

**Shadow Stock Plans**

Many successful closely held corporations--businesses with only one or a few shareholders/partners/members often in the same family--desperately need bright and talented key employees to help in the continued success of their business. While bringing in an "outsider" to help run the business may be necessary, the owners of the business want to avoid having to provide an ownership interest in the business to this person but may be willing to share some of the profits in an effort to satisfy this key employee. One way of doing this is via a "Shadow Stock Plan" (SSP) in which employees are granted "units" with values relating to common stock of the company.

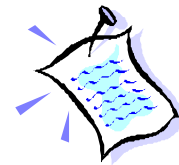
Benefits of a SSP include allowing employers to compensate key employees with stock-type incentives without giving away voting rights, risking minority shareholder problems, or creating complicated and burdensome buy-sell agreements. SSPs also avoid securities laws and regulations, particularly for publicly held companies. A business can issue phantom stock options which, unlike traditional stock options, are deductible to the employer. Additionally, the IRS has even signed off on the use of SSPs for S corporations by not stating that units held by an employee will not be deemed to be a second class of stock and thus will not threaten termination of the S election.

When structured properly, SSPs avoid the rigorous rules under the Employee Retirement Income Security Act (ERISA). ERISA contains strict employer requirements relating to so-called "benefit plans." A SSP will not be considered a benefit plan if by its terms it does not provide primarily for deferral of payments until the termination of covered employment or beyond. In other words, the key to avoiding ERISA is to allow payments from the SSP to the employee prior to the employee's leaving employment. One notable exception is for an "unfunded" plan for certain highly compensated employees, which will not be subject to ERISA rules if certain procedures are followed.

SSPs do raise some important tax issues. These issues include the deductibility of distributions, the possibility that distributions will be classified as wages to the employee and be subject to payroll taxes, the treatment as ordinary gain to the employee rather than capital gain treatment afforded to holders of stock, and possible recognition of income to an employee. Fortunately, the negative implications of some of these tax issues can be avoided through careful tax planning and ongoing oversight of the plan.

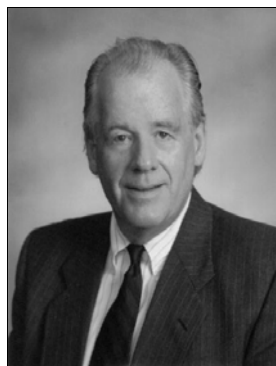
All in all, a properly structured SSP tailored to the needs of your business may provide just the sort of incentive-based compensation package desired by a highly sought-after key employee, without the need to give up any ownership interests to that employee. If you would like to find out more about whether a SSP is right for your business, please call Mark O'Donnell, who is ready to assist with all of your business planning needs from employment, to taxation, to transactions, to formation.

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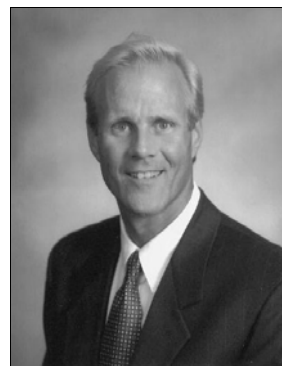


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Mark P. O'Donnell



Kelly W. Clark



## RESULTS FROM THE COURTROOM

### O & C Bags Multnomah County

Fred's Marina has been in continuous operation since 1946, providing its customers with moorage, recreation, and at various times, boat repair. Over the years, Fred's Marina has flourished into one of the more popular marinas on the channel. Beginning in the early 1990s, the marina began making plans to expand. In 1996, rising floods destroyed Fred's Marina's parking areas, as well as the boat ramp. In the winter of 1997, upon learning from the Army Corps of Engineers that high waters were once again approaching, Fred's Marina undertook to raise the level of its parking areas above flood stage, in an effort to save the family business.

Almost immediately, enforcement officers from the Multnomah County Land Use Planning Division ordered Fred's Marina to stop work to despite the apparent existence of emergency conditions. Fred's dutifully applied for permits. However, unbeknownst to Fred's Marina, the County apparently decided that it would use Fred's Marina as an example to other marina owners. Over the course of the next two and a half years, through the use of Stop Work Orders, "draft" violations, and convoluted interpretations of the Multnomah County Code, Fred's Marina and its operations were essentially shut down and left dead in the water. In August of 1999, after many failed attempts to negotiate a reasonable solution with the County, O'Donnell & Clark filed suit on Fred's behalf. The complaint alleged civil rights violations including procedural due process violations and unconstitutional takings. After hardfought litigation, earlier this year a US Magistrate ruled that as a matter of law the county's actions amounted to an unconstitutional taking of Fred's Marina's property.

As a result, the County agreed to compensate Fred's Marina for its lost business, agreed to a fast track permit process intended to allow Fred's to proceed quickly with its expansion plans, and agreed to waive all fees for future permits. The result was a tremendous victory for Fred's Marina and will hopefully mean an attitude change at Multnomah County on behalf of other businesses.



### McIntire vs. Bradbury - Politics Makes for Strange Bedfellows

During the Summer and Fall of 2000, O'Donnell & Clark brought a high profile case against Oregon's top election officials. It had been the practice of these officials to place registered voters in a category known as "inactive" without providing them with notice of the effects upon their electoral rights, most specifically the right to sign initiative petitions. As a result, thousands of registered but "inactive" voters were disenfranchised when their signatures were summarily stricken from initiative petitions without notice.

Don McIntire, an advocate of limited government and defender of the Oregon Initiative, brought this issue to our attention and stood as our lead plaintiff. Joining the list of plaintiffs were Lloyd Marbet (environmental advocate), Ted Piccolo (government waste activist), Rep. Joanne Bowman (Anti-Measure 11) and Lewis Marcus (government and disabilities policy). One courtroom observer remarked that the cast of plaintiffs reminded him of the "Cantina Bar Scene" in Star Wars. In spite of divergent political philosophies, the plaintiffs shared a common respect for the right of citizens to determine the shape of government through the Initiative.

O & C brought suit against the two most powerful elections officers in Oregon, Secretary of State Bill Bradbury and Multnomah County Elections Director Vicki Ervin, attacking the process, procedure and legitimacy of the "inactive" designation. The defendants pulled out every procedural trick in the book to avoid discussing the merits of the claims, but when the smoke finally cleared, we won.

Judge Michael Marcus agreed with us on a key constitutional challenge, determining that government officials had been violating the Federal Due Process rights of Oregon voters. Judge Marcus agreed that Oregon voters have the right to be notified if the government has placed them in a category that eliminates their right to sign petitions. The Judge seemed incredulous when attorneys for the Secretary of State argued that the ability to sign an initiative petition was not a "fundamental liberty interest" deserving of due process protection.

Following the ruling, the parties settled the case without appeal: the government reimbursed our clients for the cost of bringing the suit and agreed to work to design a new and constitutionally appropriate form of notice.

#### What We Do:

General Civil Trial Work in State and Federal Courts  
Administrative Litigation before Government Agencies  
Business and Contract Lawsuits  
Civil Rights and Constitutional Law Including Property Rights, Free Speech and Freedom of Religion  
Child Abuse and Child Sex Abuse Cases on Behalf of Victims  
Real Property Cases and Litigation  
Employment Cases on Behalf of Employers  
Wrongful Death and Serious Injury Cases  
Formation, Organization and Representation of For-Profit Corporations, Limited Liability Companies, Partnerships, and other Business Entities  
All Aspects of Non-Profit and Tax Exempt Entities  
Business Insurance Coverage and Insurance Policy Review  
Business, Personal and Estate Tax Planning  
Asset Protection Planning, Risk Management and Related  
Preventive Law Advice and Consultation  
All Aspects of Real Estate Acquisition, Sale, and Development  
Tax Free Exchanges and Real Estate Financing  
Business Succession Planning for Family and Non-Family Businesses  
Wills, Estate and Disability Planning  
Negotiation and Mediation of Business Disputes  
E-Commerce Law and Agreements  
Mergers, Acquisitions and Employment Law

**What We Don't Do,  
But Will Happily Refer for You:**

Debtor Bankruptcy  
Criminal Law  
Domestic Relations and Family Law  
Juvenile Law

### **Inside O & C: Adding Associates**

O'Donnell & Clark is pleased to announce that as of Fall 2000, Ross Day and Matthew Lowe joined the firm.

Ross Day graduated from Willamette University College of Law in 2000 and is licensed to practice in Oregon, Washington, and Federal District Courts. Ross has been a clerk with O'Donnell & Clark since 1997.

In addition to his law degree, Ross has a Master's of the Arts degree in Political Management from The George Washington University, with an emphasis in Issues Management and Lobbying and the Budget Process. Ross has a Bachelor's of Science degree in Political Science from Oregon State University. He has a strong political background, working for Senator Mark Hatfield and Congressman Jim Bunn while in Washington D.C. Upon returning to Oregon, Ross served as the Legislative Director for the Majority Office in the Oregon House of Representatives in 1997, and served as legislative aide to now State Senator Roger Beyer, during the 1999 session. Ross' practice areas include: Government Law, Election Law, Administrative and Regulatory Law, Land Use and Litigation.

Matthew Lowe also graduated from Willamette University College of Law in 2000 where he was Associate Editor of the Willamette Law Review and is now licensed to practice law in Oregon and Washington. Matt's undergraduate degree is from Villanova University, where he received a Bachelor of Arts in Political Science and a minor in History in 1991.

From 1993 to 1995, Matt served as a Legislative Assistant to U.S. Senator Bob Packwood, where he advised the Senator on various policy issues including taxation, banking, housing, urban development, foreign relations and national defense. During the 1997 Oregon legislative session, Matt served as Chief of Staff to Senator Tom Hartung and specifically focused on education policy and analysis with emphasis on charter schools.

Matt's practice areas include for-profit and nonprofit corporate and business law, taxation issues affecting small business and nonprofit entities, employment matters, and business and real estate transactions.

### **Keeping Watch on the Legislature**

In January 2001, the Oregon Legislature convened the 71<sup>st</sup> legislative assembly. There were many pressing issues facing the Legislature, such as charter schools, unemployment tax reform, and election law reform.

In January, Ross Day was asked to testify before the Senate Rules, Elections, and Redistricting Committee on election law reform. In particular, the committee was interested in the issues raised in a recent article authored by Ross in the Oregon State Bar Bulletin, concluding that the Florida fiasco which held the outcome of the presidential election at bay for some five weeks could have happened in Oregon. After his testimony, the Secretary of State himself, concerned about the impact of Ross' article, felt the need to respond to Ross's accusations, never denying the accuracy of the article.

One of the issues affecting many of O'Donnell & Clark's clients is Unemployment Tax assessments conducted by the Employment Department. In particular, one client of O'Donnell & Clark has recently felt the particularly heavy hand of the Employment Department. In addition to an administrative law hearing, O'Donnell & Clark filed a federal civil rights suit against the Employment Department. Eventually, the Employment Department conceded to the demands. Meanwhile, on the legislative front, we advocated for reforms within the Employment Department regarding the manner in which they calculate unemployment tax assessments. House Bill 2126 was introduced at our request, later incorporated into Senate Bill 666, and currently pending before the Senate Business Labor and Consumer Affairs Committee. The measure has the support of interest groups such as the National Federation of Independent Businesses. At the time of this article, it appears as though these changes will become a reality.

Kelly Clark represents many charter schools across the state. The charter school law, Senate Bill 100, passed by the 1999 Legislature, is a new creature which many school districts are trying to tame. Furthermore, many of our clients have found it difficult, if not impossible, to receive a charter from their home school districts. So, on behalf of its many charter school clients, we have effectively garnered the support of many key influential legislators, resulting in successful charter applications.

Visit our Website:

[www.oandc.com](http://www.oandc.com)

[www.odonnellclark.com](http://www.odonnellclark.com)

[odonnell-clark.com](http://odonnell-clark.com)

**O'DONNELL & CLARK, LLP in Print**

Because we strive to be experts in our fields, the lawyers at O'Donnell & Clark are frequently asked to write about legal issues for both professional and public publications. Here is a list of some of our recent work:

**Mark O'Donnell:**

**Oregon Society of Association Management**

Mark has been featured many times in the newsletter published by the Oregon Society of Association Management. In the January/February 2000 issue, Mark authored an article entitled *Your Association and Political Activity*. In it, he addressed some of the issues that an association would need to keep in mind when forming a Political Action Committee to participate in the electoral process. He identifies the Federal Elections Campaign Act, the Internal Revenue Code, as well as campaign contributions in relation to tax exempt status. In the March/April 2000 issue of OSAM, Mark was featured again with an article entitled *Disclosure Regulations for Tax Exempt Organizations Under Oregon Law and the Internal Revenue Code*. In this article, Mark elaborates on the five main areas that are addressed by the final regulations of the Internal Revenue Service regarding disclosure requirements. Finally, in May/June 2000, Mark again was featured in the OSAM newsletter with an article entitled *Required Recordkeeping*. Here, Mark addresses nonprofit organizations and the requirements of their record maintenance under Oregon law specifications. Mark wrote a two-part article for the November/December 2000 issue of OSAM entitled *Director's Risk of Legal Liability and How to Protect Against it*.

**Kelly Clark:**

**Battling Big Brother**

At the request of the Oregon State Bar, Kelly recently authored a chapter on the Oregon Administrative Procedures Act (APA) for the Bar's new treatise on "Administrative Law." While the article is somewhat technical and might not be your first choice for bedtime reading, it is good explanation of one of the main tools that lawyers have to keep government agencies under control, and Kelly's expertise in such matters was well recognized both by his having been asked to write the article, and by the article itself.

**On Measure 7**

Kelly, along with O'Donnell & Clark associate Ross Day, is featured in the March 2001 edition of Brainstorm Magazine, a journal of Northwest politics, offering analysis and criticism of the Oregon courts in their growing tendency to invalidate grassroots ballot measures for hyper-technical reasons, including the so-called single subject or multiple amendment rule. The article raises a question of whether these cases, the most recent of which invalidated Ballot Measure 7 (the property rights/partial governmental takings initiative), are essentially just a power grab by the judiciary, at the request of the political establishment, as over against the grassroots populists who drive the initiative process.

**Also on Measure 7**

Along with O&C contract attorney Eric Winters, Kelly authored a front page editorial in The Oregonian, Sunday, December 10, 2000, criticizing local government in their frantic effort to overturn the will of the people as expressed in Ballot Measure 7, when the local governments *en masse* filed suit to stop its implementation. The article chided the government for its arrogant insistence that they, rather than the people, know what is best for the people.

**Ross Day:**

**Oregon State Bar Bulletin**

Ross was featured in the February 2001 edition of the Oregon State Bar Bulletin, in an article entitled "Not in Oregon?" which was essentially an exploration of whether the election fiasco that happened in the presidential race last year in Florida could have happened Oregon. Ross concluded that, given the undue deference Oregon law gives to the Secretary of State, that such a fiasco could indeed have happened here. The article apparently hit home: the Secretary of State in the next month's edition wrote a lengthy and highly defensive article in response to Ross's piece. At the Bar's request, Ross then authored a rebuttal. The trilogy makes for fun reading.

*You can call our office at 503-306-0224 to receive copies of any of these articles.*



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