BIENNIAL REPORT
of the
OREGON LAW COMMISSION
2007-2009

The Oregon Law Commission operates through a public-private partnership between the State of Oregon and Willamette University. The Commission is housed at the Oregon Civic Justice Center, adjacent to the Oregon State Capitol at 790 State Street, Salem, Oregon.

OREGON LAW COMMISSION

245 WINTER STREET SE
SALEM, OREGON 97301

PHONE 503-370-6973
FAX 503-370-3158

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

BIENNIAL REPORT OF THE OREGON LAW COMMISSION

2007 – 2009

From the Executive Director's Office

Jeffrey C. Dobbins
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

This report can also be found online at the Oregon Law Commission website:
www.willamette.edu/wucl/olc/index.php

Cover photo courtesy of Office of Marketing Communications, Willamette University

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

This Biennial Report reflects the Commission's work from 2007-2009. 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 eight pieces of recommended legislation for the 2009 Legislative Assembly, and assisted with several other bills. In addition, the Commission is already looking ahead to 2011 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 saw a number of changes among its membership this biennium. Notably, Professor Hans Linde, who had been a member of the Commission since it was created by the legislature in 1997, left the Commission. Professor Linde was a guiding force on the Commission and a committed and active member. The Commission wishes him well and thanks him for his years of service. Following Professor's Linde departure, the Governor appointed former Attorney General Hardy Myers to serve in his place. As Attorney General, Mr. Myers had also been a member of the Commission since it was created, whose term on the Commission had ended when he completed his term as Attorney General. We are pleased that Mr. Myers will be able to continue with the Commission as another stalwart member. John Kroger became an ex officio member of the Commission in January when he began his term as Attorney General. At the end of the respective terms of Judge Mustafa Kasubhai and Sandra Hansberger, the Oregon State Bar Board of Governors appointed Mark Comstock and Julie McFarlane to the Commission. We wish Judge Kasubhai and Ms. Hansberger well, and welcome our new Commission members. Two of the Legislative Assembly's appointments also changed this biennium. Sen. Kate Brown stepped down and President Peter Courtney appointed Sen. Floyd Prozanski to the position. Rep. Robert Ackerman's term expired and Speaker Jeff Merkley appointed Rep. Greg Macpherson.

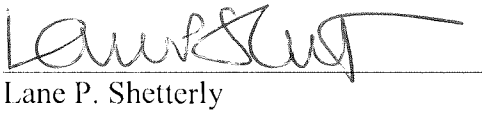
We also welcomed a new staff member this biennium. Kristy Nielsen joined the staff of the Oregon Law Commission, replacing Samuel Sears as our Staff Attorney.

The Commission has a new physical home. The Commission is now housed at 790 State Street in Willamette University's Civic Justice Center. The offices and hearing room are just steps from the state Capitol. The Commission extends its thanks to Willamette University for its generosity in support of the work of the Commission.

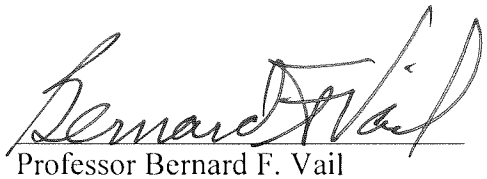
Finally, as reported elsewhere in this report, the Commission will soon be reorganized and its membership expanded to include the Chief Judge of the Oregon Court of Appeals as an ex officio member, as well as a Circuit Court judge to be appointed by the Chief Justice. For the first time, currently serving members of the Oregon legislature will also be designated for membership on the Commission. This is the first reorganization of the Commission since it was created, and will serve to enhance the Commission's role as a significant resource for law reform in Oregon.

Thank You

We would like to thank all 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 years ahead 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
245 WINTER STREET SE
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DEAN SYMEON C. SYMEONIDES
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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.

For the last nine years, Willamette University has provided a home to the Commission, as well as staff and budget support that matches the State's contribution. In 2008, we were able to provide the Commission with a new and permanent home in the historic Carnegie building, which is across from the Capitol, at the corner of State and Winter Streets. The University renovated this building and restored its old elegance at a cost of $4.5 million. The building includes a hearing room for the Commission, conference rooms for the Work Groups, and the best office space for the Commission's staff.

The above is a tangible illustration of our serious commitment to this partnership with the State of Oregon and the cause of law reform, to which the Commission is dedicated. This commitment, which is all the more important in these times of declining public revenues, remains strong, despite the fact that the University is not immune from similar budget pressures.

With my best wishes for another successful biennium.

Symeon C. Symeonides
Dean and Alex L. Parks Distinguished Professor of Law
Willamette University College of Law

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Executive Director's Office Report

Commission History and Membership

The Legislative Assembly created the Oregon Law Commission in 1997 to conduct a "continuous program" of law revision, reform, and improvement. ORS 173.315. The Commission's predecessor, the Law Improvement Committee, had fallen inactive, and the State wisely perceived the need for an impartial entity that would deal with gaps in the law and areas of the law that were confusing, conflicting, inefficient, or otherwise meriting reform.

Legislative appropriations supporting the Commission's work began on July 1, 2000. At that time, the State, through the Office of Legislative Counsel, entered into a public-private partnership with Willamette University's College of Law. Since 2000, Willamette has served as the physical and administrative home for the staff of the Law Commission. Willamette provides a wide range of support to the Commission, supplementing the state's appropriation by providing office space, administrative support, an executive director, and legal research support for the Commission and its Work Groups. The College of Law also facilitates law student and faculty participation in support of the Commission's work. With the aid of matching funds, office space, and other support from Willamette, the State is able to leverage Commission funding in order to provide a substantial service to the State.

To carry out its purposes, the Commission is made up of thirteen Commissioners pulled from a unique combination of entities within the state of Oregon, including four individuals appointed by legislative leadership, the Chief Justice, the attorney general, a governor's appointee, the deans (or their representatives) from each law school in Oregon, and three representatives from the Oregon State Bar. With the passage of SB 562 (2009), the Commission will add a Court of Appeals judge and a Circuit Court judge to its ranks. These Commissioners, appointed for their experience with various aspects of law, represent the state's long-term commitment to ensuring that the laws of Oregon are as well-crafted as possible. In the current biennium, 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; Project Selection

The Commission serves the citizens of Oregon and 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, first, by 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 contact with the people who know and use Oregon law, the Commissioners and staff are able to identify areas of the law generally considered as "broken" and in need of repair.

Once potential projects are identified, the Commission researches the areas of law at issue, with a particular emphasis on gathering input from impartial experts and those who may be affected by proposed reforms. Staff works with project proponents in order to identify and draft a formal proposal for the Commission.

Formal proposals for commission projects are initially presented to the Commission's Program Committee, currently chaired by former Attorney General, and current Governor's appointee, Hardy Myers. Relying on written guidelines governing the selection process, the Program Committee reviews written law reform project proposals, and makes recommendations to the full Commission regarding which proposals should be studied and developed by the Commission. Along with commission staff, the Program Committee helps to manage the workload of the Commission and identify a reasonable scope for projects to be recommended to the Commission.

In considering the Program Committee recommendations, the Commission uses several factors to select law reform project proposals for action. Priority is given to private law issues that affect large numbers of Oregonians and public law issues that are not within the scope of an existing agency. The Commission also considers the resource demands of a particular project, the length of time required for study and development of proposed legislation, the presence of existing 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 approved by the full Commission for study and development, a Work Group is formed. Currently, over 200 volunteers serve on Commission Work Groups; in the 2007-09 biennium, well over 2000 hours of professional volunteer time were coordinated by the Commission's staff. The 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 experience of those affected by the areas of law in question. The Commission works to produce reform solutions of the highest quality and general usefulness by drawing on a wide range of experience and expertise, and by placing an emphasis on consensus decision-making, rather than by placing 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 or professional self-interest on the recommendations of the Commission.

The Law Commission is unique in that it "shows its work" through its stock in trade: written reports (like those that follow in this biennial report) that detail each law reform project's objectives, the decision making process, and the substance of the proposed legislation. The reports work to identify any points of disagreement on specific policy choices, and set out the reasons for and against those choices. When there is dissent or uncertainty within the work group, the report makes an effort to identify the reason for that conflict and to explain why the Work Group chose to resolve it the way that it did. The Legislative Assembly is then able to identify and resolve any necessary policy choices embedded in the recommended legislation.

A Work Group's deliberations result in the presentation of proposed legislation and the accompanying written report to the full Commission, which reviews the product of each work group in detail before making its final recommendations to the Legislative Assembly. Those recommendations, in the form of proposed legislation and the

accompanying report, are distributed during Session at the time each bill is proposed in Committee and then followed throughout the legislative process. Whether the proposed bills are adopted in full or in part (and the vast majority of them are), or whether the legislation is ultimately deferred for later consideration, the Commission's commitment to thoughtful public policy formation, and the value of memorializing the decisions made in developing the laws, cannot be overstated.

2009 Legislative Session

In 2009, with the help of the many dedicated volunteers serving on the Commission and its work groups, the Law Commission prepared and approved eight bills for recommendation and introduction in the 2009 Legislative Session. This brings the Law Commission's total output, from 1999-2009, to over 85 bills, of which nearly 90% have been enacted as proposed or with limited amendments.

This Biennial Report contains the available explanatory reports for the 2009 bills, and documents the Commission's work from June 1, 2007 to June 1, 2009. It is our hope that these reports give you clearer insight into the Commission's law reform process, its work, and its potential for the future. We wish to extend our appreciation to the Commissioners and the many volunteers who have given their time to make the Commission's 2009 legislative package a success.

Jeffrey C. Dobbins
Executive Director

Wendy J. Johnson
Deputy Director and General Counsel

Commissioners of the Oregon Law Commission

		Present Term
Lane P. Shetterly, Chair Attorney at Law, Shetterly Irick & Ozias, Dallas, Oregon	**Appointed by Speaker of the House**	**9/1/07- 8/31/09**
Professor Bernard F. Vail, Vice-Chair Professor, Lewis and Clark Law School, Portland, Oregon	**Designee of Lewis & Clark Law School Dean**	**Indefinite term as designated by Dean of Law School**
Mark B. Comstock Attorney at Law, Garrett Hemann Robertson PC, Salem, Oregon	**Designee of Board of Governors of Oregon State Bar**	**9/01/08-8/31/10**
Chief Justice Paul J. De Muniz Chief Justice of the Oregon Supreme Court, Salem, Oregon	***Ex Officio***	
John DiLorenzo, Jr. Attorney at Law, Davis Wright Tremaine LLP, Portland, Oregon	**Appointed by Senate President**	**9/1/07-8/31/09**
Attorney General John R. Kroger Attorney General of the State of Oregon, Salem, Oregon	***Ex Officio***	
Julie H. McFarlane Staff Attorney, Juvenile Rights Project, Portland, Oregon	**Designee of Board of Governors of Oregon State Bar**	**9/1/08-8/31/10**
Gregory H. Macpherson Attorney at Law, Stoel Rives LLP, Portland, Oregon (formerly State Representative)	**Appointed by Speaker of the House**	**9/1/07-8/31/09**
Gregory R. Mowe Attorney at Law, Stoel Rives LLP, Portland, Oregon	**Designee of Board of Governors of Oregon State Bar**	**9/1/07-8/31/09**
Hardy Myers Former Attorney General, Portland, OR	**Appointed by Governor**	**2/25/09-8/31/10**
Senator Floyd Prozanski Senator, State of Oregon, Eugene, Oregon	**Appointed by Senate President**	**9/1/07-8/31/09**
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**	**Indefinite term as designated by Dean of Law School**

Outgoing Commissioners

The Honorable Mustafa Kasubhai Circuit Court Judge, Eugene, Oregon	**Designee of Board of Governors of Oregon State Bar**	**2/23/07-8/31/08**

Professor Hans Linde **Appointed by Governor** **10/15/97-2/24/09**
Distinguished Scholar in Residence, Willamette University College of Law, Salem, Oregon

Secretary of State Kate Brown **Appointed by Senate President** **9/1/97-8/31/07**
Secretary of State, State of Oregon, Portland, Oregon (formerly State Senator)

Robert Ackerman **Appointed by Speaker of the House** **9/1/05-9/1/07**
Attorney at Law, Eugene, Oregon (formerly State Representative)

Sandra A. Hansberger **Designee of Board of Governors of Oregon State Bar** **9/1/99-8/31/08**
Executive Director, Campaign for Equal Justice, Portland, Oregon

Staff of the Oregon Law Commission

Willamette University College of Law Staff

Jeffrey C. Dobbins
Executive Director and
Assistant Professor of Law

Wendy J. Johnson
Deputy Director and General Counsel

Kristy M. Nielsen
Staff Attorney

Lisa Ehlers
Legal Assistant

Samuel E. Sears
Staff Attorney
July 2006 – October 2007

State of Oregon Staff

Dexter Johnson
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.

Daniel Rice – Law Clerk
Summer 2007 to Spring 2008

Nathan Orf – Law Clerk
Summer 2008 to Fall 2008

Conor Johnson – Law Clerk
Spring 2009 to Present

Rebecca Werner – Law Clerk
Spring 2009 to Present

Law Fellow Staff

The following recent graduate of Willamette University College of Law served the Oregon Law Commission this biennium, as a Law Fellow.

Kevin Mehrens
February 2008 – August 2008

Work Study Student Staff

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

Nicole Rose-Russell
Fall 2007 – Spring 2009

Oregon Law Commission Meetings

The Oregon Law Commission held six meetings from July 1, 2007 through July 1, 2009. 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:

August 8, 2007	Willamette University
July 28, 2008	Willamette University
September 12, 2008	Willamette University
January 23, 2009	Willamette University
February 11, 2009	Willamette University
February 27, 2009	Willamette University

Minutes for the 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/olc/reports/index.php

The Commission is required to hold quarterly meetings (ORS 173.328). Please contact the Commission at (503) 370-6973 or check the Commission's Master Calendar web page at the following URL to confirm dates and times: www.willamette.edu/wucl/olc/calendar/index.php

Program Committee
2007-2009

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 2007-2009 biennium:

Hardy Myers, Chair
Chief Justice Paul J. De Muniz
Professor Hans Linde (July 2007 – February 2009)
Julie H. McFarlane (April 2009 – Present)
Greg Mowe
Sen. Floyd Prozanski
Lane Shetterly

The Program Committee held three meetings from July 1, 2007 through July 1, 2009 at the indicated locations on the following dates:

December 4, 2007	Department of Justice
June 27, 2008	Department of Justice
April 23, 2009	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) 370-6973 or check the Commission's Master Calendar web page at the following URL to confirm dates of future meetings: www.willamette.edu/wucl/olc/calendar/index.php

2009 Session Bill Summary:
Bills Presented by the Oregon Law Commission

During the 2009 Legislative Session, the Oregon Law Commission recommended eight bills to the Legislative Assembly. The following is a brief summary of the bills:

1. SB 512 revises SB 1092 passed during the 2008 special session regarding notice to schools of juveniles charged with certain offenses in juvenile court. SB 512 modifies the content of the notice, adds a notice when a juvenile is adjudicated by the court, and limits the list of acts triggering notice under the statute. The bill also includes several housekeeping provisions.

2. SB 558 modifies Oregon law to conform to recent changes incorporated into Articles 1 and 7 of the Uniform Commercial Code. These include changes to the general provisions of the commercial code as well as the provisions relating to warehouse receipts, bills of lading and other documents of title.

3. SB 559[1] makes a simple but important correction to the proof required when a motion to intervene is filed in a juvenile dependency proceeding. The change is made so that the judge's findings in ORS 419B.116(5)(c) match the proof required in the motion filed under ORS 419B.116(4).

4. SB 561 codifies Oregon's conflicts of law rules for tort claims and other non-contractual causes of action.

5. SB 562 modifies the Law Commission's own enabling statutes. This bill adds two members to the makeup of the Commission, modifies the requirements of the legislative appointments, and shifts duties from Legislative Counsel to Commission staff to reflect current practice.

6. HB 3021 is an overhaul of ORS chapter 401 relating to emergency functions of the government. The bill provides both workers' compensation benefits and protection under the Oregon Tort Claims Act to qualified emergency service workers and search and rescue volunteers. HB 3021 also clarifies statutory provisions relating to emergency health care providers and clarifies that an emergency does not qualify as a single accident or occurrence for purposes of the Oregon Tort Claims Act.

7. HB 3077 revises Oregon's elective share statutes to generally provide an increased amount for a surviving spouse who is written out of a decedent's will. The bill increases the elective share from 25% to 33% based on a sliding scale and broadens the scope of assets used to calculate the elective share, among other things.

8. HB 3220 codifies the procedures and standards regarding fitness to proceed motions in juvenile dependency proceedings, including guidelines for obtaining and

[1] No report was filed to accompany this bill because it was such a minor technical fix.

administering evaluations and administering restorative services. This bill was originally introduced by the Law Commission in the 2007 Legislative Session as SB 320 (2007).

Commission's Pending Law Reform Agenda for 2011 Legislative Session

The following is a list of projects pending or approved by the Commission for the 2009-2011 interim and sessions:

Pending Projects Under Discussion

- **Confidentiality of Court Records**

  The statutes regarding the confidentiality of juvenile records (ORS Chapters 419A, 419B, and 419C), adoption records (ORS Chapter 7), and civil commitment records (ORS Chapter 426) in the courts need to be reviewed and revised. The confidentiality of the various types of these court documents and materials in these types of cases is not clear, especially on appeal. The ORS lacks consistent terms and procedures regarding court records. Public records laws and the open courts provision of the Oregon Constitution also overlap into this area of law, restricting confidentiality.

- **Juvenile Court Summons**

  Some tweaking in the juvenile dependency statutes is needed to make the statutory summons requirements match up with the suggested summons form. Presently the form is missing information regarding rights of appeal. The statutes that need to work together are ORS 419B.117 and ORS 419B.818.

- **Kidnapping statutes (ORS 163.235, 163.225)**

  Vague language in the kidnapping statutes, especially relating to the "asportation" (amount of movement) element required to commit kidnapping, has resulted in sometimes unpredictable applications of the law, and cases turning on confusing factual interpretations by the courts. At a 2009 hearing to amend the Oregon kidnapping statutes to bring them in line with Jessica's Law, both the Oregon Criminal Defense Lawyers Association and the House Judiciary Committee suggested that a comprehensive review and possible revision of these statutes by the Oregon Law Commission could be warranted.

- **Uniform Registered Owners of Business Act** (now called Uniform Law Enforcement Access to Entity Information Act)

  A request to consider this uniform act was presented to the Commission by the Secretary of State's office on April 23, 2009. The concern is that Oregon's laws, like most other states, allow corporations and limited liability companies to be formed and registered with the Secretary of State's office with ease and with little beneficial ownership information. The effect is the creation of shell companies that impede law enforcement efforts in tracking individuals involved in tax evasion, money laundering,

terrorist activities and other misconduct. The uniform act would improve the contact information requirements among other things.

- **Authority to Appoint Guardian ad Litem for Youth Offenders**

The court currently lacks authority to appoint a guardian ad litem for juveniles in ORS Chapter 419C (juvenile delinquency chapter) until they are found to be a "youth offender." This means that even if it could be appropriate for a court to appoint a youth a guardian to assist him or her with making decisions about the case, such a guardian may not be appointed until after a youth is adjudicated to be within the jurisdiction of the court. A judge does have authority to appoint a guardian in a juvenile dependency case under existing law. A judge in the Juvenile Code Revision Work Group brought this issue to the Work Group's attention and the group agreed to examine this issue further in the next biennium.

- **Standard of proof for juvenile delinquency cases involving violations rather than crimes**

ORS 419C.005 states that juvenile courts have jurisdiction over persons under 18 who are accused of committing violations, and ORS 419C.400 states that, in all juvenile cases, the facts alleged must be proven beyond a reasonable doubt; this is the standard that applies to violations in adult court as well. ORS 153.076(2) carves out a special exception for traffic cases, which must be decided to a preponderance of the evidence; however it is not clear whether this applies where the person accused of committing the violation is a juvenile.

- **Juvenile Code Revision**

The juvenile dependency and delinquency codes needs continued clean-up work. When the juvenile code was split out into dependency and delinquency chapters in 1993, many technical problems and cross-reference mistakes were created. For example, ORS 419B.476(2)(d) should reference 419B.449(3) and not (2).

- **Public Records Law Review and Reform**

Members of the Legislature, Department of Justice, Judicial Department and various other interested groups continue to suggest that Oregon's Public Records Law need a comprehensive review and revision. Piecemeal revisions, numerous exceptions, and even exceptions to exceptions over the years make this are of law confusing. In addition, the electronic age has further complicated this area of law.

- **Art Consignment Glitch**

The Commission has identified a creditor priority mistake at ORS 359.210 (1)(b). This art consignment statute is designed to ensure that a consignor artist's ownership rights will have priority both in the consigned art and, if sold by a consignee, in the sales proceeds as against creditors of

the consignee. Unfortunately, the statute has a mistake and a technical reading of it leads to the opposite result.

- **Land Use Law**

The legislature has requested an audit of land use statutes in HB 2229 (2009) as resources permit. Section 17 of the bill specifically requests a policy-neutral review and audit of ORS chapters 195, 196, 197, 215 and 227, the statewide land use planning goals and the rules of the commission implementing the goals.

- **Probate: Small Estates**

Oregon law (see ORS Chapter 114) allows an abbreviated procedure for handling small estates that would otherwise require a full probate. If an estate fits the qualifications, the cost and time for distributing the estate assets may be greatly reduced. The procedure involves filing a document called an affidavit of claiming successor. The small estate procedure can only be used if an estate's personal property is valued at no more than $50,000 and real property is valued at no more than $150,000, for a total aggregate estate value of no more than $200,000. Members of the Oregon State Bar Estate Planning Section and others have reported that the small estate procedure needs review and revision.

Projects Already Approved for Next Biennium

- **Child Abuse Reporting and Jurisdictional Basis Overhaul**

This project would entail a reworking of current statutes within the juvenile code and criminal code to provide clearer guidelines for mandatory child abuse reporters as well as related issues including, but not limited to, training, liability, and overlap with criminal law standards and jurisdiction. This project was originally considered for the 2005-2007 session but has been carried over.

- **Uniform Environmental Covenants Act**

The Uniform Environmental Covenant Act was developed by NCCUSL and has been adopted by numerous other states since its creation in 2003. Under the act, an environmental covenant is a negotiated use restriction placed on a contaminated parcel of land that a state agency can enforce. Once a covenant is placed on property, the parcel may be used as long as the use is not prohibited by the covenant. In addition, the parcel may be transferred to others for use but the covenant remains attached to the land. For example, a property may be clean enough for a parking lot, but not clean enough for a school building. An environmental covenant could restrict the latter unless more clean-up efforts were made. In this way, the act allows for an incremental reintroduction of contaminated lands (often termed "brownfields") back into commerce and productive use.

- **Uniform Interstate Depositions and Discovery Act**

The Uniform Interstate Deposition and Discovery Act was developed by NCCUSL and has been adopted by a number of other states since its inception in 2007. The act establishes a procedure by which an attorney who is not licensed in Oregon may conduct depositions and discovery in Oregon without having to be admitted pro hac vice or permitted to practice under a special commission or letter rogatory, which is current practice. The Commission approved the formation of a work group to study the uniform act and modify it as appropriate. The work group met twice in early 2009 and is currently in the process of finalizing a draft to be submitted as a model rule of civil procedure to the Council on Court Procedures.

- **Judicial Review of Government Actions**

Oregon law continues to have a variety of confusing processes for seeking judicial review of government actions, making it a challenge to find the proper forum and avenue to bring a challenge. Writs of review, prohibition, mandamus, declaratory relief, injunctive relief, quo warranto, and other esoteric avenues still must be used. Attempts have been made to provide a standardized process of review of both state and local government actions, including folding in the existing Administrative Procedures Act process that applies to many state agency matters. However, legislative reform efforts have failed each time, largely over fears of expanding the scope of reviewable actions. The area of law continues to cry out for reform and a disinterested entity like the Law Commission to take on the project.

- **Decisions by Disqualified Public Officials**

Public bodies regularly make decisions that affect a wide range of individuals. If questions are later raised about whether a participant in the decision was qualified to make that decision, affected parties may raise questions about the validity of the decision itself. A decision might be questioned, for instance, because an office-holder who participated in the decision failed to meet relevant qualifications for the office or violated relevant ethics rules. There is a statutory gap in Oregon law on the question of when such a decision or action may be voided by courts (or, for that matter, by the public body) and how an action can be cured or redone.

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.

SB 1092 Work Group:

Notice to Schools

SB 512

Prepared by
Kristy M. Nielsen
Staff Attorney
Oregon Law Commission

From
The Offices of the Executive Director
Jeffrey C. Dobbins
and
Deputy Director and General Counsel
Wendy J. Johnson

Majority Report
Approved by Oregon Law Commission
at the Meeting on January 23, 2009

I. Introductory Statement

This proposed bill modifies SB 1092 (2008)[1] requiring disclosure of information to schools about students involved in the justice system prior to adjudication. The new bill would continue to require notice to schools upon the filing of certain juvenile delinquency petitions or dismissal of petitions where notice was previously filed. The proposal, however, would also require notice of an admission to being within the court's jurisdiction by the youth or adjudication by a juvenile court. The proposal also contains additional provisions protecting the individual rights of students and narrows the list of alleged acts that trigger an automatic notice to schools.

II. History of the Project

SB 1092 was presented to the Legislative Assembly during the special session held in February 2008. The bill was introduced to the Senate on February 4, 2008 and passed by the Legislative Assembly just a few weeks later. Due to the speed of the short session many groups and individuals felt that both the policies contained within the bill as well as the substantive provisions warranted further review and revision. In the final days of the special February session, just prior to passage, a provision was added to the bill requiring the Oregon Law Commission to study policies requiring notice to schools of persons who are youths.[2] The Law Commission was also directed to report its findings in February of 2009[3].

On June 27, 2008 the OLC Program Committee granted general approval to the Commission's existing Juvenile Code Revision Work Group to address SB 1092, and the Legislative Assembly's directive. The Juvenile Code Revision Work Group then formed the SB 1092 Work Group as a sub-work group of the full Juvenile Code Revision work group[4]. The Juvenile Code Revision Work Group reviewed staff's more detailed work

[1] See Appendix 1 for copy of SB 1092 (2008)

[2] ORS 419A.004 defines "youth" as a person under 18 years of age who is alleged to have committed an act that is a violation, or, if done by an adult would constitute a violation of law or ordinance of the U.S. or a state, county, or city.

[3] See Section 16 of SB 1092 (2008).

[4] Work Group members include the following: Commissioner Mark B. Comstock, Garrett Hemann Robertson PC, as Chair; Morgan Allen, Oregon Department of Education; Nancy Allen, Oregon Department of Human Services; Karen Andall, Oregon Youth Authority; Brian Baker, Juvenile Rights Project; Oregon State Representative Peter Buckley; Thomas Cleary, Multnomah County District Attorney's Office; The Honorable William Horner, Polk County Circuit Court Presiding Judge; Bob Joondeph, Disability Rights Oregon; Christina McMahan, Douglas County Juvenile Dept; Irvin Minten, Oregon Department of Human Services; Ginger Redlinger, Teacher with Oregon City School District; Mary Alice Russell, Superintendent of McMinnville School District; Karen Stenard, juvenile law solo practitioner and Executive Director of Lane County Juvenile Lawyers; John Van Dreal, Psychologist with the Salem-Keizer School District; Janette Williams, Oregon Department of Human Services; and Robin Wright, Gevurtz Menashe Larson & Howe PC. Note: Commissioner Julie McFarlane acted as chair for the first meeting of the work group.

Work Group Advisors include the following: Stacey Ayers, Oregon Department of Human Services; Chuck Bennett, Confederation of Oregon School Administrators; Ann Christian, Oregon Criminal Defense

proposal and recommended limiting the scope of the project to a review and revision of notice to schools regarding youth and youth offenders as they are defined in ORS 419A.004(35), (37). Thus, the project required the review of a limited list of provisions, including SB 1092, ORS 419A.015, 419A.300, 420.048, 420A.122, and 420A.255. The group did not focus attention on persons over 18 or persons charged with crimes under ORS 137.707 (Measure 11) or youths waived to adult court as statutes requiring notice have existed for these persons. The group first met on September 19, 2008 and met a total of six times between September 2008 and January 2009.

III. Statement of the Problem

School violence seems to be increasing and people are looking for ways to prevent such violence and protect students and school staff. One identified problem is that educators reported that they do not have enough information about their students. Educators stated that past notification practices prevented school employees from receiving information about students that may have helped them ensure student safety and provide support for students who are part of the juvenile justice system. In fact, though some statutes were in place requiring notice to schools regarding students involved in the justice system, these notices often were not being sent to schools. Some organizations and individuals believe that educators and school employees need to know more about students' criminal history, including notice of juvenile court petitions (i.e. charged but not adjudicated) as early as possible to ensure safety. However, other organizations and individuals, such as the Juvenile Rights Project, ACLU of Oregon, and Disability Rights Oregon, among others, are concerned about the potential injustice that may result from sharing petition information before the juvenile is adjudicated ("adjudicated" in juvenile court is equivalent to "convicted" in adult court), because no finding of guilt has been made. Additional concerns were expressed about the potential ramifications of such notice, including a labeling effect and disruption of the juvenile's education plan and placement. Additional concern with pre-adjudication notices revolved around the potential for a youth's right against self-incrimination to be compromised. In short, striking the correct balance between public safety on the one hand and protecting the juvenile's rights on the other is a challenge.

Prior to the passage of SB 1092, which went into effect on January 1, 2009, Oregon schools were supposed to be already receiving notice of students who were found within the juvenile court's jurisdiction and who fell within one or more of the following categories[5]: (1) They are on juvenile court probation;[6] (2) they have been placed on

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Lawyers Association; Nancy Cozine, Oregon Judicial Department; Kimberly Dailey, Oregon Judicial Department; Linda Felber, Salem-Keizer School District; Tim Loewen, Director of Yamhill County Juvenile Department; Andrea Meyer, American Civil Liberties Union of Oregon; George Okulitch, The Tressider Company; Jollee Patterson, General Counsel for Portland Public Schools; Lori Sattenspiel, Oregon School Boards Association; Mickey Serice, Oregon Department of Human Services; Tricia Smith, Oregon School Employees Association; Timothy Travis, Timothy Travis Consulting Co.; Laurie Wimmer, Oregon Education Association; and Steve Woodcock, Oregon Department of Education.

[5] See Appendix 2: School notification statutes summary after SB 1092
[6] ORS 419A.015

conditional release from DHS custody;[7] (3) they are under the legal custody of OYA and the student is going to transfer school districts;[8] or (5) they are about to be released from a youth correctional facility.[9] These notices were all post-adjudication, meaning that the youth had been formally charged and found by a juvenile court to have committed the alleged act.[10] SB 1092 added a new notice that requires district attorneys or juvenile departments to send pre-adjudication notices to schools within 15 days of a youth making a first appearance before the juvenile court on a petition alleging the commission of certain acts specified within the bill.[11]

In addition to the potential problems that these notices pose to juveniles' rights, requiring notices could create fiscal and practical problems in Oregon. Sometimes it is difficult to determine which school(s) a student may attend or already attends (e.g. there may be various charter school, private school, and public school options within and outside the school district where the juvenile resides). School districts vary in size and number of schools within a district, and thus ensuring distribution of a notice to the correct school can also be a challenge. District attorneys are charged with determining when notices are required and distributing these notices; this will be one more thing for them to take into consideration when charging juveniles and the requirement may create an administrative burden. Furthermore, follow through with these notices can be a problem as it is up to a school administrator when and to whom to pass on information. If notices are given out too easily, they may overwhelm school administrators and they may not be taken as seriously.

A second identified problem is that transfer students may present a special danger to schools, and schools are not receiving adequate information regarding the violence history of these students. Testimony before legislative committees during the February session included anecdotal information regarding a practice known as "greyhound treatment" whereby students in other states were informed that charges pending in juvenile court would be dropped if they left the school district or the state. The expressed concern was that these kids are ending up in Oregon schools and posing safety threats to students and staff. As a result, SB 1092 included a provision requiring schools to inquire of the previous schools information about transfer students' disciplinary history. Some groups and individuals felt that the provisions as contained within SB 1092 were not written clearly enough to achieve its stated purpose of obtaining information about transfer students and warranted some technical revisions from Legislative Counsel.[12]

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[7] ORS 419A.300
[8] ORS 420.048
[9] ORS 420A.122.
[10] Note: Notices are also required under ORS 339.317 when a person under 18 is **charged** with a "measure 11" crime under ORS 137.707 or waived to adult court under ORS 419C.349, 419C.352 or 419C.364. These are the only example of pre-disposition notices being sent to schools prior to SB 1092. Because these individuals do not fit within the definition of "youth" under the Oregon statutes, the Juvenile Code Revision Work Group determined that these notices were outside the Legislature's charge to the Law Commission and thus were not dealt with in substance by the SB 1092 sub-work group.
[11] See Section 2(4) of the bill for the complete list of alleged acts triggering notice to schools.
[12] See section 3(3) of SB 1092.

IV. Objective of the Proposal (Section Analysis)

The objective of the proposal is to amend SB 1092 in an attempt to increase school safety while also protecting the rights of juveniles as much as possible. Another objective is to make notices more helpful to schools. Finally, the objective is to make this area of law consistent and clear.

Section 1:

Section 1(1) of the draft contains the definitions of "principal" and "school administrator" as used in the bill. In SB 1092 these definitions were located near the back of the bill; this change was designed to improve clarity for the reader.

Section 1(2) of the bill requires notice to be sent in three situations. The first is when a youth makes a first appearance before the juvenile court on a petition alleging that the youth is within the jurisdiction of the juvenile court under 419C.005.[13] This is the pre-adjudication notice already required under SB 1092. Notice is also required to the schools when a youth admits to being within the jurisdiction of the juvenile court (similar to pleading guilty in adult court) or is adjudicated by the court (similar to being found guilty in adult court). Throughout the course of the meetings, the work group discovered that existing law had a rather large gap. The law did not require notices to be sent when a youth was actually adjudicated; rather notices were only sent when a youth was put on probation or released from custody. Members of the work group agreed that notices of a finding of adjudication seemed to be the most important to school safety concerns of all the potential notices. Also, in some counties, youths enter into what are called "diversion agreements" or "formal accountability agreements" whereby a youth admits to the offense charged in the petition and then, if the youth complies with various conditions and stays out of trouble for a stated period of time, the case can eventually be dismissed. Members of the group felt that it would be important for schools to receive information relating to such agreements so that school officials were aware of any conditions the youth should be complying with such as no contact orders. Finally, another notice is required if a court finds that the youth is not within the jurisdiction of the court or the petition is dismissed. This is unchanged from the provision in SB 1092. The work group felt that, if pre-adjudication notices were to be required, it was important to retain this provision so that a school has accurate information as the case progresses, and to limit any potential harm that might come from an erroneous notice.

Several work group members expressed concerns about what would be done with the notices once they were sent to the schools and where in the students' files they would end up. Confidentiality of these notices was something that many were worried about. After some discussion, the work group decided that it was not necessary to establish a rigid protocol that school administrators should be required to follow once the school provided notice. The work group felt that school administrators have experience dealing with sensitive and confidential information and the various school districts or individual

[13] Note: acts triggering notice can be found in section (7) of the bill.

schools could be trusted to handle these notices appropriately. The general consensus of the group was that the purpose of providing these notices was to empower school administrators to seek additional information from district attorneys or juvenile departments if they feel it is necessary. While some information that the department or district attorney has will likely be confidential, there is no law preventing communication between these entities and the work group felt it important that school administrators be encouraged to communicate with agencies who may know more about the situation whenever they feel appropriate. In addition, under the federal Family Educational and Privacy Rights Act (FERPA),[14] as well as Oregon Administrative Rules[15] these notices qualify as educational records. State and federal regulations mandate some protocol for handling these records. Also, FERPA mandates that students and their parents/guardians have unqualified access to these records, allowing students and parents to monitor the student's educational records and request removal of inaccurate information if necessary.[16]

Section 1(3) states who is required to provide the pre-adjudication notices to the school. SB 1092 stated that the district attorney or other person filing the petition under ORS 419C.005 is responsible for giving notice. The draft expands upon this provision to allow for all possible scenarios. The district attorney remains the default provider; however if someone else filed the petition or is prosecuting the case, that person is responsible for sending notice. In addition, if a juvenile department agrees to provide these notices, they are responsible for providing them, regardless of who files or prosecutes the case. This allows for flexibility amongst the counties as juvenile departments and district attorney's offices vary by county.

Section 1(4) describes the content of the notice. The draft retains the contents required by SB 1092 and adds a few additional provisions. The proposal now adds the name and contact information of the attorney for the youth. Also, the draft would require the person providing notice to include any conditions of release or terms of probation and any other conditions imposed by the court. The work group felt that this information would be helpful to schools in conducting safety planning.

Section 1(5) is a new provision. Several members of the work group expressed concerns regarding the youth's constitutional right against self-incrimination and the potential that these notices might trigger discussion between school faculty and the accused student that could elicit incriminating statements. The individuals did not believe that school employees would be interrogating the students; however they felt that students might feel pressured to talk about the incident even in the desire to seem cooperative with the school. One idea proposed was to make any statements made by a student to school faculty while the case was pending inadmissible evidence in court. This proposal was met with significant opposition, and section 1(5) represents a compromise

[14] 20 USC §1232 (2002).
[15] See OAR 581-021-0220 et seq.
[16] Upon review of the draft, the Juvenile Code Revision work group (of which the SB 1092 work group is a sub-work group), requested that a sentence be included in the proposal clearly stating that the notices are to go in the student's educational record to provide for additional clarity.

formed by the work group. A majority of the work group felt that asking school personnel not to discuss the allegation with the student does not prevent adequate safety planning while a case is pending, because the school is still permitted to discuss various conditions that the student may have placed upon him or her as a result of receiving the notice (e.g. telling the student he/she is permitted access to only one approved restroom for the time being, etc.), but school personnel may not discuss the specific charges or incident giving rise to the notice. This section contains three separate messages that should be inserted into the notice based upon the type of notice that is being provided.

The warning in section 1(5)(a) should be provided in the notice when the notice is sent after a petition is filed but no disposition has been entered into on the case. This statement alerts school personnel that the student is innocent until proven guilty, states that the allegation should not be discussed with the student, and informs the recipient that further notice will be given when disposition is entered. The warning in section 1(5)(b) is to be given where a disposition has been ordered by the court. It warns that further proceedings may take place and that the matter should not be discussed with the student. The final statement contained in section 1(5)(c) is given in the notice provided upon dismissal or a finding that the youth is not within the jurisdiction of the court (i.e. he or she is not guilty of committing the offense). This warning states that the notice and any related documents or information in the student's education records should be removed and destroyed. The work group asked that this directive be included to ensure that these notices not follow a student throughout his or her time in school if the student is found to have not committed the alleged act.

Section 1(6) retains the requirement that notices be sent within 15 days of a triggering event (e.g. first appearance or dismissal) and adds states that notice must also be given within 15 days following admission and adjudication.

Section 1(7)[17] describes the acts that, if alleged in the petition, trigger notice to schools. SB 1092 used the phrase "harm or threatened harm."[18] Legislative Counsel suggested changing this to "physical injury or threatened physical injury" to link this language to terminology used in the criminal code. Additionally, the work group agreed that only cases involving serious physical injury should trigger notice, as they pose a more significant risk to school safety and requiring notice to be sent for each and every property crime or assault IV (a misdemeanor with varying degrees of actual harm to the victim) would make these notices too numerous. The work group also agreed to limit automatic notices to felony sex offenses under ORS 181.594(4) and exempt both rape in the third degree (statutory rape) and incest under 163.525 from the automatic notice requirement. Several work group members expressed concern that incest was not a crime that necessarily posed a risk to school safety and felt that its sensitive nature warranted exemption, especially considering the high likelihood that the victim also attended school with the accused. Misdemeanor sex offenses were removed because many members of the work group did not feel that, in general, they posed safety risks to schools and many

[17] Note: the changes made in this section represent a majority, but not consensus, decision by the work group.
[18] See SB 1092 (2008) Section 2(4)(a)

of them encompass consensual sexual contact between minors (e.g. sex between two 15 year-olds).

Further, the group agreed to remove animal crimes (animal abuse in any degree and sexual assault of an animal) from the list. A majority of the work group felt that these crimes, though they may be indicative of psychological conditions, did not directly relate to the physical safety of school staff and students, but rather identified "problem children." The work group also voted to remove crimes involving the delivery or manufacture of alcohol or drugs from the mandatory notice list. A member of the work group representing school administration stated that the biggest concern with this type of behavior would be if the student was conducting this on school property, which the school would already know about without receiving notice from the district attorney or juvenile department.[19]

Despite significantly limiting the list of acts triggering notice, the work group also felt that not all situations could be accounted for on a presumptive list and that circumstances in other cases could also warrant notice being given to schools. Because of this, the work group voted to include a catchall provision (section 1(7)(b)) to allow the judge to require notice to schools if the judge feels providing notice would be necessary to safeguard the safety of the school. This would allow for notice to be given in any case, regardless of the alleged offense, if the judge felt that the school should be notified.

Section 2:

Sections 2(1) and (2) slightly modify the definitions section found in Section 3 of SB 1092. "School subcontractor" is now called "school personnel." Legislative Counsel made this change for clarity and the work group had no objection to this change. The removal of the term "youth" from this section also fixes a legal problem contained within SB 1092 regarding transfer students. "Youth" is also a legal term of art to be avoided in the education chapters as well.

SB 1092 seems to require school administrators to take action whenever a student transfers to a school within Oregon from out of state. While this is not an act requiring "notice" to schools, this is a significant part of the new law's requirements. The problem of teachers having little or no information about out of state transfers was brought up repeatedly during testimony for this bill. Section 3 of the original bill required school administrators to contact the youth's former school and request information regarding the youth's history of engaging in activity likely to place the safety of the school's students or staff at risk, and anything requiring the arrangement of appropriate counseling or education for the youth. Early on, the work group identified an issue with the use of the term "youth" in Section 3 of SB 1092. Under Oregon law, "youth" is a legal term, defined as a person under 18 years of age who is alleged to have committed an act that is a violation, or, if done by an adult would constitute a violation of law or ordinance of the

[19] Some members of the work group representing educators felt that the list of crimes from SB 1092 should not be changed. A majority of the work group felt that the opt-in provision was adequate to ensure that particularly concerning allegations would be noticed to schools if the circumstances warranted such notice.

U.S. or a state, county, or city. By using the term "youth" in this context, there will hardly ever be a situation where an administrator will be required to seek information on an out of state transfer, since the administrator must first know whether the student is a "youth" before he or she may ask for the information. In order to know whether the student is a "youth," the administrator must have information regarding prior alleged "criminal" acts committed by the student, which he or she would not have without first receiving the background information on the student. Work Group members who were involved in passing the bill stated that this was not the intention of the bill's proponents; rather the intent was that information would be sought in the case of all out of state transfers of children generally. The work group identified this section as one requiring some modification and Legislative Counsel proposed changing all references to "youth" to "student" or "person who is the subject of the notice."

Section 2(3) preserves the requirement that school administrators make inquiries into the disciplinary histories of students transferring into Oregon schools from out of state. The only change is that this inquiry must now be made in concurrence with the request for education records as currently required by ORS 326.575. The work group felt that this would be the logical time to make the inquiry and would help to streamline the process. As stated before, these notices qualify as part of the student's education record under state and federal law.

Section 2(3) also purports to slightly modify language found in SB 1092. Sections 3(2) and 3(3) of SB 1092 each contained provisions requiring the school administrator to pass along information to necessary school personnel. Section 3(2) stated that the information should be given to "school employees…who the school administrator determines needs the information" while section 3(3) states "school employees…who needs the information." The work group was confused why a separate standard would be used in the two scenarios and suggested that it be amended so identical standards applied to both the sharing of information contained within the notices as well as information obtained regarding transfer students. The language from section 3(2) was chosen because it authorizes the school administrator to make the determination as to who needs the information.

Sections 2(4)-(5) include no substantive changes from SB 1092; rather all changes are tied to the new definitions mentioned above.

Section 2(6) contains a statement that any placement procedures or decisions under this bill regarding a person with disabilities must comply with the federal Individuals with Disabilities Education Improvement Act. Since the information contained in these notices may be used for arranging counseling and educational placement of students, some work group members expressed concerns about how this might affect a student with disabilities who has an Individual Education Plan (IEP). Many felt that this statement would be necessary to remind school staff to check with any existing IEPs when making placement decisions.

Sections 3-8:

These sections do not contain any substantive modifications to SB 1092. Any additions or deletions are a result of previously-mentioned changes to definitions or other amendments.

Section 9:

Section 9 is the emergency clause section which will allow the new bill to go into effect upon passage. (Note: SB 1092 became effective January 1, 2009). Due to the identified problems with SB 1092, it is important to retain an emergency clause rather than wait until January 2010 as an effective date.

V. Suggestions Not Included in the Draft

When examining the broader issue of school safety, many work group members questioned whether notices would be the proper means for preventing school incidents, planning for safety, and generally facilitating communication between law enforcement agencies, juvenile departments, district attorneys, mental health specialists, and school districts. John Van Dreal, school psychologist with the Salem-Keizer School District and member of the Oregon Law Commission SB 1092 work group gave a presentation to the work group on a student threat assessment program that the Salem-Keizer School District pioneered and has been using since 1998, called the Mid-Valley Student Threat Assessment Team. This model utilizes threat assessment teams composed of representatives from the school district, law enforcement, mental health agencies, juvenile justice, Oregon Youth Authority, Willamette Education Service District, and others. The goal of these teams is to assess threats of potentially harmful or lethal behavior and determine the level of concern and action required to effectively deal with these threats in schools. Mr. Van Dreal explained that the system is based on situations, rather than individuals, which helps improve safety and helps prevent stigmatizing students as "dangerous."

Mr. Van Dreal stated that one key to the success of these threat assessment teams is the open communication between all agencies involved. He explained that there is a constant sharing of information between law enforcement and the schools. When information on a possible threat comes in (which might be in the form of a paper notice such as those required under SB 1092), the administrator and counselor or law enforcement representative in the school then determine if that situation necessitates a Level 1 screening. After the initial Level 1 screening, if the reviewers determine that additional screening is warranted, the case moves to a Level 2 screening, which is more formal in nature.

The Mid-Valley Student Threat Assessment Team (STAT) system has served as a model for many other school districts around the state and elsewhere. Mr. Van Dreal reported that the system may be modified to fit individual districts' needs and budgets, and that STAT principles are currently being utilized by the Willamette Education

Service District in the rural school districts of Marion County as well as throughout Polk and Yamhill counties. The system has also been established in the cities of Albany and Corvallis and is currently being implemented by Beaverton School District, the Northwest Education Service District and others throughout the state. Several Washington school districts have also adopted the system or are in the process of doing so. Unfortunately, using such a system is not completely without cost to the various agencies involved and the school districts, especially insofar as it requires representatives from all agencies to set aside man hours to devote to keeping the system going. Mr. Van Dreal stated, however, that the system can be adopted in ways that make it less expensive to implement (i.e. it can be tailored to meet the individual needs and resources available to the school district). It was noted that much of the cost is not on schools, but on the other involved agencies, and the actual cost of such a program is difficult, if not impossible, to assess.

The work group, mindful of the current economic climate in which the state finds itself, ultimately determined that it would not be prudent to mandate that all school districts adopt a student threat assessment program at this time. A majority of the work group would, however, suggest that the Legislative Assembly look further into the model and consider adopting some of its principles if it ever chooses to examine the issue of school safety in a broader context.[20] While the Salem-Keizer model may not be perfect, its primary goal is facilitating cross-agency communication regarding potential threats to schools and everyone on the work group agreed that this was important.

VI. Conclusion

The proposed bill should be adopted in order to clarify and improve upon the framework established in SB 1092 requiring disclosure of information to schools of students involved in the justice system. Upon close analysis of the bill as passed in February 2008, it became clear that the version as passed contained several provisions that were unworkable, that posed many concerns for the individual rights of children, and did not actually achieve all of the stated objectives. The opinion of the work group is that the proposed bill represents a practical compromise to improve school notices and hopefully safety while protecting the constitutional rights of students, all while having as minimal fiscal impact as possible.

Amendment Note

The Senate Education and General Government Committee approved the -7 amendments into SB 512. These amendments combined two separate proposals, one from the Department of Education and the other from Juvenile Rights Project and the Oregon Education Association. The Department of Education proposal contained primarily technical fixes to the bill to facilitate easier distribution of the notices when a student who is a subject of the notice attends a school outside of his or her "presumed" school, such as

[20] One work group member opposed this suggestion.

the School for the Blind or the School for the Deaf. With the amendment the bill provides that within 48 hours of receiving notice, the school administrator must pass that notice along to the director of the school for the blind or school for the deaf if the youth attends school at one of those institutions; the superintendent of public instruction if the youth is in an educational program under the Youth Corrections Education Program; or the principal of a charter school if the youth attends a public charter school.

The proposal from the Juvenile Rights Project and the Oregon Education Association amended section 1(7) of the bill and reflected a compromise between the majority and minority reports of the Commission. The amendment added delivery and manufacture of a controlled substance (not alcohol) to the list of crimes that must be noticed to schools, along with animal abuse in any degree.

The House Education Committee moved the -A8 amendments into SB 512. These amendments were requested by Law Commission staff and included proposals from the Juvenile Code Revision Work Group, a variety of stakeholders and staff. These amendments were primarily technical in nature but some portions of the amendment filled important gaps in the bill. The –A8 amendments add a notice for when a youth is found responsible except for insanity under 419C.411, which was one possible outcome of a case where a follow-up notice was not provided under the bill. The -A8 amendments also required notice to be sent to the appropriate school administrator at a private school or a public school that a youth attends under an inter-district transfer if it is known that the notice was misdirected. When the Department of Education pointed out that the School for the Deaf and School for the Blind were inadvertently excluded, OLC staff noted that these were additional situations that needed to be accounted for in the bill. Finally the amendment requires notice to also include contact information of the person sending the notice so the school can contact them if they have any questions. The Work Group felt this was important to facilitate communication regarding these students with District Attorney's offices, Oregon Youth Authority and juvenile departments.

Minority Report
Submitted by Oregon Law Commissioner, John DiLorenzo, Jr.
Concerning LC 2078 (SB1092 – Notice to Schools)

At its meeting of January 23, 2009, the Oregon Law Commission adopted the report of the SB 1092 Workgroup and recommended LC 2078 to the Legislative Assembly. SB 1092 was adopted by the Oregon Legislative Assembly during its special session in February, 2008. It was enrolled at Chapter 50 Oregon Laws 2008. Section 16 of that Session Law directed the Oregon Law Commission to study policies requiring notice to schools of persons under 18 years of age living within the school district who are youths subject to juvenile proceedings. The Commission was ordered to file a report with the appropriate legislative committees no later than February 2, 2009.

As a member of the Oregon Law Commission I have often afforded deference to the reports of the various workgroups appointed to assist the Commission in deliberating over complex areas of the law. The workgroups appointed by the Commission, without exception, represent broad cross-sections of effected interest groups who weigh in on resolution of questions presented to them. Their work is invaluable to the Commission.

Although the assignment provided to us by the Oregon Legislative Assembly, in part, involved an analysis of the workability of SB 1092, it also placed us in the position of recommending policy choices to the assembly. Many of these policy choices involve tradeoffs between the rights of youths who are accused in juvenile proceedings and the rights of students and parents of students to have their teachers made aware of risks to fellow students.

LC 2078, approved by the Commission, assumes that school personnel will be circumspect in the way they treat the information provided to them by balancing the potential ramifications of notice of the charges against the need to protect other students from juveniles who might pose a danger to their fellow students.

I do not take issue with the procedural requirements in the proposed legislation nor do I take issue with the "housekeeping" suggestions contained within the draft.

I do, however, take great issue with the Commission's elimination of categories of conduct by the effected juveniles which, if charged, would be worthy of notice to school officials. The Commission recommendation amends Section 2 (4), Chapter 50 Oregon Laws 2008 in the following ways:

Current law triggers a notice if a juvenile is accused by a District Attorney of conduct that, if committed by an adult, would constitute a crime involving harm or threatened harm to another person. The Commission changes this to conduct, that if committed by an adult, would constitute a crime that **involves serious physical injury or threatens serious physical injury** to another person. In so doing, the Commission recommendation narrows the type of conduct that warrants a notice to school officials. In addition, the current law triggers a notice if a juvenile is accused of an offense that, if committed by an adult, would constitute certain crimes that include misdemeanor or felony sex offenses. The Commission recommendation has narrowed the scope of the reportable conduct to only that which would constitute a felony. In addition, the current law requires a notice if a District Attorney accuses a juvenile of conduct which, if committed by an adult, would constitute a crime involving sexual assault of an animal or animal abuse in any degree. The Commission recommendation eliminates this category of conduct from the notice provisions. Finally, current law requires a notice if a juvenile is accused by a District Attorney of conduct which, if committed by an adult, would constitute a crime involving an offense for which the manufacture or delivery of alcohol or a controlled substance is an element of the crime. The Commission also eliminates this category of conduct from the notice provisions.

I am informed that one of the purposes for narrowing the types of conduct which would give rise to the notice provisions is to eliminate the possibility of "minor school yard brawls" triggering reporting requirements. I do not find that rationale convincing because I believe it would be extremely unlikely that a District Attorney would charge a juvenile based upon conduct arising from a typical "schoolyard brawl". As a parent of a child who may be attending public school, it is my view that if a juvenile engages in conduct which is serious enough to warrant a District Attorney initiating a juvenile proceeding, school officials should know about the proceeding to protect innocent students from undue risks. The Commission recommendation would, in my view, deprive teachers of invaluable information of which they should be aware in order to protect their other students. For instance, if a student is involved in a juvenile proceeding because he has engaged in conduct that involves the torturing of animals, I do not want my child or his classmates subjected to undue risks which might be posed by that student. If another student is involved in a juvenile proceeding for selling or manufacturing drugs, I do not want my child or the children of other parents subject to any undue risk which might be posed by that student either. I believe most parents would favor this common sense approach.

I am also informed that these deletions were made, in large part, as a political concession to those members of the work group who advocate privacy interests of juveniles involved in the criminal justice system. Although I respect their views and perspectives, I do not believe these important provisions should be compromised away based upon political expediency.

During the Commission proceeding I made the following motions:

(1) At Page 5, Line 21 of the draft to restore the words "harm or threatened harm" and delete "involves serious physical injury or threatens serious physical injury".

(2) At Page 5, Line 25, to restore the words “sexual assault of an animal or animal abuse in any degree”.

(3) At Page 5, Line 26, to omit the word “felony” to include all sex offenses.

(4) At Page 6, Lines 5 and 6, to restore the words “an offense for which manufacturer or delivery of alcohol or a controlled substance is an element of the crime”.

The motions were not adopted by the Commission. I therefore voted against the entire proposal and respectfully dissent.

I understand that my minority report will also be presented to the Legislative Assembly as an amendment to the Commission’s printed bill. Should the Legislative Assembly adopt the Law Commission’s recommended legislation, I urge that it include the amendments proposed by this minority report.

DATED this 28 day of January, 2009.

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John DiLorenzo, Jr.
Commissioner

UCC Articles 1 and 7 Work Group

MODERNIZING THE GENERAL AND DOCUMENTS-OF-TITLE PROVISIONS OF THE UNIFORM COMMERCIAL CODE SB 558

Prepared by Prof. Carl S. Bjerre
University of Oregon School of Law

From the Offices of the Executive Director
Jeffrey C. Dobbins
and
Deputy Director
Wendy J. Johnson

Approved by the Oregon Law Commission at its Meeting on
January 23, 2009

I. Introduction

The Uniform Commercial Code ("UCC"), which has been the law throughout the United States for several decades, has the principal purpose of encouraging the free flow of commerce across state borders. The UCC helps to accomplish this by freeing buyers and sellers, borrowers and lenders, payors and payees, etc., from the uncertainty or high research costs that would result from each state's laws differing from the laws of other states. The UCC is sponsored by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Law Institute (the "ALI"), which occasionally recommend revisions or amendments to portions of the UCC for enactment by the states.

The substance of the present bill originated with two of these NCCUSL and ALI-recommended amendments. It consists of (a) a revision of UCC Article 1, which generally acts as an "umbrella" in that it provides definitions and general principles that apply throughout the other UCC articles; and (b) a set of amendments to UCC Article 7, which applies to warehouse receipts, bills of lading and other documents of title.[1]

The bill is designed to preserve Oregon's participation in the uniform statutory framework that is shared by the other states, and by the same token to bring Oregon law up to date with the advances in certain commercial practices over the past few decades. Specifically (in addition to other much more minor updates), the bill would (a) extend the concept of course of performance so that it applies to contracts other than for the sale of goods, (b) amend the concept of good faith as set forth in UCC Article 1 to include the observance of reasonable commercial standards of fair dealing, (c) repeal a statute of frauds for sales of personal property other than goods, and (d) provide a framework for the issuance and transfer of documents of title in electronic form

II. History of the project

The substance of the bill's proposed revision and amendments were first promulgated by NCCUSL and the ALI in 2001 (for Article 1) and 2003 (for Article 7). The standard NCCUSL and ALI process was followed in both cases, and this process is

[1] Other articles of the UCC are affected by the current bill only in two limited ways. First, because of its umbrella nature, changes made to Article 1 can have effects in other articles. And second, the changes to Articles 1 and 7 are accompanied by a handful of small direct amendments to the other articles, designed to keep terminology and policy consistent across the full UCC.

The other articles of the UCC are as follows: Article 2 regarding sales of goods; Article 2A regarding leases of goods; Article 3 regarding negotiable instruments such as promissory notes; Article 4 regarding the bank/customer relationship; Article 4A regarding wire transfers; Article 5 regarding letters of credit, Article 8 regarding investment securities, and Article 9 regarding secured transactions. UCC Article 6, regarding bulk sales, has been repealed in most jurisdictions including Oregon.

quite thorough. First, for each Article, a Study Group was created for the purpose of determining whether revisions to current law were needed. Following the Study Group's affirmative report, a Drafting Committee was created for the purpose of crafting the new statutory text. Each Drafting Committee was staffed by representatives of both sponsoring groups and of the American Bar Association, many of them experts in the relevant area of commercial law. The Drafting Committees actively sought the cooperation of affected industry groups across the nation, and worked in depth over the course of numerous weekend meetings across the country. The Drafting Committee's work, when final, was approved not only by both NCCUSL and the ALI but also by the American Bar Association.

Since then, the proposed amendments to both Article 1 and Article 7 have been widely adopted by other states and U.S. territories. For Article 1 there have been 35 adoptions to date, including California, Idaho and Nevada though not yet Washington.[2] For Article 7 there have been 31 adoptions to date, including the same neighboring jurisdictions just mentioned.[3]

The Oregon Law Commission Work Group was first convened in June, 2008 for the purpose of evaluating the suitability for Oregon of the proposed amendments and, if suitable, preparing a draft bill for legislative introduction. Members of the Work Group were as follows: Richard Hagedorn, Willamette University School of Law; Johnston Mitchell, McEwen Gisvold LLP; Douglas Pahl, Perkins Coie LLP; Richard Rasmussen, West Coast Bancorp; Robert Russell, Oregon Trucking Association, Inc.; and Ken Sherman, Sherman, Sherman, Johnnie & Hoyt. Statutory drafting was carried out by Sean Brennan, Oregon Legislative Counsel. OLC support was provided by Deputy Director Wendy J. Johnson and by Legal Assistants Kevin Meherns and Lisa Ehlers. Oregon State Bar advice was provided by David Nebel. The Work Group's Chair was Lane Shetterly, Chair of the OLC. The Work Group's Reporter was Carl S. Bjerre, University of Oregon School of Law.

As is usual in the case of the UCC, the NCCUSL and ALI process resulted in Official Comments for each statutory provision. The Work Group was guided by these Official Comments as well as by the members' knowledge of the applicable law and practice. (The Official Comments are generally and rightly accorded substantial weight by the courts in construing the UCC, and for that reason the legislature should be guided by them as well in considering this bill. The Official Comments to revised Articles 1 and 7 are included as Appendices A and B, respectively.)

III. Statement of the problem areas

During the decades since UCC Articles 1 and 7 were originally promulgated, business practices have naturally evolved in various ways, with the result that some of the corresponding UCC provisions have begun to lose their usefulness as a sound legal foundation. Four principal areas in particular have emerged as problems: the

[2] See < http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucc1.asp>
[3] See < http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucc7.asp>

applicability of course of performance; the content of Article 1's general duty of good faith; the presence of statute of frauds for sales of personal property other than goods; and the accommodation of electronic documents of title.

A. *Course of performance.*

The literal words of a contract often cannot accurately interpreted until placed in the context of surrounding facts. To take a very simple example, a contract calling for payment of $10,000 may mean one thing when made by two parties who reside in the United States, and another thing when made by two parties who reside in Canada. In a long-term contract which calls for repeated actions by one or more parties, "course of performance" is an important category of surrounding facts that should aid in interpretation. UCC Article 2, governing sales of goods, has always provided for course of performance to be used as a tool of contract interpretation (see ORS 72.2080), but the same tool should be equally available to interpret contracts elsewhere in the UCC, and it currently is not.

For example, suppose that a borrower and a secured lender have agreed that the collateral for the borrower's loan includes "all rights to payment owed to the borrower by its Grade A customers," that this agreement has been in place for several years, and that the term "Grade A customer" isn't defined by the terms of the agreement. One natural way to assist a court or other interpreters in determining what "Grade A customer" means – for example, whether the term includes Spring Hill Nursery, a mid-size financially stable retailer that purchases moderate amounts of merchandise from borrower – is to look to the conduct of the borrower and the secured lender of the years in which the agreement has been in place. If the secured lender has repeatedly treated rights to payment from Spring Hill Nursery as collateral (for example, by instructing Spring Hill Nursery to pay the secured lender rather than the borrower), and if the borrower has repeated accepted this conduct, then this course of performance is strong evidence of the meaning of the agreement. But at present there is no statutory guidance on this point, outside of UCC Article 2.

B. *Definition of good faith.* Because this topic is fairly complex, its discussion is divided into two parts, with some background being provided before the statement of the problem.

1. Background: existence of the duty. UCC Article 1 provides, "Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance or enforcement." ORS 71.2030. The bill would continue this provision (though it would be relocated to a new ORS 71.3040, as provided by section 17 of the bill). Its effect is to supplement the literal language of each UCC-governed contract and duty with a duty of good faith. For example, under UCC Article 9, the contract between a borrower and a secured lender sometimes includes a "dragnet clause," according to which the borrower's assets are collateral not only for today's obligations, but also for obligations to the lender that the borrower might incur in the future.[4] UCC Article 9

[4] See ORS 79.0204(3).

itself says nothing about whether these dragnet clauses must be performed in good faith, but the effect of the above-quoted Article 1 provision makes it clear that they must.[5]

This interaction of Article 9's dragnet clauses and Article 1's duty of good faith shows how Article 1 has what we have called an "umbrella" effect on other UCC articles: the Article 1 provision contributes to determining the effect of a statute contained in another UCC article. (By contrast, and for clarity in the discussion that follows, it is important to distinguish this umbrella effect of Article 1's good faith rule from the "direct" effects of good faith that are stated outside of Article 1. Numerous provisions found in UCC Articles 2, 2A, 3, 4A, 5, 7, 8 and 9 explicitly impose a good-faith requirement by their own terms; for example, Article 3 explicitly provides that the holder of a negotiable promissory note takes free of certain defenses of the maker only if the holder took the note in good faith;[6] and the operation of these rules has nothing to do with any umbrella effect of Article 1.)

2. The problem: content of the duty. The problem is not the existence of Article 1's umbrella duty of good faith, but the content of that duty. Oregon's current version of Article 1 defines "good faith" as including only "honesty in fact in the conduct or transaction concerned." ORS 71.2010(19). However, the strong preference of modern law is to expand the definition to include an additional element: not only "honesty in fact" but also "the observance of reasonable commercial standards of fair dealing." The distinction between Oregon's current Article 1 version and the more modern version can be described as "purely subjective" versus "both subjective and objective," or as "one prong" versus "two prongs," and one-prong duties of good faith such as current ORS 71.2010(19) have sometimes colorfully been called "pure heart, empty head."

In keeping with the strong modern trend toward a two-prong definition of good faith, virtually every past amendment to UCC articles (both in Oregon and elsewhere) has updated the applicable "direct" definitions of good faith to include both prongs. As just one example, in 2001 Oregon amended its version of UCC Article 9 in exactly this way.[7]

These past amendments have kept Oregon in line with modern law to the extent of good faith's "direct" effects, but unless Oregon amends Article 1 to include the objective as well as the subjective element, then Oregon will be out of step for the "umbrella" effects of good faith. In other words, where Article 9 (for example) specifies that good faith is required, Oregon already imposes the two-prong meaning of the duty, but where Article 9 (for example) does not so specify, Oregon would impose only the one-prong meaning of the duty. This would be problematic for at least three reasons.

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[5] This example is adapted from the facts of Pride Hyundai, Inc. v. Chrysler Financial Company, 369 F.3d 603 (1st Cir. 2004).

[6] ORS 73.0302(1)(b)(B), 73.0305.

[7] See ORS 79.0102(qq) ("'Good faith' means honesty in fact and the observance of reasonable commercial standards of fair dealing."). See also ORS 72.1030(1)(b), 72A.1030(2)(n), 73.0103(1)(d), 74.1040(3)(g), 74A.1050(1)(f), 78.1020(1)(j). The sole notable exception is the amendments to UCC Article 5, governing letters of credit. The drafters of the NCCUSL and ALI amendments to Article 5 retained the one-prong definition because of circumstances that are particular to the letter-of-credit industry, and Oregon has done the same in the interest of cross-border uniformity. ORS 75.1020(1)(g).

(a) Confusion and lack of harmony within Oregon law itself. With the Oregon versions of UCC Articles 2, 2A, 3, 4A, 8 and 9 already providing for a two-prong duty for the "direct" instances of good faith, it is anomalous and needlessly confusing for "umbrella" instances of good faith to remain governed by the old one-prong standard.

(b) Growing loss of uniformity between Oregon and its sister states. As other states continue to adopt Revised Article 1, the clear majority can be expected to impose the two-prong duty, and the difference between those states and Oregon law can be expected to burden cross-border transactions that are governed by the UCC.

(c) Substantive desirability of the two-prong standard. This point is discussed in Part IV.B below.

C. *Statute of frauds.* As most lawyers know, the UCC provides that contracts for the sale of goods at a price of $500 or more are not enforceable unless in writing and signed by the party to be charged. ORS 72.2010(1). Outside the UCC, certain other contracts such as those of suretyship, or for the sale of real property, etc., are similarly subject to a statute of frauds. ORS 41.5180. Neither of these provisions are at issue in the present bill, but the UCC also contains a further obscure statute of frauds for "sale of personal property" beyond $5,000, see ORS 71.2060. This latter provision and its uniform counterparts in other states are poorly drafted (without the important and well-established exceptions provided in more mainstream statutes of frauds) and have no strong justification. They create a substantial risk that genuine transactions, such as the provable sale of a half-interest in a securities account, would be unenforceable due only to the lack of a signed writing.

D. *Electronic documents of title.* Warehouse receipts, bills of lading, and other documents of title have traditionally been in paper form, (A "warehouse receipt" is a document that represents the ownership of goods that are being professionally stored, for example, grain that is being stored in a silo. Similarly, a "bill of lading" is a document that represents the ownership of goods that are being professionally transported, for example, timber that is being shipped by railway. In both cases, people that want to buy and sell or otherwise enter large commercial transactions involving the grain or the timber can advantageously do so using the documents as opposed to the goods themselves. UCC Articles 2, 9 and especially 7 treat the goods as being embodied by the documents, much as UCC Article 3 treats a creditor's right to be paid as being embodied by a negotiable promissory note.)

However, during the past several years businesses have begun conducting transactions with documents of title in electronic form, and there is currently no Oregon legal foundation for these transactions. The law's accommodation of electronic documents of title would enhance commerce in two related ways. (a) It would allow for the quick carrying out of transactions. Buyers, secured lenders and others would be able

to acquire their documents in a matter of moments rather than a matter of days, and because time equals risk, this quickness would reduce the risk of the transferor becoming insolvent or otherwise unable to perform. (b) It would deepen the potential pool of transferors and transferees. An Oregon bank could use a warehouse receipt for Hawaiian flowers as collateral just as easily as could a Hawaiian bank, and conversely, a Japanese bank would be able to use a bill of lading for Oregon timber for collateral just as easily as could an Oregon bank. Unless Oregon joins other states in providing a strong foundation for transactions in electronic documents of title, this branch of commerce within our state or involving our businesses will be hampered.

IV. The objectives of the proposal

The bill provides resolutions for each of the above problems that (a) the Work Group, by consensus, agrees are substantively desirable on their own terms, and (b) also serve the more general goal of keeping Oregon's commercial law consistent with those of its sister states.

A. *Course of performance.*

The bill relocates the existing provisions on course of performance from Article 2 to Article 1, where they will accordingly apply throughout the UCC in umbrella fashion. See section 16(1) of the bill (adding the provisions to Article 1) and section 116 of the bill (repealing ORS 72.2080, in which the provisions are currently limited to Article 2, as well as other sections). This point has not been controversial either within the Work Group or nationally.

B. *Definition of good faith.*

The bill defines good faith for purposes of Article 1 as "honesty in fact and the observance of reasonable commercial standards of fair dealing." See section 8(2)(t) of the bill. In conjunction with the continuation of current ORS 71.2030, which as discussed above imposes the obligation of good faith as an umbrella provision, the result will be that the two-prong duty of good faith would generally apply throughout the UCC.[8]

The consensus of the Work Group is that this two-prong standard is the more desirable rule of law, because it fills the gaps of an agreement in the fullest way. When two parties make a contract, they generally draft explicit answers to the potential future questions that they can foresee arising; however, not even the most foresighted and skilled draftsperson can foresee and draft protection for all future questions that might arise. The implied duty of good faith, with an objective as well as a subjective prong, has been carefully developed by common-law judges over many decades precisely in order to help address this problem, and Article 1's umbrella duty of good faith fulfills a parallel role within the UCC. Crucially, it is well accepted in common-law cases that the implied

[8] The above-noted exception for UCC Article 5, governing letters of credit, would continue to apply.

duty of good faith includes the observance of reasonable commercial standards,[9] and at least one Oregon Supreme Court case expressly imposes a reasonableness obligation as part of the common-law implied duty of good faith.[10] With a two-prong definition of good faith, any party to any contract can have assurance that the other party will be prevented not only from acting dishonestly, but also from acting arbitrarily or unreasonably. As a result, parties who are entering into ongoing commercial relationships will benefit from an enhanced degree of upfront confidence in terms of what they can expect from their counterparties.

There can, to be sure, be some costs to the two-prong standard. The reasonableness portion of the standard, by its nature, can be difficult and fact-sensitive to apply, and in the event of a courtroom dispute, the party whose good faith is being challenged would naturally have an easier time prevailing on summary judgment under the current one-prong standard than under the two-prong standard. Nonetheless, the prevailing view in the Work Group, as at the NCCUSL and ALI level, is that these costs are outweighed by the benefits of the two-prong standard.

C. *Statute of frauds.*

The bill repeals the existing statute of frauds for sales of personal property. See section 13 of the bill. This point has not been controversial either within the Work Group or nationally.

D. *Electronic documents of title.*

The bill recognizes that documents of title can be issued in electronic form. See section 8(2)(p)(C) of the bill (defining "electronic document of title" and subjecting them to most of Article 7's existing rules).

Correspondingly, the bill also provides for electronic equivalents to two of Article 7's other traditional concepts, i.e. possession and holder. These two concepts, details of which appear below, help to implement the negotiability principle which is the linchpin of Article 7. The negotiability principle, which may be familiar to many lawyers from other areas including UCC Article 3's treatment of promissory notes, provides generally that an innocent purchaser of property can acquire its rights free of conflicting claims of ownership. In the context of Article 7, this means that an innocent purchaser of a negotiable document of title can acquire rights to the good that are being stored in the warehouse, or transported by the carrier, without concern that the goods may already

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[9] See Restatement (Second) of Contracts § 205, comment a:

> Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness *or reasonableness*.

(Emphasis added).

[10] Best v. United States National Bank of Oregon, 303 Or. 557, 739 P.2d 554, 565 (1987) (whether bank's NSF fees violate the duty of good faith "should be decided by the reasonable contractual expectations of the parties").

have been sold to granted as collateral to an unknown third party. This rule greatly enhances the robustness of commerce in documents of title.

In order to qualify for this protection under Article 7, the purchaser of the document of title has traditionally been required to "possess" it. For a paper document of title, it is easy to determine who has possession because there is only one genuine original of the document at any time. By contrast, electronic data can be infinitely and perfectly reproduced, which leads to a conundrum on the subject of who possesses the original of an electronic document of title. The bill resolves this issue by creating the new concept of "control" of an electronic document of title,[11] which serves as the equivalent of possession in Article 7. Specifically, a person has control of an electronic document of title if an electronic transfer system "reliably establishes that person as the person to which the electronic document was issued or transferred."[12] See section 54 of the bill.

The concept of "holder" is closely related to that of possession and, now, control. In order to qualify for protection under Article 7's negotiability principle, the purchaser must be the holder, which has traditionally required being in possession of a tangible document of title. The bill retains this concept, but also expands it so that the person in control of an electronic document of title is also the holder. See section 8(2)(u)(C) of the bill.

Finally, in order to enhance the flexibility of the new electronic medium, the bill provides for documents of title that were originally issued in paper form to be reissuable in electronic form, and vice versa. See section 53 of the bill.

None of these points have been controversial either within the Work Group or nationally.

E. *Choice of Law*

One topic was briefly discussed within the Work Group but does not appear in the bill: a revision of Article 1's choice-of-law rules. The reason that this revision does not appear in the bill is that the revision has been rejected nationally, and the Work Group did not believe it would be productive to pursue the topic.

ORS 71.1050 currently provides that if a transaction bears a reasonable relation both to Oregon and to a different jurisdiction, then the parties to that contract have the

[11] The concept of "control" in the bill is borrowed from other parts of the UCC and other law in which control is already a useful concept for other kinds of assets. See, e.g., ORS 78.1060 (control of securities accounts with a broker or other intermediary), ORS 79.0104 (control of a savings, checking or other deposit account), ORS 79.0105 (control of electronic chattel paper), ORS 79.0106 (control of commodity contracts), ORS 84.046 (Uniform Electronic Transactions Act's provision for control of transferable records such as electronic promissory notes).

[12] This definition of "control" is deliberately open-ended, because any more specific reference to currently existing technology would risk becoming quickly outdated and thereby could hamper the evolution of business practices. We understand, however, that systems are already in place today that are accepted as meeting the applicable "control" criteria.

autonomy to effectively specify that their contract will be governed either by Oregon law of Oregon or by the law of the other jurisdiction. For example, if an Oregon resident and a Texas resident agree on the sale of timber to be shipped from Oregon to Texas, their contract may effectively provide that it is governed either by Oregon law or by Texas law. However, if the contract purports to provide that it is governed by Massachusetts law and the transaction bears no relation to Massachusetts, such a choice of law is ineffective.

At one time the NCCUSL and ALI proposal included a substantial revision of this rule, which generally speaking would have enhanced the parties' autonomy so that, in the above example, the choice of Massachusetts law would have been effective even in the absence of a reasonable relationship to that jurisdiction. However, this proposal met with severe controversy, and of the 35 jurisdictions adopting Revised Article 1, all but one of them (the U.S. Virgin Islands, which acted even before the Article 1 revision was finally approved) rejected the new choice-of-law rule, and instead retained the rule reflected in ORS 71.1050. As a result, by May 2008 both NCCUSL and the ALI had withdrawn the proposed amendment, replacing it with a new proposal that retains current law subject only to stylistic changes.

Accordingly, the interest in keeping Oregon law uniform is clearly best served by retaining the substance of ORS 71.1050. The bill does so, though it relocates this substance to what will be a new ORS 71.3010. See section 14 of the bill. The retention of the existing choice-of-law rules has not been controversial within the Work Group or, since May 2008, nationally.

V. Review of legal solutions existing or proposed elsewhere

As noted above, the bill's provisions are largely consistent with the revisions to Article 1 and the amendments to Article 7 that have already been adopted by 35 and 31 U.S. jurisdictions, respectively.

On the subject of good faith, a clear minority of U.S. jurisdictions (11 of the 35 that have adopted Revised Article 1 to date)[13] have declined to expand the definition of good faith to include the second (reasonableness) prong. As discussed above, the prevailing opinion of the Work Group was that this approach should be rejected and that Oregon should join the clear and likely-growing majority of jurisdictions.

[13] See Keith A. Rowley, *The Often Imitated, But (Still) Not Duplicated, Revised UCC Article 1*, < http://www.law.unlv.edu/faculty/rowley/RA1.090108.pdf>

VI. The proposal

The substantively significant sections of the bill, discussed above, are presented here in list form with a cross-reference to the above discussions:

SECTION 8(2)(p)(C): defines "electronic document of title" and subjects these documents to most of Article 7's existing rules. See Parts III.D and IV.D above.

SECTION 8(2)(t): expands duty of good faith to include the observance of reasonable commercial standards of fair dealing. See Parts III.B and IV.B above.

SECTION 8(2)(u)C): defines "holder" of an electronic document of title as being the person in control of it. . See Parts III.D and IV.D above.

SECTION 13: repeals statute of frauds for sale of personal property other than goods. See Parts III.C and IV.C above.

SECTION 14: retains current contractual choice of law rule with reasonable relationship test. See Part IV.E above.

SECTION 16(1): adds course of performance to Article 1 as umbrella. See Parts III.A and IV.A above.

SECTION 17: preserves umbrella duty of good faith. See Parts III.B and IV.B above.

SECTION 53: Provides for electronic reissuance of paper documents of title, and vice versa. See Parts III.D and IV.D above.

SECTION 54: provides for "control" of electronic documents of title. See Parts III.D and IV.D above.

SECTION 116: repealing Article 2's course of performance provisions, among others. See Parts III.A and IV.A above.

The other sections of the bill represent (a) conforming changes prompted by sections already discussed above, (b) changes that relate only to gender-neutrality, medium-neutrality as between traditional writings or signatures and their electronic equivalents, or other stylistic matters, or (c) comparably very minor updates. Because of its nature as a code, many sections of the UCC are interrelated, so that a single substantive change can require numerous conforming amendments; hence the overall length of the bill.

VII. Conclusion

The bill should be adopted because it modernizes Oregon's law of commercial transactions. It provides for course of performance to be applied to all contracts within the UCC; it expands the Article 1 duty of good faith; it repeals a poorly designed statute of frauds; and it provides for the issuance and transfer of documents of title in electronic form. At the same time, the bill keeps Oregon's law of commercial transactions substantially uniform with those of its sister states, which benefits the economy of the state and the nation.

VIII. Appendices

Appendix A: Text and Official Comments to Revised UCC Article 1
Appendix B: Text and Official Comments to Revised UCC Article 7

Amendment Note

Amendments were made in the Senate Judiciary Committee to Section 14 of the bill. These were stylistic and modest changes to the choice of law provision. An explanation of the changes to this provision was incorporated in the report on pages 8-9. The Law Commission had approved the amendment at the time the bill was heard by the Commission. Due to filing deadlines with the legislature, the amendment couldn't officially be made until the bill was heard in the Senate.

OREGON LAW COMMISSION

WORK GROUP ON CHOICE OF LAW FOR TORTS

CHOICE-OF-LAW FOR TORTS AND OTHER NON-CONTRACTUAL CLAIMS REPORT AND COMMENTS

Approved by the Oregon Law Commission
at its Meeting on January 23, 2009

By
Symeon C. Symeonides
Chair and Reporter
and
James A.R. Nafziger
Reporter

CONFLICTS WORK GROUP
OREGON LAW COMMISSION

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A PROPOSED ACT ON CHOICE-OF-LAW FOR TORTS AND OTHER NON-CONTRACTUAL CLAIMS

INTRODUCTION

I. Background: The Traditional Choice-of-Law System and the Choice-of-Law Revolution

For more than one-hundred years, American courts, along with Oregon courts, followed a rigid territorialist rule-system for determining the law governing cases that had contacts with more than one state (conflicts cases). In tort and contract conflicts, this system mandated the application of, respectively, the law of the state in which the injury occurred (*lex loci delicti)* and the law of the place in which the contract was made (*lex loci contractus*), regardless of any other contacts or factors.

Over time, this system proved completely inadequate to rationally resolve the more frequent and complex conflicts brought about by increased cross-border activity and people mobility. Courts gradually began searching for oblique ways to avoid the often arbitrary and artificial results the traditional system dictated. By the 1960's, judicial dissension against that system acquired the dimensions and intensity of an open "revolution" as many courts began abandoning the *lex loci delicti* and *lex loci contractus* rules in favor of flexible open-ended "approaches." See S. Symeonides, *The American Conflicts Revolution in the Courts: Past, Present and Future* (2006).

Oregon was among the leaders of this new movement. In 1964, the Oregon Supreme Court became the second state supreme court in the United States to join the revolution. In Lilienthal v. Kaufman, 395 P.2d 543 (Or. 1964), the court abandoned the *lex loci contractus* rule and replaced it with an "approach" known as "governmental interest analysis" first advocated by Professor Brainerd Currie. See B. Currie, *Selected Essays on the Conflict of Laws* (1963). Three years later, Oregon completed the abandonment of the traditional system by discarding the *lex loci delicti* rule in tort conflicts and relying instead on the Restatement (Second) of Conflict of Laws (1971), which was then in draft form. See Casey v. Manson Constr. & Eng'g Co., 428 P. 2d 898 (Or. 1967).

In the rest of the United States, the choice-of-law revolution caught fire in the 1970s, spread in the 1980s, and declared victory in the 1990s, leading to the demolition of the traditional system, at least in tort and contract conflicts. By 2009, forty-one U.S. jurisdictions had abandoned the traditional system in contract conflict, and forty-two jurisdictions did likewise in tort conflicts. See S. Symeonides, Choice-of-Law in the American Courts: Twenty-Second Annual Survey, 57 *Am. J. Comp. L.* (2009) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1322168.

However, although the revolution has changed American conflicts law in many beneficial ways, it did not produce a new choice-of-law *system* to replace the old one. Rather than offering a unified vision for the future, the revolution offered conflicting

theories, which the courts have merged together, often adding their own variations. In its zeal to cleanse the system from all the vestiges of traditional thinking, the revolution careened to the other extreme of denouncing not only the particular rules of the First Conflicts Restatement (1934), but also all choice-of-law rules in general. Rules were replaced with "approaches," namely, flexible formulae that do not designate the applicable law but simply enumerate the many and often malleable factors to be considered in judicially selecting that law. Although these factors differ from one approach to the next, all such approaches are open-ended and call for an individualized, *ad hoc* handling of each case. The result was that, in relatively short time, American conflicts law began looking like "a tale of a thousand-and-one-cases" in which "each case [was] decided as if it were unique and of first impression." P. Kozyris, Interest Analysis Facing its Critics, 46 *Ohio St. L. J.* 569, 578, 580 (1985).

Oregon did not avoid this loss of certainty. In reviewing Oregon choice-of-law cases after *Lilienthal* and *Casey*, an experienced, long-time observer of the Oregon conflicts scene characterized them as "puzzling," "extraordinarily undisciplined," and "bewildering." J. Nafziger, Oregon's Project to Codify Conflicts Law Applicable to Torts, 12 *Willamette J. Int'l L. & Disp. Resol.* 287, 293, 304, 295 (2004). He noted that one version of Oregon's reliance on the Restatement (Second) engages in weighing the "interests" of the involved states and minimizes other factors. Another version employs "an arithmetic of contacts— a gravity-of-contacts approach—that minimizes competing interests," while a third version "sticks within the bark of territorialism to define the most significant contact or contacts without recourse to governmental interests, policies or other considerations." Taken together, the three versions present a "bewildering picture." Id. at 294-95.

Indeed, bewilderment is a common sentiment among lawyers contemplating—or seeking to avoid—litigation of choice-of-law issues in the United States today. The excessive fluidity of the various judicial choice-of-law approaches often makes it very difficult, if not impossible, to predict the outcome of a choice-of-law decision. While flexibility is preferable to uncritical rigidity, too much flexibility can be as bad as no flexibility at all. Among other things, it increases litigation costs, wastes judicial resources, and raises the possibility of judicial subjectivism. In turn, judicial subjectivism leads to dissimilar handling of similar cases, which in turn tests the citizens' faith in the legal system and tends to undermine its very legitimacy.

While conflicts law is in some respects a field apart, it is not so different as to risk ignoring these fundamental values for long. Polyphony and flexibility are both necessary and enriching in periods of transition and experimentation, but they should not be the ultimate destination goals. Four decades after the revolution began, it became evident that it had gone too far in embracing flexibility to the exclusion of all certainty, just as the traditional system had gone too far toward certainty to the exclusion of all flexibility. It was time for an exit strategy that would consolidate and

preserve the gains of the revolution, curtail its excesses, and turn its victory into success.

II. Oregon Takes the Lead, Once Again

Once again, Oregon took the lead in recognizing the need for a new way, an exit strategy from the anarchy of the conflicts revolution. This strategy called for a new breed of smart, evolutionary choice-of-law rules that would preserve the methodological accomplishments of the revolution while restoring a proper equilibrium between certainty and flexibility. To implement this strategy, the Oregon Law Commission undertook the ambitious project of drafting choice-of-law rules for enactment by the state's Legislature.

The first phase of this project produced a new comprehensive statute for contract conflicts. This statute, ORS 81.100 to 81.135, was drafted by the Commission in 2000, was unanimously adopted by both houses of the Oregon Legislature in 2001, and became effective on January 1, 2002. For a discussion of this statute, see J. Nafziger, Oregon's Conflicts Law Applicable to Contracts, 38 *Willamette L. Rev.* 397 (2002); S. Symeonides, Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis, 44 *Willamette L. Rev.*205 (2007).

III. The Attached Act

The attached draft Act represents the second phase of this project. The Act restores predictability in Oregon's conflicts law by providing specific rules for determining which state's law will govern most tort and other non-contractual claims arising from situations having contacts with more than one state. However, as explained below, the Act also provides a certain degree of flexibility and thus avoids the shortcomings of the traditional system whose rigidity had caused the revolution. Thus, the Act avoids both the excessive fluidity of modern choice-of-law approaches, in Oregon and other states, and the other extreme of the excessive rigidity of the traditional system. This new equilibrium between the need for legal certainty and the need for a certain degree of flexibility should serve Oregon well for the next generations and could well be a model for other states to follow.

The Act has been drafted under the auspices of the Oregon Law, during a process that lasted for the better part of 2008. The two reporters (Symeon C. Symeonides and James A.R. Nafziger) were assisted by a Work Group chaired by Symeonides and consisting of one retired supreme court justice (Hans Linde), one court of appeals judge (Jack Landau), one trial judge (Janice Wilson), five practicing attorneys (Kathryn H. Clarke, Jonathan Hoffman, Linda Love, James N. Westwood, and Leonard Williamson), and two law professors (Maury Holland and Dom Vetri).

Each section of the Act is accompanied by extensive explanatory comments, which have bee written by Symeonides and approved by the Oregon Law Commission. The comments accompanied the bill when introduced to the Legislature.

1. Part One: Preliminary Issues. The Act consists of 14 sections, which may be grouped into three parts. The first part, consisting of sections 1-5, deals with preliminary issues. Section 1 defines certain terms used in the Act, including the term "non-contractual claim," which delineates the Act's substantive scope. A "non-contractual claim" is a claim, "other than a claim for failure to perform a contractual or other consensual obligation, that arises from a tort . . . or any conduct that caused or may cause injury compensable by damages, without regard to whether damages are sought."

Section 2 provides that the Act applies for determining which state's law will govern a non-contractual claim "when a choice between or among the laws of more than one state is at issue," namely, when the claim arises from events or circumstances that have pertinent contacts with more than one state and the laws of the contact states on the disputed issues are in material conflict.

Section 3 provides that the law of Oregon determines the scope and meaning of terms used in the Act, while section 4 provides that Oregon law also applies for resolving certain factual questions on which the application of the Act depends, such as where the injurious conduct or the resulting injury occurred. Section 5 provides certain rules for determining a person's domicile, which is a significant factor under other provisions of this Act.

2. Part Two: Claims Governed by Oregon Law. The second part of the Act, consisting of sections 6 and 7, provides for certain non-contractual claims that will be governed by Oregon law without any further inquiry. Section 6 lists the following claims: (1) actions in which the parties agree to the application of the law of Oregon, or in which none of the parties raises the issue of applicability of foreign law, or in which the party who relies on foreign law fail to assist the court in establishing that law's content after being requested by the court to do so; (2) actions against a "public body" of the State of Oregon; (3) actions against owners or possessors of Oregon real property seeking to recover for, or to prevent, injury on that property and arising out of Oregon conduct; (4) actions between an employer and an employee who is primarily employed in Oregon arising out of Oregon injury; and (5) actions for professional malpractice arising from services rendered entirely in Oregon by personnel licensed to perform those services under Oregon law. In all of the above cases, Oregon law governs, notwithstanding any other provisions of this Act.

Section 7 deals provides that Oregon law governs product liability actions in which Oregon has any two, or more, of the following contacts: (1) the domicile of the injured person; (2) the place of injury; (3) the manufacture or production of the product; and (4) the delivery of the product when new in Oregon for use or consumption in Oregon. For a table showing the various combinations, see the Appendix at the end. However, section 7 (unlike section 6) provides two exceptions to the application of Oregon law: (1) the defendant may avoid the application of

Oregon law by demonstrating that the use in Oregon of the product that caused the injury could not have been foreseen and that none of defendant's products of the same type were available in Oregon in the ordinary course of trade at the time of the injury; and (2) either party may avoid the application of Oregon law by demonstrating that the application of the law of a state other than Oregon to a disputed issue would be "substantially more appropriate" under the principles of section 9, which contains the general choice-of-law approach of this Act. If either of the exceptions are found applicable, or if Oregon lacks the above-specified contacts, the applicable law will be selected under the general approach of section 9.

3. Part Three: Choice of Law. The third part of the Act consists of section 8-11. Section 11 provides that, if, after the parties had knowledge of the events giving rise to the dispute, the parties agree to the application of the law of a state other than Oregon, the agreement is enforceable if it is otherwise valid under ORS 81.100 to 81.135, which governs choice-of-law agreements for contractual claims.

In the absence of such an agreement, the applicable law is determined under sections 8, 9, or 10. Section 8 applies for determining the applicable law in claims between the injured person and the person whose conduct caused the injury, section 10 applies to claims between or among third parties, and section 9 is the default rule which applies when not displaced by the other sections of the Act.

The Rules of Section 8. Under section 8, the choice of the applicable law depends in part on the location of four contacts: (1) the place of the injurious conduct; (2) the place of the resulting injury; (3) the domicile of the injured person; and (4) the domicile of the person whose conduct caused the injury. The applicable law is as follows:

> (1) If the parties are domiciled in the same state (or in different states whose laws produce the same outcome), the law of the domiciliary state governs, even if the conduct and injury occurred in another state, but subject to an exception in favor of the law of the latter state for determining the standard of care by which the conduct is judged.
>
> (2) If the parties are domiciled in different states and the laws of those states on the disputed issues would produce a different outcome, then:
>
> (a) If both the conduct and the injury occurred in the same state, the law of that state governs if either party was domiciled in that state;
>
> (b) If both the conduct and the injury occurred in a state other than the one in which either party is domiciled, the law of the state of conduct and injury governs, subject to an exception for cases in which the application of that law would not serve the objectives of that law; and
>
> (c) If the conduct occurred in one state and the injury in another state, the law

of the state of conduct governs, unless the injured person formally requests the application of the law of the state of injury and provided that the activities of the person whose conduct caused the injury were such as to make foreseeable the occurrence of injury in that state.

For a table illustrating the operation of section 8, see table in Appendix. For an exception to section 8, see below.

The "Approach" of Section 9. Section 9 enunciates the general approach of this Act, which applies when not displaced by the Act's other sections. The objective of this approach is to identify and apply the law of the state whose contacts with the parties and the dispute and whose policies on the disputed issues make application of its law the "most appropriate" for those issues. To attain this objective, one must: (1) identify the involved states by examining their relevant contacts with the parties and the facts that give rise to the dispute; (2) identify the substantive rules of each involved state that appear to be in material conflict with the corresponding rules of another involved state and ascertain the policies embodied in those rules; and (3) evaluate the "strength and pertinence" of these policies in light of, and "with due regard to": (a) the policies of "encouraging responsible conduct, deterring injurious conduct, and providing adequate remedies for the conduct," and (b) the needs and policies of the interstate and international systems, including the policy of minimizing adverse effects on strongly held policies of other states.

Although in the abstract the approach of section 9 may appear somewhat vague and indeterminable, it is much less indeterminable than the approach of the Restatement (Second) of Conflict of Laws, which Oregon courts have followed thus far. More importantly, however, section 9 simply establishes the *residual* or default approach which applies only when the more specific sections of this Act are either inapplicable or they refer an issue to section 9. As noted earlier, sections 6 and 7 provide for certain claims and issues that are automatically governed by Oregon law, while section 8 designates the law applicable to most other claims and issues.

While section 6 does not allow any exceptions, sections 7 and 8 contain two escapes anchored in section 9 and intended for exceptional cases. These escapes provide that, if a party demonstrates to the court's satisfaction that, under the principles of Section 9, the application to a disputed issue of the law of a state other than the state designated by sections 7 or 8 would be "substantially more appropriate," then that issue will be governed by the "most appropriate" law selected under Section 9. With this combination of black-letter fixed rules (sections 7-8) and exceptions tied to the flexible approach of section 9, this Act strikes an appropriate equilibrium between the need for legal certainty, on the one hand, and the need for flexible, equitable solutions in individual cases, on the other hand.

4. A Road Map and Check-List. This Act provides an easy road map (see Appendix) that will significantly simplify the courts' task in resolving conflicts of

laws in torts and other cases involving non-contractual claims. A court or other decision-maker encountering such a case may use the following checklist:

(1) If, after the events giving rise to the dispute, the parties agreed to the application of Oregon law, or if none of the parties raises the issue of applicability of foreign law, or the party who relies on foreign law fail to assist the court in establishing that law's content after being requested by the court to do so, Oregon law applies without a choice-of-law analysis. See section 6(1)-(3).

(2) If the action is one of those listed in Section 6(4)-(7), Oregon law applies without any further inquiry, and without any exceptions.

(3) If the action is a product liability action that fits the requirements of section 7, then Oregon law applies, unless the opposing party demonstrates that, under the principles of section 9, the application of the law of another state would be "substantially more appropriate."

(4) If the action is not one of those that must be governed by Oregon law under sections 6 or 7 and the parties have agreed to the application of the law of non-Oregon law after they had knowledge of the events giving rise to the dispute, the agreed law applies, if the agreement meets the requirements of section 11.

(5) In the absence of such an agreement, a distinction is made between, on the one hand, claims between the injured person and the person whose conduct caused the injury, and, on the other hand, claims between or among third parties. Section 8 provides for the first category of claims. The law designated section 8 applies unless the opposing party demonstrates that, under the principles of section 9, the application of the law of another state would be "substantially more appropriate."

(6) For claims between or among third parties, such as joint tortfeasors, the applicable law is selected under the flexible approach of section 9. See section 10.

(7) Section 9 applies only when none of the other sections of this Act are applicable, or when these sections expressly refer to section 9.

DEFINITIONS

COMMENTS TO SECTION 1

(a) Definitions. This section defines, for the purposes of this 2009 Act, certain terms used in Sections 2 through 12 of this Act.

(b) "Conduct." Subsection (1) of Section 1 defines "conduct" as an act that has occurred or that "may" occur so as to include future conduct that may cause future injury, such as when one is preparing to undertake activities on property which may cause injury to, or on, nearby property. The conduct may also be an omission, such as when one's failure to exercise due care in the use of property causes injury to another.

Of course, in order to qualify as a constituent element of a non-contractual claim for the purposes of this Act, the conduct must have caused--or have the potential to cause--a compensable injury. Subsection (5) speaks of conduct that caused--or *may* cause--injury in order to cover situations in which a party seeks injunctive or declaratory relief for ongoing injurious conduct or to prevent future injurious conduct.

(c) "Domicile." This Act uses domicile as a pertinent contact or connecting factor for both natural and legal persons. Section 5 defines domicile and provides rules for determining the state in which a person's domicile is located.

(d) "Injury." Subsection (3) of Section 1 defines injury as a physical or non-physical (e.g., economic or emotional) harm to person or property. The injury may be present or future injury, but, to qualify as a constituent element of a non-contractual claim for the purposes of this Act, the injury must be potentially compensable by damages, even if the claimant does not seek damages in the particular case.

(e) "Law" and Renvoi. Subsection (4) of Section 1 is intended to exclude the phenomenon known as *renvoi*. This French word is generally used in the conflicts literature as short-hand for the practice by which the forum state applies the choice-of-law rules of another state, which may refer back to the law of the forum state (a "remission") or further to the law of a third state (a "transmission"). For practical and other reasons, Subsection (4) of section 1 is intended to avoid this practice by confining any reference to foreign law to the internal or substantive law of the foreign state, excluding its choice-of-law rules.

(f) "Non-contractual" claim. The term "non-contractual claim" delineates the substantive scope of this Act. The term is broader than a tort claim but excludes a claim for failure to perform a contractual or other consensual obligation. A tort claim is defined in the same way as in ORS 30.260(8), which defines tort as "the breach of a legal duty that is imposed by law, other than a duty arising from contract or quasi-contract, the breach of which results in injury to a specific person or persons for which the law provides a civil right of action for damages or for a protective remedy." Although statistically most non-contractual claims arise from torts, the definition of subsection (5) of section 1 encompasses not only tort claims but also claims (other than claims for failure to perform a contractual or other consensual obligation) that arise "from any conduct that caused or may cause an injury compensable by damages." Examples of such other claims are claims arising from racial discrimination, employment discrimination (beyond claims covered by employment law), unfair trade practices, breach of fiduciary duty, and restitution.

Under section 3(1), Oregon law determines whether a particular claim qualifies as a non-contractual claim so as to fall within the scope of this Act, even if the claim is ultimately governed by the law of another state.

(g) "Person." This Act uses the term "person" to include both a natural and a legal person. Subsection (6) of Section 1 defines person through reference to ORS 174.100, which provides that "'[p]erson' includes individuals, corporations, associations, firms, partnerships, limited liability companies and joint stock companies." ORS 174.100(5).

(h) "Public body." Subsection (7) of Section 1 defines a "public body" of the State of Oregon through a reference to ORS 174.109, which states that "'public body' means state government bodies, local government bodies and special government bodies." Subsequent provisions define state governmental bodies (ORS 174.111-174.114), local governmental bodies (ORS 174.116), and special governmental bodies (ORS 174.117). Subsection (7) of this 2009 Act adds to this list of public bodies the Oregon Health and Sciences University and the Oregon State Bar because these two entities would otherwise not be covered by the Act because ORS 174.108(3) excludes them from the definition of public body. Under section 3(1) of this Act, Oregon law determines whether an entity qualifies as a "public body" for the purposes of this Act.

(i) "State." Subsection (8) of section 1 provides a definition of "state" for the purposes of this Act. The definition includes a foreign country and, in some instances, a territorial subdivision of a foreign country, such as a Canadian province or a Swiss canton, *if* that subdivision has its own system of law on the disputed issues. The same qualification applies to recognized Indian tribes and other Native American, Hawaiian, or Alaskan groups. To qualify as a state for the purposes of this Act, the subdivision or group must have its own system of laws on the disputed

issues. Conversely, a federation or a multinational entity, such as the European Union, may qualify as a single country —and thus as a "state" under this Act—if the federation or union has a single law on the disputed issue.

The definition of state also includes the United States "unless the context requires otherwise." The context does not require otherwise when the United States stands on equal footing with another country (as in a maritime tort case that involves contacts with the United States and a foreign country) so that a choice between federal law and foreign law is necessary. In contrast, the context does require otherwise when the United States stands in a hierarchically superior position *vis-a-vis* a state of the United States. In such a context, the demarcation of the line between federal law and state law is not a matter of choosing between the two laws but rather is a question of determining the reach of federal law, a question answered by federal law principles. If, under those principles, the case falls within the reach of federal law, then federal law preempts any contrary state law. This Act does not purport to apply to such "conflicts" between federal and state law.

APPLICABILITY

COMMENTS TO SECTION 2

(a) Applicability. This Act applies when it is necessary to determine which state's law governs a non-contractual claim "when a choice between or among the laws of more than one state is at issue." A choice of law is "at issue" when: (1) the claim arises from events or circumstances that have pertinent contacts with more than one state; and (2) the laws of the contact states on the disputed issues are in material conflict such that each law would produce a different outcome.

(b) Relation with other statutes. This Act is not intended to displace the provisions of other Oregon statutes that expressly designate the law applicable to a particular non-contractual claim. One important example of such a statute is ORS 12.410 to 12.480, which contains the Uniform Conflict of Laws- Limitations Act. That Act provides rules for choosing the applicable statute of limitation in cases that have contacts with other states. Another example, albeit on a subject that does not overlap with the scope of this Act, is ORS 81.100 to 81.130, which provides a comprehensive set of rules for determining the law governing *contractual* claims in cases presenting choice-of-law issues.

Both of the above-cited statutes are typical choice-of-law statutes in that they deal exclusively with cases presenting conflicts of laws. However, other (substantive) Oregon statutes also contain isolated provisions delineating the intended reach of those statutes to include or to exclude certain cases that have non-Oregon contacts.

For example, ORS 656.126(1) provides that Oregon's workers' compensation statutes apply to workers employed in Oregon and injured in the course of their employment while on a temporal assignment in another state. Conversely, ORS 656.126(2) excludes from the coverage of Oregon's workers' compensation statutes certain workers employed in another state and injured in Oregon while on temporary assignment in Oregon. These provisions are veritable choice-of-law rules, even though the provisions do not use such explicit terms. This Act is not intended to displace these and other similar rules found in other Oregon statutes.

PRELIMINARY ISSUES

COMMENTS TO SECTION 3

(a) Characterization. Subsection (1) of Section 3 provides that the scope and meaning of terms and concepts employed in this Act is to be determined under Oregon law. This is consistent with the generally accepted principle that "characterization"--namely, the classification of a given factual situation under the terms and categories employed by the forum's choice-of-law rules--is conducted under the law of the forum. See, e.g., Restatement (Second) of Conflict of Laws § 7(2) (1971) (providing that "[t]he classification and interpretation of Conflict of Laws concepts and terms are determined in accordance with the law of the forum").

Subsection (2) of Section 3 provides that the scope and meaning of terms employed by the law that is determined to be applicable under this Act—which may be the law of Oregon or that of another state—are determined under that law. Cf. Restatement (Second) of Conflict of Laws § 7(3). For example, if the law of State X is applicable under the provisions of this Act and that law conditions the plaintiff's recovery on proof of "gross negligence," the meaning of "gross negligence" will be determined under the law of State X. Likewise, if State X prohibits recovery against "charitable entities," the law of State X determines whether the entity involved qualifies as a "charitable entity."

(b) Non-contractual claim. According to Section 2, the applicability of this Act depends on whether the claim is "non-contractual." Section 3(1) provides that Oregon law (including this Act) determines whether a claim is "non-contractual." If the claim is "non-contractual" under Oregon law, this Act applies--even if, under this Act, the claim is governed by the law of another state that considers the claim contractual. Conversely, if the claim is contractual under Oregon law, this Act is inapplicable and instead ORS 81.100 to 81.130 is applicable--even if, under ORS 81.100 to 81.130, the claim is governed by the law of a state that characterizes the claim as non-contractual.

COMMENTS TO SECTION 4

(a) Localization. "Localization" is the process of determining the location of a contact or event upon which the choice of law depends, such as the location of the injurious conduct or the resulting injury. (For localizing a person's domicile, see section 5). Although in most instances this determination is a factual inquiry, it is guided by (and, in some instances, depends on) legal standards. Primarily for practical reasons and in the interest of judicial economy, Section 4 provides that this determination is to be made under Oregon law, even if the location of the particular contact is ultimately determined to be in another state.

Section 4 also provides specific rules to assist in the localization process in some cases, such as cases involving conduct or injury in more than one state (subsections (1) and (3)), or cases involving more than one injured person or more than one person whose conduct allegedly caused the injury (subsections (2) and (4)). Thus, under subsection (2), in a respondeat superior action filed against an employer for injury caused by an employee, both the employer and the employee are considered to be "persons whose conduct caused the injury" for the purposes of this Act. Likewise, under subsection (4), in a claim for wrongful death or for loss of consortium, both the claimant and the physically injured or deceased person are considered to be "injured persons" for the purposes of this Act.

(b) Factual questions and parties' allegations. In some cases, questions such as whether a person was actually injured, whether the particular conduct actually caused the injury, and whether a particular person was responsible for that conduct, and other similar questions, can only be answered after establishing the relevant facts. Until then, strictly speaking, there is only an "allegedly" injured person, an "allegedly" injurious conduct, and a person whose conduct "allegedly" caused the injury. In these cases, the quoted word is implied, even if it cannot be used in the text of the Act.

COMMENTS TO SECTION 5

(a) Domicile of a natural person. This Act uses domicile as a pertinent contact or connecting factor for both natural and legal persons. Subsection (1)(a) of Section 5 defines the domicile of a natural person as comprising two elements, both of which must concur at the same time: (1) the physical element of a person's actual residence in a given state; and (2) the mental element of that person's intent to make that state his or her home state for the time being and for an indefinite period thereafter. For a similar definition, see ORS 111.005 (14) (defining domicile as "the place of abode of a person, where the person intends to remain and to which, if absent, the person intends to return."). Under section 3(1), the question of where a natural person is domiciled is answered under standards established by Oregon law (including Section

5 of this Act), even if the person ultimately is found to be domiciled in another state. See also comment (a) under Section 4.

Subsection (1)(b) begins by restating the general principle that, domicile, once established, continues until it is superseded by a new domicile, that is, until both the physical element of residing in another state and the mental element of intending to make that state the person's home coincide again. See Restatement (Second) of Conflict of Laws § 19 (1971). The second sentence of subsection 1(b) deals with persons whose intent to change their domicile is legally ineffective, for example, because they are under legal compulsion (e.g. prisoners, soldiers), or because they lack the mental capacity to form the requisite intent regarding domicile (e.g. minors, mentally ill). Subsection (1)(b) provides that, in such cases, the person's previously acquired domicile will continue to be the relevant domicile for the purposes of this Act.

Subsection (1)(c) deals with persons who are legally capable of forming the intent to have a domicile in a given state but whose actual intent cannot be determined. Subsection (1)(c) provides that, in such cases: (1) a person's residence shall be treated as his or her domicile; and (2) if that person resides in more than one state, the residence state that has the most pertinent connection to the disputed issue is deemed to be the person's domicile with regard to that issue.

(b) Domicile of a legal person. Subsection (2) of Section 5 defines the domicile of a person "other than a natural person" commonly referred to as legal person (e.g., corporations, associations, firms, partnerships, and other similar entities) as the state in which that person has its principal place of business. The question of where a legal person has its principal place of business is answered on a case-by-case basis through review of the person's total activity and connections under the standards established by Oregon law. See Section 3(1) and comment (a) under Section 4.

The second sentence of subsection (2) of Section 5 applies to situations in which a legal person has its principal place of business in one state, State A, and also has "a place of business" in another state, State B. That sentence provides that, if the dispute arises from that person's activities directed from State B (e.g., from its branch office located in State B), then either State A or State B may be treated as the legal person's domicile at the choice of the other party.

(c) Domicile and the issue of time. Subsection (3) of Section 5 provides that, for purposes of this Act, the domicile of a natural or legal person is determined as of the date of the injury for which the non-contractual claim is made, rather than at a later time, such as the time of the filing of the action or the time of litigation. However, when, a person changes domicile to another state after the time of the injury, the new domicile may be a "relevant contact" under Section 9, of this Act. See comment (d) under Section 9.

COMMENTS TO SECTION 6

(a) Applicability. In the interest of judicial economy, as well as in order to protect Oregon's policies or the parties justifiable reliance on Oregon law, Section 6 lists certain non-contractual claims that are governed by Oregon law, notwithstanding other provisions of this Act. If a claim falls within the list, the court or other decision-maker should apply Oregon law without having to conduct a choice-of-law inquiry.

Section 6 applies only as between the parties to the actions listed in section 6, namely the plaintiff (and those parties asserting claims through the plaintiff) and the defendant (and those responsible for defendant's conduct). For claims by or against third parties or between or among joint tortfeasors, see Section 10 of this Act.

(b) Express agreements for Oregon law. Subsection (1) of Section 6 provides that if, "after the events giving rise to the dispute," the parties agree to the application of Oregon law, the agreement, if otherwise valid, will be enforceable and Oregon law will govern the dispute. For cases in which the parties agree to the application of the law of a state other than Oregon, see Section 11 of this Act. For an explanation of the reasons for differentiating between agreements entered into before and after the dispute, see comment (c) under Section 11.

(c) Failure to plead or prove foreign law. Subsections (2) and (3) of Section 6 provide that Oregon law also governs if none of the litigants raises the issue of applicability of foreign law, or if the litigant or litigants who rely on foreign law fail to assist the court in establishing the relevant provisions of foreign law after being requested by the court to do so. Both of these provisions are consistent with current judicial practice in Oregon and other states of the United States.

(d) Actions against the State of Oregon or other Oregon public bodies. Subsection (4) of Section 6 provides that Oregon law applies in actions for non-contractual claims filed against the State of Oregon or any of its agencies or subdivisions or other public bodies as defined in Section 1(7), unless the application of Oregon law is waived by a person authorized by Oregon law to make the waiver. Under Section 3(1), Oregon law (including this 2009 Act) determines whether an entity is an agency or subdivision of the State of Oregon or a "public body." For a similar provision regarding certain contractual claims by or against the State of Oregon and other Oregon public bodies, see ORS 81.105(1).

(e) Actions for injury on real property situated in Oregon. Subsection (5) of Section 6 provides that Oregon law governs actions filed against the owner, lessor, or possessor of land, buildings, or other real property situated in Oregon and seeking to recover for injury occurring on such property, if the injurious conduct also occurred in Oregon. Oregon law also governs actions seeking to prevent injury on

such property if the impending or threatened conduct is expected to occur in Oregon.

(f) Actions between Oregon employers and employees. Subsection (6) of Section 6 provides that Oregon law governs actions for non-contractual claims between an employer and an employee "primarily" employed in Oregon, if the claim arises from injury in Oregon. Whether the employment meets this condition is a question of fact to be decided under Oregon law. By way of comparison, ORS 656.126 (Oregon's workers' compensation statute) applies to workers "employed in this state," even if the workers are injured elsewhere (ORS 656.126(1)), and, subject to certain conditions, exempts certain workers "from another state" when injured in Oregon. ORS 656.126(2).

(g) Actions for professional malpractice. Subsection (7) of Section 6 provides that Oregon law applies to non-contractual claims in actions for professional malpractice arising from professional services rendered entirely in Oregon if the provider of services was licensed for such services under Oregon law. In such cases, professionals rendering services in Oregon must comply with, and be accountable under, standards established by Oregon law, even if the recipient of the services is domiciled in another state.

COMMENTS TO SECTION 7

(a) Applicability and scope. Section 7 applies to "product liability civil actions" as defined in ORS 30.900. The latter provision defines a "product liability civil action" as

> a civil action brought against a manufacturer, distributor, seller or lessor of a product for damages for personal injury, death or property damage arising out of: (1) Any design, inspection, testing, manufacturing or other defect in a product; (2) Any failure to warn regarding a product; or (3) Any failure to properly instruct in the use of a product.

ORS 30.900.

Section 7 applies to *non-contractual* claims in product liability civil actions. For contractual claims, the applicable choice-of-law statute is ORS 81.100 to 81.135.

Section 7 applies only to non-contractual claims *of injured persons* as defined under Section 4 against a manufacturer, distributor, seller or lessor of a product. Section 10 applies to non-contractual claims by or against third parties or between or among joint tortfeasors.

Section 7 applies "[n]otwithstanding sections 8 and 9" of this Act. For claims falling within its scope, Section 7 is more specific than, and thus prevails over, Sections 8 and 9.

Section 7 applies only to cases in which Oregon has the contacts enumerated in Section 7. As stated in subsection (4), cases in which Oregon lacks these contacts are governed by the law selected under Section 9, the residual section of this Act. Depending on the circumstances, that law may be the law of Oregon or that of another state.

(b) Oregon's contacts. Under Section 7, the application of Oregon law depends on specified combinations of four Oregon contacts: (1) the domicile of the injured person; (2) the place of injury; (3) the manufacture or production of the product; and (4) the delivery of the product when new in Oregon for use or consumption in Oregon. Subsection (1) of Section 7 provides that (with only one exception, i.e., cases in which Oregon's only two contacts are the manufacture or production and the delivery of the product) Oregon law governs all cases in which any two (or more) of the above contacts are situated in Oregon. Thus, Oregon law applies under subsection (1):

(1) if, at the time of the injury, the injured person was domiciled in Oregon, and Oregon was also: (a) the place of injury; or (b) the place of the product's manufacture; or (c) the place of the product's delivery as new (seven possible combinations); or

(2) if the injury occurred in Oregon, and Oregon was also: (a) the place of the product's manufacture; or (b) the place of the product's delivery as new (three possible combinations).

For a table illustrating the operation of section 7, see table 1in Appendix.

As provided by Section 5(3), a person's domicile is determined as of the date of the injury concerning which the non-contractual claim is made. This is why subsection (1) of section 7 uses the past tense when referring to the domicile of the injured person. However, a post-injury change of domicile may be a relevant factor in determining whether to employ the escape clause of subsection (2)(b) of Section 7. See comment (d) under Section 9.

The phrase "delivered when new" for use or consumption in Oregon in subsection (1)(b) is intended to exclude second-hand products that first entered Oregon in used condition. This exclusion will make a difference only when the application of Oregon law *depends on this contact* because Oregon lacks other contact combinations for applying Oregon law under subsection (1). This will be the case if the product first entered Oregon in used condition and Oregon had only one of the other three contacts listed in subsection (1). In such a case, the claim will fall outside the scope of Section 7 and will be governed by the law selected under Section 9 of this Act.

(c) The exceptions. Subsections (2) and (3) of Section 7 provide two exceptions to the application of Oregon law under subsection (1). The first exception

operates for the entire claim, whereas the second exception operates on an issue-by-issue basis.

Subsection (2) provides the first exception to the defendant, who must carry the burden of persuasion for the exception's deployment. The defendant can avoid the application of Oregon law by demonstrating to the court's satisfaction: (a) that the use in Oregon of the particular product that caused the injury could not have been foreseen (this is an objective test); *and* (b) that none of the defendant's products of the same type were available in Oregon in the ordinary course of trade. If the defendant satisfies both of these requirements, the entire claim will be governed by the law selected under Section 9 of this Act.

Subsection (3) of Section 7 makes the second exception available to both defendants and plaintiffs. Either party can avoid the application of Oregon law under Section 7 by demonstrating that, under the principles of Section 9, the application of the law of a state other than Oregon to a disputed issue would be "substantially more appropriate" for that issue. In such a case, that issue will be governed by the law of the other state, while the remaining issues, if any, will be governed by Oregon law. The rationale of this exception is the same as that of a similar clause in Section 8(4), which is explained in comment (j) under Section 8.

(d) Unprovided for, or undisposed of, claims or issues. Subsection (4) of Section 7 provides that non-contractual claims or issues in product liability actions falling outside the scope of Section 7(1) are governed by the law selected under Section 9 of this Act. As noted earlier, these are cases in which Oregon lacks the combination of contacts required by subsection (1) of Section 7. The reference to Section 9 does not preclude the application of Oregon law under that section.

Subsection (4) also refers to Section 9 all claims falling within the scope of subsection (1) but "not disposed of" under subsections 1 to 3. These are the cases in which a party carries the burden of satisfying the requirements of one of the exceptions provided in subsections (2) or (3) of Section 7.

CHOICE OF LAW

COMMENTS TO SECTION 8

(a) Applicability. Section 8 provides the general rules for determining the law governing non-contractual claims not covered by the other sections of this Act, namely: Section 6, which provides for issues and claims governed by Oregon law; Section 7, which applies to certain products liability cases; Section 10, which applies to joint tortfeasors and third parties; and Section 11, which provides for certain choice-of-law agreements. These sections, being more specific on the subjects they cover, prevail over Section 8. Conversely, Section 8 is more specific and prevails

over Section 9, although Section 8 also contains two escapes (in subsections (3)(b) and (4)) that are anchored in Section 9.

(b) Scope. The rules of Section 8 apply only to claims and counter-claims between the "injured person" (and those parties asserting claims through that person) and "the person whose conduct caused the injury" (and those responsible for that person). The "injured person" and "the person whose conduct caused the injury" are determined under Oregon law as provided in Section 3(1) and (4). Section 4 also provides that Oregon law determines what constitutes "injurious conduct" or "conduct that caused the injury" and where that conduct and the resulting injury occurred. For claims by or against third parties or between or among joint tortfeasors, see Section 10 of this Act.

Under section 8, the choice of the applicable law depends in part on the location of four contacts: (1) the place of the injurious conduct; (2) the place of the resulting injury; and (3) the domicile of the injured person; and (4) the domicile of the person whose conduct caused the injury. For a table illustrating the operation of section 8, see Appendix.

(c) Common-domicile cases. Subsection (2)(a) of Section 8 provides that if, at the time of the injury, the injured person and the person whose conduct caused the injury were domiciled in the same state, the law of that state governs--even if both the injurious conduct and the resulting injury occurred in another state. The rules for determining the domicile of a natural person or a legal person are found in Section 5.

The common-domicile rule of Subsection (2)(a) conforms with the results reached by the majority of state supreme courts in the United States. Since the 1960s, in a movement known as the American choice-of-law revolution, forty-two states (including Oregon) have abandoned the traditional *lex loci delicti rule* (which mandated the application of the law of the place of the tort) and switched to other, flexible approaches. Thirty-two of those states made the switch in cases involving the common-domicile pattern covered by subsection 8(2)(a), and thirty-one of those cases applied the law of the parties' common domicile. See S. Symeonides, *The American Choice-of-Law Revolution: Past Present and Future* 146-57 (2006). In addition, virtually all recent choice-of-law codifications (more than a dozen) enacted in other countries have adopted a similar common-domicile rule. See id.157-58; E. Scoles, P. Hay, P. Borchers & S. Symeonides, *Conflict of Laws* 804-06 (2004).

The majority of the above-mentioned U.S. cases involved situations in which the law of the state of the parties' common domicile favored the victim more than the law of the state in which the conduct and/or the injury occurred. Courts and commentators unanimously characterized these cases as "false conflicts" (as opposed to "true conflicts") because only the state of the common domicile had an "interest" in applying its law, while the state of the conduct and injury did not have a

countervailing interest in applying its law.

In contrast, some commentators contend that, in the converse scenario--when the law of the state of the common domicile favors the defendant more than the law of the state of conduct/injury--the latter state does have a countervailing interest in applying its law. Nevertheless, more than two-thirds of the cases involving this pattern have applied the law of the parties' common domicile. See S. Symeonides, Choice-of-Law in the American Courts in 2008: Twenty-Second Annual Survey, 57 *Am. J. Comp. L.* (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1322168 Subsection (2)(a) adopts this position--namely, that the law of the parties' common domicile should govern not only when it favors the plaintiff, but also when it favors the defendant more than the law of the other involved state. Any resulting inequity in the second scenario can be addressed through the escape clause of subsection (4) of Section 8, in appropriate circumstances.

Subsection (2)(b) expands the scope of the common-domicile rule of subsection (2)(a) so as to include persons who are domiciled in different states which have laws that would produce the same outcome. The operation and rationale of subsection (2)(b) is explained in comment (e).

(d) Scope of the common-domicile rule. The second sentence of subsection (2)(a) introduces a limitation to the scope of the common-domicile rule by exempting from it the issue of determining the standard of care by which to judge the injurious conduct. That sentence provides that this issue is governed by the law of the state of conduct if the resulting injury also occurred in that state. If the injury occurred in a state other than the state of conduct, the applicable law is determined under subsection (3)(c), which allows the plaintiff to opt for the law of the state of injury under certain conditions. The rationale and operation of subsection (3)(c) are explained in comment (i).

This limitation to the scope of the common-domicile rule is in keeping with a distinction adopted in American case law between "conduct-regulating" and "loss-distributing" rules. See S. Symeonides, *The American Choice-of-Law Revolution* 124-40 (2006). In the words of the court that first articulated this distinction, conduct-regulating rules are those that "have the prophylactic effect of governing conduct to prevent injuries from occurring," Padula v. Lilarn Props. Corp., 644 N.E.2d 1001, 1002 (N.Y. 1994), while loss-distributing rules are those that "prohibit, assign, or limit liability after the tort occurs," id. at 1003, and thus distribute the resulting losses to classes of defendants or plaintiffs. Examples of conduct-regulating rules include:(1) "rules of the road," including civil sanctions for violating rules of the road, as well as presumptions and inferences attached to the violation; (2) rules prescribing safety standards for work sites, buildings, and other premises; (3) rules imposing punitive damages; and (4) rules that characterize as tortious conduct defined as anticompetitive, or as "interference with contract," "interference with

marriage," or "alienation of affections." Examples of loss-distributing rules include: (1) guest statutes; (2) rules that prescribe the amount of recoverable compensatory damages; (3) rules of interspousal immunity, parent-child immunity, workers' compensation immunity, and loss of consortium. All of the 32 cases (noted in comment (c), above) that have applied the law of the parties' common domicile involved conflicts between loss-distributing (rather than conduct-regulating) rules. In contrast, in conflicts involving conduct-regulating rules, courts continue to apply the law of the state or states of conduct and/or injury. See S. Symeonides, *The American Choice-of-Law Revolution* 210-36 (2006).

The second sentence of subsection (2)(a) of this section is intended to allow the same differentiation between conduct-regulating and loss-distributing conflicts by providing that the law of the state or states of conduct and/or injury determines the standard of care by which to judge the injurious conduct. This means, *inter alia*, that if, under the law of the state of conduct and injury, the actor would be judged *not* to have committed a particular tort, the actor may not be held liable for that tort under the law of the parties' common domicile. Conversely, if, under the law of the state of conduct and injury, the actor would be judged to have committed a tort—albeit one for which the actor would be immune from suit because of an intrafamily, charitable immunity, or other similar rule—then the actor may be held liable under the law of the parties' common domicile.

(e) Cases in which the parties are domiciled in states whose laws would produce the same outcome. Subsection (2)(b) deals with situations in which the parties are domiciled in different states that have laws that would produce the same outcome on the disputed issue or issues. Subsection (2)(b) provides that, in these cases, the parties should be treated as if they were domiciled in the same state "to the extent that" the laws of those states would produce the same outcome on the disputed issues. The rationale for this treatment is that these cases present what is known in the conflicts literature and case law as "false conflicts" because the result is the same regardless of which of the two laws is applied.

One effect of this provision is to facilitate the task of the court or other decision-maker in cases involving multiple victims or multiple tortfeasors. Another effect is that, in some cases, this provision may lead to the application of a different law than that designated by subsections (3)(b) and (3)(c) of Section 8. For example, if both the conduct and the injury occurred in State X, and the parties were domiciled in states Y and Z, respectively, then the case would fall under subsection (3)(b), which calls for the application of the law of State X (subject to an exception). However, if the laws of States Y and Z would produce the same outcome, then the court should reach that outcome, rather than the outcome produced by the law of State X. Similarly, if the conduct occurred in State A and the injury occurred in State B and the parties were domiciled in States X and Y, respectively, the case would fall within subsection (3)(c), which calls for the application of the law of State A unless

(under certain conditions) the injured person opts for the law of State B. However, if the laws of States X and Y would produce the same outcome, then the court should reach that outcome, rather than the outcome produced by the laws of either State A or State B.

Subsection (2)(b) does not define exactly when the two laws would produce "the same outcome," nor does it designate which of the two laws to apply. Both questions are left to judicial interpretation, but in most instances the questions will resolve themselves. For example, if both domiciliary states have an intrafamily or charitable immunity rule, then, on the issue of whether the defendant is susceptible to suit, both states' laws would produce the same outcome and it would make no difference which of the two the court applies; in either case the plaintiff's suit will be barred. If, in another case, one state imposes a $500,000 damages cap and the other state imposes a $1 million cap, the two laws would produce the same outcome "to the extent" that they both disallow unlimited damages and a different outcome "to the extent" that they allow different amounts. The rule of subsection (2)(b) would apply on the first issue and prevent unlimited damages (even if the state of conduct or injury, or both, do not limit damages), but not on the second issue of the exact amount for which the plaintiff will be eligible. The amount will then depend on which law would be applicable to this issue under the other provisions of Section 8.

(f) Cases in which the parties are domiciled in states whose laws would produce a different outcome. Subsection (3) of Section 8 provides for situations in which, at the time of the injury, the injured person and the person whose conduct caused the injury were domiciled in different states whose laws would produce different outcomes. Comments (g)-(i) address specific sub-categories of cases falling within the scope of subsection (3).

(g) Split-domicile cases in which the conduct and the injury occurred in one party's home state. Subsection (3)(a) deals with situations in which both the injurious conduct and the resulting injury occurred in the same state and either the injured person or the person whose conduct caused the injury was domiciled in that state. Subsection (3)(a) provides that, in such cases, the applicable law shall be the law of the domiciliary state in which both the conduct and the injury occurred. This result is consistent with the results reached by the majority of courts in other states. See S. Symeonides, *The American Choice-of-Law Revolution* 163-91 (2006).

This result is intuitively more appropriate when the law of that state favors the domiciliary of that state, but, for reasons of evenhandedness and other reasons, subsection (3)(a) takes the position that the same result is also appropriate even when that law favors the domiciliary of the other state. When a person is injured in her home state by conduct in that state, her rights should be determined by the law of that state, even if the person who caused the injury happened to be domiciled in another state. The law of the latter state should not be interjected to the victim's detriment or

benefit. By the same token, when a person acting within his home state causes injury in that state, he should be held accountable according to the law of that state, even if the injured person happened to be domiciled in another state. The law of the latter state should not be interjected to the actor's detriment or benefit.

(h) Split-domicile cases in which the conduct and the injury occurred in a third state. Subsection (3)(b) of Section 8 deals with situations in which: (1) at the time of the injury, the injured person and the person whose conduct caused the injury were domiciled in different states whose laws would produce a different outcome; and (2) both the injurious conduct and the resulting injury occurred in a third state other than the state in which either person was domiciled. Subsection (3)(b) provides that in such cases the applicable law is the law of the state in which both the conduct and the injury occurred, but subject to an exception. The exception provides that if a party demonstrates to the court's satisfaction that, under the circumstances of the particular case, the application of that law to a disputed issue will not serve the objectives or policies of that law, that issue will be governed by the law selected under Section 9, while the remaining issues, if any, will be governed by the law of the state of conduct and injury.

This exception is necessary (primarily, but not only) because, in some cases, the connections of the state of conduct and injury may be transient, fortuitous, or otherwise tenuous. Suppose, for example, that an airplane that was diverted by bad weather from its scheduled route over State A crashed in State B because of pilot error that occurred in the airspace of State B. Suppose further that State B, which has no other connections with the case, imposes a cap on the amount of compensatory damages for wrongful death, while other involved states do not impose such a cap. Depending on other factors and circumstances, this case may be a good candidate for the exception if the party opposing the application of State B law demonstrates that the objectives State B seeks to accomplish by imposing a damages cap (e.g., to protect defendants domiciled or based in that state) would not be served by applying the cap in this case.

Depending on the circumstances, other cases may not be good candidates for this exception, even if the connection of the state of conduct and injury are transient or fortuitous. Suppose, for example, that parties domiciled in States A and B, respectively, are involved in a two-car traffic accident in State X and one of the disputed issues is whether one of the parties was negligent in driving the car that caused the accident. In the absence of serious countervailing factors, this case would not be a good candidate for the above exception because that state's conduct-regulation policies or objectives would be served by applying State X's law for judging what constitutes negligent driving within its borders.

(i) Split-domicile cross-border cases. Subsection (3)(c) of Section 8 deals with situations in which: (1) at the time of the injury, the injured person and the person

whose conduct caused the injury were domiciled in different states that did not have the same law; and (2) the injurious conduct occurred in one state (often but not necessarily the home state of the person whose conduct caused the injury) and the resulting injury occurred in another state (often but not necessarily the home state of the injured person). Subsection (3)(c) provides that, in such cases, the applicable law is the law of the state of conduct, subject to an exception in favor of the law of the state of injury.

The exception applies if two requirements are satisfied. The first requirement is that the occurrence of the injury *in the state of injury* must have been a foreseeable result of the activities of the person whose conduct caused the injury. This is an objective, rather than a subjective, standard. Moreover, because subsection (3)(c)(A) is a choice-of-law rule rather than a substantive rule, the term "foreseeable"should be understood in a "spatial" sense and should not be confused with the foreseeability of substantive tort law. The pertinent question here is not whether one should have foreseen the occurrence of the injury, but whether one should have foreseen that the injury would occur *in the particular state in which the injury did occur*. For example, one who operates a factory in close proximity to the border with another state should foresee that any harmful emissions from the factory may cause injury in the other state because the wind may blow in that direction.

The second requirement is that the injured person must formally request, by pleading or amended pleading, the application of the law of the state of injury. If such a request is filed, it shall be deemed to encompass all claims and issues against the particular defendant. In other words, the injured person may not "pick and choose" the favorable and discard the unfavorable parts of the law of the state of injury.

The rule of subsection (3)(c) will produce the same result as that produced by the vast majority of U.S. state and federal cases involving cross-border tort conflicts and decided after the abandonment of the traditional *lex loci delicti* rule. As a recent study documents, these cases are evenly split between applying the law of the state of conduct and the law of the state of injury, but the overwhelming majority of all cases nation-wide have applied whichever of the two laws prescribed a higher standard of conduct for the defendant or of financial protection for the plaintiff. See S. Symeonides, Choice-of-Law in Cross-Border Torts (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328191. The courts that decided these cases often have reached these results after laborious and often uncertain analysis. By adopting the rule of applying the law of the state of conduct but also allowing the injured person to opt for the law of the state of injury in narrowly defined circumstances, Subsection (3)(c) accomplishes the same result but in a much more efficient and cost-saving way that will provide predictability to prospective litigants and help conserve judicial resources.

The vast majority of recent choice-of-law codifications also have adopted the

same solution, either for all cross-border torts, or for certain cross-border torts such as environmental torts or products liability. See S. Symeonides, Choice-of-Law in Cross-Border Torts, *supra*. Moreover, unlike subsection (3)(c), most of these codifications do not condition the application of the law of the state of injury to a foreseeability proviso. The same was true of the traditional *lex loci delicti* rule, still followed in ten states of the United States, which, unlike Subsection (3)(c), applies the law of the state of injury without regard to whether the occurrence of the injury in that state should have been foreseen.

It is important to stress that, although subsection (3)(c) may have the *effect* of favoring plaintiffs, the true *reason* for giving plaintiffs a choice between the laws of the state of conduct and the state of injury in this narrow circumstance is to effectuate the policies of those states in deterring wrongful conduct, preventing injuries, and providing adequate recoveries for those injuries. For the role and importance of these policies, see Section 9(3)(a), and comment (f) under Section 9. Moreover, the application of the law of the state of conduct is not unfair to defendants because it is a state with which they voluntarily associated themselves and which, more often than not, is also their home state. Likewise, because of the foreseeability proviso, the application of the law of the state of injury is not only constitutionally permissible but also appropriate from the choice-of-law perspective. It is a factor of sufficient weight to tip the scales in favor of applying the law of the state that is apt to experience the impact of the injurious conduct and a good response to any argument of unfair surprise by the defendant. By definition, tort conflicts involve conflicting value judgments of at least two states as to who should bear the social and economic losses caused by injurious conduct that at least one state considers tortious. In the final analysis, of the two parties involved in the conflict, the tortfeasor is the one who is likely to be in a better position to prevent the loss.

(j) The escape clause. Subsection (4) of Section 8 introduces an exception to all the choice-of-law rules provided in subsections (2) and (3) of Section 8. The exception is anchored in Section 9, because that section contains the general approach from which the rules of Section 8 have been derived.

Section 9 directs the court or other decision-maker to apply the law of the state whose contacts with the case and the parties and whose policies on the disputed issues make application of its law "the most appropriate" for those issues. Section 9 then lists the general principles and factors for identifying the "most appropriate" law. Relying on the same general principles, Section 8 designates in advance the "most appropriate" law in certain categories of cases. In so doing, Section 8 will provide prospective litigants with a measure of predictability and will unburden courts or other decision-makers from the laborious analysis Section 9 requires.

However, as with any *a priori* choice-of-law rules, the rules of Section 8(2) and (3) may, in exceptional cases, produce a result that is incompatible with the

principles of Section 9 from which these rules have been derived. In order to avoid such a result, Section 8(4) provides an "escape mechanism" from the *a priori* rules of Section 8. The escape clause becomes operable if a party demonstrates that, under the principles of Section 9, the application to a disputed issue of the law of a state other than the state designated by subsections (2) or (3) is "substantially more appropriate." In such a case, Section 8 must yield to Section 9 and the issue will be governed by the "most appropriate" law selected under Section 9, while other disputed issues, if any, will be governed by the law designated under the applicable provision of Section 8.

COMMENTS TO SECTION 9

(a) General and residual approach. Section 9 enunciates the general approach to choosing the law governing non-contractual claims. This approach applies "except as otherwise provided" in Sections 5 through 8, which prescribe specific rules derived from this approach, and Section 11, which provides for situations in which the parties have validly agreed on the governing law.

(b) The objective. The opening paragraph of Section 9 enunciates the objective of the choice-of-law process for non-contractual claims. The objective is to identify and apply the law of the state whose contacts with the parties and the dispute and whose policies on the disputed issues make application of its law the "most appropriate" for those issues.

(c) The process. The balance of Section 9 prescribes the process or method for achieving the objective enunciated in the opening paragraph. This process consists of three steps described below.

(d) Identifying the involved states. The first step is to identify the involved states—in addition to the forum state which is *ex hypothesi* involved—by examining their relevant contacts with the parties and the facts that give rise to the dispute. Subsection (1) of Section 9 lists some of the contacts that are usually relevant in conflicts involving non-contractual claims: the place of the injurious conduct, the place of the resulting injury, the domicile, habitual residence or pertinent place of business of each person, and the place in which the relationship (if any) between the parties was centered. This list of contacts is neither exhaustive nor hierarchical. Depending on the circumstances, other contacts may also be relevant. Moreover, not all the listed contacts will be relevant in all cases. Finally, the listing of these contacts should not be taken as an invitation for a mechanistic counting of contacts as a means of choosing the applicable law. That one state has more contacts than other states does not necessarily mean that its law should be applied to any or all disputed issues unless those contacts are of the kind that bring into play policies of that state which, in light of the other policies and factors listed in Section 9, will make application of

that law the "most appropriate."

The reference to the parties' domiciles or habitual residences in Subsection (1) is not accompanied by any specific time designation. This means that, although a party's domicile at the time of the injury remains the most relevant, the court is free to also take into account a party's domicile at the time of the choice-of-law decision if this factor is relevant in "evaluating the strength and pertinence" of the policies of the involved states. For example, a post-injury change of domicile by the injured person may reduce the pertinence of the compensatory policies of the state of the former domicile and bring into play the corresponding policies of the state of the new domicile. (See Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981), where the Supreme Court held that the plaintiff's post-accident good-faith acquisition of a new domicile in Minnesota was a factor implicating that state's interest in protecting the plaintiff.) Likewise, a post-injury change of domicile by a tortfeasor may reduce the pertinence of the policies of the tortfeasor's previous domicile in deterring or protecting tortfeasors and bring into play the corresponding policies of the new domicile. Consequently, in selecting the applicable law in cases decided under Section 9 -- or in deciding whether to employ the escape clauses found in Sections 7(3) and Section 8(3), both of which are anchored in Section 9 -- the court is free to take into account a party's domicile at both the time of the injury and the time of the choice-of-law decision.

According to Section 5(2), the domicile of a legal person is located in the state in which the person maintains its principal place of business. However, if the dispute arises from activities directed from another state in which the legal person maintains a place of business, either state may be deemed as the domicile at the choice of the other party. In addition, under subsection 1 of Section 9, a "pertinent place of business" (i.e., pertinent to the disputed issues) of a legal person—or, for that matter, a natural person—may be a relative contact in appropriate circumstances.

(e) Identifying the pertinent policies of the involved states. The second step of the process is to: (1) identify the substantive rule or rules of each involved state that appear to be in material conflict with the corresponding rule or rules of another involved state; and then (2) identify the policies embodied in those rules. As used in this context, "policy" means the objective the state seeks to accomplish by adopting or continuing to follow the particular rule. If the particular rule is a statutory rule, its policy is identified through the same process of statutory interpretation used in non-conflicts cases. If the rule is judicially created, its policy is identified in the same way one identifies the policy of any common-law rule.

(f) Evaluating the conflicting policies. The third step of the process is to evaluate the "strength and pertinence" of the conflicting policies of the involved states in light of, and "with due regard to," two sets of policies listed in subsection (3)(a) and (b) of Section 9. The first set of policies are the general policies of the law

of torts and non-contractual claims phrased in a most general way: "encouraging responsible conduct, deterring injurious conduct, and providing adequate remedies for the conduct."

The second set of policies are multistate policies derived from Oregon's membership in the interstate and international community. The admonition to evaluate the conflicting state policies in light of the "needs of the interstate and international systems" obviously goes beyond the self-evident requirement of complying with the minimal limits prescribed by the U.S. Constitution for state choice-of-law decisions. See especially Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981). In some instances, what may be constitutionally permissible may not necessarily be appropriate from the choice-of-law perspective. Courts should strive for decisions that not only stay within the limits prescribed by the Constitution, but also are deferential and sensitive to the needs and policies of the interstate and international systems.

Moreover, and more specifically, the court or other decision-maker should (1) always be mindful of the adverse consequences of the choice-of-law decision on the strongly-held policies of the involved states; and (2) choose the law of the state which, in light of its relationship to the parties and the dispute--and its policies rendered pertinent by that relationship--would sustain the most serious legal, social, economic, and other consequences of the choice-of-law decision.

(g) Policies and "interests." In general terms, a state may be said to have an "interest" in seeing that the policies and values embodied in its law are observed—or at least not disregarded—in cases that fall within the intended reach of that law. Nevertheless, Section 9 and this Act avoid using the term state "interest" in order to disassociate the approach of this Section and this Act from Professor Brainerd Currie's "governmental interest analysis" and other modern American approaches that seem to perceive the choice-of-law problem as a problem of interstate competition rather than as a problem of interstate cooperation in conflict avoidance. Instead, Section 9 calls for a focus on the *adverse* consequences of the choice-of-law decision on the policies of the involved states. Conflicts cases involve situations that fall, or appear to fall, within the reach of the laws of more than one state, and the choice-of-law process is called upon to resolve these conflicts of overlapping reach. Inevitably, when the overlap is real, the choice of one state's law will have some adverse effect on the policies of the other state. Even so, the choice-of-law process under Section 9 should aspire to resolve the conflict in a way that causes the least adverse consequences to the policies of the involved states.

(h) Issue-by-issue analysis and dépeçage. The repeated use of the term "issues" in Section 9 and this Act is intended to focus the choice-of-law-process on the particular issue as to which there exists an actual conflict of laws. When a conflict exists with regard to only one issue, the court or other decision-maker should focus

on the factual contacts and policies that are pertinent to that issue. When a conflict exists with regard to more than one issue, each issue should be analyzed separately, since each may implicate different states, or may bring into play different policies of these states. Seen from another angle, each state having relevant contacts with a given multi-state case may not be equally concerned with regulating all issues in the case, but may only be concerned with those issues that actually implicate its policies in a significant way.

This issue-by-issue analysis, which is an integral feature of all modern American choice-of-law methodologies, facilitates a more nuanced and individualized resolution of conflicts problems. One result of this analysis is that, in some cases, the laws of different states govern different issues in the same dispute. This phenomenon is known in conflicts literature by its French name of *dépeçage*. Although infrequently referred to by this name, this phenomenon is now a common occurrence in the United States. Section 9 does not prohibit *dépeçage*. However, *dépeçage* should not be pursued for its own sake. The unnecessary splitting of the case should be avoided, especially when it results in distorting the policies of the involved states.

(i) Relation to Sections 7-8. As noted earlier, Section 9 applies except as otherwise provided in Sections 7 and 8. Although the rules of Sections 7 and 8 have been derived from the general approach of Section 9, they prevail over Section 9 because they are more specific on the subjects they cover. However, as with any *a priori* rules, the rules of Sections 7 and 8 may, in exceptional cases, produce a result that is incompatible with the general objective of Section 9. In order to avoid such a result, Sections 7(3) and 8(4) each provide an "escape clause" that is anchored in Section 9. Moreover, Section 7--and, to a lesser extent, Section 8--do not cover the entire spectrum of cases or issues that might fall under the general headings of these sections. The remaining cases or issues are governed by Section 9 as the residual section. Thus, Section 9 is intended to perform a general as well as a residual role.

COMMENTS ON SECTION 10

(a) Scope. Sections 6, 7 and 8 of this Act apply to non-contractual claims between the injured person and the person whose conduct caused the injury. In contrast, Section 10 applies to non-contractual claims by or against parties other than the injured person and the person whose conduct caused the injury. Examples of claims falling within the scope of this section are claims between or among joint tortfeasors (or other similarly situated parties), and claims of employers or their insurers to recover compensation paid for injuries caused by an employee. These claims are governed by the law selected under the flexible approach of Section 9.

(b) Rationale. The reason for relegating these claims to the flexible approach

of Section 9 is because their complexity and variability make them insusceptible to categorical choice-of-law rules. For example, there is no guarantee that the choice-of-law rules of Section 8 will produce sound results in all cases involving these third-party claims, although in some cases these rules can provide valuable pointers. In many cases, it may be appropriate to apply the same law to these claims as that which governs the claims between the injured person and the person who caused the injury, while in other cases it may be more appropriate to apply the law of another state. The approach of Section 9 provides courts with sufficient flexibility to evaluate in an individualized way the complexities and peculiarities of each claim and decide accordingly.

COMMENTS TO SECTION 11

(a) Applicability. Section 11 applies to cases in which the parties have agreed to the application of the law of a state other than Oregon. Cases in which the parties have agreed to the application of the law of Oregon are provided in Section 6(1).

When the parties have agreed that their dispute will be governed by the law of a state other than Oregon and the agreement is valid under the provisions of Section 11, the agreement prevails over the rules of Sections 8, 9 and 10, but not over the rules of Sections 6 and 7, which provide for certain claims and issues governed by Oregon law.

(b) Requirements for validity of agreement. In order to be valid under Section 11, the agreement: (1) must have been entered into *after* the parties had knowledge of the events giving rise to the dispute; and (2) must conform to the pertinent provisions of ORS 81.100 to 81.135, which establish the requirements for enforcing choice-of-law agreements and also preserves the applicability of other Oregon statutes regarding such agreements. For a list of these statutes, see Section 2, comment 1 of the official comments explaining HB 2414 (2001) (Section 2 now codified as ORS 81.102), published in James A.R. Nafziger, Oregon's Conflicts Law Applicable to Contracts, 38 *Willamette L. Rev.* 397, 419 (2002).

ORS 81.100 to 81.135 establish the requirements for enforcing choice-of-law agreements in cases involving *contractual* claims. ORS 81.120(1) provides that, subject to certain conditions and limitations specified therein, "the *contractual* rights and duties of the parties are governed by the law or laws that the parties have chosen" (emphasis added). The italicized word (which was deliberately chosen in drafting that provision) limits the permissible scope of a choice-of-law agreement to contractual issues. See official comments to Section 7, comment 1 accompanying HB 2414 (2001) (Section 7 now codified as ORS 81.120), published in James A.R. Nafziger, Oregon's Conflicts Law Applicable to Contracts, 38 *Willamette L. Rev.* 397, 420 (2002) (noting that the quoted provision "makes clear that the exercise of party

autonomy within this Act extends only to contractual rights and duties of the parties and not to non-contractual rights and duties such as those arising out of the law of torts and property.").

(c) Differentiating between pre- and post-dispute agreements. Section 11 differentiates between pre- and post-dispute agreements because the parties' position in the two situations is qualitatively and significantly different. Before the dispute arises, the parties (assuming they are otherwise contractually related) usually do not--or should not--contemplate a future tort, and the parties do not know (a) who will injure whom or (b) the nature or severity of the injury. An unsophisticated party (or a party in a weak bargaining position) may uncritically or unwittingly sign a choice-of-law agreement--even when the odds of that party becoming the victim are much higher than the odds of that party becoming the tortfeasor. Thus, pre-dispute agreements may facilitate the exploitation of weak parties. In contrast, this danger is less pronounced in post-dispute agreements because, after the dispute arises, the parties are in a position to know their rights and obligations and have the opportunity to weigh the pros and cons of a choice-of-law agreement. This is why Section 11 permits choice-of-law post-dispute agreements but does not sanction pre-dispute agreements for non-contractual claims.

(d) Voluntary settlements. By resolving the choice-of-law aspect of a dispute, choice-of-law agreements can facilitate a voluntary settlement of the whole dispute without litigation. Even when litigation is not avoided, choice-of-law agreements can reduce the duration and costs of litigation and make it more predictable. Thus, choice-of-law agreements serve interests beyond those of the parties, such as the interest in conserving judicial resources. For this reason, Section 11 and Section 6(1) should be seen as expressions of a legislative policy in favor of choice-of-law agreements and an invitation to courts to encourage parties to reach such agreements. See J. Nafziger, Avoiding Courtroom "Conflicts" Whenever Possible, in J. Nafziger & S. Symeonides, *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren* 341 (2002); J. Nafziger, Making Choices of Law Together, 37 *Willamette L. Rev.* 209 (2001); J. Nafziger, Avoidance of Choice-of-Law Conflicts: An Introduction, 12 *Willamette J. Int'l L. & Disp. Res.* 179 (2004).

(e) Arbitration agreements. Section 11 does not prohibit parties from agreeing to submit a non-contractual dispute to arbitration. The validity of an arbitration agreement is governed by general contract principles. Moreover, when the arbitration agreement is valid, this Act is not binding on the arbitral tribunal, unless the agreement expressly provides otherwise. ORS 36.508 provides in pertinent part that the arbitral tribunal shall decide the dispute "in accordance with the rules of law designated by the parties as applicable to the substance of the dispute" and that the designation of the law of a given state "shall be construed, *unless otherwise expressed*, as directly referring to the substantive law of that state and not to its conflict of laws rules." (Emphasis added.) As part of Oregon's conflicts law, this Act

will be binding on the arbitral tribunal only if the arbitration agreement expressly provides to that effect. ORS 36.508 also provides that, if the arbitration agreement does not designate the applicable law, "the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute." In such a case, the tribunal may choose to be guided by the provisions of this Act in identifying the "appropriate" rules of law.

MISCELLANEOUS

COMMENTS TO SECTION 12

(a) The explanatory comments accompanying each section of this 2009 Act have been written under the auspices of, and have been approved by, the Oregon Law Commission. The comments have accompanied this Act when introduced to the Legislature.

APPENDIX

TABLE 1. PRODUCT LIABILITY CASES GOVERNED BY OREGON LAW UNDER SECTION 7

#	V's dom.	Injury	Delivery "as new"	Mnfg.	Appl. provision	Appl law
1	OR	OR	OR	OR	§7(1)	**OR**
2	---	OR	OR	OR	§7(1)	**OR**
3	OR	---	OR	OR	§7(1)	**OR**
4	OR	OR	---	OR	§7(1)	**OR**
5	OR	OR	OR	---	§7(1)	**OR**
6	OR	OR	---	---	§7(1)(a)	**OR**
7	OR	---	OR	---	§7(1)(b)(B)	**OR**
8	OR	---	---	OR	§7(1)(b)(A)	**OR**
9	---	OR	OR	---	§7(1)(b)(B)	**OR**
10	---	OR		OR	§7(1)(b)(A)	**OR**
11	---	---	OR	OR	§7(4) and § 9	?
12	OR	---	---	---	§7(4) and § 9	?
13	---	OR	---	---	§7(4) and§ 9	?
14	---	---	OR	---	§7(4) and § 9	?
15	---	---	---	OR	§7(4) and § 9	?
16	---	---	---	---	§7(4) and § 9	?

Cases ## 1-10 will be governed by Oregon law under Section 7(1). Cases ## 11-16 will be governed by the law selected under Sections 9, *if* an Oregon court has jurisdiction.

TABLE 2. CASES COVERED BY SECTION 8

		#	P's dom	Injury	Conduct	D's Dom
Subsection (2)(a)	Common Domicile cases	1	**A**	---	---	**A**
		2	**a**	---	---	**a**
Subsection (2)(b)	Cases analogous to common domicile	3	**A**	---	---	**C**
		4	**a**	---	---	**c**
Subsection (3)(a)	Split-domicile, but conduct and injury in one domiciliary state	5	**A**	**A**	**A**	b
		6	**a**	**a**	**a**	B
		7	a	**B**	**B**	**B**
		8	A	**b**	**b**	**b**
Subsection (3)(b)	Split-dom, and conduct and injury in a third state	9	C	**A**	**A**	b
		10	c	**a**	**a**	B
Subsection (3)(c)	Split-domicile, cross-border	11	**A**	**A**	b	b
		12	**A**	**A**	b	c
		13	a	a	**B**	**B**
		14	c	a	**B**	**B**

The letters in the last four columns represent states that have the contacts shown at the top of each column. The use of capital letters indicates that the state represented in that cell has a pro-recovery law while the use of lower-case letters indicates that the law of the state represented in that cell does not favor recovery. The dash "---" indicates that the law of that state is immaterial. Shaded cells indicate the state of the law applicable under Section 8.

Road Map in Applying this Act

<table>
<tr><th colspan="3">I. Issues automatically governed by Oregon Law</th></tr>
<tr><td>1. Preliminary issues: definitions; applicability; characterization; localization; determining domicile.</td><td>2. Actions listed in section 6, namely:(1) actions in which the parties agree to the application of the law of Oregon, or in which none of the parties raises the issue of applicability of foreign law, or in which the party who relies on foreign law fail to assist the court in establishing that law's content after being requested by the court to do so; (2) actions against a "public body" of the State of Oregon; (3) actions against owners or possessors of Oregon real property seeking to recover for, or to prevent, injury on that property and arising out of Oregon conduct; (4) actions between an employer and an employee who is primarily employed in Oregon arising out of Oregon injury; and (5) actions for professional malpractice arising from services rendered entirely in Oregon by personnel licensed to perform those services under Oregon law. In all of the above cases, Oregon law governs, notwithstanding any other provisions of this Act.</td><td>3. Product liability actions if Oregon has any two, or more, of the following contacts (1) victim's domicile; place of injury; (3) place of product's manufacture or production; (4) product's delivery pf product when new, unless a party satisfies the conditions for the escape, in which case the applicable law is selected under section 9.</td></tr>
<tr><th colspan="3">II. Issues not automatically governed by Oregon law, and thus subject to choice-of-law process</th></tr>
<tr><td rowspan="2">1. If parties validly agreed to application of non Oregon law, apply that law (section 11).</td><td colspan="2">2. If parties did not agree to application of non-Oregon law, then:</td></tr>
<tr><td>3. Between victim and tortfeasor — section 8:
(1) If the parties are domiciled in the same state (or in different states whose laws produce the same outcome), the law of the domiciliary state governs, even if the conduct and injury occurred in another state, but subject to an exception in favor of the law of the latter state for determining the standard of care by which the conduct is judged.
(2) If the parties are domiciled in different states and the laws of those states on the disputed issues would produce a different outcome, then:
(a) If both the conduct and the injury occurred in the same state, the law of that state governs if either party was domiciled in that state;
(b) If both the conduct and the injury occurred in a state other than the one in which either party is domiciled, the law of the state of conduct and injury governs, subject to an exception for cases in which the application of that law would not serve the objectives of that law; and
(c) If the conduct occurred in one state and the injury in another state, the law of the state of conduct governs, unless the injured person formally requests the application of the law of the state of injury and provided that the activities of the person whose conduct caused the injury were such as to make foreseeable the occurrence of injury in that state.</td><td>4. Between third parties — sections 10 and 9.</td></tr>
</table>

Oregon Law Commission Enabling Rules Work Group

SB 562

Prepared by Wendy J. Johnson
Deputy Director and General Counsel
Oregon Law Commission

From the Offices of the Executive Director
Jeffrey Dobbins

Approved by the
Oregon Law Commission
at its Meeting on January 23, 2008

I. Introductory Summary

This proposed bill revises and clarifies the Oregon Law Commission's own enabling statutes. The bill would add two commissioners to the composition, modify the requirements of the legislative appointments and make other modest changes to clarify and reorganize these statutes. The statutes have not been amended since the Law Commission was first established by statute by the Legislative Assembly in 1997.

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

The Oregon Law Commission's Enabling Rules Work Group recommends retooling the Commission's statutory provisions passed into law during the 1997 Legislative Session. See ORS 173.315 et seq. The Oregon Law Commission recently celebrated its ten year anniversary and recognizes that its own statutes as well as internal procedures should be reviewed and improved periodically. The present statutes do not entirely reflect current practice; in addition, experience has shown that some of the policies in the statute could also be improved.

Commissioner and Attorney General Hardy Myers served as the chair of the Work Group. The Work Group met six times from February 2008 to August 2008. SB 562, the legislative proposal addressed here, incorporates the Work Group's recommendations. The Work Group included the following members: Sen. Suzanne Bonamici, Mark Comstock, Chief Justice Paul DeMuniz, Sandra Hansberger, Associate Dean Peter Letsou, Prof. Hans Linde, Sen. Floyd Prozanski, Lane Shetterly, and Prof. Dom Vetri.

III. Objective of the Proposals/Section Analysis

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

Section 1(2): Commission Membership

The Commission has been composed of thirteen voting Commissioners since its creation in 1997. All three branches of government as well as the legal community (both academic and practicing legal community) comprise the Commission. The Commission has included two persons appointed by the Senate President (at least one of whom is a Senator at the time of appointment), two persons appointed by the Speaker of the House (at least of one whom is a Representative at the time of appointment), the Chief Justice of the Oregon Supreme Court (or designee), the Attorney General (or designee), a governor's appointee, the dean (or designee) from each of the three law schools in Oregon, and three persons selected by the Oregon State Bar's Board of Governors. The Work Group believes this balance in membership has worked well and has led to the success of the Commission. The

Work Group recommends generally keeping the structure, and only modifying the existing Commission membership slightly.

Legislative Members

The Legislative Assembly has had the potential to occupy at least four slots on the Commission; however the statute requires that only two of the slots be legislators at the time of appointment. In the past, the Speaker and the Senate President have chosen to appoint non-legislators to one of the slots. The Work Group believes that the participation and experience of legislators is invaluable to the success of the Law Commission's work,[1] and thus the recommended bill continues to require one sitting member of the Senate and one sitting member of the House at the time of appointment. The bill adds that the persons appointed to these slots will serve ex officio, which means that they will lose their slots if they cease to be a member of the respective legislative chamber. This will result in the commission having at least one senator and one member of the house as members. In addition, the bill provides that the second slots appointed by the House and Senate must also either be sitting members or former members of the respective chamber.

The Work Group also clarified credential requirements for the ex officio members of the Commission who are authorized to designate someone else to serve as a Commissioner in their stead. The deans of each of Oregon's law schools, the Attorney General, and the Chief Justice have the authority in the existing statute to choose a designee to the Commission. In practice, the Lewis and Clark Law School and the University of Oregon Law School deans have each designated faculty of their respective law schools to serve on the Commission. The Chief Justice has on occasion designated another Justice of the Supreme Court. And the Attorney General also has occasionally designated an assistant attorney general from the Department of Justice. The recommended statute would simply codify present practice and ensure such continued practice.

Two Additional Judicial Members

Finally, the Work Group recommends expanding the Commission size from thirteen to fifteen Commissioners. The two new slots would expand the number of judges on the Commission. The statute presently requires only one member of the judicial branch—the Chief Justice of the Oregon Supreme Court. "A major reason for including the Chief Justice was the hope of stimulating some system with the judiciary to collect and report instances, whether in statutes, regulations, or common law, where judges find sources of legal guidance more than ordinarily confused, contradictory, or simply lacking."[2] The Work Group recommends extending the Commission composition to cover the lower courts of the judicial branch.

First, the Work Group recommends adding the Chief Judge of the Court of Appeals (or designee). Section 1(2)(i). If the Chief Judge appoints a designee, the designee must be another judge of the Court of Appeals. See Section 1(6)(c). Second, the

[1] See Hans Linde, *Notes for New Generation*, 44 WILLAMETTE LAW REVIEW 463, 465.
[2] See Linde, *Notes for New Generation*, 44 WILLAMETTE LAW REVIEW at 466.

Work Group recommends adding a circuit court judge. The Chief Justice would appoint a circuit court judge or a retired circuit court judge who continues to serve as a senior judge. See Section 1(2)(j). The Work Group recognized the time demands, particularly on circuit court judges, but felt that their experience would be invaluable to the Commission. Allowing those with circuit court experience but who are now serving as senior judges (semi-retirement) was a compromise to give flexibility to the selection. The Work Group made these recommendations since lower courts see problems that the Oregon Supreme Court often does not encounter. It should also be noted that the Work Group wanted to keep the Commission total membership at an odd number for voting purposes.

The Work Group did discuss also adding a representative of the public to the Commission composition, but ultimately found that unnecessary. The Group reasoned that the staff works with the Oregon State Bar and other groups to assist with Work Group member selection, often selecting a public advocate for the respective project. In addition, the public has adequate access to the Commission's processes as meetings are open to the public.

Section 1(3): Ex Officio Membership
This section simply states what is perhaps the obvious to some, namely that certain members of the Commission sit as Commissioners by virtue of their office or position, i.e. ex officio. They continue to hold their membership as a Commissioner until they no longer hold the office or position. These Commissioners include the Attorney General, Chief Justice, and the deans of the law schools. In addition, the Chief Judge of the Court of Appeals (recommended new addition) would also be an ex officio member as would the legislative slots described above.

Section 1(4): Length of Terms for Commissioners (Non-Ex Officio Members)
The statutes have provided that Commissioners who are not ex officio members serve terms of two years. The Work Group and staff determined that two year terms are simply too short. Such service provides only one interim and regular session year. Many law reform projects take several years to fully complete and one also needs time to become familiar with the Commission process and projects. Continuity of the Commission is also important. The Work Group recommends extending the terms to four years and this section of the bill makes that change. However, to address potential changes in Oregon legislature membership and leadership (after elections), the Work Group recommends providing that the legislative appointments that require current membership in the House or Senate will cease earlier than four years if the person is no longer serving in their respective chamber of the Legislative Assembly. See Section 1(4)(b). Reappointments continue to be permitted for all members, assuming that they meet the requirements. See 1(4)(a).

Section 1(5): Filling Vacancies
This section simply explains how vacancies are to be handled when appointed Commissioners resign or otherwise end their term early. The new Commissioner

finishes out the unexpired term of the predecessor to keep the appointments staggered. Often there is very little time left in the unexpired term; this section provides the appointing authority with the power to make the new appointment for the unexpired term and the next term at the same time. This promotes efficiency and provides flexibility to the appointing authority.

Section 1(6): Designee Requirements
This section simply codifies present practice of the ex officio members to date who have designated others to serve in their stead. Looking to the future, the Work Group wanted to make sure that the Commission membership remains consistent. The Work Group hopes that the ex officio members will actually serve on the Commission themselves. However, if the ex officio member does choose to designate someone else, the person should hold a similar position within the same institution as the designating Commissioner; the bill makes this an explicit requirement.

The Work Group decided not to permit other Commissioners to use proxy voting (which reflects current practice). Only ex officio members with designation authority in statute may designate another person to vote for them. In practice, some ex officio members have made the designation long term while some have made their designation limited, e.g., for a single meeting. This practice will remain permissible.

Section 1(7): Unexcused Absences
This provision is in existing law and simply provides that the term of a Commissioner who misses three consecutive meetings without prior approval of the Commission chair shall cease. See ORS 173.315(3). Unexcused absences have never been a problem for Commissioners. The recommended revised statute simply moves this provision to a separate subsection and also provides for the procedure for a new appointment should removal of a Commissioner be made for unexcused absences.

Section 1(8):
No change is made, except for renumbering.

Section 1(9): Quorum Requirements
The Law Commission's quorum requirement is like many other boards and commission statutes in that it fixes the quorum requirement at a majority of the members of the Commission. The statute did not, however, clearly state the number of votes necessary for a decision. The additional recommended sentence clarifies this issue. It provides that if there is a quorum, the commission may take action if there is an affirmative vote by a majority of the commissioners present. This rule is consistent with practice and is consistent with the Attorney General's interpretation of common law quorum requirements and the application of Oregon quorum statutes.[3]

Section 2: Transitioning of Terms/Effective Date Provisions

[3] See Hardy Myers, Attorney General's Public Records and Meetings Manual, Public Meetings Law Appendix C, at C-4 (January 2008).

(1), (2), (3) Legislative Members: Subsections (1) and (2) transition the Commission appointments made by the Senate President and House Speaker. Present law requires only that two of these slots be actual members of the legislature at the time of appointment. At the time of this report, those positions are held by Sen. Floyd Prozanski and Rep. Greg Macpherson. The House Speaker also has also appointed a former legislator (Lane Shetterly) for the second House position. Thus, the only legislative appointment not in compliance with the proposed new requirements is the Senate appointment of John DiLorenzo, who is neither a current or former legislator. Subsection (3) would grandfather Mr. DiLorenzo, permitting him to remain as a commissioner and to be reappointed as well.

(4), (5), (6) Staggering/ Ending Date of Terms:
The Work Group recommends changing the end date of terms from August 31 to June 30 (the half year mark). This date will better correspond with session dates and the general ebb and flow of Commission work. Subsections (4), (5), and (6) give the Commission discretion in determining whether to lengthen or shorten existing Commission member terms to create a staggering effect so that all Commissioners are not ending their terms at the same time. That is, the existing Commissioners will be on a two year term and the bill would permit extension of the terms to four years. The bill allows the Commission to work with the appointing authorities to create a staggered schedule of appointments. Legislative Counsel suggested this option rather than trying to specify how to treat particular Commissioners and terms.

Section 3: Compensation for Commission and Work Group Members
The work group recommends adding language to permit legislators who are serving on Commission Work Groups or serving as Commissioners to seek reimbursement for actual expenses associated with their participation. The existing statute only permits legislators who are serving as Commissioners to receive the per diem/travel expenses from the Legislative Assembly. This has resulted in the odd case of two legislators working on the same law reform project (having been appointed to serve) and attending the same meetings, but one is reimbursed and the other is not. The Commission's work is closely associated with the duties and responsibilities of legislators, and the Work Group makes the recommendation to ensure legislator participation in Commission projects. The fiscal impact of this change is modest.

Section 4: Meetings
This section has been modified by the work group to allow for more flexibility of the Commission in setting its meetings. While the statutory requirement for quarterly meetings is deleted altogether, it should be noted that in the concurrent review of the Commission's internal Policies and Procedures, the goal of quarterly meetings has been retained. The group did this as it thought the Policies and Procedures were a better location for such a specific provision. The problem with a quarterly meeting requirement is that there are busy times of the year and slow times of the year for the Commission. For example, in the fall and winter before a regular session, the Commission needs to meet often, generally monthly. However, during session the Commission generally does not need to meet. Also, during the early part of the

interim, Commission Work Groups are busy meeting, but there is not a need for the full Commission to meet. The current requirement has led to the "tap-tap" meeting on occasion and such meetings serve little purpose.

Section 5: Legislative Counsel
The Commission continues to enjoy a close relationship with Legislative Counsel's office. At one time, Legislative Counsel's office and the Judiciary Committee's Counsel staffed the Commission's predecessor, the Law Improvement Committee. The Commission's enabling statutes were enacted in 1997 by the Legislative Assembly. Then, in 2000, the Commission began to be staffed by Willamette University College of Law when a contract was negotiated between Willamette University and Legislative Counsel. The statute, however, was never modified to reflect the changes in staff functions. Thus, the present statutes inaccurately seem to require staffing by the Legislative Counsel office itself, but those duties have been transferred to Willamette's staff for the Commission.

The Work Group determined that the provisions of current ORS 173.335(2) should be deleted altogether as they are duplicative to those tasks currently performed by Commission staff and dealt with in Section 6 (2) of this proposed bill. Lastly, the bold language in Section 5(1) is from current ORS 173.338 (2); it simply has been moved to Section 5(2). It is a statutory directive requiring action on the part of Legislative Counsel to assist with drafting services for the Commission. It is more appropriately located in Section 5, the Legislative Counsel section of the proposed bill. The Legislative Counsel's office does indeed assist with selecting Commission projects and provides invaluable drafting services to the Commission's Work Groups.

Section 6: Law Revision Program
This section, currently codified as ORS 173.338, describes the appropriate scope of Commission projects and very purpose as a law revision and recommending body. Subsection (1) has been stylistically revised to more aptly reflect the purpose and authority of the Commission. Further, subsection (2) of what is currently ORS 173.338 has been moved to the previous section, as it relates to obligations of Legislative Counsel and more appropriately fits there. Lastly the subsection (2) of this bill was formerly located in ORS 173.342 (2), and fits more appropriately within this section as it relates to a legislative directive to undertake a specific review/revision program.

Section 7: Reports
This section is currently codified as ORS 173.342. The only change from the current statute was to move subsection (2) regarding a legislative directive to study a topic and places this in the Law Revision Program section above as the group decided that would be a more appropriate location for the provision.

Section 8: Work Groups
This section provides clear statutory authority for the creation of "work groups" as per current Commission practice, and reflects the current use of the term "work group" as opposed to "committees".

Section 9: Enacting and Effective Date
This section provides that the revisions to the Oregon Law Commission Enabling Rules statutes shall become effective upon passage. The reason for the Emergency Clause is to allow the terms and new provisions to take effect sooner, particularly the membership requirements.

III. Conclusion

The proposed bill amends ORS 173.315 et seq. It improves the Commission's own enabling statutes based on recommendations of a Work Group charged with evaluating the statutes and practices of the Commission upon its ten year anniversary.

Emergency Preparedness Liability Work Group

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From the Offices of the Executive Director
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Approved by the Oregon Law Commission at its Meeting on
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I. Introduction

Several major catastrophes in other jurisdictions, notably the September 11th terrorist attacks, Hurricane Katrina and the recent California forest fires, have renewed Oregon's focus on ensuring public sector preparedness for large-scale emergencies. Under state law and practice, both the state and local government prepare for and respond to emergencies. For instance, ORS 401.015 states that the government is responsible for reducing the vulnerability of the state to "loss of life, injury to persons or property and human suffering and financial loss resulting from emergencies" as well as to provide "recovery and relief assistance from for the victims of such occurrences."

While it is the government's duty to serve these functions, the infrequency of major emergencies means that a successful response must rely heavily on volunteers and other private providers who are not regular public sector employees. In order to assure that these individuals and entities are fairly treated and willing to assist the state with providing essential emergency responses in Governor-declared emergencies and search and rescue operations, the Oregon Law Commission charged the Work Group with the task of considering and recommending (as needed) law reform to address compensation issues surrounding such volunteers when they are injured, or when they injure others.

The current statutes addressing volunteer emergency service providers are largely set out in Chapter 401. This chapter also covers multi-lateral emergency assistance, and 911 and 211 telecommunication systems. The combination of all the various emergency provider laws in one chapter makes this whole area confusing. Much of the confusion should be alleviated by the Work Group's recommended reorganization of Chapter 401.

There are two major overall policy objectives of the Work Group's proposed bill. First, the proposal provides a clear mechanism for government compensation of qualified volunteer emergency providers injured in both Governor-declared emergencies and in search and rescue operations by providing them coverage under workers' compensation. Second, the proposal clearly provides government compensation for people tortiously injured by such emergency providers by treating these providers as agents of the state for purposes of coverage under the Oregon Torts Claims Act. Enacting these provisions will alleviate concerns expressed by volunteer providers about who will bear the responsibility for compensating them or others injured while these volunteers are providing essential services for the benefit of Oregonians during emergency situations. The Work Group viewed the concerns of these volunteers as valid, even if the likelihood of injury or a tort suit occurring is not great. While the Work Group recognized the financial cost to government, it found that government responsibility for compensation under these circumstances is fair and just.

The final objective of the Work Group was to make the statutes covering emergency services and communications more user-friendly and clear through reorganization. As a result some definitions have been moved and others have been

omitted because they were unnecessary. The statutes will be broken-up into separate chapters divided by subject matter in order to provide more coherence and ease of access.

II. History of the Project

The genesis of this project was a letter to the Oregon Law Commission (OLC) from Bruce Goldberg, Director of the Department of Human Services (DHS) in November 2007. In this letter, Dr. Goldberg proposed that the Commission review the existing emergency response legislation and address the issues of liability and immunity for volunteer emergency providers during an emergency response. The letter identified the problems of volunteer hesitance to participate as well as a desire for the state to adequately prepare for emergencies. The proposal did not suggest solutions to the problems.

On December 4, the Oregon Law Commission Program Committee reviewed the proposal and requested both more information and that additional funding resources be identified to complete the project. On June 24, 2008 OLC staff, in consultation with DHS, issued a memorandum titled "Supplemental Scope Section for Proposal of Emergency Responder Liability Law Revision Project"[1] which provided more detailed information and listed seven issues for the Work Group to consider. On June 27, 2008, based upon the further research, the extended scope section document, and additional secured funding, the OLC Program Committee recommended the project and the creation of a Law Commission Emergency Preparedness Liability Work Group; the Law Commission approved the recommendations on July 28, 2008.

In August 2008, Commission Chair Lane Shetterly appointed two Oregon Law Commission Commissioners to chair the project: Representative Greg Macpherson, State Representative House District 38, and Gregory Mowe, Stoel Rives LLP. The Commission Chairs then appointed the following members of the Work Group: Rep. Jean Cowan, State Representative House District 10; Gwen Dayton, Oregon Hospital Association; Sheriff Tim Evinger, Klamath County Sheriff; Prof. Caroline Forell, University of Oregon School of Law; Dr. Grant Higginson , DHS Public Health Division; David Hytowitz, Safeco Insurance; Ken Murphy, Office of Emergency Management; Shannon O'Fallon, DOJ, General Counsel Human Services; Dr. Gary Oxman, Coalition of Local Health Officials; Doug Schaller, Johnson Clifton Larson & Schaller PC; and David Sugerman, Paul & Sugerman PC. Appointed advisors (non-voting members) were: Anna Braun, Oregon Judiciary Committee Counsel; Rob Cruickshank, Pacific Northwest Search & Rescue; Deborah Fifield, DAS Risk Management; Dr. Ross Fleischman, Portland Mountain Rescue; Susan Grabe, Oregon State Bar; Mark S. Rauch, City County Insurance Counsel; and Paul Snider, Association of Oregon Counties.

The Emergency Preparedness Liability Work Group first convened on September 15, 2008. Because of the short time-line for getting this project completed before the 2009 Oregon Legislature convened, the Work Group met six more times in late 2008 and early 2009, completing its work at its January 12, 2009 meeting. While the Work Group

[1] See supplemental scope memorandum in appendix.

considered the seven issues set out in the "Supplemental Scope" memo, the Work Group is not recommending substantive changes to current law in all seven areas.

III. Statement of the Problem Areas

In the "Supplemental Scope" memo, the Commission charged the Work Group with considering seven different issues: (1) Out-of-State Assistance; (2) Private Individual and Entity Immunity From the Scope of Liability for Negligence; (3) Private Individual Indemnification (Oregon Tort Claims Act application); (4) Triggering Events (Terms and Definitions); (5) Implications Regarding Insurance Coverage and Workers' Compensation; (6) Defining the Minimum Standard of Care Required in an Emergency; and (7) Substitution of Remedies and Scheduled Compensation. The Work Group discussed all of these issues and concluded that many of them did not require legislative action and that those that did could largely be addressed by resolving the issues of compensation for volunteers who are injured while assisting in an emergency and compensation for persons injured by volunteers who are assisting in an emergency. These were the issues that the Work Group considered most important. Because existing statutes set out in Chapter 401 either failed to address or inadequately addressed these two issues, a majority of the Work Group was concerned that the current state of the law created a disincentive to volunteer and was unfair.

For volunteers responding to Governor-declared emergencies under ORS 401.661 and Governor-declared public health emergencies under ORS 401.441 the main concern is with the liability of volunteers for injuries to others during such emergencies. Unlike volunteers, government employees are already clearly covered under the Oregon Tort Claims Act (OTCA), ORS 30.260-30.300. The current statutes contained within ORS chapter 401, however, do not clearly address the liability of volunteers, leaving entirely uncertain the risk to volunteers associated with injuries to others during a Governor-declared emergency. For example, ORS 401.515(1) and (4) can be interpreted to provide absolute immunity for torts, protection under the OTCA, or perhaps even no protection for volunteers. Outside of ORS chapter 401, volunteers can rely on ORS 30.800, the "Good Samaritan" statute, but that statute is only applicable under very narrow circumstances. Additionally, the term "agent" within the OTCA (ORS 30.265) can be broadly interpreted and is not clearly defined in statute or in case law. While some argue that emergency volunteers would likely qualify as agents of the state under the statute, that issue is far from certain under current law. (See Section V. A. below for additional discussion).

There is also concern that although ORS 410.355 currently provides workers' compensation for injuries suffered by volunteers in these situations, this statute is so broad that it unnecessarily covers other emergencies. Furthermore, ORS 401.395 provides for benefits in a system that is similar to workers' compensation but is outside the traditional workers' compensation system found in ORS chapter 656. This is especially problematic because the agency charged with administering this system (the Office of Emergency Management) has no expertise; existing workers' compensation statutory provisions and case law do not apply to this parallel system; and this system has

never been funded by the Legislature. Additionally, the $20,000 cap imposed on recoverable workers' compensation benefits under ORS 401.395 does not seem fair or appropriate.

For search and rescue volunteers the concerns are similar, including both their liability for harm to others, and compensation for injuries volunteers receive in the course of search and rescue operations. The search and rescue provisions in ORS 401.550 – 401.590 do not address either of these situations. As a result, under existing law, search and rescue volunteers can be personally liable for injuries to others resulting from a search and rescue. Furthermore, unless the county which requests their assistance voluntarily provides them with workers' compensation coverage or medical insurance (some counties currently do this) volunteers who are injured will receive no compensation from the government body for whom they volunteered unless they successfully sue under the Oregon Torts Claims Act. This is difficult to do because one must show fault on the government's part to succeed in such a claim. The frequency of multi-county searches and rescues, coupled with the practice of multi-unit response makes the varied coverage non-uniform, resulting in mistaken expectations.

The Emergency Health Care Services statutes (ORS 401.651 to 401.670) present additional problems. Under these statutes, DHS may designate certain health care facilities as emergency health care centers during Governor-declared emergencies or public health emergencies. If designated, these facilities can become agents of the state for tort claims act purposes. Also, these statutes create a special registry for health care providers, who, when the registry is activated, become agents of the state under the OTCA. One problem identified with these statutes is that, as currently enacted, their protections do not attach if the health care worker or facility receive compensation for their services. During an emergency, hospitals do not know in advance which patients will have insurance or other means to pay for services. Hospitals simply aren't checking insurance cards at the door. It does not make practical sense, policy wise, to only provide OTCA protections in those cases where hospitals do not ultimately receive compensation because a person happens to be uninsured. Another problem is that there are no guidelines in these statutes regarding 1) what types of activities are covered by these provisions (e.g. all activities conducted in the designated facilities? Only those activities specifically directed by the government?), or 2) what counts as impermissible "compensation" to particular individuals (e.g. per diem amounts? Housing for volunteers? Free meals?). Finally, there is no designation of which agency will be held responsible to indemnify and pay for any claims against qualified emergency health care providers and facilities when they arise.

Lastly, chapter 401 needs to be significantly reorganized. It currently contains all provisions relating to all types of emergencies – everything from the powers of the Governor during an emergency to the 9-1-1 emergency system and search and rescue. The Emergency Management Assistance Compact, a relatively self-contained act relating to the provision of emergency assistance across state lines, is also housed within chapter 401 and is currently located between the list of general definitions for the chapter and its

other substantive provisions. The organization of the chapter makes it extremely difficult to read and it also contains several definitions that need to be improved upon.

IV. The Objective of the Proposal

The objective of the proposal is to encourage and ensure fair compensation for qualified volunteers and health care facilities who participate in emergency response both by providing them with adequate compensation if they are injured and by protecting them from tort liability resulting from negligence committed while participating. Another objective of the proposal is to reorganize and clean up the existing statutes within ORS chapter 401 to make them clearer. Establishing certainty for volunteers and for government is an overarching goal as well, because current statutes do not speak with sufficient clarity to permit those potentially involved in emergency services to know what standards will or will not apply.

V. The Proposal

The proposal focuses primarily on amending the provisions contained within ORS chapter 401 and the proposal contains five basic elements: (1) extending Oregon Tort Claims Act protections to qualified volunteers; (2) providing workers' compensation benefits for qualified volunteers; (3) clarifying provisions relating to emergency health care services; (4) significant reorganization of ORS chapter 401; and (5) giving more control to public bodies to determine who is qualified to serve as a volunteer and thus receive benefits and liability protections.

A. *Limiting the Individual Liability of Volunteers by Bringing them within the Protections of the Oregon Tort Claims Act*

Among the suggested solutions to the exposure to liability for volunteers in Governor-declared state of emergencies and in search and rescue operations was to provide absolute immunity from liability. The Work Group concluded that this solution was inappropriate for two reasons. First, if immunity is created, in some cases injured parties will not receive compensation even for serious injury or death caused by a volunteer's unreasonable conduct. Second, under existing Oregon law, most notably the Oregon Supreme Court's 2007 decision in *Clarke v. OHSU*, 343 Or 581, creation of absolute immunity risks being declared unconstitutional under the Remedy Clause of Article I, section 10 of the Oregon Constitution. The Work Group's proposal therefore also makes clear that volunteers do not have absolute immunity by deleting ORS 401.515(1).[2] It should be noted that many other states facing this issue have simply expanded existing Good Samaritan acts to provide immunity for emergency volunteers.[3] While many of these states have Remedies Clauses similar to that contained within the Oregon Constitution, their courts have interpreted their constitutions differently.

[2] Providing absolute immunity to certain individuals and thus completely depriving injured persons of a remedy would most likely be unconstitutional under the Supreme Court's analysis in *Clarke*.
[3] For an example, see Georgia's Good Samaritan Act (Ga. Code Ann. §51-1-29).

The uncertainty surrounding the constitutionality of Oregon's current Good Samaritan statute (ORS 30.800) was a major reason that the Work Group decided not to recommend a revision to the statute. The current statute applies only to those who provide "emergency medical assistance." While this term might be interpreted broadly to cover most situations in which a Good Samaritan might provide services, a recent California decision suggests otherwise.[4] The Work Group was concerned about whether the Good Samaritan statute would survive the Oregon Supreme Court's *Clarke* decision. While the concurrence in *Clarke* suggests that the Good Samaritan statute remains constitutional under the *Clarke* interpretation of the Remedies Clause,[5] the Work Group concluded that the only way to ensure the constitutionality of any amendments to the Good Samaritan Act would be to amend the Oregon Constitution. The Work Group considered such a proposal to be beyond the scope of the current project, and therefore decided not to recommend amending the Good Samaritan statute.

Another suggestion was to alter the standard of care owed to a lower standard for persons serving as volunteers during an emergency. The Work Group also rejected this proposal since current Oregon tort law already requires that the facts and circumstances of the situation be taken into account when determining whether a person acted negligently or reasonably in a given case. The Work Group believed that mandating rigid protocols or altered standards of care for certain emergencies were unworkable.

The Work Group's proposal addresses the issue of exposure to liability for qualified volunteers in Governor-declared emergencies and in search and rescue operations by treating them as agents of a public body for purposes of the Oregon Tort Claims Act (OTCA), ORS 30.260 through 30.300. As a result, persons injured by these qualified volunteers while they were acting within the scope of the emergency would be indemnified by the public body and any recovery would be subject to the statutory caps on the amount that can be recovered. That is, persons injured by volunteers would have no cause of actions against the volunteer, only against the public body for which they serve. It should be noted that the 2009 Legislative Assembly is poised to increase the monetary caps on recovery within the terms of the OTCA to help ensure the constitutionality of substitution and indemnification by government for individuals in most cases.[6] Even if the proposed changes are enacted, an "as applied" constitutional challenge similar to *Clarke* could still be made. If such a challenge were successful, the public body, when indemnifying the individual, would likely remain liable for an amount greater than the caps.

It should be noted that the proposal may not change the law in this area much, even if it clarifies it. In many cases, these volunteers would already be protected by the OTCA since the act covers officers, employees and *agents* of the state and public bodies if they are acting within the scope of their duties (see ORS 30.260-30.300). The term "agent" is not defined anywhere within the ORS, and there is little Oregon case law on

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[4] See *Van Horn v. Watson* (Cal. 2008) (finding that similarly-phrased statute regarding provision of "medical assistance" did not encompass pulling a person out of a car after an accident).
[5] See *Clarke v. OHSU*, 343 Or. 581, 617 (Balmer, J concurring).
[6] See SB 302, 305, and 311 (2009) (Oregon Tort Claims Act Task Force recommended bills).

this topic. The common law definition, derived from the Restatement of Agency and adopted by the Oregon Supreme Court in 1937,[7] states: "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Under this definition, the Work Group believes that many qualified volunteers providing emergency services and conducting search and rescue activities would be covered by the OTCA under *current* law[8]. Nevertheless, the Work Group believed that the proposed changes provided greater clarity for volunteers ahead of time and would hopefully prevent additional litigation of the issue down the line. Thus, the Work Group recommends requiring substitution and indemnification for volunteers who are sued.

1. Qualified Volunteers Serving During a Governor-Declared State of Emergency or Public Health Emergency

The Work Group's proposal provides in section 4 that qualified emergency service volunteers are agents of a public body under the Oregon Tort Claims Act (OTCA), ORS 30.260 through 30.300, for purposes of the acts and omissions of the volunteers if these occur during an ORS 401.661 state of emergency or an ORS 433.441 state of public health emergency, so long as the volunteer is performing emergency services under the direction of the public body. The proposal sets out the requirements for being a qualified emergency service volunteer in section 3(2). Section 3(1) limits coverage under the OTCA to volunteers who receive no compensation from the public body except for reimbursement for expenses.

The Work Group also recommends an amendment to the OTCA in Section 15 that makes clear that for purposes of the OTCA's dollar limitation on recovery for a single accident or occurrence, events giving rise to a proclamation of a state of emergency or state of public health emergency do not constitute a single accident or occurrence. In other words, the flood, earthquake, or fire itself is not "one occurrence" for the purpose of the Act.

2. Qualified Search and Rescue Volunteers

The Work Group's proposal provides in section 13 that qualified search and rescue volunteers are agents of a county under the OTCA for purposes of their acts or omissions that occur while these volunteers are performing search and rescue activities under the direction of the county's sheriff or sheriff's designee. Section 11 of the

[7] See: *Kantola v. Lovell Auto Co.*, 157 Or. 534 (1937).

[8] Another definition of agency can be found in an Oregon Attorney General Opinion from 1983. This definition reads: "A person (not an employee or officer) is an agent of a public body for purposes of the Tort Claims Act if that person meeting the usual 'control' tests with respect to the manner of performance of duties *or* if that person performs a function or responsibility of the public body *on behalf* of the public body. The person is not an agent, if a service (without supervision or control) is merely performed for the public body and not on its behalf." (Emphasis in original). Op Atty Gen 145 (Opinion no. 8136, dated January 21, 1983). Most volunteers covered by this project would qualify as agents under either definition. For discussion of both definitions, see *Samuel v. Frohnmayer* 82 Or. App. 375 (1986).

proposal defines "search and rescue activities" and sets out the requirements for a qualified search and rescue volunteer. Counties will be able to control who receives coverage because the only covered volunteers are those who are pre-registered with the county or acknowledged in writing by the county as being qualified; under the proposal people cannot simply show up at an emergency and be covered by the proposal. (For additional discussion of the government's control see section E below). Furthermore, only those individuals who serve without compensation may be covered by the OTCA. The proposal makes clear that compensation does not include reimbursement for expenses.

B. ***Providing Workers' Compensation for Qualified Emergency Volunteers***

Qualified search and rescue and emergency service volunteers provide extraordinary and necessary services to Oregon and its citizens during times of crisis. They are to be commended for their willingness to serve. The Work Group's proposal assures that if these volunteers are injured in the course of providing services, they will be compensated for their injuries through a public body providing them with workers' compensation coverage. Such coverage makes workers' compensation the exclusive remedy thereby precluding any tort claim by the injured volunteer against the public body.

1. Qualified Volunteers Under a Governor-Declared State of Emergency or Public Health Emergency

The Work Group's proposal requires in Section 5 that the Office of Emergency Management provide workers' compensation coverage for qualified emergency service volunteers who are injured in the course and scope of performing emergency service activities or emergency preparedness trainings under the direction of a public body. This proposal would replace ORS 401.355 with a new provision that narrows workers' compensation coverage from "an emergency service worker" to only those qualified volunteers acting under an ORS 401.661 or ORS 433.441 governor-declared emergency.

This proposal also eliminates the provision in ORS 401.395 that places a $20,000 limit on the amount of workers' compensation benefits payable to qualified emergency service workers. This section was particularly puzzling to the Work Group because it purported to give workers' compensation benefits to emergency service workers, but it did not allow the workers to receive full compensation for their injuries, it did not provide any link to the regular workers' compensation system in ORS chapter 656, and it stated that payment only had to be provided to injured workers if the Legislature appropriated money into the fund (which it never did). The Work Group believes that no legitimate reason exists for treating qualified volunteers differently than other people entitled to workers' compensation benefits. The proposal also makes clear that if the qualified volunteer is already covered by another entity's workers' compensation program, that program will preclude workers' compensation coverage by the public entity and thereby avoid double benefits.

By providing workers' compensation benefits, the public body is also limiting its own liability. Workers' compensation is a system based upon a tradeoff agreement between a subject worker and the employer. In exchange for receiving full benefits under the workers' compensation system, the employee is barred from filing civil suit against the employer. In this case, a qualified volunteer would be barred from filing suit against the public body directing them during an emergency. While this is a limitation on a plaintiff's ability to recover his or her losses and therefore may implicate the Remedies clause under a *Clarke* analysis, the workers' compensation system is permissible because the employee is not required to prove fault on the part of the employer in order to receive compensation. This tradeoff is the element which makes the workers' compensation system withstand scrutiny by the court, as the system does not deprive the worker of a "substantial" remedy.[9] It should be noted that the $20,000 cap currently in the statute may not be an adequate tradeoff between the volunteer and public body, as it may not provide the injured worker with a substantial remedy and therefore might be unconstitutional under *Clarke*.

Oregon law currently provides three options to the state and local governments regarding the provision of benefits to volunteers who are injured: (1) Government may elect to provide full workers' compensation benefits under ORS 656.039; (2) government may elect to provide Volunteer Injury Coverage (VIC); or (3) government may elect to provide no coverage whatsoever. The third option is the default. The first option is utilized by some state agencies – one notable agency that does not make such an election is the OEM, which utilizes a significant number of volunteers. Many local governments do choose to make an election for all of their volunteers including those who volunteer in an emergency. The second option allows government to choose to self-insure its volunteers for injuries suffered while volunteering. This self-insurance system is known as Volunteer Injury Coverage (VIC), and is administered by the Department of Administrative Services (DAS) and SAIF. This coverage is loosely authorized under ORS chapter 278, but is not specifically provided for in statute. DAS has issued a policy manual explaining the terms of VIC.[10] The premiums for this service are taken from the funds paid by the agency into the workers' compensation fund, but there is no additional upfront cost for VIC coverage to the government, rather the cost is assessed at payout when the volunteer makes a claim. Under VIC, the maximum coverable amount is limited to a fixed amount of $25,000, with individual caps placed on medical expenses ($10,000 total) and loss of income (up to $1,250 per month for up to 1 year). In order to receive these benefits, the volunteer must waive his or her right to sue the state for any and all harm or damage to the volunteer's health in any manner resulting from or arising out of his or her state volunteer activities. Because the volunteer is giving up his or her right to sue and the remedy is capped at a specified low dollar amount, the VIC program raises constitutionality concerns. That is, there may not be an adequate tradeoff between what the volunteer is giving up and what he or she is receiving from the government in return (see above discussion re *Clarke*).

[9] See *Clarke*, 343 Or. at 435 (Balmer, J. concurring)
[10] See DAS Policy Manual no. 125-7-204: http://www.oregon.gov/DAS/SSD/Risk/VolInjTOC.shtml

2. Qualified Search and Rescue Volunteers

The Work Group's proposal requires that counties provide workers' compensation benefits for their search and rescue volunteers in section 13 (1). In a split vote, the Work Group concluded that current law that allows counties to elect to provide workers' compensation coverage is not satisfactory and therefore recommend mandatory coverage. The Work Group's reason for its recommendation is that mandatory coverage creates needed consistency and clarity for these important volunteers who often cross county lines while risking their lives to rescue others. Workers' compensation coverage is already provided to search and rescue volunteers by most counties and making it mandatory will make it the exclusive remedy for all counties, eliminating the possibility of more open-ended tort liability. Additionally, the proposal makes it clear that search and rescue volunteers injured while performing search and rescue activities are not eligible for county workers' compensation benefits if they are already covered by workers' compensation under ORS 401.355.

The Work Group recognizes that mandating workers' compensation coverage for search and rescue volunteers creates a new unfunded mandate for the few counties that currently do not provide workers' compensation benefits for their search and rescue volunteers. While employees of counties automatically receive workers' compensation coverage, counties may elect to cover volunteers under ORS 656.031 and 656.039. Under Article 11, section 15 of the Oregon Constitution, even if this requirement is enacted, thus imposing an unfunded mandate, counties may not be required to comply. Staff has been actively working with the Association of Oregon Counties to gain support for this provision and address the counties' concerns.

It should be noted that the decision to mandate workers' compensation benefits for search and rescue volunteers was not unanimous among Work Group members. Some proposed allowing counties to provide insurance and disability coverage to search and rescue volunteers. While this option is less advantageous for counties because these insurance benefits are not an exclusive remedy for the injured worker, this would be better than providing no coverage whatsoever. This option may be less expensive, but it also may not adequately compensate injured volunteers for their injuries.

C. *Emergency Health Care Services*

Sections 7 through 9 of the proposal state that during a Governor-declared emergency or Public Health Emergency, emergency health care providers registered under ORS 401.654 and other health care providers who volunteer to perform health care services under ORS 401.651 to 401.670 are covered by the OTCA regardless of whether they receive compensation. This allows hospitals to seek reimbursement through insurance or from federal sources if they so choose. As a tradeoff for eliminating the requirement that these health care providers volunteer without compensation, they are only covered by the OTCA if they are acting pursuant to directions from a public body. The Work Group believed it was important that there be some sort of nexus tying the tortious activity to the actions of the public body. In short, not all torts committed within

a hospital or by volunteer health care providers would be indemnified by the state during a declared emergency; a nexus would be necessary.

D. *Reorganization*

The Work Group also recommends that chapter 401 be broken up into several chapters and that various sections be amended or deleted. Early on, the Work Group identified organization of ORS chapter 401 as a major problem. Legislative Counsel (LC) reported that the organization could be easily improved by breaking the chapter into smaller sections based upon subject matter (e.g. separate 9-1-1 and 2-1-1 sections from search and rescue, etc.). Many of these organizational improvements can be accomplished by LC without legislative action, and the Work Group decided to leave it up to LC how best to reorganize and clean up chapter 401.

E. *Government Control over Who Receives Benefits*

Although emergency service workers and search and rescue volunteers receive increased protections under this proposal, the government also will have greater control over who will receive workers' compensation benefits and indemnification under the OTCA. Current law covers all "emergency service workers," defined as individuals who perform "emergency services" and who are either registered or who independently volunteer and are eventually "accepted" by the Office of Emergency Management or the county or city emergency management agency they serve under. The Work Group believed that "accepted" was not strong enough language because simply not rejecting a volunteer who comes to the scene could be interpreted as acceptance. This left the public body subject to possibly open-ended liability. The proposal makes some minor, yet significant changes to this definition by requiring that the volunteers be "acknowledged in writing" by the public body they serve. By setting up specific protocols as to how someone will receive coverage, the public body can limit its liability exposure by only registering a limited number of volunteers. Additionally, this helps prevent a flood of volunteers from showing up at the scene which can actually harm emergency relief efforts. This also informs prospective volunteers of the guidelines beforehand and lets them know that failure to follow these protocols will leave them without the benefits and liability protections. The same requirements apply to search and rescue volunteers.

VI. <u>Section by Section Analysis of the Proposal</u>

Sections 1-6: Qualified Emergency Service Volunteers

These sections amend the definitions of emergency service activities and emergency service volunteers. The definitions make clear that approved training exercises are covered under "emergency service activities" and that volunteers must be pre-registered, acknowledged in writing at the scene by the public body in charge, or a member of the Oregon State Defense Force. To be a qualified volunteer, one must be serving without compensation; section 3 clarifies that compensation does not include reimbursement for expenses.

Section 4 states that qualified emergency service volunteers are agents of a public body under the Oregon Tort Claims Act only if (1) their negligent acts or omissions are committed during a declared state of emergency or public health emergency; and (2) if they are performing emergency service activities under the direction of the public body. This section requires the public body to indemnify the negligent acts or omissions of the emergency service worker in accordance with the terms of the OTCA. Section 5 provides that the public body must also provide workers' compensation benefits to qualified emergency service workers. This section makes clear that benefits are to be given in accordance with the existing workers' compensation laws in ORS chapter 656.

Sections 7-9: Emergency Health Care Services

These sections amend ORS 401.657 to 401.670, relating to emergency health care services. The changes in sections 7 and 8 clean up the language and do not reflect substantive changes. Section 9 states that emergency health care providers are agents of the state regardless of whether they are compensated; however, they only receive these protections if they are acting pursuant to directions from a public body. This means there must be a nexus between the direction of the public body and the tortious act or omission being committed by the health care provider or facility.

Sections 10-14: Search and Rescue

Section 11 clarifies the definitions of search and rescue volunteers and search and rescue activities. Search and rescue volunteers are only qualified if they are registered with OEM or a county sheriff, a member of a designated organization that is registered with OEM or a county sheriff, or acknowledged in writing at the scene. Again, this allows the county or OEM to control who will be entitled to liability protections under the OTCA and workers' compensation benefits. Section 12 clarifies that, while search and rescue volunteers must be uncompensated to be qualified under these provisions, compensation does not include reimbursement for expenses.

Section 13 states that qualified search and rescue volunteers are agents of the county for whom they are working for purposes of the OTCA. Section 14 provides that these volunteers also receive workers' compensation benefits under chapter 656. Section 14 (2) is included because sometimes a qualified search and rescue volunteer could also be considered an emergency service worker based on the circumstances. This subsection provides that such a person may not receive double benefits.

Section 15: Oregon Tort Claims Act

This section amends the OTCA to clarify that a declaration of emergency or public health emergency by the Governor does not constitute a single act or occurrence for purposes of the OTCA. In effect, this means that the recovery for the *entire* disaster (e.g. the governor's emergency declaration following a major earthquake) will not be limited to the caps set under the OTCA.

Section 16: Series Adjustment

This section provides for some of the reorganization of chapter 401.

Sections 17-52: Miscellaneous Provisions

The changes contained within these sections are primarily included to clean up the chapter. Unnecessary definitions are eliminated, references to specific ORS numbers are amended where appropriate, and some Legislative Counsel amendments relating to style and form are made. These sections contain no substantive policy changes.

VII. Conclusion

The proposal set forth by the Work Group should be adopted for several reasons. The proposal encourages volunteerism in Oregon by providing liability protections (indemnification plus tort caps) to qualified volunteers accepted by public bodies and acting subject to their direction and control during Governor-declared emergencies and in covered search and rescue operations. Furthermore, this proposal provides workers' compensation to those who volunteer to provide essential services during a declared emergency or search and rescue efforts at the direction of public bodies. This proposal also gives the public bodies more control over who qualifies as an emergency service worker or search and rescue volunteer and thus prevents the public bodies from being subject to unlimited liability. The proposal also clarifies the emergency health care sections of chapter 401. Finally, this proposal clarifies and reorganizes an extremely complicated and poorly organized chapter in the Oregon Revised Statutes.

While there may be a fiscal impact associated with the part of the proposal requiring workers' compensation benefits to emergency service workers and search and rescue volunteers, the policy choices contained within this proposal are the right ones considering the essential service these volunteers provide to Oregon. Furthermore, the alternative—to use paid government employees rather than volunteers—would have a crippling fiscal impact to the state's already limited resources and likely would provide inadequate emergency and search and rescue services to the citizens of Oregon.

VII. Appendices

Amendment Note

The House Veterans and Emergency Services Committee moved two amendments into HB 3021. The first was requested by the Law Commission and was considered by the Commission at its meeting in February, 2009. Due to legislative deadlines, the bill had to be introduced before final review by the work group, and eventually the Commission,

could be made. These amendments brought the bill as introduced in line with the report and the Commission's recommendation.

The second amendment added in the House was proposed by the Association of Oregon Counties to give counties the choice of providing workers' compensation or medical insurance to qualified search and rescue volunteers. A few members of the committee voted against this amendment and expressed concern that it did not provide for consistent coverage for these volunteers throughout the state. The Management Labor Advisory Committee (MLAC), an advisory body created by the legislature to study workers' compensation issues and legislation affecting the workers' compensation system reviewed the bill after it passed out of the House. MLAC voted unanimously to support the bill if it were amended to either remove the provision giving counties an option to provide medical insurance rather than workers' compensation, or to remove section 14 of the bill altogether.

In response to MLAC's recommendation, Commission staff requested an amendment returning the bill to its original language (mandating workers' compensation) and the counties presented amendments providing for several other options. These amendments were all brought before the Senate Judiciary Committee, and the Committee Chair formed a work group to come up with a solution. The final amendment to section 14 requires counties to provide workers' compensation benefits to all of their qualified search and rescue volunteers, and allows self-insured counties to obtain workers' compensation coverage for search and rescue volunteers through what is known as the "Assigned Risk Pool," which is a potentially less expensive option for these self-insured counties. In short, the solution meets the requirements of MLAC, that workers' compensation benefits be provided; it will provide a consistent level of coverage throughout all of Oregon's 36 counties; and it does not place a significant cost burden on the counties to cover search and rescue volunteers.

Elective Share Work Group

ELECTIVE SHARE
HB 3077

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Approved by the
Oregon Law Commission
at its Meeting on February 11, 2009*

* Amended to reflect amendments made to the bill after further discussions with the Estate Planning Section of the Oregon State Bar.

I. Introductory Summary

Oregon's elective share statute provides 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 protect a surviving spouse from disinheritance by his or her decedent spouse. 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 assets (partnership theory); and 2) the surviving spouse should be provided some measure of support (support theory).

In contrast with the elective share, a spouse who seeks a divorce in Oregon is entitled to an equitable distribution of the couple's assets, usually roughly 50% of those assets. Thus, a spouse who files for divorce typically receives substantially more than a spouse who opts to take the elective share. Not only is the percentage higher, but in addition, the elective share statute applies only to the probate estate,[1] so it can easily be avoided through nonprobate transfers, such as revocable trusts. In short, Oregon's elective share statute has been criticized as having a percentage that is too low and for being too easy to circumvent.

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

[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.

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, Michele Grable & Associates; 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. The Work Group and the Law Commission recommended HB 2381 to the 2007 Legislative Assembly. After serious questions and amendment needs arose shortly before chamber deadlines, staff, upon consultation with the Work Group and Commission leadership, decided to halt advancing the bill during the 2007 session.

A Work Group was reconvened in 2008 to address the concerns with the 2007 bill. The Work Group was chaired by Bernie Vail, Northwestern School of Law, Lewis and Clark College and included the following members: Patricia Baxter, Oregon DHS; Susan Gary, University of Oregon School of Law; Karl Goodwin, Department of Justice; Jane Patterson; Paul Pickerell, DHS; Tim Wachter, Duffy Kekel LLP; and Eric Wieland, Samuels Yoelin Kantor Seymour & Spinrad LLP.[2]

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 (probate estate, net after claims) of the deceased spouse (decedent) as opposed to taking under the terms of the will. The amount of the elective share is reduced if the surviving spouse receives nonprobate transfers from the decedent. 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, each party to a divorce proceeding receives half of the couple's assets unless there is some reason to vary the distribution. Thus, there is a significant discrepancy between the amount received by a surviving spouse who remains married and takes the elective share (25% of the probate estate, at most) and a spouse who ends the marriage through divorce (50% of *all* assets owned by both spouses).

Three problems with the current elective share statute cause this result: 1) the statute applies only to probate assets; 2) the statute considers only the decedent's

[2] Jeffrey M. Cheyne of Samuels Yoelin Kantor Seymour & Spinrad LLP and Charles Mauritz of Duffy Kekel LLP also assisted with the project in early 2009 after raising concerns at the Oregon Law Commission meeting on February 11, 2009. Penny Serrurier of Stoel Rives LLP, William Brewer of Hershner Hunter LLP, and Bill Brautigam, DHS, participated in April and May 2009 regarding session amendments.

assets in determining the elective share amount; and 3) the percentage used, 25%, is well below the partnership percentage of 50%. In recognition of these problems with elective share statutes, and to address other probate matters, the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission) drafted the Uniform Probate Code (UPC) in 1969 and revised it substantially in 1990.[3] Many states have adopted portions of the UPC, and Oregon now is one of the few states with an elective share statute limited to probate assets. Oregon also has the lowest maximum percentage of any state with an elective share statute. The Work Group's proposal, HB 3077, is modeled in part on section 2-202 of the 1990 UPC.

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 couple's combined estates 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 an augmented estate.[4] The augmented estate is calculated by combining the decedent's probate estate, nonprobate estate, and transfers to the surviving spouse with the surviving spouse's assets. Using the augmented estate to calculate the elective share greatly reduces the ability of one spouse to circumvent elective share statutes.

The UPC also incorporates the support theory by providing for a minimum elective share amount of $50,000. This minimum amount applies regardless of the length of the marriage and means that in a small estate (joint assets of less than $100,000) the surviving spouse will get more than the elective share amount calculated using the appropriate percentage. The Oregon proposal does not include a minimum elective share amount.

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[3] 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.

[4] Below are definitions of some important terms that are used in this draft:

1) Probate Estate: Section 10 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 11 through 13 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 8 of this draft defines the augmented estate as a decedent's probate estate, decedent's nonprobate estate, the surviving spouse's estate, and the decedent's probate and nonprobate transfers to the surviving spouse.

A. Elective share limited to probate assets

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 probate estate. Common estate planning techniques include the holding of title to assets in ways that mean that the assets will not be part of the probate estate (e.g. trusts, property owned with rights of survivorship, life insurance policies and all nonprobate assets). Thus, it is common for the probate estate to be worth substantially less than a decedent's property, and anyone wishing to avoid application of the elective share can do so by transferring assets outside probate (e.g., by establishing a revocable trust).

The problem with limiting the elective share to probate assets is that the amount of the elective share will depend on how the couple held title to their assets.

B. Elective share limited to decedent's assets

Oregon's statute applies the elective share to the decedent's assets and does not consider whether the surviving spouse has assets in his or her name (unless assets were received from the decedent). This approach has been criticized because it may lead to overfunding or underfunding the elective share. The following illustration explains this concern, as well as the concern about limiting the elective share to probate assets.

Illustration[5]

Consider A and B, who were married in their twenties. They never divorced, and A died at age 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 $800,000, marking them as a somewhat affluent but hardly wealthy couple.

Under Oregon's current elective-share law, B's ultimate entitlement depends on the manner in which the couple titled their assets of $800,000 and whether the assets were titled in one name individually or in some nonprobate form. B could end up much poorer or much richer than a 50/50 partnership principle would suggest. (B would likely be left with $400,000 if the couple divorced.) The reason is that under Oregon's elective-share law, B has a claim to one-quarter of A's probate estate, and B's assets are not considered in determining the amount of the elective share.

Scenario 1

Marital Assets Disproportionately Titled in Decedent's Name.

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 $400,000, the amount B would be entitled to receive under the

[5] Modified from the General Comments of the Uniform Probate Code (2006).

50/50 partnership/marital-sharing principle.

If $700,000 of the marital assets were titled in A's name, B's claim against A's estate would still only be for $175,000 (1/4 of $700,000), which when combined with B's "own" $100,000 yields a $275,000 cut for B that is still below the $400,000 figure.

If A transferred all the assets to a revocable trust, keeping the power to revoke for life and keeping complete control over the trust, B's elective share would be zero.

If all the assets were titled in A's name and A added transfer-on-death or pay-on-death provisions to each asset, naming someone other than the surviving spouse to take, B's elective share would be zero.

Scenario 2
Marital Assets Equally Titled.

If $400,000 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" $400,000 yields a $500,000 cut for B-well above the $400,000 amount to which the partnership/marital-sharing principle would lead.

Scenario 3
Marital Assets Disproportionately Titled in Survivor's Name

If only $200,000 were titled in A's name, B would still have a claim against A's estate for $50,000 (1/4 of $200,000), even though B already had $600,000 and was overcompensated as judged by the partnership/marital-sharing theory.

Under UPC section 2-202, the elective share applies to an "augmented estate" comprised of assets held in the names of either spouse. The UPC follows, to a substantial degree, the model of the gross estate for federal estate tax purposes – any assets over which the decedent or the surviving spouse exercised some degree of control are included in the augmented estate. The proposal uses the augmented estate concept, but takes a more limited approach in the assets included. For example, the UPC includes trusts over which the decedent had a general power of appointment, trusts created by the decedent in which the decedent retained a life estate, and life insurance policies. The proposal does not include these assets, for reasons explained below.

C. Percentage

Under 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 sliding scale attempts to address two concerns. First, in a long-term marriage (defined in the statute as 15 years) the property is more likely to be marital property and therefore the spouses should share the

property equally. In a shorter-term marriage, the property is less likely to be property earned or acquired during the marriage. The smaller percentages take this into consideration. Rather than trying to determine which property is marital property and which property is separate property, the UPC uses the sliding scale to approximate a fair division of the couple's assets.

Even with the sliding scale, the statute may 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 marital assets upon the death of a spouse. Spouses may come to the marriage with property earned or inherited prior to the marriage. This is true in particular in late-in-life marriages. Elective share states generally do not distinguish between property earned or acquired during the marriage and property that is the separate property of the one of the spouses. As noted above, an attempt to adopt community property in Oregon failed.

D. Testamentary freedom

A 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 went into the Work Group's decision 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 24 of HB 3077, which are described below; See also current ORS 114.115)

IV. Objective of the Proposal (Section Analysis)

HB 3077 seeks to partially eliminate the discrepancy between what a spouse may receive through the elective share statutes and divorce proceedings, address the criticisms identified above, protect the surviving spouse, and update Oregon law. The proposal makes two basic changes to the elective share statute. First, the percentage that the surviving spouse can elect to take under the statute is changed from a flat 25% to a sliding scale ranging from 5% to 33%, depending on the length of the marriage. Second, the statute changes the definition of the estate that is elected against by including more assets, and by including assets of both the decedent spouse and the surviving spouse, in the computation of the elective share amount. 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 3 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 and elder law attorneys. These two groups expressed several concerns. First, an elective share may be more likely in a second marriage when not all the couple's assets are marital assets. If a spouse came to the marriage with significant assets earned or inherited before the marriage, giving the other spouse a full 50% share might not be appropriate.

Second, a spouse may want to leave property to children and not to the surviving spouse because the surviving spouse has qualified for government benefits, such as Medicaid. The decedent may prefer to bypass the surviving spouse to avoid the use of their remaining assets on medical bills.[6] Under current law, if the decedent held his or her assets in a revocable trust, then no elective share will be available to the surviving spouse. Under this proposal, however, the assets in a revocable trust would factor into the elective share calculation and potentially increase the elective share amount significantly. In the Medicaid context, 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 were

[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).

incompetent, which is often the case, a conservator could 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. The percentage chosen was chosen as a compromise. Although the State will receive less than it would if the percentage were 50%, under current law the percentage for anyone with competent legal counsel is zero because the decedent will use a revocable trust.

B. Augment the estate that is subject to the elective share by including property transferred by survivorship tenancies, pay-on-death and transfer-on-death designations, and transfers in which the deceased retained the right to revoke.

Sections 8 to 20 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 8 provides for the augmented estate to include the decedent's probate estate, the decedent's nonprobate estate, the surviving spouse's estate, the decedent's probate transfers to the surviving spouse, 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 16 determines the priority of sources from which the elective share is payable. Section 10 provides the definition of the decedent's probate estate, sections 11 to 12 describe the decedent's nonprobate estate, section 13 describes the surviving spouse's estate, section 14 describes the decedent's probate transfers to the surviving spouse, and section 15 describes the decedent's nonprobate transfers to the surviving spouse. It is necessary to include the probate estate, nonprobate estate, the surviving spouse's estate, and both probate and nonprobate transfers to the surviving spouse to calculate the augmented estate to provide a fair elective share.

The Work Group spent a great deal of time deciding which assets to include in the augmented estate. The Work Group concluded that the best approach was to include the assets most likely to be used to avoid the elective share and those over which the decedent retained the most control. Certain types of assets, included under the UPC's elective share, were removed from the proposal either because their inclusion seemed too intrusive on common estate planning practices (e.g., charitable remainder trusts) or likely to represent nonmarital assets (e.g., property over which the decedent held a general power of appointment). Life insurance was also excluded. Property for which the decedent received "fair consideration" is not included. The intention is not to include property sold by the decedent.

The nonprobate property included in the augmented estate is limited to the decedent's fractional interest in survivorship property, property held with a payable on death designation, a transfer-on-death registration, a co-ownership registration with a right of survivorship, a power to designate a beneficiary, and any property that could have been acquired by the exercise of a power of revocation held by the decedent, including revocable trusts. Life insurance is not included, even if owned by the decedent.

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. The proliferation of tools to avoid probate, and increasing use of those tools, leads to two problems regarding Oregon's elective share: 1) individuals may defeat the intent of the elective share by eliminating probate property altogether; and 2) courts lack clear guidance when deciding whether to include will substitutes as part of the estate in an elective share proceeding. A statute that includes nonprobate property in determining the augmented estate will effectively stop an individual from circumventing elective share laws to disinherit a spouse. In addition, the statute will give courts guidance, which will alleviate confusion and inconsistent results.

When states first enacted elective share statutes, husbands tended to hold title to property and husbands tended to die first. Today, both husbands and wives hold property and either may be the first to die. Considering the property owned by both spouses is necessary to avoid overfunding the elective share.

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. Procedural changes should increase the efficiency, fairness, and effectiveness of the elective share statutes.

Payment of Elective Share

Sections 4 and 16-17 set out the method of paying the elective share, including the priority of sources from which the elective share is payable and the liability of recipients of the decedent's nonprobate estate. The priority for satisfying the elective share is as follows: First, by utilizing the surviving spouse's own property and transfers to the surviving spouse by the decedent (probate and nonprobate); Second, by utilizing the decedent's probate property and the decedent's nonprobate property with proportionate liability of all recipients. This system requires that property received by the surviving spouse from the decedent, either under a will or through a nonprobate mechanism, count against the elective share. Thus, the surviving spouse must accept an interest in a trust and will not have the option of taking property outright, if the trust interest equals or exceeds the amount

of the elective share. The title-owning spouse retains a great deal of control over the disposition of the property, including property set aside for the surviving spouse.

Time Limit

Section 4 of the proposal increases the time limit for filing for an elective share, currently set at 90 days. Under Section 4, an election must be filed within nine months of the death of the decedent. The time period was chosen as a compromise, long enough to allow time for decision-making (particularly if the surviving spouse is receiving government benefits) but not so long as to interfere with the administration of the estate.

Who may exercise the right of election

Section 7 of the proposal states that the surviving spouse may personally exercise the election or the election may be exercised on the spouse's behalf by a conservator, a guardian, or an agent acting under a power of attorney. The surviving spouse must be alive when the election is made.

V. Proposal: HB 3077

Section 1

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

Section 2

Section 2 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 property in Oregon 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 3 – Percentage

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 4

See Section 19 below.

Section 5

This section requires the court to consider the amounts of the decedent's probate estate, decedent's nonprobate estate, the decedent's probate and nonprobate transfers to the spouse and the spouse's assets to determine whether the elective share amount has been satisfied. If the court determines that the amount of the elective share has not been satisfied, 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 16.

Section 6 – Waiver of the Elective Share

This section provides the parameters for waiving the right of election, either before or after the marriage by written agreement.

Section 7 – Who May Make Election

Section 7 provides who may exercise the right of election: the surviving spouse, or, on behalf of the surviving spouse, a conservator, guardian, or agent acting under the authority of a power of attorney.

Sections 8 to 9 – Augmented Estate Generally

Section 8 provides for what is to be included in the augmented estate, specifically the decedent's probate estate, the decedent's nonprobate estate, the decedent's probate and nonprobate transfers to the surviving spouse, and the surviving spouse's estate. Section 8 indicates that the augmented estate is reduced by enforceable claims and encumbrances against the property and that the augmented estate includes the present value of any present or future interests included in the augmented estate. This section specifies that property may not be double counted. Section 9 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 lifetimes or after the death of the decedent. This section also excludes community property.

Section 10 – Decedent's Probate Estate

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 11 to 12 – 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 some of the decedent's nonprobate property, whereas under current law the surviving spouse can only elect against the decedent's net estate, or probate property. 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) The decedent's fractional interest in property held by the decedent in any form of survivorship tenancy. (Section 12(1))

2) 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 12(2))

3) Property held immediately before death for which the decedent had the power to designate a beneficiary. (Section 12(3))

4) Property the decedent could have acquired by the exercise of a power of revocation of a revocable trust or other revocable transfer of property. (Section 12(4))

A decedent's nonprobate estate does not include the present value of any life insurance policy payable on the death of the decedent. (Section 12(5))

Section 13 – Surviving Spouse's Estate

This section states that the augmented estate includes assets owned by the surviving spouse, under the same terms as the assets of the decedent are included. In addition, section 13 provides detailed rules on how to value trusts and unitrusts.[7]

Section 14 – Decedent's Probate Transfers to the Surviving Spouse

The augmented estate includes all property subject to probate that transfers to the surviving spouse, either through intestacy or under a will.

Section 15 – Decedent's Nonprobate Transfers to the Surviving Spouse

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. The section includes the proceeds of an insurance policy on the decedent's life, payable to the surviving spouse, even though insurance proceeds payable to someone other than the surviving spouse are not included in the augmented estate.

Sections 16 - 18 – Payment of the Elective Share

These sections set forth the method of paying the elective share. Section 16 describes the priority of sources from which the elective share is payable. Because the surviving spouse's own assets are considered, the surviving spouse will receive an elective share from the decedent's probate or nonprobate assets only if the surviving spouse's own assets plus any property received from the decedent through probate or nonprobate transfers do not reach the value of the elective share amount. Section 17 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 18 provides a process for seeking a protective order.

[7] Florida's statutes regarding valuation were modified for this approach.

Sections 4 and 19 - Procedure

These sections detail the procedure for claiming the elective share, including notice to the estate and the procedure for filing a motion. An election must be filed within nine months after the death of the decedent. The ORCP applies to elective share matters, and a surviving spouse may withdraw a petition for the exercise of the elective share.

Section 20 – Effect of Separation

Section 20 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 21

This section provides a conforming amendment to ORS 114.555 to address small estate time lines.

Section 22

This section provides a conforming amendment to ORS 116.133.

Section 23

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 24

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

Section 25

This section repeals ORS 114.105, 114.115, 114.125, 114.135, 114.145, 114.155 and 114.165, the existing elective share provisions.

Section 26

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

Section 27

This section makes the bill take effect on January 1, 2011. This delay of one year from the traditional effective date for new legislation gives families, attorneys,

and courts one year to prepare and be educated on the new law. In addition, it allows for any glitches to be addressed by legislation in 2010.

Amendment Note

Amendments were made in both the House and Senate Judiciary Committees to address concerns of the Oregon State Bar's Estate Planning Section. The report was rewritten to reflect the numerous amendments and was submitted to the legislature. The Law Commission had approved the bill and the further collaboration work with the Section.

Juvenile Code Revision Work Group

Juvenile Aid and Assist

HB 3220

Prepared by Samuel E. Sears
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Updated by Kristy M. Nielsen
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From the Offices of the Executive Director
Jeffrey C. Dobbins
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Approved by the
Oregon Law Commission
February 11, 2009

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 his or her 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

[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

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 recommended bill to the Oregon Law Commission for consideration and approval. The Oregon Law Commission approved the draft for recommendation to the 2007 Legislative Assembly during its meeting on December 4, 2006.

The Work Group's proposal was introduced to the Legislative Assembly as Senate Bill 320 on January 12, 2007. Following a hearing on February 19, 2007 in the Senate Judiciary Committee, it was referred to the Senate Ways and Means Committee where it remained until the legislature adjourned in June. The Juvenile Code Revision Work Group voted at its meeting on January 16, 2009 to reintroduce the bill during the 2009 Legislative Session. The original intention of the Work Group was to reintroduce the bill in the same form as it appeared during the 2007 session; however, during the interim Legislative Counsel made a considerable number of organizational changes as well as some amendments to conform to Legislative Counsel's style and form guidelines. The Work Group felt that more careful review was needed before forwarding the proposal to the Commission and voted to reconvene the Aid and Assist Sub Work Group to examine the new draft, HB 3220, more carefully. The Aid and Assist Sub Work Group met on January 28, 2009 and proposed several minor changes to HB 3220. Further amendments were agreed to by email. The Oregon Law Commission received the draft for recommendation to the Legislature at its meeting on February 11, 2009.

III. Statement of Problem Area

Although parties currently raise fitness to proceed issues in juvenile delinquency proceedings, the Oregon statues 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, ensure public safety and develop a procedure to administer restorative services.

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 administrating restorative services. Setting out

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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.

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 and held accountable for their actions. 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 own 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 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

[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.

procedure in place. This is an issue that is essential to the workability of the bill and thus the work group recommends that is not be addressed in statute.

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 statue 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, or the age of the youth (as distinguished from the youth's maturity level).

Section 1 also 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. Section 1(3) states that the issue of fitness to proceed must be raised either in writing by a party to the proceedings or upon the court's own motion.

Finally, section 1 imports language from the adult criminal code[3], which states that the fact that the youth is unfit to proceed does not preclude the youth's attorney from raising additional defenses that do not require the participation of the youth. These include challenging the sufficiency of the petition, alleging that the statute of limitations has run, and other similar defenses.

Section 2

Section 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.

Section 2 also lays out who must pay for an evaluation. If the youth does not meet eligibility guidelines of the Public Defense Services Commission (i.e. they do not qualify for public defense services) the youth must pay for his or her own evaluation. If eligible, the county must

[3] See ORS 161.370(12)

pay for the evaluation, costs, and a reasonable fee to the person conducting the evaluation. If the evaluation is requested by either the district attorney or juvenile department, the county must pay for the expense of the evaluation. Furthermore, if the court or youth requests an evaluation and the state (district attorney) would like an independent evaluation, it may obtain one at its own expense. District attorney representatives reported that this was an important provision to include.

Section 3

This section directs DHS to develop training 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 training standards. Finally, this section provides DHS with rulemaking authority.

Section 4

This section sets out when a court may remove a youth from his or her current placement for an evaluation. Removal for evaluations should be rare and happen only in extreme circumstances. For the stability and well-being of the youth, it is important not to disrupt or change the youth's environment. In order for a youth to be removed from his or her placement, the court must find that removal is necessary for the evaluation; removal is in best interest of the youth; and, if DHS has custody of the youth, that DHS made reasonable efforts to conduct the evaluation at the youth's current placement. Usually, the youth will raise the issue of fitness and willingly participate in an evaluation. However, for example, removal may happen if the district attorney or the court raises the issue of fitness – something that is very uncommon – and the youth will not participate in the evaluation. In any case, removal must not exceed 14 days. This section also makes it clear that these statutes are not to be manipulated to move youth to hospitals or residential facilities; the purpose of these statutes is to provide an aid and assist defense, not placement.

Section 5

Section 5 sets out the requirements for filing reports and what must be contained in the evaluator's report. The report must include 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.

Section 6

Section 6 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 may obtain its own report and the court is required to hold a hearing within 21 days of the objection. If there are no written objections and the court does not adopt the findings and recommendations of the evaluator, the court must hold a hearing within 21 days after the report is filed. The court determines whether a youth is fit to proceed based on a preponderance of the competent evidence and the order issued by the court must set forth its findings.

Section 7

Section 7 is another provision relating to procedures the court must follow after receiving a report. This section states that when a written objection is not filed and the court *does* adopt the findings and determinations contained within the evaluator's report, the court must issue a written order within 10 days after the report is filed. The court must also file a written order within 10 days if a written objection is filed under section 6. In either case the order must set forth the findings on the youth's fitness to proceed.

Section 8

This section sets out how a court must proceed after it makes a finding as to whether the youth is fit to proceed. If the court finds that the youth is unfit to proceed and there is not a substantial probability that the youth will gain or regain fitness to proceed, the court must either immediately dismiss the petition or, within five days, arrange for an alternative proceeding (e.g. dependency proceedings) and then dismiss the petition without prejudice. If the court finds the youth fit to proceed, the court is required to vacate the stay and continue the proceedings. If the court finds the youth unfit to proceed but is likely to gain or regain fitness if provided restorative services, the court shall continue the order staying the proceedings and forward the order for restorative services to DHS.

Section 9

This section requires DHS to administer a program to provide restorative services and develop qualification standards for persons who provide restorative services. 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 a specific provision providing statutory requirements of DHS would address those concerns.

Section 10

Section 10 requires DHS 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. This section provides for a review

hearing and also limits the length of time for which restorative services may be ordered to the lesser of three years or the maximum commitment time had the youth been adjudicated.

Section 11

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. Section 11 states that a youth may not be removed from the youth's current placement solely for the purpose of receiving restorative services unless removal is in the youth's best interest and necessary for the provision of services.

Sections 12 and 13

These sections provide that sections 3 and 9 of this bill go into effect immediately, while the others will not take effect until January 1, 2010. This allows DHS some time to establish standards for both conducting evaluations and providing restorative services before the other elements of this bill become effective.

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]

Enrolled
Senate Bill 562

Sponsored by COMMITTEE ON JUDICIARY (at the request of Oregon Law Commission)

CHAPTER .....

AN ACT

Relating to Oregon Law Commission; creating new provisions; amending ORS 173.315, 173.325, 173.328, 173.335, 173.338, 173.342 and 173.352; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 173.315 is amended to read:

173.315. (1) The Oregon Law Commission is established to conduct a continuous substantive law revision program[*, including but not limited to the subjects stated*] **as described** in ORS 173.338.

(2) The Oregon Law Commission [*shall consist of*] **has 15 members, as follows**:

[*(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;*]

(a) A person appointed by the President of the Senate who is a member of the Senate at the time of appointment;

(b) A person appointed by the President of the Senate who is a current or former member of the Senate at the time of appointment;

(c) A person appointed by the Speaker of the House of Representatives who is a member of the House of Representatives at the time of appointment;

(d) A person appointed by the Speaker of the House of the Representatives who is a current or former member of the House of Representatives at the time of appointment;

[*(c)*] **(e)** The deans of Oregon's accredited law schools, or their designees;

[*(d)*] **(f)** Three persons [*designated*] **appointed** by the Board of Governors of the Oregon State Bar;

[*(e)*] **(g)** The Attorney General**,** or the Attorney General's designee;

[*(f)*] **(h)** The Chief Justice of the Supreme Court**,** or the Chief Justice's designee; [*and*]

(i) The Chief Judge of the Court of Appeals, or the Chief Judge's designee;

(j) A person appointed by the Chief Justice of the Supreme Court who is a circuit court judge, or a retired circuit court judge who has been designated as a senior judge under ORS 1.300, at the time of appointment; and

[*(g)*] **(k)** 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 effec-*

tive 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.]

(3) The Attorney General, the Chief Justice of the Supreme Court, the Chief Judge of the Court of Appeals and the deans of Oregon's accredited law schools are ex officio members of the commission and have the same powers as appointed members.

(4)(a) Except as provided in paragraph (b) of this subsection, appointed members of the commission serve four-year terms. Terms commence on July 1 of even-numbered years. Before the expiration of the four-year term, the appointing authority shall appoint a successor. A person who has served as a member is eligible for reappointment.

(b) A person appointed under subsection (2)(a) of this section serves a term of four years, or until the person ceases to be a member of the Senate, whichever occurs first. A person appointed under subsection (2)(c) of this section serves a term of four years, or until the person ceases to be a member of the House of Representatives, whichever occurs first.

(5) If there is a vacancy in the position of an appointed member:

(a) The appointing authority shall appoint a person as soon as possible to serve during the remainder of the unexpired term; and

(b) The appointing authority may specify that the person appointed to serve the remainder of the unexpired term is also appointed to the next following full term.

(6) If a member of the commission is authorized under subsection (2) of this section to name a designee, a person named as a designee has all of the powers and duties of the member until the designation expires or is revoked. The following persons may be designated:

(a) A dean of one of Oregon's accredited law schools may designate a member of the faculty of the law school.

(b) The Chief Justice may designate a Supreme Court judge.

(c) The Chief Judge of the Court of Appeals may designate another judge of the Court of Appeals.

(d) The Attorney General may designate an assistant attorney general or the Deputy Attorney General.

(7) The term of an appointed member of the commission shall cease if the member misses three consecutive meetings without prior approval of the chairperson, and the appointing authority for the position shall appoint a person to fill the vacancy in the manner provided by subsection (5) of this section.

[*(4)*] **(8)** 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)*] **(9)** A majority of the members of the commission constitutes a quorum for the transaction of business. **If a quorum is present at a meeting, the commission may take action by an affirmative vote by a majority of the members of the commission who are present.**

SECTION 2. (1) The member of the Oregon Law Commission who is serving on the effective date of this 2009 Act and who is a member of the Senate shall be considered to have been appointed under ORS 173.315 (2)(a), as in effect on the effective date of this 2009 Act.

(2) The member of the Oregon Law Commission who is serving on the effective date of this 2009 Act and who is a member of the House of Representatives shall be considered to have been appointed under ORS 173.315 (2)(c), as in effect on the effective date of this 2009 Act.

(3) Notwithstanding ORS 173.315 (2)(b), the person who was appointed under ORS 173.315 (2)(a), as in effect immediately before the effective date of this 2009 Act, and who was not a current or former member of the Senate at the time of the appointment, may continue to serve as a member of the Oregon Law Commission and be reappointed by the President of the Senate under ORS 173.315 (2)(b) even though the person is not a current or former member of the Senate at the time of reappointment. When the person described in this subsection ceases membership with the commission, a person shall be appointed with the

qualifications specified in ORS 173.315 (2)(b), as in effect on the effective date of this 2009 Act.

(4) Unless the term of the member is lengthened or shortened by the Oregon Law Commission under subsection (5) of this section, the term of an appointed member of the commission serving on the effective date of this 2009 Act ends on June 30 of the year in which the term of the member would otherwise have ended under ORS 173.315 (3), as in effect immediately before the effective date of this 2009 Act.

(5) Notwithstanding the two-year term of office specified for members of the Oregon Law Commission under ORS 173.315 (3), as in effect immediately before the effective date of this 2009 Act, for the purpose of staggering the terms of appointed members, the commission may establish terms that are longer or shorter than two years for the appointed members of the commission who are serving on the effective date of this 2009 Act. The term established by the commission under this subsection may not exceed four years and must end on June 30 of the year specified by the commission.

(6) Notwithstanding the four-year term of office specified for appointed members of the Oregon Law Commission in ORS 173.315 (4), the commission may establish a term that is shorter than four years for the first person appointed under ORS 173.315 (2)(j). The term established under this subsection must end on June 30 of the year specified by the commission.

SECTION 3. ORS 173.325 is amended to read:

173.325. **(1) A member of the Legislative Assembly who serves as a member of the Oregon Law Commission, or on any work group established under ORS 173.352, may receive actual and necessary travel and other expenses under ORS 171.072 from funds appropriated to the Legislative Assembly.**

(2) 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 therefor in the budget of the Legislative Counsel Committee.

SECTION 4. ORS 173.328 is amended to read:

173.328. The Oregon Law Commission shall meet [*at least once every three months at a place, day and hour determined*] **regularly pursuant to a schedule established** 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.

SECTION 5. ORS 173.335 is amended to read:

173.335. [*(1)*] The Legislative Counsel shall assist the Oregon Law Commission to carry out its functions as provided by law **and shall provide necessary drafting services to the commission as legislative priorities permit**.

[*(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.*]

SECTION 6. ORS 173.338 is amended to read:

173.338. (1) [*The specific subject areas to be part of*] The law revision program [*of*] **conducted by** the Oregon Law Commission **may** include**,** but [*are*] **is** not limited to:

(a) **Review of** 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*] **Consideration of** 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) **Consideration of** suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law.

(d) [*Such*] **Recommendation for** changes in the law [*as*] **that** 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) **Recommendation for** 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.*]

(2) The commission shall study any topic that the Legislative Assembly, by law or concurrent resolution, refers to the commission.

SECTION 7. ORS 173.342 is amended to read:

173.342. [*(1)*] The Oregon Law Commission shall file a report at each regular session of the Legislative Assembly that [*shall contain*] **contains** 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.*]

SECTION 8. ORS 173.352 is amended to read:

173.352. (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*] **work groups**. [*These committees*] **Work groups established by the commission** may be continuing or temporary. The commission shall determine the representation, membership, terms and organization of [*the committees*] **work groups** and shall appoint [*their*] **work group** members.

(2) Members of [*the committees*] **work groups established by the commission** 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.

SECTION 9. This 2009 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2009 Act takes effect on its passage.

Passed by Senate March 18, 2009

.....
Secretary of Senate

.....
President of Senate

Passed by House May 11, 2009

.....
Speaker of House

Received by Governor:

.....M.,....., 2009

Approved:

.....M.,....., 2009

.....
Governor

Filed in Office of Secretary of State:

.....M.,....., 2009

.....
Secretary of State

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

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: 503-370-6973
Fax: 503-370-3158

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 is a Commissioner, 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) 370-6973.