DISABILITY LAW

SECTION NEWSLETTER

This Issue

Vol. 6, No. 3, Summer 2002

Message From The Chair

By Richard R. Meneghello - Gordon & Meneghello, P.C.

As an employment law practitioner, I always think of Title I of the Americans with Disabilities Act when I hear the term "disability law." I can't help it. I spend half my day litigating ADA cases, talking to clients about their ADA problems and questions, and reviewing the ever-expanding library of new cases, regulations, policy guidance and secondary sources interpreting this statute. Before I joined the Disability Law Section, every other disability law topic besides the ADA seemed foreign and distant to me.

So when I started work on the Executive Committee four years ago, I was in for a reorientation. Suddenly I was introduced to practitioners from many areas of the law, and learned about the many issues facing other "disability lawyers" — social security, workers' compensation, special education, health care, mental health, public access, housing, communications — the list seems endless. And now my challenge as Chair of the Executive Committee is to ensure that voices from these many areas are heard, and all disability lawyers are provided an equal opportunity to benefit from our work.

It has been a challenge, but a rewarding one. Expanding my scope of knowledge about related areas of the law has made me a better practitioner because I am better able to spot issues that confront my clients. It has also allowed me to be better versed in the public discourse that surrounds many of these controversial and important topics. And of course, it has allowed me to meet and get to know hard-working and dedicated lawyers who are passionate about their work and are kind enough to share their lessons with me, which is a reward unto itself.

But in order for me to effectively serve as Chair, I need your help. Unless attorneys who practice in these many areas step up and assist me and the Executive Committee in our efforts, their voices will never be heard and the Disability Law Section will be one-dimensional. For example, we are in the process of planning three separate CLEs — this October, February 2003, and October 2003 — and could use the input and support of many different members. If you have an idea for a topic, or want to volunteer to help plan, or know of a good speaker, drop me a call at 503-242-4262. Also, our Committee meets monthly and is always working towards advancing the interests of disability law practitioners, and all members are free to attend meetings (again, call me for more information). I hope to hear from you, and hope that you can assist me in my efforts to educate myself and others.

DISABILITY LAW
SECTION NEWSLETTER

The Disability Law Section Executive Committee welcomes your comments, suggestions, and submissions for publication. Please feel free to contact any Executive Committee member to inquire about the Section or about the Newsletter. If you have any ideas for possible stories, please call Richard R. Meneghello, the Chair of the Publication Sub-Committee.

2002 Executive Committee Members

The purpose of the Disability Law Newsletter is to provide information on current developments in disability law and to provide a forum for the exchange of legal opinions and perspectives. Unless otherwise stated, opinions expressed in any article are solely those of the author and are not necessarily endorsed by the Executive Committee of the Disability Law Section or the Oregon State Bar.

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Supreme Court Sets Methodology for Reasonable Attorney Fees in Contingency Awards on Social Security Disability Cases

By Tim Wilborn

Section 406(b) Fee Applications and Gisbrecht

Pursuant to 42 U.S.C. ' 406(b), an attorney who represents a Social Security Disability claimant in federal court and establishes entitlement to benefits may petition the court for approval of a "reasonable" attorney's fee, not in excess of 25% of the claimant's retroactive benefits. The burning question is, "What is `reasonable?'" Without expressly defining the term "reasonable," the United States Supreme Court recently issued a ruling regarding the proper methodology for calculating such a "reasonable" contingent fee. The essence of the case on appeal is most aptly illustrated by a question posed during oral argument:

> "Suppose you had a good friend and he said I'm going to go into Social Security work. I, I know the area very well. It's going to be my specialty. I'm going to win a third of the time. I'm going to in effect get $40 an hour. Would you advise him to go into that part of the practice?" — Supreme Court Justice Anthony Kennedy, addressing the Social Security Administration's attorney, during the 3/20/02 oral argument in Gisbrecht, et al., v. Barnhart, ___ U.S. ____ May 28, 2002).

The point Justice Kennedy was making is that without consideration of contingency and some kind of fee enhancement in "winning" cases which will make up for non-payment in "losing" cases, an attorney who takes cases in a practice area with a high risk of non-payment will average such a low hourly rate that it would not be sound financial practice to take that type of case at all. This is what compelled the appeals in the cases consolidated for appeal in *Gisbrecht*.

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Oregon Health Plan

By Elizabeth Stevenson

Governor Kitzhaber is best known as the architect of the Oregon Health Plan. To put it simply: the Oregon Health Plan is based on accountability to explicit priorities in health care. Oregon's novel plan of prioritizing services and delivering health benefits to everyone less than the federal poverty level (FPL) was seen as "rationing" and a cry went up around the world. How could those backwoods Oregonians do such a thing like *ration* health care and especially to the poorest of the poor?

The truth is we were rationing health care anyway. Governor Kitzhaber put into action what others only talked about behind closed doors: it was really better to give the *most effective* health care benefits to *more* people than give *all* benefits (regardless of efficacy) to very *few* people. Before the Oregon Health Plan, Medicaid was available to only the disabled, seniors and parents and children with less than about 78% FPL. The Oregon Health Plan is administered under waivers from traditional Medicaid rules found under Title XIX of the Social Security Act, Section 1115. After the Oregon Health Plan went into place, Medicaid services were available to anyone at or below 100% FPL, regardless of their health status or age or family status.

When Oregon developed the Health Plan, several things happened all at once: We changed the definition of eligibility. We also made a prioritized list of medical conditions and paired them with treatments. We created the Health Services Commission, a commission in charge of the Prioritized List of Services. Volunteer Commission members serve at the pleasure of the Governor, meeting on a regular basis to discuss the status of the list and what needs to be changed to it. Since the Plan was implemented in 1994, there have been many revisions to the funded lines and condition/treatment pairs.

Since the inception of the Plan, the costs of delivering health care have nearly doubled.

(See Figure 1)

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Historically (and currently), there has been less than a 50% chance of establishing entitlement to an award of benefits in Social Security Disability cases appealed to federal court. By statute, see 42 U.S.C. ' 406(b), attorneys are prohibited from charging any fee for federal court representation of a Social Security Disability claimant unless benefits are awarded to the claimant. The net effect of this is that doing federal court appeals of Social Security Disability cases has not been a financially viable area of practice for most attorneys, and most attorneys who take Social Security Disability cases at the administrative levels of appeal have been reluctant to appeal many (or any) of those cases to the federal court level. This has created a situation where claimants have had difficulty finding federal court counsel.

The *Gisbrecht* attorneys (Ralph Wilborn and Tim Wilborn) applied for fees at a "contingency-enhanced" rate, based on the risk of loss and risk of non-payment. The district court awarded fees at the then-standard non-contingent hourly rate, refusing to apply any multiplier for the risk of non-payment or otherwise to consider or give any weight to the contingent nature of the contracts signed by the disability claimants. In effect, the attorneys were in the position described in Justice Kennedy's rhetorical question: They had been paid a flat hourly rate for the hours expended in the cases they had won, but due to non-payment in other similar contingent cases, they were on average receiving a much lower hourly rate. Justice Kennedy's hypothetical good friend might well not have advised a colleague to adopt this practice area as a specialty.

Prior to *Gisbrecht*, there was a split in the circuits regarding the proper method for calculating a "reasonable" attorney's fee. Some circuits had adopted the "contingency" method, whereby the court typically would award the contingent fee agreed upon (usually the full 25% allowed by statute) unless there was some reason to reduce the fee. Such reasons might include improper delay by the attorney (which would increase the retroactive benefits, and correspondingly increase the maximum fee), or a very large retroactive benefit, such that an award of the full 25% would result in a windfall to the attorney.

Courts in the Ninth Circuit applied the "lodestar" method, whereby the fee was calculated by multiplying the hours expended by a reasonable hourly rate. Although Ninth Circuit law allowed consideration of contingency, it did not mandate it, and district court judges could give contingency as much or as little weight as they pleased, without explanation. In Oregon, district court judges routinely gave no consideration at all to contingency, and thus Social Security Disability appellate practice has been a rare practice area in which attorneys have been compelled to work without pay a significant part of the time, with no opportunity to make up their losses by charging higher rates in winning cases. Attorneys with "average" win/loss rates (approximately 36% is the national average for establishing entitlement to SSD benefits in federal court appeals) were discouraged from taking cases in this area of practice by the severe financial disincentive. Attorneys with better-than-average win/loss rates were forced to choose between earning a lesser living, versus working longer hours to make up for non-payment in cases in which they were unsuccessful.

In *Gisbrecht*, the Court overturned the Ninth Circuit's "lodestar" method and made the "contingency" method the national rule. The Court did not define "reasonable," nor did the court state what hourly rate might be reasonable. However, the Court made it clear that the starting point in determining a "reasonable" fee is the contingent contract itself. As was the case in circuits which already had adopted the contingency method, courts are free in the post-Gisbrecht era to reduce the attorney's fee below 25% of the retroactive benefits if there are factors which justify a reduction.

Early agency response to *Gisbrecht* has been at least partially positive. Using the 1998 OSB Flikirs report and multiplying by the risk of loss, an attorney may easily demonstrate that a fully compensatory fee would need to be as high as $500 or $600 per hour to put a contingent-fee Social Security Disability attorney on equal footing with other Oregon attorneys who bill using the contingent fee method. Nevertheless, it is unlikely that the agency's attorneys will agree that an hourly rate in excess of $500 per hour is "reasonable." However, in at least three Oregon cases, agency counsel has

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Figure 1.

Year (Biennium)	Lines Funded / total lines	Blended Per Member Per Month Rate for Entire OHP Population
1993 (beginning Feb. 1, 1994)	606/745	$183.96
1995	581/745	$199.72
1997	574/743	$227.02
1999	574/743	$259.51
2001	566/736	$309.72

Source: Prioritization of Health Services Reports, Oregon Health Services Commission, 1993-2001. **Please note** that lines have been consolidated over the years. 566 lines in 2001 list = 578 lines in 1995 list. Starting in 1999, PriceWaterhouseCoopers used Encounter data as the primary data source for pricing the FCHP and DCO product, rather than solely FFS (MMIS) data.

In response to the rising costs of delivering health care to this population, several options have been explored. First, the federal agency (formerly known as HCFA, now known as CMS) responsible for funding Medicaid was contacted and permission requested to raise the line of funded condition/treatment pairs. We were allowed to raise the line incrementally from 606 to 566. Then CMS told us we would not be allowed to adjust the line any further.

It should be remembered that even with raising the line to this level, the Oregon Health Plan's level of benefits is richer than any other private health insurance available in Oregon's market currently. The OHP includes dental and vision benefits to our members, as well as most transplant services.

Over the years, though, it proved more difficult to control the costs of the Health Plan (prescription drugs prices alone have tripled in cost) and still excludes many people. The federal poverty level is not much money per month and there are many uninsured people in this State just above the federal poverty line denied health coverage.

Initially, as the Plan was implemented in 1994 the estimated numbers of uninsured people in Oregon had dropped and continued to fall over the next six years. However, by the 2000 Oregon Population Survey the estimated numbers of uninsured people in Oregon increased. (See Figure 2) This could be for many reasons, including increase in population, aging of the population, increase in unemployment and increases in the cost of obtaining health insurance coverage.

Figure 2

Year	Point Estimate of % Uninsured	Approximate Number Uninsured
1990	16.4%	467,740
1992	18.1%	539,956
1994	13.6%	424,796
1996	10.7%	348,597
1998	11.0%	367,904
2000	12.2%	419,812

Source: Oregon Population Survey, Years 1990-2000, The Office for Oregon Health Policy & Research

Since one initial reason for developing the health plan was to help decrease the uninsurance rate and realizing that there were still many people falling through the cracks, the Governor realized that we could be doing a better job of getting at least preventive care to our population. Since CMS is reluctant to allow flexibility in controlling costs in the

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Recent Court and 9th Circuit ADA Case Summaries

A few of these summaries have been reprinted with permission of Willamette Law Online. There services may be accessed at www.willamette.edu/law/wlo

Chevron U.S.A. Inc. v. Echazabal

- Decided: 06/10/2002
- 122 S. Ct. 2045, 153 L. Ed. 2d 82 (2002)
- Stephen M. Shapiro, for petitioner, Samuel R. Bagenstos, for respondent.
- Employers May Deny Jobs to Disabled Workers Who Face Serious Risks to Own Health or Safety

The United States Supreme Court held unanimously (opinion by Souter) that the threat-to-self defense reasonably falls within the general job-related and business necessity standard of the Americans with Disabilities Act of 1990 (ADA) and permits the EEOC regulation authorizing employers to deny a job to a disabled individual because performance on the job would endanger his own health or safety.

Echazabal worked for independent contractors at an oil refinery owned by Chevron, who offered to hire Echazabal if he could pass the company's physical examination. Echazabal's exam twice showed liver abnormality or damage which Chevron's doctors said would be aggravated by continued exposure to toxins in Chevron's refinery. Chevron withdrew their offer and asked the contractor to reassign Echazabal to a job without exposure to harmful chemicals or to remove him from the refinery. The contractor laid him off. Echazabal filed suit claiming Chevron violated the ADA by refusing to hire him or let him continue to work because of a disability. Chevron defended under an EEOC regulation allowing the defense that a worker's disability on the job would pose a direct threat to his health. The District Court granted summary judgment for Chevron. On appeal, the Ninth Circuit reversed the summary judgment and held that EEOC's regulation recognizing a threat-to-self defense exceeded the scope of permissible rulemaking under the ADA. The United States Supreme Court reversed, holding the regulation is permissible. The Court stated the direct threat defense must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence and upon an expressly individualized assessment of the individual's present ability to safely perform the essential functions of the job, after considering among other things, the imminence of the risk and the severity of the harm portended. The Court viewed the EEOC as acting within the reasonable zone when it saw a difference between rejecting workplace paternalism and ignoring specific and documented risks to the employee himself. [Summarized by Kimberly Larson.]

U.S. Airways, Inc. v. Barnett

- Decided: 04/29/02
- 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002).
- Walter E. Dellinger, III, represented the petitioner and Claudia Center represented the respondent.

Special Circumstances May Allow ADA Exception To Seniority Based Employment System

The United States Supreme Court held 5-4 (opinion by Breyer; dissent by Scalia) that altering a seniority system for the purposes of accommodating a disabled employee would be an "undue hardship" to and employer and other company employees; however, an employee seeking accommodation could present evidence that showed special circumstances for an exception to the system.

Robert Barnett injured his back while working for U.S. Airways, Inc. (U.S. Airways) as a cargo handler. Barnett was transferred to a mailroom position that was not as physically demanding. The mailroom position later became open for bidding based on seniority. Barnett lost his job to a senior employee when U.S. Airways refused to accommodate him. U.S. Airways moved for summary judgment contending that the accommodation that Barnett sought would place an "undue hardship" on the company because of the well-established seniority system. The District Court granted the summary judgment. The Ninth Circuit reversed, stating that seniority was merely a factor to be considered in a case-by-case analysis. The United States Supreme Court vacated the Court of Appeals opinion and remanded the case, holding that the alteration of a seniority system to accommodate a disabled employee is an "undue hardship" as a matter of law, but that the employee could still present evidence showing special circumstances for an exception to the seniority system. The court reasoned that the seniority system provided uniform advancement for all employees based on objective standards. The Court found nothing in the ADA that suggested that Congress meant to undermine seniority systems. Therefore, a disabled employee will bear the burden of showing special circumstances for exception to a seniority system. Justice Scalia's dissent was based on the "uncertainty" that the decision produced between the ADA and seniority systems. Justice Scalia contends that allowing disabled employees to show special circumstances would give them a "vague and unspecified power" and undercut the seniority system. [Summarized by Melody Harmon.]

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Oregon Health Plan by scaling back benefits, there remains only two other options: to reduce payments to providers or reduce benefits to the optional populations served in the OHP.

In some parts of the State providers refuse to see Oregon Health Plan patients because they don't feel that they are reimbursed enough to make it worth their while. While several efforts are in the works to try to entice providers to serve these populations in all areas of the State, access to health care remains an issue for many members of the Plan.

The critical requirement is flexibility in the benefits available to the Oregon Health Plan patients. There are two types of people currently eligible for the Oregon Health Plan: the categorically eligible group (including disabled, seniors, pregnant women and children) and the optional populations (single adults and adult members of families with income less than 100% FPL). The only population that CMS will grant flexibility to in terms of benefits is the optional group. Therefore, the 2001 Legislature passed HB 2519 that directed Department of Human Services and The Office for Oregon Health Policy and Research to develop an expansion program: This approach would expand access to the Oregon Health Plan to people up to 185% FPL, but would create two groups of benefits: Categorically eligible people would continue to get the same package of benefits and would be renamed OHP Plus. The expansion population would receive a reduced benefit package known as OHP Standard. For the first year of implementation the Standard package would be reduced to 78% of the actuarial value of the OHP Plus package. In saving money on the Standard package we could finance the expansion of OHP to more of the uninsured in the state.

House Bill 2519 called for the development of a task force to design the reduction of benefits to the Standard population. The choices were not easy: all benefits were not on the table, only optional benefits in the Medicaid program: Prescription drugs, Dental, Vision, Durable Medical Equipment and Non-Emergency Transportation.

First, the Health Services

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Toyota Motor Mfg., Kentucky, Inc. v. Williams

- 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002).
- John G. Roberts, Jr. for petitioner and Robert L. Rosenbaum for respondent.
- Daily-Life Standard for Substantial Limitation in Performing Manual Tasks For Qualifying Disability

The United States Supreme Court held unanimously (opinion by O'Conner) that determining whether a person is disabled under the ADA because her impairments limit her ability to perform manual tasks also requires the court to inquire as to whether the person's impairments prevented or restricted her from performing tasks that are of central importance to most people's daily lives.Williams suffered from carpal tunnel syndrome and other physical ailments. She filed an action under the ADA, claiming that Toyota had failed to reasonably accommodate her disability. The Sixth Circuit granted summary judgment to Williams on the issue of whether she wasdisabled under the ADA after finding that her impairments substantially limited her ability to perform manual tasks. The Supreme Court, however, reversed, holding that the Sixth Circuit did not apply the proper standardby focusing on only the limited class of manual activities and not engaging in an inquiry as to whether Williams' impairments prevents or restricts her from doing activities of central importance in most people's lives. The Court reasoned that the ADA definition for disability requires an impairment that substantially limits a major life activity, a standard which the Court must interpret strictly to create a demanding standard for qualifying for a disability. For performing manual tasks, which includes seeing, hearing and walking, to fit into this category, the tasks in question must be central to daily life. By only focusing on a limited class of manual tasks, such as gardening, housework and working, the Sixth Circuit applied the wrong standard. [Summarized by Katheryn Gettman.]

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Pickern v. Holiday Quality Foods

293 F.3d 1133 (2002), appeal of a dismissal by the district court of a suit seeking injunctive relief for a violation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181. Mark Potter and Russell Handy from the Center for Disability Access represented appellant Doran, Rebecca Ceniceros and S. Craig Hunter represented appellee Holiday Quality Foods. Appellant, a paraplegic, alleged that because defendant grocery stores were public accommodations within the meaning of the ADA, 42 U.S.C.S. § 12181 (7)(E), they were required to remove architectural barriers impeding his access to their store. The district court held that because appellant had not attempted to enter the store during the limitations period, and thus had not actually encountered any barriers during that period, his claim was time-barred and he lacked standing.

In an opinion by Judge Fletcher, the circuit court held that when a plaintiff, disabled within the meaning of the ADA, has actual knowledge of illegal barriers at a public accommodation, he need not engage in the "futile gesture" of attempting to gain access to show actual injury during the limitation period. Knowledge of the discriminatory conditions plus deterrence from patronizing the public accommodation are sufficient to meet to the actual injury requirement to fall within the statute of limitations and to satisfy the injury-in-fact requirement of standing. The case was accordingly reversed and remanded.

Barden v. City of Sacramento

292 F.3d 1073 (2002). Laurence W. Paradis for appellants, Gerald C. Hicks for appellees. Appellants, individuals with mobility and/or vision disabilities, filed a class action against the City of Sacramento alleging violation of the ADA and the Rehabilitation Act for failure to install curb ramps in newly-constructed or altered sidewalks and failure to maintain existing sidewalks to ensure accessibility by persons with disabilities. While the parties agreed to the entry of an injunction with regard to the curb ramps, they sought summary judgment and summary adjudication on the issue of whether sidewalks were a "service, program or activity" within the ADA, subjecting them to the program accessibility regulations of 28 C.F.R. §§ 35.149-35.151. The district court found in favor of the City and the issue was certified for interlocutory appeal. In an opinion by Judge Tashima, the Ninth Circuit court declined to "determin[e] whether each function of a city can be classified as a service, program, or activity for purposes of Title II" opting instead to liberally construe the ADA to include within its scope all normal governmental functions. The court's conclusion that the construction of sidewalks is a normal governmental function was supported by the legislative history of the act and the DOJ's interpretation of 28 C.F.R. § 35.150(d)(2), requiring the provision of curb ramps by public entities for side walk accessibility. The order of the district court was accordingly reversed and remanded.

Disability Advocates Call for Governor to Apologize for Forced Sterilization

The following letter was published in the May 31, 2002 edition of the Portland Tribune.

Forced sterilizations call for apology

Virginia Gov. Mark Warner recently apologized for his state's role in sterilizing 7,450 people from 1924 to 1979.

Oregon also was one of 30 states with a role in this awful experiment in "selective human breeding."

According to an Associated Press tally of the 30 states that used so-called eugenics laws to sterilize 63,966 people over the 55-year period, Oregon was No. 9 on the list, having forcibly sterilized an estimated 2,341 people.

Of the states that conducted these sterilizations, Virginia is the first to apologize. Since Oregon has the dubious distinction of having made the top 10 on this list, I'd like to see it become the second state to issue an apology.

It would be particularly appropriate for our current governor to do so, given that these shameful sterilizations were carried out by physicians.

Steve Weiss

Multnomah Disability Services Advisory Council

Court Strikes Down Death Penalty 'Mentally Retarded'

By Bob Joondeph

In *Atkins v. Virginia*, decided June 20, 2002, the U.S. Supreme Court held that executions of mentally retarded criminals are cruel and unusual punishments prohibited by the Eighth Amendment. The decision received a great deal of media attention because of its effect upon the hot-button issue of capitol punishment. But beyond its core holding, the case has special interest because of the way the court reached its conclusion.

The six to three majority opinion, penned by Justice Stevens, reverses the court's decision in *Penry v. Lynaugh*, decided a mere thirteen years earlier. In 1989, a 5-4 majority of Justices O'Connor, Rehnquist, White, Scalia and Kennedy found that such executions met constitutional muster. *Penry* had argued, per *Trop v. Dulles*, that there was an emerging national consensus against execution of the mentally retarded, reflecting the "evolving standards of decency that mark the progress of a maturing society." Justice O'Connor, writing for the majority, noted that the court had, in the past, relied largely on objective evidence such as the judgments of legislatures and juries in determining whether application of the death penalty to particular categories of crimes or classes of offenders violates the Eighth Amendment. She surveyed those judgements and concluded that the two state statutes that prohibited execution of the mentally retarded, even when added to the 14 States that had rejected capital punishment completely, did not provide sufficient evidence of a national consensus.

Justice O'Connor also noted that Mr. Penry did not offer any evidence of the general behavior of juries with respect to sentencing mentally retarded defendants, nor of decisions of prosecutors. He pointed instead to several public opinion surveys that indicated strong public opposition to execution of the retarded. O'Connor concludes: "The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment."

Fast forward to 2002 and former dissenter Stevens is now writing for the majority and is joined by two cross-overs from the Penry majority: O'Connor and Kennedy. The Court now states that mentally retarded persons, because of disability in the areas of reasoning, judgement and control of their impulses, "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct" and "their impairments can jeopardize the reliability and fairness of capital proceedings." In once more considering the "evolving standards of decency", the majority again looks to the judgements of legislatures and finds that 16 states now prohibit execution of the mentally retarded, and similar bills have passed in state legislative bodies. The court notes that "it is not so much the number of these States that is significant, but the consistency of the direction of change." It also observes that even in states where execution of the mentally retarded is permitted, the practice is uncommon. The practice, the court concludes, has become "truly unusual" and "a national consensus has developed against it."

But who qualifies as being mental retarded? Justice Stevens notes that serious disagreement may still arise as to which offenders are in fact retarded. Resolving that, the court says, is a task best left to the States. He also notes that while statutory definitions of mental retardation are not identical, most conform with the clinical definitions established by the American Association of Mental Retardation and the American Psychiatric Association.

Two dissents were issued in the case reflecting the views of Justices Rehnquist, Scalia and Thomas. The Chief Justice wrote primarily to take on footnote 21 of the majority opinion. That note states that additional evidence supports the conclusion that the legislative actions cited in the main opinion reflect "a much broader social and professional consensus." It cites the official positions of many organizations, religious communities, polling data (as did Justice O'Connor in Penry), and the laws of other nations. Although not dispositive, the majority believes that the consistency of this information with the legislative evidence supports its conclusion that a consensus on the issue exists.

This is just too much for the Chief Justice. He writes separately "to call attention to the defects in the Court's decision to place weight on

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The "R" Word

By Gayle B. Gardner - Past President
Oregon Advocacy Center

Below is reprinted an article appearing in the December 1995 edition of "The People First Connection," published by the Oregon Developmental Disabilities Council Self Advocacy Initiative.

I have been labeled retarded all my life. I feel humiliated when I am called retarded. When you associate retarded with people with disabilities you are assuming we can't do anything.

I have not had a real easy life. When you have a developmental disability people do not understand what you are all about.

If I were not a capable person I would not be my own guardian. I would not have been elected President of the Oregon Advocacy Center. I could not have achieved getting out of the workshop and obtained employment as self advocate for Community Partnerships. I could not have achieved my freedom from a group home.

People who call us retarded or yell at us are the ones ignorant and yes ,they are the ones who are uneducated.

Retarded is an ancient term used in the dark ages (get real!)

We are people just like non-disable people. If I had the chance to get your education and training I would apply to be an editor at *The Oregonian* and maybe I could really help to educate people and not make fun of them.

I may not have your college degree but I am intelligent. In fact we are smarter then you are – *at lease we can still learn*.

People who use the "R" word should go back to college, read some new books and start all over again.

I ask you, the judge and jury of *The Oregonian*, have you ever been diagnosed with disability and laughed at and put down for something you were born with?

I am crying as I write this article. You have not seen us in action.

I cannot do mathematics well so I probably will never achieve my dream of being my own conservator and make my own investments. But that is all right because I am a citizen with a disability. (get it? not a disabled citizen). I am a person. I am very proud of myself.

I'll be glad to personally come over to *The Oregonian* or any other paper so you can personally get to know me.

Than you can personally tell me to my face that I deserve to be called the "R" word.

Supreme Court Sets Methodology for Reasonable...

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agreed that a rate of $300 per hour was "reasonable." Judge Redden agreed and awarded fees at that hourly rate in one case, to date. See ORDER dated 7/8/02 in *Phillips v. Barnhart*, CV # 01-693-RE. Other cases are pending.

Despite these positive early indicators, it is important to remember that the burden of showing reasonableness of the requested fee is on the attorney, and although agency counsel may agree that a given fee is reasonable, it is the *court* which bears the responsibility of determining the reasonableness of the requested fee. The court may be more likely to approve a fee if the agency's attorney stipulates to its reasonableness, and Local Rule 7.1 requires the fee applicant to contact opposing counsel before filing a motion for approval of an attorney's fee (or any other motion, for that matter). Nevertheless, attorneys should remain prepared to meet their burden of proving all necessary elements in support of fee applications. Even in cases where the agency stipulates to the reasonableness of the requested fee, attorneys should submit compelling evidence that the requested fee is reasonable. Attorneys Wilborn found themselves in the position of appealing the cases in *Gisbrecht* because a district court judge sua sponte denied a routine and unopposed request for fees at the rate of $175 per hour, thus setting the stage for the agency's attorneys to use the fee issue oppressively in attempts to drive attorneys out of this area of practice. Other attorneys might take this as a lesson: Stipulate with agency counsel regarding a reasonable fee, but also submit detailed and sufficient documentation proving the requested fee is reasonable.

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foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion." By considering information other than legislative actions and sentencing jury determinations, the majority ignores the principles of federalism that require any permanent prohibition upon all units of government to be apparent in the "operative acts that the people have approved."

Justice Scalia, in his usual entertaining manner, mocks the reasoning of the majority. Here are some choice excerpts: The majority "miraculously extracts a national consensus..."; "But the Prize for the Courts Most Feeble Effort to fabricate a national consensus must go to ..."; "Beyond the empty talk of a national consensus..."; "The arrogance of this assumption of power takes ones breath away. And it explains, of course, why the Court can be so cavalier about the evidence of consensus. It is just a game, after all." And more to the point: "The fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society's moral outrage sometimes demands execution of retarded offenders. By what principle of law, science, or logic can the Court pronounce that this is wrong? There is none."

The bottom line, of course, is that six justices did find principles of law, science and logic to pronounce execution of the mentally retarded both wrong and unconstitutional. The next step in Oregon is for the state legislature or the courts to determine the manner in which this prohibition is to be implemented.

Oregon Health Plan...

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Commission solicited public input from across the state (Town Hall Meetings). From these meetings a consensus came up that people wanted to keep prescription drugs as the number one benefit. Next there was a close tie between mental health services and dental services. From that input and from testimony before them, the Health Services Commission agreed on a benefit package that was actuarially equivalent to 78% of the OHP Plus benefit package was decided upon. Next the Waiver Application Steering Committee (made up of a wide variety of Oregonians representing diverse interests of providers, insurance companies, and advocates) modified the Health Services Commission recommendation. (See http://www.ohppr.state.or.us/hsc/PDF_hsc/benefit_pkg_ohp_stnd.pdf for a complete report on how this benefit package was decided upon and what is included in the benefit package).

The waiver application was written and then forwarded to the Legislature in early January 2002 for approval. On May 1, 2002 the Emergency Board of the Legislature agreed to forward the waiver (slightly revised by the Legislature) to CMS and continue work on keeping the Oregon Health Plan in place. Once the Legislature approved it in May, the request was submitted to CMS to endorse the new Oregon Health Plan. The waiver was submitted to CMS by May 31, 2002.

Oregon is running out of money to fund the Oregon Health Plan as it is currently run. Costs have escalated 18-20% per year to deliver health care to the recipients of the plan. Administrators at the Oregon Medical Assistance Program at Department of Human Services have estimated that if we do nothing the OHP will become unaffordable in 2003. If we are able to implement OHP2 by this fall, we should be able to sustain the Oregon Health Plan in the near term. In the longer run, it will probably be necessary to secure additional revenue and adjust benefits further.

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