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*Focus on the Honorable Janice Stewart*

## PUBLIC SERVICE GOALS LEAD FROM SMALL TOWN TO FEDERAL JUDGESHIP

By Cindy Evans

How does an individual get from living "on the poor side of town" to being sworn in as Oregon's first female federal magistrate judge? "I was at the right place at the right time," is the Hon. Janice Stewart's assessment.

Getting to the right place for Judge Stewart began with spending her childhood in Medford. "I was in Medford until the end of 9th grade," says Stewart. "My father was a lumber grader for many years, and he also worked for an oil burner company as a repairman."

For a family of five—there is an older and a younger brother—that meant growing up with financial difficulties. "I always felt ill at ease in Medford," comments Stewart. "At that time, it was a caste society. The west was the poor side of town and the east was for the rich." She was later to learn that the town was divided by race, as well as money.

The family moved to Klamath Falls for Stewart's high school years—a



Hon. Janice Stewart

move that proved enlightening to her. On the one hand, she "felt relieved because in Klamath Falls, you didn't know who was rich or poor." But what proved to be even more pivotal to Stewart's

budding social awareness was the contrast in civil rights between the two towns. "I was surprised to learn that Medford was a 'sundown' town," she notes. "That meant that if any blacks came to town, they had to be out by sundown."

As she looked back on her years in Medford, Stewart also came to realize the inequity involving one of her best friends. Not only was her friend one of the few Chinese in Medford, but her friend's family was restricted to living behind the Chinese restaurant it ran. "They were only allowed in town because of the restaurant," she recalls.

"So I went from one extreme to another," Stewart remarks on her move to Klamath Falls. "The environment I grew up in seemed very natural to me until I left and realized how really unnatural it was." The contrast brought into focus the inequities—some legal, some social—towards minorities and those less financially well off.

That realization, rooted in personal experience and nurtured in the idealistic soil of the sixties, proved to be a turning point for Janice Stewart. "What I wanted

to do," she states, "was to get an education and use my education to help make society a better place."

Stewart went on to become valedictorian for the Klamath Union High School Class of 1968 and was awarded a full four-year scholarship to Stanford University.

For the first year, Stewart says, "Stanford was a bit intimidating for me." Many of her classmates were from prep schools, and "because they had already learned many of the things that I was learning for the first time—the writing classes, the civics classes—I felt those students had a real advantage." Advantage or not, Stewart went on to excel at Stanford, where she graduated with honors in economics in 1972.

Next came the decision to go to law school, in the hopes that it "would give me the kinds of skills I could use to help society." Stewart still can't point to a specific role model, however, who helped her to choose law as the tool for effecting the kinds of changes she envisioned. "The only lawyers I knew," she jokes, "were Perry Mason and Nancy Drew's father."

Nonetheless, it was off to Chicago for law school, again aided by a scholarship. "I remember being shocked by Chicago," she recounts. "I didn't know the downtown was so beautiful."

Another shock to the idealistic Oregonian was the less appealing side of the law school experience: her roommates were third-year students who had developed the cynicism that such

*Continued on page 4*

Editor's Note: Beginning with this issue, *Oregon Benchmarks* will be published three times a year—in January, May, and September. We welcome submissions of news items, photographs, and articles of interest about the history of the U.S. District Court for Oregon. Send your submissions to the editor, Carolyn Buan, at 812 SW Washington Street, Suite 610, Portland, OR 97205.

# THAT WAS THEN AND THIS IS NOW— CHANGES IN FEDERAL PRACTICE

By Randall B. Kester

*The following remarks were made in a talk given at the U.S. District Court of Oregon Historical Society's 1994 Annual Meeting.*

**M**y assigned topic is "Changes in Federal Practice," and of course there have been many in the last half-century. Perhaps the biggest changes came as a result of the increased volume of litigation and the accompanying increases in judges and court personnel.

I'll not bore you with a lot of statistics, but we all know that the number of cases filed in the federal court has increased by a proportion greater than the increase in Oregon's population. And this happened even though the jurisdictional limit in diversity cases was increased from \$3,000 to \$10,000 in 1958, and then to \$50,000 in 1988. Some of the increase was due to the penchant of Congress to create new federal crimes and new federal causes of action, and some was no doubt due to the increased litigiousness of society generally.

In 1940 this district had two judges, Fee and McColloch, and one bankruptcy referee, Snedecor. Now we have six active judges, three senior judges, three magistrate judges, and three bankruptcy judges.

And even with these additional judges, there has sometimes been a long wait to get a civil case to trial, because of the necessary priority for criminal cases. And last year, because of delayed appropriations, there was a possibility that civil jury cases could not be tried at all.

Next to the increase in volume of litigation, the most significant change probably was adoption of the Federal Rules of Civil Procedure. The rules became effective in 1938, and when I started in 1940, they were still the "new" rules. There was a lot of resistance to the new rules, particularly in the change from fact pleading to notice pleading, and in adopting new methods of pre-trial discovery. For a long time this controversy stymied ef-

forts to give the Oregon Supreme Court general rule-making power, for fear they might adopt the federal rules, as many other states did. When the Oregon Council on Court Procedures was finally given rule-making power, subject to a legislative veto, they were careful to specify (Rule 18-A) that a pleading shall state "the ultimate facts constituting a claim for relief" instead of the language of the federal rule (Rule 8-a-2) which requires merely "a statement of the claim." Oregon still has not adopted interrogatories such as are in the federal rule.

Judge Fee, who was then the chief judge, did not like the new rules, although he favored the courts having rule-making power, but he felt that the best way to get them changed was to enforce them up to the hilt. In the meantime he wrote several law review articles deploring the loss of pleadings as a means of defining the issues. His articles are cited in *The First Duty* (the history of the U. S. District Court of Oregon published by our historical society).

In the years 1958 to 1967 I attended the Ninth Circuit Judicial Conference as a lawyer delegate. When I first started to attend, they were still debating whether a complaint should be required to state facts sufficient to constitute a cause of action, but by the end of that time the matter was only of historical interest. Fortunately, in my view, Oregon lawyers practicing in the federal court have usually not gone all the way into notice pleading, perhaps as a carry-over from their state-court habits.

There's a lot of talk nowadays about "case management" but Judge Fee had his own method of case management. Every Monday morning was "call day" in his court, and all the active cases were scheduled for periodic status reports—usually about once a month. In addition to the call calendar he would have a motion calendar, a pre-trial conference calendar, and ex parte matters. That meant that his courtroom would be crowded with lawyers every Monday morning, and woe unto the lawyer who was not prepared to report on the sta-



Randall Kester

tus of his case. Obviously that meant a great waste of time for the lawyers and expense to the clients. But as Judge Fee once re-

marked, "litigation in the Federal Court is a luxury."

As a convenience, the *Daily Journal of Commerce* every Monday printed a list of all the cases on the calendar, and customarily the lawyers attending the call calendar would bring a copy of the paper so as to follow the list and know when each case would be called. This meant that sometimes there would be a great rustling of paper, and more than once a lawyer was rebuked by the judge for making too much noise.

That brings to mind an incident once when Walt Cosgrave and I were trying a case before Judge Fee—I think Gordon Keane was on the other side—and a spectator sitting in the back of the courtroom became so engrossed in following the testimony that without thinking he automatically lit a cigarette. The first thing we knew, Judge Fee exploded: "What you doing, smoking in my courtroom?" When we recovered from our shock, we looked back and saw the startled smoker with a wisp of smoke drifting up from the cigarette in his hand. He probably never knew how close he came to being thrown in jail for contempt.

Another of the many stories about Judge Fee concerns the time when a construction project was going on outside his courtroom on Broadway and the noise of a jackhammer was very audible in the courtroom. He sent his bailiff down to tell the operator to stop that noise while court was

in session, but the operator responded profanely that he had a job to do and he wasn't about to stop. When the bailiff reported that back to the judge, his response was to send the U.S. Marshall down. Miraculously, the noise stopped.

During World War II, Judge McCulloch heard many cases involving regulations of the Office of Price Administration. He made no secret of the fact that he disliked the regulations, he thought the statute was unconstitutional, and he was going to make things as tough as possible for the government in those cases. In one case he referred to the Emergency Price Control Act as a "legal hoax" (63 F Supp 947), and in another case he described the OPA cases as "a discreditable chapter in law enforcement" (72 F Supp 222). In some cases he refused to allow the OPA attorneys to present the government's case unless they were accompanied by an assistant U.S. Attorney, apparently on the theory that although the cases were brought in the name of the administrator, the government was in fact the real party of interest.

I suppose all of you have anecdotes about particular judges, and one of my favorites involved Gus Solomon. After he became chief judge he did away with the Monday call calendar but he continued it for a while. It was his practice, when swearing in a bunch of new lawyers, to deliver a little lecture about how to practice in federal court. On this occasion, the swearing-in ceremony occurred after he had gone

through the call calendar. During the call a young lawyer from one of the major firms confessed that he didn't know the status of one of the cases on his list, so Judge Solomon sent him out to telephone his office and find out. Then the judge proceeded with the investiture and his usual lecture.

You'll remember that Judge Solomon was a stickler on careful writing and a purist about the use of words. On this occasion, in his lecture he particularly criticized the use of the word "contact" to mean communicate, and use of the word "advise" to mean inform. After he was finished and the courtroom was still full of lawyers, the young lawyer whom he had sent to call his office returned and started his report to the court:

"Your Honor, I contacted my office, and they advised me..."

That was about as far as he got before Judge Solomon exploded.

Well, I'm straying from the subject of "Changes in Federal Practice" so I'll mention briefly some of the changes I've noticed in the last 54 years:

1. We now have six-person juries, while formerly a twelve-person jury was taken for granted.

2. We now have to justify our preemptory challenges, if the opposing party asserts that the challenge was for an improper reason such as race or gender. This is a fairly recent development.

3. We now have to list our witnesses in advance, and furnish summaries of their expected testimony, which was unheard of in 1940.

4. We now argue motions by telephone, and in emergencies can file papers by facsimile transmission—both related to advances in technology.

5. Recently we've seen much greater use of sanctions under Rule 11. While the court may have had such power, it was rarely used.

6. We now have much greater use of magistrate judges. Formerly there were special masters and commissioners but the positions of magistrate, and now magistrate judge, are fairly recent.

7. There is much greater use of settlement conferences. It was Judge Fee's view that settlements were none of the court's business, that the courts were to try cases, not meddle in settlements. Obviously that view is no longer in style.

8. There is much greater use of summary judgments, particularly the rule that affidavits must be directly controverted in order to create an issue of fact. In the early days of the new rules it was almost impossible to get a summary judgment, and if you got one it was likely to be reversed on appeal.

9. And speaking of appeals, we used to have to get the trial record printed, and then the briefs had to be printed. Back in the sixties I served on a committee of the Ninth Circuit Judicial Conference, under Judge Hamley, which recommended the use of a typewritten record and briefs, and the present practice is partly a result of that effort.

This listing of changes could go on, but enough has been said to illustrate the changing world in which we practice. And I don't mean to express any value judgments as to whether present practice is better or worse than the "good old days," except for notice pleadings. Perhaps only the hindsight of future historians can tell whether the changes improved the administration of justice. The recently released draft of a long range plan for the Federal Courts indicates that even more drastic changes may be in store for the future.

**Randall Kester** is a partner in the Portland firm of Cosgrave, Vergeer & Kester.

### Now That's a Good Deal!

Member Bill White made the Society a deal it couldn't ignore when he offered to give a free copy of his book, *The Lighter Side of Practicing Law*, to any guest at the 1994 Annual Meeting who bought a copy of the Society's book, *The First Duty*. Needless to say, thanks in large part to Bill, sales that evening were brisk. For those who weren't able to take advantage of the offer, copies of Bill's book can be ordered directly from him for \$25. His book contains over 100 anecdotes of humorous courtroom encounters, as told by 85 lawyers nationwide. Mail your check and order to: We, the Lawyers, 205 Berwick Road, Lake Oswego, Oregon 97034.

*The First Duty*, a handsome hardback book covering the history of the U.S. District Court for Oregon, can be ordered from the Ninth Judicial Circuit Historical Society, 125 S. Grand Ave., Pasadena, CA 91105, for \$32.95 (includes \$3.00 postage and handling).

