J. DE MUNIZ, OREGON SUPREME COURT^{*}

From 1982 to 2006, Oregon's judiciary had the benefit of the thoughtful and steady leadership of Chief Justice Wallace P. Carson, Jr. In behalf of his colleagues on the court, I am pleased to participate in this written tribute to his service and to enshrine permanently for Oregon's judicial history our profound appreciation for his valuable and sustained contribution to Oregon's judicial system.

Chief Justice Carson was born in Salem, Oregon, where his father practiced law in a firm founded by his grandfather in 1889. Other than undergraduate school at Stanford University and military service in Korea and Taiwan, Chief Justice Carson's life has been anchored firmly in Salem. Following his graduation from Willamette University College of Law in 1962, Carson joined his father and uncle in private law practice in Salem. Four years later, Carson made his debut into Oregon politics, successfully running for the Oregon House of Representatives. He served two terms in the House, one as majority leader. In 1970, Carson was elected to the Oregon Senate, where he served through 1977 and was minority floor leader from 1975-77. As a Republican state senator, Carson helped to pass Oregon's bottle bill and greenway bill, state constitutional amendments, and significant land use legislation. During his decade of service in the Oregon Legislative Assembly, Carson earned high praise from the public and his fellow legislators for his intelligence, thoughtfulness, and common

1. This article is taken from the author's contribution to the inaugural edition of the 2006 Oregon Appellate Almanac. See Chief Justice Paul J. De Muniz, *Reverse Dedication*, 1 Oregon Appellate Almanac (2006).

^{*} The Honorable Paul J. De Muniz joined the Oregon Supreme Court by election in January 2001 and became chief justice in January 1, 2006. Prior to his election to the supreme court, Chief Justice De Muniz served on the Oregon Court of Appeals for more than ten years. Before becoming a judge, Chief Justice De Muniz practiced law in Salem, Oregon, with the law firm of Garret, Seideman, Hemann, Robertson & De Muniz, P.C., and served as a special prosecutor in Douglas County, Oregon, and as a deputy public defender for the State of Oregon. He also served in the United States Air Force. Chief Justice De Muniz graduated from Portland State University in 1972 (Bachelor of Science) and from Willamette University College of Law in 1975.

sense, and for the bipartisan approach that he took to the legislature's law-making function.

Carson's productive legislative career ended in 1977 when Democratic Governor Robert Straub appointed him to the Marion County Circuit Court. As a circuit court judge, Carson again distinguished himself by his respectful treatment of litigants and lawyers, and by his careful and measured approach to his role as a judge. Five years later, in 1982, Governor Victor Atiyeh recognized Carson's immense talents as a judge and appointed him to the Oregon Supreme Court. In 1991, his court colleagues acknowledged Carson's unmatched work ethic and exceptional administrative skills, unanimously electing him Oregon's thirty-sixth chief justice.

During his nearly 25 years on the Oregon Supreme Court, Chief Justice Carson came to be regarded as a person and jurist of great integrity and a selfless public servant by everyone associated with Oregon's judiciary and legal profession. Attempting to relate his many contributions to the Oregon judiciary during his entire judicial career, and particularly the 14 years that he served as chief justice, is fraught with the risk of serious oversight. Instead, two endeavors during his tenure as Oregon's longest-serving chief justice immediately come to mind as symbols of the breadth and impact of his steadfast and imaginative leadership.

The first example occurred in 2003, when Oregon's judicial branch was hard hit by the biggest economic downturn in its history. Unprecedented budget shortfalls ordered by the legislature compelled Chief Justice Carson to confront unforeseen administrative challenges in guiding the response of our state judiciary. Those challenges included the loss of numerous employees statewide, the closure of courthouses one day a week, and the unflattering spotlight on Oregon in the national media. However, due to Chief Justice Carson's leadership, those dark times passed in less than one year, and he was able to restore normal courthouse operations. Oregon's judicial system weathered the storm, but many Oregon judges and lawyers now realize that the damage could have been much worse if the judiciary had not had the benefit of Chief Justice Carson's thoughtful and disciplined leadership throughout that economic crisis.

The second example is the steadfast support that Chief Justice

Carson devoted to diversifying the Oregon State Bar and improving the opportunities for minority lawyers in Oregon. In 1992, the Oregon Supreme Court established the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System. By 1994, when the Task Force issued its 120-page report, many such reports had been published by courts throughout the country. In most states, those reports received initial fanfare but were then placed on a shelf to gather dust and never considered again. However, in keeping with Chief Justice Carson's complete commitment to fairness and diversity in the Oregon judicial system, within a month of the release of the 1994 report, he formed a committee to implement the Task Force's many recommendations. As a result, the Access to Justice Committee continues today to promote fairness and diversity in the judicial system in accordance with the conclusions and recommendations of the Task Force report.

Similarly, Chief Justice Carson has been a strong supporter of the Bar's minority lawyer programs. Carson has been a regularly featured speaker at the Opportunities for Law in Oregon (OLIO) summer conference held for incoming minority law students. His presence and encouraging comments to the incoming minority law students are a valuable part of the conference.

Chief Justice Carson's unwavering commitment to the ideals of professionalism, adherence to ethical standards, and civility to all he meets have served as standard for all Oregon lawyers and judges for the past 25 years. Seldom can it be said that an individual has had such a profound impact on his state and achieved such well-deserved professional acclaim without leaving the city of his birth.

**CHIEF JUSTICE WALLACE P. CARSON, JR.:
CONTRIBUTIONS TO OREGON LAW**

LISA NORRIS-LAMPE, SARA KOBAK, AND SEAN O'DAY*

In December 2006, Chief Justice Wallace P. Carson, Jr. retired from the Oregon Supreme Court, marking the close of another remarkable chapter of Justice Carson's 41 years of public service in Oregon state government. Justice Carson's contributions to the state of Oregon—and particularly to Oregon law—cannot be overstated.

Many of Justice Carson's contributions to Oregon law are systemic in nature and difficult to quantify. Among other things, Justice Carson will be remembered for his work in promoting the importance of an independent judiciary, his contributions to legal professionalism in Oregon, his work in advancing gender and ethnic equality in Oregon's courts, and his leadership in Oregon's judiciary and legislature. Justice Carson's contribution to Oregon jurisprudence, however, also cannot be overlooked. That contribution, although equally difficult to quantify, is found in the published opinions of the Oregon Supreme Court from 1982 to 2006.

This tribute does not attempt to provide a comprehensive examination of Oregon jurisprudence during Justice Carson's 24-year tenure on the Oregon Supreme Court; neither does it attempt to summarize the entirety of Justice Carson's written opinions. Instead, this tribute seeks to highlight some of the notable developments in Oregon jurisprudence during Justice Carson's term on the court that are reflected in both Justice Carson's own opinions and the court's opinions as a whole.

This tribute first provides a brief overview of Justice Carson's legal background and the influences on his judicial outlook. The

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tribute then discusses the values reflected in Justice Carson's work as a jurist, displayed both through his authored opinions and in the context of the Oregon Supreme Court's jurisprudence as a whole during his tenure and under his leadership.

I. JUSTICE CARSON'S LEGAL BACKGROUND AND VALUES

Justice Carson's judicial outlook cannot be appreciated fully without some understanding of his legal and professional background prior to his service on the Oregon Supreme Court. Among his many professional accomplishments, Justice Carson's experiences as a state legislator and a state circuit court judge undoubtedly were two major influences on his appellate work.

Justice Carson is a native of Salem, Oregon. He obtained his undergraduate degree from Stanford University in 1956. After graduating from Willamette University College of Law in 1962, he entered private practice in Salem.³ In 1967, only five years after his graduation from law school, Justice Carson was elected to his first term in the Oregon House of Representatives.⁴ Justice Carson served a second term in the house as its majority leader. He then went on to serve two terms in the Oregon State Senate, acting as the senate minority leader during the final two years of his last term.⁵

In 1977, Governor Robert Straub appointed Justice Carson to serve as a trial judge in the Marion County Circuit Court.⁶ Five years later, in 1982, Governor Victor Atiyeh appointed Justice Carson to serve as the 84th associate justice of the Oregon Supreme Court.⁷ Over the next 24 years, the voters of Oregon repeatedly reelected Justice Carson to his position on the court.⁸

In 1991, his fellow justices on the court first elected Justice Carson to serve as the 40th chief justice of the Oregon Supreme

3. Justice Wallace P. Carson, Jr., Oregon Judicial Department – Biography, <http://www.ojd.state.or.us/courts/supreme/carsonbio.htm> (2007).

4. *Id.*

5. *Id.*

6. *Id.*

7. Oregon Blue Book, Supreme Court Justices of Oregon (2007), available at <http://www.bluebook.state.or.us/state/elections/elections27.htm>.

8. *Id.*

Court. As the chief justice, Justice Carson acted not only as the head of the Oregon Supreme Court, but also as the head of the Oregon judiciary as a whole.⁹ Justice Carson has the distinction of being the longest-serving chief justice in Oregon history, having held that position for 14 years from September 1991 to December 2005.¹⁰ Justice Carson ultimately retired from the Oregon Supreme Court in December 2006.

Justice Carson's path to the court is, in many respects, unique. During his 24-year tenure, Justice Carson often was the only judge on the court who had previously served in the Oregon Legislative Assembly. Justice Carson also was among the small minority of supreme court justices who had prior experience on the state circuit court bench.

Justice Carson's experiences as a former private practitioner, legislator, and circuit court judge brought valuable perspectives to his work on the Oregon Supreme Court. Justice Carson approached judicial decisionmaking with a pragmatic view of the importance of clarity, stability, and predictability in the law. As a former circuit court judge, Justice Carson understood the need for clarity and stability in appellate decisions as a means to assist trial courts in the consistent and correct implementation of law. Justice Carson's experiences as a legislator reinforced his belief in judicial restraint in interpreting and applying statutes. As a former legislator, Justice Carson also appreciated the need for clear and consistent judicial decisions to assist legislators in drafting statutes that courts later could construe in accordance with the legislature's intent.

The values of clarity, stability, and predictability in the law are reflected in Justice Carson's judicial leadership and service. During his tenure as chief justice, approximately 94 percent of the cases decided by the Oregon Supreme Court were decided by unanimous opinion.¹¹ Justice Carson explained that the high rate of "unanimous decisions by the [supreme court] provide Oregon with consistent law

9. *Id.*

10. Biography, *supra* note 2.

11. Justice Wallace P. Carson, Jr., Statements to American Inns of Court, Lewis F. Powell Award for Professionalism and Ethics (October 2006), *available at* <http://www.innsforcourt.org/Content/Default.aspx?Id=1737>.

and, therefore, the law becomes more stable.”¹²

Justice Carson’s judicial decisions demonstrate his commitment to judicial values of clarity, stability, and predictability in the law. Rather than attempt to survey the entirety of those decisions, this tribute highlights a few of Justice Carson’s opinions in the context of the development of Oregon jurisprudence as a whole from 1982 to 2006.

II. JUSTICE CARSON AND OREGON JURISPRUDENCE FROM 1982 TO 2006

Oregon jurisprudence advanced significantly during Justice Carson’s 24-year tenure on the Oregon Supreme Court from 1982 to 2006. During that time period, the court established many of its statutory and constitutional construction methodologies, which continue to shape Oregon law today. Additionally, Oregon became a national leader in recognizing the primacy of state law, both statutory and constitutional. The development of Oregon jurisprudence from 1982 to 2006 reflects the collective work and influences of all the justices on the court—both those still serving today and others retired from the court. As discussed below, Justice Carson’s influence and contributions to that collective body of work are significant.

A. Promotion of Stability and Predictability in the Law

Stability and predictability in the law are judicial values strongly reflected in the jurisprudence of the Oregon Supreme Court during Justice Carson’s tenure on the court. Most notably, during that time period, the Oregon Supreme Court adopted methodologies for judicial decisionmaking that are now well-established, and sometimes controversial, features of Oregon jurisprudence.¹³ Although inconsistencies arguably may exist in application from case to case, Oregon courts consistently construe Oregon statutes in accordance with the methodology set out in *PGE v. Bureau of Labor and*

12. *Id.*

13. See, e.g., Jack L. Landau, *The Intended Meaning of “Legislative Intent” and Its Implications for Statutory Construction in Oregon*, 76 OR. L. REV. 47 (1997) (evaluating statutory interpretation methodology set out in *PGE v. Bureau of Labor and Industries*, 859 P.2d 1143 (Or. 1993)).

Industries.¹⁴ Similarly, Oregon courts generally approach questions of original-provision state constitutional law by applying the methodology set out in *Priest v. Pearce*.¹⁵ Moreover, when confronted with construction issues involving statutes or constitutional provisions created by initiative petition, the courts apply the methodology set out in *Ecumenical Ministries v. Oregon State Lottery Commission*.¹⁶ Whatever the possible shortcomings of these methodologies, the Oregon Supreme Court has adopted and reinforced them for almost 15 years, establishing consistent templates for state statutory and constitutional interpretation in Oregon.

The Oregon Supreme Court's adoption of methodologies for state statutory and constitutional interpretation is consistent with Justice Carson's own preferences for appellate opinions that announce clear holdings and that—to the extent possible with case-to-case factual variations—provide “bright-line” rules for the lower courts to follow. In authoring opinions, Justice Carson strove for simplicity and clarity without sacrificing a principled explanation of each step in his analysis. In describing his own approach to opinion writing to his law clerks, Justice Carson often stated that judicial opinions should be “road maps” or “field manuals” that provide step-by-step explanations of the proper applications of the principles and laws at issue.

The court's opinion in *Delgado v. State of Oregon* is a good example of Justice Carson's thoroughness and precision in addressing state statutory and constitutional issues.¹⁷ In *Delgado*, the Oregon Supreme Court considered various constitutional challenges to ORS 30.866,¹⁸ Oregon's civil anti-stalking statute. In authoring the court's unanimous opinion in *Delgado*, Justice Carson faithfully followed the

14. 859 P.2d 1143 (prescribing methodology by which court first examine text, context, and applicable case law relating to statutory wording at issue; if ambiguity remains, court examines legislative history; if ambiguity persists, court resorts to maxims of construction).

15. 840 P.2d 65 (Or. 1992) (prescribing methodology for construing original constitutional provisions; court considers wording of provision at issue, applicable case law, and historical circumstances that led to its creation).

16. 871 P.2d 106, 111 (Or. 1994) (citing *Roseburg Sch. Dist. v. City of Roseburg*, 851 P.2d 595, 598 (Or. 1993)). *See id.*, at 111 (when construing initiated provisions, court first examines text and context; if intent is unclear after that examination, court examines history of provision).

17. 46 P.3d 729 (Or. 2002).

18. OR. REV. STAT. § 30.866 (1999).

court's methodologies for judicial decisionmaking, beginning first with statutory issues and the application of *PGE v. Bureau of Labor and Industries*¹⁹ to interpret the meaning of the statute at issue.²⁰ After construing the scope of the statute and determining that the defendant's actions had violated it, Justice Carson addressed each of the defendant's constitutional challenges to the statute by first considering his state challenges and then turning to his federal challenges.²¹ In addition to providing a good example of Justice Carson's writing style and strong adherence to the supreme court's methodologies, the decision in *Delgado* is notable for its clarification of the differences between state and federal constitutional vagueness challenges.²²

The Oregon Supreme Court's decision in *State v. Ferman-Velasco* is also illustrative of Justice Carson's judicial style.²³ In *Ferman-Velasco*, the court considered the constitutionality of ORS 137.700, the state mandatory sentencing statute commonly known as "Ballot Measure 11."²⁴ In addressing the defendant's constitutional challenges, the Oregon Court of Appeals produced a fractured, *en banc* decision that ultimately affirmed the constitutionality of the statute.²⁵ Authoring a unanimous opinion for the Oregon Supreme Court, Justice Carson agreed with the majority of the court of appeals that the statute was constitutional.²⁶ In reaching that conclusion, Justice Carson applied the court's typical methodical approach, first addressing each of the subconstitutional issues before turning to the state and federal constitutional questions.²⁷ Indeed, even more than its constitutional holdings, Justice Carson's decision in *Ferman-Velasco* is notable for its clarification of various provisions and requirements set out in Oregon's sentencing laws.

19. *PGE*, 859 P.2d 1143.

20. *Delgado*, 46 P.3d at 737-740.

21. *Id.* at 741-751.

22. *Id.* at 744 n.12.

23. 41 P.3d 404 (Or. 2002).

23. OR. REV. STAT. § 137.700 (1995).

25. *State v. Ferman-Velasco*, 971 P.2d 897 (Or. Ct. App. 1998).

26. *Ferman-Velasco*, 41 P.3d 404.

27. *Id.*

Finally, *Conway v. Pacific University*²⁸ is an example of Justice Carson's judicial restraint and opinion-writing style in the context of Oregon common law. At issue in *Conway* was whether an employer had a special relationship with its employee that created a duty of care for the employer to avoid making negligent misrepresentations to the employee. In answering that question negatively, Justice Carson's opinion began with a historical view of the tort of negligent misrepresentation in Oregon, followed by a careful explanation of the distinctions between a breach in contract and a breach in tort.²⁹ With those considerations in mind, Justice Carson compared the relationship at issue in *Conway* with other relationships that carry a heightened duty of care.³⁰ Based on that comparison, Justice Carson concluded that no special relationship existed in the case at bar, precluding a claim for negligent representation.³¹ The court's holding in *Conway* reflects the judicial restraint that was typical in most of Justice Carson's opinions addressing common-law questions.³²

Other examples of Justice Carson's promotion of clarity and consistency in the law are too numerous to list. A review of the opinions that he produced in his 24-year tenure on the court, however, reveals his consistent efforts to achieve those qualities. The jurisprudence of the Oregon Supreme Court as a whole during Justice Carson's tenure—particularly the court's adoption of, and adherence to, methodologies to guide judicial decisionmaking—similarly reflects those same values.

B. *Primacy of State Law*

In addition to adopting the various methodologies for judicial decisionmaking that are now firmly established in Oregon jurisprudence, Oregon also became a national leader in recognizing the primacy of state law during Justice Carson's tenure on the court. Although independent state constitutional interpretation now has

28. 924 P.2d 818 (Or. 1996).

29. *Id.* at 821-823.

30. *Id.* at 823-825.

31. *Id.*

32. *See, e.g.,* *Welch v. Bancorp Mgmt. Advisors, Inc.*, 675 P.2d 172 (Or. 1983). Exceptions exist, of course, as they tend to for all judges. *See, e.g.,* *Chesterman v. Barmon*, 753 P.2d 404 (Or. 1988).

gained wide recognition and acceptance, it is important to remember the relative novelty of independent state constitutional analysis at the time of Justice Carson's appointment to the Court.³³ Justice Hans Linde rightly is credited for his role in leading Oregon to recognize the importance and necessity of independent state constitutional analysis.³⁴ As with other members of the court, however, Justice Carson also contributed significantly to the development of this body of Oregon jurisprudence.

Justice Carson's article '*Last Things Last: A Methodological Approach to Legal Argument in State Courts*'³⁵—published during Justice Carson's first year on the supreme court—was one of the first academic articles promoting independent state constitutional analysis in Oregon. In true Carson fashion, the article stresses the pragmatic reasons for adopting such an approach, in addition to providing practical advice for practitioners in approaching state law issues. Among other things, Justice Carson advocated for reliance on state law as a means to promote stability and consistency in the law, explaining:

The fourth reason I see for looking to the Oregon Constitution first is what I refer to as stability. Some have claimed that the use of the Oregon Constitution will in fact bring little stability to Oregon law. . . . One of the reasons for arguing stability as a basis for adopting the Oregon Constitution is that it will allow for independent protection of individual rights. It may very well eliminate the guesswork on how the United States Supreme Court would interpret the 14th Amendment. We will have our own decision and that will be it. . . .

33. See, e.g., Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 794 (Winter 2000) ("The legitimacy of state constitutionalism seems all but taken for granted. After three decades of experimentation and debate, state courts have come routinely to give independent significance to their state constitutions, without reference to federal court decisions construing correlative provisions of the Federal Constitution.").

34. See, e.g., Wallace P. Carson, Jr., "*Last Things Last: A Methodological Approach to Legal Argument in State Courts*", 19 WILLAMETTE L. REV. 641, 642 n.1 (1983) (acknowledging article by Justice Hans Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BAL. L. REV. 379 (1980)).

35. *Id.*

. . . Finally, I hope that reliance on state law will eliminate the practical consequences of the troublesome effects of shifts in the United States Supreme Court's interpretation of the federal Constitution during the course of litigation in a state court.³⁶

Notably, in '*Last Things Last*,' Justice Carson particularly addressed the use of state constitutional analysis as a means to stabilize and provide needed clarity to search-and-seizure jurisprudence.³⁷ In defending the Oregon Supreme Court's departure from reliance on federal Fourth Amendment jurisprudence towards reliance on the search-and-seizure provisions of article I, section 9 of the Oregon Constitution,³⁸ Justice Carson observed:

If you say that there was indeed a "bright line" in the federal system and that the law of search and seizure was all very clear, then perhaps some of the criticism of Caraher is warranted. With all respect to our colleagues on the federal Supreme Court, the federal law on the subject was not all that clear or consistent.³⁹

Justice Carson's own opinions in the area of search-and-seizure law under article I, section 9 are among his most important contributions to Oregon state constitutional jurisprudence. Beginning with his decision in *State v. Davis*,⁴⁰ Justice Carson has authored some of the leading opinions clarifying both the nature of the individual rights protected under article I, section 9 and the nature of the exclusionary rule under that state constitutional provision.

Davis was one of Justice Carson's first opinions as an Oregon Supreme Court associate justice. Written at the onset of the era of independent state constitutional interpretation, Justice Carson's opinion for the majority of the court is notable as one of the first decisions applying an independent article I, section 9 analysis. Even more importantly, *Davis* is notable for declining to follow the Fourth Amendment precedents of the United States Supreme Court. Specifically, in *Davis*, Justice Carson clarified that the Oregon

36. *Id.* at 649.

37. *Id.* at 646.

38. Specifically, Justice Carson defended the majority decision in *State v. Caraher*, 653 P.2d 942 (Or. 1982) to rely on an independent reading of Article I, section 9, rather than to follow federal constitutional jurisprudence. See Carson, *supra* note 33.

39. *Id.*

40. 666 P.2d 802 (Or. 1983).

exclusionary rule exists to preserve individual article I, section 9 rights and not—as is true under the federal constitution—to serve as a deterrent to law enforcement.⁴¹ That view persists to this day, mandating a state constitutional analysis that differs significantly from the federal analysis.⁴²

In the years following *Davis*, Justice Carson contributed to other facets of article I, section 9 jurisprudence. Although his opinions in this area are too numerous for meaningful discussion in this article, several of those opinions merit acknowledgement. *State v. Vu* falls into that category.⁴³ Justice Carson authored the opinion for the court in *Vu*, clarifying the standard for “voluntariness” for both consenting to police searches and making statements in response to law enforcement. *State v. Ainsworth*⁴⁴ is another example worth mentioning, for its contribution to clarifying the meaning of a “search” for purposes of article I, section 9. Finally, in *State v. Hall*, Justice Carson wrote his most recent significant article I, section 9 opinion, providing guidance as to police conduct that implicates the protections against unreasonable seizures under article I, section 9 and resolving a long-standing debate about the consequences of such illegalities on evidence obtained in subsequent consent searches.⁴⁵

Without delving too deeply into Justice Carson’s article I, section 9 opinions, some general observations can be made. As with his other decisions, Justice Carson authored his article I, section 9 opinions with an eye toward producing a body of search-and-seizure law that was workable and clear to those who must apply it every day—that is, law enforcement, the criminal bar, and the trial courts. Justice Carson’s article I, section 9 opinions are also notable for their commitment to individual rights, while also striving to craft law reflective of the practical realities of policing.

41. *Id.* at 807.

42. *See, e.g.*, *State v. Hall*, 115 P.3d 908, 919-921 (2005) (discussing differences between Oregon exclusionary rule and federal exclusionary rule).

43. 770 P.2d 577 (Or. 1989).

44. 801 P.2d 749 (Or. 1990).

45. 115 P.3d 908 (2005).

C. Oregon Constitutional Law

In addition to construing state constitutional provisions that are similar to certain federal constitutional provisions, the Oregon Supreme Court is often faced with questions concerning unique state constitutional provisions—that is, provisions with no federal counterparts. Of course, during their tenures on the court, all justices have an opportunity to address such issues in written opinions. In his 24 years on the court, Justice Carson similarly authored a number of opinions concerning unique state constitutional provisions. Of those opinions, one of the most notable—and undoubtedly one with some of the most far-reaching effects—is the opinion that Justice Carson authored in *Armatta v. Kitzhaber*.⁴⁶

Armatta concerned a voter-initiated amendment to the Oregon Constitution, “Measure 40,” that purported to guarantee a variety of “crime victims’ rights.” In challenging the validity of the measure, the plaintiffs contended, among other things, that the measure impermissibly encompassed two or more amendments, in violation of article XVII, section 1 of the Oregon Constitution, which provides, in part: “When two or more amendments shall be submitted . . . to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately.”⁴⁷

In the plaintiffs’ view, that constitutional provision imposed a significant substantive limitation on the content of proposed initiative measures.⁴⁸ The state countered that, if the provision imposed any substantive limitation at all, then that limitation mirrored one set out in a different constitutional provision that required initiated constitutional amendments to “embrace one subject only and matters properly connected therewith.”⁴⁹

In writing for the court, Justice Carson designated the requirement set out in article XVII, section 1 as a “separate-vote” requirement.⁵⁰ Noting that only one earlier case had discussed that

46. 959 P.2d 49 (Or. 1998).

47. OR. CONST. art. XVII, § 1.

48. *Id.*; *Armatta*, 959 P.2d at 51.

49. OR. CONST. art. IV, § 1(2)(d); *Armatta*, 959 P.2d at 51.

50. As a side note, a hallmark of Justice Carson’s clear writing style is his use of consistent labels and identifiers of persons, objects, phrases, and events throughout an opinion. In training his law clerks, he was careful to point out that the use of multiple labels—such as

requirement to any significant degree, Justice Carson's opinion in *Armatta* undertook an exhaustive review of the text of the requirement, the text of related constitutional provisions, and the historical record surrounding adoption of the requirement to determine whether it imposed a substantive limitation of some sort and, if so, the nature of that limitation.⁵¹ Consistently with the judicial values discussed earlier in this tribute, the opinion adhered to the court's constitutional construction methodology, carefully reviewing each of the relevant considerations and then clearly summarizing those considerations before reaching an ultimate conclusion as to the meaning of the separate-vote requirement. The summary in particular is demonstrative of Justice Carson's continual efforts to provide a road map to readers of his opinions—that is, a careful, understandable, and systematic layering of each step of the analysis leading to a final conclusion.

In setting out the court's ultimate determination of the meaning of the separate-vote requirement, Justice Carson's opinion in *Armatta* emphasized, among other things, that the requirement could not, as the state contended, impose merely the same limitation as that imposed in the "single-subject" requirement set out in article IV, section 1(2)(d). Justice Carson wrote:

It follows, we believe, that the separate-vote requirement of Article XVII, section 1, imposes a narrower requirement than does the single-subject requirement of Article IV, section 1(2)(d). Such a reading of the separate-vote requirement makes sense, because the act of amending the constitution is significantly different from enacting or amending legislation. . . . Indeed, because the separate-vote requirement is concerned only with a change to the fundamental law, the notion that the people should be able to vote separately upon each separate amendment should come as no surprise. In short, the requirement serves as a safeguard that is fundamental to the concept of a

"car," "automobile," and "vehicle" —to describe a single object served to confuse the reader and to detract from a clear understanding of the factual and analytical discussion set out in the opinion.

51. *Armatta*, 959 P.2d at 52-64.

constitution.⁵²

Ultimately, the court set out the following inquiry for determining whether a proposal to amend the Oregon Constitution contravenes the separate-vote requirement:

We conclude that the proper inquiry is to determine whether, if adopted, the proposal would make two or more changes to the constitution that are substantive and that are not closely related. If the proposal would effect two or more changes that are substantive and not closely related, the proposal violates the separate-vote requirement of Article XVII, section 1, because it would prevent the voters from expressing their opinions as to each proposed change separately.⁵³

After reviewing the changes, both explicit and implicit, that Measure 40 made to the Oregon Constitution, the court in *Armatta* concluded that the measure effected multiple, substantive changes.⁵⁴ Regarding the question whether those changes were “closely related,” Justice Carson, writing for the court, found it sufficient to examine two sets of changes and determine that they bore no relation to each other—that is, that lack of relationship was “sufficient to demonstrate that [the measure] contain[ed] ‘two or more amendments’ to the Oregon Constitution.”⁵⁵

Having determined that Measure 40 was not adopted in compliance with the separate-vote requirement, the court in *Armatta* concluded that the measure was invalid in its entirety.⁵⁶ In invalidating the measure, however, Justice Carson took care to explain that the court’s decision was not one of policy but, rather, one of judicial construction and application of overarching constitutional requirements:

We emphasize that we express no view regarding the merits of the changes proposed by Measure 40. Indeed, this court’s case law makes clear that Article IV, section 1, grants the people the power to change the Oregon Constitution as they

52. *Id.* at 63 (emphasis in original).

53. *Id.* at 64.

54. *Id.* at 67-68.

55. *Id.* at 67.

56. *Id.* at 68.

so desire, including modifying or repealing a provision of the Bill of Rights, so long as the proposed change or changes comply with the constitutional requirements for amending the constitution. . . . Our holding here is that Measure 40 contains two or more constitutional amendments that must be voted upon separately under Article XVII, section 1.⁵⁷

Not surprisingly, that closing statement is consistent with the judicial values that Justice Carson demonstrated during his tenure on the court, discussed in this tribute—for example, his belief that the court’s role was to construe statutory or constitutional provisions consistently with the intent of the legislature or the voters, rather than in accordance with any personal policy preference or general judicial philosophy.

In addition to invalidating Measure 40, the Oregon Supreme Court’s decision in *Armatta* had a broader effect: In highlighting the Oregon Constitution’s separate-vote requirement for constitutional amendments, it immediately impacted the nature of challenges to voter-initiated amendments—a common avenue of constitutional amendment in Oregon. That impact on the initiative-petition landscape has borne out in a series of separate-vote cases that the Oregon Supreme Court has decided since *Armatta*.⁵⁸ Ultimately, in deciding those cases, the court has built on the foundation and principles that Justice Carson set out in the *Armatta* decision.

III. CONCLUSION

Justice Carson’s opinions speak volumes about his judicial values and his approach to deciding cases. Justice Carson approached each case methodically, reviewing and carefully considering the parties’ briefs, his own research and examination of the law, and the opinions of his fellow justices. Justice Carson’s deliberate writing always considered his audience, striving for law that was both workable and clear.

57. *Id.* at 68 (internal citations omitted).

58. See *Lincoln Interagency Narcotics Team v. Kitzhaber*, 145 P.3d 151 (Or. 2006); *Meyer v. Bradbury*, 142 P.3d 1031 (Or. 2006); *League of Or. Cities v. State*, 56 P.3d 892 (Or. 2002); *Swett v. Bradbury*, 43 P.3d 1094 (Or. 2002); *Lehman v. Bradbury*, 37 P.3d 989 (Or. 2002).

Justice Carson's mark on Oregon law, however, goes far beyond just his own opinions to include his contributions to the collective progress and development of Oregon jurisprudence over the last 24 years. During his tenure on the Oregon Supreme Court, Justice Carson contributed to the recognition of the primacy of state law, the development of methodical approaches to judicial decisionmaking, and the stability of Oregon law. Although Justice Carson would be quick to point out that the development of Oregon jurisprudence during his tenure on the supreme court is reflective of the collective efforts of the court as a whole, Justice Carson's judicial leadership and values have left a mark on Oregon jurisprudence that will stand the test of time. Justice Carson's retirement from the supreme court leaves a grateful Oregon benefiting from the legacy of his life of achievement, his devotion to public service, and his commitment to the rule of law.

CARSON, C.J., DISSENTING

KEITH M. GARZA *

I. INTRODUCTION

The title of this tribute arguably is more than a little misleading. In the course of his more than 14 years as Oregon's longest serving chief justice, the Honorable Wallace P. Carson, Jr. filed only one dissenting opinion. Indeed, during his nearly 25 years on Oregon's highest bench—and having been presented with thousands of opportunities to part company with his colleagues—Chief Justice Carson authored a meager nine dissents and joined in only 34 others.⁵⁹ So how can an essay about what is at best a sliver out of a quarter century's worth of jurisprudence advance an understanding about Chief Justice Carson's judicial philosophy and impact? It can in at least two ways.

First, the lack of dissenting material speaks volumes about Chief Justice Carson's view of what a state court of last resort, and an individual justice's role on that court, should be. As discussed in Section II below, for Chief Justice Carson, the Oregon Supreme Court first and foremost was and remains a law-announcing court. Consistently, with that defining view, he saw collegiality among the justices as going beyond mere pleasantries in the hallway and polite discussions at conference. Instead, for a law-announcing court to perform its function well, collegiality must be infused within the decisional process itself. In such an environment, the role of

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59. Although now a Senior Judge (*see* OR. REV. STAT. § 1.300(1) (2005) (allowing for retired judge to be designated as “senior judge of the State of Oregon”)), I worked under Chief Justice Carson by that title alone, and I find it difficult to refer to him by any other moniker (except “boss” or, outside his presence, sometimes “WPC” -- the court has a long tradition of referring to justices internally by their initials, much to the consternation of some of its members who elect not to go by their first names or who wish they had different middle ones).

separately filed opinions, though important, is limited.

Second, the few pages of dissenting text that Chief Justice Carson elected to leave to posterity themselves tell us something about his views of the highest function of a court of last resort. More than that, though, his dissenting opinions offer some of Chief Justice Carson's sharpest statements about the proper function of the judiciary in a constitutional government. And, perhaps most tellingly, his dissenting prose allows us an insight into Chief Justice Carson the man. There is something to the adage that "it is not how you win, but how you lose." When Chief Justice Carson lost, he lost well. Section III of this tribute discusses, with the same brevity that characterizes most of his separate opinions, the legacy of Chief Justice Carson's dissents.

Before all that, however, it is customary and altogether fitting that tribute articles actually pay tribute to their subjects. In the case of Chief Justice Carson, that is no chore. Thomas Elden got it right when he said that "[t]o say that he is loved and respected only touches the surface."⁶⁰ Chief Justice Carson, quite simply, is the finest man I have ever known. Whether as a judge or as a person, I see him as having set the standards for dignity, courtesy, and professionalism. I have seen him angry only twice, and both instances warranted that emotion. (One of those times, his ire was both brief and directed at me after I had played a particularly good practical joke on him. I should have added above that Chief Justice Carson also sets something of a standard for gullibility.) Those who know Chief Justice Carson also know the deep debt of gratitude that the people of Oregon owe to him. For those who have not known Chief Justice Carson, I hope they one day have the chance.

Chief Justice Carson once wrote that, "notwithstanding the variety of public troughs from which I have fed, let me declare my personal bias . . . in favor of the judiciary."⁶¹ Notwithstanding the many judges and public officials with whom I have worked, let me declare my personal bias in favor of Chief Justice Wallace P. Carson, Jr. If that bias has colored this piece, then so be it.

60. Janine Robben, *A Fine Sense of Justice*, OR. ST. B. BULL., Dec. 2006, at 15.

61. Wallace P. Carson, Jr., *Dedication*, 1 OR. APP. ALM. 11, 12 (2006).

II. GLEANING FROM RELATIVE SILENCE

Chief Justice Carson's view of the supreme court foremost as the law-announcing tribunal of this state, together with his understanding of what that view means for the day-to-day decision making at the court, I suspect is one forged out of his more than 40 years' worth of public service. That service included time spent in all three branches of Oregon's government. More than anything, it has always seemed to me that the polestar to which Chief Justice Carson has looked is the rule of law:

Whether as a legislator, a lawyer in private practice, a member of the Oregon National Guard, or a judge, it has been impressed upon me consistently that ours is a government of laws. Unlike Plato, we do not search out philosopher kings; instead we rely on the rule of law to provide both the backbone of our government and the skin out of which we cannot grow. And with the same certainty that a state reflects the soul of its citizenry [as Plato said], so too is the state the sum of its laws and, by extension, its people.⁶²

The judiciary's role in a government of laws—indeed, its emphatic “province and duty” according to Chief Justice John Marshall—is “to say what the law is.”⁶³ But to Chief Justice Carson, the term judiciary does not cut thin enough. Trial judges, of whom he was one for five years, go it alone when they interpret and announce the law and do so without setting precedent. Appellate judges, however, are part of a collegial court and do set precedent. But, since 1969, we have two tiers of appellate adjudication in Oregon.⁶⁴ And that fact was not unimportant to Chief Justice Carson when it came to the role of second opinions in appellate judicial decisionmaking. He has said more than once that he appreciates dissents in court of appeals opinions. Dissents from that court serve the important purpose of assisting the supreme court in deciding whether to allow review.

Dissenting opinions in decisions from the supreme court, however, do not serve such a function. As to matters of state law, the law that the justices announce is not subject to further review except

62. *Id.*

63. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

64. 1969 Or. Laws ch. 198 (creating Oregon Court of Appeals).

by the Oregon Supreme Court itself. As to matters of federal law that might happen to present themselves, Chief Justice Carson has offered his own personal doubts as to the amount of attention that the United States Supreme Court would pay to the separate writings of state court justices in deciding whether to grant certiorari. However, having a state court of last resort announce state law unanimously whenever possible sends a clearer message to judges, lawyers, and litigants. Decisionmaking by something approaching consensus also promotes stability in the law and reduces the instances in which issues are re-litigated simply when the membership of the court changes.

If not already well-established during his tenure as an associate justice (or perhaps even before that), Chief Justice Carson's desire to have the supreme court speak with one voice steered early into his service as chief justice. In a tribute to his predecessor, Chief Justice Edwin Peterson, co-authored with then-Justice Susan Graber, Chief Justice Carson had this to say:

Leading a group of judges has been likened to herding cats. Each of the members of the supreme court is independently elected, and—not surprisingly—independent-minded in his or her approach to the court's tasks. In that potentially discordant environment, Chief Justice Peterson was a marvel of concordance. He coaxed and conciliated, commented and cajoled. In writing his own opinions, he was always receptive to new ideas, alternative approaches, and criticism. In critiquing the work of others, he offered fresh insights and sensible editing. He consistently sought consensus and a reduction in the number of separate opinions written by individual judges.⁶⁵

In the early years of Chief Justice Carson's leadership, through the 1995-96 term, the court issued between 70 and 80 percent of its decisions unanimously. In 1997 and 1998, between 80 and 90 percent of the decisions were issued without separate opinion. From 1999 through 2005, on average, the court decided 90 percent of its cases with one opinion (including 97 percent unanimous decisions in 2001). Chief Justice Carson used the term "fractiousness" —the quality of

65. Wallace P. Carson, Jr. & Susan P. Graber, *A Tribute to Edwin J. Peterson*, 73 OR. L. REV. 731, 736 (1994).

being fractious, or “tending to cause trouble [. . . and] likely to function in unpredictable and troublesome ways” —to describe the court’s unanimity in decision making.⁶⁶ His choice of that term seems particularly apt in understanding his support for unanimous decisions.

That is not to say that there was in Chief Justice Carson a slavish devotion to deciding a case unanimously at all costs. Section III, below, shows why that is not the case. Nor is the foregoing to say that his colleagues on the court had nothing or little to do with the court’s “fractiousness” rating during his time as chief justice. (Either Chief Justice Carson was a masterful cat herder (he never has owned more than a single cat at a time), or his colleagues on the court shared in his vision and worked with him to create a model of decisionmaking that placed a high premium on unanimity.) And finally, it is not to say that a court striving to speak with one voice is a court without its critics. Finding consensus takes time and can lengthen the decisional process to the frustration of both the litigants and the public who want an answer to important questions of state law. Moreover, reaching consensus sometimes can mean agreeing to the narrowest issue, or the least common denominator, that a case presents. That, in turn, can have the effect of diluting the law that the court announces.

What all the above is to say is that Chief Justice Carson’s view of the highest function of the Oregon Supreme Court is, like the way he lives his life, principled. One cannot help but wonder how many associate justices who joined the court with Chief Justice Carson at the helm shared his views when they first arrived, and how many came around to that way of thinking after being there a while. Although Piper, the collie that Chief Justice Carson and his wife Gloria have shared a home with for five years, may not like it, the Chief should consider adopting a few more cats. He almost certainly would do quite well keeping them in order.

III. PARTING COMPANY WITH THE MAJORITY

Judge Frank Coffin of the First Circuit has described appellate courts in terms of the “paradox of collegiality.”⁶⁷ On the one hand, “the opinions of a truly collegial court are bound to be better in

66. WEBSTER’S THIRD NEW INT’L DICTIONARY 900 (unabridged ed. 2002).

67. FRANK M. COFFIN, ON APPEAL 229 (1994).

substance, style, and tone than the effusions of one judge supporting a result commanding the votes of a majority without any effort to harmonize nuanced differences of view.”⁶⁸ On the other hand:

[A] dissent . . . is more like a broadsword. It takes more resolution and commitment [than a concurrence] to wield it, and there is the expectation of drawing at least a little blood. In any event, there is a feeling of unjudicial glee as one shucks off the normal restraints of writing for a panel and proceeds to thrust and parry with gay abandon.⁶⁹

Chief Justice Carson liked writing dissenting opinions. “They’re fun,” I remember him saying. He wrote not a single dissent, however, during the time that I spent with the Oregon Supreme Court. The several attempts I made to persuade him to part company with the rest of the court were politely declined. I vaguely recall once muttering to his judicial assistant as I left his chambers something to the effect of “I wish he would have more fun.”

But a look at his separate opinions—his dissents and his concurrences—shows that both Justice and Chief Justice Carson did have some fun along the way. More than that, however, those opinions reflect the same principled approach that guided the other aspects of his judicial and administrative career. He wrote separately only when there was a good and proper purpose to be served.

A. WPC Dissents: An Overview

Some of the time, Chief Justice Carson parted company with the majority when, in his view, the court was wrong on the law. Examples of that include *State ex rel. Frohnmayer v. Oregon State Bar* (whether State Bar is “state agency” or “other public body” for purposes of public records law),⁷⁰ *Nissel v. Pearce* (whether a person is entitled to statutory credit for time served on two charges when charges result in consecutive sentences),⁷¹ and *Carrigan v. State Farm Mutual Automobile Insurance Co.* (meaning of “injury . . . resulting from the . . . use of a motor vehicle” for purposes of the Personal

68. *Id.* at 228.

69. *Id.* at 227.

70. 767 P.2d 893, 897-899 (Or. 1989).

71. 764 P.2d 224, 228-229 (Or. 1988).

Injury Protection Act).⁷² His particularly long and perhaps most noteworthy dissent in *Lloyd Corp. Ltd. v. Whiffen*,⁷³ a case involving free speech rights on private property, also probably belongs in this category. Although the history of that issue and the litigation that it has spawned are tortured, the court came around to Chief Justice Carson's way of thinking eleven years later in *Stranahan v. Fred Meyer, Inc.*⁷⁴

Other times, the analysis in his dissents was more complex, with Chief Justice Carson's disagreement going not only to the bare legal analysis but also more to the proper function of the court. For example, in *Oregon Citizen's Alliance v. Roberts*,⁷⁵ the issue was whether the Attorney General permissibly had substituted the words "pregnant woman" for the word "mother" in the ballot title of an abortion initiative. The majority approved; Chief Justice Carson did not.⁷⁶ He refused to wander into what he described as a "linguistic thicket"⁷⁷ out of a concern that the "court should not now be a party to the [abortion] debate":⁷⁸

To accept one term for the named person who potentially is subject to the measure's prohibition is to reject another term and all the belief system that goes along with it. There are no neutral terms in this debate, which is why we should adhere to the deliberate language of the proponents of the measure.⁷⁹

In another case, *State v. Miller*,⁸⁰ it was an almost involuntary adherence to the principle of *stare decisis* that compelled Chief Justice Carson to dissent. There, the question was whether the statute regarding the offense of driving while under the influence of

72. 949 P.2d 705, 709-710 (Or. 1997). At least one court has disagreed expressly with the majority's understanding of personal injury protection benefits as stated in *Carrigan*. See *State Farm Mut. Auto. Ins. Co. v. DeHaan*, 900 A.2d 208, 223 (Md. 2006) (finding other decisions "more persuasive").

73. 773 P.2d 1294, 1302-1320 (Or. 1989).

74. 11 P.3d 228 (Or. 2000).

75. 783 P.2d 1001, 1004-1005 (Or. 1989).

76. *See id.*

77. *Id.* at 1004 n.1.

78. *Id.* at 1005.

79. *Id.* at 1004 (footnote omitted).

80. 788 P.2d 974 (Or. 1990).

intoxicants stated a strict liability crime.⁸¹ The majority concluded that the statute did not contain a scienter requirement.⁸² Chief Justice Carson actually agreed with that analysis and, but for an intervening and in his view contrary Oregon Supreme Court decision (one in which he acknowledged he had joined), would have concluded likewise: “[A] lone dissenter does not have the power to overrule a case, and, accordingly, I must treat it as the law in Oregon.”⁸³

Another of Chief Justice Carson’s dissents that seems to fall under the category of the “proper role of the court” is *Warm Springs Forest Products Industries v. Employee Benefits Insurance Co.*⁸⁴ The issue in that insurance policy construction case was whether the Confederated Tribes of the Warm Springs Reservation had contracted with its insurer for the application of Oregon law, as opposed to tribal law, to govern the meaning of the policy’s terms.⁸⁵ In concluding that the Confederated Tribes intended the former, the majority reasoned in part that:

[W]e doubt that the Confederated Tribes, which engage in many substantial business transactions with the world outside the reservation, would believe that they would be best served by adopting a public policy that would cast doubt not only on the sources, nature and rules of law governing those business transactions, but even on the ability of a tribal enterprise to agree to a choice of the applicable law.⁸⁶

Chief Justice Carson disagreed with the majority on several grounds, including whether the majority improperly resolved factual questions on a motion to dismiss⁸⁷ and whether the moving party fulfilled its obligation in support of the motion.⁸⁸ But, he took the most direct aim at the seemingly paternalistic paragraph quoted above, stating:

Until we are better-informed about “traditional customs and

81. *Id.* at 974.

82. *Id.* at 978.

83. *Id.* at 984 (Carson, J., dissenting).

84. 716 P.2d 740, 744-51 (Or. 1986) (per curiam).

85. *Id.* at 741.

86. *Id.* at 743.

87. *Id.* at 744 (Carson, J., dissenting).

88. *Id.* at 749 (Carson, J., dissenting).

usages” of the Confederated Tribes, I would not speculate about how the tribes “believe that they would best be served” . . . in their deliberations about whether to conform their commercial law to Oregon’s. The majority’s views about how the tribe should decide that question of public policy are particularly regrettable because they are unnecessary.⁸⁹

Finally, a couple of Chief Justice Carson’s dissents were pedestrian: he believed that the majority incorrectly applied the facts at hand to the applicable law. One of those cases was a lawyer disciplinary proceeding in which Chief Justice Carson concluded the Oregon State Bar failed to prove by clear and convincing evidence that a lawyer knew a particular averment in an affidavit was false.⁹⁰ In the other, Chief Justice Carson, and two other justices, disagreed with the rest of the court that the particular wording of a jury instruction improperly required the jury to acquit on the primary offense first before considering lesser-included offenses.⁹¹ The majority said yes; the dissenters said no.⁹²

So concludes a brief overview of each of Chief Justice Carson’s nine dissents. The brevity of that overview itself offers some testament to the fact that Chief Justice Carson walked the walk with respect to his view that a court of last resort best performs its law-announcing function when it speaks in unison. And his tendency to dissent only in those cases in which he felt the court was not only reaching the wrong result, but also stepping outside its proper function, tells us at least a little something about Chief Justice Carson’s views of the Oregon Supreme Court’s limited role in our state’s constitutional government. But what do those opinions say about Chief Justice Carson the man? Although it is dangerous to attempt to draw conclusions from such sparse offerings, perhaps those few documents do offer a few insights.

89. *Id.* at 751 (Carson, J., dissenting) (citation omitted).

90. *In re* Conduct of Brown, 692 P.2d 107 (Or. 1985) (Carson, J., dissenting).

91. *Tarwater v. Cupp*, 748 P.2d 125 (Or. 1988) (Carson, J., dissenting, joined by Peterson, C.J., and Lent, J.).

92. *Id.* at 129-30.

B. WPC Dissents: Between the Lines

“Polite” is one of the adjectives most often used to describe Chief Justice Carson. Neither his dissents nor his concurrences, however, read as overly polite. In fact, only twice did he write to the effect “I respectfully dissent/concur.”⁹³ That may be because of Chief Justice Carson’s experience with the use of the word “respectfully” in debate or conversation: its announcement usually meant that a kick to the shins was about to be delivered. Instead, his contrarian opinions for the most part are matter-of-fact in tone. They get to the point quickly and almost inevitably conclude shortly thereafter.

He was not, however, immune from throwing in the occasional zinger:

I do not contend that the conclusion reached by the majority (and the Attorney General, the Marion County Circuit Court, and the Court of Appeals) is irrational. It is incorrect. There is no need to resort to a single presentation to a legislative committee or statutory construction when the legislature has stated its position. The majority has indeed fit its square peg into a round hole by resort to the old adage: “If it doesn’t fit, get a bigger hammer.”⁹⁴

That conclusion followed his chastisement of the majority for being “provoked into creating a mountain of statutory interpretation from a definitional molehill” and a footnote that analogized the legislature’s use of statutory terms to a fairy tale: “‘When I use a word,’ Humpty Dumpty said in a rather scornful tone, ‘it means just what I choose it to mean—neither more nor less.’”⁹⁵

Another of his comparatively more biting dissents began as follows: “To quote Justice Felix Frankfurter . . . , ‘this is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute.’ Here, the legislative history not only is doubtful—it is nonexistent.”⁹⁶

93. *Carrigan*, 949 P.2d at 709 (Chief Justice Carson’s last dissent); *Warm Springs Forest Products Indus.*, 716 P.2d at 751.

94. *Frohmayer*, 767 P.2d at 899 (Carson, J., dissenting).

95. *Id.* at 899 & n.2 (citing LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 124 (1872)).

96. *Nissel*, 764 P.2d at 228 (citation omitted).

For the most part, however, when Chief Justice Carson wanted to get a message out to the bench, bar, and public, he did it in a workmanlike and easily understandable way, and usually, but not always, without fanfare. And for those who have known and spent time with Chief Justice Carson, that is entirely in keeping with who he is.⁹⁷

IV. CONCLUSION

Justice William O. Douglas once wrote that “[t]he right to dissent is the only thing that makes life tolerable for a judge of an appellate court.”⁹⁸ And there seems to be competition between at least two United States Supreme Court Justices, John Marshall Harlan and Oliver Wendell Holmes, Jr. for the title of “The Great Dissenter.” In a culture that arguably tends to glamorize, or at least to publicize, dissent, Chief Justice Carson stands well out of the limelight. Chief Justice Carson used the separate opinion as a limited tool and for its historically accepted purpose. That is entirely consistent with his views of the judiciary generally and the Oregon Supreme Court specifically. And I, for one, think that we are the better for it.

97. A brief note on Chief Justice Carson’s concurring opinions. There were even fewer of those than dissents (only seven), and he wrote his final concurrence 15 years before he left the bench. As with his dissents, they were offered with a purpose in mind, and often that purpose was to better instruct trial judges as to how to apply the law. In descending chronological order, Chief Justice Carson offered concurrences in the following cases: *State v. Ford*, 801 P.2d 754, 766 (Or. 1990) (a true special concurrence in which Chief Justice Carson believed that the majority’s one-part test in the context of “knock and announce” searches was missing a second part (subjective apprehension of peril) that the legislature had intended be included); *State v. Williamson*, 772 P.2d 404, 406-07 (Or. 1989) (offering a shorter yet more regimented application of the majority’s reasoning); *State v. Magee*, 744 P.2d 250, 253 (Or. 1987) (denominated a concurrence, but really a special concurrence, in which Chief Justice Carson opined that a conviction the majority had set aside on state law grounds was reversible only on federal grounds); *Humbert v. Sellars*, 708 P.2d 344, 349 (Or. 1985) (expressing view that court properly extended precedent even though he disagreed with that precedent); *Estate of Barone v. Parchen*, 701 P.2d 781, 782-83 (Or. 1985) (writing to suggest particular consideration for trial court on remand); *S. Or. Prod. Credit Ass’n. v. Geaney*, 692 P.2d 83, 86 (Or. 1984) (writing because “court should give more guidance to the trial court for the assistance of the trial court and, possibly, to avoid the necessity for further appellate review,” notwithstanding that issue had not been raised on review.); *Harwell v. Argonaut Ins. Co.*, 678 P.2d 1202, 1206-07 (Or. 1984) (offering “what I consider to be a clearer statement of the role of pain in workers’ compensation cases . . .”).

98. WILLIAM O. DOUGLAS, *AMERICA CHALLENGED* 4 (1960).

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TRIBUTE TO CHIEF JUSTICE CARSON

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TRIBUTE TO WALLY CARSON

NEIL BRYANT*

The following are my thoughts concerning Wally Carson from the perspective of a friend, lawyer, and legislator. Of Wally's many admirable qualities, the two I enjoy the most are his optimism and sense of humor. I always look forward to seeing him because I will leave the conversation smiling.

My first memory of Wally is as a Republican senator, when he was the minority leader. A famous photograph was taken at this time of the entire Republican caucus in a phone booth, and Senator Carson was their leader. If the Endangered Species Act had been passed at this time, the Republican senators would have been listed as endangered.

Some time later, in 1992, I was elected to the state senate to represent central Oregon. For six years, I chaired the Senate Judiciary Committee and was involved in the Ways and Means process (which is how the judicial department is financed). Consequently, Justice Carson was a frequent visitor to our committee. At the time, many of my Republican colleagues were not happy with recent court decisions. When I requested additional money for judges, they showed their annoyance by responding, "They will get more money when we get better decisions." Quite obviously, that was not a prudent philosophy for an independent judiciary. Despite the challenges, Justice Carson enjoyed the legislative process. He understood the difficulties of lawmaking due to his experience in the "arena" as a senator. Democracy is not an easy or efficient process, nor is it intended to be one. Democracy takes patience, hard work, and skill to succeed. Working with Justice Carson, I knew he was always straightforward and candid, and he led the judiciary by

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personal example.

During the legislative session in 1995, I bumped into Justice Carson at the capitol. That morning, the supreme court issued an unfortunate decision from my point of view. I told Wally that I had already drafted legislation to reverse the Court's decision. The senate hearing would be held next week. His response was, "Good, I joined in the dissent." I should have called him as a favorable witness for the bill.

As a Rotarian for 30 years, I am always on the look-out for good speakers. When I initially booked him, there was a united groan from the members. Who would want to hear from a Supreme Court Justice? Surprisingly, Justice Carson received rave reviews and is one of our favorite speakers for the Greater Bend Rotary Club.

Frequently, Justice Carson ends a speaking engagement with the story of how speaking opportunities became available to him throughout his career. It began in 1976 when he was asked to speak to the Pioneer Association in Fossil. He was such a success that he was asked to address the plumbers in Drain, funeral directors in Monument, weight watchers in Bend, alpine yodelers in Echo, janitors in Maupin, brothers in Sisters, and the sisters in Brothers, the Toastmasters club in Boring, marijuana growers in Glide, marriage counselors in Unity, the orphans at Bandon, the stripteasers in Peel, and the supreme court justices at Riddle.

Wallace P. Carson, Jr. will be missed on the supreme court and in the capitol. I am happy this is not his obituary!

**LAWYER-CLIENT CONFLICTS OF INTEREST LAW:
CONTRIBUTIONS OF CHIEF JUSTICE WALLACE P.
CARSON, JR. DURING A TIME OF DYNAMIC CHANGE**

EDWIN J. PETERSON^{*}

Wallace P. Carson, Jr. served as chief justice of the Supreme Court of Oregon for more than 14 years, from September 1, 1991 through December 31, 2005. He served on the court more than 24 years, from July 1, 1982 through December 31, 2006. His commitment to the bench, to the bar, and to society, as well as his convictions concerning honesty and integrity, and specifically, the honesty and integrity of Oregon lawyers and judges, leave a lasting thumbprint on Oregon's history.

From the beginning, he displayed a keen interest in the standards of performance of Oregon lawyers. Through much of the 1980s and 1990s, Justice and, later, Chief Justice Carson chaired an Oregon State Bar/Supreme Court of Oregon working group (commonly referred to as the DR/BR Committee), concerning the substantive and procedural rules of lawyers' ethics. During this time, dynamic changes occurred in the law concerning lawyer-client conflicts of interest. If all the Oregon rules of legal ethics were contained in one structure, the room reserved for lawyer-client conflicts of interest would be designed by Wallace P. Carson, Jr. He contributed immensely to the growth and development of lawyer-ethics law in this state, particularly in the areas of conflicts of interest.

THE OREGON LAWYER DISCIPLINE SYSTEM

ORS 9.527 invests the Supreme Court of Oregon with the responsibility to "disbar, suspend or reprimand" a bar member who has committed an act of misconduct specified in the statute, including a violation "of the rules of professional conduct adopted pursuant to

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ORS 9.490.”⁹⁹ Former ORS 9.490(1), during much of the time referred to in this article, provided in part:

(1) The board of governors, with the approval of the state bar given at any regular or special meeting, shall formulate rules of professional conduct, and when such rules are adopted by the Supreme Court, shall have power to enforce the same. Such rules shall be binding upon all members of the bar.¹⁰⁰

Before 1995, “approval of the state bar given at any regular or special meeting” meant approval by the bar membership at a town-hall-type meeting, usually at the annual meeting of the Oregon State Bar. In 1995 the legislature amended ORS Chapter 9 to inaugurate a house of delegates system of governance for the state bar.¹⁰¹ The legislature also amended ORS 9.490(1) to read as follows:

(1) The board of governors, with the approval of the *house of delegates* given at any regular or special meeting, shall formulate rules of professional conduct, and when such rules are adopted by the Supreme Court, shall have power to enforce the same. Such rules shall be binding upon all members of the bar.¹⁰²

Lawyers, therefore, can be disciplined for violating specified statutes (most of which are found in Oregon Revised Statutes Chapter 9), or for violating the Oregon Rules of Professional Conduct (formerly the Code of Professional Responsibility). This makes for an interesting mix of governmental power. The legislature created the Oregon State Bar by enacting a statute.¹⁰³ The Supreme Court of Oregon is a creature of the Oregon Constitution.¹⁰⁴ Pursuant to ORS 9.490(1), the supreme court adopts applicable rules of professional conduct, but only after the rules have first been “formulated” by the board of governors and approved by the house of delegates. The court, with the assistance and cooperation of the bar, enforces the rules.

99. OR. REV. STAT. § 9.527 (2005).

100. OR. REV. STAT. § 9.490(1) (2005) (amended 1995).

101. See OR. REV. STAT. §§ 9.136-990 (2005).

102. OR. REV. STAT. § 9.490(1) (emphasis added).

103. See OR. REV. STAT. §§ 9.005-755 (2005).

104. OR. CONST. art. VII, § 1.

The bar has a unique role. Local professional responsibility committees investigate the conduct of attorneys.¹⁰⁵ The state professional responsibility board reviews complaints about the conduct of Oregon lawyers and institutes disciplinary proceedings against bar members.¹⁰⁶ The cases are prosecuted by members of the Oregon State Bar, either by members of the Regulatory Services/Discipline staff of the bar or by volunteer lawyers who serve without compensation. (Members of the local professional responsibility committees, the state professional responsibility board, and the disciplinary board serve without compensation.) A disciplinary board appointed by the supreme court hears the cases.¹⁰⁷ The supreme court hears appeals from the disciplinary board.¹⁰⁸ The lawyer discipline system is an unusual mix of legislative, executive, and judicial power, and the system has worked well for many years.

CONFLICTS OF INTEREST DECISIONS BEFORE 1985

One of my closest friends practices law in a rural community. He represents many farmers. We often discussed whether a lawyer, with the written consent of both parties, should be able to draft a land-sale contract for the buyer and the seller. He always maintained that he should be able to do so. I believed that it would be unethical, that the lawyer had a built-in conflict of interest in representing the buyer and the seller. One of my responses was, "Should a different rule apply to small-town lawyers?" I pointed to the repeated admonitions of the supreme court that "[i]f there is the slightest doubt as to whether or not the acceptance of professional employment will involve a conflict of interest between two clients or with a former client [. . .] the employment should be refused."¹⁰⁹

105. OR. REV. STAT. § 9.532(1) (2005); OSB RULES OF PROCEDURE, Title 2, 8-18 (4/26/2007), available at http://www.osbar.org/_docs/rulesregs/rulesofprocedure.pdf. [hereinafter "OSB RULES OF PROCEDURE"].

106. OR. REV. STAT. § 9.532(2) (2005); OSB RULES OF PROCEDURE, *supra* note 7, at Title 2, 8-18.

107. OR. REV. STAT. § 9.534(1) (2005); OSB RULES OF PROCEDURE, *supra* note 7, at Title 5, 30-32.

108. OR. REV. STAT. § 9.536(1) (2005); OSB RULES OF PROCEDURE, *supra* note 7, at Title 10, 42-43.

109. *In re Johnson*, 707 P.2d 573, 579 (Or. 1985) (quoting Raymond L. Wise, Legal

In 1970, the Supreme Court of Oregon adopted the Code of Professional Responsibility [hereinafter “Code”]. With amendments from time to time, the Code continued to govern the conduct of Oregon lawyers until 2005, when the court adopted the Oregon Rules of Professional Conduct. The road of permissible conduct under the Code was not always clear to practicing lawyers. It was not always clear to supreme court justices either.

In 1983, Arno H. Denecke, former chief justice of the Supreme Court of Oregon, wrote:

The Oregon Code of Professional Responsibility was a positive first step when adopted. Nevertheless, modern complexities have made it inadequate, particularly for furnishing guidance in the most troublesome areas. . . . [T]he time has come to reexamine the basic tenets in this sensitive and perplexing area.¹¹⁰

He maintained that the Code “offers no guidance” in the areas of “conflict of interest problems with former clients.”¹¹¹

One year later, Thomas H. Tongue, former justice of the Supreme Court of Oregon, wrote specifically on the confusing state of the law concerning conflicts of interest under the Code.¹¹² He began by noting that the Supreme Court of Oregon had decided more than 40 cases involving conflicts of interest since 1970, stating that “[p]erhaps the most important development in the law of legal ethics . . . in recent years has been on the subject of lawyers’ ‘conflicts of interest.’”¹¹³

Quoting from *In re Jans*, Justice Tongue wrote that a cardinal rule of legal ethics says “[i]t is never proper for a lawyer to represent clients with conflicting interest no matter how carefully and thoroughly the lawyer discloses the possible effects and obtains consents.”¹¹⁴ He added that the holding in *In re Jans* went beyond the

Ethics 273 (2d ed. 1970)); *In re Banks*, 584 P.2d 284, 293 (Or. 1978); *In re Hershberger*, 606 P.2d 623, 626 (Or. 1980).

110. Arno H. Denecke, *Complexities of Modern Practice Require Changes in Oregon Ethics Code*, 19 WILLAMETTE L. REV. 621, 621 (1983).

111. *Id.* at 637.

112. Thomas H. Tongue, *Oregon “Conflict of Interest” Cases Under the 1970 Code of Professional Responsibility*, 20 WILLAMETTE L. REV. 391 (1984).

113. *Id.*

114. *Id.* (quoting *In re Jans*, 666 P.2d 830, 833 (Or. 1983)).

express language of then DR 5-105(C) and DR 5-104, and that the *Jans* rule went “beyond what for many years has been regarded by lawyers as proper conduct, *as in cases in which two clients come to a lawyer and, to minimize the expense, ask him to prepare simple contracts between them* By forbidding such consent even upon consent after full disclosure, the court imposed new restrictions which appeared to prohibit these long-established practices.”¹¹⁵

Justice Tongue was critical of the court for holding, in 1984, that “an attorney may represent multiple clients with *potentially* differing interests ‘if it is *obvious* that he adequately can represent the interests of each and if each consents after full disclosure.’”¹¹⁶ He asserted that the court had “disciplined [lawyers] for conduct which, prior to 1970, would not have been regarded as improper by many, if not most lawyers,” and that “[i]n some other cases the court refused to discipline lawyers for conduct which, prior to 1970, would have been regarded as improper by many, if not most, lawyers.”¹¹⁷ Concluding that “[i]t is . . . difficult to reconcile the severe penalties . . . in some of such cases, with reprimands or dismissals in some other cases,” he called for the Oregon State Bar and the supreme court to “give serious consideration to the adoption of substantial changes in that code of ethics”¹¹⁸

That was the confusing state of lawyer-client conflicts law in Oregon until 1985, when two positive and constructive decisions clarified the law concerning lawyer conflicts of interest. They are *In re Brandsness*¹¹⁹ and *In re Johnson*.¹²⁰

POST-1984 CONFLICT OF INTEREST DECISION AND RULE CHANGES

With two respected former members of the Supreme Court of Oregon crying for certainty in the area of lawyer-client conflicts of interest, *In re Brandsness* provided an opportunity to address the

115. Tongue, *supra* note 14, at 401 (emphasis added).

116. Tongue, *supra* note 14, at 402 (quoting *In re Shannon*, 681 P.2d 794, 797 (Or. 1984)) (emphasis in original).

117. *Id.* at 407.

118. *Id.* at 407-08.

119. 702 P.2d 1098 (Or. 1985).

120. 707 P.2d 573 (Or. 1985).

problem. Though *Brandsness* did not end all uncertainty concerning conflicts of interest, it clarified the law concerning possible conflicts of interest between lawyers and former clients. *Brandsness* also was the catalyst for later significant amendments to the ethical rules concerning conflicts of interest, amendments that more clearly set the boundaries of permissible lawyer conduct. (Ethics opinions of the Supreme Court of Oregon are *per curiam*. Justice Carson's influence is clearly present in the *Brandsness* opinion, and others, as well.)

In *Brandsness*, the lawyer previously represented a husband and wife in purchasing a business corporation. The husband became president of the corporation and the wife was secretary-treasurer. Both worked in the business. The lawyer also prepared mutual wills for the husband and wife. Subsequently the wife asked the lawyer to change her will. He told her that he could not do so because he represented the husband. The wife later wrote to the lawyer that she had hired another local lawyer to prepare a new will, that her new will superseded all prior wills, and that the new will was in the possession of the other lawyer.¹²¹

Relations between the spouses deteriorated. The husband asked the lawyer to represent him in the husband's marital dissolution proceeding. The lawyer did so, filed the initial court documents and obtained a temporary restraining order granting the husband control of the business and restraining the wife from encumbering or disposing of any business assets. She complained to the bar, asserting that her spouse's lawyer had a conflict of interest because he had previously represented her.¹²²

In its formal complaint, the bar charged the lawyer with violating then DR 5-105.¹²³ Both the Trial Board and the Disciplinary Review

121. *Brandsness*, 702 P.2d at 1100.

122. *Id.*

123. DR 5-105 provided, in part:

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR-505(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients

Board – responsible at the time for deciding claims of lawyer unethical conduct under procedural rules of the Oregon State Bar – concluded that the lawyer’s representation of the wife ceased when he refused to rewrite her will, that thereafter the lawyer represented the husband, and that the wife knew it.¹²⁴ The Trial Board found no DR 5-105 violation.¹²⁵ The Disciplinary Review Board concurred, and dismissed the complaint.¹²⁶

On review in the supreme court, the court agreed that at the time the papers were filed in the dissolution proceeding, the lawyer no longer represented the wife. It then considered whether a conflict existed between the lawyer and his former client. In its opinion, the court first distinguished between an “open file” conflict –which exists when a lawyer represents one client against another current client– and a “closed file” conflict –which exists when a lawyer represents a client against a former client.¹²⁷

The court defined a “closed file” conflict as follows:

A “closed file” conflict arises when a lawyer represents a client who is in a position adverse to a former client in a matter that is significantly related to a matter in which the lawyer represented the former client.¹²⁸

The court then articulated this test to determine whether a closed-file conflict exists:

[A] three-factor test can be used to determine if a conflict exists. When the following factors co-exist, a conflict results:

1. The adverse party is one with whom the accused had a lawyer-client relationship;
2. The representation of the present client puts the accused in a position adverse to the former client;

if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(Source: 1985 Oregon State Bar Membership Directory).

124. *Brandsness*, 702 P.2d at 1100.

125. *Id.* at 1100-1101.

126. *Id.* at 1101.

127. *Id.* at 1102.

128. *Id.*

and

3. The present matter is significantly related to a matter in which the accused represented the former client.¹²⁹

The court concluded that a lawyer-client relationship previously existed between the lawyer and the wife, and that the representation of the husband put the lawyer in a position adverse to the former client. As to the third factor –whether the present matter was “significantly related” to the matter in which the lawyer had previously represented the former client– the court decided this issue by reference to two sub-tests.¹³⁰

The first sub-test was matter specific, and prohibited the lawyer from representing a client against a former client if “[r]epresentation of the present client in the subsequent matter would, or would likely, inflict injury or damage upon the former client in any matter in which the lawyer previously represented the former client.”¹³¹ The second sub-test was “information specific,” and prohibited the lawyer from representing a client against a former client if “[r]epresentation of the former client provided the lawyer with confidential information the use of which would, or would likely, inflict injury or damage upon the former client in the subsequent matter.”¹³² The court concluded that in representing the wife in the purchase and organization of the business “the accused’s representation of [the wife] . . . was more than merely incidental to his representation of her husband” and, therefore, there was a matter-specific conflict.¹³³

Brandsness gave lawyers and judges a clearer roadmap, concerning when lawyers could represent parties adverse to former clients.

In a January 29, 2007 email to the author, Jeffrey Sapiro, Manager of the Oregon State Bar Regulatory Services/Discipline Office, stated:

The beauty of *Brandsness* was that it gave us a concrete methodology to analyze former client conflicts. Before that, debate over whether a former client conflict did or did not exist in any given set of facts was fairly nebulous, based primarily on the important but vague concept of client loyalty. *Brandsness* provided a more practical analytic tool. Even though the rules and terminology have changed, I still

129. *Id.*

130. *Brandsness*, 702 P.2d at 1104.

34. *Id.*

35. *Id.*

133. *Id.*

walk through the *Brandsness* test in my head whenever looking at a former client conflict problem.¹³⁴

Two months later, the court further clarified lawyer-client conflicts law in *In re Johnson*,¹³⁵ a case involving an alleged conflict between *existing* clients. Concerning DR 5-105, the court noted the following:

Since its adoption by this court in 1970, DR 5-105 has undergone a judicially-crafted metamorphosis. . . . The rule is couched in terms of the effect upon the exercise of the lawyer's independent judgment but has been interpreted to concern conflicts of interest which, in turn . . . are measured by conflict between the interests of two or more existing clients (a so-called 'open file' conflict).¹³⁶

The court held that when the interests of two or more present clients are in actual conflict, the lawyer cannot represent either of them.¹³⁷ The court then referred to a different level of conflict –a “likely conflict”– stating: “Where the lawyer's independent professional judgment only is *likely* to be adversely affected, the lawyer may represent multiple clients if, and only if, he or she complies with the requirements of DR 5-105(C).”¹³⁸ (DR 5-105(C) then provided that a lawyer can represent multiple clients “if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure”¹³⁹)

The court again admonished that “the simultaneous representation of multiple clients is fraught with professional danger,” stating that “in respect to the representation of the buyer and seller in a land-sale contract such representation is unethical.”¹⁴⁰ (My friend has definitely lost the argument!)

Following the *Johnson* and *Brandsness* decisions, pursuant to ORS 9.490(1), the Oregon State Bar Board of Governors proposed

134. E-mail from Jeffrey Sapiro, Manager of the Oregon State Bar Regulatory Services/Discipline Office, to Edwin J. Peterson, Distinguished Jurist in Residence, Willamette University College of Law (Jan. 29, 2007) (on file with author).

135. 707 P.2d at 573.

136. *Id.* at 577.

137. *Id.* at 578 (confirming the rule stated in *In re Jans*, 666 P.2d 830).

138. *Johnson*, 707 P.2d at 578 (emphasis added).

139. *Id.* at 576.

140. *Id.* at 579-80.

changes to DR 5-105. The proposals concerned whether lawyers could handle cases against current clients and former clients. The membership did not approve the amendments proposed by the Board of Governors and voted to adopt a different revision. The supreme court did not approve the measure that passed at the 1985 annual meeting. In an order dated March 21, 1986, the court intimated that it would likely approve the board of governors' original proposal.

The issue continued to percolate within the bar.¹⁴¹ Justice Carson and the court fretted under the limitation of ORS 9.490(1). The court could not recommend rule changes, nor could it "formulate" rule changes because rule changes had to be "formulated" by the board of governors and "approved" by the membership before the supreme court could adopt them.

The court appointed a special working group of lawyers (later, other judges were added) to work with Justice Carson to address possible amendments to the rules of ethics. The group met regularly and drafted rule changes for the board of governors to "formulate" and for the members' approval. Ultimately the rule changes were approved by the membership.

On August 29, 1988, the supreme court adopted a revised DR 5-105, which further clarified the rules applicable to lawyer-client conflicts.¹⁴² The new DR 5-105(F) permitted a lawyer to represent a

141. A detailed explanation of the events between 1985 and 1988, and the various proposed amendments to DR 5-105 is contained in an April 21, 1988 letter from George Riemer, then General Counsel to the Oregon State Bar, to Justice Wallace P. Carson, Jr. The letter is on file at the Oregon State Bar. Justice Carson was the court's liaison with the bar concerning the proposed DR 5-105 amendments from 1985 into the nineties.

142. DR 5-105 Conflicts of Interest: Former and Current Clients.

(A) Conflict of Interest. A conflict of interest may be actual or likely.

(1) An "actual conflict of interest" exists when the lawyer has a duty to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client.

(2) A "likely conflict of interest" exists in all other situations in which the objective personal, business or property interests of the clients are adverse. A "likely conflict of interest" does not include situations in which the only conflict is of a general economic or business nature.

(B) Knowledge of Conflict of Interest. For purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer.

(C) Former Client Conflicts - Prohibition. Except as permitted by DR 5-105(D), a lawyer who has represented a client in a matter shall not subsequently represent another client in the same or significantly related matter when the interests of the current and former clients are in actual or likely conflict.

client against another existing client if the conflict was “likely,” provided that both consent to the representation after full disclosure. The DR 5-105(D) amendment permitted a lawyer to represent a client against a former client whether there was an actual or likely conflict of interest, provided that both clients consented after full disclosure. “Full disclosure” was defined in DR 10-101(B) as follows:

(B) “Full disclosure” means an explanation sufficient to apprise the recipient of the potential adverse impact on the recipient of the matter to which the recipient is asked to consent. Full disclosure shall also include a recommendation that the recipient seek independent legal advice to determine if consent should be given. Full disclosure shall be contemporaneously confirmed in writing.

These matters pretty much stood until the court adopted an entirely new body of ethical rules, the Oregon Rules of Professional Conduct, effective January 1, 2005.¹⁴³ Oregon Rules of Professional Conduct sections 1.7-1.11 retain, for the most part, the salient provisions of former DR 5-105.

CONCLUSION

The common law is, at times, a beautiful thing to behold. Rarely

Matters are significantly related if either:

(1) Representation of the present client in the subsequent matter would, or would likely, inflict injury or damage upon the former client in connection with any proceeding, claim, controversy, transaction, investigation, charge, accusation, arrest or other particular matter in which the lawyer previously represented the former client; or

(2) Representation of the former client provided the lawyer with confidential information the use of which would, or would likely, inflict injury or damage upon the former client in the course of the subsequent matter.

(D) Former Client Conflicts - Permissive Representation. A lawyer may represent a client in instances otherwise prohibited by DR 5-105(C) when both the current client and the former client consent to the representation after full disclosure.

(E) Current Client Conflicts - Prohibition. Except as permitted by DR 5-105(F), a lawyer shall not represent multiple current clients in any matters in which their interests are in actual or likely conflict.

(F) Current Client Conflicts - Permissive Representation. A lawyer may represent multiple current clients in instances otherwise prohibited by DR 5-105(E) when their interests are not in actual conflict and when each client consents to the multiple representation after full disclosure

....

Supreme Court of Oregon Order No. 88-64, August 30, 1988.

143. For a copy of the rules, see <http://www.osbar.org/docs/rulesregs/ORPC.pdf>.

fast. Often unclear. It labors along, ultimately reaching workable results. Between 1970 and 2005, the Supreme Court of Oregon, in a series of decisions and rule changes, and with assistance from the bar, shaped the law of lawyer-client conflicts of interest into a coherent whole.

The Oregon State Bar became an integrated bar in 1935. From its inception, it has worked cooperatively with the Supreme Court of Oregon to ensure a qualified, honest, reliable, legal profession. Innumerable rule changes have been discussed, debated, and voted on by the bar and court since that time to improve the standards of conduct for Oregon lawyers and the processes used to evaluate, investigate and act on complaints about their conduct.

Justice and, later, Chief Justice Wallace P. Carson, Jr. made significant contributions to Oregon's system of lawyer discipline. He worked closely with the bar, in his always warm and friendly manner, in discharging the supreme court's "management" responsibilities to promulgate both substantive ethics rules for Oregon lawyers and procedural rules for lawyer disciplinary proceedings. In his role as a member of the court hearing appeals of cases involving alleged misconduct by Oregon lawyers, no one better understood the need for understandable court decisions and clear rules of professional conduct. His convictions and his dedication to drafting clear opinions and fair and workable rules were an example to all of us who worked with him. I doubt that there is (or ever will be) a plaque or award honoring Justice Carson for his work in the disciplinary arena, but he certainly deserves one.

Justice Carson's legacy is that improvements in the law come from hard work and a deep commitment to strong and honest communication between institutions with interrelated and interdependent roles in the processes involved. The Supreme Court of Oregon and Oregon State Bar would not be the strong and vibrant institutions they are today without the unwavering and decades-long personal commitment of Justice Carson to both.¹⁴⁴

144. I sent a draft of this article to George Riemer, former General Counsel of the Oregon State Bar. He responded with his suggestions and with this closing comment, which I publish with his permission:

I think you underestimate the contributions of Chief Justice Carson in the overall area of lawyer discipline. I cannot think of any justice that interacted with the organized bar on lawyer ethics and discipline issues over the last two decades more than Wally. The DR/BR committee was the forum for interaction between the court and bar on

POSTSCRIPT

Others will write of the humanity of Chief Justice Carson. I will, however, mention undertakings in which he played a significant role. The work of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System began early in his tenure as chief justice, in May 1992.¹⁴⁵ Its report stands as a monument to the courage of Chief Justice Carson and other Oregon lawyers and judges, who were willing to look at themselves and at the court system and ask such questions as, “Am I prejudiced?” and “Do people of color get a fair shake in Oregon courts?”

Promptly after the task force report issued in May 1994, he appointed a committee to implement the recommendations of the Task Force. That committee, originally chaired by then court of appeals judge and current Chief Justice Paul J. De Muniz, issued its first report in January 1996.¹⁴⁶ The committee, now known as the Access to Justice for All Committee, continues to this day.

In 1995 Chief Justice Carson also participated in the creation of the Oregon State Bar/Oregon Supreme Court Commission on Professionalism. He signed the order creating the commission and was one of the original commission members. He faithfully attends commission meetings.

Chief Justice Carson carried the law into the community. He willingly gave up evenings and weekends to represent Oregon’s legal system at ceremonies, events, and community gatherings. He put a human face on the laws and systems that govern Oregon’s citizens.

these important issues. Wally chaired this committee throughout its tenure. Wally was the glue between the court and bar. He listened to the bar’s concerns on innumerable issues, and he always worked to find solutions to identified problems. His legacy is that, working together, the court and bar can continue to improve an already effective lawyer disciplinary process. It is not perfect and never will be, but the justices have to maintain strong lines of communication with the organized bar to continue to do so. If the justices don’t take the time to interact with the bar regarding the regulation of the profession, they abdicate their role as the ultimate authority for the proper conduct of lawyers in Oregon. Wally stands out as a judge who truly cared about how lawyers conducted themselves and also truly cared about the fairness of the process used to determine if a lawyer had in fact engaged in inappropriate conduct.

145. A complete copy of the Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System May 1994 may be found at 73 OR. L. REV. 823 (1994).

146. See the report at <http://www.ojd.state.or.us/osca/cpsd/courtimprovement/access/documents/ICReport.pdf>.

He spoke about the workings of the legal system and the courts in direct language that bridged the gap between citizens and the courts.

WALLACE P. CARSON, JR.—A CELEBRATION
JUSTICE W. MICHAEL GILLETTE*

The resignation as chief justice and subsequent retirement of the Honorable Wallace P. Carson, Jr.¹⁴⁷ from the Oregon Supreme Court represent a great many things to the legal life of Oregon, many of which are touched upon by the other contributors to this volume. I take the liberty of presuming that I have been asked to submit my own thoughts on those events because I have had the opportunity to work with Justice Carson—er, excuse me, Wally—on the supreme court for a long time and have come to know him well. Whether that or some other reason is the motivation, however, the privilege is one I happily accept.

Wally Carson is that rarity—a true and instinctive gentleman. He is kind to everyone, tolerant of everyone, encouraging to everyone. And so he has been throughout the third of a century during which I have had the chance to know him. The reasons for those qualities, apart from his own sunny and optimistic nature, are principally family. Wally is the scion of one of Salem’s most prominent families, a family filled with lawyers who practiced law in Salem. And, from Wally’s own stories of his childhood and family life, it seems obvious that the family also was one that placed the highest value on scholarship and public service. But it also is clear that the family concerned itself with manners. Respectful behavior toward others seems to have been a hallmark of what Wally saw and heard from his earliest days. Those lessons took.

Wally had the opportunity to practice law with his father and uncle while he took his first fling at public service, gaining election to the Oregon House of Representatives. He followed that with election to the Oregon State Senate. When I first met him, his party was in a

* The Honorable W. Michael Gillette has been an associate justice of the Oregon Supreme Court since 1986. Prior to his appointment to the supreme court, Justice Gillette served on the Oregon Court of Appeals for more than nine years. Before becoming a judge, Justice Gillette held numerous positions with the Oregon Department of Justice, including Solicitor General and Chief Trial Counsel. He also served as Assistant Attorney General in American Samoa and as a Deputy District Attorney in Multnomah County. Earlier, he practiced law in Portland, Oregon, with the law firm of Rives and Rogers. Justice Gillette graduated from Whitman College in 1963 (Bachelor of Arts) and from Harvard Law School in 1966.

147. Hereinafter commonly referred to—because he would not have it any other way—as “Wally.”

distinct minority, but Wally was as influential as if he were a leader of the majority. Everyone listened to him, his counsel was followed, and his contributions to legislation far exceeded his status. Much of the reason for this was due to his gentleness, his affability, and his genuine pleasure in working with his colleagues. Even more of it, however, was due to Wally's fascination with the legislative process itself. He read the bills he worked on; he understood their effect; and he tried to be sure that the same was true of those around him. And he liked crafting legislation, particularly if it amounted to a "field manual"—a set of directions as to how the law should be followed. Wally was constantly thinking of the potential consequences of his votes and trying to eliminate confusion as to what the legislation in question was about and how it was to work.

Wally and I came to the bench within a few months of each other and have become increasingly fast friends ever since. I watched Wally take to the trial bench with great success; he put up with my being able (for a change) to overrule him. *See Richardson v. Cupp*, 600 P.2d 420 (Or. Ct. App. 1979) (illustrating proposition).¹⁴⁸ Then, in 1986, I had the opportunity to begin service with Wally on the supreme court and was his colleague continually until his retirement.

During much of that time, Wally served the court as chief justice. His service in that role followed that of the redoubtable Edwin Peterson, who had forged a single entity out of the scattered parts of the judiciary, oftentimes with some strain and uneasiness. Wally, who had been a trial judge, cemented the work that Chief Justice Peterson had begun. Few could disagree with him, and even fewer could fight with him. (He was, after all, Wally—self-effacing, generous, unconcerned with credit, interested in everything and in everyone. How could you not want to join in any effort that he made?) The true consolidation of the judicial branch was cemented under Wally's tenure, to the everlasting benefit of the judiciary and the state as a whole.

148. Wally belongs to the "don't get mad, get even" school of judging. He always grumbled at the disposition in the *Richardson* case, in which I participated in the court of appeals and which reversed a judgment of Wally's with a bare citation to another case, *Reitz v. Coca-Cola Bottling Co.*, 584 P.2d 791 (Or. Ct. App. 1978). "*Reitz v. Coca-Cola*" became a mock battle cry between the two of us (and, on occasion, still is). Wally had his revenge, however, after joining the supreme court. *See Banister Continental Corp. v. Northwest Pipeline Corp.*, 724 P.2d 822 (Or. 1986) (vacating *Banister Continental Corp. v. Northwest Pipeline Corp.*, 709 P.2d 1103 (Or. Ct. App. 1985)).

As a colleague, Wally was just what anyone who knew him would expect. Philosophically and intellectually, he had no set agenda. He went where the law (as he understood it) took him. He was as open-minded a human being as anyone could ask—comfortable in his own mind, but less interested in winning an argument than in getting the answer right. And he continued his interest in writing field manuals—his opinions were characterized, more than most others, by an effort to describe what should happen next. (He also had a particularly charming eccentricity—he loved maps. Thus, when it came time for the court at its weekly conference to decide whether to allow review in a decision of the court of appeals, the petition for review was virtually assured of at least one affirmative vote if it had a map in it. A few lawyers, aware of this characteristic, even began (somewhat whimsically) to attach maps to their briefs when the maps had nothing to do with the case.)

With respect to others' opinions, Wally was unfailingly tolerant, trying to concentrate on the opinions' principal analytical points, not on their style. His comments and recommendations always had a practical turn, bringing some of us back from abstraction with the reminder that real judges and real lawyers had to live with what we wrote. Whenever any opinion of the supreme court had a very practical aspect, Wally was probably a contributor.

I have not tried to write this brief appreciation of Wally objectively, because that would lie beyond my poor powers. I revere him as a human being and treasure him as a colleague. He has been, he is, and he always shall be my friend.

And how shall I summarize my friend? Wallace P. Carson, Jr. is a kindly, bright, gentle, unfailingly decent, wholly dedicated public servant whom nothing daunts, whom nothing defeats, who readily gives intellectual quarter but who neither asks nor requires it for himself. He has served his state with a steadfast dedication to its future. He has made a life of the law and, in doing so, brought the law to life.

So might it be said of all of us.

