

BIENNIAL REPORT *of the* OREGON LAW COMMISSION 2005-2007



The Oregon Law Commission operates through a public-private partnership between the State of Oregon and Willamette University. The Commission is housed at the University's College of Law, adjacent to the Oregon State Capitol.



Dedication to David R. Kenagy
Executive Director of the Oregon Law Commission

With admiration and affection, we are pleased to dedicate this issue of the Oregon Law Commission's *Biennial Report* (2007) to David R. Kenagy, Executive Director of the Oregon Law Commission, in honor of his myriad contributions to the Oregon Law Commission. David is retiring from Willamette University and the Commission at the end of the 2007 legislative session.

David has served as an unabashed and effective advocate for the Law Commission the last ten years. David believes that the Commission fills a critical void in the lawmaking process by providing a continuous and impartial program of law reform. Kenagy explains that "Statutes are like bridges. If you appropriate money to build them, then you must also maintain them. The law is the same; it must be changed to stay current."

As Associate Dean at the College of Law, Kenagy was instrumental in the very formation of the Oregon Law Commission and served as its first (and to date only) Executive Director. According to Dean Symeon Symeonides, Kenagy was "ideal for the position" because he is "very thoughtful, energetic and diplomatic." Major law improvement projects that resulted in significant legislative reform under Kenagy's tutelage certainly include the revision of Oregon's laws on judgments and judicial sales (2003 and 2005), the revision of Oregon's government ethics laws (2007) and revisions to the Juvenile Code (2003, 2005 and 2007).

For his tireless efforts on behalf of the state and community, the Oregon Law Commission dedicates this issue of its *Biennial Report* to David R. Kenagy, Executive Director – our colleague and friend.



OREGON LAW COMMISSION

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Sen. Kate Brown
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John DiLorenzo
Sandra A. Hansberger
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Lisa L. Ehlers
Legal Assistant

Ann Boss
Legislative Counsel

David W. Heynderickx
Special Counsel to
Legislative Counsel

BIENNIAL REPORT OF THE OREGON LAW COMMISSION

2005 – 2007

From the Executive Director's Office

David R. Kenagy
Executive Director

and

Wendy J. Johnson
Deputy Director and General Counsel

**This Report is prepared for the Legislative
Assembly as required by ORS 173.342**



*The Oregon Law Commission
is housed at the Willamette
University College of Law,
which also provides executive,
administrative and research
support for the Commission.*

Cover photo courtesy of Office of Communications, Willamette University



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This Biennial Report reflects the Commission's work from 2005-2007. We would like to take this opportunity to share the work completed by the Commission this biennium and also share some changes that have occurred within the Commission.

Work Completed

The Oregon Law Commission, with the help of over two hundred dedicated and exceptional volunteers, completed work on twenty-one pieces of recommended legislation for the 2007 Legislative Assembly. In addition, the Commission is already looking ahead to 2009 and has commenced study or will begin study of several other significant law reform projects as described in this Report.

Changes for the Commission

The Oregon Law Commission encountered changes among its membership this biennium. Notably, Chief Justice Wallace Carson retired and his successor, Chief Justice Paul J. De Muniz replaced him as an Ex-Officio member of the Commission. After being appointed to the Oregon Supreme Court, Justice Martha Walters also resigned from the Commission. The Oregon State Bar Board of Governors appointed Mustafa T. Kasubhai, a member of the Worker's Compensation Board, as her replacement.

We must note the end of an era. Executive Director of the Oregon Law Commission and Associate Dean of Willamette University College of Law, David R. Kenagy, will retire from his positions, effective at the end of the 2007 legislative session. Dave has served as the Executive Director of the Commission since it was first funded in the year 2000 and, with his endless energy and foresight, the Commission's role in legislative reform has grown exponentially. We thank Dave for his tremendous contributions to the Commission. Replacing Dave as the Executive Director will be Jeffrey Dobbins. Jeffrey is an Assistant Professor of Law at Willamette University College of Law, and we look forward to working with him as we enter a new biennium.

We welcomed two new staff members as well this biennium. Samuel Sears joined the staff of the Oregon Law Commission, replacing Marta Stadelli as our Staff Attorney. In addition, Lisa Ehlers was hired as a Legal Assistant, replacing Julie Gehring. In one more staff development, Wendy Johnson, our Deputy Director, has been named General Counsel for the Commission. Wendy



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will stay on as Deputy Director, but her new added title appropriately recognizes the scope of her work for the Commission.

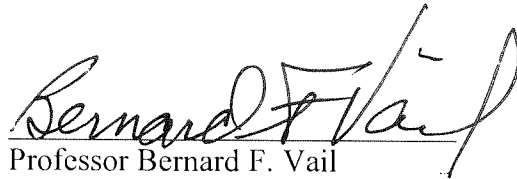
In addition to these changes to the make-up of our Commission and staff, we saw a change in the source of our projects. This biennium marked the first time that the Law Commission produced legislation based on requests from the Governor, legislature, and State Treasurer. We received a specific mandate from the Governor and legislature to overhaul government ethics law in Oregon. Our extensive work on the ethics issues culminated in the proposal of ten ethics related bills. State Treasurer Randall Edwards and the MDAC also asked the Oregon Law Commission to review the government borrowings statutes, resulting in a bill providing for the overhaul of three chapters of bond law. And, the legislature again requested that the Oregon Law Commission tackle various issues in the area of paternity, resulting in another complex bill updating Oregon law.

Thank You

We would like to thank the distinguished and very capable members of the Commission, its Work Groups, and the Executive Director's office at Willamette University for their extensive efforts on behalf of the Commission. The Commission looks forward to the next two years as it continues the important work of law reform in support of the Oregon Legislative Assembly.



Lane P. Shetterly
Chair, Oregon Law Commission



Professor Bernard F. Vail
Vice-Chair, Oregon Law Commission



WILLAMETTE
THE FIRST UNIVERSITY IN THE WEST

COLLEGE OF LAW
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On behalf of Willamette University, it is my pleasure to congratulate the Oregon Law Commission and its staff for another highly productive biennium, the results of which are described in this Report.

I would like to begin by recognizing the leadership and dedication of David R. Kenagy, who is retiring from his positions as the first Executive Director of the Oregon Law Commission and Associate Dean of the Willamette University College of Law. David's hard work and exceptional skills during this formative time for the Commission have earned him well-deserved, universal praise. We shall miss him. At the same time, I am pleased to announce that Professor Jeffrey Dobbins has agreed to serve as the new Executive Director. Jeff has an outstanding record of accomplishment and a keen interest in our State's future, both of which are essential ingredients for success in this position.

The Willamette University College of Law is a proud supporter of and contributor to the all-important endeavor of law reform. Based on a public/private partnership agreement with the State of Oregon first entered into in 2000, the College of Law continues to biennially support the work of the Commission, including providing a home for the Commission. As the person who, for the last seven years, has had signing authority over this expenditure, I continue to wholeheartedly support it, despite multiple competing needs of the law school.

As additional evidence of our commitment to the future of the Oregon Law Commission, I would mention the acquisition by Willamette University of the historic Carnegie building (the former Salem Public Library), which is adjacent to the Capitol at the corner of State and Winter Streets. This building will house the Commission, after we renovate and restore it to its old grandeur, at a cost of \$4.5 million, by the end of 2008. The building will include a hearing room, which will provide a good meeting room for both the Commission and the Work Groups.

Again, I am pleased that we have been able to continue our partnership with the State and to support the important work of law reform.

Sincerely,

Symeon C. Symeonides
Dean and Professor of Law

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Commission History

The Oregon Law Commission was created in 1997 by the Legislative Assembly to conduct a continuous program of law revision, reform, and improvement. (ORS 173.315) The Commission's predecessor, the Law Improvement Committee, had been inactive since 1990. Legislative appropriations supporting the Commission's work began July 1, 2000. At that time, the State, through the Office of Legislative Counsel, entered into a public-private partnership with Willamette University. The Commission is composed of thirteen Commissioners and is staffed by the Executive Director's office, which is housed at Willamette University College of Law. The College of Law provides executive, administrative and legal research support for the Commission and the Commission's Work Groups. The College of Law also facilitates law student and faculty participation in support of the Commission's work.

Commission Membership

In creating the Commission, the Legislative Assembly recognized the need for a distinguished body of knowledgeable and respected individuals to undertake law revision projects requiring a long-term commitment and an impartial approach. Oregon statute requires that the Commissioners include four legislators or their designees, the chief justice of the Oregon Supreme Court, the attorney general, a governor's appointee, the deans or representatives from each law school in Oregon, and three representatives from the Oregon State Bar. Lane P. Shetterly and Professor Bernard F. Vail were elected to serve as the Commission's Chair and Vice-Chair, respectively.

Commission Mission and Purpose

The Commission serves the citizens of Oregon by assisting the legislature, executive agencies and judiciary by keeping the law up to date through proposed law reform bills, administrative rules and written policy analysis. It accomplishes this by first identifying appropriate law reform projects, through suggestions gathered from the citizens of Oregon, each branch of government and the academic community. By remaining in close personal relationships with the people who use and know Oregon law, the areas generally considered "broken" and in need of repair become clear. Once potential projects are identified, the Commission researches the areas of law at issue, including gathering input from disinterested experts and those whom may be affected by proposed reforms. The goal of the Law Commission is both proposed law and written reports on the proposed reform provisions. The written reports are the Law Commission's stock in trade. These reports detail the law reform project's objectives, the participants, and the decision-making process. Importantly, the reports describe points of disagreement on specific policy choices and set out the reasons for and against those choices.

Commission Project Selection

The Commission's Program Committee, chaired by Attorney General Hardy Myers, reviews written law reform project proposals and makes recommendations to the full Commission regarding which project proposals should be studied and developed by

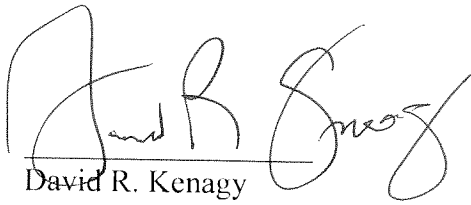
the Commission. In considering the Program Committee recommendations, the Commission uses several factors to select law reform project proposals for action. Written guidelines govern the project selection process. Priority is given to private law issues that affect large numbers of Oregonians and public law issues that are not in the scope of an existing state agency. The Commission also considers the resource demands of a particular issue, the length of time required for study and development of proposed legislation, rules or written policy analysis, and the probability of approval of the proposed legislation by the Legislative Assembly and the Governor.

Commission Project Preparation and Use

Once a law reform project has been presented to the Program Committee and approved by the full Commission for study and development, a Work Group is formed. Currently over two hundred fifty volunteers serve on the Commission's Work Groups. Work Groups are generally chaired by a Commissioner and often have a designated Reporter to assist with the project. Work Group members are selected by the Commission based on their recognized expertise, with Work Group advisors and interested parties invited by the Commission to present the views and experiences of those affected by the areas of law in question. The Commission works to produce reform solutions of highest quality and general usefulness by drawing on a wide range of experience and expertise rather than placing primary reliance on specific interest-driven policy making. This is hard to do, but constant vigilance over the process by the Commissioners and staff with heavy reliance on the expertise of technically disinterested Work Group members has tended to minimize the influence of personal self interests on the recommendations of the Law Commission.

With the help of the many dedicated volunteers serving on the Commission's Work Groups, the Commission prepared and approved 21 bills for recommendation and introduction in the 2007 Legislative Session. Commission recommendations are unique in that each is advanced with an accompanying explanatory report. The Law Commission "shows its work." The reader can see who was involved, the arguments raised, resolved or deferred and the reasons why. The Legislative Assembly is then able to efficiently make any necessary policy choices embedded in the recommended legislation. This Biennial Report contains the available explanatory reports for the 2007 bills. These were generally distributed during Session at the time each bill was presented in Committee and then followed the bill through the legislative process. The Commission presents its recommended bills and reports to the Legislative Assembly. The usefulness of the Commission's work is found in its contribution to thoughtful public policy formation. This is true whether the recommended bills themselves are enacted in whole or in part or deferred for later consideration. The value of memorializing the thinking behind each of the Commission's law reform proposals cannot be overstated.

This Biennial Report documents the Commission's work from June 1, 2005, through June 1, 2007. It is our hope that the report gives you clearer insight into the Commission's law reform process, its work, and its potential for the future. We wish to again extend our thanks to the Commissioners and the many volunteers who have given of their time to make the Commission's 2007 legislative package a success.



David R. Kenagy
Executive Director



Wendy J. Johnson
Deputy Director and General Counsel

Commission Staff Transitions: A personal note from the outgoing Executive Director

As noted elsewhere in the Biennial Report, effective at the end of the 2007 Session, I am retiring from the Willamette University College of Law and stepping down as the Law Commission's Executive Director. As many of you know, my health has limited the energy I am able to devote to this important work. It is therefore time for a change.

I am pleased that the Commissioners have so graciously welcomed the selection of our new Executive Director, Professor Jeffrey Dobbins. I am grateful to our Dean and Law Commissioner, Symeon Symeonides, for this important appointment. I am also glad for his recognition of the significant contributions of long time Deputy Director, Wendy Johnson, with her promotion by our Dean to Deputy Director and General Counsel. The College of Law remains dedicated to the important mission of the Commission and has expressed that dedication through the commitment of its best and brightest to this work.

It has been a joy helping the Oregon Law Commission for the past ten years as both volunteer and Executive Director. There has been much good work accomplished on behalf of the citizens of Oregon. Law reform free from the influence of personal gain – but driven instead by a heart-felt desire to meet Oregon's law improvement needs with expertise-driven proposals – is a great gift to our state. I want, therefore, to again thank the many private citizens, legislators, judges, agency personnel, academicians, staff and administrators, including my dear friends at the College of Law, the Law Commissioners and our own dedicated staff, all of whom have made this happy gift a reality. Finally, to Wendy Johnson, my personal thanks for your understanding and support especially during these most recent years as you have faithfully stepped up to help me at each new turn. DRK

Commissioners of the Oregon Law Commission

Lane P. Shetterly, Chair Director, Oregon Land Conservation and Development, Salem, Oregon	Appointed by Speaker of the House	<u>Present Term</u> 9/1/05- 8/31/07
Professor Bernard F. Vail, Vice-Chair Designee of Lewis & Clark Law School Dean Professor, Northwestern School of Law, Portland, Oregon		9/1/06-9/1/08
Senator Kate Brown Senator, State of Oregon, Portland, Oregon	Appointed by Senate President	9/1/05-8/31/07
Chief Justice Paul J. De Muniz Chief Justice of the Oregon Supreme Court, Salem, Oregon	<i>Ex Officio</i>	
Sandra A. Hansberger Executive Director, Campaign for Equal Justice	Designee of Board of Governors of Oregon State Bar	9/1/06-8/31/08
Professor Hans Linde Distinguished Scholar in Residence, Willamette University College of Law, Salem, Oregon	Appointed by Governor	9/1/06-8/31/08
Gregory R. Mowe Attorney at Law, Stoel Rives LLP, Portland, Oregon	Designee of Board of Governors of Oregon State Bar	9/1/05-8/31/07
Attorney General Hardy Myers Attorney General of the State of Oregon, Salem, Oregon	<i>Ex Officio</i>	
Robert Ackerman Attorney at Law, Eugene, Oregon (formerly State Representative)	Appointed by Speaker of the House	9/1/05-9/1/07
Dean Symeon C. Symeonides Dean of Willamette University College of Law, Salem, Oregon	Dean of Willamette University, College of Law	Indefinite term as Dean of Law School
Professor Dominick R. Vetri Professor, University of Oregon School of Law, Eugene, Oregon	Designee of University of Oregon Law School Dean	9/1/06-9/1/08
John DiLorenzo Attorney at Law, Davis Wright Tremaine LLP, Portland, Oregon	Appointed by Senate President	9/1/05-8/31/07
Mustafa T. Kasubhai Member, State of Oregon Workers' Compensation Board, Salem, Oregon	Designee of Board of Governors of Oregon State Bar	2/26/07-8/31/08
<u>Outgoing Commissioners</u>		
Chief Justice Wallace P. Carson, Jr. Chief Justice of the Oregon Supreme Court, Salem, Oregon	<i>Ex Officio</i>	1997-4/24/06
Martha L. Walters Justice of the Oregon Supreme Court, (formerly Attorney at Law, Walters Chanti & Zennache PC, Eugene, Oregon)	Designee of Board of Governors of Oregon State Bar	9/1/02-9/26/06

Staff of the Oregon Law Commission

Willamette University College of Law Staff

David R. Kenagy
Executive Director

Wendy J. Johnson
Deputy Director and General Counsel

Gerald G. Watson
Special Counsel

Samuel E. Sears
Staff Attorney

Sara Hernandez
Law Clerk

Lisa Ehlers
Legal Assistant

Julie K. Gehring
Administrative Assistant
April 2004-June 2006

Marta A. Stadel
Staff Attorney
October 2005-June 2006

State of Oregon Staff

Ann Boss
Legislative Counsel

David W. Heynderickx
Special Counsel to Legislative Counsel

We would also like to recognize and thank all of the Legislative Counsel attorneys, staff, and editors who worked tirelessly with the Commission, enabling us to complete our recommended legislation.

Law Student Staff

One of the goals of the Law Commission is to bring the legal academic community into the law reform process together with legislators, lawyers, judges, and other interested parties. Law students assist the Commission in a variety of ways, including researching new law reform projects, writing legal memoranda, attending Law Commission meetings, and writing final reports. The following law students, from Willamette University College of Law, served the Oregon Law Commission this biennium. The Commission is hopeful that the University of Oregon and Lewis & Clark law schools will participate in the future.

Jason Janzen- Research Assistant
Summer 2005 to Fall 2005

Ben Stewart- Law Clerk
Summer 2006 to Spring 2007

Scott Harris- Research Assistant
Fall 2005 to Spring 2006

Daniel Rice- Law Clerk
Summer 2007 to Present

Work Study Student Staff

The following students, from the Willamette University College of Liberal Arts, served the Oregon Law Commission this biennium. These students assisted in a variety of ways, focusing on clerical work.

Janel Addicott- Work Study
Spring 2006

Megan West- Work Study
Summer 2005 to Fall 2005

Jessica John- Work Study
Summer 2005

Ashley Wilkerson- Work Study
Fall 2006 to Present

Josie Tofflemire
Summer 2005 to Spring 2006

Oregon Law Commission Meetings

The Oregon Law Commission held seven meetings from July 1, 2005 through July 1, 2007. Committees and Work Groups established by the Commission held numerous additional meetings. The Commission meetings were held at the indicated locations on the following dates:

April 24, 2006	Oregon Department of Fish and Wildlife
July 19, 2006	State Capitol
November 15, 2006	State Capitol
December 4, 2006	State Capitol
December 20, 2006	State Capitol
January 18, 2007	Willamette University
February 8, 2007	State Capitol

Minutes for the seven Commission meetings are available both at the Oregon Law Commission's office and the Archives Division of the Secretary of State. They also may be viewed at the Oregon Law Commission web site,
www.willamette.edu/wucl/oregonlawcommission/home/pubs-minutes.html

The Commission is required to hold quarterly meetings (ORS 173.328). Please contact the Commission at (503) 779-1391 or check the Commission's Master Calendar web page at the following URL to confirm dates and times:
www.willamette.edu/wucl/oregonlawcommission/home/calendar.html

Program Committee

2005-2007

The purpose of the Program Committee is to review law reform projects that have been submitted to the Oregon Law Commission, and then review and make recommendations to the Commission.

Commissioners serving on the Program Committee during some or all of the 2005-2007 biennium:

Attorney General Hardy Myers, Chair

Chief Justice Paul J. De Muniz

Professor Hans Linde

Greg Mowe

Lane Shetterly

Chief Justice Wallace P. Carson Jr. (July 1, 2005- April 24, 2006)

Martha Walters (July 1, 2005- September 26, 2006)

The Program Committee held three meetings from July 1, 2005 through July 1, 2007 at the indicated locations on the following dates:

September 26, 2005	Department of Justice
March 31, 2006	Department of Justice
June 6, 2007	Willamette University

The Program Committee meets as necessary to review proposed law reform projects for the Oregon Law Commission. Please contact the Commission at (503) 779-1391 or check the Commission's Master Calendar web page at the following URL to confirm dates of future meetings: www.willamette.edu/wucl/oregonlawcommission/home/calendar.html

2007 Session Bill Summary:

Bills Presented by the Oregon Law Commission

During the 2007 Legislative Session, the Oregon Law Commission recommended twenty-one bills to the Legislative Assembly. The following is a brief summary of the bills:

1. SB 320 codifies the procedures and standards regarding fitness to proceed motions in juvenile delinquency proceedings. Specifically, this bill sets out guidelines for: 1) obtaining, administering, and filing evaluations; 2) challenging evaluations; and 3) administering restorative services.
2. SB 322 is a “clean-up” bill that addresses a series of issues arising from the adoption of large and significant bills dealing with judgments/garnishments and judicial sales in 2003 and 2005. Issues addressed include clarification of (a) judgment lien priority; (b) amounts owing on a money award; and (c) the effect of a sheriff’s levy on a judgment creditor’s interest in personal property of a debtor. The bill also establishes a detailed statutory process for authorizing orders in aid of execution.
3. SB 325 clarifies in the substantive statutes and the summons forms that persons must personally appear in juvenile court and not rely on appearance of counsel in dependency, permanent guardianship, and termination of parental rights cases. Clarifies exception for court approved electronic appearance. Codifies counsel’s authority to move to withdraw when person fails to appear.
4. SB 328 expands the jurisdiction of the Juvenile Psychiatric Security Review Board to cover juveniles who successfully make a mental disease or defect defense when adjudicated and that have the mental defect of mental retardation. Clarifies DHS’ placement authority and responsibility and also the Board’s jurisdiction and authority to review placements.
5. SB 494 modifies and clarifies Oregon statutes relating to conflicts of interest. Significantly, this bill prohibits members of the Legislative Assembly from certain participation when they have an actual conflict of interest. Among other things, this bill expands the definition of relative and member of the household, provides that interest in stocks in a mutual fund will not create a conflict, and requires disclosure of conflicts based on membership in a non-profit organization.
6. SB 495 clarifies government ethics laws regarding nepotism by establishing specific provisions that substantially reflect current practice. In general, public officials are prohibited from hiring or supervising their relatives. There are exceptions for legislators and for any public official who hires a relative as an unpaid volunteer.
7. SB 496 modifies Chapter 171 of the Oregon Revised Statutes, which regulates lobbying and lobbyists. This bill restructures the Government Standards and Practices Commission (GSPC) adjudication provisions to make them consistent with

Chapter 244 and makes several other cleanup changes. In addition, the bill modifies lobbyist reporting and increases possible sanctions that the GSPC may impose.

8. SB 497 clarifies existing and establishes new public official reporting requirements. Specifically, this bill requires public officials to file quarterly reports of gifts and other items received. In addition, this bill requires gift givers to report the amount of the gift to the public official and allows public officials to file amended Statements of Economic Interest.
9. SB 498 requires public officials to disclose personal financial interests and individualized personal bias and generally prohibits public officials from acting when such financial interest or personal bias exists.
10. SB 499 amends ORCP 47 by substituting “summary determination” for “summary judgment” throughout the rule and making other conforming changes to ORCP 47 and ORS 86.742(3). The purpose of this change in terminology is to avoid possible confusion between the procedures for dealing with “judgments” established in ORS Chapter 18 and the concept of a “summary judgment” as currently described in ORCP 47.
11. SB 501 clarifies terminology dealing with two terms as they are used in ORS Chapter 18: “money award” and “separate record.” It adds language to ORS 18.042(2)(d) specifying that the “money award” mentioned in that provision is only one component of the financial obligation that the judgment may impose on the judgment debtor. The term “separate record” is replaced with “judgment lien record” throughout ORS Chapter 18.
12. HB 2381 revises Oregon’s elective share statutes to generally provide an increased amount for the surviving spouse. Among other things, HB 2381 increases the elective share amount from 25% to a 33% maximum based on a sliding scale and broadens the scope of assets used to calculate the elective share.
13. HB 2382 updates Oregon’s laws regarding the establishment and disestablishment of paternity. Specifically, this bill removes the conclusive presumption of paternity and establishes a procedure for challenging judgments establishing paternity. In addition, this bill modifies and clarifies statutes regarding voluntary acknowledgments of paternity.
14. HB 2384 requires self-insurers to pay liability damages required by the Financial Responsibility Law when a permissive driver of the self-insured vehicle does not have the required insurance. If damages are higher than the Financial Responsibility Law minimums, victims can recover from their own uninsured policy. The bill also clarifies secondary user priority, limited liability, and other related insurance issues.
15. HB 2385 is a housekeeping bill to further clarify the meaning of the auto insurance statutes when uninsured and underinsured policies overlap.

16. HB 2594 prohibits legislators from lobbying for one regular session after leaving public office and establishes other subsequent employment restrictions. This bill also prohibits public officials from representing clients for a fee before a public body of which the public official is a member and prohibits public officials from using confidential information gained while holding public office.
17. HB 2595 modifies several statutory provisions affecting the duties and authority of the Government Standards and Practices Commission. Specifically, the provisions of this bill affect rulemaking, investigation, advisory opinions, sanctions, funding, and status of official action.
18. HB 2596 restructures statutory provisions regarding the Government Standards and Practices Commission's adjudication process to provide a logical framework and greater clarity. This bill also modifies the circuit court opt out provisions of ORS 244.260, extends GSPC investigation timelines, and permits establishment of a legal defense trust fund.
19. HB 2597 prohibits public officials from using campaign funds to defray expenses incurred while in office and prohibits inter-candidate transfers from one principle campaign committee to another. In addition, this bill establishes appropriate means to dispose of leftover campaign funds and sets out who can serve as treasurer for campaign committees.
20. HB 2598 revises Oregon law dealing with public official's receipt of gifts. This bill deletes the gift exception for entertainment and prohibits the practice of bundling to circumvent the gift limits. It technically raises the aggregate limit from \$100 to \$250, although that amount is lowered from \$350 due to the deletion of the entertainment exception. This bill retains the exceptions for food consumed in the presence of the giver and for travel, food, and lodging in connection with official events.
21. HB 3265 is a comprehensive revision of the state and local government borrowing statutes in ORS Chapters 286, 287 and 288. These statutes affect all Oregon governments that borrow money. The bill modernizes, clarifies, and simplifies the borrowing provisions and authorities of state agencies and local governments.

2005-2007 Summary of projects not receiving a recommendation

In addition to the Law Commission recommendations this biennium represented by the 21 bills submitted to the 74th Legislative Assembly, there were a handful of projects that did not receive recommendations. There are various reasons why these projects did not result in recommendations or legislation. Some projects were deferred because further review and work were necessary to fully address all of the issues raised in the proposal, and others did not receive a recommendation because there was simply a lack of consensus on how to proceed. Below is a brief summary of these projects.

Welfare Code

The Commission, at its May 21, 2004 meeting, approved the formation of a work group to study and recommend changes to Oregon's outdated Welfare Code. At that time, the Commission voted to limit the work group's assignment for the 2005 legislative session to a review of ORS chapters 412 (Aid to Blind and People with Disabilities) and 413 (Old-Age Assistance). That initial limited scope of the project was consistent with the recognition in the Project Proposal that a rewrite of Oregon's Welfare Code would be best accomplished in a gradual manner. Given that narrow assignment, the work group produced recommendations on the provisions that had been in ORS chapters 412 and 413, and the Legislature approved the recommendations through its passage of House Bill 2276.

The Commission subsequently chose to postpone further review of the Welfare Code until after the 2007 session. Specifically, Commissioners decided at their July 19, 2006 meeting to defer the formation of another Welfare Code work group until the 2007-2009 biennium. Many reasons supported deferring the project. The project's primary advocate, Lorey Freeman, was leaving her position at the Oregon Law Center for a new job; the Department of Human Services was undergoing an extensive review of its budget and accounting procedures; potential changes at the federal level to the Medicaid, Medicare, and Temporary Assistance to Needy Families (TANF) programs were pending; and the Commission staff already had a full workload with other law reform projects. Commissioners, however, noted at the time of the deferral that many problems remained in the Welfare Code and that they did not want the Commission to lose focus on the project.

Juvenile Code: Duration of Disposition

The Law Commission approved the duration of disposition project on April 24, 2006. The work group convened on May 12, 2006 and met on a monthly basis until July 28, 2006. The charge to the work group was to clarify statutes relating to the duration of disposition of juvenile delinquents. Under current law, there is ambiguity regarding what counts toward the disposition of a juvenile offender. The work group was unable to reach consensus on these issues and disbanded without presenting a recommendation for the Law Commission's consideration.

Juvenile Code: Mental Health Records

This project was approved by the Law Commission on April 24, 2006. The purpose of this project was to determine whether and to what extent juvenile mental

health and substance abuse records obtained through screenings and evaluations should be privileged. In attempting to reach a consensus, the work group balanced many competing interests, such as the welfare of juveniles, community safety, and accountability. The work group had its first meeting on July 21, 2006 and met monthly until December 13, 2006. During the final meeting of the interim, the work group determined that the project needed further study and review before it was ready to be forwarded to the Law Commission for approval. The work group expressed a desire to continue meeting after the legislative session ends.

Wet Marine Insurance

The Law Commission approved the Wet Marine Insurance project on July 19, 2006. The work group met on September 8, 2006. During that meeting the work group members discussed whether wet marine and transportation insurance should remain exempt from attorney fee provisions contained in Chapter 742 of the Oregon Revised Statutes. After an informed and thorough conversation, the work group determined that the existence of the exemption was not anomalous and that there was not a compelling reason to recommend change. The work group recommended that the Law Commission take no further action on the project.

Conflicts of Laws: Torts

In 1998, the Law Commission accepted a proposal and assembled a work group to examine and reform Oregon's conflict of laws rules. Since it was too late in the interim to complete a recommendation for the 1999 session, the work group convened on January 21, 2000. The work group bifurcated its work with a plan to approach conflicts of laws in a two phase process. The efforts from the first phase of that work group resulted in a recommendation by the Law Commission to the 71st Legislative Assembly (2001) regarding conflicts of laws relating to contracts. In 2003, the work group reconvened to begin work on the second phase of the project dealing with torts. The Work Group did not meet this biennium, but the Commission expects to authorize a work group after the legislative session ends.

Commission's Law Reform Agenda for 2009 Legislative Session

The Commission will determine its 2007-2009 biennium agenda after the 2007 legislative session ends, but the Commission is already considering the following projects for the 2009 legislative session:

Deferred Projects (Considered for the 2005-2007 biennium, but deferred)

- o Conflict of Laws for Torts - creation of choice of law statute for tort cases.
- o Child Abuse Reporting & Training - crafting of clearer statutory guidelines for mandatory child abuse reporters and related issues including, but not limited to, training, liability and overlap with criminal law standards.
- o Criminal Records Checks - examination of Oregon's criminal records check provisions, many of them currently in administrative rules, to determine how they could better protect public safety and ensure individual privacy.
- o Welfare Code - next phase in reform of outdated and inconsistent Welfare Code.

Continuing Projects (Projects started and/or finished during the 2005-2007 biennium)

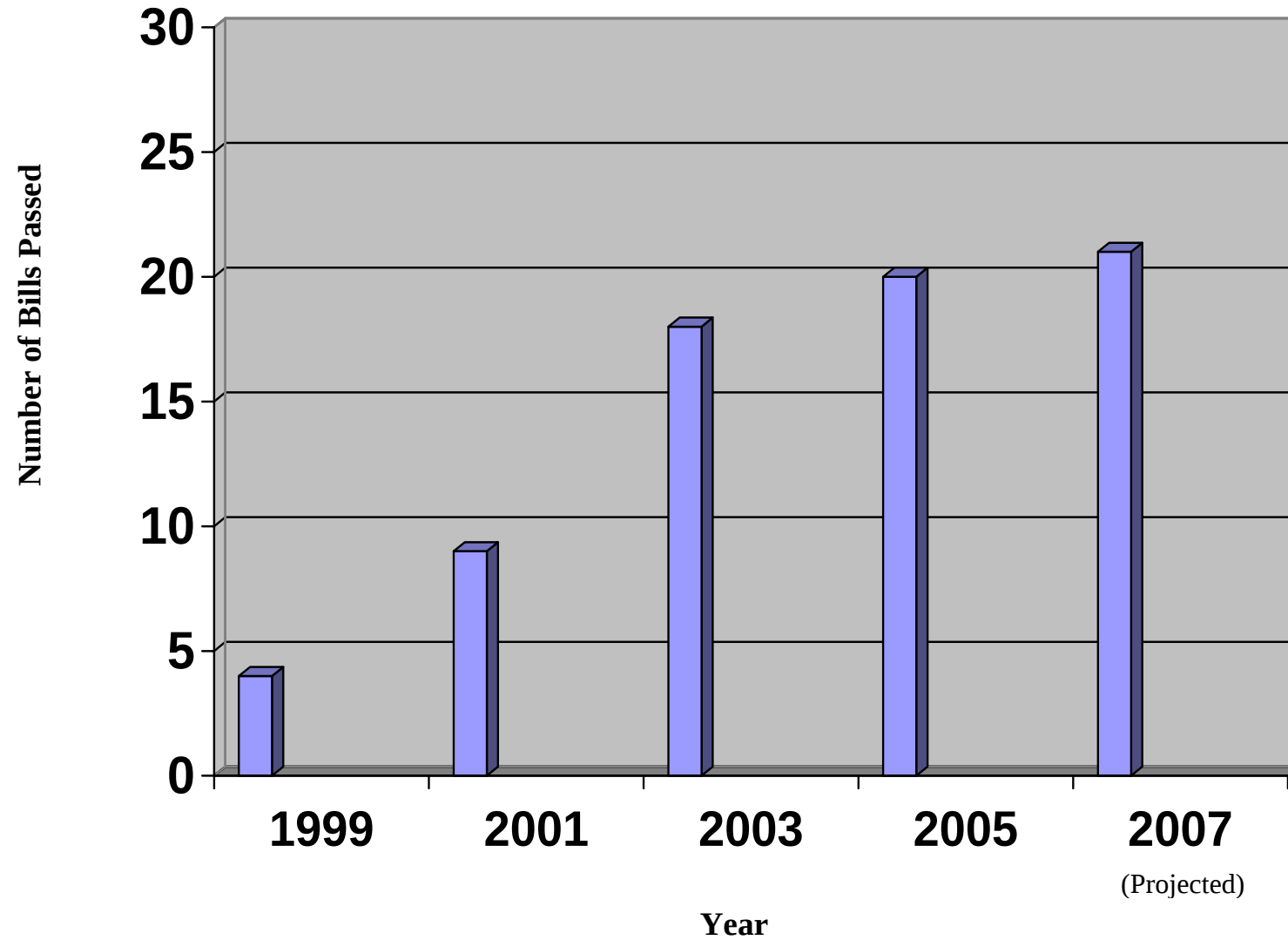
- o Juvenile Records - continue review of the status of juvenile mental health and substance abuse records obtained during screenings and assessments.
- o Government Bonding - clean-up of government borrowing statutes.
- o Elective Share - continuation of project to change Oregon's spousal elective share provisions.
- o Remedy for Actions Taken by Disqualified Officials – continuation of issue discussed by Government Ethics Work Group.
- o Juvenile Code Revision – continue improvement of ORS Chapters 419 A,B,C (dependency and delinquency codes).

Potential New Projects

- o Judicial Review - examination of methods for statutorily ensuring judicial review of all official actions.
- o Estate Planning Malpractice - review statute of repose as applied to attorneys who negligently prepare estate planning documents.

- o Water Code – review of statutes, including adjudicatory procedure.
- o OLC Statutes - revision of Commission's enabling and operating legislation, as statutes are now ten years old and have not been revised.
- o Revised UCC Arts. 1 & 7 - implementation of 2001 and 2003 revisions to UCC regarding definitions, rules of construction and documents of title for storage and shipment of goods.

Oregon Law Commission Bills Passed by Session



2007 Oregon Law Commission Legislative Package at a Glance

Bill Number	Work Group	Work Group Chair	Drafter of Report(s) for Bill(s)
SB 320 SB 325 SB 328	1. Juvenile Code Revision Juvenile Fitness to Proceed Juvenile Court Summons Juvenile Psychiatric Security Review Board	Sen. Kate Brown Julie McFarlane Tom Cleary	Samuel E. Sears Carmen Brady- Wright Wendy J. Johnson
SB322 SB 499 SB 501	2. Judgments Judgments and Judicial Sales: General Money Awards and Judicial Lien Record Summary Determination	John DiLorenzo	Gerald G. Watson
HB 2381	3. Elective Share	Prof. Bernie Vail	Samuel E. Sears
SB 494 SB 495 SB 496 SB 497 SB 498 HB 2594 HB 2595 HB 2596 HB 2597 HB 2598	4. Ethics Conflicts of Interest Nepotism Lobbying Reporting Requirements Public Official Reporting Requirements Prejudgment Bias Disqualification Subsequent Employment GSPC Organization, Funding, Sanctions, Remedies Adjudication Process, Training, Legal Defense Fund Campaign Finance Gifts, Honoraria and Financial Gain	Atty. Gen. Hardy Myers Greg Mowe (SubWork Group Chair)	Gerald G. Watson
HB 2382	5. Uniform Parentage Act: Establishing, Disestablishing, and Challenging Legal Paternity	Sandra Hansberger	Prof. Leslie Harris
HB 2384 HB 2385	6. Automobile Insurance Overlapping Insurance in UM/UIM Statute Self-Insurer Requirements	Martha Walters	Benjamin P. Stewart Wendy J. Johnson
HB 3265	7. Government Borrowings	Lane Shetterly	Harvey W. Rogers

Report Note

The explanatory reports provided in the following section were approved by both the respective Work Group and by the Oregon Law Commission for recommendation to the Legislative Assembly, unless otherwise noted in the report. The reports were also submitted as written testimony to the Legislative Committees that heard the respective bills. Thus, these reports can be found in the State Archives as they constitute legislative history.

Some bills were amended after the Commission approved recommendation of the bill and accompanying explanatory report. The reports are generally printed as presented to the Commission; however, some reports had minor edits made after the Commission's approval. Several of the bills were amended during the Legislative Session. Rather than try to change the text of the reports affected, the Executive Director's office has inserted an "Amendment Note" at the conclusion of some reports when a bill was amended to assist the reader by providing context and history. Other reports were amended to reflect legislative amendments.

Juvenile Code Revision Work Group

Juvenile Fitness to Proceed

SB 320

Prepared by Samuel E. Sears
Oregon Law Commission
Staff Attorney

From the Offices of the Executive Director
David R. Kenagy
and
Deputy Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
December 4, 2006

I. Introductory Summary

Like an adult criminal defendant, a youth in a delinquency proceeding has a constitutional right to raise the issue of fitness to proceed and to stand trial before he or she can be adjudicated in juvenile court. The Oregon Juvenile Code, however, is silent on the subject of fitness. No procedure is set out in the Code for the determination of fitness, and no options for the court are specified when a youth is found unfit. As a result, courts are left to fashion an outcome for the youth with no guidance in the law. Clear options are needed to help ensure that both the best interests of the youth and the best interests of victims and the community are protected. This draft provides a statutory structure that best fits juvenile court delinquency proceedings when youth may be unfit to proceed.

In order for a criminal defendant to stand trial he or she must be “fit to proceed” (i.e. able to aid and assist in their defense). This means that the defendant must be able to understand the nature of the proceeding and assist and cooperate with his or her counsel. If a defendant is not able to aid and assist the defendant undergoes restorative services until the defendant regains fitness. Restorative services are generally instructional with a focus on educating defendants about the nature of their crimes and the process and results of the trial or proceeding. These services, however, may also include medication or treatment for mental disabilities. Currently, there are statutory provisions codifying fitness to proceed requirements and procedures that govern adult aid and assist proceedings, but there are no similar statutes for juveniles.

Generally, when counsel raises issues regarding fitness to proceed in juvenile court, the courts proceed similarly to how they would proceed in adult court. This, however, is not preferable because in some instances there are specific reasons that juvenile cases

should be handled differently. In addition, with no statutory guidance courts deal with aid and assist proceedings inconsistently. Significantly, some judges have not allowed counsel to raise the issue in juvenile proceedings because it is not provided for in statute. The Aid and Assist Sub Work Group was convened to develop a statutory framework to govern fitness proceedings in order to provide guidance to the courts, ensure consistent application for the litigants, and account for differences between the juvenile and adult system.

II. History of the Project

In December 2003, the Oregon Law Commission's Juvenile Code Revision Work Group proposed and the Oregon Law Commission approved the juvenile aid and assist project. The project was deferred to the 2007 Legislative Session. The Aid and Assist Sub Work Group first met on April 14, 2006. The members of the Sub Work Group include judges, district attorneys, defense attorneys, and other stakeholders who represent or work with juveniles.¹ The group conducted work in monthly meetings until October, 2006 where it met five times between October 3 and November 9 in order to complete its work and present a final draft to the Juvenile Code Revision Work Group. The Juvenile Code Revision Work Group approved the draft with some minor amendments and forwarded the proposal to the Oregon Law Commission for consideration and approval. The Oregon Law Commission approved the draft for recommendation to the Legislative Assembly during its meeting on December 4, 2006.

III. Statement of Problem Area

Although parties currently raise fitness to proceed issues in juvenile delinquency proceedings, the Oregon statutes provide no guidance for courts or parties. This has led to confusion and inconsistency. In fact, one circuit court judge recently denied a fitness to proceed challenge due to lack of statutory authority. In addition, some defense attorneys are reluctant to raise or may be ignorant of the defense because there are no juvenile aid and assist statutes. Not only does this raise issues of fairness, but it implicates constitutional due process rights. It is necessary to establish statutory procedures and guidelines for aid and assist challenges in order to provide direction, ensure consistency, guarantee that constitutional rights are not violated, and develop a procedure to administer restorative services.

¹ **Juvenile Aid and Assist Sub Work Group members:** Julie McFarlane, Juvenile Rights Project (co-chair); Thomas Cleary, Multnomah County District Attorney's Office (co-chair); Karen Andall, Oregon Youth Authority; Bill Bouska, Office of Mental Health & Addiction Services; Mary Claire Buckley, Psychiatric Security Review Board; Michael Clancy, Clancy & Slininger; Daniel Cross, Law Office of Daniel Cross; Judge Deanne Darling, Clackamas County; Summer Gleason, Clackamas County District Attorney's Office; Judge Kip Leonard, Lane County; Tim Loewen, Yamhill County Juvenile Department; Bob Joondeph, Oregon Advocacy Center; Patricia O'Sullivan, Department of Human Services; Andrea Poole, Marion County District Attorney's Office; Mickey Serice, Department of Human Services; Karen Stenard Sabitt, Attorney in private practice; Ingrid Swenson, Office of Public Defense Services; Timothy Travis, State Court Administrator's Office; Janette Williams, Department of Human Services; Dr. Laura Zorich, Licensed Clinical Psychologist.

IV. Objective of the Proposal

The objective of this proposal is to establish substantive and procedural guidelines for juvenile aid and assist cases. The draft defines when a youth is unfit to proceed and sets out procedures and substantive rules regarding raising the issue of fitness to proceed, obtaining evaluations, challenging evaluations, and administering restorative services. Setting out statutory standards will protect youths by ensuring that they will not be adjudicated without being able to assist and cooperate with counsel. In addition, it will protect the public by providing the necessary restorative services so that youths who are capable of being restored to fitness will be properly adjudicated. Other states, such as Virginia and Connecticut, have developed juvenile aid and assist statutes. The Aid and Assist Sub Work Group used statutes from these and other states as well as Oregon's adult aid and assist statutes to develop this draft.

Typically, aid and assist challenges are made by the youth, but the draft provides that any party or the court may raise the issue of fitness. If a party raises the issue the court is required to order an evaluation to determine whether the youth is able to aid and assist. The evaluation is administered by a medical professional and consists of questions and tests to determine whether the youth understands the nature and consequences of the delinquency proceedings and to determine whether the youth suffers from a mental disease or defect. After the evaluation is provided to the parties and the court, the court makes a fitness determination and, if necessary, orders restorative services. The non moving party may object to any part of the evaluation and have another evaluation administered. The delinquency proceedings continue once the youth is restored. If the youth is incapable of restoration – that is, cannot be treated so that the youth is able to aid and assist – the delinquency proceedings are dismissed and, most likely, the district attorney will initiate dependency proceedings.

Under the provisions of this proposal, the Department of Human Services (DHS) is required to administer restorative services to youths who are unfit to proceed. Usually, that will consist of educational type services to teach youths about the nature of the alleged offense and the juvenile process. In some instances, restorative services will include medication or other treatment to address a mental disease or defect. Accordingly, this proposal will have a fiscal impact. The cost to DHS has not yet been determined, but if Oregon is consistent with other states there will be about 35 to 40 youths per year who require restorative services.²

The draft is silent on the issue of involuntary medication. In some instances, a youth will be unfit to proceed, but able to achieve fitness with the administration of psychiatric medication. The work group was unable to agree as to whether or under what circumstances a court should order involuntary medication to an unwilling youth. Some work group members proposed a section that would allow courts to order medication upon clear and convincing findings that: 1) the medication would render the youth fit to proceed; 2) there are no less intrusive means; 3) the medication is narrowly tailored to minimize

² This prediction is based on the number of youths who are provided restorative services in Virginia and recent records of fitness to proceed cases from Oregon counties.

intrusion on the youth's liberty and privacy interests; 4) it is not an unnecessary risk to the youth's health; and 5) the seriousness of the allegations are such that the state's interests outweigh the youth's interest in self-determination. Ultimately, the work group voted not to include that section on involuntary medication arguing that it would not sufficiently protect the interests of youths, there are no similar provisions in the adult aid and assist statute, and the section would be unconstitutional. Proponents argued that the section would be constitutional, could provide sufficient safeguards to protect youths, and is necessary because courts currently order involuntary medication so there should be statutory procedure in place.

V. Section Analysis

Section 1

This section sets out the standards for courts to determine whether a youth is fit to proceed. It largely mirrors the adult statute except that it provides that a youth may raise the issue of fitness based on other conditions such as severe immaturity. The adult statute provides that a defendant may be unfit to proceed if as a result of *mental disease or defect* the defendant is unable to aid and assist in his or her defense. This proposal is broader because it allows a youth to raise the issue of fitness if he or she is unable to assist as a result of a "*mental disease or defect or another condition.*"

In addition this section provides that a court may not base a finding of unfitness solely on the inability of the youth to remember the acts alleged in the petition, evidence that the youth was under the influence of intoxicants, and the age of the youth (as distinguished from the youth's maturity level).

Section 2

This section is comprised of six subsections which establish the procedures and guidelines for raising the issue of fitness, obtaining evaluations, challenging evaluations, and administering restorative services.

Subsection 1

This subsection provides that any party or the court can raise the issue of fitness any time after the filing of the petition. It requires the court to stay the delinquency proceedings and order the youth to participate in an evaluation to determine whether the youth is fit to proceed if the court finds: 1) there is reason to doubt the youth's fitness to proceed; and 2) there is probable cause to believe that the factual allegations contained in the petition are true.

Subsection 2

Subsection 2 provides that only licensed psychiatrists, psychologists, or clinical social workers may conduct evaluations to determine a youth's fitness to proceed. In addition, this subsection requires the party who requested the evaluation to provide information regarding the evaluation to the other parties and the court. It authorizes any party to submit written information to the evaluator and provides that the evaluation must be paid for by the moving party, unless the court raises the

issue of fitness, in which case Public Defense Services must pay for the evaluation. Finally, this subsection sets out when a court may remove a youth from his or her current placement for an evaluation. The removal for an evaluation cannot be longer than 10 judicial days (two weeks). Removal for evaluations would be rare and happen only in extreme circumstances. Usually, the youth will raise the issue of fitness and willingly participate in an evaluation. Removal may happen if the district attorney or the court raise the issue of fitness – something that is very uncommon – and the youth will not participate in the evaluation.

Subsection 3

Subsection 3 sets out what must be contained in the evaluators report, and includes the information the evaluator reviewed, the evaluator's opinion regarding the fitness of the child, and whether the child would benefit from restorative services. It provides that statements made by the youth about facts alleged in the petition may not be used against the youth in proceedings related to the petition. Additionally, this subsection provides that the Department of Human Services (DHS) may obtain copies of the evaluation report and petition. In most instances, the parties will submit any evaluations, the petition, and any other information about the proceeding to the DHS. In the case that the parties do not submit that information, DHS would need authority to obtain the information so that they can ascertain why the youth is unable to aid and assist and properly administer restorative services.

Subsection 4

Subsection 4 sets out procedures the court must follow after receiving the evaluator's report. This subsection was drafted with the purpose of ensuring efficient and timely proceedings without compromising a party's right to object to and obtain their own evaluation. Accordingly, a party may object to a report within 14 days of receipt of the report. The objecting party obtain its own report and the court is required to hold a hearing within 21 days of the objection.

If there are no objections, the court is not required to hold a hearing and can, depending upon the conclusions in the evaluation, dismiss the petition, vacate the stay, or order restorative services. A court can hold a hearing on its own motion. The moving party is required to show the youth is not fit proceed by a preponderance of the evidence. The court is required to issue a written order outlining the fitness findings.

Subsection 5

This subsection sets out how a court must proceed after it makes fitness findings. If the court finds the youth fit to proceed it is required to vacate the stay and continue the proceedings. If the court finds the youth unfit to proceed and unable to benefit from restorative services the court is required to dismiss the petition without prejudice.³ Finally, if the court finds the youth unfit to proceed and able to

³ Without prejudice means that the petition can be filed against the youth at a later time if the youth is restored (fit to proceed). If a case is dismissed with prejudice it cannot be filed again at a later date.

benefit from restorative services the court shall order DHS to provide restorative services.

DHS is required to implement restorative services within 30 days of receipt of the court's order. No later than 90 days after receipt of the court's order, DHS must send a report to the court describing the nature and duration of services provided and recommend whether services should be continued. After the court receives the report from DHS, the court is required to make a fitness finding and either vacate the stay, dismiss the petition, or order further restorative services. If services are continued, DHS is required to issue another report no later than 90 days after the receipt of the order from the court. If the youth is cooperative and when possible, restorative services will take place at the youth's current placement. When necessary, however, the court may remove a youth in order for DHS to administer restorative services.

A youth can only be removed from his or her placement when it is necessary to do so to have restorative services administered. Additionally, the court must find that removal is in the best interest of the child. The maximum amount of time that a child may be removed from his or her current placement or that the DHS may provide restorative service is the lesser of three years or the maximum duration of the youth's potential commitment. The draft provides for a maximum time for removal and the administration of restorative services so that a youth is not confined in the system indefinitely. This time frame is the same as what is provided in the adult aid and assist statute.

Subsection 6

This subsection directs DHS to develop training and standards for persons providing evaluation services, develop guidelines for conducting evaluations, and provide the court with a list of evaluators. Although the court and parties may use that list to find qualified evaluators, they are not required to do so and may use other evaluators as long as the evaluators meet the requirements set out in Section 2 (2).

Section 3

This section requires DHS to administer a program to provide restorative services, develop qualification standards for persons who provide restorative services, and provide restorative services upon receiving an order from the court. This section was included based on the concerns of some sub work group members that a court may not have authority to order a non party (DHS) to provide restorative services. The sub work group agreed that by specifically providing statutory requirements of DHS would address those concerns.

Section 4

Provides that this proposal applies to petitions filed under ORS 419C.005 on or after January 1, 2008, which is the normal effective date for measure approved during the 2007 session.

Amendment Note:

The Senate Judiciary Committee approved the -1 amendments to SB 320. These amendments reflect changes that were approved by the Law Commission and incorporated in the original report. The amendments were necessary because the changes were discussed and approved after the original version of SB 320 was drafted.

Juvenile Code Revision:

ORS Chapter 419B Summons Clean-Up

SB 325

Prepared by
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From
The Offices of the Executive Director
David R. Kenagy
and
Deputy Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
December 4, 2006

STATEMENT OF THE PROBLEM

(1) *Former* ORS 419B.917(2) (2001) provided: “Except by express permission of the court, for a jurisdictional or termination of parental rights trial or related mandatory court appearances, summoned parties may not waive appearance or appear through counsel.” In 2003, that statute was repealed by HB 2272 (the OLC summons clean-up bill) and was replaced, in part, by ORS 419B.918. The provisions in *former* ORS 419B.917 regarding a party or parent’s non-appearance were broken out into several different statutory provisions for the various types of juvenile court proceedings. See ORS 419B.815(7) and ORS 419B.819(7). The specific language in *former* ORS 419B.917(2) about waiving appearance or appearing through counsel, however, was not explicitly included in the amended statutes. Anecdotal information from some members of the OLC sub-work group that developed HB 2272 in 2003 indicates that the group did not intend to change the policy that was stated in *former* ORS 419B.917(2) (2001).

The absence of any explicit statutory provision regarding appearance through counsel has led to some confusion for both courts and juvenile court practitioners about how to proceed when a person or parent fails to appear at a jurisdictional or termination of parental rights trial or related mandatory court appearance. Such confusion has led to inconsistency in practice from county-to-county about (1) whether the State may proceed on a jurisdictional or termination petition when a person or parent fails to appear but counsel is present and (2) the attorney’s role in the hearing when his or her client (the person or parent) has failed to appear.

(2) Although ORS 419B.815(2)(a), (b) and ORS 419B.819(2)(a), (b) require the parent or person to “appear personally” (if that is the manner of appearance chosen by the particular court), the sample summons form uses only the term “appear.” ORS 419B.818 (dependency summons form); ORS 419B.822 (permanent guardianship or termination of parental rights summons form). Additional language in the sample summons forms is needed to be consistent with the other summons statutes and to provide further notice to the parent or summoned person that he or she must appear *in person*.

(3) While ORS 419B.918 now provides a process for a parent or other person to obtain permission from the court to appear by alternate means (*e.g.* telephonic) or to reschedule a mandatory appearance, there is no reference to that statute in the sample summons forms (ORS 419B.818; ORS 419B.822) or in the statutes addressing the summons requirements and the appearance requirements (ORS 419B.815; ORS 419B.819). Additional language in the sample summons forms and in the statutes addressing the summons requirements and the appearance requirements is needed to further notify a parent or person of the option for appearance by means other than personal appearance.

(4) Finally, there is currently no provision in ORS Chapter 419B that expressly authorizes an attorney to move to withdraw, when appropriate or ethically required. A specific concern for attorneys has been when the attorney’s client (the parent or person) fails to appear, without reasonable explanation, for a mandatory court appearance and the attorney does not have enough direction to ethically represent the client. There also is no provision that authorizes the court to grant a motion to withdraw when appropriate. The absence of explicit statutory language has led to confusion for both the court and juvenile court practitioners about how to proceed particularly when a person or parent fails to appear at a hearing to which the parent or person has been summoned or ordered to appear. Such confusion has led to inconsistency in practice from county-to-county about whether the court may grant an attorney’s motion to withdraw when the parent or person fails to appear as summoned or ordered to appear. That is, some courts believe they have authority and others do not. The Oregon Rules of Professional Conduct provide for lawyers’ ethical obligations, including withdrawal provisions, but a process in statute regarding withdrawal would clear up any confusion.

HISTORY OF PROJECT

On March 31, 2006, the OLC Program Committee granted general approval to the Juvenile Code Revision Work Group to address clean-up issues related to past bills recommended by the OLC Juvenile Code Revision Work Group (JCRWG). Wendy J. Johnson (OLC, Deputy Director) determined that a clean-up to the summons statutes in ORS Chapter 419B, fell within that authority.

At the May 12, 2006, meeting of the JCRWG, AAG Kathryn Garrett (DOJ, Civil Enforcement: Family Law Section) presented a memo to the work group outlining the issues for which clean-up amendments might be needed. At that meeting, Judge Deanne Darling raised an additional issue related to withdrawal of counsel upon a summoned

person's non-appearance. Discussion ensued and Senator Kate Brown asked work group members to solicit input for a draft proposal that would address the issues raised.

Over the next two months, comments were gathered and a draft proposal was submitted to the JCRWG for its consideration. At the July 14, 2006 meeting of the JCRWG, Senator Brown encouraged additional discussion and resolution of issues by e-mail. On July 19, 2006, Wendy Johnson presented the issue to the OLC and received approval for a sub-work group to be formed to address the juvenile dependency code summons statutes.

On August 3, 2006, inquiries were sent on the four issues outlined above to judges from several counties, the Office of Public Defense Services, Juvenile Rights Project, private defense attorneys, OJD, DOJ, OLC, and Legislative Counsel. The questions were accompanied by the draft proposal that the JCRWG addressed at the July 14, 2006, meeting. Further discussion ensued and a revised draft proposal was submitted to the JCRWG for consideration at the September 15, 2006 meeting.

At the September 15, 2006, meeting of the JCRWG, the group agreed to the following:

(1) Add language to ORS 419B.815 *et seq.* to clarify that a parent or person cannot appear through counsel.

(2) Add language to ORS 419B.818 and 419B.822 (sample summons forms) to clarify that a parent or person must appear personally.

(3) Include in the summons forms notice of the option of telephonic appearance by adding a reference to ORS 419B.918.

(4) Create a new statute that confirms an attorney's ability to move to withdraw when the parent or person fails to appear at a hearing to which the parent or person has been summoned or ordered to appear and confirms the court's authority to grant the motion to withdraw, when appropriate. The group agreed that whether an attorney should move to withdraw as counsel when his or her client (the parent or person) fails to appear should be left to the attorney's discretion. That is, the attorney is not required to withdraw if his or her client fails to appear. Moreover, the group agreed that whether to grant or deny the motion should be left to the court's discretion.

PROPOSED SOLUTION: SB 325 (formerly LC 1538)

Withdrawal of Counsel When Person or Parent Fails to Appear

The Group proposes creating a new provision for ORS Chapter 419B that clarifies an attorney's ability to move to withdraw when the parent or person fails to appear at a hearing to which the parent or person has been summoned or ordered to appear, and confirms the court's authority to grant the motion to withdraw when appropriate.

Prohibition on Appearance through Counsel

The Group recommends the following amendments to current law to make it clear that one must personally appear and not rely on the appearance of counsel in dependency, permanent guardianship, and termination of parental rights cases:

(1) Amend the list of summons content requirements in ORS 419B.815(4) (juvenile dependency summons requirements) and ORS 419B.819(4) (permanent guardianship/termination of parental rights summons requirements) to clearly require notice in the summons that the person or parent served with a summons may not appear through counsel at any hearing where the person or parent is required to appear. In ORS 419B.815(4) only, provide an exception to personal appearance for children who must be served with a dependency summons as provided by ORS 419B.839(1)(f) (child is 12 years of age or older); that is, the child's attorney may appear on behalf of a summoned child who is at issue in the case.

(2) Amend ORS 419B.815 and ORS 419B.819 to provide new substantive law provisions that provide that if a summons or order requires personal appearance, the person or parent may not appear through counsel. Again, for ORS 419B.815 only, provide an exception for appearance through counsel for the child at issue in the proceeding who has been served with the dependency summons.

(3) Amend ORS 419B.816 (contesting petition to establish jurisdiction) and ORS 419B.820 (contesting petition to establish permanent guardianship or termination of parental rights) to require the court by written or oral order to inform the person or parent that for future hearings the person or parent may not appear through counsel. Again provide for an exception for both ORS 419B.816 and ORS 419B.820 that allows a child's attorney to appear on behalf of a child served with summons pursuant to ORS 419B.839(1)(f).

(4) Amend ORS 419B.818 (form of dependency summons) and ORS 419B.822 (form of permanent guardianship or termination of parental rights summons) to notify the parent or person summoned that if he or she is summoned to appear in person, the parent or person may not appear through counsel. For ORS 419B.818 only, provide again an exception for a child's attorney to appear on behalf of the child at issue in the proceeding.

Opportunity for Appearance by Telephone or Other Electronic Means

Several amendments are also needed to accurately reflect that while personal appearance is generally required, exceptions can be made for telephonic or other electronic appearance.¹ Authority for such appearance is authorized already by ORS 419B.918. Recommended amendments are as follows:

(1) Amend ORS 419B.918(1) by adding ORS 419B.816 (contesting petition to establish jurisdiction) to the "Notwithstanding" list of provisions – so as to allow

¹ For example, persons in prison often appear telephonically.

telephonic or other electronic means of participation for required appearances under ORS 419B.816. This provision seems to have been inadvertently left out.

(2) Amend the list of summons content requirements in ORS 419B.815(4) (juvenile dependency summons requirements) and ORS 419B.819(4) (permanent guardianship/termination of parental rights summons requirements) to require notice in the summons that if the court has granted an exception in advance under ORS 419B.918, the person or parent may appear in any manner permitted by the court under ORS 419B.918.

(3) Amend ORS 419B.816 (contesting petition to establish jurisdiction) and ORS 419B.820 (contesting petition to establish permanent guardianship or termination of parental rights) to require the court by written or oral order to inform the person or parent that if the court has granted an exception in advance under ORS 419B.918, the person or parent may appear in any manner permitted by the court under ORS 419B.918.

(4) Amend ORS 419B.818 (form of dependency summons) and ORS 419B.822 (form of permanent guardianship or termination of parental rights summons) in the “RIGHTS AND OBLIGATIONS” section to provide that when summoned, the parent or person must personally appear unless the court grants an exception in advance under ORS 419B.918.

CONCLUSION

This bill further clarifies for parents and other persons their rights and responsibilities regarding hearings to which they are summoned or ordered to appear in juvenile court. The proposed statutory amendments and creation of a new statute in ORS Chapter 419B will also clarify the rights and responsibilities of attorneys for parents and other persons when their clients fail to appear. The bill should lead to more consistency statewide in how courts and juvenile court practitioners proceed when parents or other persons fail to appear at hearings to which they have been summoned or ordered to appear.

Amendment Note: SB 325 as drafted needed a technical amendment to ORS 419B.819. That amendment was made through the -1 amendment in the House. The amendment made wording in Section 3 and 6 parallel.

Juvenile Code Revision Work Group:

Juvenile PSRB Clean-Up

SB 328

Prepared by Wendy J. Johnson
Deputy Director
Oregon Law Commission

From the Offices of the Executive Director
David R. Kenagy
and
Deputy Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
December 4, 2006

I. Introductory Summary

This proposed bill provides that another group of juveniles who make a successful mental disease or defect defense may be placed under the Juvenile PSRB's jurisdiction. The bill would add coverage of juveniles whose mental defect is manifested as mental retardation and the juvenile is a substantive danger to others. Present law is silent as to disposition for these juveniles who are successful with a mental disease or defect defense. The bill also clarifies the roles of the Juvenile PSRB and the DHS with respect to jurisdiction, placement, and security oversight.

II. History of the Project / Statement of the Problem Area

The Oregon Law Commission (based on the recommendations of the Commission's Juvenile Code Revision Work Group¹) recommends retooling the juvenile mental disease and defect provisions passed into law during the 2005 Legislative Session. See ORS 419C.520 et seq. Current ORS provisions are based on SB 232 (2005), recommended by the Oregon Law Commission last session. That bill was recommended after several years of

¹ This work group is comprised of over 60 Work Group members with prosecution, defense, juvenile department, judicial, and agency experience. The Work Group is chaired by Commissioner, Sen. Kate Brown.

research, analysis, and collaboration of interested persons.² However, the Commission's recommended bill was amended during the waning hours of the 2005 session so as to delete the developmental disability of mental retardation as one of the listed serious mental conditions that would automatically qualify for disposition of jurisdiction to the juvenile panel of the Psychiatric Security Review Board (PSRB) when a successful mental disease or defect defense (commonly referred to as the insanity defense) was made. The amendment was made last session to lower the fiscal impact of the bill in a tight budget year and was requested by the Department of Human Services, Seniors and People with Disabilities Division. That Division provides services to mentally retarded and developmentally disabled persons.

Juveniles with mental retardation can still raise the defense under present law, but if successful with the defense, the disposition would not be to transfer jurisdiction of the juvenile to the juvenile panel of the Psychiatric Security Review Board. Rather, the law is presently silent regarding disposition. Since such juveniles have not been adjudicated of an offense if successful with the defense (found not guilty except for insanity if this were adult court), they cannot be placed in the custody of the Oregon Youth Authority (youth correctional facility). Historically, such juveniles have been placed informally into the custody of the child welfare agency or released to their parents. Some maintain that child welfare cannot presently provide the level of community protection needed in many cases. In addition, due to the silence of the present statutes, defense attorneys, prosecutors, and judges alike are hesitant to raise or allow the mental disease or defect defense due to a concern for the safety of the community. That is, such juveniles may end up in a correctional facility rather than a mental health facility. Present law raises constitutional questions due to the different treatment of these juveniles.

The Department of Human Services (DHS) is required by SB 232 (2005) to report back to the 2007 legislature with a proposed solution for these mentally retarded juveniles, too. The Juvenile Code Revision Work Group, however, did not support a provision in the DHS recommended bill draft (SB 164) that would place a cap on the number of juveniles who could be served. That is, if another juvenile were to be committed and the cap was already reached, the Juvenile PSRB would have to select a juvenile to release. A cap would place the Board in an awkward public safety position as the Juvenile PSRB has jurisdiction responsibility. There were other minor wording issues that the Work Group had with the DHS bill. Due to timing, the Department submitted its bill draft for purposes of the Governor's recommended budget, but compromises and reconciliation with the Commission's recommended bill are still probable. Since this was a Law Commission project originally, the

² See Juvenile Code Revision: Juvenile Panel of The Psychiatric Security Review Board (PSRB) SB 232 Report, available on the Commission's website: <http://willamette.edu/wucl/oregonlawcommission/home/Biennial%20Report%2003-05.pdf> (See Appendix D)

Juvenile Code Revision Work Group felt strongly that it should recommend a fix this session and not rely entirely on DHS' bill.

III. Objective of the Proposal/ Section Analysis

The Commission recommends making the Juvenile PSRB jurisdiction statutes also applicable to juveniles who have the mental defect of mental retardation--providing the same disposition and procedures. In other words, the recommendation is that the deletion made last session should be removed. Treatment differences, definition issues, and federal dollar match differences were reconsidered this interim for these juveniles. These considerations are now reflected in the accompanying bill.

The proposed bill does the following key things:

1) Reworks the definition of "serious mental condition" to clearly include mental retardation if that mental defect exists concurrently with qualitative deficits in activities of daily living and deletes ORS 419C.520(2)(b) which had taken out mental retardation from the definition of mental disease or defect. The new proposed text actually uses the term "mental retardation" instead of putting in IQ scores or only using the phrase "significantly subaverage intellectual function" because "mental retardation" is the recognized medical term. Using the term "mental retardation" will also make it clearer to judges and lawyers as to which juveniles might even qualify for that "serious mental condition." See present 419C.520(2)(b) (proposed deleted), and proposed ORS 419C.520(3)(d)(A), (B)(ii).³

2) Provides a definition of "Activities of Daily Living," modeling it after ORS 410.600-- the DHS definition used for Seniors. The difference in definitions is only that "communicating" is added and "cognition" is deleted. This is intended to track better what is needed for juveniles. See proposed ORS 419C.520(3)(d)(B)(i).⁴

3) Adds "secure intensive community inpatient facility" to ORS 419C.529(2)(a). This addition will require DHS to designate a secure facility for all initial commitments by the court (could be up to 90 days). This secure facility placement will be pending a hearing by the juvenile panel of the PSRB. That is, there is a gap between when the court orders commitment to the Juvenile PSRB (after finding a successful defense) and when the Board must meet for a hearing. The Board has jurisdiction and thus public safety

³ This was amended after the bill was initially filed. Mental retardation was taken out of the definition of serious mental condition. Thus, the defect of mental retardation must be coupled with being a substantial danger to others for the juvenile to fall under the jurisdiction of the juvenile PSRB.

⁴ This definition was deleted by amendment because of the amendment to the definition of serious mental condition.

responsibility from the initial commitment. Requiring a secure facility initially and then allowing DHS in consultation with the Board to later designate a different facility (perhaps less secure) gives DHS maximum discretion on designation (except for the first 90 days), and seems to get at the security concerns and responsibility issues of the PSRB. DHS has been particularly concerned about having enough secure beds for juveniles with mental retardation that would fall under the Board's jurisdiction. ORS 161.327(1)(B) already uses this term, "secure intensive community inpatient facility" and the only facility used today that meets this definition is the Children's Farm Home in Corvallis. There is no security or lock requirements elsewhere in the ORS Chapter 419C juvenile sections for placement and this would so require, but for only the initial placement.

4) Adds a new provision (See Section 2 of SB 328) to give the Board clear authority to review all DHS placements on public safety grounds. That is, DHS will designate the placement/facility, and only if the Board finds the designation (on a case by case basis) so inappropriate as to create a substantial danger to others, will DHS have to alter placement. DHS's designation authority is also clarified by adding a list of factors to take into account when making its designations. See Section 4, adding (6) to ORS 419C.529. This list notes the balancing the Department must consider: the needs of the juvenile, the resources of the department, and the safety of the public. This gives DHS maximum flexibility for choosing facilities and the Group believes this obviates, to a large degree, the need for a cap in statute. This new provision is modeled after ORS 419C.478(2), (5) and ORS 419C.492 which give juvenile courts review authority in delinquency cases but maintains placement authority with OYA and DHS. Note that throughout ORS Chapter 419C, DHS gets to "designate" the facility or hospital for placement. See ORS 419C.532(5), 419C.538(4), (5). Despite the several statements in present law of "hospital or facility designated by the Department of Human Services," apparently some people have read that to mean that the designation is made once by DHS and that there is but one facility—i.e. the Children's Farm Home. That is, some people have read the statute to not allow for designation on a case by case basis. (This interpretation is probably because of how the designations in ORS 161.327 have been handled in practice--i.e. state hospital for adults and farm home for children.) Legislative Counsel has added "on an individual case basis" throughout the bill to clarify this point. That is, placement could be at the Children's Farm Home, Albertina Kerr, etc.

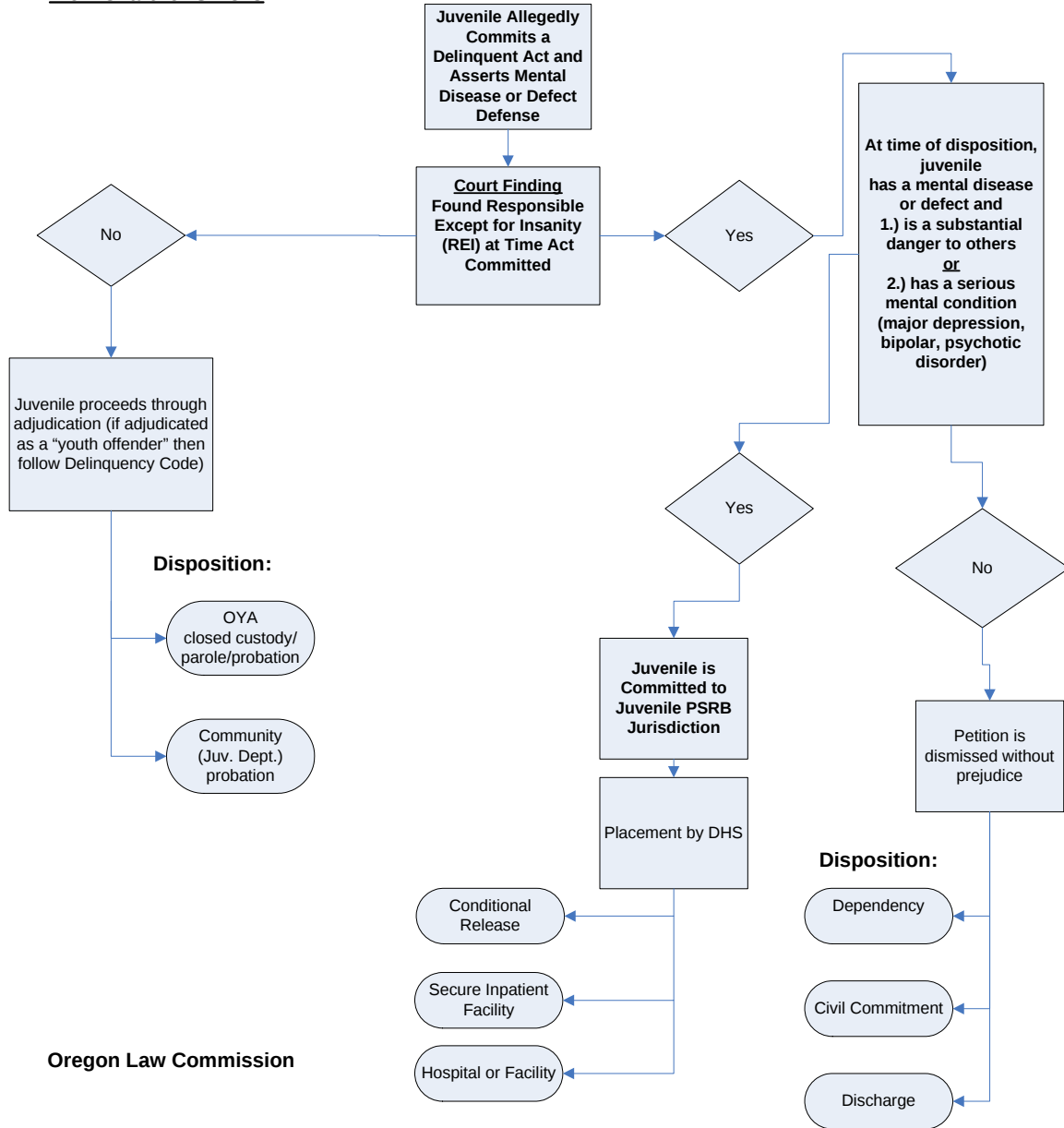
5) Adds "developmental disabilities treatment provider" throughout the Mental Disease or Defect section of ORS Chapter 419C to acknowledge that there are mental health treatment providers and special treatment providers for those with developmental disabilities.

IV. Amendment Note

Amendments were made regarding the definition of “serious mental condition” and “activities of daily living” as described above in footnotes. In addition, the phrase “the young person or” was deleted in Section 2. The young person’s needs are taken into account for treatment, etc. but the correct standard for a “substantial danger” determination is substantial danger to others and not the young person. See ORS 419C.529. The mistake was not noticed when the bill was presession filed.

The bill was also amended to clearly provide the juvenile panel of the PSRB with rulemaking authority. The bill, in fact, was amended at the request of DHS to require the PSRB to adopt rules regarding placement of young persons with mental retardation. The PSRB is required to consult with DHS before issuing rules.

Flow Chart for SB 328



Judgments and Judicial Sales Work Group:

Judgments and Judicial Sales Clean-Up

SB 322

Prepared by Gerald G. Watson
Special Counsel
Oregon Law Commission

From the Offices of the Executive Director
David R. Kenagy
and
Deputy Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
January 18, 2007

I. Introductory Summary

For the 2007 Legislative Session, the Oregon Law Commission's Judgments and Judicial Sales Work Group proposes a bill that deals with "clean up" and "follow up" issues from legislation involving judgments and judicial sales that was approved in 2003 and 2005.

II. History of the Project

In 2005, the Legislative Assembly dealt with and approved large and significant bills involving judgments/garnishments (HB 2359) and judicial sales (SB 920). The Judgments bill itself was the continuation of a major overhaul of Oregon judgments law approved by the 2003 Legislative Assembly, culminating in HB 2646. At its meeting on March 31, 2006, the Program Committee of the Oregon Law Commission acknowledged that cross-referencing problems and unintended consequences were likely to come up involving this legislation, and that the Work Group should continue for the purpose of dealing with "clean up" and "follow-up" issues. The Law Commission accepted that recommendation at its meeting on July 19, 2006, authorizing a reorganized work group to meet and consider such issues.

Law Commissioner John DiLorenzo served as chair of the Judgments and Judicial Sales Work Group.¹ The work group met four times in the fall of 2006, most recently by telephone

¹ The Work Group included the following members:
Cleve Abbe Oregon Land Title Association
Gary Blackledge Greene & Markley PC
Doug Bray Oregon Judicial Department

conference on November 29, 2006. The Work Group decided to divide its task into manageable components. LC 1351, the legislative proposal addressed here, incorporates the Work Group's recommendations with regard to most, but not all, issues involving judgments and judicial sales that it intends to address for the 2007 Legislative Session.²

III. The Problems that This Proposal Addresses

This proposal addresses a series of issues or perceived problems. Each of those matters is specifically addressed below. The matters are listed in the order covered by the statutory proposal, with sections of the proposal indicated as appropriate.

Judgment Lien Priority (Section 1). ORS 18.165 was enacted into law in 2005. It establishes circumstances in which a judgment lien is and is not entitled to priority over a "conveyance" of the property, including mortgages and trust deeds on the property. This provision is a substantial re-write of former ORS 18.370. It has been suggested that as currently written, ORS 18.165(1)(d) gives absolute priority to all purchase money mortgages, trust deeds and other such security instruments over judgment liens.

On review, the Work Group determined that the intent of ORS 18.165(1)(d) was to specifically provide priority for mortgage lenders who provided a purchase money mortgage to the judgment debtor. Although there is language in the initial segment of subsection 1 of ORS 18.165 limiting the effect to conveyances of real property of the debtor, the Work Group determined that it would be desirable to provide additional clarifying language to ORS 18.165(1)(b), (c), and (d) indicating that the conveyance must be "by the debtor" or "of the debtor's interest" in the property. The proposal also adds language to ORS 18.165(1)(a) indicating that a conveyance to a good faith purchaser must be "delivered and accepted" prior to the entry or recording of a judgment in the county where the property is located. See Section 1 revising ORS 18.165 at subparagraphs 1(a)-(d).

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Dave Heynderickx, Special Counsel to the Legislative Counsel, provided drafting assistance.

Jerry Watson, Special Counsel to the Oregon Law Commission, provided staff and research assistance.

² Remaining issues have been referred to subcommittees of the Work Group for more detailed consideration. The Work Group anticipates bringing those remaining issues to the Law Commission in one or more additional legislative drafts at a subsequent meeting of the Commission.

Multiple Judgments on a Single Writ of Execution (Section 2). The issue here is simply whether a single writ of execution may be issued for two or more judgments. The issue arose during the course of Work Group deliberations. The existing relevant statute, ORS 18.860, simply doesn't speak to this question. The Work Group determined that a single writ should be allowed so long as the judgments are against the same judgment debtor and are entered in the same case. See Section 2 amending ORS 18.860 to that effect by adding a new subsection (3).

Satisfaction of Judgments (Section 3). ORS 18.235(1) allows 1) a judgment debtor or 2) a person with an interest in real property against which a judgment lien exists to seek a court order declaring a judgment satisfied. The problem is that under the existing statutory language the phrase "with an interest in real property against which a judgment lien exists," can be interpreted to describe both "person" and "judgment debtor" and not just "person." The Work Group determined that that minor changes to the wording of ORS 18.235 would clarify the intent. See Section 3 amending ORS 18.235.

Money Award (Sections 2 and 4-7). The current version of Ch. 18 does not explicitly address post judgment inclusion of post judgment interest and costs and expenses accruing after the date of entry of judgment as amounts collectible under the money award. After discussion it was decided that statutory clarification was appropriate in those statutory provisions that use the term "money award" to distinguish between the two types of references to "money award": (1) the amount awarded at the time of judgment; and (2) the balance due on the judgment. Changes were made in Section 5 of LC 1351 by adding a new statutory section explicitly including interest accruing on the money award, as well as expenses defined elsewhere in statute (ORS 18.999) as amounts owing on the money award. Sections 2, 6 and 7 make conforming changes, respectively to ORS 18.860, 18.868 and 18.936 by adding the phrase "amounts owing on" before the term "money award," to make clear that the reference was to the current balance (after application of credits and additions) due on the judgment and not the static amount awarded at the time of entry of the judgment.

Challenge to Execution (Sections 8 and 9). The issue addressed here is whether the circumstances under which a judgment debtor can challenge an execution should be expanded. The issue arose in the context of the Work Group's discussion of money awards and the amount(s) collectable under such awards. Existing law allows a judgment debtor to use a Challenge to Execution form only to claim such exemptions as are permitted by law. The Work Group recognized that a judgment debtor should also have a mechanism to challenge a writ of execution where the amount specified in the writ is greater than the amount owed under the money award. Section 8 provides for this additional use by adding a new subsection (1)(b). Section 9 amends the Challenge to Execution form set out in ORS 18.896 to conform to changes in Section 8.

Orders in Aid of Execution (Sections 10 and 11). The issue raised here is whether there should be a detailed statutory process for and method of authorizing orders in aid of execution that allow the Sheriff authority to enter into structures, commercial or residential, and occupied or not occupied. The law is presently silent on this matter. Representatives from Sheriff's offices expressed a strongly felt need for court direction when asked to enter a structure or other

enclosure, in order to protect a sheriff's office from claims of unlawful entry. The Work Group determined that a procedure to obtain such an order should be specified in statute, that the order should allow for the use of reasonable force, and that such an order could then be relied upon by a sheriff in entering a structure or other enclosure for the purposes of levying on personal property. Section 11 sets forth the procedural requirements for an order for entry of premises, and provides that a sheriff may rely on such an order.

Effect of Levy by Sheriff (Alternative Method of Levy) (Sections 12 and 13). An issue was raised about the impact on creditor rights of using the alternative method of levy set forth in ORS 18.880, particularly by "rendering the property inoperable," if such a levy is challenged by a Trustee in bankruptcy. The Work Group agreed that the intended effect of a levy was to establish the priority of a judgment creditor over other interests to the fullest extent allowed by law. Section 12 implements this policy by amending ORS 18.878 (ORS 18.878 incorporates a reference to ORS 18.880) to provide that upon levy, the interest of a judgment creditor in personal property is the same as that of a secured creditor with a perfected security interest in the property. Section 13 contains a minor amendment to ORS 18.888 to conform its provisions to the changes made to ORS 18.878.

Definitions: Tangible Personal Property and Intangible Personal Property (Section 14). The existing statute lacks definitions of several significant terms, including "tangible personal property," and "intangible personal property." This can create confusion and uncertainty because remedies and procedural requirements for execution on and sale of property under ORS Chapter 18 depend upon the type of property involved. The Work Group considered whether reliance on common law definition of such terms is adequate or whether statutory definitions were needed. The Work Group determined that the terms were inherently difficult to define and declined to create statutory definitions. Instead it decided to resolve the matter by specifically allowing court determination of whether property is tangible or intangible by ex parte order. See Section 14 amending ORS 18.884.

Impact of Deficiency Judgment Restrictions on Priority (Sections 15-17). The issue here is whether the effect of ORS 88.075, defining a purchase money mortgage, should be expressly limited to restricting the right of a purchase money mortgage lender under ORS 88.070 to a "deficiency judgment" when the mortgage is foreclosed. Apparently the IRS has argued that ORS 88.075 also governs priority between a mortgage and a pre-existing judgment or tax lien. ORS 88.075 was added to existing provisions on lien foreclosure in 1975. Placement of this provision in the statutory chapter (Chapter 88) on lien foreclosure led the Work Group to conclude that its logical and intended purpose was limited to defining and restricting the rights of a mortgagor to a deficiency judgment under ORS 88.070, rather than to more generally govern priority between a mortgage and other encumbrances. Sections 15-17 deal with this issue. Section 15 incorporates the provisions of current ORS 88.075 into ORS 88.070, clarifying its sole application to that provision. Section 17 repeals ORS 88.075 as now unnecessary. Section 16 makes minor conforming changes to ORS 86.770 by deleting reference to ORS 88.075.

Creditor Bond Requirement (Sections 18 and 19). The issue here is whether a sheriff's right to require a bond is substantially absolute or should be based on objective standards. Under current law (ORS 18.886) a sheriff may require a creditor's bond or irrevocable letter of credit if

property is perishable, the sheriff has actual notice of a third-party claim, or the sheriff has “doubt” as to actual ownership or any encumbrance on the property. This provision vests very broad discretion in a sheriff to require a bond or letter of credit. No standards for determining “doubt” or “reasonableness” are set forth in the current statutory provision. Sheriff’s offices were concerned to protect themselves from potential liability to parties whose interests were adversely affected by execution or sale; judgment creditors wished to avoid the additional time and expense involved in providing a bond or letter of credit. After extensive consideration, the Work Group determined that the most appropriate way to handle the matter was to always allow sheriffs to require a bond or letter of credit if there is an identified third party with an interest in the property or if the property is perishable. If the property is not perishable and there is no identified third party, and the sheriff has reasonable doubts concerning the ownership or any encumbrance on the property, the sheriff is to be allowed to request a bond or letter of credit, unless the judgment creditor provides the sheriff with title documents or other appropriate records from state or federal government agencies establishing that no encumbering interests exist that would be affected by execution or sale. See Section 18 amending ORS 18.886 to this effect. Section 19 contains a conforming amendment to ORS 18.950 to add an “irrevocable letter of credit” to the list of costs of sale recoverable from the proceeds of sale. A “bond” was already a listed allowed recoverable cost.

Form and Style (Section 20). This provision simply expresses form and style provisions of Legislative Counsel.

IV. Conclusion

The proposed bill creates new provisions, amends ORS 18.165, 18.235, 18.860, 18.868, 18.878, 18.884, 18.886, 18.888, 18.892, 18.896, 18.936, 18.950, 83.770 and 88.070, and repeals ORS 88.075. This bill addresses inconsistencies, ambiguities and unintended consequences of existing law dealing with judgments and executions on judgments and resolves such issues in an appropriate manner.

V. Possible Amendment

The Oregon Judicial Department is expected to request a minor, non-substantive amendment to Section 5 of SB 322 to clarify that this section does not require court clerks to calculate interest on judgments. Clerks do not do so now, at least on civil judgments. Section 5 is a new provision to make clear that accruing interest and collection expenses are included in the money award. This matter was briefly discussed by the workgroup at its meeting on January 9, 2007. The Work Group does not object to the introduction of this amendment. The Oregon Law Commission has not considered the proposed amendment and, therefore, the Commission does not take a position, either in favor or opposition, to such an amendment.

Amendment Note

As anticipated above, a minor, non-substantive amendment was made in the Senate to Section 5 of SB 322. The bill as amended was passed by both the Senate and the House. The Oregon Judicial Department requested this amendment to clarify that Section 5 did not require court clerks to calculate interest on judgments. The Work Group did not object to the introduction of this amendment since there was no intent to change existing practice with regard to responsibility for calculating interest.

Judgments and Judicial Sales Work Group:

Summary Determination

SB 499

Prepared by Gerald G. Watson
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From the Offices of the Executive Director
David R. Kenagy
and
Deputy Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
January 18, 2007

I. Introductory Summary

For the 2007 Legislative Session, the Oregon Law Commission's Judgments and Judicial Sales Work Group proposes a bill that clarifies terminology, primarily in ORCP 47 for consistency with legislation involving judgments that was approved by the Legislative Assembly in 2003 and 2005.

II. History of the Project

In 2005, the Legislative Assembly dealt with and approved large and significant bills involving judgments/garnishments (HB 2359) and judicial sales (SB 920). The Judgments bill itself was the continuation of a major overhaul of Oregon judgments law approved by the 2003 Legislative Assembly, culminating in HB 2646. At its meeting on March 31, 2006, the Program Committee of the Oregon Law Commission acknowledged that cross-referencing problems and unintended consequences were likely to come up involving this legislation, and that the Work Group should continue for the purpose of dealing with "clean up" and "follow-up" issues. The Law Commission accepted that recommendation at its meeting on July 19, 2006, authorizing a reorganized work group to meet and consider such issues.

Law Commissioner John DiLorenzo served as chair of the Judgments and Judicial Sales Work Group.¹ The work group met five times in the fall and early winter of 2006/2007. The

¹ The Work Group included the following members:

Cleve Abbe	Oregon Land Title Association
Gary Blacklidge	Greene & Markley PC

Work Group decided to divide its task into manageable components. SB 499, the legislative proposal addressed here, advances the Work Group’s recommendation with regard to a narrow, but important issue involving judgments and terminology in ORCP 47.²

III. The Problem that This Proposal Addresses

In 2003 and 2005, the Legislative Assembly enacted significant reforms dealing with judgments in ORS Chapter 18, including codifying key terms, such as a “general judgment,” “limited judgment,” and “supplemental judgment.” ORS 18.005. Concerns exist about possible confusion between the procedures for dealing with “judgments” established in ORS Chapter 18 and the concept of a “summary judgment” described in ORCP 47. A party may seek summary judgment upon all or any part of an action that the party has brought or against which the party is defending. The fundamental concern is that the concept of a “summary judgment” includes the determination of many matters which should not be regarded as judgments under ORS Chapter 18.

The last sentence of ORCP 47C provides that “a summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.” A specific concern is that ORS 18.005(16)³ might be read together with ORCP 47C as an argument that a summary determination of liability by itself is a “claim for relief” that could serve as the basis for an appealable judgment because ORCP 47C specifically authorizes disposition of that issue by judgment.

IV. Objective of the Proposal

The objective of the proposal is to clarify terminology in order to avoid confusion between the different ways in which “judgment” is used in ORS Chapter 18 and in “summary judgment” under ORCP 47. Upon review, the Work Group concluded that the concept

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Dennis Paterson	Davis Wright Tremaine LLP
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Jerry Watson, Special Counsel to the Oregon Law Commission, provided staff and research assistance
Dave Heynderickx, Special Counsel to the Legislative Counsel, provided drafting assistance.

² Remaining issues have been brought to the Law Commission in separate proposed legislation.

³ ORS 18.005 (11) defines a judgment” to mean “the concluding decision of a court on one or more requests for relief in one or more actions, as reflected in a judgment document.” ORS 18.005(16) defines a “request for relief as “a claim, or charge in a criminal action or any other request for a determination of the rights and liabilities of one or more parties in an action that a legal authority allows the court to decide by a judgment.”

“summary judgment” refers to the summary determination of some issue or matter. That issue or matter may or may not be a “judgment” as that term is used in ORS Chapter 18. To avoid confusion, the Work Group recommends substituting the term “summary determination” for the term “summary judgment” throughout ORCP 47. The Work Group recognized and gave considerable attention to the fact that “summary judgment” is a widely used and commonly understood term. However, the Work Group felt that the term “summary determination” more accurately reflected what kinds of action that can be taken under ORCP 47, and avoids potentially significant confusion with ORS Chapter 18.

V. The Proposal

Sections 1-7.

Sections 1-7 amend ORCP 47 (subject to amendment by the Council on Court Procedures) at Sections A-F and H, respectively, by substituting “summary determination” for “summary judgment” throughout the rule. Other conforming changes are made throughout ORCP 47 Sections A-H to eliminate references to judgment (for example, replacing “enter judgment for the moving party” with the phrase “grant the motion”) that could perpetuate confusion.

Section 8.

This section makes a single conforming amendment to ORS 86.742 to substitute “summary determination” for “summary judgment” in ORS 86.742(3).

VI. Conclusion

The proposed bill amends ORCP 47 and ORS 86.742. It addresses ambiguity and possible confusion between the judgment provisions of ORS Chapter 18 and the use of “summary judgment” elsewhere in the statute. It resolves that ambiguity by substituting a new term “summary determination” for the existing term “summary judgment.”

VII. Amendment Needed

The Oregon Law Commission approved SB 499 as introduced in the Legislative Assembly subject to a single amendment: the addition of language at Section 7 (amending ORCP 47H) specifically indicating that if a "summary determination" results in a resolution of all claims (against one or more parties), then a "general" judgment is to be entered. This amendment parallels existing language in Paragraph H indicating that a "limited" judgment can be entered. It was intended to eliminate ambiguity created by mentioning "limited" judgments without also providing for the entry of a "general" judgment when appropriate. The Oregon Law Commission anticipates that an appropriate amendment will be advanced through the legislative committee process.

Amendment Note

The “needed” amendment discussed above was not made to this bill. The bill as introduced remained in committee when the committee closed.

Judgments and Judicial Sales Work Group:

Money Award and Separate Record

SB 501

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From the Offices of the Executive Director
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Report Approved at
Oregon Law Commission Meeting on
January 18, 2007

I. Introductory Summary

For the 2007 Legislative Session, the Oregon Law Commission's Judgments and Judicial Sales Work Group proposes a bill (SB 501) that clarifies terminology dealing with "money award" and "separate record" as those terms are used in ORS Chapter 18. The term "separate record" is replaced with "judgment lien record" throughout ORS Chapter 18. SB 501 also makes conforming changes to other statutory chapters substituting "judgment lien record" for references to a "separate record" found in those provisions.

II. History of the Project

In 2005, the Legislative Assembly dealt with and approved large and significant bills involving judgments/garnishments (HB 2359) and judicial sales (SB 920). The Judgments bill itself was the continuation of a major overhaul of Oregon judgments law approved by the 2003 Legislative Assembly, culminating in HB 2646. At its meeting on March 31, 2006, the Program Committee of the Oregon Law Commission acknowledged that cross-referencing problems and unintended consequences were likely to come up involving this legislation, and that the Work Group should continue for the purpose of dealing with "clean up" and "follow-up" issues. The Law Commission accepted that recommendation at its meeting on July 19, 2006, authorizing a reorganized work group to meet and consider such issues.

Law Commissioner John DiLorenzo served as chair of the Judgments and Judicial Sales Work Group.¹ The work group met five times in the fall and early winter of 2006/2007. The

¹ The Work Group included the following members:

Work Group decided to divide its task into manageable components. SB 501, the legislative proposal addressed here, advances the Work Group’s recommendations with regard to clarifying the amounts to be included in the money award portion of a judgment and creating a new name, “judicial lien record,” for the currently unnamed “separate record” mentioned throughout ORS Chapter 18².

III. The Problems that This Proposal Addresses

This proposal addresses two requests referred to the Workgroup by the Oregon Judicial Department:

1. Distinguish the Money Award section of the judgment (ORS 18.042(2)(e) – (h)) from the Money Award made on a request for relief in the pleadings in the action (ORS 18.042(2)(d)).
2. Name the unnamed “separate record,” known as the “docket” before 2003 House Bill 2646 (2003).

Money Award.

ORS 18.075(3) requires that the court administrator enter the “money award in a judgment in a “separate record” In 18.042(2)(d), the “money award” is only one component of the financial obligation that the judgment may impose on the judgment debtor. The other obligations are set out in 18.042(2)(e) through (h) and may include monetary amounts to be entered in the separate record as a part of the court’s “money award” in the case and subject to lien status. Entering only 18.042(2)(d) amounts understates the court’s total award to the judgment creditor.

To eliminate confusion as to which amount court clerks should enter in the separate record, the Judicial Department proposed renaming one of the amounts called “money award.” The Workgroup appointed a subcommittee to review and recommend action to the Workgroup.

Cleve Abbe	Oregon Land Title Association
Gary Blacklidge	Greene & Markley PC
Doug Bray	Oregon Judicial Department
Mark Comstock	Garrett, Hemann, Robertson, Jennings, Comstock & Trethewy PC
Nori Cross	Oregon Judicial Department
John Davenport	Davenport & Hasson LLP
Brian DeMarco	Oregon Judicial Department
David Hercher	Miller Nash LLP
Randy Jordan	Oregon Department of Justice
Tim Leader	Washington County Sheriff’s Office
Jim Markee	Markee & Associates
Jim Nass	Appellate Courts Staff Attorney
Dennis Paterson	Davis Wright Tremaine LLP
Marshall Ross	Multnomah County Sheriff’s Office

Jerry Watson, Special Counsel to the Oregon Law Commission, provided staff and research assistance
Dave Heynderickx, Special Counsel to the Legislative Counsel, provided drafting assistance.

² Remaining issues have been brought to the Law Commission in separate proposed legislation.

The subcommittee proposed amending ORS 18.042(2)(d) to describe the amount awarded and not call it a “money award.” It debated and rejected using the term “principal” for that amount because “principal” has other meanings. The subcommittee proposed the language in Section 1 of the bill replacing reference to “money award” with “the amount of money awarded in the judgment, exclusive of amounts required to be included in the separate section under paragraphs (e) to (g) of this subsection.” The Workgroup agreed.

Separate Record.

The 2003 revisions to the law of judgments discontinued the term “docket” to describe the court record where the clerk of court enters money judgments to create judgment liens. The 2003 revisions required the clerk to enter those amounts in a “separate record” but did not name the separate record. The Judicial Department proposed giving the separate record a formal name that identified the record as a circuit court record that creates a judgment lien.

The Workgroup reviewed several options and agreed that “judgment lien record” sufficiently described the record and distinguished it from other court records and other lien records, because circuit courts are the only Oregon courts that can create judgment liens. Sections 2 – 14 of SB 501 amend ORS 18.075 to replace the term “separate record” with “judgment lien record and conform language in ORS chapters 18, 46, 52, 87, and 416.

IV. Objective of the Proposal

The purpose of these proposals is to eliminate confusion caused by the current statutory references to “money award” and “separate record” in ORS Chapter 18.

V. The Proposal

Section 1.

Section 1 of the bill amends ORS 18.042 by replacing a single reference to “money award” at paragraph (d) of subsection 2 with “the amount of money awarded in the judgment, exclusive of amounts required to be included in the separate section under paragraphs (e) to (h) of this subsection.”

Sections 2-14.

Sections 2 – 14 of SB 501 amend ORS 18.075 to replace the term “separate record” with “judgment lien record” Sections 3-13 make conforming changes throughout Chapter 18, and to provisions using the term “separate record” in ORS chapters 46, 52, 87, and 416.

Section 15.

Section 15 contains LC form and style changes.

VI. Conclusion

The proposed bill amends ORS 18.042 to clarify use of the term “money award.” It also substitutes the term “judgment lien record” for the existing term “separate record” as that latter term is used throughout ORS Chapter 18 and makes conforming changes in other statutory chapters where the term “separate record” is used.

Amendment Note

This bill was amended in the House by adding selected non-controversial portions of SB 499, as new Sections 15-17. Existing Section 15 described above was renumbered as Section 18. SB 499 would have made significant changes to the concept of summary judgment in ORCP 47, but did not move out of committee. The amendment to SB 501 changes inappropriately broad references in ORCP 47 from “entry” of a “judgment,” to more accurate references such as “granting” or “denying” the “motion,” or otherwise indicating that a party is entitled to “prevail” as a matter of law. The term and concept of “summary judgment” (used as a noun) remains intact. The Senate concurred in the House amendment. The amendment was requested by staff, after consultation with the Work Group Chair, and notice to Work Group members and Law Commission members.

Elective Share Work Group:

ELECTIVE SHARE

HB 2381

Prepared by Samuel E. Sears
Staff Attorney
and
Ben Stewart
Law Clerk

From the Offices of the Executive Director
David R. Kenagy
and
Deputy Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
January 18, 2007

I. Introductory Summary

Oregon's elective share statutes provide that a surviving spouse is entitled to 25% of the net probate estate of a deceased spouse regardless of the provisions of the deceased spouse's will. The purpose of elective share statutes is to help ensure that no surviving spouse is disinherited by their spouse and barred from receiving a portion of the couple's marital estate. There are two primary justifications for this rule: 1) both spouses contribute to the acquisition of wealth during marriage and both should receive an equal portion of the couple's marital estate (partnership theory); and 2) the surviving spouse should be provided some measure of support (support theory).

In contrast, a spouse who seeks a divorce in Oregon is usually entitled to 50% of a marital estate. Thus, a spouse who files for divorce receives substantially more of the marital estate than a spouse who opts to take the elective share. In addition, the elective share statute applies only to the net estate,¹ so it can easily be avoided through nonprobate transfers, such as trusts. In short, Oregon's elective share statute has been criticized as having too low of a percentage and for being too easy to circumvent.

¹ ORS 114.105 provides, in part, that "...the surviving spouse of the decedent has a right to elect to take the share provided by this section. The elective share consists of one-fourth of the value of the net estate of the decedent..." ORS 111.005 (23) defines "Net estate" as the real and personal property of a decedent, except property used for the support of the surviving spouse and children and for the payment of expenses of administration, funeral expenses, claims and taxes.

II. History of the Project

In 2001, the Law Commission established an Elective Share Work Group which spent considerable time studying this problem and recommended that the Commission consider the possibility of proposing that Oregon adopt some form of community property regime as a solution to this and other problems inherent in a separate property system. As a result, the Elective Share Work Group was reconstituted as the Marital Property Work Group. In 2003, the Marital Property Work Group started its work, focusing its attention primarily on the Uniform Marital Property Act (UMPA). After significant deliberation, the work group recommended a modified version of the UMPA. Legislative Counsel prepared a draft statute and the work group disseminated it to various sections of the Oregon State Bar for input and feedback. After receiving almost uniformly negative response from various bar sections the Work Group decided to abandon the proposal that would have established a community property regime in Oregon.

In 2005, the Elective Share Work Group reassembled in order to focus on the narrower issue of the disparity between the amounts a surviving spouse can obtain through the elective share versus the amount a spouse can obtain through divorce. The Work Group was chaired by Bernie Vail, Northwestern School of Law, Lewis and Clark College and included the following members: Alan Brickley, First American Title Co.; Susan Gary, University of Oregon School of Law; Heather Gilmore, Heather O. Gilmore PC; Karl Goodwin, Department of Justice; Susan Grabe, Oregon State Bar; Evan Hansen, Grable & Hantke, LLP; Steven Heinrich, Attorney in private practice; David Heynderickx, Legislative Counsel; Sally LaJoie, Oregon State Bar; Rick Mills, Department of Human Services; David Nebel, Oregon State Bar; Richard Pagnano, Davis, Pagnano, & Williams LLP; Lane Shetterly, Department of Land Conservation and Development; Brian Thompson, Luvaas Cobb; Tim Wachter, Bullivant Houser Bailey PC; Merle Weiner, University Oregon School of Law; and Michael Yates, Yates Matthews & Associates.

III. Statement of Problem Area

ORS 114.105 provides that a surviving spouse has the option to elect to take one-fourth of the value of the net estate of the deceased spouse (decedent) as opposed to taking under the terms of the will. In a divorce proceeding, however, ORS 107.105(f) requires courts divide assets in a manner that is “just and proper in all of the circumstances.” As a practical matter, parties to a divorce proceeding receive half of the assets unless there is some reason to vary the distribution. There is a significant discrepancy between what a surviving spouse receives who remains married and takes the elective share (25% of the net estate) and a spouse who ends the marriage through divorce (50% of *all* marital assets). Additionally, ORS 114.105 limits what is available for a spouse to elect by confining the elective share to a percentage of the assets that are part of the net estate. Common estate planning techniques include the establishment of nonprobate assets that are not part of the net estate, such as trusts, ownership of property with rights of survivorship, and life insurance policies. Thus, it is common for a net probate estate to be worth substantially less than the spouses’ actual marital estate.

In recognition of these problems with the elective share, and to address other probate matters, the National Conference of Commissioners on Uniform State Laws drafted the Uniform

Probate Code (UPC).² HB 2381 is modeled in part on section 2-202 of the 1990 UPC. Under the UPC section 2-202, the value of the elective share is determined based on a sliding scale that starts after one year of marriage at 3% and increases to 50% after 15 years of marriage. The results of the elective share provisions under the UPC are driven by the partnership theory of marriage. Under the partnership theory each spouse of a long term marriage would be entitled to 50% of the estate under the rationale that both spouses share in the work to accumulate marital assets. The partnership theory can be stated in various ways and is sometimes thought of “as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike.” M. Glendon, *The Transformation of Family Law* 131 (1989). Integral to ensuring that a surviving spouse receives his or her share of a marital estate is to calculate the elective share based on the augmented estate.³ The augmented estate is calculated by combining the probate estate, nonprobate estate, and other transfers to the surviving spouse. Using the augmented estate to calculate the elective share greatly reduces the ability of a person to circumvent elective share statutes.

One criticism of elective share statutes is that they provide either too little or too much of the marital assets to the surviving spouse. For this reason, many scholars favor community property because it generally provides for equitable ownership and distribution of assets upon the death of a spouse. If marital property is titled to the decedent, there is the chance that the surviving spouse will receive substantially less than 50% of the marital estate. Alternatively, if marital property is titled to the surviving spouse, he or she may end up receiving much more than 50% of the marital estate. The following scenarios illustrate these points.

Illustration⁴

Consider A and B, who were married in their twenties or early thirties; they never divorced, and A died at age, say, 70, survived by B. For whatever reason, A left a will entirely disinheriting B. Throughout their long life together, the couple managed to accumulate assets worth \$600,000, marking them as a somewhat affluent but hardly wealthy couple.

Under conventional elective-share law, B's ultimate entitlement depends on the manner in which these \$600,000 in assets were nominally titled as between them. B could end up much poorer or much richer than a 50/50 partnership principle would suggest. The reason is that under conventional elective-share law, B has a claim to one-third (one-quarter under current Oregon law) of A's "estate."

² As of December 2006, 18 states have adopted some form of the UPC. Those states are: Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, Utah, and Wisconsin.

³ Below are definitions of some important terms that are used in this draft:

1) Probate Estate: Section 12 of this draft defines the probate estate as “the value of all estate property that is subject to probate...”. Probate property is property that passes under the decedent’s will or by intestacy.

2) Nonprobate Estate: Sections 14 through 18 of this draft define the nonprobate estate as property that the decedent had an interest in that was not included in the probate estate. Generally, nonprobate property is property that passes under an instrument other than a will (e.g. a trust).

3) Augmented Estate: Section 9 of this draft defines the augmented estate as a decedent’s probate estate, nonprobate estate, and nonprobate transfers to the surviving spouse.

⁴ Modified from the General Comments of the Uniform Probate Code (2006).

Scenario 1

Marital Assets Disproportionately Titled in Decedent's Name; Conventional Elective-share Law Frequently Entitles Survivor to Less Than Equal Share of Marital Assets.

If all the marital assets were titled in A's name, B's claim against A's estate would only be for \$200,000—well below B's \$300,000 entitlement produced by the partnership/marital-sharing principle.

If \$500,000 of the marital assets were titled in A's name, B's claim against A's estate would still only be for \$166,500 ($\frac{1}{3}$ of \$500,000), which when combined with B's "own" \$100,000 yields a \$266,500 cut for B—still below the \$300,000 figure produced by the partnership/marital-sharing principle.

Scenario 2

Marital Assets Equally Titled; Conventional Elective-share Law Entitles Survivor to Disproportionately Large Share.

If \$300,000 of the marital assets were titled in A's name, B would still have a claim against A's estate for \$100,000, which when combined with B's "own" \$300,000 yields a \$400,000 cut for B—well above the \$300,000 amount to which the partnership/marital-sharing principle would lead.

Scenario 3

Marital Assets Disproportionately Titled in Survivor's Name; Conventional Elective-share Law Entitles Survivor to Magnify the Disproportion.

If only \$200,000 were titled in A's name, B would still have a claim against A's estate for \$66,667 ($\frac{1}{3}$ of \$200,000), even though B was *already* overcompensated as judged by the partnership/marital-sharing theory.

This proposal was drafted in contemplation of these scenarios in order to ensure that if the surviving spouse elects to take under the elective share laws, the surviving spouse will receive at least one-third of the marital assets. This would be the case regardless of which name was on the title or what methods the decedent used to distribute assets after death.

Another criticism of elective share statutes is that they are contrary to freedom of testation. That is, they place certain limitations on what a person can do with his or her property upon death. Some argue that the decedent is in the best position to determine the future needs of his or her family and that the decedent will take these concerns into consideration when formulating an estate plan. On the other hand, the decedent can leave a surviving spouse penniless. Thus, there is friction between testamentary freedom and society's interest in protecting a surviving spouse. This is one consideration that was used to select the elective share amount of 33% as opposed to the 50% number used by the UPC. In addition, this issue can be eliminated entirely through the use of a prenuptial or postnuptial agreement. (See Sections 6 and 27 of HB 2381, which are described below; See also current ORS 114.115)

As a final concern, Oregon's current elective share statute rewards the surviving spouse, regardless of the length of the marriage. In one Pennsylvania case⁵ the groom collapsed and died at the marriage ceremony and the surviving spouse was allowed to elect against his estate. This inequity can be further exacerbated where there are multiple marriages. Oregon's current elective share statute would not fully protect a decedent's desire to provide for children of previous marriages. The main objective of providing a sliding scale amount for the elective share between 5% and 33% is to account for shorter marriages under the reasoning that the partnership theory of marriage is better suited for longer term marriages.

IV. Objective of the Proposal (Section Analysis)

HB 2381 seeks to partially eliminate the discrepancy between what a spouse may receive through the elective share statutes and divorce proceedings, address the criticisms listed above regarding equitable distribution and freedom of testation, protect the surviving spouse, and bring Oregon law up to date with current estate planning techniques. This is accomplished through a two part change. First, the percentage that the surviving spouse can elect to take under the statute is increased from 25% to a maximum amount of 33%. Second, the statute changes the definition of the estate that is elected against by subjecting all assets, not just the net estate, to the proposed percentage. The draft provides several other changes in an effort to reflect the overarching policy of protecting the surviving spouse and providing an improved process for electing against the decedent's estate.

A. Increase the percentage of the estate that may be obtained through choosing to receive the elective share

Section 4 of this draft provides that a surviving spouse may obtain up to 33% of the augmented estate if that spouse chooses to receive the elective share. The percentage of what a spouse can receive under the elective share is based on the duration of the marriage. The amount starts at 5% for less than two years of marriage and increases each year of marriage up to a maximum of 33% after 15 years of marriage.

Justification for increasing the amount to 33%

There are several reasons why the work group chose to increase the elective share to 33% and not some other amount. Elective share statutes vary widely from state-to-state usually ranging from 33% to 50%. From a philosophical perspective, the elective share arguably should be close to 50%, especially in longer marriages, because each spouse has contributed to the marriage. The sliding scale approach recognizes that there are widely varying fact patterns under which an elective share may be claimed and that individuals involved in a longer marriage are likely more deserving of a large portion of the estate.

From a practical perspective, the work group decided not to increase the elective share amount to 50% – making it equal to what a party would likely obtain in a divorce proceeding – because of opposition from estate planners. One common estate planning technique employed by estate planners is to create a trust that will provide for the needs of a surviving spouse but which passes the trust property to others at the spouse's death. There are several reasons for

⁵ *In re Neiderhiser's Estate*, 27 Fiduc. Rep. 329 (Pa. Com. Pl. 1977).

creating these trusts, one of which is to ensure that a surviving spouse is able to qualify for certain state benefits, such as Medicaid, without depleting the assets on medical bills.⁶ Under current law, the assets that are placed in these trusts are not used to calculate the elective share. Under this proposal, however, the assets in these trusts would factor into the elective share calculation and potentially increase the elective share amount significantly. If the surviving spouse failed to make the election, the surviving spouse could be disqualified from Medicaid for effectively allowing assets that belong to the surviving spouse to transfer to another person. If the surviving spouse was incompetent, which is often the case, DHS would seek to have a conservator nominated to make the election on behalf of the surviving spouse.

The state is authorized to bring an action under ORS 414.105 upon the death of the surviving spouse to recover amounts paid for public assistance and care and maintenance. The amount the state can recover is dependent on the surviving spouse's remaining assets. In short, the higher the percentage of the elective share, the more likely the state can recover from an estate for reimbursement for amounts expended for the benefit of the surviving spouse.

B. Augment the estate that is subject to the elective share by including property transferred by the deceased two years preceding death, joint tenancies, and transfers in which the deceased retained either the right to revoke or the income for life.

Sections 9 to 21 set out which assets are included in the augmented estate for purposes of determining the elective share and establish how the elective share shall be satisfied. Section 9 provides for the augmented estate to include the decedent's probate estate, the decedent's nonprobate estate, and the decedent's nonprobate transfers to the surviving spouse. This is a significant change from current law, which provides for election against only the net probate estate. Section 21 determines the priority of sources from which the elective share is payable. Section 12 provides the definition of the decedent's probate estate, sections 13 to 19 describe the decedent's nonprobate estate, and section 20 describes the decedent's nonprobate transfers to the spouse. It is necessary to include the probate estate, nonprobate estate, and nonprobate transfers to calculate the augmented estate to ensure that the surviving spouse receives his or her full elective share. The following example will help illustrate this point.

Assume that a surviving spouse from a marriage of over 15 years opts to take the elective share instead of taking under the terms of the will. Further assume that there is \$500,000 of probate assets (none of which was bequeathed or devised to the surviving spouse), \$250,000 of nonprobate assets, and a \$250,000 nonprobate transfer to the surviving spouse before the decedent died. Under the provisions of this measure the augmented estate would be \$1,000,000 and the surviving spouses elective share amount would be \$330,000. Under Section 21 (1)(a) and (b) amounts included in the decedent's probate estate that pass to the surviving spouse and nonprobate transfers to the surviving spouse would be used first to satisfy the elective share amount. Thus, the \$250,000 that was given to the surviving spouse would be used first to satisfy the elective share. The remaining \$80,000 would be satisfied using the probate estate. If the \$250,000 nonprobate transfer to the surviving spouse was not used to calculate the elective share,

⁶ Assets placed in certain types of trusts, such as special needs or supplemental trusts (*See* 42 U.S.C. 1396p(d)(4)(setting out the types of trusts that are not used to calculate Medicaid eligibility under state plans), are not used in Medicaid asset calculations so long as the distributions do not violate Medicaid's income and resource tests. *See also* OAR 461-140-0010 *et seq.* (setting out Oregon's eligibility rules).

the elective share would only be \$247,500 (33% of \$750,000) and the surviving spouse would receive well under \$330,000 (33% of \$1,000,000).

Justification for using the augmented estate to calculate the elective share

In today's society, nonprobate property accounts for a large portion of an average estate. This is largely in response to the negative view of the probate process. This leads to two problems regarding the elective share: 1) individuals may defeat the intent of the elective share by eliminating probate property altogether; and 2) courts are not provided clear guidance when deciding whether to include will substitutes as part of the estate in an elective share proceeding. Providing that nonprobate property shall be used to determine the augmented estate will effectively stop an individual from circumventing elective share laws to disinherit a spouse. In addition, the statutes will give courts guidance, which will alleviate confusion and inconsistent results.

C. Other methods to protect the surviving spouse and improve the elective share process

This proposal sets forth other provisions in an effort to further advance the policy of protecting the surviving spouse. Part of this effort has led to procedural changes to increase the efficiency, fairness, and effectiveness of the elective share statutes.

Payment of Elective Share

Sections 21 to 23 set out the method of paying the elective share, including the priority of sources from which the elective share is payable, the liability of recipients of the decedent's nonprobate estate, and protection of payors and other third parties. The priority for payment of the elective share begins with the probate property of the decedent that passes to the surviving spouse. Following is the decedent's nonprobate transfers to the surviving spouse and then the decedent's remaining probate and nonprobate estates. This system of priority reflects the fairness of the elective share by requiring that the surviving spouse's nonprobate property received from the decedent be counted against the elective share. Likewise, it reflects to a great degree the intent of the decedent by allowing for probate transfers to be made and counted against the elective share. (See current ORS 114.105)

Time Limit

Section 24 of the proposal increases the time limit for filing for an elective share from 90 days to 120 days. This section provides further protection to the surviving spouse.

Who may exercise the right of election

Section 7 of the proposal expands the group of persons who can exercise the right of election. ORS 114.155 currently allows a court or the conservator of the estate to exercise the right of election. The proposal would increase that group of people to include a conservator, guardian, agent, the personal representative of the estate should the surviving spouse die before the election is exercised, and the Department of Human Services if the department has a claim against the surviving spouse for amounts paid to the surviving spouse as public assistance or care and maintenance.

V. Proposal: House Bill 2381

Section 1

Section 1 provides that the sections of this draft are added to and made a part of ORS chapter 114.

Section 2

This section adds definitions for the terms “power,” “power of appointment,” “property,” and “transfer.” The purpose of this section is to provide clarity and continuity throughout the act. The definitions were also necessitated by the change from using the probate estate to calculate the elective share, to using the augmented estate to calculate the elective share.

Section 3

Section 3 sets out the right of the elective share generally. It also clarifies that any amount received under ORS 114.015 (child or spousal support) is in addition to the elective share. The section also adds a choice of law provision for a surviving spouse to elect against a decedent’s in state property when the decedent is domiciled outside of the state of Oregon. In such a case the law of the state where the decedent is domiciled governs.

Section 4

This section provides that the amount of the elective share will be a percentage of the augmented estate dependent on the length of the marriage. The elective share starts at 5% of the augmented estate for less than two years of marriage, and it increases 2% for every year of marriage thereafter until it reaches the maximum of 33% for 15 years of marriage or more.

Section 5

This section requires the court to consider the amounts of the decedent’s probate estate, decedent’s nonprobate estate, and decedent’s nonprobate transfers to determine whether the elective share amount has been satisfied. If the court determines that the decedent’s nonprobate transfers to the surviving spouse do not satisfy the amount of the elective share, any additional amounts necessary to satisfy the elective share will be paid out of the decedent’s probate and nonprobate estate in a manner provided by Section 21.

Section 6

This section provides the parameters for waiving the right of election, either before or after the marriage by written agreement. The section also provides the limitations on the enforceability of the agreement to waive the right of election.

Section 7

Section 7 provides who may exercise the right of election which includes the surviving spouse, or for the benefit of the surviving spouse by a conservator, guardian, or agent under the authority of power of attorney. Likewise, if the surviving spouse dies before exercising the right of election the personal representative may exercise the right of election for the estate of that spouse.

Section 8

This section provides for exercise of the elective share by the state through the Department of Human Services (DHS). DHS may exercise the right of election in order to fulfill a claim against the surviving spouse for amounts paid as public assistance, as defined in ORS 411.010, or for amounts paid for the care and maintenance of the surviving spouse in a state institution as described in ORS 179.610 to 179.770, despite whether or not the surviving spouse has waived the right of election. DHS may not exercise the right of election, however, if the decedent establishes a special needs trust in an amount equal to or exceeding the elective share amount and names DHS as the beneficiary for the purpose of reimbursing DHS for amounts paid in public assistance or care and maintenance.

Sections 9 to 11 – Augmented Estate Generally

Section 9 provides for what is to be included in the augmented estate, namely the decedent's probate estate, the decedent's nonprobate estate, and the decedent's nonprobate transfers to the surviving spouse. Section 10 provides for certain exclusions from the augmented estate, specifically the future enhanced earning capacity of either spouse and any irrevocable transfers made with the consent of both spouses during their lifetime. Section 11 describes the effect of separation on the ability of the surviving spouse to take the elective share. Specifically, the section authorizes a court to deny part or all of the elective share as the court deems reasonable and proper. In making this determination, the court must consider whether the marriage was a first or subsequent marriage for either or both spouses, the contribution of the surviving spouse to the marital assets, the length and cause of the separation, and any other relevant circumstances.

Section 12

This section defines the decedent's probate estate as the value of all estate property that is subject to probate and that is available for distribution after payment of claims and expenses of administration. A decedent's probate estate also includes all property that could be administered under a small estate affidavit.

Sections 13 to 19 – Decedent's Nonprobate Estate

These sections set out the details of what is included in the decedent's nonprobate estate. These sections represent the most significant change to current law because they allow the surviving spouse to elect against the decedent's nonprobate property, whereas under current law the surviving spouse can only elect against the decedent's net estate, or probate property. The nonprobate estate essentially consists of everything that is not in the probate estate or transferred to the surviving spouse.

Nonprobate property includes the following property so long as it is not included in the probate estate or otherwise passed on to the surviving spouse:

- 1) Property owned by the decedent immediately before death that was transferred by the decedent upon death. (Section 14)
- 2) The decedent's fractional interest in property held by the decedent in any form of survivorship tenancy. (Section 14)

3) Decedent's ownership interest in property or accounts under a payable on death designation, under transfer on death registration, or in co-ownership registration with a right of survivorship. (Section 14)

4) The net cash surrender value of a certain life insurance policies. (Section 14)

5) Property the decedent could have acquired by revocation of a revocable trust or other transfer of property. (Section 14)

6) Certain property transferred by the decedent during marriage by means of an irrevocable transfer or by means of a transfer under which decedent retained power over income or property. (Section 15)

7) Certain property passed during marriage and during the two-year period immediately before the decedent's death. (Section 16)

8) The amount of specified life insurance premiums paid by decedent during marriage and during the two-year period immediately before the decedent's death. (Section 17)

9) All other transfers of property made during marriage during the two-year period immediately before the decedent's death. (Section 18)

A decedent's nonprobate estate does not include any property for which the decedent received full consideration or any insurance policy maintained by the decedent in compliance with a court order. (Section 19)

Section 20

This section defines the decedent's nonprobate transfers to the surviving spouse for purposes of calculating the augmented estate. Generally, transfers include any transfer of property to the surviving spouse that passed to the surviving spouse outside probate at the decedent's death, and includes property held in survivorship tenancy, accounts held in co-ownership with the right of survivorship, but excludes property passing to the surviving spouse under the federal Social Security Act.

Sections 21 to 23 – Payment of the Elective Share

These sections set forth the method of paying the elective share. Section 21 describes the priority of sources from which the elective share is payable. Section 22 describes the liability of recipients of the decedent's nonprobate estate. This section is important because it defines the relationship between the surviving spouse and the other parties that could potentially be liable to the surviving spouse for the elective share. Section 23 sets forth the protection afforded to receivers of property who in good faith already disposed of the transferred property. Conversely, it sets forth the liability of persons who disposes of transferred property with knowledge of the pending motion to take an elective share.

Section 24

This section details the procedure for claiming the elective share, including notice to the estate and the procedure for filing a motion. Of significance, this section increases the time limit to file a motion from 90 days to 120 days.

Section 25

This section provides conforming amendment to ORS 116.133.

Section 26

This section provides that this act applies only to surviving spouses of decedents who die on or after the effective date of this act.

Section 27

This section provides for the ability to waive the right to the elective share, in either a prenuptial or postnuptial agreement.

Section 28

This section repeals ORS 114.105, 114.115, 114.125, 114.135, 114.145, 114.155 and 114.165.

Section 29

This section provides that the unit and section captions are not part of the law.

VI. Amendment Note

HB 2381 was assigned to the House Judiciary Committee this session, but did not receive a hearing and remained in committee when the committee closed. The Elective Share Work Group and the Oregon State Bar's Elder Law and Estate Planning Sections worked together during session to attempt to reach compromise over disputed aspects of the bill. Those meetings resulted in a relatively complex set of amendments, which needed further work before they were presented to the Judiciary Committee. The Elective Share Work Group is planning on reconvening during the 2007-2009 interim to continue its work on HB 2381 and the -1 amendments. The goal of the Work Group is to submit a modified proposal to the Law Commission for the 2009 legislative session.

The changes made by the -1 amendments generally helped alleviate the concerns of the Estate Planning Section, but did not necessarily address the policy concerns raised by the Elder Law Section.

The changes made to HB 2381 by the -1 amendments would have provided as follows:

1. The scope of the augmented estate would be substantially contracted in several respects, and expanded in other respects.

- a. Contraction of the Scope of the Augmented Estate: The augmented estate would be modified to consist of the decedent's probate estate, revocable trusts established by the decedent, payable on death (POD) and transfer on death (TOD) designations (bank accounts, CDs, stock accounts, etc.), property held with right of survivorship, and outright gifts made within a year of death (which exceed the annual exclusion amount). The following sections would not be part of the augmented estate and, therefore, be deleted: General powers of appointment (sec. 14(1) and 14(6)), life insurance (sec. 14(4)), property transferred during marriage (sec. 15), property transferred within two years of death (sec. 16 – this section was changed to include only outright transfers within one year of death), and insurance premiums (sec. 17).

These changes were made for two reasons: 1) to simplify the calculation of the augmented estate while including most of the types of transfers that would be used to disinherit a surviving spouse; and 2) to provide minimal disruption to current estate planning practices.

b. Expansion of the Scope of the Augmented Estate: The augmented estate would be expanded to include all property owned by the surviving spouse at the time of decedent's death, including property passing from the decedent through non-probate transfers (now sec. 20). This change is consistent with the 2002 UPC and was made to eliminate the potential for a surviving spouse who owns most of the marital assets to be overcompensated by claiming the elective share. It was not included in the original draft because arguably it would have made calculation of the augmented estate overly complex and would put the surviving spouse in an adversarial position with the probate estate. Upon further review, however, the group determined that it is more equitable to follow the UPC in this regard. In addition, the concerns that calculating the augmented estate would be too complex are somewhat alleviated with the changes made (as noted above) to reduce the number of assets included in the augmented estate.

2. Sources of payment of the elective share would be modified to reflect the changes made to the augmented estate. Additionally, the value of the income from trusts created by the decedent and payable to the surviving spouse would be calculated based on set criteria (as is done in other states) and would provide valuations for QTIP or credit shelter trusts set up by the decedent either inter vivos or by will.

3. Section 8 – which provided for DHS to bring an action for the elective share unless the decedent established a special needs trust with DHS as a beneficiary – would be deleted. That section was originally included as a potential compromise with the Elder Law Section. Although the Elder Law Section rejected it as a complete compromise, the Work Group had determined that Section 8 would at least be preferable as a partial compromise. In the end, no one desired to have this section as part of the bill, so it would be deleted in the -1 amendment.

These three changes were provided in the -1 amendments and were drafted relatively late in the legislative session. Not surprisingly, given the complexity of these changes, the work group noticed further modifications that were necessary before the bill was ready to be presented to the committee. The work group was unable to have further amendments drafted by the deadline for bills to be heard in their chamber of origin.

Uniform Parentage Act Work Group:
ESTABLISHING, DISESTABLISHING AND CHALLENGING LEGAL PATERNITY

HB 2382

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Report Approved at
Oregon Law Commission Meeting on
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I. Introduction

Oregon's paternity law is based on the 1973 Uniform Parentage Act, which was promulgated a short time after the Supreme Court first held in *Stanley v. Illinois*, 405 U.S. 645 (1972), that at least some unmarried fathers have constitutionally protected rights regarding the custody and rearing of their children. The Oregon laws have been amended over the years, but the legislature has not comprehensively reexamined the paternity issue for more than 30 years.

Laws and social practices affected by the law of paternity have changed significantly since the 1970s. Among the most important forces of change are the availability of genetic testing that can identify a child's parents with certainty and the development of a sophisticated and complex federal-state program for establishing paternity and collecting child support. Perhaps of greatest significance in the long-run are major changes in family forms and mores. Compared to 30 years ago, many more children are born to unmarried women, and many more children spend portions of their lives living in households with a parent and the parent's partner who is not the child's biological parent but who may function as a parent and to whom the parent may or may not be married.

These changes are not confined to Oregon, but are occurring across the country. The laws from the mid-twentieth century regarding legal parentage sometimes deal inadequately with new problems that arise because of these changes or do not address them at all. The most prominent issues concern the circumstances under which legal paternity can be challenged on the basis that the legal father is not the child's biological father. This report proposes how Oregon law should be revised in light of these social and technical changes.

II. History of the project

In 2004, the Oregon Child Support Program asked the Oregon Law Commission to convene a work group to examine the law of paternity, particularly but not exclusively the

circumstances in which paternity may be challenged or disestablished. The Program asked the Commission to undertake this project because of the potentially far-reaching impact of amending paternity laws and the large number of stakeholders with an interest in these issues. The Program identified as a possible model for reform the 2002 Uniform Parentage Act (UPA), promulgated by the National Conference of Commissioners on Uniform State Laws and approved by the ABA in 2003. Seven states, including Washington, have revised their parentage statutes based on the 2002 UPA.

The Commission agreed to the Child Support Program's proposal and appointed a work group charged with examining all provisions of the UPA except Articles 7 and 8 (related to assisted reproduction and gestational agreements) in relation to current Oregon law and determining whether the UPA should be adopted in whole or in part. The group was not limited to making recommendations about the UPA but was instructed to propose law reforms in this area.

The work group was large because the paternity law potentially affects so many areas, including private custody and child support, adoption, the federal-state child support enforcement program, and juvenile court dependency proceedings. Its members, who were the voting members when formal votes were taken, were Karen Berkowitz, Oregon Law Center; Paula Brownhill, Clatsop County Circuit Court Judge;¹ Emily Cohen, Oregon State Bar (OSB) Juvenile Law Section; Gil Feibleman, OSB Family Law Section; Summer Gleason, Clackamas County District Attorney; Lawrence Gorin, OSB Family Law Section; Professor Kathy Graham, Willamette School of Law; Sandra Hansberger, Executive Director Campaign for Equal Justice; Professor Leslie Harris, University of Oregon School of Law; Russell Lipetzky, OSB Family Law Section; Matt Minahan, D.A.D.S. of America; Maureen McKnight, Multnomah County Circuit Court Judge; Robin Pope, OSB Family Law Section; Mickey Serice, Deputy Director Department of Human Services (DHS) Children, Adults, and Families; Ronelle Shankle, Department of Justice (DOJ) Policy, Projects, & Legislative Coordinator; Bealisa Sydlik, Oregon Judicial Department (OJD) Court Programs and Services Division; and Angelica Vega, Marion-Polk Legal Aid Service. The chair of the work group was Oregon Law Commission member Sandra Hansberger. Staff attorney assistance was provided by Samuel Sears, Oregon Law Commission; Susan Grabe, OSB; and Doug McKean, Legislative Counsel. Leslie Harris was the reporter.

Advisors to the work group, who participated in meetings, were Scott Adams, OSB Family Law Section; Kevin Anselm, Office of Administrative Hearings; Tim Brewer, OSB Family Law Section; John Chally, OSB Family Law Section; Stacey Daeschner, DHS Children, Adults, and Families; David Gannett, OSB Family Law Section; Carmen Brady-Wright, DOJ Family Law Section; Sybil Hebb, Oregon Law Center; David Koch, Multnomah County Juvenile Services Division; Shari Levine, Executive Director Open Adoption & Family Services; Vicki Tungate, DOJ Division of Child Support; and Jennifer Woodward, DHS Center for Health Statistics.

Interested persons who were advised of the group's activities and some of whom participated in work group sessions included Deb Carnaghi, DHS Children, Adults, and Families; Jean Fogarty, DOJ General Counsel; Thomas Hedberg, DOJ Division of Child Support; Audrey Hirsch, DOJ Family Law Section; Nancy Keeling, DHS Children, Adults, and Families; Tim Loewen, Yamhill County Juvenile Department; Kim Mosier, DOJ Family Law; Gail Schelle, DHS Children, Adults, and Families; Amy Sevdy, DHS Children, Adults, and

¹ Judge Brownhill had to resign from the work group in the fall of 2006.

Families; Catherine Stelzer, DHS Foster Care; Kathie Stocker, Holt International Children Services; Ingrid Swenson, Office of Public Defense Services; William Taylor, Staff Counsel Judiciary Committee; and Patrick Teague, DOJ Division of Child Support.

To prepare for this project, the work group familiarized itself with the following materials in addition to the 2002 UPA:

- 1) Cases from the United States Supreme Court on the rights of unwed biological fathers;
- 2) Oregon statutes and cases from the Oregon Supreme Court and Court of Appeals concerning the establishment of legal paternity;
- 3) Provisions of federal law with which Oregon must comply as a condition of participating in the federal-state child support enforcement program; and
- 4) Newspaper and legal journal articles and technical reports about trends in the law regarding paternity disestablishment across the country and specific provisions of several states' laws.

In fashioning this proposed legislation, the work group also reviewed the work of the 2005 OLC Putative Fathers Work Group, which drafted amendments to Chapters 109 and 419B that were enacted as SB 234 in 2005.

III. The problems that this proposal addresses

In the 1970s, about 90 per cent of all children were born to married women, and their paternity was resolved by the legal presumption that a married woman's husband is the father of her children.² In a number of states, including Oregon, legal rules prohibited the admission of evidence to rebut the presumption³ or precluded parents from testifying so as to "bastardize" their child. Even in states where the presumption could be rebutted, blood tests then available were so primitive that they were unlikely to exclude a man as the biological father even if he were not.⁴ As a result of these conditions, the legal father of most children was also the social father, the man who functioned as their father – their mother's husband. This man was usually also their biological father, but even when he was not, few people were likely to know for sure. Children born to unmarried mothers typically did not have a social father, but they also did not have legal fathers because paternity was often not legally established. In these circumstances, the law simply did not need to choose between children's biological and social fathers for purposes of determining their legal fathers. For all practical purposes, social fathers were legal fathers.

Legal and social changes have brought sharp challenges to this approach to legal paternity. The most important issue, the one that underlies most of the problems that this proposal deals with, is the relative importance of social and biological paternity in determining legal paternity when a child's legal father and biological father are not the same. This issue arises both for legal fathers who are not and have never been married to the children's mothers and for husbands who are presumed to be the legal fathers of their wives' children.

² Center for Disease Control and Prevention, 48 (16) *National Center for Health Statistics Report* 17 (table 1) (Oct. 18, 2000).

³ ORS 109.070 creates a conclusive presumption that a married woman's husband is the legal father of her children if he is not impotent or sterile and was living with the mother at the time of conception.

⁴ Ira Mark Ellman & David Kaye, *Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?* 54 N.Y.U. L. REV. 1131, 1135 (1970).

Changes in the number and legal position of children born to unmarried women make it much more likely today that men will have the legal responsibilities of fatherhood without being the children's social fathers. Today about a third of all children are born to unmarried women, about a quarter to a half of whom live with the child's father at birth.⁵ All states, including Oregon, now aggressively seek to determine the biological paternity of children born to unmarried mothers for purposes of imposing child support obligations on these men. The result is that many unmarried legal fathers have never functioned as their children's social father.

In addition, the legal methods for establishing paternity create risks that the men identified as fathers may not actually be biological fathers. The federal-state child support enforcement program encourages unmarried mothers and men believed to be fathers to establish legal paternity voluntarily; all states, including Oregon, allow mothers and alleged fathers to do this by signing a voluntary acknowledgment identifying the man as the legal father and filing it with the state.⁶ This has become the most common way that legal paternity of children born to unmarried mothers is established.⁷ Most of the voluntary acknowledgments are signed at the time of birth at the hospital or other birthing facility. A voluntary acknowledgment can be signed without genetic testing having been done; indeed, federal law provides that states may not require blood testing as a precondition to signing a voluntary acknowledgment of paternity.⁸ The second most common way that paternity of children born to unmarried mothers in Oregon is through an administrative process that establishes legal judgments of paternity.⁹ Blood testing is available, but orders are not infrequently entered when testing has not been done because the man alleged to be the father does not contest the action, believing that he is the father, or because he does not respond and a default order is entered.

Today when someone becomes suspicious that a child's legal father may not be the biological father, genetic testing can readily resolve the question. In the last 30 years, tests have been developed that can identify a child's biological parents with certainty in most cases. These tests are not prohibitively expensive for most individuals and are easy to administer, and they are being used with increasing frequency.

Recent studies show that almost always the man identified as a child's legal father is the biological father. The most comprehensive data analysis concluded that in the U.S., 98 percent of the men raising children they believe to be their biological children are correct and that only 30 percent of the men who seek blood tests to confirm paternity are not the biological father.¹⁰ Data from the Vital Records section of the Oregon Health Division and the Child Support Program

⁵ Mary Parke, *Who are "Fragile Families" and What Do We Know About Them?* (Center for Law & Social Policy Policy Brief Jan. 2004); Larry Bumpass et al, *The Changing Character of Stepfamilies: Implications of Cohabitation and Nonmarital Childbearing*, DEMOGRAPHY 425, 436 (1995); Jason Fields & Lynne Casper, *America's Families and Living Arrangements*, *Current Population Reports P20-537* at 12-14 (2001).

⁶ The federal requirements are set out in 42 U.S.C. § 666(a)(5). The state statutes are discussed in this report.

⁷ According to data from the Oregon Vital Records office and Child Support Program, in fiscal years 2004, 2005 and through March of 2006, paternity was established for 31,866 children in the state; of these, 27,536 or more than 86 per cent of the total, were by voluntary acknowledgment. These figures were provided to the work group by representatives from the Vital Records Office and Child Support Program who participated in the group.

⁸ 45 CFR 302.70(a)(5)(vii).

⁹ See ORS 416.400 to 416.465.

¹⁰ Kermyt G. Anderson, *How Well Does Paternity Confidence Match Actual Paternity? Results from Worldwide Nonpaternity Rates*, 48 (3) CURRENT ANTHROPOLOGY 511 (2006), discussed at *Nearly All Paternity Tests Back Dad's Biological Claim*, FORBES MAGAZINE, (Apr. 17, 2006), www.forbes.com/forbeslife/health/feeds/hscout/2006/04/17/hscout532176.html and U. S. D.H.H.S. HEALTHDAY REPORTER (Apr. 17, 2006), <http://www.healthfinder.gov/news/newsstory.asp?docID=532176>.

show that in less than one per cent of all cases in which paternity was established by voluntary acknowledgment were judicial orders later entered finding that the man was not the biological father. In fiscal years 2004, 2005 and through March of 2006, of the 27,536 cases in which paternity was established by voluntary acknowledgment, a party filed a request with the state to reopen the paternity findings in 79 cases. In 22 percent of these 79 cases, the man identified as the legal father was found not to be the biological father.¹¹

Nevertheless, when genetic testing does show that a child's legal father is not the biological father, someone – most often the mother or the legal father – may want to obtain a legal order that the man is not the legal father. Oregon law addresses the possibility of such challenges, but the results it provides have come under criticism. Each of the ways that paternity can be established – by presumption, by voluntary acknowledgment, and by administrative or court order – has come under scrutiny.

A. Presumptions that husbands are the legal fathers of their wives' children

ORS 109.070(1)(a) provides that a husband is conclusively presumed to be the father of his wife's children if he is not impotent or sterile and the couple was cohabiting at the time of conception.¹² The effect of the conclusive presumption is to define the husband as the legal father of his wife's children, regardless of biological reality, if the facts of cohabitation and fertility are proven. See *Matter of Marriage of Hodge*, 301 Or. 433, 722 P.2d 1235 (1986). The only other state with a conclusive presumption allows husbands and wives to challenge it under some circumstances. Cal. Fam. Code §§ 7540, 7541.

The conclusive presumption is no longer justified by lack of reliable evidence about biological parentage, but it does protect married couples who are raising children who are not the husband's biological offspring from outsiders to the marriage who want to establish the husband's nonpaternity. The most common challenge would be from the biological father of a child who wanted to establish a legal relationship with the child over the objection of the mother and her husband. The conclusive presumption of paternity can constitutionally be invoked to preclude a biological father from establishing his own paternity in such a case. *Michael H. v. Gerald D.*, 499 U.S. 937 (1989).

The problem, then, is determining whether to retain the conclusive presumption and, if it is abolished, whether to allow third parties to challenge a husband's paternity when he and the mother object.

B. Rescinding and challenging voluntary acknowledgments of paternity

The federal child support enforcement laws require state law to create a voluntary acknowledgment of paternity process and to provide that a valid, unrescinded voluntary acknowledgment is legally equivalent to a judgment of paternity. State law may permit a voluntary acknowledgment to be challenged only on the basis of fraud, duress or material mistake of fact. 42 U.S.C. § 666(a)(5).

Oregon statutes comply with these requirements. Under ORS 109.070(2), a party to a voluntary acknowledgment of paternity may rescind it within the earlier of 1) sixty days after the acknowledgment was filed or 2) the date an order in a proceeding relating to the child, including

¹¹ These figures were provided to the work group by representatives from the Vital Records Office and Child Support Program who participated in the group.

¹² SB 234, which was passed by the legislature in 2005, removed the conclusive presumption from Oregon law. That provision, however, sunsets effective January 2, 2008.

a proceeding to establish a support order, was entered. Under ORS 109.070(3), a voluntary acknowledgment may be challenged in circuit court on the basis of fraud, duress or material mistake of fact at any time by a party to the acknowledgment, the child or the Department of Human Services or the administrator of the child support enforcement program if the child is in the care and custody of DHS as a dependent child under ORS 419B and the department or the administrator reasonably believes that the acknowledgment was obtained through fraud, duress or a material mistake of fact. Subsection (3) also allows a challenge to be brought in circuit court for up to one year, unless ORS 109.070(4)(a). Subsection (4)(a), in turn, allows a party or the state, if child support enforcement services are being provided and if blood testing has not been done, to apply to the child support administrator or the court for an order for blood testing for up to one year after the acknowledgment was signed. If the blood tests exclude the man as the child's biological father, a party or the state may apply to the court for a judgment of nonpaternity. The paternity that receives this judgment must send it to the state office of vital records so that the child's birth records can be corrected.

The principal problems with this section are 1) the lack of a clear procedure for exercising the rights to rescind or challenge a voluntary acknowledgment, 2) whether a court should have discretion to refuse to set aside a voluntary acknowledgment to achieve justice and equity for the parties and the child, and 3) whether blood test evidence showing that the man who signed the voluntary acknowledgment is not the biological father should automatically result in an order setting aside the acknowledgment on the basis of fraud or mistake if either of the parties was unaware that the man was not the biological father.

A fourth problem, particularly important in adoption cases, is that mothers and alleged fathers may sign acknowledgments of paternity at any time, even after the mother has relinquished a child for adoption after identifying another man as the father. If this happens, the adoption may not go forward or may be delayed until the man's parental rights are terminated.

C. Challenging administrative orders of paternity

ORS 416.443 provides that if paternity was established administratively through the Child Support Program, a party may petition to reopen the matter for up to one year if no genetic tests were done before the finding of paternity was made. This section does not fully set out the procedure for handling such petitions, and it does not make the process available when paternity is established by voluntary acknowledgment because it was enacted before the statutes establishing the voluntary acknowledgment process. However, ORS 109.070(4), as discussed above, does allow a party and, in some cases the state child support enforcement agency, to use this process for up to one year when paternity was established by acknowledgment and blood testing was not done.

D. Challenging judicial orders of paternity

The Oregon statutes do not establish a specific process for challenging a judicial order of paternity. The main issues presented to the work group were whether the Oregon statutes should set out a process for challenging orders of paternity or leave the process to be governed by ORCP 71, and whether the case law that has developed regarding challenges to orders of legal paternity on the basis that the legal father is not the biological father applies rules that are consistent with current policy.

Under existing Oregon law, a judgment of paternity is *res judicata* as to parties to the proceeding. ORCP 71 provides that a judgment procured by fraud is an exception, but if the father does not contest the proceeding, he cannot successfully claim that he was defrauded if

later blood testing shows that he is not the biological father. *Watson v. State*, 71 Or. App. 734, 694 P.2d 560 (1985). If a husband does not contest that he is the father of a child during a divorce proceeding, and he later learns that the mother lied to him about this, he does not have a claim to set aside the judgment under ORCP 71. *McClain v. McClain*, 155 Or, App. 258, 958 P.2d 909 (1998).

E. Rights of putative fathers in proceedings under ORS Chapter 109

SB 234, proposed by the Law Commission and enacted by the 2005 legislature, redefined which putative fathers (alleged fathers whose paternity has not been resolved) are entitled to procedural and substantive protection in juvenile court proceedings regarding the custody of their children to bring the law into line with constitutional requirements and express sound policy. ORS 419B.875. The work group that proposed this legislation recognized that ORS 109.096 deals with the same issue of putative fathers' rights when adoption or custody proceedings are brought under Chapter 109. However, the work group did not recommend amendments to ORS 109.096 because its members believed that all the groups with an interest in actions under Chapter 109 were not adequately represented on the group. This issue was referred to the UPA work group. However, this proposal does not address this contested issue because the work group simply ran out of time to do so.

IV. The objectives of the proposal

The proposed legislation addresses the problem areas identified above as well as an issue that is common to all methods of establishing paternity.

A. Amendments regarding the presumption that the husband is the child's father

1) Abolish the conclusive presumption of paternity but retain a rebuttable presumption

The work group unanimously concluded that, given the availability of relatively inexpensive, reliable genetic testing, the absolute rule that a husband is father of his wife's children no longer expresses sound public policy and that only the rebuttable presumption should continue to be part of Oregon law. The work group considered a proposal to impose a time limit on challenges by the parents, as does California law. Cal. Fam. Code §7541. The Uniform Parentage Act also requires that challenges to a presumption that a man is the father of a child be brought within two years of the child's birth. UPA § 607(a). While the work group was divided on this issue, those who favored a time limit agreed not to impose one in the spirit of compromise with those who believed strongly that a husband should be able to challenge the presumption at any time.

2) Create a presumption regarding the paternity of children born soon after the end of a marriage

The work group also decided to recommend enactment of a new rebuttable presumption – that a child born to a formerly married woman within 300 days of the ending of the marriage is the child of the former husband. This presumption derives from UPA § 204(a)(2). Without this provision, a child born to a woman after her husband dies, they divorce, or the marriage is otherwise terminated has no presumptive father, even though it may be very likely that the former husband is the father. The work group was informed that, when a child is born under these circumstances and the parties have no reason to doubt the husband's paternity, Oregon

practitioners sometimes proceed as if this presumption existed.

The provision produced some controversy in the work group because it requires that a former husband (or a former wife who objects to her former husband being the legal father) take steps to rebut the presumption. One member of the group was particularly concerned about the difficulties of rebutting the presumption if the marriage ended by death. A majority of the work group voted 8-2 to create the presumption, concluding that it codifies current practice in many situations and expresses sound policy. Members of the work group observed that in the situation where the husband of the child has died and his paternity is challenged, if it is not possible to do genetic testing, the presumption can be rebutted by other evidence. It is also possible in such a situation that no one would invoke the rebuttable presumption in the first place.

3) Limit the ability of third parties to challenge a husband's paternity

The work group unanimously concluded that public policy favors protecting married couples raising children from challenges to paternity by outsiders to the family for so long as a couple wishes to remain together and raise the children together. Allowing a third party to raise a paternity challenge would violate the parents' right to family and marital privacy and would not serve the interests of the children. However, if the parents are no longer married and living together, their claim to privacy and the assumption that the interests of the children are served by allowing the parents to raise them without interference are not so strong. Therefore, the work group recommends that for so long as the mother and her husband are married and living together, only one of them may introduce evidence in any legal proceeding to challenge the husband's paternity. This provision is similar to California Family Code §§ 7540, 7541. The group discussed what term properly describes the family that is protected and decided to use "married and cohabiting" with the understanding that the term is not to be interpreted narrowly but covers all intact families. Thus, a family in which one spouse was away for an extended period, but the husband and wife were still together as a couple would be protected by the provision.

B. Procedures and standing for challenges to voluntary acknowledgments of paternity

1) Failure to give adequate advice about the legal effect of acknowledgments

The work group discussed whether hospitals are following recommendations from the Department of Justice to give information about the legal effects of voluntary acknowledgments to mothers and putative fathers before they sign these documents. Work group members expressed concern that often hospital staff do not show videos or give adequate warnings regarding the consequences of signing an acknowledgment and recommended greater efforts to educate attorneys, the public, and hospital staff about signing and challenging voluntary acknowledgments.

2) Create a process for challenging voluntary acknowledgments

The work group voted 9 to 1 to establish an explicit statutory process to challenge voluntary acknowledgments, with 2 abstentions. The limited resistance to this proposal was based on the belief that a detailed procedure was not necessary. The majority of the work group accepted arguments from the Child Support Program that a significant number of people who want to rescind or challenge voluntary acknowledgments are proceeding *pro se* and need statutory guidance.

3) Challenges to voluntary acknowledgments based on blood test evidence

The work group discussed at length whether the law should explicitly provide that a person who is not a biological parent may not sign a voluntary acknowledgment and whether a purported acknowledgment from such a person should be *per se* invalid. Ultimately the group decided not to impose these requirements. Federal legislation and the history of the federal legislation indicate that there is not a federal requirement that the man who signed the voluntary acknowledgment be the biological father. Moreover, the federal and state laws that allow an acknowledgment to be challenged after 60 days for fraud, duress or material mistake of fact is inconsistent with the idea that a voluntary acknowledgment should automatically be set aside upon submission of blood test evidence showing that the man who signed the acknowledgment is not the biological father. Cases from other states reach inconsistent conclusions about whether lack of biological parentage is enough to support a finding of material mistake of fact, and the group decided not to propose legislation on this issue but to leave it for judicial development.

4) Define fraud for purposes of this statute

The group rejected a proposal to define “fraud” for purposes of this section. The group concludes that fraud is adequately described in case law and that further definition might create confusion rather than clarity.

5) Prohibit parents whose rights have been eliminated from filing acknowledgments

The group also agreed to prohibit parents who have already relinquished children for adoption or whose parental rights had been terminated from signing voluntary acknowledgments that would have the effect of delaying the adoption or other permanent placement of the children. This provision was not controversial.

C. Allow petitions for blood testing when a voluntary acknowledgment was signed without testing having been done and clarify the process when a petition is filed

Under existing law, if blood tests were not performed before an administrative order of paternity is entered, a party to the proceeding may file an administrative petition to reopen the issue for up to one year. ORS 416.443. A party to a voluntary acknowledgment or the state, if child support enforcement services are being provided, may seek an order from the court or from the administrator for blood testing for up to one year after the acknowledgment was signed if blood tests were not done. ORS 109.070(4)(a). The work group agreed to extend this option to the state if the child is in state custody under the dependency provisions of ORS Chapter 418B.

ORS 416.443 implicitly contemplates that if blood testing shows that the legal father is not the biological father, the administrator may seek a court order of nonpaternity, but the section does not state this clearly. The work group agreed to propose language that will make this explicit.

D. Create an explicit process for challenging judicial orders of legal paternity on the basis that the legal father is not the biological father

The work group was divided about whether the Oregon statutes should be amended to create a specific process for challenging orders of paternity. Several lawyers argued that this was unnecessary because ORCP 71, governing motions to set aside judgments, is entirely sufficient for the purpose. However, representatives from the Child Support Program argued that a

statutory process is needed because a number of people who wish to make challenges proceed *pro se* and do not understand how the rules of civil procedure could relate to their problem. The work group agreed to set out a procedure that is as parallel as possible to ORCP 71. The group also agreed that the substantive rules here should be the same as the substantive rules applicable to challenges to voluntary acknowledgments unless an explicit reason for treating the two kinds of paternity findings differently exists.

1) Standing to file a petition

Standing to file a petition to challenge an order of paternity is extended to the same persons and entities that can file a challenge to a voluntary acknowledgment: the parties, DHS if the child is in the custody of DHS as a dependent child under ORS Chapter 419B, and the Division of Child Support if support rights have been assigned to the state. However, the estate of a legal father who has died may not bring an action under this statute. The work group intentionally decided to limit access to this procedure to those most likely to raise challenges, while recognizing that it is possible that others may have interests that are affected by a finding of legal paternity and wish to challenge it. Such actions would be governed by the rules of civil procedure and generally applicable Oregon statutes.

2) Time limits on challenges

Challenges based on mistake, inadvertence, surprise or excusable neglect must be filed within one year. This provision is parallel to ORCP 71. A challenge based on fraud, misrepresentation or other misconduct must be brought within one year from the date of discovery.

3) Specifics of the petition

The work group agreed that the petition must state “the facts and circumstances that resulted in the entry of the paternity judgment and explain why the issue of paternity was not contested” to avoid having petitioners plead the language of the statute in conclusory terms.

The petitioner must designate as parties everyone who was a party to the original paternity proceeding, the child if he or she is “a child attending school” under Oregon law, DHS if the child is in DHS custody under the dependency provisions of ORS Chapter 419B, and the Division of Child Support if child support rights have been assigned to the state. Others may have interests that are affected by the proceeding, but in the interests of simplicity, the work group decided not to require that they be made parties. However, a proceeding under this section does not bar anyone who has an interest affected by a finding regarding the child’s legal paternity from bringing an action based on that interest. For example, a child may not bring an action under these amendments, and minor children are not parties to actions brought by others, but children’s interests are obviously affected by orders under this section. If a child wishes to bring an action regarding his or her paternity at a later date, due process would require that he or she be permitted to do so.

4) Representation of children’s interests

If the child is older than 18 and is a “child attending school” under Oregon law, he or she must be made a party. The work group decided that minor children should not be made parties, but the court on its own motion or the motion of a party may appoint counsel for the child and must appoint counsel on the child’s request. This provision parallels the requirements of ORS 107.425(2).

5) Effect of finding of nonpaternity on past and future child support

If a judge enters an order vacating or setting aside a finding that the man was the child's legal father, he or she must enter an order that future support is not due and may enter an order providing that unpaid child support is excused or satisfied in whole or in part. The judge may not order the state to repay any child support that it collected before the finding of nonpaternity was made. These provisions are consistent with existing law regarding findings of nonpaternity when paternity was based on a voluntary acknowledgment.

6) Technical provisions

Even if blood tests have not been done, a judge may enter an order if a party defaults or if the parties agree. After a court sets aside or vacates a paternity determination, the petitioner must send a copy of the order to the state vital records office so that the child's birth records can be corrected. The court may award reasonable attorney fees and costs to the prevailing party.

NOTE: Attorney members of the work group observed that under current law, family law practitioners may not consider that a divorce decree that identifies children as "children of the marriage" is a judicial order establishing paternity because the conclusive presumption of paternity did not allow this issue to be contested. Since the conclusive presumption is being abolished, divorce is a logical time that the rebuttable presumption would be challenged. Practitioners need to be made aware of this and to recognize that practice needs to change in response to this change in the law.

E. Allow judges discretion to deny requests for blood tests and challenges to paternity based on justice and equity

Under current Oregon law, a court may refuse to allow the presumption of paternity to be challenged or to set aside the order because the petitioner is equitably estopped from denying paternity. *Johns v. Johns*, 42 Or App 439, 601 P.2d 475 (1979); *Hodge and Hodge*, 84 Or App 62, 733 P.2d 458 (1987). The work group discussed at great length whether to retain this discretion.

A minority of the work group believed that the biological fact of paternity should always determine legal paternity and objected to giving judges any discretion that could result in a finding that a husband, former husband, or other man identified as a legal father was still the legal father even though evidence showed him not to be a child's biological father. The people taking this view framed the issue as one of fairness between the mother and the man and particularly focused on child support obligations. They argue that a man who can establish his biological nonpaternity has been defrauded by the mother's unfaithfulness and simply should not be obliged to pay support under any circumstances. Some of this group would support allowing the judge to deny a challenge to paternity based upon a showing that the party making the challenge should be estopped from denying paternity because he knew the child was not his and still assumed the paternal role (or because she had represented that the child was the husband's) and the other party had relied on this representation. However, these members of the group opposed allowing the judge to consider the child's best interests in making the decision, believing that the matter should simply be an issue of equity between the adults.

A majority of the work group believe that the circumstances in which a presumption or rule establishing legal paternity might be challenged are so variable that judges should have

discretion to determine whether the facts of a particular case are sufficiently unusual that justice to the parties and the child require that the legal relationship between the man and the child not be severed. For example, the presumption might be challenged by a mother who wanted to cut off the relationship between the child and her soon-to-be-former husband even though the husband and the child had a loving relationship and the husband wished to continue to act as a father to the child. If the rule were that biological paternity was absolutely determinative, the judge could not act to preserve the legal parent-child relationship, even if the judge found that the mother should be estopped from denying her husband's paternity or that maintaining the parent-child relationship was in the child's best interests. Similarly, a husband or man who has had both a social and legal relationship to the child for many years may seek to terminate the relationship because of the results of paternity tests and a desire not to pay child support. In this case, a judge would consider the emotional ties between the legal father and the child, as well as the legal father's conduct toward the child. In other circumstances, especially where the child is very young, disestablishment is very likely to be the appropriate result.¹³

The majority concluded that society has a legitimate interest in protecting children from harm, especially in situations where the legal father has also had a social relationship with the child. Although we cannot legislate that fathers have continuing social relationships with their children, social policy does not and law should not condone severing these relationships. The work group decided that it would not be feasible to draft a statute that would be flexible enough to appropriately respond to the variety of fact scenarios that are likely to arise and that judicial discretion is an appropriate solution.

Some of the opponents who wanted biology to control argued that the judge could protect the husband and child with a developed relationship under the psychological parent statute, ORS 109.119. However, the conditions under which a nonparent can be awarded custody or visitation under ORS 109.119 are very limited, and as a constitutional matter, the position of a nonparent with rights under ORS 109.119 is far more tenuous than that of a legal parent. See *Troxel v. Granville*, 530 U.S. 57 (2000).

The work group voted 10-2 (with one abstention) to grant judges discretion to deny a motion to set aside a judgment of paternity when the evidence shows that the man is not the child's biological father and later voted to extend this discretion to situations where paternity was established by voluntary acknowledgment or marital presumption. Some of the work group wanted the statute to state explicitly that the judge could consider the child's best interests in making the determination because they fear that if the "best interests" language is omitted, judges will believe that they may consider only the interests of the parties and not the interests of the child. Opponents of this view argued that if the "best interests" language were included, some judges would take it as a signal to deny most petitions on the theory the best interests of the child is not usually served by disestablishing paternity. The work group settled on the language "just and equitable to the parties and the child" as best expressing that judges should consider both the conduct of the parties and the interest of the child in exercising this discretion.¹⁴

By way of comparison, The Uniform Parentage Act allows judges to deny a motion for genetic testing, the first step in rebutting a presumption of paternity under that Act, when the

¹³ As previously noted, the UPA allows challenges only during the first two years of the child's life. The work group recommends that challenges be permitted beyond this time, provided that courts retain discretion to consider all of the facts of the case.

¹⁴ The majority concluded that the same standard of judicial discretion should apply to disestablishing paternity where paternity was established by presumption, voluntary acknowledgment or judgment because legal rules should not vary simply because the decision-making forum differs.

facts show that the party offering the evidence should be estopped from denying the father-child relationship or when the best interests of the child are served by denying the motion. UPA § 608. The UPA includes a list of factors to guide the judge in exercising the discretion granted under the “best interests” provision, and some of the members of the work group favored including such a list in the Oregon statute, but a majority did not support this approach.

The vote on whether to extend judicial discretion to paternity established by voluntary acknowledgment was 4-3 in favor of granting discretion, with a number of members absent. Some of those voting against judicial discretion believed that the federal law which allows challenges to voluntary acknowledgments only on the basis of fraud, duress or material mistake of fact, does not allow judicial discretion. The majority believed that judicial discretion was allowed.¹⁵

F. Clean-up provisions

The work group recommends amendments to other statutory sections to make them consistent with the substantive changes made by the bill, and, as a courtesy, recommend amendments to correct omissions and mistakes from last year’s SB 234. The specific changes are discussed in the section-by-section analysis below.

V. Review of legal solutions existing or proposed elsewhere

The work group spent much of the summer of 2006 working through the UPA to determine whether it should be enacted in Oregon. The group quickly agreed not to recommend that the UPA be enacted without changes because of disagreement over some policy issues. The group then considered whether to propose that the UPA be enacted with amendments to reflect these differences. However, the UPA is structured differently from existing Oregon law and does not address a number of issues that are covered in Chapter 109, making it quite difficult to fit the UPA and existing law together. Therefore, the group decided to consider the issues and policy choices expressed in the UPA but not to use it directly as the basis for proposed amendments.

The 2005 legislature amended SB 234, the bill regarding paternity in juvenile court that was developed by the OLC, to include changes regarding paternity disestablishment. These changes are effective only through January 2, 2008, because the legislature knew that this work

¹⁵ It appears that states may limit the ability of parties to raise challenges, at least so long as the challenges are the kind that the state permits to be made to judgments. The Uniform Parentage Act, which was drafted by a team of experts from around the country, allows courts to disallow a challenge to a voluntary acknowledgment based on principles of estoppel. UPA § 609(c). *See also* State ex rel. W. Va. Dep’t of Health & Human Res., Child Support Enforcement Div. v. Michael George K., 531 S.E.2d 669, 677 (W. Va. 2000) (challenge to voluntary acknowledgment after the sixty-day period based on fraud, duress, or material mistake of fact is simply a threshold matter which does not require that the affidavit be set aside. Rather, once the threshold is met, the court must determine whether setting the affidavit aside is in the child’s best interest.); *In re Paternity of Cheryl*, 746 N.E.2d 488 (Mass.2001)(where father voluntarily acknowledged child and judgment was entered accordingly and he moved to set aside five and a half years later, motion to vacate was not filed within a reasonable time, father was not entitled to relief from judgment under catchall provision of rule allowing for relief from judgment; and mother’s alleged failure to disclose that father was not child’s biological father did not constitute fraud upon the court.). The California voluntary acknowledgment statute allows a court to set aside an acknowledgment based on genetic testing showing that the man is not the biological father if in the best interests of the child and lists factors for the court to consider in making this determination. Cal. Fam. Code § 7575(b).

group was going to reexamine the issues. The work group considered simply recommending that the changes be made permanent but decided to rethink the issues instead.

VI. The proposal

A. Provisions relating to the presumption that a husband is the father of children born to his wife

SECTION 1. ORS 109.070, as amended by section 17, chapter 160, Oregon Laws 2005, is amended to read:

109.070. (1) The paternity of a person may be established as follows:

[(a) The child of a wife cohabiting with her husband who was not impotent or sterile at the time of the conception of the child is conclusively presumed to be the child of her husband, whether or not the marriage of the husband and wife may be void.]

[(b) A child born in wedlock, there being no judgment of separation from bed or board, is presumed to be the child of the mother's husband, whether or not the marriage of the husband and wife may be void. This is a disputable presumption.]

(a) A man is rebuttably presumed to be the father of a child born to a woman if he and the woman were married to each other at the time of the child's birth, without a judgment of separation, regardless of whether the marriage is void.

(b) A man is rebuttably presumed to be the father of a child born to a woman if he and the woman were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment or dissolution or after entry of a judgment of separation.

* * *

(2) The paternity of a child established under subsection (1)(a) or (c) of this section may be challenged in an action or proceeding by the husband or wife. The paternity may not be challenged by a person other than the husband or wife as long as the husband and wife are married and cohabiting, unless the husband and wife consent to the challenge.

(3) If the court finds that it is just and equitable to the parties and the child, the court shall admit evidence offered to rebut the presumption of paternity in subsection (1)(a) or (b) of this section.

COMMENT: The proposed amendments to subsections (1) (a) and (b) abolish the conclusive presumption that a husband who is not impotent or sterile and who was living with his wife at the time of conception is the father, retain the rebuttable presumption that a husband is the father of children born to his wife during the marriage, and establish a new presumption that a child born to a woman who is unmarried at the child's birth but who was married within 300 days of the birth is the child of her former husband.

Old subsection (1)(b), which will be renumbered (1)(a) retains the traditional rule that a husband is rebuttably presumed to be the father of children born to his wife during marriage. The language changes in this subsection update terminology to make the rule clearer and do not change substantive law.

New subsection (1)(b) creates a new rebuttable presumption, that a child born to a woman within 300 days after her marriage ended is the child of her former husband.

Subsection (1)(c)

Subsection (2) authorizes the husband or wife to offer evidence to rebut the presumption

with no time limit. The subsection also provides that for so long as the husband and wife are married and cohabiting no other person may challenge the presumption without the consent of both the husband and the wife.

Subsection (3) gives the judge discretion to exclude evidence offered to rebut the presumption of paternity established in subsection (1) upon a finding that to do so is “just and equitable to the parties and the child.” This language is intended to allow judges to invoke traditional principles of estoppel and laches to preclude challenges when the facts warrant, as well as to conclude that on balance, the best interests of the child and justice and fairness to the adults will be best served by this ruling.

B. Provisions relating to voluntary acknowledgements of paternity

SECTION 1. ORS 109.070, as amended by section 17, chapter 160, Oregon Laws 2005, is amended to read:

109.070. (1) The paternity of a person may be established as follows:

* * *

(c) By the marriage of the parents of a child after **the birth of the child, and the parents filing with the State Registrar of the Center for Health Statistics the voluntary acknowledgment of paternity form as provided for by ORS 432.287.**

* * *

(e) By filing with the State Registrar of the Center for Health Statistics the voluntary acknowledgment of paternity form as provided for by ORS 432.287. Except as otherwise provided in subsections [(2) to (4)] **(4) to (7)** of this section, this filing establishes paternity for all purposes.

[(2)] **(4)(a)** A party to a voluntary acknowledgment of paternity may rescind the acknowledgment within the earlier of:

[(a)] **(A)** Sixty days after filing the acknowledgment; or

[(b)] **(B)** The date of a proceeding relating to the child, including a proceeding to establish a support order, in which the party wishing to rescind the acknowledgment is also a party. For the purposes of this **subparagraph**, the date of a proceeding is the date on which an order is entered in the proceeding.

(b) To rescind the acknowledgment, the party shall sign and file with the State Registrar of the Center for Health Statistics a written document declaring the rescission.

[(3)(a)] **(5)(a)** A signed voluntary acknowledgment of paternity filed in this state may be challenged **and set aside** in circuit court[:]

[(A)] at any time after the 60-day period **referred to in subsection (4) of this section** on the basis of fraud, duress or a material mistake of fact. *[The party bringing the challenge has the burden of proof.]*

(b) The challenge may be brought by:

(A) A party to the acknowledgment;

(B) The child named in the acknowledgment; or

(C) The Department of Human Services or the administrator, as defined in ORS 25.010, if the child named in the acknowledgment is in the care and custody of the department under ORS chapter 419B and the department or the administrator reasonably believes that the acknowledgment was obtained through fraud, duress or a material mistake of fact.

(c) The challenge shall be initiated by filing a petition with the circuit court. Unless

otherwise specifically provided by law, the challenge shall be conducted pursuant to the Oregon Rules of Civil Procedure.

(d) The party bringing the challenge has the burden of proof.

[(B) Within one year after the acknowledgment has been filed, unless the provisions of subsection (4)(a) of this section apply. A challenge to the acknowledgment is not allowed more than one year after the acknowledgment has been filed, unless the provisions of subparagraph (A) of this paragraph apply.]

[(b)] **(e)** Legal responsibilities arising from the acknowledgment, including child support obligations, may not be suspended during the challenge, except for good cause.

(f) The court may set aside the acknowledgment if the court finds that it is just and equitable to the parties and the child to do so and finds by a preponderance of the evidence that the acknowledgment was signed because of fraud, duress or a material mistake of fact.

(6) Within one year after a voluntary acknowledgment of paternity form is filed in this state and if blood tests, as defined in ORS 109.251, have not been completed, a party to the acknowledgment or the department, if the child named in the acknowledgment is in the care and custody of the department under ORS chapter 419B, may apply to the administrator for an order for blood tests in accordance with ORS 416.443.

(7)(a) A voluntary acknowledgment of paternity is not valid if, before the party signed the acknowledgment:

(A) The party signed a document consenting to the adoption of the child by another individual;

(B) The party signed a document relinquishing the child to a public or private child-caring agency;

(C) The party's parental rights were terminated by a court; or

(D) In an adjudication, the party was determined not to be the biological parent of the child.

(b) Notwithstanding any provision of subsection (1)(c) or (e) of this section or ORS 432.287 to the contrary, an acknowledgment signed by a party described in this subsection and filed with the State Registrar of the Center for Health Statistics does not establish paternity and is void.

[(4)(a) Within one year after a voluntary acknowledgment of paternity form is filed in this state and if blood tests, as defined in ORS 109.251, have not been previously completed, a party to the acknowledgment or the state, if child support enforcement services are being provided under ORS 25.080, may apply to the court or to the administrator, as defined in ORS 25.010, for an order requiring that the mother, the child and the male party submit to blood tests as provided in ORS 109.250 to 109.262.]

[(b) If the results of the tests performed under paragraph (a) of this subsection exclude the male party as a possible father of the child, a party or the state, if child support enforcement services are being provided under ORS 25.080, may apply to the court for a judgment of nonpaternity. The party that applied for the judgment shall send a certified true copy of the judgment to the State Registrar of the Center for Health Statistics and to the Department of Justice as the state disbursement unit. Upon receipt of a judgment of nonpaternity, the state registrar shall correct any records maintained by the state registrar that indicate that the male party is the parent of the child.]

[(c) The state Child Support Program shall pay any costs for blood tests subject to recovery from the party who requested the tests.]

COMMENT: Subsection (1) (e) restates the existing requirements for establishing paternity by voluntary acknowledgment when the mother and alleged father are not married to each other.

Subsection (1)(c) amends former subsection (1)(c) by requiring that parents who marry after a child is born also file a voluntary acknowledgment of paternity to establish the husband's legal paternity. This provision is taken from UPA § 204(a)(4) and clarifies that all stepfathers do not automatically become the legal fathers of their wives'.

Subsection (4)(b) establishes a process for a party to rescind a voluntary acknowledgment.

Subsection (5)(b)-(d) creates the process for challenging a voluntary acknowledgment outside the 60-day rescission period, prescribes who may file such a challenge, and allocates the burden of proof. Some of these provisions were part of SB 234, proposed by the Oregon Law Commission and enacted by the legislature in 2005, and were inadvertently made subject to sunset provisions in that legislation. This provision makes those terms permanent.

Subsection (5)(f) grants the judge discretion to decline to set aside the voluntary acknowledgment upon a finding that to do so is "just and equitable to the parties and the child." This language is intended to allow judges to invoke traditional principles of estoppel and laches to preclude challenges when the facts warrant, as well as to conclude that on balance, the best interests of the child and justice and fairness to the adults will be best served by this ruling.

Subsection (6) allows a party or the state if the child is in the custody of DHS pursuant to a dependency proceeding brought under ORS Chapter 419B to use existing administrative procedures to seek blood tests to determine paternity for up to one year after the voluntary acknowledgment was filed if blood tests were not previously done. These administrative proceedings are governed by ORS 416.443, which is described in the next section.

Subsection (7) makes invalid a voluntary acknowledgment signed by a parent or alleged parent after that parent or alleged parent consented to adoption of the child or permanently relinquished the child to a child caring agency, after the parent's rights were terminated by a court or after a court found that the alleged parent was not the child's legal parent.

C. Provision related to administrative proceedings to challenge paternity

SECTION 7. ORS 416.443 is amended to read:

416.443. **(1) As used in this section, "blood tests" has the meaning given that term in ORS 109.251.**

[(1)] (2) No later than one year after an order establishing paternity is entered under ORS 416.440 and if no [genetic parentage test has] blood tests have been completed, a party may apply to the administrator to have the issue of paternity reopened and for an order for blood tests.

(3) No later than one year after a voluntary acknowledgment of paternity is filed in this state and if no blood tests have been completed, a party to the acknowledgment, or the Department of Human Services if the child named in the acknowledgment is in the care and custody of the department under ORS chapter 419B, may apply to the administrator for services under ORS 25.080 and for an order for blood tests.

(4) Upon receipt of a timely application, the administrator shall order:

(a) The mother and the male party to submit to [parentage] blood tests; and
(b) The person having physical custody of the child to submit the child to [a parentage test] blood tests.

[(2)] (5) If a party refuses to comply with an order under subsection [(1)] (4) of this section, the issue of paternity shall, upon the motion of the administrator, be resolved against

that party by an *[appropriate]* order of the court *[upon the motion of the administrator.]* **either affirming or setting aside the order establishing paternity or the voluntary acknowledgement of paternity.**

(6) If the results of the blood tests exclude the male party as the biological father of the child, the administrator may file a motion with the court for an order setting aside the order establishing paternity or the voluntary acknowledgment of paternity and for a judgment of nonpaternity.

(7) Support paid before an order *[is vacated]* establishing paternity or a voluntary acknowledgment of paternity is set aside under this section *[shall]* may not be returned to the payer.

(8) The administrator shall send a court certified true copy of a judgment of nonpaternity to the State Registrar of the Center for Health. Upon receipt of the judgment, the state registrar shall correct any records maintained by the state registrar that indicate that the male party is the parent of the child.

(9) The Child Support Program shall pay any state registrar fees and any costs for blood tests ordered under this section, subject to recovery from the party who requested the tests.

COMMENT: ORS 416.443 has been part of the Oregon code since 1979, when the legislature created the administrative process for establishing paternity and child support obligations. As currently written, this section allows a party to an administrative proceeding to petition to reopen the issue of paternity if genetic testing was not done before the paternity order was entered. The petition must be filed within one year after the order was entered. The most important change to this section extends this option to parties who established paternity by signing a voluntary acknowledgment. The other changes are technical.

Administrative reopening of voluntary acknowledgments of paternity Section 3 extends the option of petitioning the agency that administers the child support enforcement program to reopen paternity findings to parties who signed a voluntary acknowledgment if genetic testing was not done before the acknowledgment was signed. The petition to reopen must be filed within a year of filing the acknowledgment. This amendment also allows DHS to file such a petition when the child is in the custody of DHS as a dependent child under ORS 419B. This provision is consistent with other amendments to Chapter 109 enacted in 2005 and proposed by this bill that in some cases allow DHS to challenge the legal paternity of children in its custody.

Technical changes Throughout this section the term “genetic parentage test” is changed to “blood test” because the latter term is defined and used elsewhere in the Oregon Code to refer to blood/genetic testing in disputed paternity cases. Under ORS 109.251, the term “blood tests” includes any accredited test for genetic markers to determine paternity, including HLA and DNA testing.

The amendments in former subsection (2), now subsection (5), make clear that if a party refuses to comply with blood testing as ordered by the administrator, the administrator may ask the court to enter an order against the party. This section is similar to ORS 109.252, which allows a court to enter an order against a party who refuses to comply with a court order for blood testing. However, section 109.252, unlike this section, does not require the court to enter a judgment against the party who fails to comply. It provides, instead, that the court “may resolve the question of paternity against such person or enforce its order if the rights of others and the interests of justice so require.”

Subsection (6) is added to clarify that if blood tests show that the man identified as the legal father is not the biological father, the administrator may seek a court order setting aside the order establishing paternity or the voluntary acknowledgment. This authority has been implicit in this section; this amendment makes it explicit.

Subsection (7) amends the last sentence of former subsection (2) for clarity. The meaning of the section is not changed.

Subsection (8) requires the administrator to send a copy of the judgment of nonpaternity to the state vital records office so that official records regarding the child's paternity can be corrected.

Subsection (9) provides that the state will pay testing and filing fees for actions undertaken under this section and that it may seek to recoup these costs from the party that requested the tests.

D. Provisions related to judicial proceedings to establish paternity or to challenge orders establishing paternity

SECTION 4. ORS 109.125 is amended to read:

109.125. (1) Any of the following may initiate proceedings under this section:

(a) A mother of a child born out of wedlock or a ~~[female]~~ **woman** pregnant with a child who may be born out of wedlock;

(b) The duly appointed and acting guardian of the child, conservator of the child's estate or a guardian ad litem, if the guardian or conservator has the physical custody of the child or is providing support for the child;

(c) The administrator, **as defined in ORS 25.010**;

(d) A ~~[person]~~ **man** claiming to be the father of a child born out of wedlock or of an unborn child who may be born out of wedlock; or

(e) The minor child by a guardian ad litem.

(2) Proceedings shall be initiated by the filing of a duly verified petition of the initiating party. The petition shall contain:

(a) If the initiating party is one of those specified in subsection ~~[(1)(a) to (c)]~~ **(1)(a), (b), (c) or (e)** of this section:

(A) The name of the mother of the child born out of wedlock or the ~~[female]~~ **woman** pregnant with a child who may be born out of wedlock;

(B) The name of the mother's husband if the child is alleged to be a child born to a married woman by a man other than her husband.

~~[(B)]~~ **(C)** Facts showing the petitioner's status to initiate proceedings;

~~[(C)]~~ **(D)** A statement that a respondent is the father;

~~[(D)]~~ **(E)** The probable time or period of time during which conception took place; and

~~[(E)]~~ **(F)** A statement of the specific relief sought.

(b) If the initiating party is a ~~[person]~~ **man** specified in subsection (1)(d) of this section:

(A) The name of the mother of the child born out of wedlock or the ~~[female]~~ **woman** pregnant with a child who may be born out of wedlock;

(B) The name of the mother's husband if the child is alleged to be a child born to a married woman by a man other than her husband.

~~[(B)]~~ **(C)** A statement that the initiating party is the father of the child and accepts the same responsibility for the support and education of the child and for all pregnancy-related expenses that he would have if the child were born to him in lawful wedlock;

[(C)] **(D)** The probable time or period of time during which conception took place; and
[(D)] **(E)** A statement of the specific relief sought.

(3) When proceedings are initiated by the administrator, **as defined in ORS 25.010**, the state and the child's mother and putative father are parties.

(4) When a proceeding is initiated under this section and the child support rights of one of the parties or of the child at issue have been assigned to the state, a true copy of the petition shall be served by mail or personal delivery on the Administrator of the Division of Child Support of the Department of Justice or on the branch office providing support services to the county in which the suit is filed.

(5) A man whose paternity of a child has been established under ORS 109.070 is a necessary party to proceedings initiated under this section unless the paternity has been disestablished before the proceedings are initiated.

COMMENT: ORS 109.125 sets out the initial procedures for filiation (also known as paternity) suits. The changes to this section clean up problems with the existing statute. If the mother has a husband, Subsection (2) requires that the court be apprised of his identity to that it can insure that his interests are protected. This requirement should probably have been in the statute all along but is particularly necessary, given the abolition of the conclusive presumption of paternity. Subsection (5) makes clear that a man whose paternity was previously established by any of the means sets out in ORS 109.070 is a party to the proceedings. Due process requires that he have notice and right to be heard, since his paternity is inherently at stake. This provision also should probably have been in the statute all along.

SECTION 5. ORS 109.155 is amended to read:

109.155. (1) The court, in a private hearing, shall first determine the issue of paternity. If the respondent admits the paternity, *[such]* **the** admission shall be reduced to writing, verified by the respondent and filed with the court. If the paternity is denied, corroborating evidence, in addition to the testimony of the parent or expectant parent, shall be required.

(2) If the court finds, from a preponderance of the evidence, that the petitioner or the respondent is the father of the child who has been, or who may be born out of wedlock, the court shall then proceed to a determination of the appropriate relief to be granted. The court may approve any settlement agreement reached between the parties and incorporate the *[same]* **agreement** into any judgment rendered, and ~~[it]~~ **the court** may order such investigation or the production of such evidence as *[it]* **the court** deems appropriate to establish a proper basis for relief.

(3) The court, in its discretion, may postpone the hearing from time to time to facilitate any investigation or the production of such evidence as it deems appropriate.

(4) The court *[shall have the power to]* **may** order either parent to pay such sum as *[it]* **the court** deems appropriate for the past and future support and maintenance of the child during *[its]* **the child's** minority and while the child is attending school, as defined in ORS 107.108, and the reasonable and necessary expenses incurred or to be incurred in connection with prenatal care, expenses attendant with the birth and postnatal care. The court may grant the prevailing party reasonable costs of suit, which may include expert witness fees, and reasonable attorney fees at trial and on appeal. The provisions of ORS 107.108 apply to an order entered under this section for the support of a child attending school.

(5) An affidavit certifying the authenticity of documents substantiating expenses set forth in subsection (4) of this section is prima facie evidence to establish the authenticity of *[such]* **the**

documents.

(7) If a man's paternity of a child has been established under ORS 109.070 and the paternity has not been disestablished before proceedings are initiated under ORS 109.125, the court may not render a judgment under ORS 109.124 to 109.230 establishing another man's paternity of the child unless the judgment also disestablishes the paternity established under ORS 109.070.

COMMENT: ORS 109.155 establishes the procedures that governing filiation suit hearings, sets out the relief that a court may order, and creates mechanisms for enforcing orders under this section. All of the amendments to this section exception the addition of the last subsection clean up and clarify language and do not change the meaning of the statutes.

The new final subsection makes clear that if under ORS 109.070, a man is or is presumed to be a child's legal father, another man's paternity may not be declared in a filiation proceeding under ORS 109.125 unless the court first enters an order disestablishing the first man's legal paternity. Besides eliminating the possibility that different men could simultaneously claim legal paternity under ORS 109.070 and ORS 109.125, this amendment establishes that claims based on ORS 109.070 have priority over filiation proceeding orders and must be resolved before a filiation order can be entered.

SECTION 9. (1) As used in this section:

- (a) "Blood tests" has the meaning given that term in ORS 109.251.**
- (b) "Paternity judgment" means a judgment or administrative order that:**
 - (A) Expressly or by inference determines the paternity of a child, or that imposes a child support obligation based on the paternity of a child; and**
 - (B) Resulted from a proceeding in which blood tests were not performed and the issue of paternity was not challenged.**

- (c) "Petition" means a petition or motion filed under this section.**
- (d) "Petitioner" means the person filing a petition or motion under this section.**
- (2)(a) The following may file in circuit court a petition to vacate or set aside the paternity determination of a paternity judgment, or any child support obligations established in the paternity judgment, and for a judgment of nonpaternity:**

- (A) A party to the paternity judgment.**
- (B) The Department of Human Services if the child is in the care and custody of the Department of Human Services under ORS chapter 419B.**
- (C) The Division of Child Support of the Department of Justice if the child support rights of the child or of one of the parties to the paternity judgment have been assigned to the state.**

(b) The petitioner may file the petition in the circuit court proceeding in which the paternity judgment was entered, in a related proceeding or in a separate action. The petitioner shall attach a copy of the paternity judgment to the petition.

(c) If the ground for the petition is that the paternity determination was obtained by or was the result of mistake, inadvertence, surprise or excusable neglect, the petitioner may not file the petition more than one year after entry of the paternity judgment.

(d) If the ground for the petition is that the paternity determination was obtained by or was the result of fraud, misrepresentation or other misconduct of an adverse party, the

petitioner may not file the petition more than one year after the petitioner discovers the fraud, misrepresentation or other misconduct.

(3) In the petition, the petitioner shall:

(a) Designate as parties:

(A) All persons who were parties to the paternity judgment;

(B) The child if the child is a child attending school, as defined in ORS 107.108;

(C) The Department of Human Services if the child is in the care and custody of the Department of Human Services under ORS chapter 419B; and

(D) The Administrator of the Division of Child Support of the Department of Justice if the child support rights of the child or of one of the parties to the paternity judgment have been assigned to the state.

(b) Provide the full name and date of birth of the child whose paternity was determined by the paternity judgment.

(c) Allege the facts and circumstances that resulted in the entry of the paternity judgment and explain why the issue of paternity was not contested.

(4) After filing a petition under this section, the petitioner shall serve a summons and a true copy of the petition on all parties as provided in ORCP 7.

(5) The court, on its own motion or on the motion of a party, may appoint counsel for the child. However, if requested to do so by the child, the court shall appoint counsel for the child. A reasonable fee for an attorney so appointed may be charged against one or more of the parties or as a cost in the proceeding, but may not be charged against funds appropriated for public defense services.

(6) The court may order the mother, the child and the man whose paternity of the child was determined by the paternity judgment to submit to blood tests. In deciding whether to order blood tests, the court shall consider the interests of the parties and the child and, if it is just and equitable to do so, may deny a request for blood tests. If the court orders blood tests under this subsection, the court shall order the petitioner to pay the costs of the blood tests.

(7) The court may vacate or set aside the paternity determination of the paternity judgment, including provisions imposing child support obligations, and enter a judgment of nonpaternity if the court finds that it is just and equitable to the parties and the child to do so and finds by a preponderance of the evidence that:

(a) The paternity determination was obtained by or was the result of:

(A) Mistake, inadvertence, surprise or excusable neglect; or

(B) Fraud, misrepresentation or other misconduct of an adverse party;

(b) The mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or other misconduct was discovered by the petitioner after the entry of the paternity judgment; and

(c) Blood tests establish that the man is not the biological father of the child.

(8) If the court finds that the paternity determination of a paternity judgment was obtained by or was the result of fraud, the court may vacate or set aside the paternity determination regardless of whether the fraud was intrinsic or extrinsic.

(9) If the court finds, based on blood test evidence, that the man may be the biological father of the child and that the cumulative paternity index based on the blood test evidence is 99 or greater, the court shall deny the petition.

(10) The court may grant the relief authorized by this section upon a party's default, or by consent or stipulation of the parties, without blood test evidence.

(11) A judgment entered under this section vacating or setting aside the paternity determination of a paternity judgment and determining nonpaternity:

(a) Shall contain the full name and date of birth of the child whose paternity was established or declared by the paternity judgment.

(b) Shall vacate and terminate any ongoing and future child support obligations arising from or based on the paternity judgment.

(c) May vacate or deem as satisfied, in whole or in part, unpaid child support obligations arising from or based on the paternity judgment.

(d) May not order restitution from the state for any sums paid to or collected by the state for the benefit of the child.

(12) If the court vacates or sets aside the paternity determination of a paternity judgment under this section and enters a judgment of nonpaternity, the petitioner shall send a court-certified true copy of the judgment entered under this section to the State Registrar of the Center for Health Statistics and to the Department of Justice as the state disbursement unit. Upon receipt of the court-certified true copy of the judgment entered under this section, the state registrar shall correct any records maintained by the state registrar that indicate that the male party to the paternity judgment is the father of the child.

(13) The court may award to the prevailing party a judgment for reasonable attorney fees and costs, including the cost of any blood tests ordered by the court and paid by the prevailing party.

(14) A judgment entered under this section vacating or setting aside the paternity determination of a paternity judgment and determining nonpaternity is not a bar to further proceedings to determine paternity, as otherwise allowed by law.

(15) If a man whose paternity of a child has been determined by a paternity judgment has died, an action under this section may not be initiated by or on behalf of the estate of the man.

(16) This section does not limit the authority of the court to vacate or set aside a judgment under ORCP 71, to modify a judgment within a reasonable period, to entertain an independent action to relieve a party from a judgment, to vacate or set aside a judgment for fraud upon the court or to render a declaratory judgment under ORS chapter 28.

(17) This section shall be liberally construed to the end of achieving substantial justice.

COMMENT: This new section creates a procedure for petitioning to set aside a judicial order establishing paternity, defines the substantive grounds for granting such an order, and prescribes how orders will be implemented.

Subsection (1) defines terms used in the rest of the statute.

Subsection (2) prescribes who has standing to file a petition under this section. While this subsection limits standing to the parties to the challenged judgment and to DHS and DCS under certain circumstances, others may still be able to challenge paternity judgments in other kinds of proceedings, as subsections 14 and 16 explicitly recognize.

Subsection (3) prescribes who must be designated as parties and what the petition must contain.

Subsection (4) provides for service of process according to the usual procedures of ORCP 7.

Subsection (5), which is parallel to ORS 107.425(2), allows the court to appoint counsel for the child on its own motion or the motion of any party and requires appointment on the request of the child. Note that minor children are not parties to actions under this section, which is also the case for custody actions under ORS Chapter 107.

Subsection (6) allows the court to require the mother, child and man whose paternity is at issue to submit to blood tests. However, the judge has discretion to deny a request for blood tests upon a finding that to do so is “just and equitable” to the parties and the child. This language is intended to allow judges to invoke traditional principles of estoppel and laches to preclude challenges when the facts warrant, as well as to conclude that on balance, the best interests of the child and justice and fairness to the adults will be best served by this ruling.

Subsection (7) allows the judge to vacate or set aside the paternity determination if blood tests establish that the man is not the biological father and the court finds that the paternity judgment was procured by mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or other misconduct of a adverse party that the petitioner discovered after the judgment was entered. However, the judge has discretion to refuse to set aside or vacate the judgment upon a finding that to do so is “just and equitable” to the parties and the child. This language is intended to allow judges to invoke traditional principles of estoppel and laches to preclude challenges when the facts warrant, as well as to conclude that on balance, the best interests of the child and justice and fairness to the adults will be best served by this ruling.

Subsection (8) eliminates the distinction between intrinsic and extrinsic fraud for purposes of this section.

Subsection (9) makes clear that if the blood tests confirm the man’s biological paternity, the court must deny the petition.

Subsection (10) allows the court to grant the relief authorized by this section if a party defaults or if the parties consent, without requiring blood tests.

Subsection (11) requires the court to vacate and terminate future child support obligations if it enters a judgment vacating or setting aside the paternity finding. It grants the judge discretion to excuse the nonpayment of past due child support in whole or in part, and it precludes the court from ordering the state to repay any child support collected before the finding of nonpaternity was entered.

Subsection (12) requires the petitioner to send a copy of the judgment of nonpaternity to the state vital records office so that official records regarding the child’s paternity can be corrected.

Subsection (13) allows the judge to award the prevailing party attorney fees and costs, including the costs of blood tests ordered by the court if the prevailing party previously paid them.

Subsection (15) prevents the estate of a legal father from filing an action under this section to set aside or vacate findings about his paternity.

Section 10 of the Act provides that the amendments in Section 9 apply to all paternity judgments, including those entered before or on the effective date of the Act.

E. Technical provisions to give effect to or clarify effect of provisions discussed above

SECTION 2. ORS 109.103 is amended to read:

109.103. (1) If a child is born *[out of wedlock]* **to an unmarried woman** and paternity has been established **under ORS 109.070, or if a child is born to a married woman by a man**

other than her husband and the man's paternity has been established under ORS 109.070, either parent may initiate a civil proceeding to determine the custody or support of, **or parenting time with,** the child. The proceeding shall be brought in the circuit court of the county in which the child resides or is found or in the circuit court of the county in which either parent resides. The parents have the same rights and responsibilities regarding the custody and support of, **and parenting time with,** their child that married or divorced parents would have, and the provisions of ORS 107.093 to 107.425 that relate to *[the custody or support of children]* **custody, support and parenting time** apply to the proceeding.

* * *

COMMENT: The changes in this section are intended to make clear that a man whose paternity is established by any means may bring an action for support, custody or parenting time. The change from “out of wedlock” to “to an unmarried woman” expresses the concept more clearly and does not change the substantive meaning. The addition of references to “parenting time” clarifies that these rules apply when a parent seeks parenting time rather than custody.

SECTION 3. ORS 109.124, as amended by section 20, chapter 160, Oregon Laws 2005, is amended to read:

109.124. As used in ORS 109.124 to 109.230, unless the context requires otherwise:

* * *

(2) “Child born out of wedlock” means a child born to an unmarried woman[;] or to a married woman by a man other than her husband[, *if the conclusive presumption in ORS 109.070 (1)(a) does not apply*].

* * *

COMMENT: This is a technical amendment to remove the reference to the conclusive presumption, which is abolished by Section 1.

SECTION 6. ORS 109.326, as amended by section 22, chapter 160, Oregon Laws 2005, is amended to read:

109.326.

* * *

(2) If paternity of the child has not been determined, a determination of nonpaternity may be made by any court having adoption, divorce or juvenile court jurisdiction. The testimony or affidavit of the mother or the husband or another person with knowledge of the facts filed in the proceeding constitutes competent evidence before the court making the determination.

(3) Before making the determination of nonpaternity, the petitioner shall serve on the husband a summons and a true copy of a motion and order to show cause why *[the husband's parental rights should not be terminated]* **a judgment of nonpaternity should not be entered** if:

(a) There has been a determination by any court of competent jurisdiction that the husband is the father of the child;

(b) The child resided with the husband at any time since the child's birth; or

(c) The husband repeatedly has contributed or tried to contribute to the support of the child.

* * *

(5) A summons under subsection (3) of this section must contain:

(a) A statement that if the husband fails to file a written answer to the motion and order to show cause within the time provided, the court, without further notice and in the husband's absence, may take any action that is authorized by law, including but not limited to *[terminating the husband's parental rights and]* entering a judgment of nonpaternity on the date the answer is required or on a future date.

* * *

(b) A statement that:

(A) The husband must file with the court a written answer to the motion and order to show cause within 30 days after the date on which the husband is served with the summons or, if service is made by publication or posting under ORCP 7 D(6), within 30 days from the date of last publication or posting.

(B) In the answer, the husband must inform the court and the petitioner of the husband's telephone number or contact telephone number and the husband's current residence, mailing or contact address in the same state as the husband's home. The answer may be in substantially the following form:

IN THE CIRCUIT COURT OF
THE STATE OF OREGON
FOR THE COUNTY OF _____

_____	)	
Petitioner,	)	
	)	
	)	ANSWER
and	)	
	)	
_____	)	
Respondent.	)	

_____ I consent to the *[termination of any parental rights that I may have]* **entry of a judgment of nonpaternity.**

_____ I do not consent to the *[termination of my parental rights. The court should not order the termination of my parental rights]* **entry of a judgment of nonpaternity. The court should not enter a judgment of nonpaternity** for the following reasons

* * *

(8) If the husband files an answer as required under subsection (6) of this section, the court, by oral order made on the record or by written order provided to the husband in person or mailed to the husband at the address provided by the husband, shall:

* * *

(c) Inform the husband that, if the husband fails to appear as ordered for any hearing related to the motion and order to show cause or the adoption petition, the court, without further notice and in the husband's absence, may take any action that is authorized by law, including but not limited to *[terminating the husband's parental rights and]* entering a judgment of nonpaternity on the date specified in the order or on a future date, without the consent of the husband.

(9) If a husband fails to file a written answer as required in subsection (6) of this section or fails to appear for a hearing related to the motion and order to show cause or the petition as

directed by court order under this section, the court, without further notice to the husband and in the husband's absence, may take any action that is authorized by law, including but not limited to *[terminating the husband's parental rights and]* entering a judgment of nonpaternity.

* * *

(11) Notwithstanding *[the provision of]* ORS 109.070 *[(1)(b)]* **(1)(a)**, service of a summons and a motion and order to show cause on the husband under subsection (3) of this section is not required and the husband's consent, authorization or waiver is not required in adoption proceedings concerning the child unless the husband has met the requirements of subsection (3)(a), (b) or (c) of this section.

* * *

(13) Nothing in this section shall be used to set aside an act of a permanent nature, including but not limited to adoption *[or termination of parental rights]*, unless the father establishes, within one year after the entry of the order or general judgment, as defined in ORS 18.005, fraud on the part of the petitioner with respect to the matters specified in subsection (10)(a), (b), (c) or (d) of this section.

COMMENT: ORS 109.326 concerns adoption proceedings when the biological mother was married at the time of birth but her husband is not before the court. This amendment makes clear that a court order that a woman's husband is not the father of a child under this section is not properly called a "termination of parental rights," but rather is a judgment of nonpaternity.

F. Clean-up of juvenile code provision amended by SB 234 in 2005

SECTION 11. ORS 419B.875 is amended to read:
419B.875.

* * *

(3) A putative father who satisfies the criteria set out in subsection (1)(a)(C) of this section shall be treated as a parent, as that term is used in this chapter and ORS chapters 419A and 419C, until the court confirms his paternity or finds that he is not the legal **or biological** father of the child or ward.

* * *

COMMENT: ORS 419B.875 is the section of the Juvenile Code that defines who the parties to a dependency proceeding are. This section was substantially amended during the 2005 Legislative Session on the recommendation of the Oregon Law Commission (juvenile code putative fathers work group). This amendment adds language that was mistakenly omitted from the 2005 bill. It provides that if a juvenile court finds that a putative father is not the child's biological or legal father, he is not entitled to party status in the dependency proceeding.

VII. Conclusion

The proposed bill should be adopted so that Oregon's law regarding paternity will express sound public policy; be accessible to parties proceeding pro se; and treat similar cases similarly, regardless of whether paternity is established by voluntary acknowledgment or administrative or judicial order.

VIII. Staff Amendment Note

The following amendments were included in HB 2382 in the House Judiciary Committee. Although members from the UPA Work Group participated in the negotiation of these changes, the amendments never appeared before the Law Commission for a formal vote. There were four changes made by the amendment, two provided clarification and two modified the operation of judicial discretion. It should be noted that the Law Commission's original recommendations were represented by the -1 amendments to HB 2382. The four changes to that recommendation are described below and were contained in the -4 amendments:

- 1) In Section 1 (3), wording was added to clarify that courts should make decisions to admit evidence to rebut the presumption of paternity after giving consideration to the interests of the parties and the child. In the original version it could have been argued that courts were only authorized to admit evidence if it was just and equitable to each party and child involved in the matter. The intent of the subsection was to provide courts with discretion to weigh the interests of all of the parties and the child when determining whether to admit evidence to rebut the presumption of paternity.
- 2) In Section 1 (5)(f), the Judiciary Committee made changes to modify the court's discretion in matters involving voluntary acknowledgments of paternity. Under the original proposal (See the -1 amendments to HB 2382), the court was provided broad discretion to either set aside or not set aside a voluntary acknowledgment based on a determination of whether doing so was just and equitable to the parties and the child. The amendments adopted by the Judiciary Committee provide that a court must set aside a voluntary acknowledgment that was signed as a result of fraud, duress, or material mistake of fact, unless doing so would be substantially inequitable.
- 3) In Section 9 (2)(a) the word "or" was changed to "including." This change was made in order to clarify that the court is setting aside the paternity determination, including any support obligations stemming from that paternity determination. This change was included to clarify that this statute is not meant to create another way to set aside or vacate a child support order. (See page 10, line 35 of the A-Engrossed bill).
- 4) In Section 9 (7), the Judiciary Committee made changes to modify the court's discretion in matters involving judgments establishing paternity. Under the original proposal (See the -1 amendments to HB 2382), the court was provided broad discretion to either set aside or not set aside a judgment establishing paternity based on a determination of whether doing so was just and equitable to the parties and the child. The amendments adopted by the Judiciary Committee provide that a court must set aside a judgment establishing paternity that was obtained as a result of fraud, duress, or material mistake of fact unless doing so would be substantially inequitable.

Automobile Insurance Work Group:
OVERLAPPING INSURANCE IN UM/UIM STATUTE

HB 2384

Prepared by Benjamin P. Stewart
Law Clerk
Oregon Law Commission

From the Offices of the Executive Director
David R. Kenagy
and
Deputy Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
January 18, 2007

I. Introductory Statement

The proposed legislation is intended to be a house-keeping fix to address a portion of last session's SB 925 (2005) that was mistakenly omitted. The purpose of SB 925 (2005) was to clarify the confusing provisions of ORS 742.504(9)(b) dealing with model uninsured (UM) and underinsured (UIM) motorists policies. The model provision is of the sort included in policies that declare what happens when the policy covers (overlaps) the same injury that is covered by a similar UM or UIM policy. The clarification provided by SB 925 (2005) last year served to expedite claims and avoid disputes. The version of SB 925 (2005) that passed last session omitted the necessary words "this insurance or" after the present phrase "applicable limits of liability of." See ORS 742.504(9)(b).

II. History of the Project

The initial project was discussed extensively by the Oregon Law Commission's Program Committee, which identified the auto insurance statutes as an area of law in need of reform. In 2004, the Automobile Insurance Work Group identified five problematic areas to address for the 2005 Legislative Session. SB 925 (2005) dealt with the problem of the overlapping insurance provisions in ORS 742.504(9). The problem was that the statute was difficult to read and failed to clearly state that UM/UIM coverage under a policy is primary while the insured is occupying a vehicle owned by the named insured under the policy's coverage. SB 925 (2005) clarified the language of the statute in order to reduce the number of disputes between insurers and between

insurers and insureds. SB 925 (2005) easily passed both the Senate and the House, and was signed into law by the Governor on June 14, 2005.¹

III. Statement of the Problem

The problem with the version of SB 925 (2005) that was passed in 2005 is that it omitted three words meant to be included in ORS 742.504(9)(b) when the final version was passed. The statutory provision creates a presumption that the insurer's liability will not exceed the maximum limits for liability on the individual policies, whether they be primary or excess. The omission of these words creates a situation where the limits of the insured's damages are deemed not to exceed the liability limits of the additional primary or excess insurance, but not of the UM/UIM insurance in question. The problem with the present language is that the insurer's liability can exceed that of the UM/UIM policy, but not that of the additional primary or excess insurance policy. The addition of "this insurance or" after "applicable limits of liability of" will allow the limit to apply to both insurance policies, thereby resolving the conflict. SB 925 (2005) was meant to have passed with the proposed language, but the three words were unintentionally omitted.

IV. Objectives of the Proposal

Amend ORS 742.504(9)(b) by inserting "this insurance or" after the present phrase "applicable limits of liability of."

The provision is a house-keeping fix to insert the language that was mistakenly omitted in SB 925 from last session.

V. The Proposal

The proposal is identified as House Bill 2384. See page 5 at line 39.

VI. Conclusion

Amending ORS 742.504(9)(b) will further clarify the meaning of the statute's overlapping UM/UIM coverage and will fix the mistaken omission from last session.

¹ Appointed members of the work group included Commissioner Martha Walters, Walters, Romm Chanti & Dickens PC (Chair) (resigned when she was appointed to the Oregon Supreme Court); John Bachofner, Bullivant Houser Bailey PC; Joel Devore, Luvaas Cobb Richards & Fraser PC; Dean Heiling, Dean Heiling & Assoc.; Neal Jackson, Neil Jackson & Partners; Richard Lane, L. Wobbrock Trial Lawyer PC; Tom Mortland, Liberty Northwest (left Oregon during the interim); Stephen Murrell, State Farm Insurance; Justice Edwin Peterson, Willamette University, College of Law; and Senator Charlie Ringo. Several other persons participated in the process including the following: Dave Barrows, Lana Butterfield, Toni Chodrick, Paul Cosgrove, Jeff Eberhard, Al Elkins, Darrell Fuller, James Gardner, Susan Grabe, Kristin Leonard, Brian Miller, Shawn Miller, Kevin Neary, George Okulitch, Michel Morter, Jack Munro, Joyce Patton, John Powell, Greg Remensperger, and Lou Savage.

Automobile Insurance Work Group:

AUTOMOBILE INSURANCE: SELF-INSURER REQUIREMENTS

HB 2385

Prepared by Benjamin P. Stewart, Law Clerk
And Wendy J. Johnson, Deputy Director
Oregon Law Commission

From the Offices of the Executive Director
David R. Kenagy
and
Deputy Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
January 18, 2007

I. Introductory Statement

The proposed legislation aims to address two existing problems with automobile insurance coverage caused by self-insured vehicles. First, this bill will require self-insured vehicle owners to provide coverage, meeting the statutory minimum Financial Responsibility Law requirements, for their permissive users. In essence, this bill will require self-insurers to mirror the coverage that ordinary automobile insurance policies must provide for permissive drivers. ORS 806.080(1)(b).

Second, this bill will allow persons who are unable to recover the full amount of their damages (i.e. their damages exceed the Financial Responsibility Law minimum requirements) to collect through their own uninsured or underinsured motorist (UM/UIM) coverage. Presently, the UM/UIM statute declares that self-insured vehicles can never be uninsured vehicles for purposes of UM/UIM coverage. ORS 742.504(2)(e)(B). Thus, if you are struck by a self-insured vehicle, you can not recover from your own UM/UIM coverage. Even if the adverse driver was uninsured, your own policy's uninsured motorist coverage will not pay. Even if the adverse driver or self-insurer did pay the required minimum of \$25,000 per person, you have higher UIM limits than \$25,000, and your damages exceed \$25,000, your own policy's UIM coverage will not pay for your underinsured damages.

The new provision will allow the injured person's own UM/UIM coverage to make up the difference where the self-insurance falls short. These two items were addressed last session in SB 922 (2005) and the current proposal nearly mirrors the previously proposed language. SB 922 (2005) passed through the Senate but never made it out of committee in the House to receive full consideration.

II. History of the Project

The project was initially discussed extensively by the Oregon Law Commission's Program Committee, which identified the auto insurance statutes as an area of law that needed reform. In 2003, the Auto Insurance Study Group considered 22 issues and determined that nine of those issues were of the highest priority. In 2004 the Law Commission approved the creation of a Work Group to generate proposals to remedy some defects in the automobile insurance statutes. The Work Group proposed to the Law Commission separate bills addressing five particular problem areas. The Law Commission approved all five bills, four of which passed during last session and were signed into law. This bill, the only remaining bill of the five, passed through the Senate, but was never given full consideration by the House. This bill addresses two interrelated issues arising from self-insured vehicles.¹

III. Statement of the Problems

A. Liability Insurance

In 1989, the Oregon Supreme Court established principals underlying Oregon's Financial Responsibility Law, the statutes that set forth the basic requirements of automobile liability insurance. The court construed the statutes to require that insurance policies on vehicles must provide liability coverage for anyone who drives the vehicle with the owner's permission. *Viking Ins. Co. v. Perotti*, 308 Or. 623, 631 784 P.2d 1081 (1989); *Viking Ins. Co. v. Peterson*, 308 Or. 616, 621 784 P.2d 437 (1989). The legislature showed its agreement by codifying the requirement in the next session. See ORS 806.080(1)(b).

The Financial Responsibility Law does not require everyone to buy insurance on their vehicles. Another way to comply with the law is to become "self-insured." ORS 806.060. The Department of Transportation can issue certificates of self-insurance to any entity that owns 25 vehicles or more so long as the entity promises that it will "pay the same amounts" required by the Financial Responsibility Law. (\$25,000 per person / \$50,000 per accident). ORS 806.130.

The problem arose when the Oregon Court of Appeals construed the self-insurance statute narrowly, holding that it implied no requirement that a permissive driver of a self-

¹ Appointed members of the work group included Commissioner Martha Walters, Walters, Romm Chanti & Dickens PC (Chair) (resigned when she was appointed to the Oregon Supreme Court); John Bachofner, Bullivant Houser Bailey PC; Joel Devore, Luvaas Cobb Richards & Fraser PC; Dean Heiling, Dean Heiling & Assoc.; Neal Jackson, Neil Jackson & Partners; Richard Lane, L.Wobbrock Trial Lawyer PC; Tom Mortland, Liberty Northwest (left Oregon during the interim); Stephen Murrell, State Farm Insurance; Justice Edwin Peterson, Willamette University, College of Law; and Senator Charlie Ringo. Several other persons participated in the process including the following: Dave Barrows, Lana Butterfield, Toni Chodrick, Paul Cosgrove, Jeff Eberhard, Al Elkins, Darrell Fuller, James Gardner, Susan Grabe, Kristin Leonard, Brian Miller, Shawn Miller, Kevin Neary, George Okulitch, Michel Morter, Jack Munro, Joyce Patton, John Powell, Greg Remensperger, and Lou Savage.

insured vehicle be covered by the self-insurance. The court held that the requirement “to pay the same amounts” did not imply that the self-insurer must pay under the same circumstances as those required by the Financial Responsibility Law. *Farmers Ins. Co. v. Snappy Car Rental, Inc.*, 128 Or.App. 516, 876 P.2d 833 (1994) (permissive user not covered); see also *Neal v. Johnson*, 154 Or. App. 500, 962 P.2d 706 (1998) (no permission). Self-insured cars, therefore, need not provide coverage when a permissive driver drives, unlike everyday automobile insurance. Self-insurance does not, in this regard, accurately reflect the fundamental requirements of the Financial Responsibility Law.

Typically, self-insurers are corporate entities, utilities, and car rental businesses. The problem this bill addresses usually does not arise because most permissive drivers own liability coverage. The problem does arise, however, when the driver lies about coverage, has been excluded from coverage, or has had their coverage cancelled. When this occurs, there is no coverage for the permissive driver of the self-insured vehicle. In this respect, self-insured vehicles and traditionally insured vehicles are treated differently. The proposed legislation includes a specific section making it clear that a self-insurer is required to provide payment up to the Financial Responsibility Law minimum only when the motor vehicle liability insurance policy of a customer of the self-insurer, or an operator of the self-insured vehicle, does not provide the minimum required payment under the Financial Responsibility Law.

The proposed legislation also specifically clarifies that self-insured vehicle owners are not required to provide liability coverage to a secondary user if the self-insurer does not consent to that person’s use of the vehicle. This does not make a substantive change to any law, but clarifies and confirms that self-insurers are only required to provide coverage to those who the self-insurer has permitted to operate the vehicle.²

B. Uninsured and Underinsured Motorist Coverage

The uninsured and underinsured motorist statute declares by definition that an “uninsured vehicle” can not be a self-insured vehicle. One possible rationale for this provision is that at the time the statute was passed it may have been thought that self-insurers would always provide enough money to pay for damages. That rationale fails for two reasons. First, self-insurers do not have to provide coverage for their permissive users. See *Snappy Car* supra. Second, self-insurers, when required to pay, are only required to pay up to the Financial Responsibility Law minimums of \$25,000 per person or \$50,000 per accident. *Thompson v. Estate of Pannell*, 176 Or.App. 90, 98, 29 P.3d 1184 (2001).

Presently, when an Oregonian is injured in an accident involving a self-insured vehicle, they can discover that not only may the driver of the self-insured vehicle have no liability coverage, but that the injured person will be denied their own uninsured motorist coverage. Though an injured person may have basic uninsured (UM) coverage, a self-insured vehicle is never an uninsured vehicle and the person will therefore be denied coverage. Likewise, when

² This secondary use provision required an amendment to the pre-session filed bill, and that amendment was approved by the Law Commission at the January 18th, 2007 meeting, but was not previously presented to the work group for consideration. This amendment was requested by Enterprise Rent-A-Car Company of Oregon.

the driver of the self-insured vehicle does have liability coverage but the coverage fails to cover the damages, the injured person's own *underinsured* (UIM) motorist coverage will automatically fail. The injured person may have severe damages and adequate underinsured coverage, but a self-insured vehicle, by its definition, can never be an *underinsured* vehicle – thus, the injured person can not collect.

The proposed legislation further clarifies that the self-insurer's uninsured motorist coverage is excess to other available insurance (i.e. not primary or pro rata). This change is also consistent with the provision making liability coverage excess to other available insurance.³

IV. Objectives of the Proposal

The objectives of the proposal are twofold. First, assure that self-insurance complies fully with the Financial Responsibility Law. Permissive users of self-insured vehicles would be afforded the same liability coverage as they would be in vehicles covered by traditional insurance.

Second, if the self-insurer is non-complying or the self-insurance fails, or if after paying the minimum limits the self-insurance fails to cover the damages, then the injured person's own UM or UIM coverage would pay in the normal manner.

Nothing in the bill is intended to obviate the limited liability provisions of ORS 30.135. That is, ORS 30.135 is a liability statute, and not an insurance statute; it insulates a vehicle owner from automatic liability in certain circumstances. The new (6) in Section 4 is intended to make the distinction clear.⁴ In addition, the proposal is not intended to eliminate the existing requirement that a claimant must first exhaust the underlying liability limits by judgment or settlement in one of the methods provided in ORS 742.504(4)(d).⁵

V. The Proposal

The proposal is identified as House Bill 2385.

VI. Conclusion

Self-insurance was most likely envisioned to provide at least the coverage provided by the Financial Responsibility Law. Likewise, no Oregonian would imagine that their own

³ This excess coverage clarification provision required an amendment to the pre-session filed bill, and that amendment was approved by the Law Commission at the January 18, 2007, meeting, but was not previously presented to the work group for consideration. This amendment was requested by Enterprise Rent-A-Car Company of Oregon.

⁴ The Work Group agreed that some further wordsmithing could be done to better accomplish this clarification. Thus, the Work Group recommended and the Commission approved an amendment to the pre-session filed bill to accomplish this provision.

⁵ An amendment requested by Enterprise Rent-A-Car Company of Oregon, that would exempt self-insurers from providing PIP coverage was neither approved nor rejected by the Law Commission at its January 18, 2007, meeting, nor was it addressed during work group meetings.

uninsured/underinsured (UM/UIM) insurance would fail just because the wrong-doer happens to drive a self-insured vehicle. These two statutory defects warrant reform and are resolved through the proposed legislation. In addition, self-insured vehicle owners' liabilities are further clarified.

VII. Amendment Note

Amendments to the pre-session filed bill were made in the House as requested by the Commission and described in the report.

Government Borrowings Work Group:
Revision of State and Local Government Borrowing Laws
Found in ORS Chapters 286, 287 and 288

HB 3265

Prepared by
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From the Offices of the Executive Director
David R. Kenagy
and
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1. Introductory Summary

This explanatory report is written to accompany the provisions of House Bill 3265 referred to in the report as “HB 3265” or “the bill”.¹

In October of 2004, Oregon State Treasurer, Randall Edwards, and the Oregon Municipal Debt Advisory Commission requested that the Oregon Law Commission approve and undertake the revision of the general laws affecting state and local government borrowing that are found in ORS Chapters 286, 287 and 288. The Law Commission approved the request and formed the Government Borrowings Work Group.

The Government Borrowings Work Group is chaired by Oregon Law Commission Chair, Lane Shetterly. Its members include representatives from the following groups: the Office of the Oregon State Treasurer, the Oregon Municipal Debt Advisory Commission, the Department of Justice, Oregon state agencies that borrow, Oregon cities, Oregon school districts, nationally recognized bond counsel, academia, financial advisors and underwriters of Oregon municipal bonds.²

¹ The original bill had not been through final revisions by the Work Group when the bill was filed with the Assembly. The -6 amendments were recommended by the Work Group as a “gut and stuff” replacement of the bill, reflecting the final work product of the Work Group. The House Revenue Committee adopted the amendments on May 30 and they comprise HB 3265A. On May 30, the Committee also adopted -5 amendments that permit the DEQ to issue loans to intergovernmental entities. See Section 232a of HB 3265A.

² Work Group members include the following: Commissioner Lane Shetterly, as Chair; Harvey Rogers, Partner, Kirkpatrick & Lockhart Preston Gates & Ellis LLP, as Reporter; Cynthia Byrnes, Assistant Attorney General, State of Oregon Department of Justice; Pat Clancy, Principal, Western Financial Group and Chair, Oregon Municipal Debt Advisory Commission; Ed Einowski, Partner, Stoel Rives LLP; Doug Goe, Partner, Orrick, Herrington & Sutcliffe LLP; Eric Johansen, Debt Manager, City of Portland; Bob Larson, Debt Manager,

HB 3265 is a comprehensive revision of the state and local government borrowing statutes in ORS Chapters 286, 287 and 288. These statutes affect all Oregon governments that borrow money. The Government Borrowings Work Group believes that the changes embodied in HB 3265 will make Oregon government borrowings more efficient, reducing unnecessary costs to state agencies, local governments and Oregon citizens.

2. Statement of the Problem HB 3265 Seeks to Address

Unlike private entities, state agencies and local governments need very clear authority to borrow money. A borrowing that is done by a state agency or local government without clear legal authority can be declared *ultra vires* and void by a court. Purchasers of state and local government bonds protect themselves against this risk by requiring that government borrowers provide an “unqualified” legal opinion that the borrowing is authorized. The lawyers who give these opinions (usually described as “nationally recognized bond counsel”) are able to give unqualified opinions on the borrowings only if there is no substantial doubt that the borrowing is authorized. Because of the risk of an *ultra vires* determination and the need for unqualified opinions, there is a significant and unnecessary cost to the state and its local governments if Oregon’s borrowing statutes are ambiguous or inconsistent.

ORS Chapter 286 originally contained general provisions relating to the duties of the Office of the State Treasurer with respect to state borrowings. Many agencies, however, had authority (dating from the turn of the early and mid-1900’s) to issue bonds without oversight by the State Treasurer. The details related to agencies’ bond programs are located in various chapters dealing specifically with their bond funded programs. Beginning in the 1980’s, the State Treasurer was given an increased role in the issuance of the state’s bonds, including approving if, when and how bonds are to be issued. Many of the original statutes under which state agencies issued bonds independent of the State Treasurer’s oversight, however, were not changed.

ORS Chapter 287 originally contained provisions relating to local government borrowings. Beginning roughly in 1977, when the Oregon Legislative Assembly authorized the creation of the Oregon Municipal Debt Advisory Commission (MDAC), borrowing

Oregon Housing & Community Services; Laura Lockwood-McCall, Debt Management Division Director, Oregon State Treasurer’s Office; Angie Peterman, Administrative and Support Services Director, Oregon School Boards Association; Jim Shannon, Partner, Mersereau and Shannon; Dave Taylor, Vice President, Seattle-Northwest Securities; and Frederick Thompson, Professor, Willamette University Atkinson Graduate School of Management.

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Special thanks to Legislative Counsel’s office and specifically to Harrison Conley, Deputy Legislative Counsel and Dexter Johnson (formerly Senior Deputy Legislative Counsel) for their drafting services. Law Commission staff for this project included Wendy Johnson, Deputy Director and Benjamin Stewart, Law Commission law clerk.

legislation started to appear in the form of “uniform acts” that were intended to apply to large numbers of government borrowers, often including both state agencies and local governments. Many of these provisions were codified in ORS Chapter 288.

For the last thirty years, the Oregon Legislative Assembly has been adding bits and pieces to these three chapters. The chapters lack generally applicable definitions, and terms in those chapters are often used inconsistently. Particular government bodies are occasionally left out because of drafting inconsistencies, and it is growing harder and harder to determine how different sections of these chapters relate to each other. Legislation that originally began “notwithstanding any other provision of law” or that otherwise overrode inconsistent prior legislation have been codified without those overrides, and the inconsistent statutes have, in some cases, been subsequently amended, making it even more difficult to determine what these statutes mean.

In addition, during this period there has been tremendous innovation in the capital markets. Governments often can save substantial amounts of money for their citizens if the governments take advantage of these innovations. The Oregon Municipal Debt Advisory Commission and the State Treasurer have frequently requested the Oregon Legislative Assembly to expand the borrowing powers of Oregon governments. During the last ten years, legislation granting those requests often has been in the form of bills that broadly grant authority to governments. Often those bills have combined awkwardly with the hodge-podge of old and new statutes in those chapters.

3. Scope of the Project

HB 3265 revises ORS Chapters 286, 287 and 288 to:

- A. Include in ORS Chapter 286 the general borrowing provisions that relate to state borrowings, clarify that all state borrowings are issued by the State Treasurer, clarify the responsibilities of state agencies in connection with state borrowings, and streamline the process for state borrowings by eliminating unnecessary formal requirements for State Treasurer review of state borrowings.
- B. Include in ORS Chapter 287 the general borrowing provisions that relate to local government borrowings, and clarify how those provisions relate to each other.
- C. Repeal ORS Chapter 288 and incorporate relevant provisions into Chapters 286 and 287.
- D. Use modern, simplified language and definitions.
- E. Eliminate inconsistencies and references to outdated or unnecessary requirements.
- F. Make the financing techniques currently in ORS Chapters 286, 287 and 288 broadly available to all state agencies and local governments unless there is a sound policy reason for denying those techniques to particular governments.

- G. Grant the State Treasurer more authority to adopt rules affecting state and local borrowings, and greater flexibility to impose fees for services provided by the Office of the State Treasurer to borrowing governments.
- H. Reform older statutes that prescribe in detail how borrowings must be done to give the State Treasurer, state agencies and local governments the ability to adapt the details of borrowings to rapidly evolving public finance markets.

4. Policy Changes Made by HB 3265

The charge to the Government Borrowings Work Group did not include making substantial policy changes in current law. Nevertheless, in executing its charge, the Work Group found it necessary or appropriate to recommend some discrete policy changes in order to facilitate the streamlining and reorganization of the government borrowings statutes. Those policy changes are identified in this section. HB 3265 is not intended to make changes in any of the fundamental policies underlying existing Oregon government borrowings statutes.

HB 3265 does not authorize any new types of borrowings, but it does allow the state and local governments more flexibility when they exercise the powers that the legislature has previously given to them, so that they can respond to changing market conditions and minimize the cost of borrowings.

In addition, HB 3265 makes the following changes:

- A. Section 232 a. This section amends ORS 468.423(2) to allow the Oregon Department of Environmental Quality to make state revolving fund loans to intergovernmental entities.³
- B. Section 5. This section gives the State Treasurer broader authority to charge state agencies and local governments for services the State Treasurer's Office provides in connection with state and local government borrowings. Currently the State Treasurer provides a wide variety of services but charges for only a few. These provisions are intended to allow the Oregon State Treasurer to charge fees that are commensurate with services given, instead of subsidizing services in one area with fees collected in another. The Office of the Oregon State Treasurer requested this change and the Work Group believes it is appropriate.
- C. Section 7(2)(g). This subsection allows the State Treasurer to invest bond proceeds separately from other money held by the Treasurer. This provision facilitates compliance with federal tax laws and allows investments that support borrowings to be tailored to those borrowings.

³ This change was made at the request of the Chair of the House Committee on Revenue, Rep. Phil Barnhart, to assist the cities of Eugene and Springfield. Waste water there is governed by an intergovernmental entity rather than separate districts for each city. The term "agency" was too narrowly defined so as to not cover intergovernmental entities. The Work Group supported the amendment as did the DEQ.

- D. Section 9(2). This section changes the State Treasurer's report that assists the Governor in preparing the budget for state borrowings. The change has the State Treasurer recommending a prudent maximum amount of borrowings, rather than having the Treasurer simply consult with and advise the Governor.
- E. Section 9(4), (5). This section allows the unused bonding authority that the legislature grants to a state agency for a biennium to be used by the agency after the end of the biennium, but only until the legislature acts to set new bonding authority for the agency or the legislature adjourns.
- F. Section 29. This section deletes one of the standards for allocating the private activity bond volume cap. The standard has proved difficult to apply meaningfully, and the deletion is made at the request of the Office of the Oregon State Treasurer, which administers the allocation of volume cap. It also designates the State Treasurer as the Chair of the Private Activity Bond Committee.
- G. Section 40. This section clarifies the priority of claims by two bond programs to money held by the state for distribution to school districts.
- H. Section 44. This section deletes the requirement that counties hold a public hearing before they call a bond election. No other local government is required to hold a public hearing before it submits a bond measure to voters.
- I. Section 47(3)(a). This section allows tax anticipation notes of all local governments to have a maximum term of 13 months. Existing law only permits school districts and one city to issue tax anticipation notes with a term of 13 months; other government tax anticipation notes must mature by the end of the fiscal year in which they are issued. The Work Group recommends this change because it matches the term of tax anticipation notes to that permitted by federal law, and because it is useful for governments to be able to borrow across fiscal years if their finances are disrupted.
- J. Section 95a. This section amends ORS 283.089 to allow the Department of Administrative Services to charge benefited state agencies for costs associated with investing proceeds of certificates of participation. The change is requested by the Oregon Department of Administrative Services, which often has invested proceeds of certificates of participation in guaranteed investment contracts. The change is necessary to allow the Department to adapt to changes in the market for those investments.
- K. Sections 97, 97a, 98 and 101. These sections amend the conduit revenue bond statutes of the Oregon Economic and Community Development Department at the request of the Department to: (i) allow the Department to issue conduit revenue bonds to provide financing for airports, docks, wharves and other exempt facilities described in federal law, and for nonprofit organizations; (ii) set fees for and charge costs for bond-related services; (iii) modernize, broaden and restate the ability of the Department to enter into contracts related to conduit revenue bonds; and (iv) allow

certain bond-related actions to be taken by the Department instead of its commission or the State Treasurer.

- L. Section 184. This section amends ORS 407.525 at the request of the Oregon Department of Veterans' Affairs to clarify that all the proceeds from new bond issues need not be used to make loans before moneys in the sinking account may be used for that purpose, in order to preserve the most advantageous federal tax treatment of bonds issued for the Department.
- M. Sections 236 and 237. The bill also has a unique transitional feature. Sections 236 and 237 of the bill allow state agency borrowers and local governments to use existing law between the enactment of HB 3265 and January 1, 2010. These provisions protect state agency and local government borrowers against the possibility that the substantial revisions to existing law in this very large bill have adverse unintended consequences.

5. **Section By Section Summary – State Borrowings**

This section briefly summarizes the sections of HB 3265 that relate to state borrowings.

- A. Section 2. This section provides the modernized and simplified definitions that are used in proposed new ORS Chapter 286, which applies to state borrowings.
- B. Section 3. This section describes the basic duties of the State Treasurer in connection with state borrowings. This section also simplifies the signature requirements for state bonds to require only the State Treasurer's signature, without the Governor or Secretary of State.
- C. Section 4. This section describes the basic duties of state agencies to provide information to the State Treasurer in connection with state borrowings.
- D. Section 5. This section authorizes the Office of the State Treasurer to charge fees to state agencies and local governments for services provided by the Office in connection with government borrowings.
- E. Section 6. This section grants a continuing appropriation to the State Treasurer to spend the fees collected under Section 5 to provide services in connection with government borrowings.
- F. Section 7. This section grants broad, clear authority to the State Treasurer, in consultation with the affected state agency, to structure state borrowings and enter into agreements related to state borrowings.
- G. Section 8. This section broadly authorizes use of credit enhancements for state borrowings. Existing law authorized them, but not for all agencies and state borrowing programs.

- H. Section 9. This section relates to developing the Governor's budget and the amounts that may be borrowed during a biennium. It combines several existing statutes, modified to use the new definitions and to make the changes discussed in section 4.D and 4.E of this report.
- I. Section 10. This section contains the existing authority of state agencies to use interest rate swaps for state borrowings, modified to use the new definitions in the bill. It also clarifies that state agencies may establish and fund reserves to pay amounts due under interest rate swaps.
- J. Sections 11, 13 and 14. These sections restate the existing authority of the State Treasurer to issue tax anticipation notes using the new definitions in the bill.
- K. Section 15. This section combines several statutes that describe how state debt limits are calculated and modifies them to use the new definitions in the bill.
- L. Sections 17 and 18. These sections contain the provisions of existing law relating to pledges and rate covenants made by the state, modified to use the new definitions in the bill.
- M. Sections 20 and 21. These sections modernize, combine and make consistent existing authority that is located in several different statutes relating to appointment of bond counsel and financial advisors. The sections clarify that state agencies and the State Treasurer can appoint bond counsel and other financial service professionals.
- N. Sections 22, 65 and 126. These sections restate existing laws providing that interest on Oregon state and local government bonds are exempt from Oregon personal income taxation.
- O. Section 23. This section restates and modernizes the authority of the state to comply with federal requirements imposed on federally tax-exempt bonds.
- P. Section 24. This section replaces outdated sections that applied to printed, coupon bonds. Most bonds today are in electronic, book-entry form.
- Q. Section 25. This section restates existing law providing that records of bond ownership are not public records.
- R. Section 26. This section simplifies and modernizes the language in the existing statute relating to annual audits of bond programs.
- S. Section 27. This section modernizes and restates the duties of the State Debt Policy Advisory Commission. The content and timing of the report from the State Treasurer are intended to work better with the development of the Governor's budget.

- T. Sections 29, 31 and 32. These sections modernize and restate existing laws related to allocation of the federal private activity bond volume cap and incorporate the changes discussed in section 4.F of this report.
- U. Section 33. This section modernizes and restates existing law related to the Oregon Baccalaureate Bond program.
- V. Sections 35 through 39. These sections conform existing state lottery bond statutes to the new provisions of the bill.
- W. Section 40. This section clarifies the priority of claims on money held by the state for school districts. Claims of the state bond guaranty program are given first priority and claims under intercepts for school district pension bonds are given second priority, as noted in section 4.G of this report.

6. Section by Section Summary – Local Government Borrowings

This section briefly summarizes the sections of HB 3265 that relate to local government borrowings.

- A. Section 42. This section provides the modernized and simplified definitions that are used in proposed new ORS Chapter 287, which applies to local government borrowings.
- B. Section 43. This section restates the authorization and debt limit for city bonds.
- C. Section 44. This section restates the authorization and debt limit for county bonds. It also eliminates the public hearing requirement for county bonds as described in section 4.H of this report.
- D. Section 45. This section restates the existing authority of counties to incur indebtedness under Article XI, Section 10 of the Oregon Constitution.
- E. Section 46. This section restates the existing provisions of the Uniform Revenue Bond Act (ORS 288.805 to 288.945).
- F. Section 47. This section restates the existing laws allowing local governments to do short term borrowings. It also allows all governments to issue tax anticipation notes with a term of 13 months or less as noted in section 4.I of this report.
- G. Section 48. This section grants broad, clear authority to local governments to structure local government borrowings. It is comparable to Section 7 of the bill.
- H. Section 49. This section broadly clarifies the ability of the governing bodies of local governments to delegate borrowing decisions.
- I. Sections 50 and 51. These sections contain the provisions of existing law relating to pledges and rate covenants made by local governments, modified to use the new

definitions in the bill. These sections are comparable to Sections 17 and 18 of the bill.

- J. Section 50a. This section restates existing laws relating to pledges of full faith and credit by local governments.
- K. Section 52. This section broadly restates existing law authorizing local governments to obtain credit enhancements for borrowings.
- L. Section 53. This section restates existing authority of local governments to enter into interest rate swaps. It also clarifies the ability of local governments to fund reserves to pay amounts due under interest rate swaps.
- M. Section 54. This section restates and modernizes existing laws allowing local governments to issue current refunding bonds.
- N. Sections 55, 56, 57 and 59. These sections restate and modernize existing laws allowing local governments to issue advance refunding bonds.
- O. Sections 60 through 63. These sections restate and modernize existing provisions relating to the Oregon Municipal Debt Advisory Commission.
- P. Section 64. This section combines and modernizes existing laws relating to the calculation of local government debt limits.
- Q. Section 66. This section restates existing laws describing the consequences of spending local government general obligation bond proceeds incorrectly.
- R. Section 67. This section restates existing laws relating to tax levies for local government general obligation bonds.
- S. Section 68. This section restates existing laws providing that the powers granted to local governments in new ORS Chapter 287 are in addition to powers granted by other laws.
- T. Section 69. This section restates existing law providing that records of ownership of local government bonds are not public records.
- U. Section 70. This provision specifies that the provisions of new ORS Chapter 287 do not apply to refundings bonds or advance refundings bonds done prior to the effective date of the bill.

7. Conforming Changes and Formal Provisions

Except as noted above, the remaining sections of HB 3265 contain amendments that conform existing laws outside ORS Chapters 286, 287 and 288 to the language of the bill, establish effective dates, or deal with formal matters.

8. Conclusion

HB 3265 is the result of more than two years of work by representatives of the Office of the State Treasurer, the Oregon Municipal Debt Advisory Commission, the Department of Justice, cities, school districts, nationally recognized bond counsel, academia, financial advisors and underwriters.

The bill substantially rewrites ORS Chapters 286 and 287 to modernize, clarify and simplify their provisions and clarify the borrowing authority of Oregon state agencies and local governments. The Government Borrowings Work Group of the Oregon Law Commission believes that these changes will make Oregon government borrowings more efficient and cost-effective, ultimately reducing costs for citizens throughout Oregon.

Respectfully submitted,

Harvey W. Rogers*
Reporter

* Nationally recognized bond counsel and partner in the law firm of Kirkpatrick & Lockhart Preston Gates Ellis LLP

Amendments and Report Note:

This bill was presented and recommended to the Oregon Law Commission at its meeting on February 8, 2007. At that time the Work Group explained that further technical amendments were still needed. The Commission authorized that continued work during Session and recommended the bill to the legislature subject to amendments. The report was written after the major amendments were completed by Legislative Counsel's office. The report was approved by the Work Group, but due to time constraints, the Commission did not review or approve the report. The report reflects the final bill including amendments made to the original bill.

**Oregon Law Commission
Report to the 2007 Legislative Assembly**

REPORT ON GOVERNMENT ETHICS

**SB 494, SB 495, SB 496, SB 497, SB 498,
HB 2594, HB 2595, HB 2596, HB 2597, and HB 2598**

Prepared by Gerald G. Watson, Ph.D., J.D.
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From the Offices of the Executive Director
David R. Kenagy
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Wendy J. Johnson

Report Approved by the Oregon Law Commission on February 8, 2007
(Incorporating Oregon Law Commission discussion and recommendations made
November 15, 2006 and December 20, 2006)

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I. INTRODUCTION

The overarching principle of governmental ethics in a democratic society is the fiduciary concept of public service as a public trust.¹ Thomas Jefferson enunciated this basic principle by simply stating “[w]hen a man assumes a public trust, he should consider himself as public property.” Underlying the principle of public trust are two closely related concepts that may be regarded as its major corollaries: (a) public officials shall not use public office for private gain; and (b) public officials shall act impartially and not give preferential treatment to anyone.

While almost everyone will agree upon the importance of these principles, substantial controversy and some measure of disagreement exists on how best to achieve ethical conduct in government. Approaches to promoting ethical conduct can be arrayed along a continuum with education, training and gentle persuasion at one end, and specific rules with sanctions, including criminal penalties, at the other. The focus here is upon substantive and procedural rules, including sanctions for rule violations, expressed in Oregon’s government ethics laws.

There is widespread agreement that Oregon’s government ethics laws are in need of revision. Most of those ethics laws, including a “code of ethics” (ORS 244.040), are contained in ORS Chapter 244.² Additional relevant statutory provisions are found in ORS Chapter 171 (lobbying) and Chapter 260 (campaign finance).

Since the ethics code was first adopted in 1974, ORS Chapter 244 has been amended in each regular legislative session except those held in 1981 and 1985. The relevant provisions of Chapter 171 on lobbying and Chapter 260 on campaign finance have also been amended from time to time. The Oregon Law Commission’s Government Ethics Project is a direct result of the continuing controversy surrounding government ethics law.

¹ In Oregon, the principle is specifically set forth in the very first sentence of ORS Chapter 244 as follows: “The Legislative Assembly hereby declares that a public office is a public trust, and that as one safeguard for that trust, the people require all public officials to adhere to the code of ethics set forth in ORS 244.040.” ORS 244.010(1). Why a code of ethics? James Madison put it this way: “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.” James Madison, *Federalist* #51. As Oregon law recognizes, a code of ethics is a useful safeguard in establishing and maintaining that control.

² Although ORS 244.040 is specifically labeled a “code of ethics,” and contains many of the substantive prohibitions in current ethics law, other substantive provisions are found elsewhere in Chapter 244. Most of the remainder of this chapter is devoted to procedural matters, the organizational structure of the Government Standards and Practices Commission, and a delineation of sanctions for violations of ethics laws.

II. HISTORY OF PROJECT

The most comprehensive ethics bill to come before the Legislative Assembly in recent years was House Bill 3328, introduced in 2003. The Legislative Assembly approved the bill, but Governor Kulongoski vetoed it on September 25, 2003. In November, 2003, Governor Kulongoski requested that the Oregon Law Commission review Oregon's government ethics laws and prepare a comprehensive revision for recommendation to the next regular legislative session. The Oregon Law Commission agreed, subject to funding, to prepare a comprehensive revision of Oregon's government ethics law for the 2007 legislative session, concluding that the necessary work could not be accomplished in time for the 2005 session. The Commission subsequently directed staff to prepare a preliminary report analyzing Oregon's ethics laws as an initial step toward revision. That preliminary report was presented to the 2005 Legislative Assembly. At the close of the 2005 legislative session, the Assembly provided funding and directed the Oregon Law Commission to prepare a further report and draft legislation on government ethics laws, campaign finance and lobbying for its consideration during the 2007 session.³

In response to this charge, the Oregon Law Commission established the Government Ethics Work Group in the fall of 2005. Oregon Law Commissioner, Attorney General Hardy Myers, was selected to serve as Chair. The following individuals were invited and agreed to serve as members of the Work Group:

Justice Hans Linde - Retired Oregon Supreme Court Justice; Currently Distinguished Scholar in Residence, Willamette University College of Law; Member of the Oregon Law Commission

Greg Mowe - Attorney, Stoel Rives LLP; Member of the Oregon Law Commission

Deputy Chief Debbie Baker - Salem Police Department

Chuck Bennett – Lobbyist for Council of School Administrators

Rep. Vicki Berger - State Representative, District 20

Steve Bryant – Former City Administrator, City of Albany

Keith Garza – Former Staff Attorney for the Oregon Supreme Court; Attorney for Tri-Met

Sen. Betsy Johnson - State Senator, District 16

John Junkin – Attorney, Bullivant Houser Bailey P.C.

Carla Kelley - Attorney, Port of Portland

Margaret Olney – Attorney, Smith Diamond & Olney

Larry Rew – Attorney, Private Practice in Pendleton; Former Oregon State Bar President

Mardilyn Saathoff - Attorney, Tektronix Inc.; Former Legal Counsel to Governor Kulongoski

John Schoon - Former State Legislator and Former Member of the Oregon Government Standards and Practices Commission

³See SB 420 (2005) (not adopted) and HB 5023-A appropriating general funds to Emergency Board (DAS budget note at page 13).

Additionally, a number of interested persons were invited to participate in the Work Group as advisors.

Bruce Bishop - Attorney and Lobbyist, Harrang Long Gary Rudnick P.C.
John DiLorenzo - Attorney and Lobbyist, David Wright Tremaine LLP
Susan Grabe – Attorney and Public Affairs Director, Oregon State Bar
Jim Green – Attorney, Oregon School Boards Association
Pat Hearn - Former Executive Director of the Government Standards and Practices Commission (Replaced by Don Crabtree who was Acting Executive Director of the GSPC after Pat Hearn resigned)
Genoa Ingram - Executive Director, Oregon Fire District Directors Association
John Lindback – Administrator of the Election Division, Secretary of State Office
Jim Markee - Lobbyist, Markee & Associates
Harvey Mathews – Lobbyist, Associated Oregon Industries
Andi Miller - Executive Director, Common Cause
Christy Monson – Legislative Director, League of Oregon Cities (Replaced by Mike McCauley, Executive Director, League of Oregon Cities)
Janice Thompson - Executive Director, Money in Politics Research Action Project

Advisors participated actively in all meetings.

The Work Group and Oregon Law Commission also benefited from the active involvement of Senior Deputy Legislative Counsel, Ted Reutlinger, throughout the work group process. The Oregon Law Commission commends Senior Deputy Legislative Counsel Reutlinger for his excellent work. His crucial and time-consuming work in preparing carefully crafted draft legislation for review by the Work Group, the Oregon Law Commission and the Legislative Assembly, made this large project possible. The Commission also extends its thanks to Legislative Counsel, Ann Boss, and the entire staff of LC drafters and publication services personnel in the Office of the Legislative Counsel.

The Government Ethics Work Group held its first meeting in November 2005 and followed that session with a second meeting in December. At the December 2005 meeting the Work Group organized into two sub-work groups. Sub-Work Group #1, chaired by Attorney General Hardy Myers, was assigned responsibility to study and prepare recommendations on 6 topics involving government ethics standards.⁴ Sub-Work Group #2, chaired by Oregon Law Commissioner Greg Mowe, was assigned responsibility to study and prepare recommendations on 8 additional topics generally involving administrative aspects of government ethics.⁵

⁴ Assigned topics: (1) Campaign Finance, (2) Gifts, Honoraria and Financial Gain, (3) Conflicts of Interest, (4) Subsequent Employment and Nepotism, (5) Substantive Reporting Requirements, and (6) Lobbying.

⁵ Assigned Topics: (1) Organizational Structure, (2) Rule Making and Advisory Opinions, (3) Adjudication Procedures, (4) Education and Training, (5) Procedural Reporting Requirements, (6) Sanctions and Remedies, (7) Monitoring and Evaluation, and (8) Funding.

Each sub-work group met 11 times during 2006, usually once or twice a month, for a total of some twenty-two meetings. Those meetings were followed by two public hearings held in early October 2006 (one in Portland, the other in Salem). Three additional meetings of the full Government Ethics Work Group were held in late October and early November 2006 to review and finalize recommendations.⁶

The Commission's work and the collective wisdom of the Government Ethics Work Group and its sub-work groups is distilled in the legislative proposals accompanying this report⁷ and additional non-statutory recommendations presented to the Legislative Assembly. Members of the Oregon Law Commission were apprised of the Work Group's activities throughout the work group process. Commissioners regularly received summary meeting reports (SMR's) of Work Group and Sub-Work Group actions and thus were well aware of the issues, concerns and recommendations coming from the Work Group. In addition, Commissioners were provided with detailed staff summaries of the final Work Group recommendations and drafts of proposed legislation reflecting those recommendations prior to the Commission's meetings on November 15, 2006, and December 20, 2006. The recommendations and the legislative proposals embodying the recommendations were discussed and debated by the Law Commission. The Oregon Law Commission reviewed and discussed the Work Group's recommended legislative and non-legislative proposals on November 15, 2006. Those proposals, as amended by the Commission based upon its further discussion and debate, were approved at the December 20, 2006 meeting of the Oregon Law Commission with direction that they be provided to the Legislative Assembly along with this report.

III. THE PROBLEMS THAT THESE PROPOSALS ADDRESS

Overview

The Government Ethics Work Group identified several broad areas of concern to address.

- Campaign finance
- Receipt of gain
- Disclosure of gain and conflicts of interest
- Employment-related conflicts
- Lobbying
- Organizational structure, duties, and powers of a government ethics entity
- Funding for the administration of government ethics

⁶ Considering that most of these meetings lasted about 3 hours (not including preparation time), and that each of the 15 Work Group member served on one of the sub-work groups, that represents more than 500 hours of time volunteered to law improvement in Oregon—an impressive number. That figure doesn't begin to take into consideration the amount of time invested by advisors, interested persons, and Oregon Law Commission staff not only in attending the meetings, but in preparing for those meetings, conducting research and responding to questions and requests for information. All in all, the state of Oregon has been the beneficiary of several thousands of hours of time by persons who are knowledgeable about the issues and concerned about good public policy.

⁷ See HB 2597, HB 2598, SB 494, SB 498, SB 497, SB 495, HB 2594, SB 496, HB 2595 and HB 2596.

The Work Group also considered a number of more specific issues under each of those general topics. Those specific issues were drawn from information provided to the Work Group by Oregon Law Commission staff, oral and written testimony provided at various work sessions and public hearings, as well as the personal and professional experiences and expertise of Work Group members and advisors.⁸ As the project progressed, the Work Group gave additional consideration to current ethics complaints and news coverage on ethics issues of local and statewide concern.⁹

Among the more specific issues addressed by the Work Group were: (1) what should be permissible use(s) of campaign contributions; (2) whether public officials, their spouses, relatives and household members should be allowed to receive any gifts or other things of value, such as food, lodging, travel or entertainment from persons with a legislative or administrative interest; (3) whether there should be *de minimis* exceptions to rules on the receipt of gifts and other things of value, or on the use of public equipment; (4) how to clarify ambiguous and conflicting rules, including rules on the definition and treatment of gifts, conflicts of interest, and reporting requirements; (5) whether any official should be able to make a decision or take any action when faced with an actual conflicts of interest; (6) whether civil penalties were appropriate for “inadvertent” or technical errors by public officials, in light of the potential “chilling” effects on public service of strict liability for even unknown, unintentional-but reasonable-errors; and (7) how to establish and maintain an adequate budget for the administration of ethics laws that is insulated from undue political pressure.

Predicate Decisions: The Road Not Taken

“Two roads diverged in a wood, and I –
I took the one less traveled by,
And that has made all the difference.

Robert Frost, *The Road Not Taken*¹⁰

⁸ Staff provided information analyzing prior legislative proposals and the history of ethics reform in Oregon, summarizing ethics opinions and case histories of matters before the Government Standards and Practices Commission and Oregon courts, identifying specific ethical issues raised in Oregon and elsewhere by media and interested persons, and summarizing oral and written testimony before the Work Group and its sub-work groups.

⁹ The Work Group was certainly aware of specific recent public controversies involving such varied matters as trips to Hawaii and Israel provided by lobbyists to legislators, free meals and entertainment provided to public officials, the alleged misuse of cell phones and frequent flyer miles by public officials, and employment of relatives by legislators. Various members of the Work Group also attended one or more meetings of the Government Standards and Practices Commission to observe how actual controversies were handled by that body.

¹⁰ From *The Poetry of Robert Frost* by Robert Frost, edited by Edward Connery Lathem. Copyright 1916, 1923, 1928, 1930, 1934, 1939, 1947, 1949, © 1969 by Holt Rinehart and Winston, Inc. Copyright 1936, 1942, 1944, 1945, 1947, 1948, 1951, 1953, 1954, © 1956, 1958, 1959, 1961, 1962 by Robert Frost. Copyright © 1962, 1967, 1970 by Leslie Frost Ballantine.

As Robert Frost observed in *The Road Not Taken*, any decision, whether explicit or implicit, has consequences for future choices. Before turning to the specific legislative drafts, it is worthwhile to briefly note several decisions, conclusions or assumptions (collectively referred to as “predicate decisions”) that framed the work group’s consideration of government ethics reform. Those decisions fundamentally shaped the direction of these proposals—and that, in the words of the poet, “has made all the difference.” The five most important of those predicate decisions are:

- *Unity.* Maintain a *unitary* structure of ethics governance

The statutory proposals assume and build upon a single, comprehensive ethics governing entity that applies to all public officials. The Work Group considered and rejected approaches to ethics governance that would create multiple ethics governing entities. The broad coverage of all elected and appointed public officials, including employees and volunteers, at all levels of government (state, local, special district or other type of entity) is maintained by these statutory proposals.

- *Uniformity.* Enhance the *uniformity* of rules and rule application to all public officials

The Work Group consciously determined that ethics rules should apply equally to all public officials, unless there was a compelling reason to treat some officeholders differently than others.

- *Transparency.* Enhance the *transparency* of ethics laws and governance by emphasizing uniformity, clarity and consistency of rules and by minimizing exceptions and exclusions

The Work Group operated from the assumption, sometimes expressed only implicitly, that ethics laws and the ethics governing structure should be as transparent and as understandable as possible. As a practical matter, promoting transparency meant trying to simplify rules where possible, eliminate perceived inconsistencies and minimize exceptions or exclusions from coverage of particular rules.

- *Continuity.* Maintain *continuity* of the basic statutory framework

The Oregon Law Commission was charged to conduct a comprehensive review and evaluation of Oregon government ethics laws. Importantly, the Work Group implicitly accepted the basic statutory framework of Chapter 244, making its decisions and recommendations by adding to, subtracting from, and modifying (amending) existing provisions of the Oregon Revised Statutes. This decision is not inconsistent with comprehensive review, but it does mean that one is not beginning with a clean slate. The recommended end product bears significant similarity to existing law, particularly in the basic organization and structure of the ORS Chapter 244 provisions.

- *Consistency.* Enhance *consistency* with fundamental ethical principles.

Consistency with fundamental ethical principles is generally enhanced when rules are simple and apply universally without exceptions. Exclusions and exceptions, particularly exclusions from and exceptions to key statutory definitions, can significantly erode the actual consistency of the statute with the underlying principle(s) upon which it is based.¹¹ The Work Group clearly did not attempt to eliminate every exception to or exclusion from general ethical rules. On the other hand, for the most part, the group did carefully consider whether those exceptions or exclusions were justified and consistent with the underlying principles. By considering its decisions within a framework of fundamental ethical principles, the Work Group sought to balance considerations providing support for exceptions and exclusions with the broad goal of developing law that consistently applied those fundamental ethical principles.

The Legislative Proposals

A. Campaign Finance (Use of Campaign Contributions) (HB 2597)

1. Issues identified from Existing Law.

The growing cost of political campaigns, the unequal access to political decision-makers that large campaign contributions may provide, and the potential to divert those contributions to personal or other inappropriate use makes campaign finance a perennially “hot” topic.¹² The Oregon Law Commission deliberately limited its consideration of campaign finance law to the two matters that are most directly related to ethical concerns about the conduct of public officials: (a) the disclosure of campaign contributions, and (b) limits on the use of contributions.¹³ Upon further review, the Government Ethics Work Group decided that the Elections Division of the Secretary of State was for the most part adequately addressing disclosure through the development of an on-line “real time” system of reporting all campaign contributions and expenditures. Development of that system was previously mandated by the Legislative Assembly and is to be implemented by January 1, 2007. For this reason, the Work Group took no further action on that matter, instead devoting its full attention to one basic issue: the appropriate

¹¹ Exceptions and exclusions also make it more difficult to understand the law, and introduce a lack of uniformity in treatment, creating tension with the predicate decisions of uniformity and transparency.

¹² Significant issues of public policy involving campaign finance include: (1) whether campaigns should be publicly or privately funded; (2) whether steps should be taken to limit the overall cost of political campaigns; (3) the limits, if any, which should be placed on campaign contributions by individuals, corporations, unions or a variety of political action groups; (4) the extent, if any, to which campaign contributions and expenditures should be disclosed; and (5) the limits, if any, which should be placed on the use of campaign contributions.

¹³ The Government Ethics Work Group did not consider, and the Commission takes no position on questions such as public funding, the cost of political campaigns or limits on making campaign contributions. The Commission acknowledges that any efforts to place limits on campaign contributions would likely require an amendment to the Oregon Constitution and that two ballot measures on the 2006 General Election Ballot attempted, unsuccessfully, to deal with this important topic.

uses of campaign contributions and the closely related question of who controls the expenditure of those funds.

2. Issues Addressed.

Particular concerns were expressed about three practices involving the use of campaign funds:

- Using campaign contributions to defray expenses incurred in fulfilling the responsibilities of public office once in office.
- Using campaign contributions to pay expenses also covered by legislative per diem payments (so-called “double-dipping”).
- Transferring campaign contributions to other persons or entities (sometimes called a “pass-through”).

The statutory recommendations address each of these specific issues.¹⁴

3. Alternative Approaches Considered.

States have adopted a variety of approaches to deal with the regulation of campaign contributions and expenditures. In some states, there are significant restrictions on political contributions and expenditures, while others, such as Oregon, rely heavily on disclosure. The Government Ethics Work Group began with the premise that campaign contributions were not the property of the candidate, but rather held by the candidate or campaign committee in a “trust” relationship with fiduciary obligations. The group concluded that disclosure, while helpful, was not sufficient to maintain this trust and carry out this policy. Indeed, some provisions of current law made campaign contributions seem like property of the candidate. The Work Group determined that greater clarity and more restrictions were needed in the law regarding permitted and prohibited uses in order to provide guidance to candidates and campaign committees concerning their fiduciary obligations.

4. Narrative Description of Recommendations.

Key Recommendations. Based on the foregoing, the Oregon Law Commission made the following key recommendations on campaign finance:

- a. Candidates and principal campaign committees of candidates may use campaign contributions only for campaign purposes, with certain very limited exceptions.

¹⁴ Some concern was also expressed about personal use of campaign contributions. Existing law already prohibits personal use, but does so with significant exceptions and some additional ambiguity caused by authorizing campaign contributions to “be used for any other lawful purpose.” See ORS 260.407(1)(d) and (2). The recommended statutory draft states the prohibition on personal use more succinctly and with only one exception: transfer to the principal campaign committee of the same candidate for nomination or election to a different public office.

- b. Candidates and principal campaign committees of candidates are specifically prohibited from:
- converting contributions to personal use by anyone;
 - making contributions to any other candidate or political committee (“pass-through”);
 - using contributions to defray expenses incurred in connection with duties of public office;
 - using contributions to pay civil or criminal penalties unless the conduct that gave rise to the fines was non-criminal; or
 - using contributions to pay certain kinds of membership dues.
- c. Candidates and principal campaign committees of candidates are specifically allowed to distribute campaign contributions to:
- the principal campaign committee of the same candidate for a different office; or
 - upon discontinuing their principal campaign committee to distribute excess contributions to certain charitable organizations,¹⁵ a political committee of any political party, a legislative caucus political committee or (for legislative candidates) the Property and Supplies Stores account established by the Legislative Assembly.

Additional Recommendations. The Oregon Law Commission made additional recommendations that impact the transparency of disclosures and help ensure that those who are interested in whether campaign funds are being properly expended can adequately track expenditures. These recommendations: (1) provide that a candidate can designate only one political committee as the candidate’s principal committee; (2) prohibit a candidate from serving as his or her own treasurer except in very limited circumstances involving small, self-funded campaigns; and (3) allow campaign funds to be used to purchase liability insurance coverage for a person who serves as campaign treasurer.

Collectively the campaign finance recommendations constitute a significant change from existing law.¹⁶ These recommendations clarify that campaign contributions can generally only be used for campaign purposes, substantially limit transfers to other entities, and prohibit their use to pay office expenses, civil penalties, and most membership dues.

¹⁵ The Oregon Law Commission amended the initial recommendation on charitable contributions from the Work Group by prohibiting contributions to charitable organizations whose charitable purpose is for the benefit of religion.

¹⁶ Existing law prohibits only the personal use of campaign funds. Under current law campaign funds can be freely transferred to other candidates and campaigns. In addition, payment of office expenses, membership dues, and certain penalties are allowed.

Continuing Controversies.

Although substantial consensus was reached on most of these recommendations, objections were raised and noted to significant new restrictions on the use of campaign contributions made to principal campaign and candidate committees. The most controversial of the proposed restrictions (a) prohibit use of campaign funds for payment of expenses incurred in connection with duties of public office and (b) transfers to other candidates or political campaigns. Some persons would continue to allow use of campaign contributions for some or all of these items. However, the Law Commission has chosen to address reasonable concerns about restrictions on the use of campaign funds through other recommendations. For example, the Law Commission has taken a strong position that reasonable expenses of holding public office should be paid with public money. A non-statutory recommendation to increase the Legislative Assembly's own budget to adequately pay for reasonable expenses (staff, computers, paper, travel, mailing, copying, etc.) once in office is tied to this recommendation.

A second area that may remain controversial is recommendation of a limited ban on the use of campaign funds to pay for fines or other penalties imposed on a candidate or principal campaign committee. Under existing law, campaign funds can be used for this purpose. The Work Group recommended a full ban on this practice. However, the Commission, by split vote, amended its recommendation to allow use of campaign funds for this purpose if the conduct that gave rise to the fines was non-criminal. The partial ban may not satisfy critics who oppose the use of campaign funds to pay any kind of fine or penalty. On the other hand, eliminating the use of funds for this purpose has been opposed by those who object to the impact of expanded personal financial liability on the willingness of people to participate in the political process.¹⁷

Legislative Counsel expressed concern that the recommended prohibition on transfers to other candidates or political committees may violate the very broad right to freedom of expression guaranteed by Article 1, Section 8 of the Oregon Constitution. See *VanNatta v. Keisling*, 324 Or 514 (1997). The Work Group and the Oregon Law Commission was aware of these constitutional concerns, but proceeded on the basis that the recommended statutory restriction was both important and likely constitutional because it was narrowly tailored to address a significant harm to the public. By doing so, the Oregon Law Commission at least impliedly concurred in the view that the proposed restrictions could be distinguished from the holding in *VanNatta* on several grounds, including the fiduciary concept that contributions made to a specific campaign committee are held in trust for that campaign and do not belong to the candidate.

¹⁷ In this regard, it is important to note that a separate legislative proposal advanced by the Oregon Law Commission proposes to allow creation of legal expense trust funds to which contributions may be made for this purpose. That proposal is discussed elsewhere in this report (See HB 2596).

B. Receipt of Gain (Gifts, Honoraria, Financial Gain) (HB 2598)

1. Issues Identified from Existing Law.

One of the most basic principles of governmental ethics is that government employees and public officials shall not use public office for private gain. Oregon law prohibits all public officials from using their official position or office to obtain financial gain or avoidance of a financial detriment, with certain specific exceptions, most notably, official salary and reimbursement of expenses. Despite this general principle that seems clearly embedded in existing law, Oregon’s statutory framework for dealing with financial gain is confusing and riddled with exceptions.

This section focuses on three areas within the financial gain framework that have raised significant concerns: financial gain generally, gifts, and honoraria.¹⁸ Among the specific issues that have been identified are:

- Whether and under what circumstances the personal use by public officials of public equipment and resources, such as cell phones, the internet and frequent flier miles is appropriate.
- The need to clarify the definition of a “gift” and the circumstances under which public officials are either allowed to or prohibited from receiving gifts.
- A perceived existing definitional inconsistency that arguably prohibits public officials from receiving any gifts from persons without a “legislative or administrative interest,” while allowing gifts (within limits) from persons with a “legislative or administrative interest.”
- How gift limits should be applied when gifts are provided by multiple sources.
- Whether public officials should be allowed to receive entertainment, food, lodging and travel, and, if allowed, the restrictions, if any, that should be placed on receipt of those items.
- Whether spouses and relatives of public officials should be able to accept entertainment, food, travel and lodging in connection with a public official’s position.
- Whether any or all public officials should be allowed to accept honoraria in connection with their public office.

¹⁸Other matters, such as nepotism and subsequent employment, may also be regarded as forms of financial gain. Those issues are treated separately elsewhere in this report and the accompanying draft legislation.

- Whether there should be *de minimus* exceptions to restrictions or prohibitions on the personal use of public equipment and resources, and the receipt of gifts or honoraria.

2. Issues Addressed.

The statutory recommendations in HB 2598 address each of the issues identified above.

3. Alternative Approaches Considered.

States have adopted a variety of approaches to deal with financial gain. They have generally done so by requiring disclosure of certain kinds of allowed financial gain and/or by prohibiting or setting limits on the receipt or solicitation of some types of gain, commonly including gifts, honoraria, food, lodging, travel and entertainment.¹⁹

The Government Ethics Work Group considered these various approaches to dealing with financial gain. Although there is an appropriate role for disclosure through reporting requirements, that approach alone was deemed inadequate to implement the basic ethical principle that public office should not be used for private gain. On the other hand, so-called “zero-tolerance” laws or total prohibitions on private gain were deemed unattainable, impractical and possibly contrary to the public interest by making public service unnecessarily unattractive. Instead, the approach adopted by the Work Group focuses on a combination of selective prohibitions and significant limitations on gain,²⁰ coupled with establishing threshold requirements for disclosing allowed gifts, food, beverage, lodging, travel and honoraria.²¹

4. Narrative Description of Recommendations.

Key Recommendations. Based on the foregoing, the Oregon Law Commission advanced the following key recommendations on financial gain:

¹⁹ The treatment of gifts is a good example of the different ways in which states have chosen to deal with financial gain. Although every state prohibits giving or receiving gifts with the intention of influencing official action, states adopt different approaches to regulate the giving and accepting of gifts generally. A study by The National Conference of State Legislatures divides gift restriction statutes into three broad categories: “zero-tolerance,” “bright-line,” and pure “disclosure” laws. Almost half of U.S. states employ some form of a bright-line test, normally specifying a monetary threshold on gift limits. Oregon is one of those states. Unfortunately, the line has proved not to be as bright in Oregon as it could be. Additionally, Oregon, along with other states, exempts certain food, lodging, travel and entertainment from this bright line limit. Those exceptions have proven to be controversial.

²⁰ Limitations on out-of-state travel and a restriction on food and beverage to those items provided at an organized event were among other specific alternatives considered, but rejected by the Work Group and the Oregon Law Commission.

²¹ The form of disclosures and processes involving disclosures are separately addressed elsewhere in this report and in the accompanying draft legislation.

- a. The current exception to the general prohibition on private financial gain for “salary” is expanded to clearly include fringe benefits and other items included in an official compensation package, approved by the employer.²²
- b. Public officials may receive gifts without limit from persons without a “legislative or administrative interest.”
- c. Public officials may receive gifts from persons with a “legislative or administrative interest” up to a maximum value of \$100 for a single gift (regardless of how many persons provide or contribute to that gift) and an aggregate limit of \$250 per year on all gifts from any “single source.”
- d. The gift exception for “entertainment” is eliminated. Entertainment is treated as a gift for all purposes, including the limits above.
- e. Public officials may accept food, lodging, travel and the cost of registration in connection with an event where the official “participates in an official capacity.” The definition of “participates in an official capacity” is clarified and cost of registration is added.
- f. Public officials are not allowed to receive honoraria in connection with their public position except for *de minimus* honoraria having a value of \$50 or less, or as may be allowed for public officials in higher education under other statutory provisions.²³
- g. Gifts and Honoraria over \$15 must be reported by mandatory SEI (Statement of Economic Interests) filers. Food, lodging, travel, registration fees and professional achievement awards over \$75 must also be reported.

Additional Recommendations. Several additional recommendations are also advanced in HB 2598, including recommendations to (a) require reporting of an unsolicited award for professional achievement valued at more than \$75, (b) allow public officials to receive professional publications and free or discounted professional education programs, (c) clarify that gifts to family and household members count against gift limits to public officials, (d) amend the definition of “public official” in ORS 244.020 for greater clarity.

Continuing Controversies.

Although the Oregon Law Commission eventually reached substantial consensus on these recommendations, objections were raised and noted to a number of issues involving

²² Cell phone usage and frequent flyer miles would be allowed if approved by the employer as part of a compensation package.

²³ Existing law allows most public officials to accept honoraria without limitation, but imposes somewhat complex and confusing restrictions on statewide elected officials and legislative officials. Legislative officials, for example, are allowed to accept honoraria in “relation to” their “private profession or occupation,” but those terms of limitation are not defined.

financial gain before both the Work Group and the Oregon Law Commission. One fundamental objection concerns whether there should be an outright ban or, at a minimum, significantly more severe limits, on all or almost all kinds of financial gain received by public officials from persons with a legislative or administrative interest, including gifts, food, lodging, travel, entertainment and honoraria.²⁴ The opposite concern has also been expressed, that is, that restrictions or prohibitions are generally inappropriate. A movement toward outright prohibition or more severe restrictions on gain is clearly consistent with the underlying ethical principles discussed previously, but is also subject to criticisms ranging from impracticality to unconstitutionality.²⁵

Limitations on gifts and honoraria raise state constitutional issues about protected forms of expression. Legislative Counsel expressed concern that “gift limits raise constitutional issues under section 8, Article 1 of the Oregon Constitution.”²⁶ Oregon courts have not spoken directly on this issue. The concern is largely based upon Oregon Supreme Court holdings in two leading free expression cases interpreting the Oregon Constitution, *State v. Robertson*, 293 Or. 402, 649 P.2d 569 (1982) and *VanNatta v. Keisling*, 324 Or. 514, 931 P.2d 770 (1997). The Work Group was aware of these constitutional concerns, but proceeded on the basis that the recommended statutory restrictions were both important and likely constitutional. The proposed restrictions can be distinguished from the holding in *VanNatta* under a *Robertson* analysis on the basis that gifts are not “political expression” in the way that campaign contributions are regarded by the courts, and that either a “historical exception” or an “incompatibility exception” is available under a *Robertson* analysis.

Limitations on honoraria may also raise federal constitutional issues.²⁷ Although the leading case does not apply directly to state ethics laws, at a minimum, it suggests that

²⁴ A closely related concern is whether the proposed recommendations continue to rely too heavily on reporting of gain, rather than prohibiting such gain.

²⁵ Additional criticism of more severe restrictions focus on interference with common social courtesies, such as gift-giving and the availability of food and beverages at meetings, restricting access to public officials, and limiting a public official’s educational opportunities from attending sponsored events.

²⁶ See Memorandum from Ted W. Reutlinger, Senior Deputy Legislative Counsel, to Wendy Johnson, Deputy Director, Oregon Law Commission, dated November 14, 2006. In 2000, Legislative Counsel provided State Representative Max Williams with a detailed analysis of the constitutionality of restrictions on gifts to public officials, concluding that “gifts addressed by ORS 244.040 are expression protected by Article 1, Section 8, that the gift limits are focused on the content of speech per se and not on some forbidden effect that may be regulated, and that the resulting restriction of expression is not saved by any historical exception or incompatibility exception.” Legislative Counsel based its analysis upon the Oregon Supreme Court’s decision in the leading case on freedom of expression, *State v. Robertson*, 293 Or.402, 649 P.2d 569 (1982). The *Robertson* case established a framework that separates laws that effect speech into three categories, applying a different legal standard to each category. Legislative Counsel also gave considerable weight in its analysis to the decision in *VanNatta v. Keisling*, 324 Or. 514, 931 P.2d 770 (1997) that invalidated certain campaign contribution limits, expressing the view that the court’s reasoning in *VanNatta* regarding campaign contributions would also apply to gifts.

²⁷ In 1995, the U.S. Supreme Court struck down a provision of the federal Ethics in Government Act that prohibited receipt of honoraria by government employees. *U.S. v. National Treasury Employees Union*, 513 U.S. 454, 115 S. Ct. 1003, 130 L.Ed.2d. 964. It did so largely on free speech grounds, finding that

any restrictions on honoraria should be limited to those situations with some nexus to government employment.²⁸ The statutory recommendations limiting honoraria in HB 2598 take this concern into account: the restrictions apply only to honoraria “solicited or received in connection with the official duties of the public official.”

C. **Conflicts of Interest (SB 494)**

1. Issues Identified from Existing Law.

One of the basic postulates of ethical conduct in the public arena is that government employees and other public officials shall not hold financial interests that conflict with the conscientious performance of duty. Such interests could lead a public official to promote personal benefit over the public welfare or fail to treat the general public equally.

SB 494 makes changes to conflicts of interest law applicable to public officials in Oregon. Those changes primarily concern what public officials must do and not do when the official has either an actual or potential conflict of interest.

Significant issues of public policy involving conflicts of interest include:

- Whether there should be any exceptions to a general rule that public officials should not take an action or participate in a decision where the official has an “actual” conflict of interest.
- Whether the scope of “interests” covered under the conflicts prohibition should be expanded to include the interests of additional members of the household and relatives of a public official.
- Whether certain kinds of involvement by a public official with a non-profit organization should be treated as actual or potential conflicts of interest.

Section 501(b) of the Ethics in Government Act of 1978, as amended by The Ethics Reform Act of 1989, created an overly broad restriction on expression, which did not pass the “balancing test” of the prior *Pickering* decision. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). At issue was the very broad language of Section 501(b) which said that “[a]n individual may not receive any honorarium while that individual is a Member, officer or employee.” Although the holding was limited to parties before the Court, the Office of Legal Counsel within the Department of Justice subsequently concluded that the prohibition on honoraria could not be enforced against any federal government employee.

²⁸Honoraria received in connection with the duties or office of a public official are clearly a legitimate ethical concern because they could be used to get around gift restrictions intended to prevent favoritism and self-serving conduct.

2. Issues Addressed.

The statutory recommendations in SB 494 address each of the issues identified above. Particular attention is devoted to addressing conflicts involving members of the Legislative Assembly based upon state constitutional concerns.

3. Alternative Approaches Considered.

Conflicts of interest are ubiquitous in the public sector. Most if not all aspects of government ethics law deal in some manner with actual or potential “conflicts” between individual public officials and the broader public interest.²⁹ Such conflicts cannot be avoided, without depriving government of the knowledge and abilities of too many of its citizens. On the other hand, they cannot be tolerated if they lead to self-interested conduct. According to the ABA Committee on Government Standards, “the prohibition against exercising official power in order to further one’s own interest (or the interest of one’s family or friends) follows immediately and ineluctably from understanding public service as a public trust.”³⁰

The issue raised here is a fairly narrow, but important one: How should public officials handle immediate conflicts of interest?³¹ The two basic approaches to dealing with conflicts of interest are to require disclosure of those conflicts or to restrict or prohibit a public official from taking action or making decisions in situations involving conflicts.³² In this regard, the options for dealing with conflicts are similar to the options available for handling issues of financial gain.

²⁹ According to a study by the National Conference of State Legislatures, “ethics commissions and committees have reported that the largest number of requests for advice and counseling revolve around conflict of interest issues.” NAT’L CONFERENCE OF STATE LEGISLATURES, STATE OF STATE LEGISLATIVE ETHICS (2002) at 63. The same situation prevails in Oregon. Concerns about conflict of interest have led to numerous staff and advisory opinions by the Government Standards and Practices Commission. A review of opinions issued by the Government Standards and Practices Commission since 1997 shows that the GSPC issued over 100 staff opinions on conflicts of interest, more than any other category of opinions.

³⁰ ABA Committee on Government Standards (Cynthia Farina, Reporter), *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L. REV. 287, 301 (1993).

³¹ Certain aspects of conflict of interest, such as the receipt of gifts and things of value, honoraria, and the requirement to make periodic personal financial disclosures are dealt with elsewhere in this Report and are not discussed at this point.

³² A review of state conflict of interest laws shows that states have dealt with conflicts in a variety of ways. Not all states have an explicit definition of “conflict of interest.” When definitions are provided, they usually refer to some discernible difference between an official’s personal interest and the public interest. Some, but not all states distinguish between “actual” or “potential” conflicts. Most states require disclosure of conflicts. Whether one can vote or otherwise take action when conflicts exist varies from state to state, and, in some cases depends upon the nature of the conflict. For additional information, see Peggy Kerns & Nicole Moore, *Conflict of Interest: What Is It? Can You Avoid It?*, 12 LEGISBRIEF 36. (Nat’l Conference of State Legislatures, August/September 2004).

At a minimum, Oregon law requires the disclosure of “actual” and “potential” conflicts, and provides sanctions for failure to do so.³³ The more controversial issue involves those circumstances under which a public official should be prohibited from taking action or making decisions. The methods of handling those conflicts of interest in Oregon are set out in ORS 244.120. In general, all “actual” and “potential” conflicts must be disclosed, but the actions to be taken after disclosure differ depending upon the public official’s office.

Under current law, members of the Legislative Assembly may take action upon both actual and potential conflicts after they are announced. ORS 244.120(1)(a). Other elected public officials and appointed officials serving on boards or commissions must generally abstain from participating in the discussion on or voting on the issue at hand where “actual” conflicts are involved, but may take action as a public official in those circumstances involving only “potential conflicts.” ORS 244.120(2). Other public officials (including employees and volunteers) must notify in writing the person who appointed them to office and “request that the appointing authority dispose of the matter giving rise to the conflict,” whether the conflict is “actual” or “potential.” ORS 244.120(1)(c).

4. Narrative Description of Recommendations.

The Government Ethics Work Group proposed several significant changes to Oregon’s conflict of interest laws, while leaving the general structure of those laws in place.

Key Recommendations. Based on the foregoing, the Oregon Law Commission made the following key recommendations on conflicts of interest:

- a. Continue existing policies (a) requiring public officials to disclose all “actual” and “potential” conflicts and (b) allowing legislators, other elected public officials and appointed members of boards and commissions to participate fully in decisions or actions involving a “potential” conflict after disclosure.
- b. Impose significant new conflict restrictions on members of the Legislative Assembly by prohibiting a legislator with an actual conflict of interest from participating in consideration of a matter, but allowing participation in floor votes if permitted by the rules of the Legislative Assembly.
- c. Clarify limited circumstances in which other public officials are allowed to vote (but not participate in deliberations) despite a conflict of interest on the basis that the public official’s vote is “necessary.”

³³ Oregon government ethics law covers two types of conflict of interest: “actual” conflicts and “potential” conflicts. Both are limited to conflicts involving “private pecuniary benefit.” See ORS 244.020(1) and (7) for definitions of these terms. According to a recent staff opinion from the Government Standards and Practices Commission, “the difference between an actual conflict of interest and a potential conflict of interest is determined by the words would and could.” Oregon Government Standards and Practices Commission, Advisory Opinion 03A-1007 (Nov. 21, 2003).

- d. Require disclosure of “actual” or “potential” conflicts arising from being a member or director of a 501(c) tax-exempt non-profit corporation, but allow a public official to act freely after such disclosure.³⁴
- e. Expand the scope of “interests” covered under conflicts law to cover the interests of additional relatives and members of the household, including domestic partners and persons for whom the public official has a legal support obligation.

Additional Recommendations. Several additional recommendations were advanced, including recommendations to (a) amend the definition of financial gain to allow public officials to make recommendations (but not decisions) with regard to salary or compensation for themselves, relatives or household members when such recommendation is part of the official duties or responsibilities of the public official, (b) clarify that mere ownership of a mutual fund does not create a conflict of interest with respect to each stock that is part of the mutual fund³⁵ and (c) provide that judges are to comply with the Code of Judicial Conduct if there is a direct conflict between that code and the conflict of interest provisions of ethics law.

Continuing Controversies.

Legislative Counsel expressed concern that provisions in SB 494 regulating actual conflicts of interest for members of the Legislative Assembly (prohibiting all official participation and debate except for floor vote when there is an actual conflict) raise Art. IV, Section 9 and Article IV, Section 11 concerns under the Oregon Constitution.³⁶ While those arguments have some force, it is important to note that Oregon courts have not spoken directly on point. Indeed, existing conflict provisions that already impact the Legislative Assembly have been in place since the mid-1970’s and have not led to challenges before the appellate courts on constitutional grounds.³⁷

³⁴ Present law does not require even disclosure in this circumstance.

³⁵ The Oregon Law Commission directed that its approval of this recommendation should be forwarded with the further notation that some further statutory clarification may be appropriate if there are mutual funds so specific and narrow as to create what a reasonable person would regard as a conflict of interest.

³⁶ Article IV, Section 9 of the Oregon Constitution contains the free speech and debate clause; and Article IV, Section 11 grants each house of the Legislative Assembly the power to determine its own rules. The basic contention is that the GSPC can not enforce such conflict of interest laws. Legislative Counsel’s concern is based, at least in part, on an opinion by a 1999 Attorney General Opinion taking the position that the Legislative Assembly has exclusive authority to adjudicate a member for speech that takes place within performance of a member’s official functions. See 49 Op Att’y Gen. 167 (1999). The concern of Legislative Counsel is two-fold: (a) that each legislative chamber may adopt rules that are inconsistent with the proposed statutory requirement and (b) that the Government Standards and Practices Commission may not enforce conflict of interest laws with respect to the legislative assembly.

³⁷ The Oregon Law Commission, while aware of the constitutional concerns expressed above, also took the position that there was value in articulating a standard of conduct which, if approved by the Legislative Assembly, would at least strongly encourage, if not require, that body to adopt internal rules that are consistent with general ethical standards applicable to conflicts of interest for other public officials.

D. Individualized Personal Bias (SB 498)

1. Issues Identified from Existing Law.

One of the basic postulates of ethical conduct in the public arena is that government employees and other public officials should treat everyone fairly. A public official's personal bias, either for or against, another person, should not have an impact on public policy or the actions or decisions of the public official. While state and federal civil rights laws already deal with bias toward individuals and classes on the basis of factors such as race, religion, gender and nationality, there are no statutory prohibitions that speak clearly to bias in terms of hostility or favoritism toward persons outside of recognized protected classes.

SB 498 makes changes to government ethics conflicts law applicable to public officials in Oregon. Those changes primarily concern what a public official must do and not do when the official has individualized personal bias, either for or against another person.

The significant issue of public policy involving individualized personal bias is:

- Whether the kinds of “conflicts” covered by conflicts laws should include matters of personal bias, as well as financial or “pecuniary” interests.

2. Issues Addressed.

The statutory recommendations in this bill address the issue identified above.

3. Alternative Approaches Considered.

The issue raised here is a fairly narrow, but important one: How should public officials handle personal bias towards others? Personal bias can best be regarded as a kind of conflict of interest, pitting the interest of the public official, whether direct or indirect, against the interest of the public in the fair and equitable treatment of everyone. The two basic approaches to dealing with conflicts of interest in general are to require disclosure of those conflicts or to restrict or prohibit a public official from taking action or making decisions in situations involving conflicts.³⁸ In this regard, the options for dealing with personal bias are similar to the options available for handling issues of financial gain or conflicts of interest.

At a minimum, Oregon law requires the disclosure of “actual” and “potential” conflicts, and provides sanctions for failure to do so.³⁹ As noted in the analysis of conflict of interest previously, the more controversial issue involves those circumstances under which a public official should be prohibited from taking action or making decisions. The

³⁸ For additional information, see the analysis of conflicts of interest above.

³⁹ See ORS 244.120.

current legislative proposal resolves that issue by generally prohibiting public officials from taking action or making decisions where they have a personal financial interest or where there is an individualized personal bias for or against an identified person that may significantly influence the public official's choice of action.

4. *Narrative Description of Recommendations.*

Key Recommendation. The Oregon Law Commission made the following key recommendation on matters involving personal financial interests and individualized personal bias:

Require disclosure of a personal financial interest or individualized personal bias and prohibit public officials from taking action where that action may be significantly influenced by a personal financial interest or individualized personal bias for or against an identified person.

Additional Recommendations. The legislative proposal includes closely related provisions to make the key recommendation effective, including provisions; (a) requiring most public officials to provide notice of personal financial interest or individualized personal bias and refrain from acting in those circumstances; (b) requiring elected public officials and appointed officials serving on boards or commissions to publicly announce the nature of the personal interest or bias and refrain from participating in any discuss or debate in those circumstances;⁴⁰ and (c) requiring members of the Legislative Assembly to make disclosure and refrain from participating in discussion or debate, but allowing members to vote on the matter when it is considered by the Senate or House of Representatives.

Continuing Controversies

Extensive consideration was given to whether it was appropriate to expand the range of “conflicts” covered by ethics law to include matters of personal or prejudgment bias. The issue may remain somewhat controversial. While there was general agreement that personal bias should not color the judgment or actions of a public official, significant concerns were raised about being able to draft meaningful and enforceable standards and the application of such standards to smaller cities and counties. The specific statutory provisions of SB 498 dealing with this matter enjoyed substantial, but not universal, support before the Oregon Law Commission.

⁴⁰ Elected public officials and members of boards or commissions may vote on a matter, but not otherwise participate, if the public officials vote is necessary.

E. Public Official Reporting Requirements (SB 497)

1. Issues Identified from Existing Law.

SB 497 would make changes to substantive, procedural and administrative aspects of ethics reporting requirements affecting public officials. Public disclosure through mandatory reporting may detect and deter violations that arise from self-dealing, conflicts of interest and failure to maintain impartiality.⁴¹

Under current law, certain statutorily specified public officials, including members of the Legislative Assembly, statewide elected officeholders and most city and county elected officials, must file annual statements of economic interest (SEIs). Most public officials are exempt from these reporting requirements.

There are a number of significant issues of public policy involving mandatory disclosures by public officials. The emphasis here is upon substantive issues about personal financial disclosure, including statements of economic interest and reporting of gifts, honoraria and other forms of financial gain. Some attention is also given to procedural and administrative aspects of reporting. The issues include:

- Who should be required to make disclosures?
- What kinds of information should public officials disclose?
- How much detail should be provided in the information disclosed?
- How frequently should this information be reported?
- How can public access to reports be improved?
- Should additional reporting requirements and procedures continue to exist for selected officials in the office of the State Treasurer?
- How should public officials be notified of reporting requirements and who should be responsible for providing that notice?

2. Issues Addressed.

The statutory recommendations in this bill address each of the issues identified above.

⁴¹ Existing Oregon law calls for two basic kinds of “reports” to be prepared and filed with the Government Standards and Practices Commission. The first is a *Statement of Economic Interest* required of certain statutorily specified public officials. The second consists of those documents required in connection with lobbying: (a) the *Lobbyist Registration Statement*, (b) the *Individual Lobbyist Expenditure Report* and (c) the *Annual Entity Expenditure Report* (required of those who employed lobbyists). Statutory recommendations concerning lobbyist reporting requirements will be found in SB 496 below.

3. Alternative Approaches Considered.

Disclosure, like sunshine, is sometimes regarded as an antiseptic or disinfectant, protecting the public from self-serving conduct. Some observers are critical of reporting requirements, seeing them as costly, intrusive and largely ineffective.⁴² Any system of disclosure must balance the gains of public disclosure against the costs of collecting and analyzing the information, enforceability and compliance. Additionally, other societal values such as reasonable expectations of privacy and the possibly “negative” impact of disclosure upon the willingness of some to participate in governmental affairs need to be taken into account. The discussion of reporting requirements in the Government Ethics Work Group took place within the context of this larger debate.

The Work Group determined that disclosures were appropriate. It also found that current reporting requirements were subject to reasonable criticism as overly complex and containing little timely or useful information. The Work Group determined that reporting requirements should not be abandoned, but instead those requirements should be modified to make any report more meaningful and useful.

The Work Group gave particular consideration to increasing the frequency of reporting as a way to make reports more meaningful and useful. The Work Group also recognized that the current SEI form contained a mix of two kinds of information that might be more useful and understandable if provided in two separate forms: (a) information about the general financial interests of public officials that was likely to be quite stable over time; and (b) other information about specific instances of financial gain from persons with a legislative or administrative interest that would be useful only if provided on a more contemporaneous basis. The Work Group gave additional consideration to making changes to the manner in which information concerning the financial interests of public officials is made available to the public, including expanded use of electronic databases.

4. Narrative Description of Recommendations.

Key Recommendations. Based on the foregoing, the Oregon Law Commission made the following key recommendations on public official reporting requirements:

- a. Simplify the annual statement of economic interest (SEI) by requiring identification of the five most significant sources of income received by the public official and members of the household (instead of existing complex requirements involving income percentages) and by moving most financial gain reporting requirements out of the SEI and into a new separate reporting form to be filed quarterly (see subparagraph 3 below).⁴³

⁴² For a perspective that is pessimistic about the value of financial disclosures, see G. CALVIN MACKENZIE, SCANDAL PROOF: DO ETHICS LAWS MAKE GOVERNMENT ETHICAL? 92 (2002).

⁴³ The Work Group decided not to require specific value or value range reporting for financial interests disclosed on the statement of economic interest, concluding instead that reporting the existence of the interest itself was sufficient to protect the public.

- b. Require all persons obligated to file annual statements of economic interest to also provide a separate quarterly report showing (a) gifts and monetary honoraria with a value exceeding \$15; (b) food, lodging or travel expenses with a value exceeding \$75; and (c) income greater than \$1000 from sources doing business with, or having a legislative or administrative interest in a governmental agency in which the public official serves or over which the public official would have authority.⁴⁴
- c. Expand the number of persons required to file statements of economic interest by deleting existing exceptions for local officials in certain cities and counties.⁴⁵
- d. Expand the definitions of “relative” and “member of household” to increase the scope of interests that must be reported by a public official.
- e. Require persons who provide gifts that exceed the reporting threshold to provide notice of the value of the gift to the recipient and to the Government Standards and Practices Commission in order to enhance the accuracy and certainty of reporting by public officials.
- f. Require public officials to report gifts and other reportable items using a good faith estimate of value when the public official is not given notice of the value of the item by the provider.
- g. Require the public body that a public official serves to promptly notify all newly elected or appointed public officials required to file statements of economic interest about the statutory requirement to file such reports.

The thrust of these recommendations is to enhance the clarity and usefulness of disclosures. This is accomplished primarily by creating two reports instead of the existing single report. By creating two reports each can be more carefully tailored to serve a specific purpose. The information required annually on the statement of economic interest is general information about economic status and interests—

⁴⁴ General gift reporting is a new requirement, as is the requirement of a separate quarterly report. The other items to be reported on the quarterly report have generally been moved from the required annual statement of economic interest. Note: The Oregon Law Commission made a minor modification to the initial recommendation of the Work Group by deleting a requirement to report all honoraria and substituting a more limited requirement to report monetary honoraria valued over \$15 because of its concern about the difficulty, practicality and utility of determining and reporting value for modest, non-monetary honoraria.

⁴⁵ Exemptions currently exist for municipal judges, elected city or county officials, members of city or county planning, zoning or development commissions, and city or county managers in those city and counties in which either a majority of the votes in the 1974 general election establishing Oregon’s government ethics code was in opposition or where a majority of votes cast in the city or county at an election on the issue of filing statements of economic interest was in opposition. It is important for all cities and counties to have the same minimum standards. This historical exception affects very few public officials and was removed as an anomaly inconsistent with the goal of a comprehensive government ethics system that applied uniformly to public officials. An example of a city not currently covered is Keizer and examples of counties not currently covered include Gilliam, Grant, Wheeler and Morrow.

information that usually won't change significantly in the short term. The quarterly report is designed to disclose information that is primarily transactional in nature, such as giving and receiving gifts or travel expenses, where timely reporting is most important.

Additional Recommendations.

The Oregon Law Commission made several additional recommendations concerning reporting requirements. Those recommendations: (a) add names of household members (over age 18) and relatives (over age 18) not members of the household to the statement of economic interest form; (b) provide a thirty day period within which public officials may file amended statements of economic interest without penalty; (c) retain limited reporting requirements for members of congress and candidates for federal office; (d) continue to allow the GSPC to adopt by rule requirements that it be notified of actual or potential conflicts; (e) retain the basic procedural and administrative structure for handling additional Statement of Economic Interest forms (trading statements) from State Treasury officials, including the confidentiality of those statements; and (f) extend the basic procedural and administrative structure for handling required lobbying reports, as outlined in ORS 171.766 and 17.772, to general ethics reporting requirements in ORS Chapter 244, excluding only those documents which are confidential under other statutory provisions.

Continuing Controversies

After careful consideration, the Oregon Law Commission reached substantial consensus on each of the recommendations. However, some persons may remain concerned about the value of these disclosures, particularly of lower-valued items, when weighed against the intrusion into personal privacy and the cost of compliance, both to the public official and to the government.

F. Nepotism (SB 495)

1. Issues Identified from Existing Law.

Nepotism is the exercise of preferential employment practices, including hiring and promotion, based upon familial relationships. Hiring a relative creates, at a minimum, an appearance of favoritism based on relationship rather than on merit. SB 495 makes changes to ethics laws by adding new provisions applicable to the hiring, firing and supervision of relatives by public officials. For the most part those changes are designed to clarify existing law and practice, rather than to change the law in this area.

Oregon currently has no specific restrictions on nepotism in the public sector.⁴⁶ Instead, nepotism is generally restricted as improper financial gain (ORS 244.040) because of the financial gain to a family member. In addition, hiring a family member typically presents

⁴⁶Indeed, Oregon's civil rights laws significantly restrict the right of employers generally to discriminate against an employee or applicant for employment solely because of employment of another family member. ORS 659A.309.

a conflict of interest that must be disclosed (ORS 244.020). The basic question is whether more specific restrictions should be added to Oregon’s ethics law to enhance clarity and certainty, or whether the broad statutory provisions regulating financial gain (ORS 244.040) and conflicts of interest (ORS 244.020) are sufficient.⁴⁷ The issue has been most acute with regard to employment practices in the Legislative Assembly.

The two most significant issues of public policy involving nepotism are:

- Under what circumstances, if any, is it appropriate for a public official to be involved with employment decisions concerning relatives or in supervising relatives?
- Should the practice of allowing members of the Legislative Assembly to hire relatives be continued or prohibited?

2. Issues Addressed.

The statutory recommendations in SB 495 address each of the issues identified above.

3. Alternative Approaches Considered.

The Work Group closely examined nepotism prohibitions in federal laws and other state statutes or constitutions.⁴⁸ It considered three broad alternatives: (a) keeping the law as it is; (b) revising ORS 244.040 on financial gain and adopting guidelines, administrative rules or advisory opinions clearly stating that this provision also prohibits certain activities such as appointing or hiring of a relative to a public position; and (c) drafting a new statute prohibiting or restricting nepotism in the public sector. In considering these alternatives, the Work Group gave particular consideration to the potential impact of possible nepotism rules upon smaller communities⁴⁹ and the Legislative Assembly. With

⁴⁷ ORS 244.040(1)(a) prohibits a public official from using or attempting to use his or her “official position or office to obtain financial gain or avoidance of financial detriment... for the public official or the public official’s relative, or for any business with which the public official or a relative of the public official is associated.” Similarly, “financial gain” for a relative would constitute either a “potential conflict of interest” or an “actual conflict of interest,” as those terms are defined in ORS 244.020. However, how this financial gain prohibition applies to nepotism isn’t always clear. On the one hand, The Government Standards and Practices Commission has interpreted ORS 244.040(1)(a) to mean that directly hiring or offering a contract to a relative, at least on the part of a school superintendent, would violate the prohibition on financial gain. GSPC Case No. D4-103EDC. On the other hand, it is common practice for members of the Legislative Assembly to hire relatives as staffers, although there is no statutory exception to the financial gain prohibition on point.

⁴⁸ The federal government and approximately half of the states specifically prohibit nepotism by statute or in the state’s constitution. The remaining states, including Oregon, have statutes that could be interpreted to include restrictions on nepotism, but lack the clarity of specific restrictions.

⁴⁹ Particular concerns were expressed about the difficulties that a ban or restrictions on nepotism might pose for small, insular rural communities where many people are likely to be related. The Work Group declined to provide a direct exception for small communities. However, provisions in SB 495 allowing a

regard to legislative employment, strong arguments were advanced in favor of continuing to allow employment of relatives on two grounds: (a) necessity due to low legislative salaries and a lack of adequate staff budgets; and (b) the high level of personal trust, confidence, and confidentiality expected of personal legislative staff. The Work Group generally found these arguments persuasive as to the practical necessity, if not the desirability, of continuing to allow members of the Legislative Assembly to hire relatives to serve on their personal staffs. Some attention was also given to the idea that nepotism restrictions should not make second-class citizens out of public officials generally or those who seek to hold public positions.⁵⁰

The Work Group declined to recommend a broad ban on nepotism, beyond that already covered by ethics laws dealing with financial gain and conflicts of interest. However, it did conclude that some additional statutory provisions were appropriate to clarify existing law and practice on the subject, particularly with regard to employment of relatives by members of the Legislative Assembly.

4. Narrative Description of Recommendations.

Key Recommendations. Based on the foregoing, the Oregon Law Commission made the following key recommendations on nepotism:

- a. Require a public official to comply with conflict of interest rules in order for the public official to appoint, employ, promote, discharge, fire or demote a relative or member of the household.
- b. Allow exceptions for employment of personal legislative staff by a member of the Legislative Assembly and the appointment of unpaid volunteers by any public official.
- c. Generally, prohibit a public official acting in his or her official capacity from directly supervising a relative or household member, except for personal legislative staff and unpaid volunteers, but authorize a public body to adopt policies specifying when a public official may directly supervise a relative or household member.
- d. Clarify in statute that the public body served by a public official may hire that public official's relative or household member.

public official to appointment relatives as volunteers, allowing a governmental body to appoint or employ the relative of a public official in circumstances where the public official would be prohibited from doing so, and allowing public bodies to adopt their own policies specifying when a public official may directly supervise a relative may indirectly mitigate this concern.

⁵⁰ While an outright ban on nepotism might be attractive because of its simplicity and clarity, such a ban would be inconsistent with the apparent policy behind Oregon's civil rights statute, ORS 659A.309, to not unduly interfere with the rights and opportunities for employment of persons, simply because they are related to someone else.

e. Expand the definition of “relative” for purposes of this statutory section only by adding “domestic partner” (and in-laws of domestic partners) and “member of household.”⁵¹

Additional Non-Statutory Recommendation. The Oregon Law Commission also specifically directed that this report indicate that the Law Commission recommends that the Legislative Assembly develop guidelines and restrictions regarding payment to family members who work as staff to prevent abuse of the exception for legislative staff. That recommendation is contained in the list of Non-Statutory Recommendations at the end of this Report.

Continuing Controversies

Allowing legislators to hire and supervise relatives and members of the household is a matter of some continuing controversy. It is an exception to the general prohibition on financial gain for relatives of a public official, as well as to the proposed requirements for a public official to comply with conflict of interest provisions of ORS Ch. 244 and generally prohibiting the direct supervision of a relative or household member.

G. Subsequent Employment (HB 2594)

1. Issues Identified from Existing Law.

One of the basic postulates of ethical conduct in the public arena is that government employees and public officials shall not receive financial gain from public service apart from that specifically allowed by law, such as salary and expense reimbursement. Issues of employment and subsequent employment are relevant to ethics. Offers of employment and the prospects of future employment are forms of gain that may cause public officials to engage in conduct while in office that is self-serving and contrary to the public interest. Subsequent employment may allow a public official to take inappropriate advantage of relationships or confidential information after leaving public office.

HB 2594 makes changes to ethics laws regarding employment and subsequent employment of public officials in Oregon.⁵² Significant issues of public policy involving employment and subsequent employment include:

⁵¹ These definitions are modified by various legislative proposals described in this report. As noted earlier, those proposals are not entirely consistent and will be reconciled by Legislative Counsel in the final form of proposed legislation.

⁵² Oregon’s ethics laws contain two sections dedicated to the regulation of subsequent employment. ORS 244.040(3) prohibits any public official from receiving a promise of subsequent employment based on the understanding that the official’s vote or actions would be influenced by that promise. ORS 244.045 adds more stringent employment restrictions to a relatively few high-level state public officials, primarily administrative employees. Notably absent from this list are state legislative offices, statewide elected offices (except that of the State Treasurer), and any local elected or appointed offices. Those few public officials subject to ORS 244.045(1) are prohibited, for one year after leaving their positions, from

- Should public officials be prohibited from receiving promises of future employment from persons who have matters pending before the public official, whether or not there is any understanding that an official's vote or actions would be influenced by that promise?
- Should some or all public officials be barred from accepting employment for some period of time after leaving public office from persons who have business before the public body served by the public official?
- Should some or all public officials be barred for some period of time from representing any person before the public body previously served by the public official (the "revolving door")?⁵³
- Should "revolving door" restrictions be applied to former legislators who seek to lobby the Legislative Assembly or executive branch officials?

2. Issues Addressed.

The statutory recommendations in HB 2594 address the issues identified above.

3. Alternative Approaches Considered.

Two basic approaches can be used to regulate future employment of public officials. The first approach is to prohibit a public official, while in office, from receiving or accepting offers or promises of future employment from persons who have business before the public official or the public body served by the public official. Such offers or promises are simply deferred financial gain that may lead the public official to engage in conduct in conflict with the public interest. The second approach is to prohibit public officials from appearing before the public body the official previously served, or more broadly from accepting employment with any person or entity that has had business before the public body the official served. The harm that this second approach seeks to prevent is more remote, uncertain, and controversial, consisting of the possible inappropriate use of established relationships or information acquired through public office.

The Work Group gave careful consideration to the appropriate breadth of possible restrictions on offers of both future employment and actual subsequent employment. The Work Group generally determined that employment restrictions should be drawn narrowly to deal with perceived harms, without unduly impacting on career opportunities available to public officials.

becoming employees of or receiving any financial gain from any private employer engaged in the activity, occupation or industry over which the former public officials had authority.

⁵³ Revolving door statutes typically prevent former public officials from working as lobbyists or otherwise attempting to influence government entities with which they were affiliated for a certain amount of time after leaving office.

4. Narrative Description of Recommendations.

Key Recommendations. Based on the foregoing, the Oregon Law Commission made the following key recommendations on employment-related matters:

- a. Retain the basic restriction, currently found in ORS 244.040(3), that prohibits public officials or candidates from soliciting or receiving promises of future employment based on any understanding that the official's vote or action would be influenced by the promise.
- b. Add a new provision prohibiting public officials or candidates from soliciting or receiving promises of future employment from persons who have matters pending before the public official in which the public official is personally and substantially participating.
- c. Prohibit former members of the Legislative Assembly from receiving money or other consideration for lobbying for one full session after the person ceases to be a member of the Assembly.
- d. Prohibit public officials, for a period of two years, from receiving a direct financial interest in a public contract authorized by the public official or by a board or committee of which the public official was a member at the time the contract was authorized, unless the public official didn't participate in the authorization.

Additional Recommendations. The Oregon Law Commission made additional recommendations to: (a) extend the existing statutory ban on using confidential information for personal gain to include use of confidential information by former public officials;⁵⁴ and (b) extend the existing prohibition on current public officials representing clients for a fee before the government body served by the public official to prohibit public officials from providing advice or other services to a client, for a fee, related to influencing action by the public body served by the public official.

Continuing Controversies.

The provision of HB 2594 that prohibits former members of the Legislative Assembly from engaging in lobbying activity for compensation was vigorously debated before the Work Group and the Oregon Law Commission and continues to be controversial. One Commissioner argued in particular that such a restriction was both unfair and unconstitutional. Legislative Counsel also expressed the view that a law that prohibits lobbying raises constitutional issues under Article 1, Section 8 of the Oregon Constitution

⁵⁴ The Oregon Law Commission modified the Work Group recommendation by specifying that prohibitions on use of confidential information applied not only to personal gain for the public official, but to personal gain for any person. In other words, former public officials are not to make use of confidential information for any purpose. The Commission amendment is reflected in the proposed legislation.

and may be determined by a court to be unconstitutional.⁵⁵ Legislative Counsel’s analysis is based upon the *Robertson*⁵⁶ and *Fidanque*⁵⁷ line of cases. The Work Group and the Oregon Law Commission acknowledged those objections and concerns, but clearly did not concur in the underlying analysis. The constitutionality of the “revolving door” provision is best supported by an argument that the provision does not regulate lobbying itself, but rather compensation for lobbying. As such, it is aimed at a specific harm that the Legislative Assembly may regulate, is not overbroad, and, furthermore, is necessary to protect the legislative process and to prevent the use of public office for private financial gain.

H. Lobbying Reporting Requirements (SB 496)

1. Issues Identified from Existing Law.

The right to petition government is a fundamental right in the United States, found in both the U.S. Constitution (1st and 14th Amendments) and the Constitution of Oregon (Article I, Section 10). Lobbying is one way that right is exercised. Simply put, lobbying involves efforts to influence or attempt to influence public policy through persuading public officials to take or refrain from taking certain actions.

SB 496 would make changes to lobbying reporting requirements, with an emphasis on the registration and reporting requirements for lobbyists and the reporting requirements for those entities that employ lobbyists.⁵⁸ The authority to regulate lobbying in Oregon is vested with the Government Standards and Practices Commission.⁵⁹

The most significant issues concerning reporting requirements generally have to do with who should report, the information to be reported, the timing and frequency of reports and the question of whether a centralized or common reporting system can and should be established.

Significant issues of public policy involving lobbying include:

⁵⁵ Letter to Wendy Johnson, Deputy Director, Oregon Law Commission from Ted W. Reutlinger, Senior Deputy Legislative Counsel, dated November 9, 2006. Senior Deputy Legislative Counsel Reutlinger acknowledged that his analysis was based on a conservative reading of cases and that his “conclusions are not free from doubt.”

⁵⁶ *State v. Robertson*, 293 Or 402, 649 P.2d 569 (1982).

⁵⁷ *Fidanque v. State ex rel. Oregon Government Standards and Practices Commission*, 328 Or. 1, 969 P.2d 376 (1998).

⁵⁸ Recommendations on reporting requirements for public officials can be found in SB 497 above.

⁵⁹ ORS 244.290(5) provides authority to the Oregon Government Standards and Practices Commission to adopt rules necessary to carry out its duties to regulate lobbying. Existing substantive provisions on regulation of lobbying are to be found in ORS Chapter 171, rather than in ORS Chapter 244. See ORS 171.725 to 171.785 and ORS 171.992 for those substantive provisions.

- What kinds of activities should be considered “lobbying?”
- Should lobbyists be required to register and report on their expenditures?
- Should those who employ lobbyists be required to report?
- What expenditures should be reported and how much detail should be required in lobbying reports?
- How frequently should information be reported by lobbyists and those who employ lobbyists?
- How can public access to reports be improved?

2. Issues Addressed.

The statutory recommendations in this bill address each of the issues identified above.

3. Alternative Approaches Considered.

There was general agreement that those who engage in lobbying should be required to register and report their activities.⁶⁰ However, existing Oregon law provides a limited definition of lobbying and regulates only lobbying that focuses upon legislative action.⁶¹ The Work Group considered expanding the definition of lobbying to include all efforts to persuade public officials at the state and local level.⁶² That approach was rejected in favor of clarifying that lobbying includes not only efforts to influence legislative officials, but also efforts to influence executive branch officials, including the Governor, on matters involving legislative action. Consideration was given to existing exceptions and thresholds to registration and reporting requirements, as well as to expanding the exceptions. Particular attention was given to clarifying and harmonizing the reporting requirements for lobbyists, those who employ lobbyists, and public officials. Present law

⁶⁰ There are significant constitutional free speech issues which make it difficult, if not impossible, to prohibit lobbying or to regulate the content and substance of lobbying activity. Therefore, with regard to lobbying, even more so than such topics as campaign finance or conflicts of interest, governments tend to rely heavily on reporting to maintain ethical behavior while balancing the rights of persons to petition government and speak freely on political matters.

⁶¹ According to ORS 171.725 (8) “Lobbying,” means “influencing, or attempting to influence, legislative action through oral or written communication with legislative officials, solicitation of others to influence or attempt to influence legislative action or attempting to obtain the good will of legislative officials.” (underlining added).

⁶² The rationale for such expansion rests on the fact that many governmental entities, in addition to the Legislative Assembly, deal with large budgets and have significant decision-making authority subject to influence. The list includes state executive agencies, as well as larger cities, counties, school district and other entities such as Tri-Met, the Port of Portland, the Oregon University System and OHSU.

has different reporting thresholds for those who give and those who receive gifts, honoraria, food, lodging, travel and other forms of regulated gain.

The Work Group gave particular consideration to increasing the frequency of reporting. More contemporaneous reporting will enhance accountability by increasing public access to relevant current information. The Work Group gave additional consideration to making changes to the manner in which data concerning lobbying expenditures and financial interests are made available to the public, including expanded use of electronic databases.

4. *Narrative Description of Recommendations.*

Key Recommendations. Based on the foregoing, the Oregon Law Commission made the following key recommendations on lobbying reporting requirements:

- a. Amend the definition of lobbying to clarify that it includes efforts to influence the executive branch on legislative matters.
- b. Clarify that a lobbyist must file a separate registration for each client represented by the lobbyist once the registration threshold is reached; and that the “24-hour rule” and \$100 spending thresholds for initial registration are aggregate, and not client-by client, requirements.
- c. Require that those who employ lobbyists report (1) aggregate payment for lobbying activities, (2) total amounts paid to each lobbyist or lobbying firm, and (c) all gifts to public officials over \$15 and other expenditures on behalf of public officials over \$75 on an itemized basis, consistent with reporting requirements for public officials.
- d. Continue to require lobbyists or lobbying firms to report the total amount of money expended by the lobbyist or lobbying firm for food, refreshments and entertainment, but delete current requirements to report total expenditures on printing, postage, telephone, advertising, public relations, education and research, and miscellaneous items.
- e. Require lobbyists or lobbying firms to report gifts to public officials over \$15 and expenditures on behalf of public officials over \$75 on an itemized basis, consistent with reporting requirements for public officials.
- f. Lobbyist expenditure reports should be filed on a quarterly basis.⁶³
- g. Expenditure reports for those who employ lobbyists should be increased from an annual basis to a quarterly basis to match the filing requirement for lobbyist expenditure reports.

⁶³ The existing reporting requirement is three times during odd-numbered years and two times during even-numbered years.

- h. Clarify that a registered lobbyist is not required to file an expenditure report for a client where the lobbyist is not being compensated and does not exceed either a 24-hour time or \$100 expenditure threshold for that client.
- i. Increase the maximum fine for violations of lobbying regulations from \$1,000 to \$5,000 and authorize a fine for late filing of lobbyist registration forms of \$10 per day for the first 14 days and \$50 per day thereafter, up to a maximum of \$5,000.
- j. Direct the Government Standards and Practices Commission to provide notice to the Legislative Assembly of lobbying law violations and further direct the Commission to adopt rules to determine when violations based solely on late reporting must be sent to the Legislative Assembly.
- k. Amend the list of those persons exempted from registering as a lobbyist by adding the following: the deputy chief of staff and deputy legal counsel for the Governor, the chief of staff to the Office of State Treasurer, and Oregon Law Commissioners and staff conducting the Commission's law revision program under ORS 173.315 to ORS 173.357.

Additional Recommendations. The Oregon Law Commission made additional recommendations to: (a) clarify that a lobbyist must either amend an existing registration or file an additional registration within 3 days of acquiring a new client to identify that client and that all other changes in the information provided on a lobbyist registration statement must be revised within 30 days of a change; (b) restructure the complaint investigation and review process to parallel proposed revisions of the process for investigating and reviewing complaints of general ethics laws violations in ORS Chapter 244; and (c) direct the Government Standards and Practices Commission to prescribe by rule forms for lobbyist registration and expenditure statements.

Continuing Controversies.

The recommendations addressed by this bill were thoroughly discussed by the Government Ethics Work Group and the Oregon Law Commission. There is broad support for clear, meaningful and enforceable lobbying registration and reporting requirements.

I. Organization Structure, Rulemaking and Advisory Opinions; Sanctions; Funding; and Remedies (HB 2595)

This bill addresses four main topics: (a) GSPC organization structure, rulemaking and advisory opinions; (b) sanctions for ethics violations; (c) GSPC funding; and (d) remedies (status of official action). The analysis of each topic is treated separately below.

Organization Structure, Rulemaking and Advisory Opinions

1. Issues Identified from Existing Law.

The first sections of this bill deal primarily with the organizational structure of the GSPC, as well as rulemaking and advisory opinions of that body. Many of the proposed changes are primarily technical in nature, designed to streamline and clarify the process for developing administrative rules and advisory opinions concerning government ethics. A major substantive change involves establishment of a “three-tier” system of advisory opinions and advice with significant differences in the extent to which public officials can rely upon those opinions and advice depending upon the tier involved.

Significant issues of public policy involving organizational structure, rulemaking and advisory opinions include:

- What criteria and processes should be used for selection of GSPC board members and chairperson?
- Should the GSPC be more insulated from the political process and, if so, how can that be accomplished?
- Should the overall location of the GSPC within state government be changed to enhance its independence, allow its functions to be performed more efficiently and/or insulate it from possible funding pressure?
- Should more use be made of the administrative rulemaking process in order to ensure public input to ethics decisions?
- Should the process for issuing ethics advisory opinions be revised and streamlined?
- To what extent should public officials be able to rely upon formal and informal staff advice and opinions on ethical issues to guide future conduct?

2. Issues Addressed.

The statutory recommendations in HB 2595 address the issues identified above.

3. Alternative Approaches Considered.

The Government Ethics Work Group gave considerable attention to the organizational structure of the ethics governing entity, the Government Standards and Practices Commission. Consideration was given to the independence of the governing entity, the governing structure of that entity, the impartiality of its decision-making processes, and

its representational character.⁶⁴ Additional consideration was given to relocating the governing entity, or at least some of its key functions, to other locales within state government, including location under a non-partisan controller. A recommendation on that matter was deferred pending legislative consideration of a proposal from the Public Commission on the Oregon Legislature to establish a new office of Controller under the Secretary of State with responsibility for conducting ethics investigations. The Oregon Law Commission directed that this Report specifically emphasize the Commission's endorsement of appropriate changes in the provisions of HB 2595 and HB 2596 to locate the investigation function in a new office of Controller if the Legislative Assembly adopts the Public Commission's recommendation on this point. The Work Group and the Oregon Law Commission also considered changing the name of the GSPC to the Oregon Government Ethics Commission, but declined to make such a recommendation.

Discussion of rulemaking centered around the issue of whether the Government Standards and Practices Commission should be required to make more use of the rulemaking processes of Oregon's Administrative Procedures Act (ORS Chapter 183), rather than relying so heavily upon formal and informal advisory opinions. Attention was also given to eliminating the agency's current ability to exempt certain "gifts" from statutory coverage by rulemaking. In terms of advisory opinions, the focus was primarily on two issues: clarifying and streamlining the process for issuing advisory opinions, and specifying the extent to which public officials could rely upon the several different types of advisory opinions.

4. Narrative Description of Recommendations.

Key Recommendations. Based on the foregoing, the Oregon Law Commission made the following key recommendations:

- a. Require the GSPC to consider the public interest and both prior and future sanctions applied in other government proceedings when deciding whether to proceed with an investigation or impose sanctions.
- b. Require the GSPC to conduct an annual review of existing rules and the need for additional rules to address matters of broad or recurring interest.
- c. Allow state agencies and statewide associations of governmental entities to submit ethics policies applicable to their members to the GSPC for approval. Upon approval, conduct permitted by such policies would be exempt from sanctions by the GSPC.
- d. Eliminate statutory authority for the GSPC to exempt any kind of "gift" from gift limitations of ORS 2444.040 by rulemaking.

⁶⁴ Some attention was given to whether ethics laws should be enforced on the local level and to the possibility of establishing a separate structure for dealing with matters involving the Legislative Assembly. Those ideas were ultimately rejected in favor of maintaining a unified ethics structure operating on a statewide basis as the most appropriate way to organize the administration of government ethics.

e. Consolidate rulemaking provisions of ORS Chapter 244 into one statutory section to the fullest extent possible.

f. Require all formal “advisory opinions” to be issued in writing and specifically identified as either a “commission advisory opinion,” or a “staff advisory opinion.” Require that any advice issued orally by Commission staff and any written staff opinion (including e-mail) that is not designated as a “staff advisory opinion” shall be considered “staff advice.”

g. Create a three-tier system with regard to ability of public officials to rely upon formal written opinions and other staff advice by providing that: (a) a requestor or person similarly situated acting in good faith upon a written commission advisory opinion that has not been amended or revoked shall not be sanctioned for actions allowed under the commission advisory opinion; (b) good faith reliance by a requestor on a staff advisory opinion, unless material facts were omitted or misstated, shall be taken into account by the Commission in determining penalties; and (c) the Commission may, but is not required, to consider “staff advice” when imposing sanctions.

h. Require the GSPC to conduct “accuracy audits” on a sample of all reports submitted to it.

Additional Recommendations. The Oregon Law Commission made additional recommendations to (a) limit members of the Oregon Government Standards and Practices Commission to one four-year term plus the unexpired portion of any term to which they are initially appointed, (b) grant specific statutory authority to the GSPC to adopt rules necessary to carry out all of its duties, (c) require the GSPC to adopt by rule guidelines or standards clarifying what constitutes a single or multiple violations of ethics laws and guidelines for determining sanction amounts, (d) establish time limits within which “commission advisory opinions” and “staff advisory opinions” are to be provided, and (e) fund a publicly accessible and searchable online database.

In addition, the Oregon Law Commission, as noted above, directed that this report specifically emphasize the Law Commission’s endorsement of appropriate changes in the provisions of HB 2595 and HB 2596 to locate the investigation function in a new office of Controller if the Legislative Assembly adopts the Public Commission’s recommendation on this point.

Continuing Controversies.

The recommendations addressed by this portion of the bill were carefully discussed and appear to have resolved each issue addressed.

Sanctions

1. Issues Identified from Existing Law.

HB 2595 also addresses issues involving sanctions for ethics law violations. Sanctions are those penalties, civil and criminal, levied against an individual who violates government ethics laws.

Significant issues of public policy involving sanctions include:

- Should existing monetary sanctions, which have remained essentially unchanged since the government ethics laws were written in the 1970's, be increased?
- Should the ethics governing authority have greater discretion in the kinds of sanctions that it may impose?
- Should public officials be able to “opt out” of the administrative hearing process by requiring that a case be brought in circuit court?

2. Issues Addressed.

The statutory recommendations in this bill address the issues identified above.

3. Alternative Approaches Considered.

This proposal deals with two discrete topics: changes to the amount of sanctions and the “opt out” issue. With regard to the “opt out,” consideration was given to retaining the “opt out” in its present form, the entire elimination of the “opt out”, and retaining a limited version of the provision.” After some discussion, the Commission on a split vote approved a compromise provision that would establish a three-step process for use of the “opt out.”⁶⁵ With regard to sanctions against individual public officials, consideration was given to maintaining existing penalty levels or increasing them to take account of inflation over the past 30 years. Consideration was also given to establishing daily maximum penalties for late filing, particularly if maximum penalty levels were increased.

4. Narrative Description of Recommendations.

Key Recommendations. The Oregon Law Commission made the following key recommendations on sanctions:

- a. Increase maximum civil penalties from \$1,000 to \$5,000.

⁶⁵ The “opt out” issue is described in detail in the analysis of HB 2596 below, and will not be further reviewed here, except to note that the Oregon Law Commission directed that provisions of this bill dealing with the “opt out” conform to the “opt out” recommendations in HB 2596 below. For additional information see the discussion of the “opt out” in connection with HB 2596 below.

- b. Allow the Government Standards and Practices Commission to issue a written reprimand in lieu of imposing a civil penalty.
- c. Direct the Government Standards and Practices Commission to notify the public body served by a public official if it determines that the public official violated provisions of government ethics law.
- d. Replace the statutory provision allowing public officials to elect to have the Commission file a lawsuit in Marion County Circuit Court with provisions establishing the following process. Initially, a GSPC notice of intent to impose a penalty would trigger a contested case proceeding under the Administrative Procedures Act (APA). If the public official chooses to exercise the option to proceed in Marion County Circuit Court, the matter would proceed in court unless the GSPC exercised its option to have the matter still proceed as an administrative proceeding. In order to exercise this last option, the GSPC would have to delegate final order authority to the OAH ALJ for this proceeding.⁶⁶

Additional Recommendations.

The Law Commission made additional recommendations to (a) consolidate provisions specifying that requirements and penalties under government ethics law apply in addition to requirements and penalties applicable under other laws, (b) clarify that conflicts of interest requirements for members of Oregon Investment Council are subject to investigation and sanction by the Government Standards and Practices Commission, (c) revise the definition of “public servant” in criminal laws to include “public officials” subject to government ethics laws, and (d) specify that criminal penalties for false swearing apply to verified statements of economic interest.

Continuing Controversies.

The recommendations on sanctions addressed in HB 2595 were carefully discussed and appear to have resolved any remaining controversies concerning sanctions.

Funding

1. Issues Identified from Existing Law.

HB 2595 also addresses the important topic of funding for the Government Standards and Practices Commission. Significant issues of public policy involving funding include:

- How should a general lack of adequate funding be handled?
- How (and by whom) should the agency be funded?

⁶⁶ See also HB 2596 below, which contains this same recommendation.

- How can the agency's funding be insulated from undue political pressures?

2. Issues Addressed.

The statutory recommendations in this bill address the funding issues identified above.

3. Alternative Approaches Considered.

The funding issues identified above are inextricably interwoven. The Government Standards and Practices Commission is widely, if not universally, perceived as underfunded. There is also a fairly widespread perception that this underfunding is due, at least in part, to past legislative dissatisfaction with the agency's administration and its decisions. The Government Ethics Work Group and the Oregon Law Commission considered a variety of ways to deal with these interrelated concerns. Consideration was given to continued funding through the General Fund appropriation process, to the use of fees for services, and to funding the agency through some form of local assessment. Moving agency funding away from the General Fund was considered as a way to reduce undue political pressures. Consideration was also given to other options to insulate agency funding from political pressure, including embedding budgetary provisions into the Oregon Constitution instead of statute, creating a "blue ribbon" budgetary oversight committee of state-wide elected officials that would recommend an appropriate budget level, and establishing a separate fund with continuous appropriations.

4. Narrative Description of Recommendations.

Key Recommendations. The following key recommendations on funding are advanced by the Oregon Law Commission for consideration by the Legislative Assembly:

- a. Appropriate to the GSPC for the biennium beginning July 1, 2007, from the General Fund, an amount to be established by the Legislative Assembly.
- b. Establish a statutory procedure requiring the Department of Administrative Services to determine on a biennial basis thereafter the amount of money needed for the next biennium to enable the GSPC to maintain current service levels and appropriating that amount from the General Fund to the GSPC, subject to allotment under ORS 291.230 to 291.260.

Additional Recommendations. A determination was made that the Oregon Law Commission would not recommend a specific budget level, in part because to do so would be outside the ability and expertise of the Work Group and the Commission.⁶⁷ Additionally, any budget level would be dependent upon how many of the proposals

⁶⁷ See Memorandum from Wendy Johnson, Deputy Director of the Oregon Law Commission, to Ethics Work Group #2, dated September 21, 2006, indicating that the Legislative Fiscal Office (LFO) and GSPC staff concurred in that analysis, but that recommending approximate FTE's and changes in administrative functions that have costs could be useful to the LFP and the Legislative Assembly. The memorandum proceeds to set out approximate FTEs and cost changes needed to adequately fund the GSPC.

forwarded by the Oregon Law Commission are actually enacted into law. Instead, the Oregon Law Commission, in addition to the funding proposal set forth here, has advanced non-statutory recommendations that the Legislative Assembly adequately fund the GSPC generally and fund all specific positions identified as necessary for the GSPC to carry out its responsibilities. See Section V below for the complete list of non-statutory recommendations.

As additional guidance to the Legislative Assembly on this matter, the Government Ethics Work Group asked that the following information on approximate staffing levels and likely items of additional expenditure be forwarded to the Legislative Assembly. It is provided as an example, rather than as a specific recommendation, of what it might reasonably take to meet the non-statutory recommendation that the Legislative Assembly adequately fund the GSPC.⁶⁸

Estimated Staffing Levels⁶⁹

- 1 FTE for an Executive Director
- 1 FTE for an Office Assistant/Receptionist
- 1-2 FTE for a Compliance Officer/Information Systems Specialist/Electronic Database Manager
- 1-2 FTE for Investigators
- 1 FTE for a Training Specialist
- Continued appropriation of funds for Legal Counsel

Estimated Additional Cost Factors

- Office Space (to accommodate increased staff)
- Computers, Phones, Office Equipment (to accommodate increased staff)
- Printing, mailing, and handling costs (due to increased frequency of reporting and other changes in operating procedures)
- Database software and additional computer-related expenses
- Public and Distribution of the ethics manual

Continuing Controversies.

The funding recommendations addressed by this bill were carefully discussed and appear to have resolved, at least in part, funding issues.

⁶⁸ For a full description of this information on approximate FTEs and cost changes. See the Memorandum from Wendy Johnson, Deputy Director of the Oregon Law Commission, to Ethics Work Group #2, dated September 21, 2006.

⁶⁹ The GSPC's budget for the current biennium is \$653,68 for 3 FTE (1 Executive Director, 1 Executive Assistant, and 1 Investigator).

Remedies (Status of Official Action)

1. Issues Identified from Existing Law.

Unlike sanctions, which focus on penalties levied against a person for ethical violations, remedies broadly concern the rights of government and third parties when a public official takes an action. The statutory proposal in HB 2595 addresses a fairly narrow issue involving the status of official action: the validity or invalidity of actions taken by public officials under circumstances where the official is legally disqualified to act.

Significant issues of public policy involving the status of official action where there are ethics law violations include:

- Should government ethics law more clearly identify the circumstances under which actions taken by or with the participation of a legally disqualified public official are either valid or invalid?

2. Issues Addressed.

The statutory recommendations in this bill address the issue identified above.

3. Alternative Approaches Considered.

A particularly difficult issue to handle from both conceptual and drafting perspectives involved whether statutory changes should be adopted more clearly delineating the effect of action by a legally disqualified public official.⁷⁰ Some consideration was given to detailing those specific circumstances under which actions should be invalid, but it was determined that trying to describe those multiple circumstances in statute would be exceedingly difficult if not impossible. Instead, the approach recommended by the Oregon Law Commission identifies three specific circumstances in which an action is valid. It leaves any further determination of validity or invalidity, or of the rights and remedies of persons unchanged.

4. Narrative Description of Recommendations.

Key Recommendation. The Oregon Law Commission made a single recommendation on this matter:

Specify in statute that action taken by a legally disqualified public official is valid in three specific situations as follows: (a) where the official is disqualified solely for failure

⁷⁰ The only applicable existing statutory reference is contained in ORS 244.130(2) which states: that [N]o decision or action of any public official or any board or commission on which the public official serves or agency by which the public official is employed shall be voided by any court solely by reason of the failure of the public official to disclose an actual or potential conflict of interest.” This negative reference, without further explanation, leaves the legal effect of actions by public officials largely to judicial interpretation of common law principles.

to disclose a potential conflict of interest; (b) where the action is reaffirmed by the public body the official serves or a superior public official in writing and including a description of reasons for disqualification; or (c) where the official's only participation was to cast a vote in making a collective decision and the vote was either unnecessary or allowed by statute as a matter of necessity.

Continuing Controversies.

The adoption of this recommendation on the status of official action was the subject of debate and some difference of opinion, which may make it a matter of continuing controversy.

J. Adjudication Processes/Training and Legal Expense Trust Fund (HB 2596)

This bill addresses two major topics: (a) the adjudication procedures and educational responsibilities of the GSPC; and (b) creating a statutory mechanism that allows public officials to establish legal expense trust funds to defray legal expenses incurred in defending against charges of ethics violations.

Adjudication Procedures and Training

1. Issues Identified from Existing Law.

HB 2596 deals in part with ethics adjudication procedures and educational responsibilities of the Government Standards and Practices Commission. It makes substantive changes to existing adjudication procedures and streamlines adjudication statutes for greater readability and understanding. In terms of education, this bill consolidates statutory provisions regarding a required manual on government ethics and requires distribution of the manual to all public officials to the extent feasible.

Significant issues of public policy involving adjudication procedures and training include:

- Should time limits for each phase of the ethics complaint investigation process be increased?
- Should the preliminary phase of an investigation of a candidate for public office be permitted to be delayed until after a pending election if the election date is soon?
- Should parties charged with ethics violations continue to be able to "opt out" of contested case proceedings before an administrative law judge and instead have a matter brought to circuit court before a judge?

- Should any changes be made in the role and responsibility of the GSPC in: (a) preparing and distributing information about government ethics; and (b) providing ethics training to public officials?

2. Issues Addressed.

The statutory recommendations in this bill address the issues regarding adjudication processes and training identified above.

3. Alternative Approaches Considered.

The Government Ethics Work Group carefully considered whether substantive changes were needed in adjudication procedures of the GSPC. With two exceptions, it determined that substantive change was not needed, but that reorganization, clarification and comprehensive codification of those procedures would be helpful. The two exceptions involved extending procedural time limits and amending the so-called circuit court “opt out” provision. With regard to time limits, particular consideration was given to ensuring that time limits were long enough to mesh reasonably with the Commission’s formal meeting schedule, while protecting a public official’s interest in prompt resolution of a matter before the GSPC. With regard to the “opt out,” consideration was given to retaining the “opt out” in its present form, the entire elimination of the “opt out”, and retaining a limited version of the provision.”

The Work Group discussed the "opt out" issue at some length and recommended the entire elimination of the "opt out." This determination was based, in part, on the fact that the “opt out” provision had been enacted before the creation of the Office of Administrative Hearings (OAH). Creation of the OAH has altered the process for administrative agency contested case proceedings by having a cadre of independent administrative law judges (ALJs) preside over hearings and issue proposed final orders. Any changes made to proposed final orders by the final agency decision maker must be explained in the final order and any changes made to determinations of historical fact will be reviewed *de novo* (i.e. the court will reach its own determination anew) by the reviewing court, if challenged. The Work Group determined that these changes have altered the process sufficiently to bring into question the continuing need for the “opt out” provision. The Work Group determined that there were no compelling reasons for having GSPC proceedings handled uniquely after the advent of the OAH⁷¹ and that the additional costs required for proceeding in circuit court were not justified.⁷² While there was some support expressed for retaining the "opt out" on the basis of a perceived lack of fairness in the administrative hearings process to persons accused of violating ethical standards, the Work Group supported eliminating the “opt out” provision for three

⁷¹ Other state agencies are required to use the general contested case procedures of ORS Chapter 183.

⁷² In addition to the higher costs generally associated with litigation before the courts, some attention was also given to the cost impact on the GSPC of requiring attorney fee awards to a prevailing public official in ethics administrative hearings and judicial proceedings, as currently provided in ORS 244.400. GSPC staff indicated that concern about possible attorney fee awards was a significant factor leading it to settle cases. While the attorney fee provision is controversial, no recommendation to eliminate it was advanced here.

reasons: (a) the lower cost and efficiency of the administrative process; (b) consistency with the adjudication process used by other state agencies; and (c) the fact that the current independent administrative hearings structure, created after the “opt out” was established, should resolve concerns about fairness in the administrative hearings process.

When this issue came before the full Commission, alternative proposals were presented to: 1) retain the “opt out” provisions; or 2) make all orders issued by the OAH administrative law judges final orders in GSPC proceedings. After some discussion, the Commission on a split vote approved a compromise provision that would establish a three-step process. A notice of intent to impose a penalty issued by the GSPC would initiate a regular contested case process that would proceed through a hearing conducted by an OAH ALJ with the final order to be issued by the GSPC. If the charged public official wished instead to proceed in circuit court (i.e., “opt out”), then the public official could so request and cause the matter to proceed in circuit court. The GSPC could then either acquiesce to proceeding in circuit court or exercise the GSPC's option to have the matter proceed in an administrative proceeding. In order to exercise this last option, the GSPC would have to delegate final order authority to the OAH ALJ for this proceeding.

4. Narrative Description of Recommendations.

Key Recommendations. The Oregon Law Commission made the following key recommendations on adjudication procedures and training:

- a. Increase the period of time allowed for the GSPC to conduct a Preliminary Review of a matter from 90 to 135 days.
- b. Increase the period of time allowed for the GSPC to move from a finding of cause to the beginning of any contested case proceeding (called the Investigatory Phase) from 120 days to 180 days.
- c. Replace the statutory provision allowing public officials to elect to have the Commission file a lawsuit in Marion County Circuit Court with provisions establishing the following process. Initially, a GSPC notice of intent to impose a penalty would trigger a contested case proceeding under the Administrative Procedures Act (APA). If the public official chooses to exercise the option to proceed in Marion County Circuit Court, the matter would proceed in court unless the GSPC exercised its option to have the matter still proceed as an administrative proceeding. In order to exercise this last option, the GSPC would have to delegate final order authority to the OAH ALJ for this proceeding.⁷³
- d. Combine and streamline statutory provisions dealing with a government ethics manual.

⁷³ See also HB 2595 above, which contains this same recommendation.

Additional Recommendations. The Government Ethics Work Group made an additional recommendation to delete lobbyists from the coverage of ORS 244.340 dealing with education programs (since GSPC does not have an education program for lobbyists).

Continuing Controversies.

Recommendation c above is a compromise developed and approved by the Oregon Law Commission. It attempts to resolve the “opt out” controversy by allowing the GSPC to require a matter to be handled through the administrative hearing process, but only if it agrees that the administrative hearing decision will be final. That compromise enjoyed substantial, but not universal support within the Oregon Law Commission, and may continue to be somewhat controversial.

Legal Expense Trust Fund

1. Issues Identified from Existing Law.

HB 2596 also establishes a statutory mechanism that allows a public official accused of an ethics violation to create a legal expense trust fund to defray legal expenses involved in defending against those accusations. It makes conforming changes to other provisions of ORS Chapter 244 to clarify that contributions to a legal expense trust fund are neither a prohibited form of financial gain, nor a “gift” to the public official.

There are two significant issues of public policy involving a legal expense trust fund:

- Is it appropriate to provide a statutory mechanism by which a legal expense trust fund can be created through which certain legal expenses of a public official may be paid for by others in circumstances where campaign contributions and ordinary gifts could not be used for this purpose?
- If a legal expense trust fund is an appropriate device, how can such a legal expense trust fund be structured so that (a) the source and amount of contributions and the amount of expenditures are disclosed in a timely manner and (b) contributed funds cannot otherwise be used for the personal financial or pecuniary gain of the public official?

2. Issues Addressed.

The statutory recommendations in this bill address the issues identified above.

3. Alternative Approaches Considered.

The issue of creating a legal expense trust fund arose in the context of discussing the financial burden placed upon a public official in responding to an allegation that the official violated government ethics law. The discussion was pushed forward by a proposed change in Oregon’s campaign finance laws. Under recommendations to change

Oregon's campaign finance law, the ability of a public official to use campaign contributions to pay legal expenses will be sharply reduced.⁷⁴ Brief consideration was given to allowing campaign contributions to be used for this purpose or, alternatively, to simply defining direct contributions to a public official for legal expense purposes as an allowed form of financial gain. Both alternatives were rejected, at least in part on the basis of concerns about adequate disclosure and preventing personal use. The approach adopted here is modeled after a trust available to members of the U.S. Congress, in which an independent trustee with fiduciary responsibilities has control of trust funds, may distribute them for specified purposes, and is responsible to ensure that proper accounting and public disclosure take place.

4. Narrative Description of Recommendations.

Key Recommendations. The Oregon Law Commission made the following key recommendations regarding a legal defense trust fund:

- a. Allow public officials, upon authorization by the Oregon Government Standards and Practices Commission, to establish legal expense trust funds to defray legal expenses in civil, criminal or other legal proceedings brought by a public body that relates to or arises from the course and scope of duties of the person as a public official.
- b. Require that any trust established for this purpose and authorized by the Government Standards and Practices Commission have a written trust agreement incorporating by reference the operative provisions of the legal expense trust fund statute and containing affidavits from both the public official and trustee that they will comply with the provisions of that statute.
- c. Require the trustee of a legal expense trust fund to (a) establish and maintain a single bank account for the trust, and (b) file a quarterly statement with the Government Standards and Practices Commission showing contributions received and expenditures made by the trust, with identifying information.
- d. Require any contributed funds that are not expended for appropriate purposes to be returned to contributors, on a pro rata basis, not later than 30 days after a trust fund is terminated. In the event attorney fees are awarded to the public official, require any sum awarded to be distributed first to pay outstanding legal expenses, then pro rata to contributors, with any remaining amount distributed to the public official (or tax exempt organization if required by the trust agreement).

Additional Recommendations. The Law Commission made additional recommendations to exclude contributions to a legal expense trust fund from the definition of "gift" in ORS 244.020 and to add such contributions as an allowed form of financial gain.

⁷⁴ Although no change is proposed by the Oregon Law Commission in the current law (ORS 244.400) that allows a prevailing public official to recover attorney fees against the GSPC, early discussion of eliminating the attorney fee provision also played a role in developing the legal expense trust fund proposal.

Continuing Controversies.

The legal defense trust fund recommendations addressed by HB 2596 were carefully discussed. The recommendations appear to have resolved any remaining concerns about providing adequate public disclosure and preventing contributed funds from being used for personal purposes other than specified legal expenses.

IV. SECTION-BY-SECTION ANALYSIS OF LEGISLATIVE PROPOSALS

A. HB 2597 (Campaign Finance) (Use of Campaign Contributions)

HB 2597 would make changes to the election law statutes found in ORS Chapter 260. The provisions focus on the use of campaign contributions and the treasurer requirements of principal campaign committees, as these two issues relate to government ethics. The substance of the Work Group's decisions regarding campaign finance ethics issues can be found in sections 1 and 2 of the bill.

Section 1.

This Section amends ORS 260.407 by deleting certain existing allowed uses of campaign contributions. It provides that campaign contributions can “only” be used “for the purpose of making expenditures to support the nomination or election of the candidate.” Exceptions are allowed in two circumstances: (a) funds can be distributed to the same candidate's principal campaign committee for a different political office; or (b) funds can be distributed to certain specified entities, including charitable organizations, if a candidate or the principal campaign committee of a candidate does not intend to be a candidate for public office. This section specifically prohibits a number of possible uses of campaign contributions, including personal use, use to defray office expenses, contribution to other candidates, or use to pay civil penalties imposed by government, unless the conduct giving rise to the penalty was non-criminal.

Section 2.

ORS 260.037 presently allows candidates to serve as their own campaign treasurer. This Section amends ORS 260.037 to limit a candidate's ability to serve as his or her own treasurer to only two situations: (a) where neither total contributions nor expenditures exceed \$2,000; and (b) where the campaign is funded solely by the candidate. Additionally, it requires that any candidate serving as the candidate's own treasurer appoint and certify a treasurer at the time the candidate designates himself or herself as treasurer in the event the monetary or self-funding limitations are exceeded. Finally, this Section provides that both the candidate and the treasurer have the same duties and are legally responsible for any violations relating to the candidate's principal campaign committee.

Sections 3-7.

Sections 3-7 of the draft have LC form and style provisions and effective date provisions.

B. HB 2598 (Gifts, Honoraria and Financial Gain)

HB 2598 would make changes to laws concerning gifts, honoraria and financial gain applicable to public officials in Oregon. Sections 1-4 generally deal with the definition and treatment of gifts. Sections 6-11 generally deal with honoraria. Sections 5 and 12-19 have LC form and style provisions, conforming amendments and effective date provisions.

Section 1.

This section amends ORS 244.020, the basic definitional section of Chapter 244. The definition of a “gift” (ORS 244.020(5)) is expanded to mean “something of economic value” given not only to a public official or a relative of the public official, but also a member of the public official’s “household.” The definitions of “member of the household” (ORS 244.020(9)) and “relative” (ORS 244.020(14)) are also significantly expanded. This section modifies exclusions in the gift definition by (a) deleting the “entertainment” exclusion (ORS 244.020(5)(b)), (b) adding an exclusion for “event registration expenses,” (c) limiting the exclusion for “food, lodging, travel and event registration expenses” to situations where the public official is a registered attendee at an event or appears on the agenda as a presenter, and (d) providing statutory clarification as to what constitutes “participation.” (See ORS 244.020(5)(b)(C)). The exclusion for food, lodging, travel and event registration expenses applies only to a public official, not relatives or household members.

Section 2.

This section amends ORS 244.040 on financial gain. It adds a new restriction on gain received by a household member to the current restriction on gain received by the public official or a relative of the public official. ORS 244.040(1). It clarifies that allowed “gain” includes an official’s compensation package, expense reimbursement, honoraria to the extent allowed by the proposed act (see Section 6 below), gifts that do not exceed specified limits (see Section 3 below), unsolicited awards for professional achievement, certain gifts and items explicitly excluded from the gift definition. ORS 244.040(2).

Section 3.

This proposed statutory section provides limitations on the value of any single gift (\$100) from single or multiple sources, and the aggregate value of all the gifts (\$250) in a year from a single source known to have a legislative or administrative interest. The limits apply to both public officials and persons offering gift. Gifts to family and household members are counted against limits on gifts to public officials and candidates for public office.

Section 4.

This section makes several technical form and style amendments to ORS 244.100 and incorporates two substantive changes recommended by the Work Group. First, consistent with a public official's reporting requirement found elsewhere in these statutory proposals (see SB 497) it changes the required notice threshold from \$50 to \$75 for persons who provide food, lodging, travel or event registration expenses to a public official.⁷⁵ Second, it adds a requirement in Subsection (4) requiring persons providing a public official with an honorarium or other item of value that exceeds the reporting threshold of \$15 in Section 7 to provide notice to that effect to the public official within 10 days.⁷⁶

Section 6.

This section prohibits all public officials and candidates for public office from soliciting or receiving honoraria in connection with the official duties of the public official or the office for which the person is a candidate, except for honoraria or other items with a value of \$50 or less. Honoraria received for services performed in relation to a private profession, occupation, avocation or expertise of the public official are permitted.

Sections 7.

Section 7 amends ORS 244.060 to change reporting thresholds for food, lodging, travel or event registration expenses, and honorarium. It requires reporting of food, lodging, travel or event registration expenses in an aggregate amount of \$75, and honoraria valued at more than \$15. Section 7 also adds a new subsection to ORS 244.060 requiring reporting of unsolicited awards for professional achievement with a value exceeding \$75.

Sections 8.

Section 8 amends ORS 244.280 to delete a superfluous reference involving honoraria and to make conforming changes.

⁷⁵ The reporting threshold currently set out in ORS 244.060 (\$50) is indexed by law. The actual threshold has been adjusted over time and is currently \$144. Indexing is deleted in the Law Commission proposal.

⁷⁶ ORS Section 244.100 is one of several statutory provisions amended by more than one of the legislative proposals discussed in this report. The most significant and comprehensive changes will be found in SB 497, which deals most directly and extensively with reporting requirements. See that discussion below under the analysis of SB 497. It is important to recognize that the several statutory drafts are not internally consistent. Statutory changes developed during the consideration of a particular substantive or procedural topic, were dealt with independently from the consideration of other topics by the Government Ethics Work Group and its Sub-Work Groups. Inconsistencies between drafts will be reconciled by Legislative Counsel based upon legislative history, including the sequence in which the Work Group considered material. Legislative Counsel will address such conflicts through its conflicts reconciliation process as the Legislative Assembly passes bills.

Sections 9 – 11.

Sections 9 and 10 amend ORS 351.067 and ORS 353.270 dealing, respectively, with honoraria received by public officials in the Oregon University System and Oregon Health and Sciences University. Those statutes treat compensation from consulting, appearances, speeches and similar activities, if authorized by the educational entity, as part of the individual's official compensation. These sections conform existing exceptions for educational institutions to the financial gain provisions set forth in Section 2 of HB 2598. Section 11 amends ORS 244.010(1) to avoid an inconsistency between a general mandate for all public officials to "adhere" to the code of ethics in ORS 244.040 and the higher education exceptions by clarifying that officials are to comply with the "applicable" provisions of this chapter.

C. SB 494 (Conflicts of Interest)

SB 494 would make changes to conflicts of interest law applicable to public officials in Oregon. The changes focus on making conflict of interest rules apply equally to all public officials, regardless of position, unless such equal application would or would likely violate state or federal constitutional law.

Section 1.

This section amends ORS 244.120. It continues the existing requirement that all public officials disclose "potential" and "actual conflicts," but also contains a number of significant changes to the way in which public officials are to conduct themselves in conflict situations.

- Judges are to be removed from a case when there is either a "potential" or an "actual" conflict of interest. However, judges are to comply with the Code of Judicial Conduct if it provides different requirements.
- After disclosure, all elected public officials (other than judges) and appointed members of boards and commissions are allowed to act freely in situations involving potential conflicts.
- After disclosure, all elected public officials (except judges and members of the Legislative Assembly) and appointed members of boards and commissions with an actual conflict must refrain from participating in any discussion, debate or vote on the matter at hand unless the public official's vote is necessary to meet a requirement of a minimum number of votes to take official action.
- In situations involving actual conflict, members of the Legislative Assembly may not participate in committee or floor discussion, or in caucus meetings, but may, if allowed by legislative rules, vote on the matter when it is considered by the full Senate or House of Representatives.

Section 1 also defines in greater detail what is required for a public official's vote to be "necessary" (See subsection 4) and provides that after disclosure a public official may participate fully in any action or decision where the conflict arises because of

membership in or membership on the board of directors of certain nonprofit corporations (See subsection 6).

Section 2

This section contains additional amendments to ORS 244.020, the basic definition section of Chapter 244, primarily to incorporate changes to the definition of “business” (subsection 2) and “business with which the public official is associated” (subsection 3) required by the Work Group’s decision to include non-profit entities within the scope of the kinds of interests which create “actual” or “potential” conflicts. Those relationships had previously been excluded from the definition of “business” and “business with which the public official is associated,” keeping them effectively outside of the scope of regulated conflicts. This section also contains other statutory changes approved by the Work Group substantially expanding the definition of “relative” at subsection 16 (including, among others, domestic partners, stepchildren, spouses of children) and “member of household” at Subsection 12 (See also HB 2598 for additional changes to the definition of “relative” and “member of household”). Subsection 17 is amended to provide an exception to “potential conflicts of interest” for ownership of individual stocks in a mutual fund.

Section 3.

This section amends ORS 244.040, the basic financial gain statute, primarily by expanding the list of permitted kinds of financial gain to include a recommendation made by a public official with regard to the official’s own salary, or salary of a relative or household member when made as part of the official duties or responsibilities of the public official.

Sections 4.

Section 4 contains changes to statutory provisions of ORS Chapter 293 affecting the Oregon Investment Council to conform to the definitions of “business” and “business with which the public official is associated” found in Section 2 of the proposal.

Sections 5.

Section 5 amends ORS 469.810 in order to retain the existing, narrow definitions of “relative” and “member of the household” for the Pacific Northwest Electric Power and Conservation Planning Council. This latter proposal to effectively retain a special, limited definition of key terms affecting the scope of conflicts law applicable to one entity reflects a drafting decision that may merit additional consideration.⁷⁷

⁷⁷ The Oregon Law Commission and the Government Ethics Work Group generally endorsed the view that those provisions of other statutory chapters that provide special exceptions to general ethics rules proposed for Chapter 244 or speak specifically to ethics provisions found in Chapter 244 should not be changed to conform to the proposals being recommended to the Legislative Assembly. The rationale for this decision was that each of the identified provisions was very narrow in scope and generally reflected a recognized

Section 6.

This section repeals ORS 244.135, which presently provides a unique statutory scheme to deal with conflict issues involving members of local planning commissions. Instead, planning commission members are subject to the same requirements as all other members of appointed boards and commissions. Elimination of this special provision is consistent with the Law Commission's decision that conflict laws should apply as equally as possible to all public officials.

Section 7.

Section 7 contains effective date provisions.

D. SB 498 (Individualized Personal Bias)

SB 498 adds provisions to ORS Chapter 244 requiring disclosure and prohibiting action by public officials in circumstances where choice of action may be significantly influenced by a personal financial interest or an individualized personal bias for or against an identified person.

Section 2.

This section requires a public official who recognizes that the official's choice of action may be significantly influenced by financial interests or individualized personal bias for or against an identified person to (a) disclose the potential violation and (b) refrain from taking action except as specifically allowed. The section does not apply to judges. It contains differential conduct standards for three groups: (a) members of the Legislative Assembly, (b) other elected public officials and appointed public officials serving on a board or commission, and (c) all other public officials.

Section 3.

This section allows a public body to adopt rules to administer the provisions of Section 2 above, including exceptions necessary to accommodate the duties of public officials serving the public body. Rules adopted under this section are subject to review and approval by the Government Standards and Practices Commission.

historical exception. Based on this directive, Legislative Counsel amended ORS 469.810 (see Section 5 above) to delete the connection by reference to ORS 244.020 and add language that would retain the existing, narrow definitions of "relative" and "member of the household" for the Pacific Northwest Electric Power and Conservation Planning Council. Whether this special definitional treatment of one governmental entity is appropriate is a policy decision. The decision reflected in the statutory draft is a logical way, but not the only way in which the directive could be implemented. The question is whether the directive to increase uniformity in statutory application takes precedence over the directive to leave those statutory ethics rules found elsewhere in the Oregon Revised Statutes unchanged at this point.

Section 4.

This section establishes a procedure for the executive director of a public body or the governing body of a public body to investigate potential violations. The procedure provides that upon determination that a violation has occurred, the public body may reconsider, set aside or modify any action taken in violation of the Act, disqualify the official from holding any appointment or employment with the public body or report findings to the Government Standards and Practices Commission with a request for the Commission to take action.

Sections 5.

This section contains an effective date provision.

E. SB 497 (Public Official Reporting Requirements)

SB 497 will make changes to the government ethics substantive reporting requirements found in ORS Chapter 244. The provisions focus on who must report, what must be reported, as well as the form and frequency of disclosures. The substance of the Law Commission's decisions regarding reporting requirements can be found in Sections 1-4, 6, 8, 10-12 and 14. Section 19 repeals several statutory provisions as unnecessary or inconsistent with other recommendations regarding elimination of city and county reporting opt outs. Sections 5, 7, 9, 13 and 20 of the draft have conforming provisions, LC form and style provisions and effective date provisions.

Section 1.

This section amends ORS 244.050. It retains mandatory reporting through an annual verified statement of economic interest and expands the number of persons who must file a statement by requiring reports from certain previously exempt city and county officials. (See subsection 1(b), (i), (j), (k) and (r)). Subsection 8 allows an amended statement of economic interest to be filed without penalty for 30 days after the filing deadline.

Section 2.

This section amends ORS 244.020 by expanding the definition of "member of the household" to include any person residing with the public official, and expands the definition of "relative" by adding domestic partners, any individual for whom the public official has a legal support obligation, siblings, and certain other persons to the list of defined "relatives."⁷⁸ (See section 2 (12) and (16) of SB 497).

⁷⁸ ORS Section 244.020 is one of several statutory provisions amended by more than one of the LC drafts discussed in this report. Other significant changes to the definitions of relative will be found in HB 2598. It is important to recognize that the several statutory drafts are not internally consistent. Statutory changes developed during the consideration of a particular substantive or procedural topic, were dealt with independently from the consideration of other topics by the Government Ethics Work Group and its Sub-Work Groups. Inconsistencies between drafts will be reconciled by Legislative Counsel based upon legislative history, including the sequence in which the Work Group considered material. Legislative

Section 3.

This section amends ORS 244.060 by: (a) requiring addresses and descriptive information for all categories of financial interest reported on a statement of financial interest; (b) adding a requirement to provide disclosure of the five most significant sources of income and deleting existing percentage-based income disclosure requirements; (c) requiring names of household members and relatives age 18 or older not living in the household; and (4) deleting provisions on reporting honoraria, food, lodging and payment of travel expenses (these deleted provisions are moved to a new quarterly report established in Section 6 of the proposed legislation).

Section 4.

This section amends ORS 244.070 by deleting a requirement to report certain sources of income over \$1,000. That requirement is moved to a new quarterly report established in Section 6 of the proposed legislation. In addition this section includes LC form and style changes.

Section 6.

This section amends ORS 244.100 by creating a new quarterly report to be filed by mandatory reporters disclosing: (a) gifts and monetary honoraria with a value exceeding \$15; (b) food, lodging and travel expenses with an aggregate value exceeding \$75; and (c) sources of income exceeding an aggregate amount of \$1,000 received from sources doing business with or that have a legislative or administrative interest in the governmental agency served by the public official. Additionally, this section (a) requires gift givers to report the value of gifts exceeding \$15 to both the GSPC and the recipient; (b) changes the existing threshold for providing notice of food, lodging and travel from \$50 to \$75; and (c) requires public officials who do not receive the required notice of gift value from the giver to nonetheless include a good faith estimate of the value of the gift in the quarterly report.⁷⁹

Section 8.

This section sets forth the specific calendar schedule for filing the quarterly reports required by Section 6.

Section 10.

Counsel will address such conflicts through its conflicts reconciliation process as the Legislative Assembly passes bills.

⁷⁹ ORS Section 244.100 is another statutory provision amended by more than one of the LC drafts discussed in this report. Other significant changes to the reporting requirements in ORS 244.100 will be found in HB 2598 (see particularly Subsection 4 of HB 2598). Legislative Counsel will address conflicts through its conflicts reconciliation process as the Legislative Assembly passes bills.

This section amends ORS 244.195 by requiring all public bodies to provide information prepared by the GSPC about reporting requirements to every newly elected or appointed public official serving that public body who is required to file statements of economic interest.⁸⁰ The section also contains conforming provisions.

Sections 11, 12 and 14.

These changes are technical and do not alter existing law. Sections 11 and 12 move the requirement officials in the office of the State Treasurer to file trading statements from ORS 244.055(5) (Section 11) to ORS 244.110 (Section 12). The penalty provision of ORS 244.055 is moved to a separate section (Section 14).

Section 15.

This section makes LC form and style changes, but otherwise retains existing reporting requirements for members of Congress or candidates for congressional office.

Section 16.

This section contains LC form and style changes, but otherwise retains existing discretionary authority for the Government Standards and Practices Commission to establish criteria for having notices of conflicts of interest provided to the Commission.

Section 17.

This section amends ORS 244.290 by adding procedural requirements for the GSPC to accept and file information provided to it and to make statements and other information filed with the Commission available for inspection and copying. These changes parallel provisions already found in ORS Chapter 171 on lobbying reports.

Section 18.

This section amends ORS 244.300 by clarifying that all information submitted to the Oregon Government Standards and Practices Commission in any required statement is a public record. Subsection 2 is intended, in part, to preserve the existing confidentiality of trading statements submitted by officials in the office of the State Treasurer under ORS 244.055. Trading statements would remain confidential unless those reports are submitted to the Commission.

F. SB 495 (Nepotism)

SB 495 would add new provisions to the government ethics statutes regarding nepotism. The substantive provisions dealing with nepotism are found in Sections 2 to 4.

⁸⁰ The current requirement applies only to city and county officials.

Section 2.

This section provides specific expanded definitions for the terms “member of the household” and “relative” applicable to Sections 3 and 4 that follow.

Section 3.

This section requires an official to comply with conflict of interest provisions in ORS Ch. 244 when appointing, employing, promoting, discharging, firing or demoting a relative or household member. Specific exceptions to this requirement are provided for members of the Legislative Assembly and for most appointments to a position as an unpaid volunteer. It also allows unpaid volunteers to receive reimbursement of expenses provided in the ordinary course of business. Finally, the section clarifies that a public body may make employment decisions in circumstances where a public official might be prohibited from doing so on the basis of nepotism restrictions. That is, relatives may work for the same public body, but relatives cannot generally be involved in the hiring decision of a relative.

Section 4.

This section contains provisions prohibiting public officials from supervising a relative or household member. It contains specific exceptions parallel to those in Section 3 above, including exceptions for supervision of a relative or household member by a member of the Legislative Assembly or where the relative or household member is an unpaid volunteer.

Sections 1, 5 and 6.

Sections 1, 5 and 6 have LC form and style provisions and effective date provisions.

G. HB 2594 (Subsequent Employment)

HB 2594 would make changes to ethics law dealing with offers of employment to and subsequent employment by certain public officials. Sections 2-5 contain the substantive provisions dealing with employment. Sections 1, 6 and 7 contain form and style as well as conforming provisions. Sections 8-10 contain effective date provisions.

Section 2.

This new section contains existing prohibitions on promises of future employment. Those provisions, currently found in ORS 244.040(3), are reorganized but remain substantially unchanged. See Sections 2(1)(a) and Section 2(2). The section also includes an additional objective participation-based restriction on promises of future employment. This latter provision is narrowly drawn to cover only offers from persons involved in any matter in which the public official is also “personally and substantially” participating.”

Section 3.

This section contains an existing provision (moved from ORS 244.040(6) by Section 5 below). That provision prohibits representing a client for a fee before the governing body of a public body of which the public official is currently a member. It also contains a new provision further prohibiting a current public official from providing any advice or other service for a fee related to influencing action by the public body served by the public official. This would prohibit consulting fees for current public officials. Most significantly Subsection 4 contains a “revolving door provision” prohibiting a former member of the Legislative Assembly from receiving money or other consideration for lobbying until the adjournment of the next regular session following the date the person ceases to be a member of the Legislative Assembly.

Section 4.

This section contains a two-year restriction on a public official having a direct beneficial financial interest in a public contract authorized by the public official or governing body of which the public official was a member. Present law only prohibits such conduct as a conflict if the public official knows that there will be a benefit. This creates an objective test.

Section 5.

This section amends ORS 244.040 to delete provisions moved to Sections 2 and 3 of HB 2594. The section also contains a new restriction on use of confidential information by former public officials. Restrictions on use of confidential information by a current or former public official are expanded to prohibit gain to any person, not just the public official.

H. SB 496 (Lobbying Reporting Requirements)

SB 496 would make changes to ethics laws dealing with registration and reporting requirements for lobbyists and those who employ lobbyists. Sections 1 through 9 and 11 contain the substantive provisions dealing with lobbying. Section 10 contains LC form and style provisions. Section 12 contains effective date provisions.

Sections 1 and 2.

Section 1 amends ORS 171.725 by adding the phrase “executive officials or other persons” to the definition of lobbying to clarify that lobbying includes efforts to influence the executive branch on legislative matters. Section 2 amends ORS 171.730 to clarify that lobbying includes efforts to influence the executive branch on legislative matters.

Section 3.

This section amends ORS 171.735 to clarify that hour and spending thresholds for lobbyist registration are aggregate thresholds, not separate for each client. Subsection 5 of ORS 171.735 is amended to take account of new titles for certain currently exempt officials and to add several additional positions to the list of public officials exempt from registration and reporting requirements.

Section 4.

This section amends ORS 171.740 at subsection 3 by adding a new requirement clarifying that a lobbyist must file a separate lobbyist registration for each person that employs the lobbyist. This subsection also tightens the time within which a registration must be filed to not later than three business days after the day the lobbyist “first appears” or “works” for the person. New subsection 4 to ORS 171.740 provides an exception allowing an already registered lobbyist to lobby without compensation on behalf of a person without filing an additional registration statement if no more than 24 hours of time and no more than \$100 is expended on behalf of that person per calendar quarter.

Section 5.

This section amends ORS 171.745 by: (a) deleting current requirements to report total expenditures on printing, postage, telephone, advertising, public relations, education and research, and miscellaneous items; (b) changing the threshold for itemized reporting of expenditures from \$25 to \$75; (c) adding a new requirement that gifts exceeding \$15 in value are to be reported on an itemized basis; (d) providing a reporting exception to match the registration exception previously added to ORS 171.740 (see Section 4) for uncompensated lobbying, subject to thresholds; and (3) requiring registered lobbyists to file reports on a quarterly basis according to the schedule set forth in Section 11 below.

Section 6.

This section amends ORS 171.750 to require persons who employ lobbyists to report: (a) the name of each registered lobbyist or lobbying entity; (b) the total amount of money paid to each lobbyist or lobbying entity; (c) the aggregate amount spent on lobbying; (d) all expenditures on behalf of a public official in excess of \$75 on an itemized basis; and (e) all gifts to public officials exceeding \$15 in value on an itemized basis. It further amends ORS 171.750 to require those who employ lobbyists to file reports on a quarterly basis according to the schedule set forth in Section 11 below.

Section 7.

This section amends ORS 171.722 to require the Government Standards and Practices Commission to use the rule-making process to prescribe forms for lobbying registration and reports.

Section 8.

This section amends ORS 171.778 by rewriting major portions of the existing statutory section. The intended purpose of these proposed revisions is to substantially parallel the investigation and review process proposed in HB 2595 with regard to ethics complaints under ORS Chapter 244.

Section 9.

This section amends ORS 171.992 to increase the maximum fine for violations of lobbying regulations from \$1,000 to \$5,000, and provides specific daily penalties for late filing up to the maximum total penalty of \$5000. In addition, this section requires the Government Standards and Practices Commission to report lobbying violations for which a penalty is imposed to the Legislative Assembly.

Section 11.

This section sets forth the quarterly calendar deadlines for filing lobbying reports.

I. HB 2595 (Organization Structure, Rulemaking and Advisory Opinions; Sanctions; Funding; and Remedies)

Sections 1-16 make changes to ethics laws dealing with the organizational structure of the GSPC, as well as its use of rulemaking and advisory opinions. Sections 1-6, 8-9, 11-12, and 14-16 contain substantive provisions dealing primarily with organization structure, rulemaking and advisory opinions.⁸¹ Sections 17-25 make changes to ethics laws dealing with sanctions. Sections 17-18, 21-23, and 25 contain the substantive provisions dealing with sanctions. Sections 26-28 make changes to ethics laws dealing with funding for the Government Standards and Practices Commission. Sections 29-30 make changes to ethics laws dealing with remedies (status of official action).

Sections 7, 10, 13, 19-20 and 24 contain LC form and style provisions and conforming changes called for by other sections of this legislative proposal. Sections 31 and 32 contain additional conforming changes. Sections 34-39 contain effective date provisions. Section 40 contains an emergency clause provision, making the Act effective with the beginning of the 2007-2009 biennium. July 1, 2007.

Organization Structure, Rulemaking and Advisory Opinions

Section 1.

This section amends ORS 244.250 to change the maximum term of office for a GSPC member and making LC form and style changes.

⁸¹ However, Sections 2 and 11 also deal in part with issues addressed when the Work Group considered sanctions.

Section 2.

This section amends ORS 244.390 by adding a requirement to consider the public interest and any other penalty or sanction that has been or may be imposed against a public official before deciding to undertake an investigation or impose penalties under ORS 244.350 and ORS 244.360. This section also amends ORS 244.390 to incorporate provisions currently found in ORS 244.030 (repealed by Section 33 below) and contains LC form and style changes.

Section 3.

This section amends ORS 244.290 by reorganizing and consolidating provisions dealing with the mandatory and discretionary rulemaking authority of the GSPC. The section adds requirements to (a) review existing rules and consider adopting rules dealing with matters of general interest on an annual basis, (b) adopt guidelines or standards clarifying what constitutes a violation and (c) adopt guidelines for determining sanction amounts. This section also adds a requirement to conduct accuracy audits of a sample of all reports submitted to the GSPC. LC form and style changes are made throughout the section.

Section 4-5.

These sections establish a procedure by which state agencies or statewide associations of public bodies may adopt ethics rules or policies that, upon approval by the GSPC, provide protection from sanctions for public officials who take action in good faith based upon those rules or policies.

Section 6.

This section amends ORSD 244.100 by deleting existing authority for the GSPC to exempt certain gifts from gift limitations. Additionally, GSPC authority to require gift reporting and disclosure by rule is moved from this section to Section 3 (amending ORS 244.290) above.

Section 8.

This section amends ORS 244.020, the basic definitional section of ORS Chapter 244 by removing discretionary authority of the GSPC to establish class sizes by rule for purposes of conflicts of interest. The provision is moved to Section 3 above (ORS 244.290).

Section 9.

This section amends ORS 244.130 by deleting a rulemaking provision and making LC form and style changes. The rulemaking provision is moved to Section 3 above (ORS 244.290).

Section 11.

This section amends ORS 244.270 by adding a provision that the Government Standards and Practices Commission shall notify the public body served by a public official of any finding by the Commission that a public official has violated ethics law within 10 business days of making its determination. The section also contains LC form and style changes.

Section 12.

This section amends ORS 244.080 by replacing most of the existing text with new provisions outlining revised procedures for issuing written commission advisory opinions and specifying the reliance effect of such opinions.

Section 14-16.

Section 14 contains new procedures for issuing written staff advisory opinions and specifying the reliance effect of such provisions. Section 15 permits staff to issue other written or oral advice and specifies the reliance effect of such staff advice. It specifically provides that any written advice not designated a “staff advisory opinion” under section 14 above is considered staff advice issued under this section 15. Section 16 clarifies that the executive director may issue staff advisory opinions, but not commission advisory opinions.

Sanctions

Section 17.

This section amends ORS 244.050 by deleting certain provisions moved to ORS 244.350 (see Section 2) and contains LC form and style changes.

Section 18.

This section amends ORS 244.350 to (a) incorporate certain provisions moved from ORS 244.050 (see Section 1 above), (b) increase maximum civil penalties for violating provisions of ORS Chapter 244 from \$1,000 to \$5,000, (c) provide for daily maximum penalties for late filing of statements up to the maximum penalty of \$5,000 and (d) permit the Government Standards and Practices Commission to issue a written reprimand in lieu of a civil penalty. In addition, it contains LC form and style changes throughout.

Section 21.

This section amends ORS 293.708 by adding a clarifying provision that complaints about violations of this section (which deals specifically with members of the Oregon Investment Council) may be made to the Government Standard and Practices Commission for review, investigation, and possible imposition of civil penalties.

Section 22.

This section amends ORS 162.005 by making a conforming change to the term “public servant” to clarify that a public servant is a “public official” as defined in ORS Chapter 244.020.

Section 23.

This section amends the current “opt out” provision in ORS 244.060 to establish a three-step process: GSPC proceedings initially will proceed as regular contested case matters, if the public official involved chooses, the proceeding will be moved to Marion County Circuit Court; but if the GSPC delegates final order authority to the OAH ALJ, then the GSPC can cause the matter to be conducted as an administrative proceeding.

Section 25.

This section amends ORS 244.400 to make conforming changes required by amendments to the current “opt out” provision of ORS 244.060. The section also contains LC form and style changes.

Funding

Section 26.

This section appropriates to the Government Standards and Practices Commission a sum to be specified by the Legislative Assembly for the biennium beginning July 1, 2007. The Oregon Law Commission anticipates this sum will be determined through the Ways and Means process after it is determined what the duties of the agency, the GSPC, will be.

Section 27.

This section contains provisions (a) requiring Oregon Department of Administrative Services to determine the amount of money needed to fund current service levels for each biennium thereafter; and (b) appropriating that amount to the Oregon Government Standards and Practices Commission from the General Fund, subject to allotment under ORS 291.230 to 291.260.

Section 28.

This section contains an effective date provision for initial determination of current services funding amount by the Oregon Department of Administrative Services.

Remedies (Status of Official Action)

Sections 29 and 30.

Section 29 adds Section 30 to ORS Chapter 244. Section 30(1) specifies those circumstances under which action taken by a legally disqualified public official is valid. Section 35(2) provides that subsection (1) does not affect (a) the validity or invalidity of an official action under any other provision of law or equity, (b) the rights or remedies otherwise available to any person or (c) any applicable period of limitation or procedural prerequisite for a judicial remedy.

Section 33.

This section repeals ORS 244.030 and ORS 244.080. The provisions of ORS 244.030 are added to Section 2 above (amending ORS 244.390). The substance of ORS 244.080 is moved to Section 3 (amending ORS 244.290).

J. HB 2596 (Adjudication Processes/Training and Legal Expense Trust Fund)

HB 2596 would make changes to ethics laws dealing with adjudication procedures and educational responsibilities of the GSPC. It would also add new provisions to Oregon's government ethics laws dealing with creation of a legal expense trust fund for the purpose of defraying certain legal expenses of a public official. Sections 1-8 and 23 contain the substantive provisions on adjudication procedures and training as well as a penalty provision dealing with failure to file required reports for a legal expense trust fund (see Section 2). Sections 10-21 contain the substantive provisions dealing with creation and operation of a legal expense trust fund. Sections 9, 22 and 26 contain LC form and style changes. Sections 24 and 25 contain effective date provisions.

Adjudication Procedures and Training

Section 1.

This section substantially amends ORS 244.260 by reorganizing and rewording provisions to make the adjudication process statute easier to read and follow. Provisions are reorganized in sequential order of the adjudication process, starting from the complaint or the Commission's own motion, through the contested case process. Some process provisions have been added from agency administrative rules so that the full process is reflected in statute. This section also includes substantive changes to (a) amend the "opt out" provision that currently allows a party charged with an ethics violation to have the matter taken to circuit court instead of following the administrative hearing process of ORS Chapter 183; (b) extend the time periods to complete the Preliminary Review and Investigatory Phase to 135 and 180 days, respectively; and (c) permit a delay in the 135-day Preliminary Review Phase, if requested by a candidate for public office, when a complaint is filed against the candidate within 61 days of an election. In addition, LC form and style changes are made throughout the section.

Sections 2 and 3.

These sections amend ORS 244.350 and ORS 244.400, respectively, to make conforming changes required by the changes to ORS 244.260 set forth in Section 1 above. Sections 2 and 3 also contain LC form and style changes.

Section 4.

This section amends ORS 244.320 in order to consolidate provisions found elsewhere in ORS Chapter 244 regarding a manual on government ethics. Some provisions are moved from ORS 244.290 (See Section 5 below) and ORS 244.330 (See Section 23 below). This section also adds a requirement that the manual set forth recommended uniform reporting methods for use by persons filing statements under Chapter 244.

Section 5.

This section amends ORS 244.290 by deleting a provision moved to ORS 244.320 (See Section 4 above).

Section 6.

This section amends ORS 244.340 by deleting a requirement to provide a program of continuing education for lobbyists. It retains the requirement to provide such a program for public officials.

Section 7.

This section amends ORS 244.160 by adding a subsection clarifying that it is a violation of this chapter for a public official in a political subdivision other than a city or county to fail to file a statement of economic interest with the GSPC if the political subdivision has adopted a resolution requiring such filing. The section also includes LC form and style changes.

Section 8.

This section amends ORS 244.380 to further clarify that penalties provided in ORS 244.380 for failure to timely file statements of economic interest also apply to statements required by resolution adopted under ORS 244.160 (see Section 7 above).

Legal Expense Trust Fund

Section 10.

This section authorizes a public official to establish a legal expense trust fund subject to authorization of the Government Standards and Practices Commission. It allows proceeds of the trust to be used to pay legal expenses incurred by the official in defending against a civil or criminal proceeding brought by a public body arising from the status of the person as a public official.

Section 11.

This section identifies the allowable uses for proceeds of a legal expense trust fund, including defraying legal expenses and costs reasonably incurred in administering the trust fund.

Section 12.

This section sets out the process to be used by a public official to establish a legal expense trust fund, including mandatory provisions of the trust agreement and affidavit requirements for the public official and the trustee. This section also establishes the obligations of the Oregon Government Standards and Practices Commission to review the trust agreement and required quarterly reports filed by the trustee.

Section 13.

This section establishes the responsibilities of the trustee, including receipt of funds, authorization of all expenditures, and filing quarterly statements. It also prohibits relatives, household members, an attorney for the public official, or anyone who has a business or employment relationship with the public official from serving as trustee.

Section 14.

This section prohibits a principal campaign committee from contributing to a legal expense trust fund, but allows all other persons to make contributions in unlimited amounts.

Section 15.

This section requires the trustee of a legal expense trust fund (a) to establish a single exclusive account in a financial institution and (b) to deposit all contributions and to draw all expenditures from that account. It also prohibits including any public or private moneys other than contributions in the account and requires the trustee to retain account records for at least two years.

Section 16.

This section sets out the obligation of a trustee to (a) file a quarterly statement showing contributions and expenditures from the trust fund, (b) provide the name and address of each contributor and the amount of each contribution, and (c) provide the name and address of each payee, as well as the amount and purpose of each expenditure. This section also establishes the schedule by which quarterly reports are to be filed.

Section 17.

This section sets forth the means for termination of a legal expense trust fund and requires that a final report listing all contributions and all expenditures be filed not later than 30 days after a trust fund is terminated.

Section 18.

This section establishes a mechanism and priority for return of any moneys remaining in the fund upon termination. Funds are to be returned to contributors on a pro rata basis. In the event attorney fees, costs or any other money judgment are awarded to the public official, the section sets out the distribution order for such funds.

Section 19 and 20.

Section 19 amends the “gift” definition in ORS 244.020 to exclude contributions made to a legal expense trust fund and makes other LC form and style changes. Section 20 amends the restrictions on financial gain in ORS 244.040 by adding an exception allowing contributions made to a legal expense trust fund. LC form and style changes are made throughout both sections.

Section 21.

This section contains a conforming change to ORS 244.060.

Section 23.

This section repeals ORS 244.330. The provisions of ORS 244.330 are moved to ORS 244.320 (See Section 4 above).

V. NON-STATUTORY RECOMMENDATIONS

The Oregon Law Commission determined that a number of important issues were not appropriate for inclusion in proposed legislation, but should be brought to the attention of the Legislative Assembly, the Government Standards and Practices Commission, and the office of the Secretary of State as further recommendations. The Law Commission directed that each of the following matters be submitted to the appropriate body as

additional recommendations of the Oregon Law Commission to supplement the statutory ethics reform package.

A. Recommendations to the Oregon Legislative Assembly:

1. The Assembly should adopt rules for each chamber regarding actual conflicts of members. (SB 494, Section 1)
2. The Assembly should adopt rules regarding members' hiring of relatives to ensure accountability and ensure public trust. (SB 495)
3. The Legislative Assembly should increase its own budget to provide adequate funds for legislators' reasonable office expenses (including staff, computers, paper, copying, travel, etc.) once in office. (HB 2597)
4. The Legislative Assembly should fund a full-time GSPC trainer to better reflect the two primary functions of the GPSC: enforcement and education. (HB 2596)
5. The Legislative Assembly should provide adequate stable funding for the GSPC. (HB 2595)
6. The Legislative Assembly should adopt rules for addressing reports received from the GSPC regarding lobbyists/lobbying entities that have committed ethics violations. (SB 496, Section 9(4))
7. The Legislative Assembly should adopt rules for each chamber regarding limits on gifts from persons with legislative or administrative interests. (HB 2598)

B. Recommendations to the Oregon Government Standards and Practices Commission:

1. The GSPC should maximize the availability of training tools to all public officials. (HB 2596)
2. The GSPC should more prominently label its *Guide for Public Officials* as an advisory opinion and distribute the *Guide* more readily to public officials. (HB 2595)

C. Recommendations to the Oregon Secretary of State:

1. The Secretary of State should provide clear notice to political campaign committee treasurers and candidates of their statutory responsibilities and liabilities regarding reporting and use of campaign funds. (HB 2597)

2. The Secretary of State should make sure candidates' names and the respective offices they seek are clearly provided in principal campaign committee records so they can be easily searched online and tracked by the public. (HB 2597)

VI. CONCLUSION

As James Madison said over 200 years ago, “[I]f men were angels, no government would be necessary.” Laws alone cannot overcome human frailty. In the final analysis, ethical conduct depends upon ethical principles being internalized into the values and consciousness of public officials and the public they serve. Ethics laws establish minimum standards for conduct and provide mechanisms for enforcing those standards. Such laws can be a useful adjunct to ensure ethical behavior in public office.

The basic principles of ethics in government are clear: Public office is a public trust. Public office should not be used for private gain and public officials should act fairly and impartially with regard to all members of society. While those basic ideas can already be found in Oregon law, there appears to be widespread agreement that Oregon’s government ethics laws are in need of revision to enhance clarity, consistency, and conformity with those underlying principles. The recommendations contained in this report and the accompanying draft statutes are intended to achieve those goals.

Some of the recommendations and proposed statutory provisions are undoubtedly controversial and involve significant public policy choices. It is reasonable to inquire whether the proposals have gone too far or not far enough in reforming Oregon’s government ethics laws. That debate, as it continues before the Legislative Assembly, must be informed by those basic underlying ethical principles identified at the beginning of this report: public office as a public trust for the benefit of the public rather than the benefit of public officials and impartiality in the treatment of everyone. Full consideration of those principles will place decision makers in the best position to evaluate whether the proposed legislation should ultimately become a part of Oregon law.

VII. Addendum to Report on Government Ethics June 14, 2007

This addendum contains brief staff summaries of each of the ten government ethics bills introduced in the Legislative Assembly at the request of the Oregon Law Commission. The summaries highlight the significant substantive provisions of each bill. Where a bill has been amended in the Legislative Assembly, the summary is followed by an “Amendment Note.” Several of these bills were still under consideration at the time of printing of this Biennial Report and may be further amended.

A. SUMMARY OF SB 494 (Conflicts of Interest)

Background: The issue addressed in SB 494 is a narrow, but important one: How should public officials handle immediate conflicts of interest? Existing statutes dealing with conflicts are unnecessarily complex and are frequently unclear.

Highlights of the Bill:

- Continues the existing requirement that all public officials disclose potential and actual conflicts. **Section 1**
- Allows members of the Legislative Assembly to participate in floor votes on matters involving an actual conflict, but otherwise prohibits participation in committee or floor discussion or in caucus meetings on the matter. **Section 1(2)**
Note: Because of the class exception to conflicts of interest, legislators will rarely have an actual conflict of interest. **See Section 2(14)(b)**
- Clarifies that elected public officials (other than judges) and appointed members of boards and commissions may participate in situations involving potential conflict after disclosure. **Section 1(2) and Section 1(3)**
- Continues law that all elected public officials (other than members of the Legislative Assembly) and appointed members of boards and commissions may not participate in any discussion, debate or vote on a matter when a public official has an actual conflict. **Section 1(3)**
- Clarifies exception that a public official may participate despite an actual conflict if the public official's vote is necessary to meet a minimum vote requirement to take public action. **Section 1(4)**
- Continues and clarifies provisions that all other public officials (i.e. not elected, legislators, or appointed members of boards and commissions) are disqualified from participation in situations involving potential or actual conflicts and such officials shall notify their superiors to handle the matter. **Section 1(5)**
- Modifies present conflict of interest exception for conflicts based on membership in a non-profit to require disclosure, but continues law permitting participation. **Section 1(6)**
- Expand the definitions of "relative" and "member of household," effectively increasing the scope of interests that create actual or potential conflicts. **Section 2(12), (16)**
- Provides that interest in a mutual fund will not create a conflict of interest for each stock held in that fund. **Section 2(14)(d)**
- Allows a public official to make salary recommendations for the public official's own salary, or the salary of a relative or household member, when making such a recommendation is part of the official duties or responsibilities of the public official. **Sections 2(14)(c) and 3(2)(e)**

B. SUMMARY OF SB 495 (Nepotism)

Background: Current Oregon Law prohibits nepotism under the general financial gain laws contained in ORS 244.040. In short, a public official is prohibited from hiring, promoting, appointing, or otherwise benefiting a relative because the GSPC could find such action to be a forbidden form of financial gain for the public official. The financial gain laws, however, do not explicitly mention the employment or supervision of relatives. As a result, the laws regarding nepotism are not clear from the face of the statutes and are applied somewhat inconsistently. For example, current law technically prohibits legislators from hiring relatives even though such hiring is allowed in practice. SB 495 sets out clear and straightforward provisions regarding the hiring, firing, and supervision of relatives. This measure generally retains the current law and practice of prohibiting public officials from hiring relatives. In addition, the measure comports with current practice by providing an exception to the general nepotism rules for members of the Legislative Assembly and for any public officials who hire or supervise unpaid volunteers.

Highlights of the Bill:

- Prohibits a public official from hiring, appointing, or promoting relatives unless the public official complies with conflict of interest requirements. **Section 3 (1)(a)**
- Provides that a public body is not prohibited from hiring the relative of a public official who is serving in the public body. **Section 3 (4)**
- Prohibits a public official from directly supervising a relative or member of the household. **Section 4 (1)**
- Authorizes public bodies to adopt local policies allowing public officials to supervise relatives and members of the household. (Such policies must be determined by the public body and not the public official.) **Section 4 (4)**
- Provides exceptions allowing members of the Legislative Assembly to hire or supervise relatives and allowing any public official to hire or supervise a relative who is an unpaid volunteer. **Section 3 (2) and (3)(a); Section 4 (2) and (3)**

C. SUMMARY OF SB 496 (Lobbying Reporting Requirements)

Background: The Government Standards and Practices Committee regulates the ethics standards of lobbyists in ORS Chapter 171. Lobbyists have both substantive ethics laws to follow and reporting (disclosure) requirements. Under current law there are different reporting requirements for public officials, lobbying entities, and lobbyists. These different standards make it difficult to comply with an already complex regulatory scheme. In addition, the reports are both confusing and perceived as unhelpful and untimely for the public. The statutory framework outlining the GSPC's administrative adjudication process for violation of ethics rules is also poorly structured. SB 496 harmonizes the reporting requirements between lobbyists, entities and public officials and adopts a statutory framework for the GSPC's administrative adjudication process that is logically arranged and consistent with the process for public officials. Present law also references the lobbying of executive branch officials for the purpose of influencing legislative action, but the laws have been interpreted to only regulate the lobbying of legislative officials. Finally, lobbyist registration threshold requirements are confusing, and the penalties the GSPC may levy against lobbyists for violations of the ethics laws have not been raised since the 1970s.

Highlights of the Bill:

- Modifies lobbying regulation to clearly cover both persons who lobby legislative officials AND persons who lobby executive officials to influence legislative action. **Sections 1 and 2**
- Clarifies who must register as a lobbyist (24 hour or \$100 expenditure rule) and expands list of public officials who are exempt from registering. **Sections 3 and 4**
- Requires lobbyists to submit quarterly reports listing all money expended on food, refreshment, and entertainment, including itemized statements for expenditures over \$75 in value and gifts over \$15 in value. **Section 5 (1)(a), (b), and (c); Section 11**
- Requires entities that employ lobbyists to submit quarterly reports listing total amounts spent on lobbying, amounts spent on each individual lobbyists or lobbying entity, and itemized statements for expenditures over \$75 in value and gifts over \$15 in value. **Section 6 (1)(a), (b), (c), and (d); Section 11**
- Modifies the administrative adjudication process to provide clarity and consistency with the administrative adjudication process for public officials. **Section 8 (1) – (14)**
- Extends the length of the preliminary review phase from 90 days to 135 days and of the investigatory phase from 120 days to 180 days. **Section 8 (4)(a) and 6(a)**
- Allows a person subject to an action by the GSPC to transfer the action to the Marion County Circuit Court in lieu of a contested case proceeding (“opt-out”) unless the GSPC agrees that the decision of the administrative law judge is final. **Section 8 (7)**
- Increases the maximum fine that the GSPC may impose for a violation of these rules from \$1,000 to \$5,000. **Section 9**

Amendment Note: Portions of this bill were added by amendment to HB 2595 in the House. The provisions moved to HB 2595 are primarily non-substantive clean-up type changes that were not addressed in other legislation (SB 10). One important

substantive provision (Section 8) amending ORS 171.778 dealing with procedures for handling lobbyist violations before the GSPC, was added to HB 2595 as Section 24. However, the proposed modified “opt-out” alternative in that section was deleted, leaving HB 2595 with a straight APA procedure for handling such violations.⁸²

⁸² Other provisions from SB 496 that were added to HB 2595 are the following: Section 7 (added to HB 2595 as Section 27) and Section 9 (added in part to HB 2595 at Section 34). In addition, minor conforming changes may have been made to other provisions in HB 2595 due to the addition of these provisions.

C. SUMMARY OF SB 497 (Public Official Reporting Requirements)

Background: Under current Oregon law, specified public officials (about 4000 total) are required to file a yearly statement of economic interest (SEI). The primary purpose of the SEI is to provide notice to the public of a public official's economic interests, particularly those interests derived from sources who have legislative or administrative interests and those over which the public official has authority. The information contained on these statements includes listings of certain income sources, property ownership, business relationships, debts, and payment of certain trip expenses by others. These statements have been criticized for being overly complex and ineffective in providing relevant information in a timely fashion to the public. In addition, reporting requirements are inconsistent for public officials, lobbying entities, and lobbyists. The chief aims of SB 497 are to clarify and strengthen reporting requirements for public officials, make compliance less burdensome and provide greater public transparency.

Highlights of the Bill:

- Simplifies reporting requirements of the *yearly* SEI filing form by removing percentage based income reporting in favor of reporting the five most significant sources of income. **Section 3 (1)**
- Requires SEI filers to file a separate more frequent (quarterly) report of the following:
 - Requires itemized reporting for gifts received over \$15 in value from persons with a legislative or administrative interest. (Previously public officials were not required to report gifts and lobbyists reported gifts over \$73.)
 - Requires itemized reporting of food, lodging, and travel expenses related to an event that bears a relationship to the public official's office and when the public official appears in an official capacity, that are paid for by a person with a legislative or administrative interest. if the expenses are over \$75. (Previous reporting requirements were \$148 for public officials and \$73 for lobbyists.)
 - Requires reporting of honoraria over \$15 if money award. (Previous reporting requirements were \$50 for public officials and \$73 for lobbyists.)
 - Requires itemized reporting of sources of income over \$1,000 received from a person with a legislative or administrative interest. (This is existing law, but it is reported only yearly.) **Section 6 (1)**
- Requires gift givers subject to the gift limits to report to the GSPC and to the public official the value of such gifts and food, lodging and travel expenses related to an event.
- Allows public officials to file an amended statement of economic interest without penalty if done within 30 days after the filing deadline. **Section 1 (8)**
- Repeals provisions allowing electors of certain cities and counties to opt out of the SEI requirements. **Section 1 (1)(b), (i), (j), and (k)**

Amendment Note: Portions of SB 497 were added by amendment to HB 2595 in the House. The provisions moved to HB 2595 are primarily non-substantive clean-up type changes that were not addressed in other legislation (SB 10).⁸³

⁸³ Provisions of SB 497 added to HB 2595 are as follows: Portions of Section 1 dealing with SEI's were moved to Section 17 of HB 2595. Section 5 amending ORS 244.090 clarifying circumstances under which stock ownership did not create a business relationship between a lobbyist and a public official was added as Section 33 of HB 2595. Portions of Section 9 amending ORS 244.160 were added to Section 34 of HB 2595. Portions of Section 10 amending ORS 244.195 were added to Section 10 of HB 2595. Portions of sections 11, 13 and 14 dealing with false swearing and related matters were moved to Sections 29-31 of HB 2595. Section 15 dealing with reporting for Congressional candidates and officeholders was added as Section 33 of HB 2595. Provisions of Section 16 amending ORS 244.130 on conflicts of interest were moved to Section 9 of HB 2595. Provisions of Section 17 amending ORS 244.290 on GSPC recordkeeping obligations were added to Section 3. Section 18 on public records was moved to Section 35 of HB 2595. Section 19, repealing provisions that exempted certain cities and counties from the requirement to file SEI's was moved to Section 41 of HB 2595. In addition, minor conforming changes may have been made to other provisions in HB 2595 due to the addition of these provisions.

E. SUMMARY OF SB 498 (Prejudgment Bias)

Background: SB 498 would significantly expand the scope of conflict laws by requiring public officials to disclose personal bias or prejudice for or against identifiable persons and by further requiring the public official to refrain from acting when such bias is present. Under current law certain biases, such as those based on race, sex, religion, family status or sexual orientation, are prohibited by civil rights laws. However, personalized bias, which is not prohibited by civil rights laws, can exist, and be harmful to the rights and interests of members of the public. SB 498 is designed to tackle this problem.

Highlights of the Bill:

- When a public official has authority to choose among alternative actions, this measure prohibits most public officials from taking action where that action may be significantly influenced by a personal financial interest or individualized personal bias for or against an identified person. **Section 2(1)**
- Requires public official to disclose personal financial interest or individualized personal bias when facing an action that may violate this statute. **Section 2(2) and Section 2(3)**
- Allows elected public officials and appointed members of boards and commissions to vote, but not otherwise participate in discussion or debate, where such vote is necessary to meet a minimum vote requirement. **Section 2(4)**
- Requires members of the Legislative Assembly to make disclosure and refrain from participating in discussion or debate when the legislator may be significantly influenced by a personal financial interest or individualized personal bias, but allows members to vote on a matter despite the bias or a personal financial interest when it is considered by the Senate or House of Representatives. **Section 2(5)**

F. SUMMARY OF HB 2594 (Subsequent Employment)

Background: One of the basic guiding principles of Oregon's government ethics law is that public officials should not receive financial gain, that would be otherwise unavailable, but for being a public official. Actions surrounding a public official's present employment (and the overlap with the duties of a public official) and subsequent employment are relevant to ethics laws and this principle of financial gain. Present employment and the prospects of future employment are forms of financial gain that may cause public officials to engage in conduct while in office that is self-serving and perhaps contrary to the public interest. Ethics subsequent employment laws are intended to prohibit public officials from taking inappropriate advantage of relationships or confidential information after leaving public office. The Law Commission recommends expanding the law in the area of employment, but the expansions are intended to be drawn narrowly to deal with perceived harms, without unduly impacting career opportunities available to public officials.

Highlights of the Bill:

- No public official shall solicit or receive any pledge or promise of future employment from any person who is involved in a matter in which the official personally and substantially is participating. (The official must recuse themselves from all matters they are participating on involving the potential employer if they want to engage in employment discussions. This is existing law for government lawyers.) **(Section 2(1)(b))**
- Public officials may not represent a client for a fee before the governing body of a public body of which the public official is a member. In addition, public officials may not provide to a client for a fee, advice relating to influencing the public body served by the official (consulting fees). (Present law takes care of this issue generally with conflict of interest rules, but legislators can act despite a conflict of interest.) **(Section 2(2))**
- Legislators may not receive money for lobbying for one session after they leave office (revolving door prohibition). (Present law restricts subsequent lobbying by certain executive branch officials but there are no current restrictions on legislators). **(Section 3(4))**
- Public officials may not receive any direct beneficial financial interest in a public contract authorized by the public official or governing body of which the public official was a member, for 2 years, unless the public official did not participate. **(Section 4)**
- A person who ceases to be a public official may not use confidential information gained by reason of holding a position as a public official for gain of any person. (Present law only covers confidential information while a public official.) **(Section 5)**

G. SUMMARY OF HB 2595 (GSPC Organization, Funding, Sanctions and Remedies)

Background: The Government Standards and Practices Commission (GSPC) enforces Oregon's government ethics that apply to all state and local government public officials. When the GSPC determines a violation was made, the GSPC imposes sanctions. The GSPC also has authority to issue advisory opinions to assist officials in making decisions—to prevent ethics violations and clarify ethics law requirements. The GSPC has lacked stable funding for many years. The GSPC relies primarily on the media and public to bring ethics complaints; it does not have auditing authority or abilities presently. The GSPC has rulemaking authority but it has been underutilized. Finally, there is very little statutory or case law guidance on what the effect is of a government action taken by or with the participation of a public official who was ethically not legally eligible to participate.

Highlights of the Bill:

- Requires the GSPC to consider the public interest and both prior and future sanctions in other government proceedings when deciding to investigate or impose sanctions. **Section 2(2)**
- Requires GSPC to conduct accuracy audits of a sample of reports and statements filed with the GSPC. **Section 3(2)(e)**
- Requires GSPC to promulgate rules distinguishing continuing violations from multiple violations of an ethics rule and rules defining appropriate sanction amounts for violations within the statutory ranges. **Section 3(2)(f), (g)**
- Requires rulemaking and review of rules at least once a year. Provides specific requirement for GSPC to promulgate rules for issues of general interest that have been addressed on a recurring bases. **Section 3(4)**
- Provides that state agencies and state-wide organizations may submit specific ethics policies for review and approval by the GSPC. If approved, the GSPC may not impose sanctions for actions in compliance with the approved policy. **Section 5**
- Establishes a “three-tier” system of advisory opinions and advice (GSPC formal written, staff written, and staff advice). Provides timelines for GSPC and staff to respond to requests for opinions or advice and requires internet access to opinions. When imposing sanctions, provides for mitigation and consideration by the GPSC if an official relied on an opinion or advice. **Sections 12 to 16**
- Increases maximum civil penalties for most ethics violations from \$1,000 to \$5,000 and increases per day fine for late filings of reports, but also allows the GSPC to issue a written reprimand in lieu of imposing a civil penalty. **Section 18**
- Limits current ability of public officials to “opt out” of the administrative hearings process and go to circuit court, if the GSPC gives final order authority to the ALJ. **Section 23(8)**
- Provides for funding mechanism for GSPC and requires the Department of Administrative Services to determine on a biennial basis the amount of money needed to enable the GSPC to maintain current service levels and appropriates that sum to the GSPC. **Sections 26 to 28**

- Clarifies circumstances under which action taken by a public official or public body is valid despite an official being disqualified by law (including ethics laws) from taking part in the action **Section 29 to 30**

Amendment Note: This bill was substantially amended in the House of Representatives by addition of selected provisions from SBs 496 and 497, and HBs 2596 and 2598. See the amendment notes following each of those bills for more information on the provisions added to SB 2595.

Additionally, provisions dealing with remedies, funding and the legal expense trust fund were deleted from HB 2595 in the House of Representatives. Funding and the legal expense trust fund are addressed elsewhere (SB 10). As amended, HB 2595 contains a lot of non-controversial changes and other non-substantive clean-up work. The bill is mostly focused on GSPC duties and the adjudication process. The highlights of the amended bill as it was passed in the House (HB 2595 A) are set forth below.

Highlights of HB 2595 A:

- Requires the GSPC to consider the public interest and both prior and future sanctions in other government proceedings when deciding to investigate or impose sanctions. **Section 2(2)**
- Requires GSPC to conduct accuracy audits of a sample of reports and statements filed with the GSPC. **Section 3(2)(e)**
- Requires GSPC to promulgate rules distinguishing continuing violations from multiple violations of an ethics rule and rules defining appropriate sanction amounts for violations within the statutory ranges. **Section 3(2)(f) and (g)**
- Requires rulemaking and review of rules at least once a year. Provides specific requirement for GSPC to promulgate rules for issues of general interest that have been addressed on a recurring bases. **Section 3(4)**
- Provides that state agencies and state-wide organizations may submit specific ethics policies for review and approval by the GSPC. If approved, the GSPC may not impose sanctions for actions in compliance with the approved policy. **Section 5**
- Requires the GSPC to notify a public body if the public official violates any government ethics laws. **Section 11**
- Establishes a “three tier” system of advisory opinions and advice (GSPC formal written, staff written, and staff advice). Provides timelines for GSPC and staff to respond to requests for opinions or advice and requires internet access to opinions. Provides immunity or mitigation from sanctions depending on the type of opinion relied upon by the public official. **Sections 3 and 12 – 16**
- Deletes exemption from filing an SEI for public officials, including municipal judges, of counties and cities voting “no” on Ballot Measure 14 in 1974. **Section 17**
- Increases maximum civil penalties for most ethics violations from \$1,000 to \$5,000 and increases per day fine for late filings of reports. **Section 18**

- Puts in clear chronological order the GSPC’s adjudication procedures, detailing the Preliminary Review Phase (confidential) and the Investigatory Phase. **Sections 23 and 24**
- Extends timelines for the GSPC to act during each phase to correlate with the GSPC’s meeting schedule (approximately every 6 weeks). **Section 23 (4)(a) and (6)(a); Section 24 (4)(a) and (6)(a)**
- Provides new exception for Preliminary Review Phase timeline: when a complaint is filed against a candidate and the election is within 61 days, candidate can choose to proceed or extend the timeline until after the election (helps depoliticize the GSPC). **Section 23 (4)(a)(B)**
- Eliminates public official’s ability to “opt out” of the administrative hearings process (APA process) and move proceedings to circuit court. **Deleted Section 23 (8) and Section 24 (8)**
- Requires GSPC to report findings to person subject to investigation, and if applicable, to appointing authority, Attorney General, local district attorney, and Commission on Judicial Fitness. **Section 23 (8); Section 24 (8)**

H. SUMMARY OF HB 2596 (Adjudication Process, Training, Legal Defense Fund)

Background: The Government Standards and Practices Commission (GSPC) enforces Oregon's government ethics laws that apply to all state and local government public officials. The process for bringing a complaint is codified in ORS Chapter 244. The statutes are difficult to read and the entire present process was reviewed by the Oregon Law Commission to determine whether substantive and technical improvements could be made.

Highlights of the Bill:

- Puts in clear chronological order the GSPC's adjudication procedures, detailing the Preliminary Review Phase (confidential) and the Investigatory Phase. **Section 1**
- Modestly extends timelines for the GSPC to act during each phase to correlate with the GSPC's meeting schedule (approximately every 6 weeks). **Section 1(4)(a), (6)**
- Provides new exception for Preliminary Review Phase timeline: when a complaint is filed against a candidate and the election is within 61 days, candidate can choose to proceed or extend the timeline until after the election (helps depoliticize the GSPC). **Section 1(4)(a)(B)**
- Limits current ability of public officials to "opt out" of the administrative hearings process and go to circuit court, if the GSPC gives final order authority to the ALJ. **Section 1(7)**
- Requires GSPC to report findings to person subject to investigation, and if applicable, to appointing authority, Attorney General, local district attorney, and Commission on Judicial Fitness. **Section 1(9)**
- Requires copy of ethics manual to be distributed to every public official as practicable. **Section 4**
- Permits public official to establish a legal expense trust fund (regulated by the GSPC) to defray legal expenses incurred by the official in defending civil, criminal or other legal proceedings brought by a public body that relate to or arise from the course and scope of the duties of the public official. Makes such donations to the legal expense trust fund an exception to the financial gain and gift prohibitions. **Sections 9-20**

Amendment Note: Portions of this bill were added by amendment to HB 2595 in the House. The provisions moved to HB 2595 are primarily non-substantive clean-up type changes that were not addressed in other legislation (SB 10). One important substantive provision (Section 1) amending ORS 244.260 dealing with procedures for handling ethics violations before the GSPC, was added to HB 2595 as Section 23. This provision provides parallel procedural treatment to that provided by Section 24 for lobbying violations under ORS Chapter 171. However, the proposed modified "opt-out" alternative in that section was deleted (as was a parallel provision in Section 24 originally drawn from SB 496) leaving HB 2595 with a straight APA procedure for handling such violations.⁸⁴

⁸⁴ Other provisions from SB 2596 that were added to HB 2595 are the following: Section 4 (added to HB 2595 as Section 36); portions of Section 5 (added to Section 3 of HB 2595); Section 6 (added to HB 2595 as Section 37); and portions of Section 7 (added to Section 34 of HB 2595). In addition, minor conforming changes may have been made to other provisions in HB 2595 due to the addition of these provisions.

I. SUMMARY OF HB 2597 (Campaign Contribution Usage)

Background:

One of the basic guiding principles of Oregon's government ethics law is that public officials should not receive financial gain, that would be otherwise unavailable, but for being a public official. This concept is captured in ORS Chapters 244 and 171, especially in the areas of regulating lobbyists and gifts. There is an obvious overlap in another regulated area of law—campaign finance. That is, public officials can be influenced in two primary ways: 1) lobbying and 2) campaign contributions. If restrictions on both are not addressed consistently, gamesmanship can occur. This bill would amend provisions in ORS Chapter 260 to restrict the use of campaign contributions.

Highlights of the Bill:

- Defines what principal campaign contributions may be used for-- campaign contribution may be used to support the nomination or election of the candidate.
Section 1(1)
- Prohibits use of campaign funds to pay fines and judgments except for certain civil penalties imposed by the Secretary of the State. **Section 1(2)(a), (3)(b), (5)(c)**
- For principal or candidate committees, prohibits transfer of contributed moneys to any other candidate or political committee. Contributed money is in trust for election of candidate—not others. (Miscellaneous PACs can still transfer moneys and candidates can contribute personal funds to other candidates or political committees.)
Section 1(2)(b)
- Prohibits use of campaign funds to defray expenses incurred once in office. (No double dipping.) (Public money should pay for public office expenses, and not campaign money.) **Section 1(2)(c), (5)(b)**
- When a principal or candidate campaign committee determines to discontinue, leftover moneys only may be distributed to charitable organizations, political committees of any political party (state or local), caucus political committee, or the Property and Supplies Stores Account of the legislature. **Section 1(4)**
- For principal or candidate campaign committees, the Treasurer may NOT be the candidate unless it is a small campaign (<\$2000) or the campaign is funded entirely by personal funds. **Section 2**

J. SUMMARY OF HB 2598 (Gifts, Honoraria and Financial Gain)

Background: One of the most basic principles of governmental ethics is that government employees and public officials shall not use public office for private gain. HB 2598 deals specifically with gifts, honoraria and other financial gain received by public officials. The Oregon Law Commission considered, but did not adopt, an outright gift ban, recognizing that such bans could adversely affect beneficial and constructive interactions. Instead, the Law Commission employed enhanced reporting requirements. (See SBs 496 and 497) This bill attempts to balance the needs of public officials to interact with experts, the interested public, and members from other branches of government with the real and perceived need to limit and disclose what public officials receive from persons with a legislative or administrative interest.

Highlights of the Bill:

- Allows public officials to accept food, lodging, travel and cost of registration in connection with an event, but only where the official “participates in an official capacity at an event that bears a relationship to the public official’s office.” The definition of “participates in an official capacity” is clarified and strengthened. **Section 1(6)(b)(C)**
- Continues the gift exception for food and beverage consumed in the presence of the giver. **Section 1(6)(b)(D)**
- Provides new exceptions to gift limits for continuing education registration expenses, membership dues in professional organizations, and publications. **Section 1(6)(b)(E), (F), and (G)**
- Eliminates the extra entertainment exception. **Section 1(6)(e) [deleted]**
- Expands the current “salary” exception to the general prohibition on private financial gain by clarifying that it includes fringe benefits and other items that are part of an official compensation package approved by the employer. This provision would allow, but not require, public bodies to include such items as cell phone usage and frequent flyer miles in an official compensation package. **Section 2**
- Allows public officials to receive gifts from persons with a “legislative or administrative interest,” but only up to a maximum value of \$100 for a single gift (regardless of how many persons provide or contribute to that gift) and an aggregate limit of \$250 per year on all gifts from any “single source.” The bill effectively reduces the value of allowed gifts by eliminating current indexing, capping the value of gifts from multiple contributors and establishing an aggregate limit. **Section 3(1)**
- Limits honoraria if the honoraria are solicited or received in connection with the official duties of the public official to \$50 and monetary honoraria over \$15 must be reported. **Sections 4(4) and 6**

Amendment Note: Portions of this bill were added by amendment to HB 2595 in the House of Representatives. The provisions moved to HB 2595 are primarily

non-substantive clean-up type changes that were not addressed in other legislation (SB 10).⁸⁵

⁸⁵ Provisions of SB 2598 added to HB 2595 are as follows: Portions of Section 5 were added to Section 7 of HB 2595. Section 11 was moved to SB 2595 as Section 28. Section 15 was moved to HB 2595 as Section 38.

Oregon Law Commission

173.315 Oregon Law Commission established; duties; membership; chairperson.

(1) The Oregon Law Commission is established to conduct a continuous substantive law revision program, including but not limited to the subjects stated in ORS 173.338.

(2) The Oregon Law Commission shall consist of:

(a) Two persons, at least one of whom is a Senator at the time of appointment, appointed by the President of the Senate;

(b) Two persons, at least one of whom is a Representative at the time of appointment, appointed by the Speaker of the House of Representatives;

(c) The deans of Oregon's accredited law schools, or their designees;

(d) Three persons designated by the Board of Governors of the Oregon State Bar;

(e) The Attorney General or the Attorney General's designee;

(f) The Chief Justice of the Supreme Court or the Chief Justice's designee; and

(g) One person appointed by the Governor.

(3) The term of office of each appointed member of the Oregon Law Commission is two years. Before the expiration of the term of a member, the appointing authority shall appoint a successor whose term begins on September 1 next following. A member is eligible for reappointment. If there is a vacancy for any cause, the appointing authority shall make an appointment to become immediately effective for the unexpired term. A member shall be removed from the commission if the member misses three consecutive meetings without prior approval of the chairperson.

(4) The Oregon Law Commission shall elect its chairperson and vice chairperson from among the members with such powers and duties as the commission shall determine.

(5) A majority of the members of the commission constitutes a quorum for the transaction of business. [1981 c.813 §1; 1997 c.661 §1]

173.320 [1963 c.292 §3 (173.310 to 173.340 enacted in lieu of 173.155); repealed by 1979 c.472 §2]

173.325 Compensation and expenses of members. A member of the Oregon Law Commission who is not a member of the Legislative Assembly shall receive no compensation for services as a member but, subject to any other applicable law regulating travel and other expenses for state officers, may receive actual and necessary travel and other

expenses incurred in the performance of official duties, providing funds are appropriated therefore in the budget of the Legislative Counsel Committee. [1981 c.813 §2; 1987 c.879 §3; 1997 c.661 §2]

173.328 Commission meetings. The Oregon Law Commission shall meet at least once every three months at a place, day and hour determined by the commission. The commission also shall meet at other times and places specified by the call of the chairperson or of a majority of the members of the commission. [1997 c.661 §5]

173.330 [1963 c.292 §4 (173.310 to 173.340 enacted in lieu of 173.155); repealed by 1979 c.472 §2]

173.335 Commission staff; duties. (1) The Legislative Counsel shall assist the Oregon Law Commission to carry out its functions as provided by law.

(2) The Legislative Counsel pursuant to subsection (1) of this section shall:

(a) Coordinate research for, and preparation of, legislative proposals, as requested by the commission.

(b) Examine the published opinions of any judge of the Supreme Court, the Court of Appeals and the Oregon Tax Court of this state for the purpose of discovering and reporting to the commission any statutory defects, anachronisms or omissions mentioned therein.

(c) Receive suggestions and proposed changes in the law from interested persons, and bring such suggestions and proposals to the attention of the commission.

(d) Perform such other services as are necessary to enable the commission to carry out its functions as provided by law. [1981 c.813 §§3,4; 1997 c.661 §6]

173.338 Law revision program; drafting services. (1) The specific subject areas to be part of the law revision program of the Oregon Law Commission include but are not limited to:

(a) The common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.

(b) Proposed changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies.

(c) Suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law.

(d) Such changes in the law as the commission considers necessary to modify or

eliminate antiquated and inequitable rules of law and to bring the law of Oregon into harmony with modern conditions.

(e) The express repeal of all statutes repealed by implication or held unconstitutional by state and federal courts.

(2) The Legislative Counsel shall provide necessary drafting services as legislative priorities permit. [1997 c.661 §3]

173.340 [1963 c.292 §5 (173.310 to 173.340 enacted in lieu of 173.155); repealed by 1979 c.472 §2]

173.342 Commission biennial report to Legislative Assembly. (1) The Oregon Law Commission shall file a report at each regular session of the Legislative Assembly that shall contain recommendations for statutory and administrative changes and a calendar of topics selected by the commission for study, including a list of the studies in progress and a list of topics intended for future consideration.

(2) The commission shall also study any topic that the Legislative Assembly, by concurrent resolution, refers to it for such study. [1997 c.661 §4]

173.345 Cooperation with bar associations or other associations. The Oregon Law Commission may cooperate with any bar association or other learned, professional or scientific association, institution or foundation in a manner suitable to fulfill the functions of the commission. [1997 c.661 §7]

173.347 Appearance of commission members or staff before Legislative Assembly. The Oregon Law Commission by its members or its staff may appear before committees of the Legislative Assembly in an advisory capacity, pursuant to the rules thereof, to present testimony and evidence in support of the commission's recommendations. [1997 c.661 §8]

173.350 [1965 c.397 §1; repealed by 1979 c.472 §2]

173.352 Advisory and technical committees. (1) To aid and advise the Oregon Law Commission in the performance of its functions, the commission may establish such advisory and technical committees as the commission considers necessary. These committees may be continuing or temporary. The commission shall determine the representation, membership, terms and organization of the committees and shall appoint their members.

(2) Members of the committees are not entitled to compensation, but in the discretion of the commission may be reimbursed from funds available to the commission for actual and necessary travel and other expenses incurred in the performance of their official duties. [1997

c.661 §10]

173.355 Solicitation and receipt of gifts and grants. The Oregon Law Commission may solicit and receive funds from grants and gifts to assist and support its functions. [1997 c.661 §9]

173.357 Disposition of moneys collected or received by commission. All moneys collected or received by the Oregon Law Commission shall be paid into the General Fund of the State Treasury. Such moneys are continuously appropriated for and shall be used by the commission in carrying out the purposes for which the funds are received. [1997 c.661 §11]

Program Committee Selection Criteria

In addition to the guidance of ORS 173.338, the Oregon Law Commission approved the following criteria for the selection of law reform projects for development by the Commission:

Selection of Issues for Study/Development of Legislation

The Commission should select issues for study/development of legislation based on the following criteria:

- A. Source of Work Proposals (Priorities)
 - 1. Legislative Assembly proposals approved by resolution, legislative leadership or committee chair;
 - 2. Judicial branch proposals approved by the Chief Justice of the Supreme Court, Judicial Conference or State Court Administrator;
 - 3. Legislative Counsel proposals;
 - 4. Law school proposals;
 - 5. Oregon State Bar section proposals;
 - 6. Commission member proposals; and
 - 7. Other sources
- B. Nature of Issues

The Commission should give highest priority to private law issues that affect large numbers of Oregonians and public law issues that fall outside particular regulatory areas administered by state agencies.
- C. Resource Demands

The Commission should select issues that available staff and the Commission can finish within the time set for study/development of legislation.
- D. Probability of Approval by Legislature/Governor

The Commission should select issues that can lead to legislative proposals with a good prospect of approval by the legislature and Governor.
- E. Length of Time Required for Study/Development of Legislation

The Commission should select issues that include both those permitting development of proposed legislation for the next legislative session and those requiring work over more than one biennium.

Program Committee: Project Proposal Outline
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Do you (or does your organization) have a law reform project that is well-suited for study by the Oregon Law Commission?

A written law reform proposal seeking involvement of the Oregon Law Commission should be addressed to the Oregon Law Commission Program Committee for consideration and contain the following preferred sections:

1. **PROBLEM:** Identify the specific issue to be studied or addressed by the Law Commission and explain the adverse consequences of current law. An illustration from real life might be helpful.
2. **HISTORY OF REFORM EFFORTS:** Explain past efforts to address the problem and the success or limits of those efforts.
3. **SCOPE OF PROJECT:** Explain what needs to be studied, evaluated or changed to fix the problem.
4. **LAW COMMISSION INVOLVEMENT:** Explain why the issue is a good subject for law reform of broad general interest and need (as opposed to an issue likely to be advanced by a single interest group or lobby).
5. **PROJECT PARTICIPANTS:** Identify individuals who are willing to serve on a Work Group, and a Reporter who is willing to work with the Chair of the Work Group to draft a Report and Comments. The Chair of the Work Group should be a Commissioner. The Proposal may state a preference for a chair.

Mailing Address:
Oregon Law Commission
245 Winter Street SE
Salem, OR 97301

Phone: 503-779-1391
Fax: 503-779-2535

Illustrative Outline of a Report to the Oregon Law Commission

All Commission recommended legislation should be accompanied by a report that among other things explains the need for the bill and the details of the bill. The following is an outline of a report to the Oregon Law Commission for Work Groups to consider when preparing their own reports to the Commission. Of course, each Work Group's issues are unique and certain sections outlined below may not be necessary for every report. Therefore, the following outline is only a guide and actual reports may differ.

I. Introductory summary

This section briefly identifies the problem area, the reason why it needs attention, and the overall objective of the bill. The introductory summary may be followed by the actual text of the proposal's scope section, if the text is quite brief, otherwise by a summary of its provisions.

II. History of the project

This section recounts when the OLC undertook the project, who led it, who was on the Work Group, who participated in the research and the design of the proposal, the process of consultation with experts in or outside Oregon, and interested persons outside the Commission.

III. Statement of the problem area

This section explains in some detail what in the existing state of the law is problematic, either by reason of uncertainty and lack of clear standards, or because apparently clear standards are inconsistent or self-contradictory, or are outmoded, inefficient, inadequate, or otherwise unsatisfactory.

IV. The objectives of the proposal

The preceding sections set the stage for now identifying the objectives of the proposal concretely (as distinct from general goals like "clarification," "simplification," or "modernization") in advance of explaining the choice of legal means to achieve those concrete objectives. This section would identify propositions that are uncontroversial and others on which different interests have competing objectives. If one objective of the proposal is to craft an acceptable compromise among competing interests, this section would candidly state what opposing positions were argued in the consultations, and why the proposal represents the best and most principled accommodation of those that have merit. This section would also note any issues that were discussed but were deferred, complete with an explanation of the deferral.

V. Review of legal solutions existing or proposed elsewhere

The report here or later should describe models of existing or proposed legal formulations that were examined in preparing the proposal. An explanation of how Oregon compares with the rest of the states would be helpful.

VI. The proposal

In this section, the report should set forth the whole proposal verbatim, except for revisions of a lengthy statute that is better attached as an appendix. The report would then proceed by setting out significant parts of the bill section by section (or by multi-section topics), followed by explanatory commentary on each item. American Law Institute statutory projects offer an illustrative model.

On occasion, the Commission may choose to offer alternative drafts. This can be appropriate when the Commission considers it important that a statute (or rule) provide clear and consistent guidance on a legal problem while leaving to the political decision-makers the choice of which among competing policy objectives should prevail.

VII. Conclusion

The conclusion summarizes the reasons why the bill should be adopted.

VIII. Appendices

These would include a bibliography of sources, and perhaps relevant statutory texts or excerpts from other relevant documents or published commentary bearing on the proposal.

IX. Form of publication

A formal report to the Oregon Law Commission should be reproduced in a format suitable for preservation by the Commission, Legislative Counsel, the Department of Justice, and for distribution to libraries and other interested subscribers, perhaps by one of the state's academic law reviews.

Apart from the formal report, the experts who worked on the project should be encouraged to publish their own articles analyzing and commenting on the subject of the report in more detail. Publication in these two different forms was the common practice for scholarly reports to the Administrative Conference of the United States.

MEMORANDUM

To: Commissioners of the Oregon Law Commission
From: David Kenagy
Date: September 6, 2001
Re: Managing Mid-Session Amendments to Law Commission recommended bills

Our experience in the 2001 Legislative Session taught that even the most carefully drafted Law Commission legislative recommendations will be amended during the legislative process. We also learned that the amendments may be proposed from many sources for reasons some of which may not even be known or revealed until after an amendment has been adopted.

Other Law Commissions around the country have faced the same issue. In general they favor maximum flexibility for those charged with guiding the legislation on behalf of the Commission. They do not adopt policy constraining the process but follow understood practices that have developed over their years of experience. I suggest that we do the same. This memo displays the broad outlines of the approach used by the Executive Director's office, which we intend to use in the future, subject to further guidance from the Commission.

You will recall that in light of the experiences of the 2001 Session, the Commission discussed at its July 13, 2001 meeting how to best process the inevitable amendments to Law Commission bills. This discussion included a desire to see Commission recommendations enacted, unless the content of the final enactment departs fundamentally from the original recommendation.

The Commission's Executive Director is responsible for guiding the Commission's recommendations through the legislative process. In that capacity the Executive Director is expected to exercise an initial judgment when faced with a proposed legislative amendment to a Law Commission bill. That initial judgment is to distinguish between amendments that make either "material" or "immaterial" changes to the Law Commission bill. Technical text changes and corrections which do not alter the purpose and function of a bill are examples of immaterial changes.

In the exercise of this initial judgment concerning materiality, the Executive Director will resolve doubts in favor of assuming materiality in order to engage the wider consultation and discussion about the amendment as detailed below. Consultation with either the Commission Chair, Vice-Chair or others usually would be a part of the Executive Director's initial decision making process.

If an amendment is immaterial, the Executive Director will continue to guide the amended Law Commission bill as would be the case without amendment. Making clear, however, that the amendment does not carry formal Law Commission approval.

If an amendment is material, the Executive Director will take steps from among those listed below. The steps selected will naturally depend upon the stage of the legislative process in which the amendment is proposed or made.

Generally, early in the Session there is more time for broad-based discussion, reflection and review. Later in the Session faster responses are needed, requiring a more confined and efficient discussion. Regardless of the step chosen, the Executive Director will consult with the Chair of the Commission in order to take such other necessary steps or combinations of steps as may not be contemplated at this writing. The keys are good communication and flexibility in approach.

The hierarchy of steps in managing mid-session amendments is as follows:

1. In consultation with the Commission Chair or Vice-Chair, present the amendment to the full Law Commission for formal consideration and a vote on taking a position on the amendment. Only this first approach would authorize the Executive Director to affirmatively report support or rejection of an amendment "on behalf of the Commission." This approach, however, requires both an assessment of the time available for such action and the nature and scope of the amendment itself. Experience has shown that some amendments, while fairly judged "material," are of lesser scope and effect than others and may therefore be better addressed in a less formal manner.
2. In consultation with the Commission Chair or Vice-Chair, present the amendment to the full Work Group responsible for the Commission's draft at a meeting of the Work Group or informally by email or otherwise where necessary.
3. In consultation with the Commission Chair or Vice-Chair, present the amendment to the responsible Work Group Chair, to the Work Group Reporter, and to any members of the Work Group known to the Executive Director to be most knowledgeable on the subject raised by the amendment.
4. In consultation with the Commission Chair or Vice-Chair, present the amendment to the Work Group Chair, Reporter or other most knowledgeable Work Group member.

Following each of the above actions the Executive Director will carry out the steps next reasonably necessary to implement the guidance obtained from the process. In no case shall the views of any person or group of persons be reported by the Executive Director as the views of the Law Commission unless supported by a vote of the Commission affirming those views.

To: Commissioners of the Oregon Law Commission
From: David Kenagy, Executive Director of the Oregon Law Commission
Date: November 9, 2001

Re: Memorandum of Understanding: Reminding Work Group Members to Act on Their Independent Professional Judgment

The Oregon Law Commission exists to provide clarification and improvement of Oregon law. ORS 173.315; ORS 173.338. For this purpose, the Commission must rely on knowledgeable committees, known as Work Groups, to pursue the various substantive projects that are the Commission's task. ORS 173.352 (1) provides that the Commission shall determine the membership and organization of the committees and "shall appoint their members." Work groups generally are made up of Commissioners and volunteers who bring either professional expertise to the law reform project or familiarity with community interests that are particularly affected by the project.

The goal of a Commission project is to produce what the Commission, in its professional judgment, determines to be the best feasible improvement in the law, taking into account that different people and groups have divergent views on and interests in the subject matter. This goal is furthered by finding a way for knowledgeable advisors who will express those views and interests to inform the Commission's Work Groups, while leaving the decisions on the substantive issues to the disinterested professional judgment of the regularly appointed members of the Work Group. The work of these committees can only be hampered if some members subordinate their judgment of the public interest to the interests of a particular private party or client. I therefore recommend that the Commission accept a practice by the Executive Director's office of communicating to Work Group members that they are to speak and vote on the basis of their individual and professional convictions and experience in the exercise of independent judgment.

Other commissions and committees in Oregon and throughout the United States have addressed the issue of membership criteria in this context. Some have promulgated statutes, rules, or policies to require or encourage members to contribute solely on the basis of their personal experience and convictions. For example, Congress passed the Federal Advisory Committee Act in 1972. A section of that statute speaks to membership. 5 U.S.C.A. app.2 § 5 (West 1996). See Attachment 1 for full text of statute. That Act arose out of the growing number of advisory groups in the nation and growing concern that special interests had captured advisory committees, exerting undue influence on public programs. H.R. REP. NO. 1017, 92d Con., *reprinted in* 1972 U.S.C.C.A.N. 3491, 3495; Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE L. ON REG. 451, 462 (1997). The Act also required advisory committees to keep minutes, including a record of persons present. In short, the goal of the Act was to establish openness and balanced representation but also prevent the surreptitious use of advisory committees to further the interests of any special interest. H.R. REP. NO. 1017, 92d Con., *reprinted in* 1972 U.S.C.C.A.N. 3491, 3500.

Another example comes from the National Assessment Governing Board, appointed by the Secretary of Education, for the purpose of formulating policy guidelines for the National Assessment; the Board has twenty-five members. 20 USCA § 9011 (West 2000). The statute establishing the Board contains the following provision limiting membership: “The Secretary and the Board shall ensure at all times that the membership of the Board reflects regional, racial, gender, and cultural balance and diversity and that the Board exercises its independent judgment, free from inappropriate influences and special interests.” *Id.* at §9011 (b)(3). Still another example is found in ORS 526.225; that Oregon statute authorizes the State Board of Higher Education to appoint a Forest Research Laboratory Advisory Committee composed of fifteen members. Composition of the Committee is to include three members from the public at large, but they may not “have any relationship or pecuniary interest that would interfere with that individual representing the public interest.” See Attachment 2 for full text of statute.

Less formal examples are found in other law reform organization. The American Law Institute, in its Rules of Council, provides guidelines for membership in the Institute. Rule 9.04, titled Members’ Obligation to Exercise Independent Judgment, was added at the December 1996, meeting of the Council. That Rule communicated that members are to “leave client interests at the door.” See Attachment 3 for full text of Rule. Finally, the Louisiana State Law Institute has a philosophical policy statement, dating back to 1940, that encourages “thorough study and research, and full, free and non-partisan discussion.” See Attachment 4 for text of statement (John H. Tucker, Address at Louisiana State University on the Philosophy and Purposes of the Louisiana State Law Institute (Mar. 16, 1940)).

Instead of a formal rule or statute to express an ideal that Oregon Law Commission Work Group members should leave their client interests at the door, the Executive Director’s office suggests the Commission accept this Memorandum of Understanding and the following statement:

“To maintain the Oregon Law Commission’s professional non-partisan analysis of legal issues in support of law reform, Commissioners and those individuals appointed by the Commission to serve as Work Group members are expected to exercise independent judgment when working on Oregon Law Commission projects by speaking and voting on the basis of their individual and professional convictions and experience. Recommendations to and from the Law Commission must be the result of thoughtful deliberation by members dedicated to public service. Therefore, Work Group members are not to subject their individual and professional judgment to representation of client or employer interests when participating in the Work Group’s decisions.”

Unless otherwise directed, the Executive Director’s staff will incorporate the above statement into the Work Group letters of appointment as a means of communicating to Work Group members the Commission’s important mission and expectations.

QUICK FACT SHEET

What does the Oregon Law Commission do?

The Commission assists the legislature in keeping the law up to date. By statute, the Commission will “conduct a continuous substantive law revision program. . .” (ORS 173.315). The Commission assists the legislature in keeping the law up to date by:

- Identifying and selecting law reform projects
- Researching the area of law at issue, including other states’ laws to see how they deal with similar problems
- Communicating with and educating those who may be affected by proposed reforms
- Drafting proposed legislation, comments and reports for legislative consideration

How was the Oregon Law Commission formed?

The 1997 Legislative Assembly adopted legislation creating the Oregon Law Commission (ORS173.315). Legislative appropriations supporting the Commission’s work began July 1, 2000.

How does the work of the Oregon Law Commission compare to the work of other groups who may have ideas about changing Oregon laws?

The Commission identifies and considers needs that are not likely to be advanced by traditional interest groups.

What is the role of Willamette University?

Willamette University has entered into a public-private partnership through the Office of Legislative Counsel that allows the Oregon Law Commission to recommend law reform, revision and improvement to the legislature while providing opportunities for student and faculty involvement in support of the Commission’s work. The Dean of the College of Law, Symeon Symeonides, and Professor Hans Linde are both Commissioners, and several professors participate with work groups. The Office of the Executive Director, housed at the Willamette University College of Law, provides administrative support to the Commission and the Commission’s Work Groups. Undergraduate students serve as office assistants, and law students serve as Law Clerks for the Commission.

Who makes up the Oregon Law Commission?

In creating the Commission, the Legislative Assembly recognized the need for a distinguished body of knowledgeable and respected individuals to undertake law revision projects requiring long term commitment and an impartial approach. The Commissioners include four legislators or their designees, the chief justice of the Oregon Supreme Court, the attorney general, a governor’s appointee, the deans or representatives from each law school in Oregon and three representatives from the Oregon State Bar. In addition to the thirteen Commissioners, currently over seventy volunteers serve on the Commission’s Work Groups. Once an issue has been selected by the Commission for study and development, a Work Group is established. Work Groups are made up of Commissioners, volunteers selected by the Commission based on their professional areas of expertise, and volunteers selected by the Commission to represent the parts of the community particularly affected by the area of law in question. The expectation is that the Commission is able to produce the best reform solution possible by drawing on a wide range of experience and interests.

How do people get involved?

To apply for service as a volunteer on a Work Group or to receive electronic Work Group meeting notices, please contact the Office of the Executive Director at (503) 779-1391.

