

# Thomas Cooney

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THE OREGON  
HISTORICAL  
SOCIETY  
FOUNDED 1898

COONEY: Thomas E. Cooney

LK: Lisa A. Kaner

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## Tape 1, Side 1

2000 October 17

LK: We have Tom Cooney. The date is October 17 year 2000. So, tell us, tells us your name, tell us where you got started, tell us where you were born.

COONEY: My name is Thomas Emmett Michael Cooney. I was born and raised in Portland. July 16, 1931 was my birth date. Good Irish Catholic. I was born at the Portland Sanitarium, which was the Adventist Hospital over on Southeast 60th and Belmont.

Kind of is a coincidence, I used to give the graduation lecture to the graduating nurses over there. And I finally told them that instead of me doing it every year, they ought to video tape it and they could use it. So they did and we went into a room to be videoed. The president of the school had found out I was born there and they actually videoed that last lecture that I gave, it was in the birthing room that existed in 1931 when I was born. So it summarizes a tape of that crazy lecture.

My dad was born in Ireland, his name was Thomas M. Cooney as well. He was one of ten brothers and one sister. They were all tall, big men, over six feet tall. One of them was 6 feet 6 inches. My mother's maiden name was Clune. She was Irish, but was born in this country. I had a sister who was six years older than I was. My dad went to the eighth grade, was an auto-mechanic. My mother was a homemaker. We grew up in the upper

portion of East Moreland, which was referred to as “Berkley Heights” and I attended Duniway Grade School.

LK: Why was it referred to as Berkley Heights?

COONEY: That was just the name of it. It’s called East Moreland Heights now. It used to be a vegetable farm up on about 40th and Flavel, owned by an Italian family. Then over the hill down on Johnson Creek Boulevard, where Precision Cast Parts is located, there was a Japanese farm. When the war broke out, all those people were shipped off to a camp and we never saw them again. I never knew what happened to them.

LK: This was World War II?

COONEY: This was World War II. Five of my uncles were in the service at the same time and one was in the U.S. Air Force and bombed Japan. He was a pilot, flew a B29. The other two were in the Navy, three were in the Navy actually, and they’re all gone now except one is still alive, Uncle Walter. Duniway Grade School was within walking distance of my house. We moved three or four times during my growing up years, but we always lived in the same block. [LK laughs] We never left that block.

In grade school I remember my sister being quite a bit smarter than I was, she always had better grades. In the early years I was not a very good student. In fourth grade, one of my school teachers decided that I would be Robin Hood in the school play. So, I played Robin Hood in the school play and to this day I remember the first lines I had to learn. I walked on to the stage in the green tights, which were my dad’s long underwear that my mother had shrunk and dyed green for me. And I said “What now my merry men? Here you sit in comfort. I for one shall sally forth in search of adventure.” That was the play.

[Tape stops]

LK: We had a short interruption, but were just talking about Peter Pan...

COONEY: Robin Hood.

LK: Oh gosh, I'm sorry. Robin Hood and green tights. [Laughs]

COONEY: Well I played Robin Hood and I remember Robin Hood was supposed to have a horn that he blew and we couldn't find one, but my dad was a hunter and he had an old horn that he picked off of a steer someplace. So, I strapped it in my green tights, and it smelled terrible. Maid Marian, who I was supposed to be chasing around the stage, couldn't stand to be near me when I had that horn in my hands. [LK laughs] So, I would keep a long distance from her, but the point of the whole story was that Maid Marian went on to become Rose Festival Princess at Cleveland High School in 1949, still works here in Portland, then retired from an ophthalmologist's office and still is a good friend. Robin Hood was kind of the beginning of the feeling I developed that I wanted to stand up and show off, which was probably what led me into the courtroom to be a trial lawyer.

I remember in the seventh grade I was supposed to give the Gettysburg Address to the assembly and my mother came. A couple of my friends and I got in the back of the stage and we decided that the Gettysburg Address was pretty boring. So, I put on a ballet tutu, and at that time in the seventh grade I was six feet tall, weighed about one hundred and thirty pounds, and it was quite a sight. I stood out in front and gave the Gettysburg Address in my tutu and my poor mother was humiliated and got up and left about halfway through the Gettysburg Address. My sister, for a while, was the secretary to the principal of the school. When I would misbehave, which I'm afraid was more frequent than my teachers would have liked, they would threaten me that I would have to go sit in my sister's office. That was a fate worse than death, so it kept me pretty much under control. [LK laughs]

We were talking about World War II. I remember when the war broke out on a Sunday morning December 7th . I was over playing in the basement of a friend of mine. His name was Tommy Witlow and they lived on the corner of 36th and Rex Street. In those days a lot of the homes in East Moreland were heated by sawdust furnaces and they had a big sawdust bin. We used to go down as kids and play in the basement, and we would play in the sawdust bin. We would get all kinds of sawdust down our backs. I remember his parents coming and telling us that war had been declared and what an impact it was. About forty years later, George Kirkland and I were trying a case against each other and Mrs. Witlow was on the jury and she remembered I was in her basement playing in the sawdust bin on December 7, 1941. George left her on the jury, which I think was a mistake. After...

LK: Did he ever tell you why he left her on the jury? Was he hoping you were just a bad child? [Laughs]

COONEY: I don't know what George's thinking was, but I had been friends with Tommy Witlow for years.

LK: Did you ever speak to his mother after the trial?

COONEY: No, no, I didn't think of it. Tommy Witlow, by the way, was another one of the kids who used to play "war guns," we used to call it, down over the hill at 39th and Crystal Springs where Johnson creek runs through there. It was a beautiful wooded area...

[Tape stops]

LK: We had a short break.

COONEY: It was a beautiful wooded area and I remember going to a movie one time and seeing the Japanese camouflaging themselves and hiding in the trees. So, a bunch of us went down to play and unbeknownst to me, the bushes we selected to camouflage ourselves with and stick in our pants, down our shirts and in our helmet was poison oak. It was pretty incredible poison oak, and my dad was credulous that I would be so stupid as to put poison oak down my pants. [LK laughs]

LK: How old were you?

COONEY: We were probably ten or eleven years old.

LK: So, wait I have to go back to the story of the friend's mother on the Jury. Did you win that case?

COONEY: Yeah we did. I've forgotten what the case was now, but it was the first time I tried a case with George. My dad, although he had a limited formal education, was a very intelligent man. I wanted to be like him as a child so I went down to his shop when I was eleven or twelve to help him and of course he was a typical shanty Irish and he had things strewn all over, yet he knew where everything was. So I went in to help him, I cleaned up everything, put his tools away and he couldn't find anything for about a week. [LK laughs] I knew he wanted me out of there in the worst way so he finally said, he always called me "Boy" I don't know why he always called me "Boy" but he did; he said "grab that floor jack and go jack up that Buick and drain the differential and put in some new oil." So I went out, and I knew what a Buick was, I knew what the floor jack was and I guessed where the differential was in the rear portion of the vehicle. So I stuck the floor jack under the rear of the vehicle and proceeded to jack the jack up through the gas tank. I ran into my dad and said there was some stuff coming out of the rear of the car. He came out and was just aghast. He turned to me, and I'll never forget it as long as I live, he said "Boy you better

make it with your mouth, you'll never make it with your hands." [LK laughs] That day was what launched me on the road to the law, which I enjoy doing.

From grade school I went to high school. We lived right on the line between Franklin and Washington High Schools. At that time Cleveland High School was known as Commerce and they were called the "Commerce Stenographers." It was primarily a business training school and not many boys went there, although it was a co-ed school. I had an *Oregonian* route up there in my neighborhood and we'd play basketball for the *Oregonian* team. A lot of those kids went to Franklin so I ended up going to Franklin, where most of my classmates went to Washington. I stayed at Franklin a year and found I was really missing my friends I went to school with, so I transferred to Washington and graduated from Washington in 1949. I was Student Body President the last year, the last term, which meant you were to introduce the Rose Festival Princess. They insisted in order to do that I had to participate in the debate team.

I did that and I didn't like debate, I think I was too lazy to do the research and the work but I participated and then they took us to all these speech tournaments. You had to participate in the impromptu and extemporaneous and different speeches. The teacher always kind of thought of me as a flake because I wasn't very into the debate, but we went to the state championship down in Corvallis and lo and behold I won the impromptu at the state championship. Impromptu in those days were you walked up with a piece of paper and turned around and started talking for however long it was. I remember turning the piece of paper and it said "discuss the fact that the governor such and such committee is a fifth wheel." I remember just being stunned because I knew who the governor was but I wasn't quite sure what a fifth wheel meant, and I had no idea what the committee was. So I chattered for two or three or four minutes, whatever it was and then won the darn thing.

LK: Too bad they don't have that on tape.

COONEY: That's right. That's right. In high school I played golf on the high school team. Not very many people played golf. We won the city tournament; there were eight schools at that time. Some very famous golfers played at that time. Dick Estey was the number one player for our team. A couple of the guys have since turned pro.

This year, or last year, we had the fifty-eighth reunion of the eight high school golf teams and we played at Broadmoor Golf Course. One of the fellows, Dick Sterns, who played with me at the University of Portland on the golf team, shot a seventy. Then this year one of the guys who is a professional, Vern Perry, shot a seventy. I was reminding Perry that I beat him in high school, but I could not come even close to him now. When I was in high school, I worked in the city parks in Creston, Sellwood and Montavilla and all the way out to Peninsula. They were good jobs for the summer.

Then I went to the University of Portland, was there for two years and went into the Air force during the Korean time. I was freshman class president my first year there at University of Portland. My second year I was cheerleader. We kind of had a different group of cheerleaders and we did all kinds of goofy things -- led yells on pogo sticks and all kinds of things and actually got some national attention from either *Life* or *Time Magazine*. They came out one time to write us up. I was riding my pogo stick up in Seattle and they came to see us, take pictures and so forth. I slipped and the pogo stick came out and hit me in the mouth and knocked out my front teeth.

So, I ended up not being able to do very much, but that night some of the people from University of Portland stole the big pep flag that University of Seattle had. Somebody got in a fight and slugged the student body president at Seattle University and of course everybody thought it was me because I came back to school with my front teeth knocked out, but it wasn't. So, we finally gave them back their flag.

LK: Didn't you also work during the time you were in school?

COONEY: Yes. I worked, in the summer I worked at the parks and I also had a job at the what was then the *Oregon Journal Newspaper* working in advertising and I stayed with that until I went to the *Oregonian*.

I worked at a Dairy Queen out on 82nd and Stark. When I was in college, I used to be through with my classes around noon and go to the Dairy Queen in the car that my dad had and went to work at 1:00 and worked until 10:00 at night. It was a job where there were some dead spots and so you could do your homework. I remember sitting there doing Latin, which I had to take for two years. One of the big things that we did was, we've all seen the Dairy Queen ice cream cone with the curl on top, well we'd have a friend come in and fill the cone, put the curl on top, turn it upside down and do the same thing on the bottom. Then hand it to them sideways and we'd sit there and watch them try to lick both ends to keep it from falling off.

I graduated with my class when I came back from the service. I played golf on a golf team in the service. When I came back from golf, and I was able to stay at the Portland Airport. I was only in 16 months when they let us out early.

LK: What did you do when you were in the service?

COONEY: Played golf. [Laughs] I was in base operations, which is down on the flight line and what they call a personal equipment technician. I handed out parachutes and took care of the flight gear. I went into active duty as a Corporal in the Air force Reserves and when they activated us. If you were promoted in the field I was in, if you were up one notch you couldn't get an early discharge. I wasn't too crazy about the military so I would refuse promotions and a Corporal remained, so I didn't have to get promoted and I was able to get out early.

My commanding officer, [Laughs] by the way, came down and found that I had a pogo stick, which I would ride out on the flight line once in a while. Somewhere I have a picture of me leading an aircraft that needed to be parked with a sign on my back that said "follow me" and I'm riding a pogo stick in front of this airplane. I thought I would be court



marshaled if anybody were to find out that we did that. So, he came down, Captain Maguire was his name, and he wanted to try the pogo stick. I told him it was kind of tricky and by golly he jumped a few times and fell off and broke his ankle. We were a little bit at a loss for a while how to explain his ankle.

I came back from the service and again was a cheerleader in my last year. I worked and didn't have time to play golf or participate in any sports and when I graduated, Fr. Swinney was the president of the University and I remember him coming up with this look of delight on his face that he was going to be rid of me.

He said, "Well Cooney what is it you're going to do now?"

I said, "Well Father, I'm going to law school. I've been a philosophy major with a minor in education. I thought I wanted to be a teacher, but I decided I would try law school."

He said, "Well that's good." He said, "Where are you going to go to school?"

I said, "I'd like to try Willamette."

So, he paused and said, "Well, you know the Catholics were never able to help you very much so maybe the Methodists can straighten you out."

That was the way I went off to law school.

LK: So, what year did you graduate from college?

COONEY: 1953. I went to Willamette in September of '53. Senator Mark Hatfield was the Dean of Men at Willamette at that time. There was a tavern down in Salem called Dick Orey's Tavern and lots of us used to hang out there.

At that time television was just becoming popular and on Friday night they would have boxing matches. My grandfather had been the middle weight boxing champion in the British Isles, so I had grown up with an interest in boxing. So we used to go down to Dick Orey's Tavern on Friday and drink beer and smoke cigarettes and talk big. Mark Hatfield, the Dean of Men found out about it and Willamette didn't allow you to drink or smoke. So they wrote us a letter and said they were going to throw us out of school unless we quit.

So we said no, we're not going to quit, we're all twenty-one and we can do what we want, we don't get drunk. We weren't rowdy so Hatfield left us alone.

He was here in Oregon about eight, nine, ten years ago now and I saw him. I went up to him, reminded him of that and he didn't remember it, but he said it sounded like something stupid he might have done in those days.

I got a job at Meier and Frank in Salem. It opened my senior year, in the Fall of 1955. I worked in sporting goods and sold golf clubs and finished my schooling. Jerry Frank, who writes for the Oregonian today, was the manager for the Salem store. So, when I graduated, my boss told Jerry about it and he invited me up to the office and offered me a job as a Junior Executive.

I said, "What does that mean?"

He said "Well we can train you to be a manager."

I asked "How much do I make?"

He said, "\$300 a month."

"Well," I said, "I make more than that selling golf clubs with my commission, so I don't think I want to do that, and I think I'll try being a lawyer."

So that's what I did. When it came time to take the Bar, I was married by then and had a son who was born in April and the Bar was in July. We lived in a 27 foot trailer house, my wife and I and the baby. I took the Bar exam and studied with a guy that I'd actually played on the golf team with in high school and played against in college. He was probably the brightest guy in the class, but he was bottom man in the class because he didn't study. He had a near photographic mind, so we studied for the Bar and were able to pass it.

The night before the Bar exam, I went home to my parents' place. We lived in Holy Family Parish and my mom lived right across the street from the parish priest. As a kid I had been an altar boy there for years, but went away to college, went into the service and had been gone about ten years. The same old priest was there, so I went over to confession on Saturday night. The old church was small, the confessional was small and dark and you couldn't see over the screen that was between you and the priest, but if you talked real loud you could hear it all over the church.

So, I went in and I didn't know who was on the other side of the barrier and told him I'd done everything bad since I was a kid and started to leave. In the Catholic church there was a tradition that if you had a special problem that you wanted some help with, you'd say to the priest, "I have a special intention and I would like someone magic to pray too."

He said, "Well, what is the thing you need help with?"

I said, "Well, I'm going to take the Bar exam tomorrow and I was worried about it and I have a wife and a baby and another one on the way."

The priest said, "Pray to the Holy Ghost. He's in charge of the intellect."

I said, "Thank you Father" and I started to leave. Then in a voice you could hear all over the church he said, "And Tommy, Tommy," he said, "in your case pray to St. Jude, he's in charge of the impossible."

It worked, alright. [Laughs] I passed the Bar, but that was a heck of a way to be remembered.

When I was going to school, I also worked at my dad's gas station, which was on Milwaukie and Ellis Street. We used to jokingly call it "Cooney's Law Clinic and Auto Repair." We actually wore t-shirts that said that and then on the back it said, "Irish B.S. is our specialty." We did that because my dad was so proud that I was in law school and his friends would come by and say, "Tom, your boy's in law school, what do you think about this?" And my dad would actually give legal advice. [LK laughs] I'd tell him he couldn't do that, but he would.

LK: He didn't ask your opinion?

COONEY: No, no, no, no, he knew that I was a very square student. Anyway, he was very proud of the fact that I was a lawyer and when he retired he used to follow me around and go to trials with me out of town and he became kind of a jail house lawyer. He would drive sometimes, when I would work and he would go to small towns and sometimes a case would take longer than we thought, so we had to wash our underwear in the motel and things of that sort. It was something that he really enjoyed.

I tell this story on U.S. District Judge Owen Panner and I told it at a dinner here in town at the American College of Trial Lawyers, so I'm not telling something out of school. We were up in Pendleton trying a case in the Federal Court and Owen was the Judge. I think Marc Blackman was one of the plaintiff's lawyers and Ken Renner and I and Dave Landis were defending. It was a malpractice case, a medical malpractice of some kind, and my dad was sitting in the back of the courtroom and at different times in the case it got boring so he opened the *Oregonian* and was reading the sports page in the back of the courtroom.

Owen saw him doing that and was offended by it and so at the intermission I stepped out in the hall to do something and either Owen or the clerk went back and told my Dad not to read the newspaper during court because it showed lack of respect to the court.

I didn't see any of this happen, so I came back in and I asked my Dad, "How does the case look, how do you think it's going?" because he was pretty perceptive in those things.

He said, "Well, the case is going all right," he says, "you're kind of boring as usual," but he then said, "who's that asshole?" [Both laugh] He was talking about Judge Panner. I told that a couple times in front of Judge Panner and he takes it with delight.

LK: How old is your Dad?

COONEY: Oh, Dad is dead now, but he was about 86 at that time and he didn't care who the Judge was, or anything of that sort.

When I finished law school we moved back to Portland and lived on 39th and Malden, not too far from where my folks lived, and we had two children. My son Jeff, who is now a veterinarian and college professor in Bend and my son Tom, who is a lawyer with me. Jeff was born in law school in Salem and Tom was born here in Portland at the old St. Vincent's Hospital. We lived on 39th and Malden until 1959.

I had an uncle, the one that flew bombers over Japan, who was a realtor and builder and he built some homes out in Lake Oswego. He had one he couldn't sell, so he sold it to me and we moved out there. I think my Mother was always kind of mad at me because she thought we were a little bit uppity because we left the old neighborhood and hadn't stayed in the same block like we had when I was growing up.

But we raised our family out there and I had two more children, Paul, who is a lawyer with me now and my daughter Tracy, who is a teacher. The kids went to Lakewood Grade School and Lake Oswego Junior High. My oldest boy was in the first class when Lakeridge High School opened, so they all went to Lakeridge.

I remember coaching my sons in football, basketball and baseball and they were known as The Lakewood Panthers. My first year with the basketball team were fourth graders and you were allowed to play zone defense only one quarter a game and the rest of the time you had to play man to man. We were a very short team and I think we lost every game we ever played by at least a hundred points and were not very good, so I finally decided to try and teach them a zone defense. In order to do it, I took some chalk and I went out on the basketball floor and I drew squares and I said "this is your zone and you stay in your zone on defense and anybody that comes into that box is your man" and we worked on it and worked on it, but it was a little hard getting them to transfer thinking from man to man to zone.

So anyway, the game started and I decided to start the first quarter using zone and the first two or three times the other team got the ball, they went right through the zone where my left forward was supposed to be and he was chasing his man all over the court.

So I called a time out and brought him over and his name was Chris. His dad used to help me and he was standing right at my shoulder and I said "Chris, now remember son you're playing a zone defense" and he said "Yah, Yah coach, I know." I said "remember the box, remember the box now, I drew you the box." He said "Yah, yes, coach, I know" and I said "well, what are you doing?" He says "I understand coach, but that dumb kid I'm checking won't stay in the box" [Laughs]. He was following that kid all over the place and so the concept never got through to him [Laughs].

When I finished law school I didn't have a job and the only person I knew that was a lawyer was Frank Harrington, still a lawyer here in Portland. Frank taught Business Law at the University of Portland when I was there. So, when I got through school, I looked him up hoping that he'd offer me a job – he was a solo practitioner and didn't have need for anyone, but he was kind enough to invite my wife and I to the Bar convention in Gearhart in 1956, which is when I graduated. In those days it was the old Gearhart Hotel, right across the street from the Gearhart Golf Course. It's gone now, but it was kind of a drinking contest and the lawyers would all go to their meetings, but then all the firms would have cocktail parties. And so my mentor, Frank Harrington, took me around to all these parties and introduced me to these people and he'd say "he's looking for a job."

So, at that time I ran into Randall Kester, who was with MaGuire, Shields, Morrison & Bailey. Randall eventually became a Justice of the Oregon Supreme Court and I was with Cosgrave and Kester and the rest of that Vergeer Group. Anyway, I met him and nothing much happened. So, I took my Dad's car, it was a Dodge station wagon, and I threw a sleeping bag, some canned soup, a camp stove, my one suit that I had and a razor and I took off for Eastern Oregon. I remember interviewing for the DA's job in Heppner and also in Condon, but both of those were already taken. So, then I went to Fossil and Judge Abrams, who died here just a few years ago, was the DA in Fossil. That job was \$250 bucks a month and I got a desk and you could practice law privately at the same time.

LK: That was less than you were making selling golf clubs at [....] .

COONEY: I was doing better [Laughs] at Meier & Frank. So I left Fossil that night at least having a job offer. I think I was the only applicant. I drove down to Burns and pulled over on the side of the road to sleep and darned near froze to death; it was colder than the dickens up there. I went into Burns the next morning and went into an Arco - Richfield they were called then - gas station, went into the men's room and shaved, put on my suit and

came out looking like a Big Shot. I met with a local lawyer, Representative Robert Smith, who's in Congress now but he was a rancher up there and they interviewed me. Judge Jim Burns, the Federal Judge, had just left there as DA and that was the job that was open.

So they talked to me at some length over lunch and finally asked me how I felt about gambling and I didn't know anything about gambling, I didn't do gambling except when I played golf. I said well there's nothing wrong with a little gambling and they said "well, that's good because we make quite a bit of money off the slot machines in the Elks Club and we wouldn't want anybody to interfere with that. I didn't even know gambling was illegal. [LK laughs]

So, anyway, they thought I was pretty good for the job of the DA and I drove home and told my wife that "we've got two options, one is Fossil and the other is Burns, what do you think?" She was from a small town, she was born in Grand Ronde, Oregon -- she was actually born in Brooks, Oregon, but I met her in Grand Ronde, Oregon. She is part Grand Ronde Indian - one-quarter. She said "fine, whichever one you want to go to."

About that time the phone rang and it was Randall Kester asking me if I wanted to come down and interview for a job and so I did. I felt really kind of out of place because that was a pretty prestigious firm in those days and there were a lot of guys from Columbia, Harvard and Yale and here was Tom Cooney from the University of Portland and Willamette and I felt kind of out of place. They offered me the job - \$300 bucks a month - and I continued with my job at the *Oregonian*. I was still working nights and weekends at the *Oregonian* to support the family.

LK: Oh, were you selling ads or writing?

COONEY: We wrote them, we just took them over the telephone. So, I continued to do that for a couple years and worked a lot with Howard Beebe, Randall Kester, Bill Morrison and Walt Cosgrave and I was kind of their flunky research bagman. Bob Maguire had been a judge in the Nuremberg Trials after World War II and was a very interesting man. He had some of the transcripts of the testimony there and like a dummy I never took the time to

read them. Roy Shields was the Governor's personal lawyer and of course Randall Kester went on to the Supreme Court for a while. I remember interviewing there and I went in to see my first lawyer there, his name was Nate Cohen.

He said "what kind of a lawyer do you want to be?"

I said "well, gee, I don't really know." "I think I want to gravitate toward the courtroom, but I've never been there.

He said "well what don't you want to do?"

I said "God, I certainly don't want to be a tax lawyer" and I said "what do you do?"

He said "I'm a tax lawyer." [Laughs]

That set me off right away, but I finally got the job and started there in 1956. I had a good experience working in a lot of different fields, but gravitated toward the courtroom.

In 1959 Howard Beebe, who was one of the primary trial lawyers, had a heart attack, so I was pushed into his spot and took over his caseload. In those days, they used to grant a lot of nonsuits at the end of the plaintiff's case and a lot of times they would try the case over again. So, I would retry some of the cases that Howard had gotten a nonsuit in and I had the transcript of his cross-examination and people thought I was pretty smart because [Laughs] I was able to cross-examine these guys and sound like I knew what I was doing. All I was doing was reading Howard's transcripts. But, he and Walter and Bill Morrison were pretty much my teachers and I was fortunate to win a lot of cases without ever losing one.

One day I was in Howard's office – in those days we didn't go back to get the jury verdict, the judge would just call you and tell you what the verdict was – and I was in Howard's office and took the call. I forgot who the judge was, but I had lost the case. It was the first case I had ever lost. I just was dumbfounded, I was crushed, you know, it was just terrible and so Howard took one look at me and said "come on, I'm going to go buy you a drink." So we went down and had a couple drinks and he said "let me tell you something" he said "I've watched you and I've watched you get bigheaded and you won all those cases and you weren't so hot. You won cases that should have been won, you weren't so great." He said "also you lost a case today that you should have lost." He said "you have to learn that you don't make the facts and don't take each win and loss personally."



It took me a long time to think about that but I finally learned to evaluate my performance in the trial while the jury was out and before I knew the results of the case. I would just kind of review in my mind, if I did a good job or I did a so-so job or I was really good or whatever it was. Then, the outcome of the case I knew was beyond my control and it helped a lot being able to not face all the torment you go through when you lose a case.

I remember being in the bank in the old Standard Plaza and there was a lawyer friend of mine standing in front of me – it was about 10:30 in the morning – and I could smell booze on him. I thought “what is he doing drinking at this time of the day” and he turned around and said “Oh, Tom, I’m glad to see it’s you”. He said “I’m about half tight” but he said “I just lost a case that I should have won and it’s just killing me.” He said “you’ve been doing this for a while, how do you cope with that?”

So I said “well it’s something you learn with experience. When your case comes in and the verdict is against you tell your client not to worry, you’ll talk to them the next morning and you don’t go back to the office, you stop at the liquor store and get a gallon of whiskey. You go home, you don’t kick the dog and you don’t insult your wife or the children and you immediately go downstairs and get a card table, two shot glasses and two chairs” and all the while this lawyer is hanging on every word I’m telling him and I said “then you go out and get the rabbit. Every trial lawyer has to have a rabbit and if you don’t have one that might be a problem [Laughs] but anyway you get the rabbit and it has to be a black rabbit and you sit down and you and the rabbit sit there and you pour the rabbit a drink and then you pour yourself a drink and you tell the rabbit what a hell of a rabbit he is and then he will pour you a drink and he will tell you what a hell of a guy you are and pretty soon you don’t care about that case anymore.” [Laughs] But I said “it’s tough on rabbits if you lose a lot.” So, that story got around [Laughs] and through the years somebody gets clobbered in the courtroom and they’d call up and say “Tom, Tom send the rabbit, send the rabbit.”

One story I forgot to tell about golf. When I was playing for the University of Portland, we played Oregon State and Oregon State's number one man was a fellow named Dick Yost, who played at Grant High School and was on the Walker Cup Team and was at that time probably the best golfer in the Northwest. He was number one for Oregon State and I was number six for Portland. We didn't have any players of his caliber, so the coach switched me up to number one and sacrificed me. I don't think they were supposed to do that, but they did. Anyway, I played Yost and I always tell that I almost beat him at the second hole because I shanked a shot coming out of the sand trap and almost hit him in the head. I thought I was going to kill him, so thereafter he kept an eye on me. Finally, he had me Dormey on the 12th hole at Portland Country Club, which is a Par 3 and I had two of my friends who were cheerleaders with me and they were laughing at me because I was getting beat so bad.

Anyway, Yost hit his shot on the green and I hooked mine over toward a fence and if I didn't win that hole the match was over. So, I'm sitting there by the fence, I'm trying to take a swing at it and I'm too close to the fence and I can't get a swing at it and I can't move it. My friends are standing by the sand trap and they're just laughing, they think it's funny.

So finally I remembered caddying for a guy in the City Tournament at East Moreland Golf Course. He was up against a tree and he turned his back to the hole, straddled the ball and croqueted the shot backwards between his legs and to the green and he was able to chop on it and not have to take a full swing. So, I thought "by golly I'll try that shot and I'll surprise Yost and I'll make a comeback, which was impossible" [Laughs].

But I couldn't remember which club the guy used to hit the shot, so I took my wedge, which was a mistake and I chopped down on the ball and it flew up and hit me right in the groin [Laughs] and it damn near killed me. I mean I went down hard, [Laughs] I was hurt and I went down on both legs and these two fool friends of mine, they were laughing to beat the band, they were rolling around [Laughs] in the sand trap thinking it was the funniest thing they ever saw. So that was my other great experience in the golf course [Laughs]. The next week the school paper said "Cooney suffers T.K.O. on the 12th at Portland."

I remember thinking I was a pretty big shot as a trial lawyer and I went off to one of these sensitivity training schools they had for trial lawyers and they were trying to teach us to be more aware and sensitive to a jury when you pick them because when I started you were taught the lawyers did all the talking and the jurors didn't talk much to us. So, anyway, it was at the beginning of the type of jury selection where you ask open-ended questions and listen to the jurors.

So, at the seminar they told us to be sure and watch the jurors as they went into the jury box and you could see things that they wanted to talk about or the way they limped or whatever it was. So I came back and I was really full of myself and there was an obviously pregnant lady that went up into the jury box and the lawyer on the other side never even mentioned it. I thought to myself "you dummy, you haven't had the benefit of this wonderful training that I have and now I'm going to ingratiate myself to this juror," so I said "Mrs. Johnson, when is the baby due?" and she looked at me and said "Mr. Cooney, I'm not pregnant, I'm just fat."

LK: Oh no [chuckles]

COONEY: And if you wanted to see a poor, dumb Irishman turn beat red, it was me. I left her on the jury. I was so humiliated and my client, I think, was going to kill me and I think she felt so sorry for me that I think she voted for us.

LK: You won that case?

COONEY: We won the case [Laughs]. My boss used to say "When you're young you can do anything in the courtroom and the jury would forgive you" because in those days the jury used to be predominantly women and he said the women will all say "Oh that nice young man, he reminds me of my son." [Laughs]. And as you grow older and you get a little more gray hair they'll say "That jerk, he reminds me of my husband" [Laughs]. So you have to make all your mistakes while you can, while you're young [Laughs].

Another, this is Bill Morrison's advice, he called me in one day and he says "Cooney, there's three rules to making it as a lawyer and being successful in this firm." I said "what are they?" "Number one, you never ever steal money from a client. Number two you don't fool around with your secretary, and number three, in the case of your people, the Irish, you don't drink." And so, here four years ago when I got the Professionalism Award from the Multnomah Bar Association I mentioned those three rules and I told the audience I could assure them that in over forty years of practice I had never, ever once stolen my client's money [Laughs]. They understood what that was all about.

When I graduated in '56, I went to work for MacGuire, Shields, Morrison, Bailey, which was a business insurance defense firm and we were together until 1965. Then we split. Bill Morrison and Walter Cosgrave had a falling out and it was pretty devastating to the firm and so we decided to go our separate ways. A bunch of us left and went to become Morrison and Bailey and the rest became what is now the Cosgrave, Kester firm. I stayed with the Morrison and Bailey firm until 1980, when I decided to leave.

Richard Van Hoomissen and I left that firm and started Cooney & Van Hoomissen in 1980. We went from about a 40 man firm to a two man firm, which was quite a shock and I just about killed myself working. You always worry about whether you had a practice because you were a member of a firm or whether you had a practice because of you. Fortunately, we hadn't been out very long and I had a call from one of my students, who had been in my Law and Medicine Course up at Lewis & Clark Law School and she was the new Claims Manager for a company called ICA, which was writing medical malpractice insurance for the Northwest, and wanted to know if I'd be their Oregon lawyer. I said "you betcha" and we were able to make it primarily because of that client and a few others.

Dick Van Hoomissen and I stayed together two years and then Mike Crew, who had been with me at the Morrison and Bailey firm, joined us. Dick decided to go solo, so it was Cooney & Crew for a while. Then, Jeff Wihtol, who also had been in that firm, left and came over and then it was Cooney, Crew & Wihtol. Jeff Wihtol was offered a line of business with an insurance company that I couldn't represent because of conflicts I had. He left and joined, I want to say Ater, Winn, but I'm not sure that's right, and he was there for a while.

So it became Cooney & Crew again and there were seven lawyers. Then, in about 1986 we joined up with Frank Moscato's firm and became Cooney, Moscato & Crew and grew up to an eighteen man firm again. I decided that size was not good -- there was too much administrative headache and so forth, so we dissolved that firm after five years and became Cooney & Crew and are still Cooney & Crew to this day. I have two of my sons practicing with me in our downtown office: Thomas Michael and Paul Alan Cooney and they do the same type of work that I do: insurance defense, health law and legislative work. The Oregon Medical Association is one of our primary clients and we do a lot of legislative work.

**[End of Tape 1, Side 1]**

**Tape 1, Side 2****2000 October 17**

LK: In B of the tape on October 17 and this is the continuation of the oral history of Tom Cooney

COONEY: I was talking about representing the Oregon Medical Association and malpractice defense work of necessity led us into doing a lot of physician discipline cases before the Board of Medical Examiners and lawyer defense for the PLF and defense of lawyers and their discipline, so we do quite a bit of that. Actually, one of the very first lawyer discipline case I handled -- one of the partners in the MaGuire Shields firm had to be a witness, so I was supposed to try the case and in those days they all went to the Supreme Court. It was In Re Maury Corcharan was the name of the case but the thing I remember about it was the court reporter called me afterward and said "Tom, did you read the testimony of your senior partner, Mr. So and So, because it doesn't make much sense and I must have made a lot of mistakes." I said "no Mary, that's the way he talks a lot of the time" [Laughs].

In the early days of the trial practice when I started, it was much easier for a lawyer to get a lot of jury experience because in those days we would try a case over the sum of \$250. If you couldn't settle it for \$250, you were that far apart, you would try it. When Howard Beebe went down with his heart attack and Walt Cosgrave and Bill Morrison got into their disagreements, I ended up carrying the trial load for actually three people.

I remember one week actually trying to conclusion three jury trials -- running down the hall from one jury room to the next to start a case. I didn't want much work, I'd always made a commitment to myself that I would be at home with the family, because I had young children. So I'd always be home by 6:00 or 6:30, but I had an office at home and after everybody went to bed I'd work until 1:00 or 2:00 o'clock in the morning to get ready for the case the next day.

So, in 1963 I came down with rheumatoid arthritis and was in pretty bad shape for a while. I went to the doctor and he ordered me to quit work for six months which the firm was supportive. In those days they thought that rheumatoid arthritis was caused by stress as opposed to the autoimmune system deficiency, which they know it is now. So, anyway I was supposedly stressed out and I went and stayed home and got more stressed out because I was taking care of the kids all the time and they were driving me nuts, [Laughs] so I went back to work to survive.

I was fortunate the rheumatoid arthritis went into remission and I have not had any reoccurrence, [Laughs] except in mild degrees. I couldn't play golf because I couldn't hang onto the golf club, my hands, arms and back hurt so bad, so I quit playing golf in '63 until 1980 when I finally started playing again. I kept my membership in the Oswego Lake Country Club all those years [LK laughs] and I remember joining it in 1959 and it cost \$250 to join. I had to borrow the \$250 from one of the lawyers in the firm and now I think it's \$35,000 or \$40,000 to belong.

LK: It's a good investment

COONEY: A pretty good investment and next year when I turn seventy I don't have to pay dues anymore, so that's pretty good. That's one advantage of getting old, I guess. [LK laughs]

When I went into the practice of law I was always a little uncertain as to whether I should have been a teacher and also I thought maybe I wanted to be a judge. I had an opportunity to be both. I was able to teach at the law school here in Portland, Lewis & Clark, for a couple of years and taught Law and Medicine. I enjoyed it for the first year and the second year it got kind of boring and I don't think I did as good a job, so I only did it for two years. I decided I didn't want to be a teacher.

Then in the '70's there was an organization that I belonged to called The American Board of Trial Advocates and dockets were behind and so that organization had a national program of lawyers volunteering to be pro tem judges, so we would all volunteer two

weeks a year of our time and we did it without pay. We would go around and be Circuit Court judges and I went to Lane County and Roseburg, Douglas County, Clackamas County and Multnomah County. I did that for a few years and decided that wasn't what I wanted to do either. It can get kind of boring if you have really good trial lawyers that know what they're doing, the judge doesn't do much, so I decided I really was lucky in that I had found my niche and was doing what I liked. I have always been able to say I made the right choice. I'm one of the few lawyers I think of my generation that still truly enjoys the practice of law.

LK: Are you still trying cases?

COONEY: Oh yeah, yeah, yeah. If I can stand up, I figure I can still try them. You know my boss, Bill Morrison, actually was trying cases in his 80's and I remember he and Mike King – Mike King, the Federal Judge, was in our firm at that time. Our senior lawyer, Bill Morrison, and King were up trying a case and King kept calling me at night saying the case wasn't being handled too well and what should he do and I said "I didn't know what we can do." So when they came back it was put on my shoulders to go talk to the senior man and tell him maybe he shouldn't try cases anymore. He was the one that had taught me and hired me, so for me to go in and say that to him he kind of took offense at it. He turned and looked at me and said "listen young man" he said "you don't mature as a trial lawyer until you're 75," so that was the end [Laughs] of anything like that to try and slow him down.

I remember attending the first meeting of The Oregon Association of Defense Counsel. It was in a restaurant that Larry Hilaire owned called The Encore, as I remember and Judge Robert P. Jones was talking about it and he organized and it became The Oregon Association of Defense Counsel. I think my first or second year of that organization I was the secretary and we did all the mailings and everything out of my office. I believe I was the third President of that and it was the beginning of what is now the OADC. It's kind of a nice thing to look back on because it's really grown and does a lot.



The American Board of Trial Advocates we started here in about 1969 and in order to be a Diplomate in that organization you had to have tried to completion at least 300 jury trials. I was one of the few Diplomates in the Country having tried that many cases. I remember the fellow that had tried more than I had was Roy Kilpatrick [LK chuckles] in Eastern Oregon and I asked Roy, I said “how did you try so many cases?” and he was quite a bit older than I was and he said “well we tried a lot of cattle rustling cases over here” [Laughs]. Cattle rustling was what they were trying.

LK: You had a case against him, though, right?

COONEY: Yes, I called it Chernobyl East and I will discuss it more later.

I think I may have told you before that I had started to collect little articles for a book and I had the name for it. I was going to call it “My Life In Court and Little League.” In all the moves I’ve made I lost all those notes -- a lot of them I don’t have anymore.

When No Fault Insurance was being considered I wrote to Representative Wendall Wyatt and I wrote an article about no fault. I labeled it, I used that name “My Life In Court and Little League” and he read it, it was in the Congressional Record and he sent me a copy of it. So, a lot of nonsense, but [...] [LK laughs].

I was admitted to the American College of Trial Lawyers about 10 years ago. In 1996 the Multnomah Bar gave me the Professionalism Award, which was very nice. That same year the American Board of Trial Advocates gave me the honor of being The Distinguished Trial Lawyer of the Year. I think that was just because I was getting old and they’d better do it before I disappeared [LK laughs].

A lot of people think that the name of the firm Cooney & Crew is a joke because they think it’s me and all my kids because my two boys are with me, but there really is a guy named Mike Crew [LK laughs] and he practices out in our Lake Oswego office.

One thing I didn’t mention that I have a memory of is my Dad used to have a garage, it was downtown on 4th and Lincoln, and he was the mechanic for the old Royal Cab Company. As a little kid I would go down there and somehow beer bottles would end up

in the cab and it was my job to go around and collect beer bottles and I could keep what I made from them. The Labor Temple was in that area – it was actually right across the street from the old City Hall, it was down in the basement. After work, he would go down and they had this huge bar and I was maybe four or five years of age and my Dad would take me down there. I had gotten to know the bar tender, his name was Skoll, is what I called him. They would stand me up on the bar, give me a shot glass full of beer and I'd put my hand up high and I'd yell to everybody "Skoll" and all the guys would stand up and chug their beer down [LK laughs] and that's my memory of the Labor Temple. That place closed and a little Italian Restaurant went in there.

When I was dating my wife I wanted to show her what a big shot I was and how much I knew about restaurants and I said "come on and we'll go down to this Italian restaurant and I'll get us some of that great Italian soup." And so we went in and sat down, the waiter came up and I said "I'd like two bowls of Spumoni" and they brought the Spumoni [Laughs] and my poor wife said "I've never had frozen soup before" [Laughs] so much for my big shot ideas of trying to impress her.

It was kind of interesting when she and I got married in 1952, she was one-quarter Indian from the Grand Ronde Tribe, and there was actually a statute on the books that said it was illegal in Oregon for anyone to marry anyone of color or of Indian ethnic ancestry of one-quarter or more and I remember stumbling across that in law school and talking to one of my professors and he said that's been on the books, but everybody knows it's unconstitutional and what the Legislature does is every two years they pass a Bill legalizing all marriages that took place that were in violation of that law.

LK: Why don't they just take that statute off the books?

COONEY: Well they did eventually, but at the time it was still there. My children are one-eighth Indian and are registered with the Tribe out there. My son, Paul, is a great big guy with blonde hair and blue eyes and would kind of laugh to think he has Indian blood in him,

but he does. With the casino out there, they get some pretty good benefits now as members of the Tribe, so it's been a good deal for them.

My wife and I separated in 1978 and were divorced in May, 1984. I remarried in 1986 and I have a stepson named Eric, who is married and lives in Bozeman, Montana and is about ready to have a baby. My son, Jeff is a veterinarian and lives in Bend and his wife is a veterinarian and teaches at the Community College there. My son, Tom is a lawyer with me, is married to Judge King's secretary, Pam, and they're about ready to have a baby. My son Paul is a lawyer with me and is single. My daughter, Tracy, is a teacher and has a baby that is three years old now and she lives with her mother. And my ninety-seven year old mother is down at her little place at Gearhart living a few blocks from my sister, who can no longer take care of her, so we have a person that lives in and takes care of my mother. She chastises me whenever she comes to the house for dinner that we ran out of wine pretty early [Laughs]. You don't want to disappoint Grandma when it comes time to eat or drink.

LK: But she finally moved out of the neighborhood, right, off the block?

COONEY: Off the block, that's right, that's the first time. She bought that little place at Gearhart in 1958 or '59 and it was just a shack, paid \$1500 for it.

LK: Wow

COONEY: Through the years we've built, and it does look like "Tobacco Road" now, but it's home to her.

That's all that I can think of my life.

LK: Alright, alright. We're going to stop now.

**[End of Tape 1, Side 2]**

**Tape 2, Side 1**  
**2000 November 2**

LK: Today is Thursday, November 2nd and this is the continuation, day two of Tom Cooney's oral history. We're going to talk about various cases he's had in the past. Just tell me about some.

COONEY: I've gone back and kind of reviewed the cases through the years and some of the things that took place, that got me to the point where I was able to try cases and I think of a couple of events that happened. I started in 1956 and during the first two or three years I probably took eight million depositions, but never was able to get to the courtroom very often. Finally, one day we were getting ready to try a case and my boss had selected a case and they actually could have settled it for \$250, but he wanted me to get some trial experience so I was getting ready for trial. I don't remember whether I mentioned this case before on the other tape, but the morning of the trial the lady came in and started sobbing uncontrollably -- did I tell you this?

LK: No [Laughs]

COONEY: And so her husband took me out in the hall and said "I don't think she can go through trial, she just got over cancer surgery and she's in a pretty bad emotional state." So I went to my boss, Bill Morrison, and said "I think it's unkind of us to force her to go to trial just so I can get some experience."

So he called up the insurance man on the phone and I could hear them arguing -- the insurance guy saying "You told us we'd try this and we're not going to give them the \$250."

Finally, Morrison said "Would you shut up for a minute and let me tell you the problem we've encountered. The client, the insured, came in this morning and took one

look at Cooney and we can't get her to stop crying." [LK laughs] That was part of the humility we learned in those days by our bosses.

Another time, we used to take depositions on Saturday all the time until I declared I was a Seventh Day Adventist and couldn't do it, which was a lie, but I got out of doing depositions. On one particular Saturday we were going over to Walter Evans' office. Walter was an Admiralty Lawyer, a very, very dynamic lawyer and a very able, good lawyer. He just commanded presence no matter what he did. I had practiced maybe a year or two and was going over to his office and my client was kind of anxious. He got through the deposition okay and as we walked back I said something to him to the effect "that wasn't so bad was it" and he said "no it really wasn't, but there was just one thing." I said "like what?" and he said "oh, never mind" and I told him "no, you can tell me, I'm your lawyer." And he said "well, I wish the other guy was my lawyer" and he was talking about Walter Evans [Laughs] and so I had to take that.

LK: That's terrible

COONEY: I had to take that and take those lumps and be able to get through it.

One of the first cases that I remember trying as a jury case was against Chuck Paulson and I'm not so sure it wasn't Chuck's first Circuit Court jury trial. It was in the Supreme Court, the case of Lavitch v. Smith. We could have settled that case, as I remember, for \$750 and we went to trial over that. Chuck's client, Mr. Lavitch was a dress salesman and my client, Miss Smith, ran a dress store somewhere in Southwest Portland.

Mr. Lavitch, the plaintiff, went into kind of a little office, which is kind of off the main floor and sat down on a davenport, leaned back against some dresses that were hanging from a rack. The rack was beneath the shelf and on the shelf was a vase that was empty. As he leaned back, the weight of his body pulled on the dresses, which pulled on the hook that was holding them. It tilted the cupboard down a little bit and the vase fell off and hit him on the head. He had a cut on his head that was about two inches long, a scalp wound. We tried the case and our theory was he was not a business invitee in the area where it

happened, that he was just a licensee. The case went to the jury and we lost - I think we lost \$2000, which was a tremendous loss at that time, a big amount of money. We went to the Supreme Court and the Supreme Court talked about "no, he was still a business invitee." We had in the office the transcript of the testimony and my boss, Bill Morrison, took my cross examination and for years it was used in firms as a teaching tool as the worst cross examination that had ever taken place in the State of Oregon up to that time.

LK: [Gasp], Oh [chuckle]

COONEY: And all the things you're taught not to do on cross examination I had done. We talked about the case that U.S. District Court Judge Mike King and I had. Mike was a member of our firm at one time and we actually hired him out of the DA's office to work in the Morrison and Dunn firm. Then, he went with Jack Kennedy and became a skilled lawyer, a member of the American College and eventually a U.S. District Judge. Before he went on the bench we had an anesthetic death case. He had a forty year old man, who was a prominent citizen, lived in Lake Oswego and went in with, as I remember, gallstones and they did really almost an elective surgery. He was a big man, kind of a little bit heavy set. As he woke up he had what they call pulmonary edema and went into an arrest and died. I was representing the anesthesiologist.

Mike and I, although we were very good friends, were on adversarial roles and we were negotiating a mediation of that case before Sid Lezak. Mike's widow was a very, very, very nice lady. So we were in mediation, Mike was in one room, I was in another with my client and the insurance people. Sid Lezak kept running back and forth and kept telling me "Mike's got a pretty good case" and "why are you so confident" and that sort of thing. So I told him to remind King I've never lost a medical malpractice case. At that time I had not lost any. Lezak seemed very impressed by that and so he ran in and told King that and pretty soon Lezak came back and said "King is impressed with your record, but" he said "he also knows you have enough experience to pick off the bad ones and settle those and

not try the dangerous ones” [Laughs] and so he said “this is one of those dangerous ones.” We settled the case for quite a bit of money.

Another time I remember being at a lecture at Lewis & Clark College and I don’t remember what the event was, but it was on trial practice. This is 15 - 20 years ago and one of the things that I had felt during trials was all these exhibits that we use and blow up and so forth, half the jury can’t see them because they can’t see, they’re blind or semi blind. So I adopted a policy of creating a jury exhibit book, which would have the various exhibits and then the jury could follow with them and most judges would allow you to let the jury follow with them. I always thought it was a good technique, particularly in medical malpractice cases where you were dealing with hard to read documents and terminology that was sometimes foreign to the jury and I found it effective in making complicated facts clear. So it wasn’t three or four months after that Larry Wobbrock and I were trying a case on the other side of each other and low and behold he whipped out the twelve jury exhibit books and did an excellent job of clarifying and I eventually settled the case and I always said it was based on my own stupidity for revealing that secret [Laughs] and it came back to haunt me after that time.

One of the other things I remember was as a young lawyer we tried a lot more cases than we do now. I think I mentioned before in one week I remember I actually tried through to completion three Circuit Court Jury trials – running from one courtroom to the other to finish a case and start the next one. But, I had some good mentors – Bill Morrison, Walter Cosgrave and Howard Beebe.

I was in Howard Beebe’s office one day and in those days we didn’t go back to receive the jury verdict, the Court would call us. I was in Howard Beebe’s office and Judge Charlie Crookham called and told me I’d lost the case and it had been the first I’d ever lost. I was just devastated and my mentor, Howard Beebe, told me “come on, I’m going to take you out and buy you a bowl of whiskey and we’re going to talk about losing lawsuits.” So we went out and he bought me several bowls of whiskey and we talked. He kind of brought me down to size by saying he’d watched me develop as a young lawyer and I was winning a bunch of cases and I thought I was just about the hottest thing in town. He said “you

know you weren't the hottest thing in town, you just won a bunch of cases you should have won and your skill didn't have a whole hell of a lot to do with it, so why beat yourself up when you lose a bad case and why not recognize it was a bad case and go from there." That was hard to accept, but eventually it sank in. I learned after that to evaluate how I thought I did in each trial while the jury was out, as I was walking back to the office and not waiting to make my evaluation of my performance until the verdict came in because if I knew the verdict, then I felt bad and always said it was my fault. But, if I made the evaluation before I knew the outcome, then I felt I did a more objective analysis of it and it was a comfort to be able to do that.

The other thing I recall and I have this videotape and my kids show it to me at Christmas periodically to remind me being humble is an attribute, and that was my Dad's retirement. He had a little one pump gas station over in Southeast Portland and he used to fix the lawnmowers for the little old retirees and the widow ladies he'd fix their cars and wouldn't charge them or he'd charge them very little. I remember when we closed his garage he had a bunch of things he'd taken in – he had an old bowling ball that was broken, he had a Japanese rifle [Laughs] from somebody that he'd taken in trade.

When he announced his retirement, all the people in the neighborhood gave him a party and they called the press and the video people were there. We were all standing around and we had ice cream and cake. My dad was still working on a car, all full of grease and dirt and they finally brought him up out to interview him and he had dirt on his face and dirt on his hands They asked him about his career and his work and he was very down to earth, very articulate and he said "things weren't as easy as they used to be." He spoke a little bit about the idea of training of young mechanics and how much they had to know today and was just an outstanding person on the video.

Then they interviewed me and here I was in my three-piece suit, pompous, trying to in my stupidity show how proud I was of my Dad, but saying it in such a way it made me sound like something from out of space. So the kids play that back to me and say "look there, there's Dad in his pompous suit" [LK laughs] and it always, it's a good thing to touch base with once in a while.



Another lesson that I learned as a young lawyer was being able to respond and handle the pressure of winning and not crossing the line of tampering with truthfulness. I was getting ready to try a case and the client came in and said “You know since the deposition I’ve been thinking about this and I think I said something in error on the deposition and it didn’t happen this way, it happened that way.”

And I said “Well my God, if you say that, we’ll lose.”

He said “Well that’s what happened.”

I said “Are you sure now, because you said it the other way?”

“No,” he says “I’ve thought about it and I was wrong.”

He was a professor up at Portland State and I said “Well, my God we’ll lose this case if that’s what you say.” And I was frustrated with him.

And he said “Well, Mr. Cooney, I’ll say whatever you want me to say, but that’s what happened.”

So, I said “I’ll meet you at the courthouse.” He was driving his car and I walked up and for the first few blocks I was steaming about him because I thought, “My God, he’s going to make me lose my case.” As I walked and walked I thought “Wait a minute, you dope, you’re thinking about winning or losing a case and the client’s telling you what he said was not correct and what he’s telling you he says is correct and it’s true and it makes the case a liability and what are you fretting about.” I was so concerned about winning or losing, I was struggling with myself about what to do.

So, when I finally got to the courthouse, the walk had done me good and brought me to my ethical senses and I told him “Just go in and sit down and I’m going to call the insurance company and we’re going to settle the case,” which we did. But it kind of brought home a lesson to me that you as a young lawyer, or as a lawyer of any stage, always had to be cognizant of the fact that you can’t get your ego in the way so that you do things that are not ethical or honest in order to win a lawsuit.

As I told you earlier, I had a case with Roy Kilpatrick. It was probably the case that I remember the most. This actually wasn’t a case, it was one hundred and twenty lawsuits over in Deschutes County and they started in about 1986. I jokingly referred to it as

“Chernobyl East” and it’s kind of an insensitive thing to say, but it’s a description that stuck in my mind.

I received a phone call on Friday night from an insurance company client and they said can you get on a plane and go to Bend, or drive over, because we’re having a meeting tomorrow with a problem that has developed over there. I asked them what it was and they said that St. Charles Hospital put in a new Cancer Treatment Center and they put in a machine that delivers radiation in 1983. It was miscalibrated and over six hundred people have been treated, receiving more radiation than they were supposed to. So there was a meeting the next morning in Bend with the representatives of the hospital, the radiation oncologist, who was my client, and the physicists, who were the people who actually calibrated the equipment.

I got to thinking about the impact of that type of information on cancer patients, if they were told they’d received too much radiation. Many of them were in the process of dying and I was a little bit concerned as to what, if anything, we should do as far as disclosure to patients that weren’t coming forward and saying to the doctor or to the hospital that you must have committed some form of malpractice. So that night I called several psychiatrists to seek their counsel as to would I be doing more medical harm or what if I told them and what would I be doing if I withheld it. As I said, many of them were in the process of dying.

So, in any event, I drove over and the next morning we had a meeting of all the players and there was a mixed bag of opinions as to whether we should disclose or not disclose. I felt the doctor was in a position that was a fiduciary relationship and he really didn’t have a choice, that he had to disclose it to the patient. The physicists, who weren’t in the same position, didn’t have the same fiduciary responsibilities and I always remember the little nun, who was the head of the hospital. She stood up and she said, “No question, we have to tell the patients” and that kind of settled the issue at that point.

Then, the question became what we were going to tell them because the error had resulted in only about 13 or 15% more radiation than they’d been prescribed. As I delved into this a little bit I learned that there was substantial variation in the various medical

centers as to how high a dose of radiation would be given and it would vary from place to place.

So we decided that it would be important for the patients to know whether the dose they received, although it was higher than prescribed, whether it fell outside the recognized standards of treatments. We found that Stanford University is very high and some universities were lower. We employed three radiation oncologist, and I think there were only about six in the State at the time, to review all 600 or 700 charts of these patients that had been treated with this equipment and they broke it down into those that were in the upper limits, those that were over the limit and those that were within the range of normal so when we gathered that information, we could write a letter to each patient and tell them where they were in the category of whether they'd been outside the recognized standards. Then they had a television public broadcast informing the community of the problem and what they should do about it.

And, of course, as soon as that hit, the lawsuits started coming in and eventually of the six hundred and some people, there were about one hundred twenty or one hundred thirty of them that came forward and filed lawsuits. Most of them were handled by Roy Kilpatrick, who was a well-known, highly regarded plaintiff's lawyer east of the mountains. Roy filed the various lawsuits and brought in a lawyer from Wisconsin, whose last name was Johnson and we jokingly referred to him as "Johnson from Wisconsin." He was a nice guy and a very good lawyer and he actually had more technical knowledge about this type of case than I did because he'd tried some around the country and to my surprise, this had happened before.

Evidently, these machines are calibrated by the physicists and one of the calibrations is the altitude you're at where the equipment is located and they calibrated it at sea level, whereas Bend is around thirty-five hundred to four thousand feet and as a result they miscalibrated it for the wrong altitude and they pumped out more radiation than was indicated.

The interesting thing was before it was discovered three different physicist groups had made the same, identical mistake and they would fly into Bend and land at Redmond

and when you walk into the Redmond Airport there's a sign that says you're at such and such an elevation – a great big sign that you can see. They all missed it and as a result, all these folks got too much radiation.

It was the first time in my life I had ever been faced with a situation where my client was overwhelmed by the magnitude of the litigation. He was the only radiation oncologist in town, he was on call every day, twenty-four hours a day, seven days a week, taking care of very, very ill people and we had a case set for trial every other month, going out about three years. The trials took about ten days to two weeks and then there would be depositions and preparation in between and it was extremely difficult for him to be able to cope with litigation, let alone try to practice medicine and take care of all the people that he had. Fortunately, he had a blessed wife that was very helpful to him and we were able to get him through it. It kind of taught me a lesson that I don't think I knew at the time but to be a little bit more sensitive to what your clients are going through and you, as a lawyer are something more than the cowboy that goes into the court to try and win or lose a case, as the case may be.

The first thing that happened was the plaintiffs tried to turn it into a class action and we were able to resist that on the basis that there was too much variation in the dosages and the manifestations of harm and it just didn't fit a class action. So, that was denied.

The physicists were represented by the Hoffman, Hart firm and Mark Wagner and Bob Nash, who was over in Bend locally, and as we got into the cases, they were able to convince the plaintiffs' lawyers to bifurcate liability of the physicists from the damages issue and they bifurcated the physicists case from our case, which was the hospital and the doctor. So they went to trial on one occasion defending the physicists on the question of whether the physicists were negligent in miscalibrating the equipment and to everyone's surprise, they were able to defend that case and so the physicists were out of the case.

LK: Wow

COONEY: They were the ones that really made the mistake. The first case we had that went to trial - I don't think the physicists had yet been found without fault, but they were not joined and the lawsuit was just against the hospital and the doctor. The plaintiffs brought in an expert from Canada, from McGill University, who had won the radiation oncologist doctor emeritus award on an international level that year and I remember his name was Walt Disney Rider and he was on vacation in New Zealand. He flew in and testified against my client and made a very impressive witness, but got hung up on a little stupid question, which I asked only out of desperation because it's kind of a crummy question and you don't ask it if you've got anything to hang your hat on and I just asked him how much he was being paid to testify, a very amateurish question, [Laughs] but I was getting kind of desperate and he rebelled at that question and became indignant and refused to answer. He made a big scene about it and the judge finally had to order him to answer it and the drama grew as he resisted. It was only \$250 an hour, or something, which wasn't an enormous amount, but when that sum was blurted out finally after all the hubbub about it, the jury kind of gasped [LK laughs] as though he'd said something horrible and I think he lost a lot of credibility there.

As you know, in Oregon we have "trial by ambush" and we didn't know who their experts were going to be or really what they were going to say. They came in on a theory that we had not anticipated and it wasn't that the equipment had been miscalibrated, but they came in on a theory that there should have been no radiation at all because the biopsy that had been performed on the lady's cervix, they contended, did not contain tissue that was in fact from the cervix, but from some other area and that you didn't have cancer cells from the cervix then there was a thought of in medicine that you didn't use radiation therapy.

We had not anticipated that and the doctor that did the biopsy was in Mexico on a mountain somewhere and over that weekend we found him and were able to fly him home. Alan Beck was in my office at that time and we flew him into Bend that night, on Sunday evening, about 10:00 o'clock at night, and he was able to demonstrate to my satisfaction the instruments that he used that were of the size and length and were built in such a way

that if properly used, which he said he had done, you could only biopsy cervical tissue. Then, I had a pathologist who had looked at the tissue and disagreed with the first pathologist and so we were able to establish that it was in fact cervical tissue and it was appropriate. The jury found in favor of the doctor in the case.

Something happened between the plaintiffs lawyers, Roy Kilpatrick and this fella Johnson, they had some kind of falling out, and so in the next cases, Johnson was hovering around in the courtroom, but he didn't participate anymore. I never did know quite what the background of that was. And so we tried five or six more of them. As we went through them, I could see plaintiffs' lawyers beginning to develop a theory, which in the last two or three was, I thought a good theory and required a good deal of effort on our part, and that was simply this: that the doctor wouldn't know the equipment was miscalibrated, but after treating a certain number of patients, he should have recognized that he was having, perhaps, a higher rate of complications than had the equipment and the dosage been correct.

So, some of the cases – I remember the first one involved forty-five patients and we had to review all forty-five cases. Then the next couple were sixty and eighty. So, in order to defend the case, we had to get oncologists to review the preceding sixty patient charts and be able to relate to the jury why the complications that they had or didn't have were indicative of any over-radiation. It was quite a task to be able to get radiation oncologists to spend that much time to review them and we had to synthesize and boil down the medical charts so they could review them in fairly rapid order. We tried those and they resulted in defense verdicts and eventually the cases were disposed of. The other one hundred-twenty were paid a very small amount of money.

We had different judges in each of the cases. The first one was Judge Jackson, who was brought in from Baker County and he tried the first one. Then, Judge Edmonds, who went to the Court of Appeals from that position, tried two or three and then Judge – up there, I know he's got an Irish name and I'm going to go to Hell for not remembering an Irishman's name [LK laughs] but he was the DA in Madras who the Rasneeshees allegedly tried to...

LK: Oh yah, poison.

COONEY: Poison and he was very new to the bench and was kind of overwhelmed because there were so many evidentiary issues and procedural issues, but did a very, very good job and took his time and saw us through all those cases. Someday, I'm going to write a book about all those cases. I actually have the tapes of the testimony. The Court up there used a tape recorder like we're using here, as well as the court reporter system. So, when I write My Life in Court and Little League I'll include that as part of it.

Another case that was of some significance. In our work representing the Oregon Medical Association, we have been actively involved in legislation and writing the laws of Oregon that apply to physicians. One of the first cases that I remember being involved in was a case involving the question of informed consent in Oregon and that's the case of Getchell v. Mansfield and when you defend a medical malpractice case, everything is governed by the standard of care of what an ordinarily competent physician does under the circumstances. It was thought that informed consent was governed by the same standard, what doctors generally tell their patients.

In Getchell that issue arose and the instruction was given that it was the standard of care issue when it came to informed consent. The Supreme Court reversed and said no, informed consent is not a matter of standard of care, but it's a matter of absolute legal duty, that a physician has an absolute duty to tell a patient of the procedure, the alternatives and materials risks. That was in about 1969 and we went through a series of years of physicians complaining about scaring the patients because they would sit the patients down when they were about ready to go into heart surgery and they'd say well you might die, you might do this and you might do that. I was getting a lot of feedback about it being bad medicine and so we started thinking about changing law in some way.

It was kind of brought home to me when a member of my family was going in for cervical fusion and paralysis, of course, is one possible side effect of cervical fusions and the neurosurgeon was a friend of mine and he went in and talked to the family member

and I went in afterwards and she was crying. She says, “You damn lawyers have screwed up medicine and the doctor came in here and I didn’t want to listen to all this, scared the hell out of me and I’m all upset and I’m going to be a bad candidate for surgery” and so on.

As a consequence of that, we went back to the drawing board and drafted the existing statute, which is in the Medical Practice Act dealing with informed consent. What it does is make the doctor inform the patient of what the procedure is, that there are risks, there are alternatives and asks the patient the question whether they want to hear all that or not and gives the patient the option. That’s the law now of Oregon and it was written back in 1975.

A case, however, came down recently *Gaston v. Parsons*. I didn’t try that case, but I represented the defendant Parsons on his excess exposure. There was a question of the statute of limitations. We had written the statute of limitations and that was in about 1969 and the statute of limitations was adopted, it was a discovery rule, and prior to the statute, the Supreme Court had just come down and said it was two years whenever you discovered, no matter how far that goes out, it can go out for a lifetime. That caused the insurance companies for the malpractice to scream and holler because they were trying to predict the future payments.

Anyway, we were talking about the statute of limitations and the *Gaston v. Parsons* Rule. We had written the statute to put in a discovery requirement and that simply said that the patient must bring the claim within two years of the event when they knew or should have known of the injury. That had been the law and the *Gaston v. Parsons* Rule changed it substantially and they quote the legislative history where we appeared and gave testimony as the reason for the rule and the Supreme Court said that the Legislature, when they said “discovery of the injury” the Legislature meant three things, number one they had to discover it was the defendant that did it; that it was the defendant that caused the injury and that the injury was due to malpractice. They read all that into discovery of the injury, which always kind of stood my hair on end, but that’s the rule now [LK laughs] and that’s what the legislative history says.



Another case that we were involved in was in 1987 the Tort Reform was at its height and malpractice insurance rates were very high – five million dollars worth of insurance for an obstetrician was costing about sixty thousand dollars a year and so we put together some Tort Reform, part of which was a cap on pain and suffering type damages. Historically, around the country there's been a question of whether those are constitutionally valid or not and Washington declared theirs invalid and California declared theirs valid. We had drafted ours along the lines of California on the idea we thought it would be upheld.

Now, the first case that tested it was Geist, and that was a wrongful death case, I think I've got the name of that correct, but in any event the Court of Appeals said it was unconstitutional and then the Supreme Court came along and reversed the Court of Appeals. The Legislature had created the cause of action that did not exist in common law and therefore the Legislature could cap damages and they held it was valid. Interestingly, when I started practicing law in 1956, the cap on death claims was five thousand dollars, so at least we've progressed some. It's five hundred thousand now.

The issue of whether the cap is valid - if a patient survived was not decided and clearly the wrongful death claim was not authority that it would be good in a survival case. So the case of Lakin v. Senco came along and that was the first case that challenged where the cap was valid or not and we prepared and filed amicus briefs and the Medical Association supporting the cap, but the Oregon Supreme Court ruled that the cap was invalid and unconstitutional because it prohibited the jury from making a complete evaluation of the plaintiff's claim and they based it on the fact that our constitution was adopted in 1859 and anything that was in existence was a recognizable claim in its form was frozen in time and the Legislature could not change that. So, the cap was thrown out. Two years ago, Measure One was before the public on referendum to amend the Oregon Constitution to permit the Legislature to change measures of damages in cases. The voting public voted that down, so the cap is no longer a viable issue.

Another case that was quite interesting was the case of Bremner v. Charles. That was a case that arose out of Umatilla County in Pendleton and Dr. Charles was my client.

She was the only obstetrician in town. Bremner was a young mother that was pregnant, had a baby and the baby was damaged, allegedly at birth, and had severe hypoxia and brain damage. They sued the hospital, the obstetrician and they sued a family practitioner, who was the one that actually delivered the baby. The thing that was interesting about it was it was the first and only case in my years of practice where I was ever successful in State court in getting the court to bifurcate injury from damages and liability. So Judge Olson granted the Motion to Bifurcate liability from the injury and damages and we tried it for a month.

LK: A month?

COONEY: A month, in Pendleton.

LK: Just the liability?

COONEY: Just the liability. There were multiple experts from all over the country and the jury returned a verdict in favor of the defendants, all of them, and the plaintiffs appealed. The case, from the time it was filed until it was finally disposed of in mediation, after multiple trips up and down between the Supremes and the Court of Appeals, was almost eight years in the making and the issues on appeal were predominantly the issue of whether the court properly bifurcated the case. The Court of Appeals said no, the Supreme Court said yes and then it laid there for a while. Then the appellant finally decided they'd like to go back to the Court of Appeals because there were some other unanswered questions and it bounced back and forth between the two courts. It was finally reversed by the Supremes on the evidentiary issue of when prior consistent statements are admissible and so much time had passed that my client had left Pendleton and was practicing elsewhere. The insurance company that had insured the doctor was on the verge of bankruptcy and a mediation took place and it was finally settled.

Unfortunately, in my career I've had the task of defending many lawyers in Bar Discipline matters and those cases are always tragic. I'm not going to go through each of those.

Another kind of interesting case involving a medical malpractice claim and involving informed consent was the case of *Arena v. Gingrich*. Arena was the mother of a young announcer on TV, Arena, the sportscaster-announcer. And, as a matter of fact, the Arena family grew up just a block away from where I grew up as a kid, so I knew the Arenas and they were neighbors. This Arena was suffering from a hiatal hernia and those were not easy surgical repairs, and, as I remember, there were two different ways to do it. Dr. Gingrich was the defendant doctor and was my client and he had never used this angelchik device before and explained to her preoperatively the procedure he was going use and she consented to it. Shortly before the surgery he went to a medical meeting and the topic was a new way to handle surgical repairs of hiatal hernias and the physician who was speaking was a Dr. Angelchik. He had designed a device that was kind of like a donut, a plastic donut, and it had an opening on one side and a draw string and you would open the chest, put this around the esophagus, then tie the draw string and it would lay on top of the area where the hiatal hernia would slide up the esophagus and it was designed, just by its light weight to keep that in place.

Unfortunately, he didn't talk to the patient about using that device until after the surgery, it just didn't occur to him, and so he told her and it was admitted that he told her afterwards. The thing seemed to go along pretty well, but as time went on, she began to have trouble swallowing and had all kinds of problems with it. She attributed that to the device and a lawsuit was filed based on having no informed consent. The doctor admitted he had not spoken to her about it.

The surgeon that went in to remove the device said the device was free and not causing the problem, but the area around the esophagus where they have to stitch, irrespective of whether they use that device or not, had scarred and it had tightened down, so as a result of natural scarring, it had tightened the esophagus so she had a cinch and it

was choking her. Even after it was removed, she still had that sense, but we tried the case and admitted that he hadn't told her about it, but urged...

LK: It wasn't the cause?

COONEY: It wasn't the cause of the problem. Had he done the very thing he told her he was going to do, he would still have done the stitching of this opening and it still would have scarred down. Therefore, it wasn't causal and the jury bought that and found in favor of the defendant doctor. It went to the Court of Appeals and I think we won it in the Court of Appeals.

Then, it went to the Supreme Court and we lost it in the Supreme Court. It was reversed and the Supreme Court adopted for the first time in Oregon the subjective rule of informed consent and it was thought to have been the rule in Oregon that the doctor had to tell the patient what an ordinarily competent person would want to know. That was the majority rule around the country and the Supreme Court said no, it's the subjective test, the doctor has to tell whatever this particular patient thinks they want to know. So that is the current rule of law, arising out of the *Arena v. Gingrich* case. It was sent back and there was a settlement conference with Judge LaMar and the case was finally settled.

Kind of an interesting case involving a lawyer was *Collins v. Fitzwater* and Collins was a member of a Board of Directors of some company and Fitzwater was the lawyer for the corporation, not the lawyer for the individual directors. The Corporation issued promissory notes to raise capital and these were ultimately determined to be securities that weren't registered and were in violation of the Securities Act and whoever the purchaser of the notes were brought a claim against the corporation and the individual directors and the directors were able to recover or settle and they then turned around and brought a claim against Fitzwater, claiming he gave negligent advice and they followed it. We had raised the issue that he was the lawyer for the corporation, not for the directors and therefore there was no direct relationship. We also raised the issue that this was really a claim for indemnity and they had entered into some type of covenant not to execute

where they hadn't really paid anyhow and they didn't have to pay [...] it was kind of a subterfuge to be able to get money from the lawyer, who was insured and these other people weren't. Some of my great lawyering resulted and we lost the case at trial and we lost the case in the Supreme Court. The court said yes it was a security and yes he was lawyer for the corporation but he was negligent in the advice he gave and it wasn't a claim for indemnity and so we lost all the way around. So, that was my big entrance into the legal malpractice field.

An interesting case was the case of Wattenberg v. United Medical Laboratory. Wattenberg was a salesman for some type of computer company. United Medical Labs was at one time the biggest lab in Oregon and it was noted for being a computer oriented laboratory, one of the first. They had a president, by the name of R.S. Michael, as I remember, and Mr. Michael was a religious man and I don't remember his faith, but it was a strong thing in his life. He had an employee for the lab that went to Norway or Switzerland to look at new computers and new equipment for use in the lab and while this young man was over there in Norway or Switzerland, he met a young woman who he was attracted to. I think he was married. He made some arrangements with Dr. Wattenberg, who was the salesman that was trying to sell all this stuff to him that Dr. Wattenberg would bring this lady to the United States, give her a job and whatever was going to go on could go on. All this transpired – she came here and so somewhere along the line Wattenberg was putting pressure on the United Medical Lab fellow that had gone over and met this woman to buy all these computers and he was thinking these weren't the computers that he wanted and he felt like he was being pressured.

So, he went to the boss of United Medical Labs, R.S. Michael, and told him the whole story and leveled with him. Michael was outraged and called the employer, Dr. Wattenberg, and said that guy is blackmailing my employee and I want it stopped. So Dr. Wattenberg's employer fired him and he then brought a lawsuit against the lab and Mr. Michael, as I recall, for libel and slander and interference with contract. Wayne Hilliard, who is now deceased, represented Dr. Wattenberg and Gordy Moore, of the old Schwabe, Williamson Firm, represented both the lab and R.S. Michael.

Shortly before the trial, Gordy Moore came into the office and said would you try the case for Mr. Michael and he, Gordy, would try the case for the lab and I said that would be fine. So, we were ready for trial and the night before the trial, Jerry Banks, who was a lawyer with Gordy Moore, called me at home and said "Turn on your television, Dr. Wattenberg is on television in New York."

So, I turned on the television and there was Dr. Wattenberg, but he was not being introduced as Dr. Wattenberg he was being introduced as Joe Blow, somebody else, and the author of the best seller, a paperback novel at that particular point and time and it was entitled *How to Find and Fascinate a Mistress and Survive* [LK laughs] so we perked up and called each other back and said "Wasn't that him?"

"Yes, that was him," but he was under the assumed name of Joe Blow, the author.

So the next day we found this book and it was, to say the least, quite a bit off color. In fact, I couldn't keep it away from my secretary [LK laughs] and so his picture was on the back of the book as the author. So, here's a man who's saying his reputation had been damaged and all the wonderful things he'd done and he was writing this book.

So, we went to trial and Gordy Moore was noted for being a little aggressive in the courtroom and of course on top of the counsel table right next to the jury sat the book *How to Find and Fascinate a Mistress and Survive* and Wayne Hilliard, I don't know if Wayne ever knew about it or not, but he picked up on it, called us into chambers before Judge Olsen and made a Motion in Limine to restrict the use of the book, which he did, but he didn't preclude us from mentioning it as to the question of what damage at trial, I mean what was his reputation? Anyway, we went ahead and tried the case and as the case went on, Gordy and Wayne were at each other's throats pretty badly and it got to the point where Wayne would say to me, "Tom, would you tell Mr. Moore to sit down and shut up" [LK laughs] and Mr. Moore would say, "Tom, would you tell Wayne Hilliard that he's a jerk [LK laughs] or whatever may be and I was caught in the middle.

As the case went on, the book got more and more involved and became more and more a centerpiece and Judge Olsen became more and more irritated with everybody in the courtroom. The case ended up with a verdict for the defense and the Judge was upset

with the book being displayed as much as it was, so granted a new trial based on his own motion [Both laugh] without anybody having raised it and it went on up to the Supreme Court.

I don't actually remember the outcome of the case now, but I remember the to-do we had about trying to figure out if that was really Dr. Wattenberg and it was.

The first malpractice case I ever tried was Austin v. Sisters of Charity and Providence Hospital and one of my mentors, Howard Beebe, it was his case and he suffered a heart attack not too long before the case was to be tried. So I was asked to try it and Mr. Austin went in for an x-ray, he'd had a spinal fusion, and they were x-raying him and the technician, which was a young woman that wasn't very big and Mr. Austin was a pretty good sized man. She got above him and put her arms under his shoulders to slide him up on the x-ray table a little bit. He contended he was laying with nothing on, except a gown that was open in back, so his skin was on the marble of the x-ray table, and as she tried to pull him, he said his body didn't move freely, and she pulled and it popped his back [LK laughs]. She denied it, she said there was a pad there, so it was a "he says, she says" type of thing. The x-rays that were taken afterwards showed the fusion that had been done originally had never healed and it was what we'd call a pseudo-arthritis and it was kind of grisly, but it wasn't bone, so it wouldn't take much to pull that loose.

In any event, the case was tried and the plaintiff's lawyer didn't offer anybody, any expert witness to say...

**[End of Tape 2, Side 1]**

**Tape 2, Side 2**  
**2000 November 2**

LK: [...] two, day two, November 2 of the oral history of Tom Cooney and we were talking about a medical malpractice case

COONEY: Austin v. Sisters of Charity

LK: Okay, maybe you can describe it again, just to make sure we're on track.

COONEY: Okay, this is the case of Austin v. Sisters of Charity and the verdict had come in in favor of the plaintiff and Judge Crookham, I believe it was, set it aside and granted a new trial. Plaintiff appealed and the Supreme Court said although it was true – actually, the Judge not only granted a new trial, but he entered a judgment notwithstanding the verdict and plaintiff appealed and the Supreme Court reversed the JNOV and sent it back for new trial. They said it was true, but there was no expert testimony sufficient to establish that the movement had broken the pseudo-arthritis, but the patient's complaints of immediate pain and discomfort were sufficient to let it go to a jury on the basis of a sprain. So, the case came back and I think it was ultimately settled for some amount.

The other case we might mention is one that it was entitled Pemberton v. Bennett and it's kind of brought to my mind because of some recent efforts that were being made in the Commission that puts together the Oregon Rules of Civil Procedure and it has to do with independent medical exams and whether the plaintiff has a right to have his or her lawyer present at an independent exam. This case is quite old, I've forgotten, probably 25 or 30 years old.

Martin Schedler, who's still practicing, was representing Ms. Pemberton and I represented Ms. Bennett. Ms. Pemberton was at a grocery store, walking toward the grocery store along a sidewalk that was between the building and the parking lot. Ms. Bennett pulled her car in, facing into the sidewalk where Ms. Pemberton was walking,



reached around to chastise her child in the back seat and her foot slipped off the brake, hit the gas, jerked forward and pinned poor Ms. Pemberton to the wall and injured her legs.

So the case was getting ready for trial and in those days I used to use independent medical exams more than I do now. I requested an exam and I can't remember whether the plaintiff showed up for the exam with her lawyer and the doctor called me and refused to proceed, or whether the lawyer told me he was going to do it, but anyway, we ended up in court and Judge Charles Redding, Robert Redding's Dad, ruled there could not be a lawyer present during the exam of a female patient.

That kind of settled the rule for a long time, until these recent debates arose regarding whether you should have a lawyer there for the plaintiff and whether it should be tape-recorded, and all those things. When I talked with some of the members of the Committee that were reviewing it, they didn't even know [. . .?], didn't even know the case existed, but the gist of the case was it gave the discretion with the court as to whether to allow a lawyer to be present.

Those are kind of the cases that I remember off the top of my head.

LK: Okay

**[End of Tape 2, Side 2]**

**[End of Interview]**