

# View From The Bench



Hon. Rick Haselton

## *Kids ask the hardest questions*

by Hon. Rick Haselton  
Oregon Court of Appeals

*Note: The author reminds readers that the views expressed here are solely his own and do not represent those of his colleagues individually or of the Oregon Court of Appeals as an institution.*

For the last four years, the Court of Appeals has held oral arguments, roughly once a month during the school year, at high schools and middle schools around Oregon, from Coos Bay to La Grande, from Newport to Klamath Falls, and dozens of locations in between. Many OTLA member lawyers have participated as counsel in our “road show” arguments, and many others have helped prepare the students in their communities for our visits. When the arguments are completed, we take questions from the students and often visit their classrooms later to engage in further Q&A.

Those unscripted sessions have produced the most candid interchanges between judges and citizens that I’ve witnessed. Because the students are fearless and ingenuous, the questions often go to the heart of who we are and how we perceive, and perform, our work. Other questions are, predictably, silly (as are our responses). Regardless, I’ve often thought that, if I were still in practice, I’d love to be in that classroom or auditorium. Hence, my top ten “road show” ques-

tions, with my responses:

*Question 1:* What are the hardest cases?  
*Answer:* Cases involving children—especially termination of parental rights and custody fights.

Why? Because they are so personal and emotional, because we have *de novo* review, and because, no matter what you do, there’s (almost) always some doubt. They are so *permanent*—people’s lives are changed forever; things will never be the same. There are lots of cases with hard, close legal issues, but I leave those at the office. It’s the kid cases that wake me up in the middle of the night.

*Question 2:* Do your personal background and beliefs affect how you decide a case?

*Answer:* Judges are not computers. We’re people and, like everyone else, we bring our life experiences to our work. That’s natural and inevitable. I’d be lying to you if I said that, at least at some subconscious level, our experiences never affect how we look at a case.

With that said, the challenge is to try to be aware of those influences and to check, and double check, yourself. You can’t begin a case by subconsciously pulling for one side. You can’t begin with some preconceived idea of the “right” outcome, based on some personal agenda, and then work backwards so that your reasoning fits that result. If you did,

the judicial system would lose its credibility—and, in the end, that’s all it has. Credibility. Instead, you have to discipline yourself to be indifferent about the outcome. That sounds heartless—but if you deal honestly with the facts and the law, the results will almost always be “just” (even if occasionally distasteful).

*Question 3:* Have you ever decided a case where, looking back, you wish you could change the result?

*Answer:* Yes. There are two or three decisions from my first few years on the court that I wish I could take back (I won’t identify them). I suspect that many judges feel the same way. Some of that is experience; some of that is that we all change; and some of that is that no one bats 1,000. You do your best, learn, and move on.

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However, for me, much more frequently I wish I could change my *reasoning*. One of the really intimidating aspects of our work is that once we write an opinion and it's published in the bound volumes for the whole world to see, it's there forever and it's binding—unless the Supreme Court reverses us or we overrule ourselves, which happens very rarely. Thus, anything you write can—and often will—come back to bite you. The real lesson, which I'm still learning, is that it's usually best to say less, not more.

*Question 4:* Do you worry about public reaction to your opinions?

*Answer:* Sometimes, yes—initially. It's involuntary and instinctive. But the real question is what do you do next?

Sooner or later, almost every judge will be faced with rendering some really controversial and unpopular decision—like striking down an initiative or granting a convicted murderer or rapist a new trial. You know what the reaction is going to be. You know that it may hurt your chances to be reelected—and, believe me, it's no fun being the bum of the week on talk radio.

But then you do your duty—or try to, as well as you can. You do that because you've taken an oath. You do it because any judge who pulls his or her punches isn't worthy of the job. When you start looking over your shoulder, it's time to hang it up. You do it because of history, because of your colleagues' trust, and because, in the end, you have to live with yourself. In my ten years on the Court of Appeals, I've never seen a single vote affected by concern about adverse public reaction.

I'm not saying that it's easy. And I'm not saying that we're heroes. It's just the way it is.

*Question 5:* What are your most memorable (or grossest) cases?

*Answer:* At least three are both memorable and “gross”:

- *Penland v. Redwood Sanitary Sewer Service District*, 156 Or. App. 311, 965 P2d 433 (1998) Affirming an injunction against a sewerage district's “Jo-Gro” operation, which converted human waste to fertilizer, generating “unbearably nauseating” odor; composting operation held to be a nuisance.
- *Brown v. Washington County*, 153 Or. App. 367, 987 P2d 1254 (1999) After escaping from county correctional facility because he suspected that his wife was having an affair, an inmate found his wife in bed with his brother, and killed his brother with an axe. The brother's widow successfully sued the county for, *inter alia*, “custodial negligence,” and the Court of Appeals affirmed the jury's award.
- *Turudic v. Stephens*, 176 Or. App. 175, 31 P3d 465 (2001) Homeowners' maintenance of two pet cougars on their property did not violate subdivision's CC&Rs. Neighbors' ostensibly retaliatory placement of a purple “port-a-potty” on their property in front of the cougar owners' picture window, so as to impair their view, violated CC&Rs. As for purely “memorable” cases, there are many—but here are a few:
  - *Picray v. Secretary of State*, 140 Or. App. 592, 916 P2d 324, *affirmed by an equally divided court*, 325 Or. 279 (1996) Striking down a statute that prohibited wearing of any “political badge, button or other insignia” in a polling place, as violating free expression protections of the Oregon Constitution.
  - *Lakin v. Senco Products*, 144 Or. App. 52, 925 P2d 107 (1996), *aff'd*, 329 Or. 62, 987 P2d 463 (1999) Affirming product liability verdict in favor of a plaintiff who was grievously injured when a nail gun malfunctioned, shooting a roofing nail into his brain.
  - *Hanzo v. De Parrie*, 152 Or. App. 525,

953 P2d 1130 (1998) Reversing issuance of civil stalking protective order against an anti-abortion activist, where the predicate “contacts” involved constitutionally protected expression.

- *McCathern v. Toyota Motor Corp.*, 160 Or. App. 201, 985 P2d 804 (1999), *aff'd*, 332 Or. 59, 23 P3d 320 (2001) Affirming award of damages to the plaintiff in a catastrophic vehicle rollover case; exploring contours of Oregon's “consumer expectation” test.
- *State v. Thorp*, 166 Or. App. 564, 2 P3d 903 (2000) (Haselton, J., dissenting), *dismissed*, 332 Or. 559 (2001) Addressing whether imposition of 75-month Measure 11 sentence on a 16-year-old defendant, who was convicted of statutory rape for engaging in consensual intercourse with his 13-year-old girlfriend, violated the proportionality provisions of the Oregon Constitution.

*Question 6:* How do you balance your work and your family/home life?

*Answer:* Not as well as I'd like—and sometimes, not very well at all. Too often, to be honest, my family loses out. Over time, though, I think I've gotten better, not just because I've become somewhat more efficient, but also because of a talk I had with one of my old law partners a couple of years ago. My friend was, and is, very wise—he'd done it all and seen it all. He pointed at the leather-bound volumes in which our opinions are published and said, “When you die, do you think that *they* are going to mourn you or remember you? Do you really think that anyone's going to read that [expletive deleted] 50 years from now?” I try to remember that.

*Question 7:* If you could change one thing in your job, what would it be?

*Answer:* The volume of our work, and particularly the reading. Because we don't have any discretion to turn appeals away—to “turn off the spigot”—every

month more and more cases come in, and you feel like you're running just one step ahead of an avalanche. Sometimes the avalanche catches you.

Because of all the reading, you feel as if you never have enough time to do what is most important—to *really* think and write. You're constantly scrambling to free up some uninterrupted time. Beyond that, there's another real danger: The Court of Appeals has always prided itself on treating each case individually—that is, we try to keep in mind just how important each case is to the parties, even if it might not be to anyone else. At some point, however, the volume of work and our fatigue can undercut that ethic, that sense that each case is important. Still, I have no solution.

*Question 8:* What do your law clerks do?

*Answer:* More than anything else, my law clerk keeps me out of trouble. Even as a kid, I was always too sure of myself—at least when it came to arguments. And I never had much patience for working through the steps of a problem—I always wanted to jump ahead to get to the “fun stuff.” That can get you into trouble in math, and it can get you into trouble in law. So when I sit down with my law clerks on their first day of work, I tell them that their primary responsibility is to make me slow down, to make me think, to keep me from becoming complacent, and to tell me when I'm wrong.

What that means in practical terms is that we will discuss cases before and after oral argument and brainstorm different approaches. They will draft opinions, talking with me frequently, so that we can wrestle through problems together. And then, after they draft an opinion, and I work it over with *lots* of red ink (just as your teachers do with your term papers), we discuss and debate those changes. Of course, the final call is, and must be, mine—and then we move on to the next case, starting all over again.



Photo by Hon. Eric Valentine

*Appeals Court Judges Mary Dietz, Bob Wollheim (r) and Rick Haselton discuss their work at Eastern Oregon University's Hoke Students Center on May 11, 2004.*

*Question 9:* Do you guys hang out together outside of work?

*Answer:* Not very much. At work, we do spend a lot of time together, chatting about cases, and sometimes going out for lunch—and some of us car pool together. We'll also sometimes attend judicial conferences or retreats, to discuss court-related problems. But unlike when I was a practicing lawyer, it's rare that we'll go out after work or on the weekends to have a few beers, catch a movie or see a ball game. I'm not sure why—we certainly like one another well enough—it may just be that we're older and have other commitments. Still, one of the judges has organized court-wide bowling parties and a pool party, and people had a lot of fun with those.

*Question 10:* If you weren't a judge, what would you be?

*Answer:* Either a high school history teacher or shortstop for the Red Sox.

For extra credit, five bonus questions:

*Question 11:* Have you ever broken the law?

*Answer:* I'll take the Fifth....

*Question 12:* Why do judges wear robes (and what's under them)?

*Answer:* They cover a lot of imperfections.

*Question 13:* What is the difference between the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of the Oregon Constitution?

*Answer:* You've got to be kidding. Ask your mother or your father. (This question was asked by a middle schooler—and I knew that both of her parents were attorneys.)

*Question 14:* How much do you make?

*Answer:* Every time we have one of these school settings, someone asks that question—and I can never remember.

*Question 15:* Was that lawyer getting paid?

*Answer:* Yes, but not by us.

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*The Honorable Rick Haselton is a Judge with the Oregon Court of Appeals. You can contact him at Oregon Court of Appeals, 1163 State St, Salem OR 97301-2563.*