

# Criminal Law



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## Oregon State Bar Criminal Law Section's Executive Committee

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Wendy Rae Willis, *Member*  
Barbara Buehler, *Staff Liaison*

## Annual Report to Section

by Jesse Wm. Barton, *Chairman*

As chairman it is my duty, and also my pleasure, to report on our Section's status and major activities during the past "bar year."

First, I need to start by explaining that before 2000, bar years ran from October 1 to October 1. But during 2000 the Board of Governors changed it to run from January 1 to January 1. Consequently, the current bar year started running on October 1, 1999. It will conclude 15 months later on January 1, 2001.

Second, although Section membership dropped in 1997, 1998, and 1999, in 2000 the downward trend finally stopped. This year membership increased by about four percent, to 553. Although this is a welcome change, Section membership still is well below its 1996 peak of 631.

Finally, during the current bar year the Section and its executive committee engaged in the following activities:

On April 15, 2000 the Section held its 13th Annual CLE: Contemporary Issues in Criminal Justice. The CLE included an excellent component on the state's child abuse reporting laws. This met the new (as of July 1, 2000) requirement that bar members earn one credit on the topic during their three-year CLE reporting periods. About 150 persons attended the CLE. Another 13 persons separately ordered the CLE materials.

In 2000 the Section's executive committee experimented with videotaping the CLE for regional replays. So far the program has been replayed twice, once in Gold Beach and once in Coquille. A total of eight persons attended the replays (four of whom also joined the Section). On top of that the bar copied the program's child abuse reporting component for use in a

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## NOTICE OF SECTION'S ANNUAL MEETING AND ELECTIONS

**Annual meeting held on November 4, 2000 at  
10 a.m. at the Oregon State Bar offices.**

All section members are welcome to attend.  
The main topic to be addressed at the meeting  
is the election of officers and at-large members.

The following members have been nominated for the listed positions:

|                   |                 |
|-------------------|-----------------|
| Jennifer Ahlen    | Chair Elect     |
| Cynthia Easterday | Secretary       |
| Ken Bauman        | Treasurer       |
| Angie Lee         | At Large Member |
| Tim Bowman        | At Large Member |
| Greg Scholl       | At Large Member |
| Lindsay Partridge | At Large Member |

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videotaped CLE it is offering. The Section receives approximately one-third of the registration fee the bar charges for its CLE.

Bar policies encourage executive committees to meet periodically in the state's various geographic regions. Last June the committee met in the northeast region, at the Wallowa Lake resort area south of Joseph. In August the committee met in the south coast region, at Bandon.

On August 17, 2000 the Supreme Court issued its opinion in a disciplinary case called *In re Gatti*. In *Gatti* the court affirmed disciplining an attorney for using deceptive tactics to try to obtain information beneficial to his client. The executive committee is concerned that criminal practitioners, prosecutors in particular, could be sanctioned for using similar tactics. Consequently, the committee is considering seeking policy changes—legislation or amendments to the bar's disciplinary rules—limiting *Gatti* to civil cases.

Section secretary Scott Asphaug and executive committee member-at-large Jack Ransom served as the Section's representatives to the bar's Indigent Defense Task Force III. The Task Force recently issued its final report. It is available on the bar's web page. See <http://www.osbar.org/>. Among other things the report concludes that problems with the state's indigent defense system largely stem from inadequate funding. [As an editorial comment, the inadequate funding stems from the fact that the system bases compensation on the posterously low rate of \$40 per hour.]

Member-at-large Jennifer Ahlen was selected to serve on the interim legislature's Pretrial Release Workgroup. This group is working with the Interim Judiciary Committee, the Criminal Justice Commission, and the Joint Legislative Audit Committee to evaluate the statewide pretrial release system and make recommendations to the 2001 Legislature. Ms. Ahlen will regularly apprise the executive committee and the Section of the work group's activities.

Chairman-elect Tim Sylwester and I are serving as the Section's representatives to Chief Justice Carson's Criminal Justice Advisory Committee (CJAC). As its name implies, CJAC advises the Chief Justice on numerous policy matters affecting the state's criminal justice system. CJAC likely will offer a handful of bills for consideration by the 2001 Legislature. Also during the legislative session, CJAC will review numerous other bills and offer its technical advice on them. Mr. Sylwester and I will regularly apprise the executive committee and the Section of CJAC's activities.

Related to the Section's involvement with CJAC, at the start of the bar year the executive committee determined that uniform waiver of counsel and plea petition forms would benefit the bench and bar. They would systematize the matters they address and help avoid subsequent litigation. Mr. Sylwester drafted the forms, and the executive committee has completed the initial stage of its work on them. The committee soon will meet with interested representatives from the judicial branch who have expressed concerns with the plea petition form's content. The committee intends that after those concerns have been addressed, it will present the

forms to CJAC for its consideration. If all goes well, CJAC will assist in the forms' adoption (perhaps as appendices to the Uniform Trial Court Rules).

Related to the uniform waiver of counsel and plea petition forms, the executive committee met with Jeff Barlow of the Oregon Judicial Department (OJD) who is developing a uniform judgment and sentence form. The executive committee will continue working with OJD on that project, lending its technical expertise wherever it can. Moreover, it will keep the Section informed of the project's developments.

Member-at-large Angela Lee is leading the Section's continuing efforts at resolving the nagging problem of frivolous bar complaints being permanent parts of the public record. You may recall that prior to the 1999 legislative session, the executive committee requested the Public Affairs Committee, and later the House of Delegates, to offer legislation exempting frivolous complaints from public disclosure. Both the Committee and the House rejected our requests. Rather than engage in the probably futile exercise of again asking those entities to pursue legislation, the executive committee will sponsor a bar initiative requiring the bar to pursue the legislation.

This ends my report on the Section's status and major activities during the past bar year. If you have any questions or comments on anything we've been up to, please don't hesitate to contact me or any other member of the executive committee.

## Draft Forms

*by Timothy A. Sylwester, Chair-Elect*

Among the projects that the executive board of the Criminal Law Section is undertaking this year is to draft sample forms that may be used in criminal prosecutions. Two forms are nearing completion: One is a Waiver of Counsel form for a defendant to execute if he desires to waive counsel and proceed pro se. This form is intended to contain the complete advice of rights and warning that the appellate courts have held is necessary to ensure a constitutionally adequate waiver of counsel. The other is a Petition to Enter Plea of Guilty or No Contest that may be used in felony prosecutions. The petition is an extensive form, with a certificate of counsel, and is intended to be an exhaustive disclosure of rights and potential collateral consequences. Once that form is complete, the form will be shortened for use in simple felony or misdemeanor cases. If you have any interest in participating in this project or would like to see the current version of the draft forms, please contact Tim Sylwester (503) 378-4402).

## Appellate Update

*by Timothy A. Sylwester, Chair-Elect*

In *Apprendi v. New Jersey*, 530 US \_\_\_, 120 S Ct \_\_\_, 147 L Ed2d 435 (2000), the United States Supreme Court recently held that "[o]ther than the fact of a prior conviction

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tion, any fact that increases the penalty for a crime beyond the prescribed statutory maximum [for the underlying offense] must be submitted to a jury, and proved beyond a reasonable doubt." 147 L Ed2d at 455. The Court invalidated New Jersey statute that permitted the sentencing court to impose an enhanced sentence based on its finding that the defendant's crime was racially motivated violated the defendant's constitutional right to a jury.

That holding largely parallels the rule that the Oregon Supreme Court adopted 20 years ago under Article I, section 11. In *State v. Quinn*, 290 Or 383, 623 P2d 630 (1981), the court invalidated the former capital-sentencing statutes because it required the sentencing court to make findings of the aggravating factors that were necessary in order to impose a death sentence. The court acknowledged *State v. Hoffman*, 236 Or 98, 385 P2d 741 (1963), in which it had held that it was permissible to allow imposition of an enhanced penalty based on a post-verdict finding by the sentencing judge if the fact at issue was a prior conviction. The court distinguished that case by noting: "The difference \* \* \* is found in the simple principle that the facts which constitute the crime are for the jury and those which characterize the defendant are for the sentencing court." 290 Or at 405.

The Supreme Court applied that same principle in *State v. Wedge*, 293 Or 598, 652 P2d 773 (1982), when it held that the defendant was entitled to a jury verdict on the allegation that he used a firearm, for purpose of the enhanced firearm-minimum sentence mandated by ORS 161.610. And the Court of Appeals later reached the same conclusion in *State v. Mitchell*, 84 Or App 452, 734 P2d 379, rev den 303 Or 590 (1987), with respect to a challenge to a challenge to the finding required by the dangerous-offender statute (ORS 161.725(1)(b)) that the underlying crime "seriously endangered the life or safety of another." See also *Lovelace v. Zenon*, 159 Or App 158, 161, 976 P2d 575 (1999).

Although *Apprendi* appears merely to parallel *Quinn* and progeny, it has raised questions about Oregon practice in two respects. First, in the context of a dangerous-offender finding, *Mitchell* long has required the jury to make the "seriously endangered" finding, but Oregon practice typically has been that the sentencing court makes the other necessary finding – i.e., that the defendant has a severe personality disorder. That is permissible under the dichotomy set forth in *Quinn*. But it is as yet unclear whether the rule announced in *Apprendi* permits that finding to be made by the sentencing court, because it is not a finding of a prior criminal conviction. That issue has cropped up in pending post-conviction and federal habeas corpus proceedings being prosecuted by inmates who are serving dangerous-offender sentences. The state is taking the position in those cases that *Apprendi* does not require that that finding must be made by the jury.

The other area in which *Apprendi* has raised an issue in Oregon is whether a defendant is entitled to have a prior-conviction element kept from the jury. Several statutes ele-

vate misdemeanor offenses to felony offenses based on whether the defendant has a prior conviction for the same offense. See, e.g., ORS 163.160(3) (felony fourth-degree assault); felony DUII (ORS 813.010(5)), felony stalking (ORS 163.732(2)(b)), and felony public indecency (ORS 163.465(2)(b)). In *Apprendi*, the Court noted that it is permissible for a sentencing court to make the finding on a prior conviction even if that fact authorizes imposition of an enhanced sentence. Likewise, the court in *Quinn* noted that Article I, section 11, does not require a jury finding on a prior conviction. Moreover, ORS 132.540(2) provides: "The indictment shall not contain allegations that the defendant has previously been convicted of the violation of any statute which may subject the defendant to enhanced penalties, except where the conviction constitutes a material element of the crime charged." The question is whether those authorities mean that a defendant charged with felony assault in the fourth degree (or one of the other similar charges) is entitled to insist that a prior-conviction element be kept from the jury. There are at least two cases pending before the Oregon Court of Appeals in which that issue is presented.

## Video Replay of April 2000 CLE

*by Wendy Rae Willis, Member at Large*

Videotape replays of the April 2000 CLE are available for individual or group viewing. The CLE is worth seven and one-half credits, including a one-hour credit for the new child-abuse reporting requirement. Other highlights include the state-federal task force on "high tech investigations," sentencing orders to satisfy the Department of Corrections, Judge DeMuniz on search and seizure, and the ever-popular appellate update. The materials and the oral presentations received high marks from the attendees, and the video has been replayed in several locations around the state. The materials include Judge DeMuniz's manual on search and seizure. The replay is \$100 for members of the Criminal Law Section and \$125 for non-members. Please contact Barbara Buehler at the Oregon State Bar to arrange a video replay.

## Your Suggestions, CLE - April 2001

*by Aida Iranzo, Past Chair*

We respectfully request your ideas and suggestions for topics and/or speakers for the "Contemporary Issues in Criminal Justice" CLE that will take place on April 21, 2001. Final decisions must be made very soon in order to line up all participants. Please contact Jess Barton (Chair) at [jbarton@opd.state.or.us](mailto:jbarton@opd.state.or.us) or at (503)378-3349 x227.

# OPEN HOUSES

## WHEN:

Wednesday, October 18

## WHAT:

Oregon's recently completed Legal Needs Study, co-sponsored by the Oregon State Bar, the Governor's Office, and the Oregon Judicial Department, will be the focal point of this year's Open Houses event, held October 18 in legal aid offices throughout the state. The Oregon State Bar is once again hosting this event and invites you to join Bar leaders, legislators, community leaders, foundations, bankers, legal aid staff and the press in recognizing the work these offices have done to achieve access to justice in Oregon.

***Save the date!***

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## Upcoming OCDLA CLEs

The OCDLA has the following CLEs scheduled during the remainder of 2000:

- | October 26 to 28  
Management Seminar  
Otter Crest
- | November 4 to 8  
Sunny Climate Seminar  
Puerto Vallarta
- | December 8  
Juvenile Law  
Benson Hotel, Portland
- | December 8 to 9  
Benson Hotel, Portland

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