# BIENNIAL REPORT
*of the*
# OREGON LAW COMMISSION
2011-2013

**The Oregon Law Commission operates through a public-private partnership between the State of Oregon and Willamette University. The Commission is housed at the Willamette University College of Law in 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
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www.willamette.edu/wucl/olc



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# BIENNIAL REPORT OF THE OREGON LAW COMMISSION

## 2011 – 2013

**From the Executive Director's Office**

**Prof. Jeffrey C. Dobbins**
**Executive Director and Associate Professor of Law**

**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:**
**http://www.willamette.edu/wucl/olc/reports/index.php**

Cover photo courtesy of Office of Marketing Communications, Willamette University

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This Biennial Report reflects the Commission's work from 2011-2013. We are pleased to take this opportunity to share with you the work completed by the Commission this biennium and to also share some changes that have occurred within the Commission.

## Work Completed

The Oregon Law Commission, with the help of over one hundred and fifty dedicated and exceptional volunteers, completed work on seven pieces of recommended legislation for the 2012 and 2013 Legislative Assemblies and formed a work group that has been studying the process of appellate judicial selection. In addition, the Commission is already looking ahead to 2014 and 2015 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 several changes among its membership this biennium. Following the retirement of Chief Justice Paul J. De Muniz, the Commission welcomed current Chief Justice Thomas A. Balmer as an *ex-officio* member of the Commission and Chief Justice Balmer appointed Judge Stephen K. Bushong as the Circuit Court Judge representative to the Commission, replacing Judge Karsten Rasmussen. Justice David Brewer left his position as Chief Judge of the Oregon Court of Appeals and his successor, Chief Judge Rick T. Haselton, replaced him as an *ex-officio* member of the Commission. Professor Dom Vetri, the University of Oregon's School of Law Dean's appointee to the Commission, retired this biennium, and the Dean appointed Professor Susan N. Gary as his replacement. Finally, Attorney General Ellen Rosenblum replaced former Attorney General John Kroger as an *ex-officio* member of the Commission.

## Thank You

We would again 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 College of Law for their extensive efforts on behalf of the Commission. We look forward to the Commission's continued law reform service in support of the Oregon Legislative Assembly and the State of Oregon.

**Lane P. Shetterly**
**Chair, Oregon Law Commission**

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

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WILLAMETTE UNIVERSITY | College of Law

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On behalf of Willamette University, it is my pleasure to congratulate the Oregon Law Commission and its staff for yet another highly productive biennium. The results, which are described in the attached report, include legislative proposals relating to adoption records, unsworn foreign declarations, juvenile records, the trust code, and the law on notarial acts.

The Willamette University College of Law is proud to support the work of the Commission through its public/private partnership with the State of Oregon. Now in its second decade, this partnership permits Willamette University to contribute to the all-important endeavor of law reform by providing the Commission with an outstanding and dedicated staff and an attractive and historic home at the University's Oregon Civic Justice Center. The College of Law remains wholeheartedly committed to its partnership with the State of Oregon and looks forward to supporting the work of the Commission and serving as the Commission's home for many years to come.

Although I will soon conclude my term as the College of Law's dean, I know the College of Law's commitment to the Commission will remain strong in the years ahead. My successor as dean, Curtis Bridgeman, values the College of Law's association with the Commission just as strongly as I do, and I know we both look forward to the long continuation of our successful partnership.

With my best wishes.

Sincerely,

Peter V. Letsou
Dean and Roderick & Carol Wendt
Professor of Business Law

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**From the Executive Director's Office. . .**

This biennium, again with the help of the many dedicated volunteers serving on the Commission and its work groups, the Law Commission prepared and approved seven law reform projects. This brings the Law Commission's total output from its first session in 1999 to nearly 100 bills. Approximately 90% have been enacted as proposed or with limited amendments. Several of the projects this session were technical law cleanup type bills, but the Commission also advanced legislation that charted new territory in Oregon law with an adoption records project. Three of this session's projects were based on uniform acts from the Uniform Law Commission that were adjusted to work with existing Oregon law. The Commission also continues to work in the area of juvenile law reform, forwarding two bills in that area this year.

This Biennial Report contains the explanatory reports for the 2012 and 2013 bills, and documents the Commission's work from July 1, 2011 to June 30, 2013. It is our hope that the report gives you clearer insight into the Commission's law reform process, its work, and its potential for the future. The Commission and its staff are proud of its reputation of providing quality law reform recommendations that address complex areas of law by working with the private bar, all three branches of government, and the citizens of Oregon.

We wish to again thank the Oregon Legislative Assembly and Willamette University for their support of the Commission and dedication to the work of law improvement and reform in the state. Finally, and most importantly, we extend our thanks to the many volunteers and legislative staff who have given their time to make this biennium another success.

**Professor Jeffrey C. Dobbins**
**Executive Director**

**Wendy J. Johnson**
**Deputy Director and**
**General Counsel**

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# Commissioners of the Oregon Law Commission

| | | Present Term |
|---|---|---|
| **Lane P. Shetterly, Chair**<br>Attorney at Law, Shetterly Irick & Ozias, Dallas, Oregon | **Appointed by Speaker of the House** | **7/1/12 – 6/30/16** |
| **Professor Bernard F. Vail, Vice-Chair**<br>Professor, Lewis and Clark Law School, Portland, Oregon | **Designee of Lewis & Clark Law School Dean** | **Indefinite term as designated by Dean** |
| **Chief Justice Thomas A. Balmer**<br>Chief Justice of the Oregon Supreme Court, Salem, Oregon | ***Ex Officio*** | |
| **Judge Stephen K. Bushong**<br>Multnomah County Circuit Court Judge, Portland, Oregon | **Appointed by Chief Justice** | **7/26/12 – 6/30/16** |
| **Mark B. Comstock**<br>Attorney at Law, Garrett Hemann Robertson PC, Salem, Oregon | **Designee of Board of Governors of Oregon State Bar** | **7/1/12 – 6/30/16** |
| **John DiLorenzo, Jr.**<br>Attorney at Law, Davis Wright Tremaine LLP, Portland, Oregon | **Appointed by Senate President** | **6/30/10 – 6/30/14** |
| **Representative Chris Garrett**<br>Representative, State of Oregon, Lake Oswego, Oregon | **Appointed by Speaker of the House** | **7/28/10-6/30/14** |
| **Professor Susan N. Gary**<br>Orlando J. & Marian H. Hollis Professor of Law, Univ. of Oregon Law School, Eugene, Oregon | **Designee of University of Oregon Law School Dean** | **Indefinite term as designated by Dean** |
| **Chief Judge Rick T. Haselton**<br>Chief Judge of the Oregon Court of Appeals, Salem, Oregon | ***Ex Officio*** | |
| **Julie H. McFarlane**<br>Staff Attorney, Juvenile Rights Project, Portland, Oregon | **Designee of Board of Governors of Oregon State Bar** | **7/1/12 – 6/30/16** |
| **Hardy Myers**<br>Former Attorney General, Portland, Oregon | **Appointed by Governor** | **7/1/10-6/30/14** |
| **Senator Floyd Prozanski**<br>Senator, State of Oregon, Eugene, Oregon | **Appointed by Senate President** | **7/1/12 – 6/30/16** |
| **Attorney General Ellen Rosenblum**<br>Attorney General of the State of Oregon, Salem, Oregon | ***Ex Officio*** | |
| **Scott Shorr**<br>Attorney at Law, Stoll Berne, Portland, Oregon | **Designee of Board of Governors of Oregon State Bar** | **1/1/10-6/30/14** |
| **Dean Symeon Symeonides**<br>Dean Emeritus of Willamette University College of Law, Salem, Oregon | **Designee of Willamette University College of Law School Dean** | **Indefinite term as designated by Dean** |

**Outgoing Commissioners**

| | | |
|---|---|---|
| **Justice David V. Brewer** | **Former *Ex Officio* Member (as Chief Judge of the Court of Appeals)** | |
| **Fmr. Chief Justice Paul J. De Muniz** | **Former *Ex Officio* Member** | |
| **Fmr. AG John R. Kroger** | **Former *Ex Officio* Member** | |
| **Judge Karsten H. Rasmussen** | **Appointed by Chief Justice** | **7/8/09 – 6/30/12** |
| **Professor Dom Vetri** | **Designee of University of Oregon Law School Dean** | **9/1/99 – 12/31/11** |

# Staff of the Oregon Law Commission

## Willamette University College of Law Staff

Jeffrey C. Dobbins
Executive Director and
Associate Professor of Law

Wendy J. Johnson
Deputy Director and General Counsel

Lisa Ehlers
Legal Assistant

## State of Oregon Staff

Dexter Johnson
Legislative Counsel

David W. Heynderickx
Special Counsel to Legislative Counsel

We 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. David Heynderickx will be retiring after the legislative session and we want to acknowledge and recognize his invaluable contributions to the Oregon Law Commission's law reform work since the Commission's creation in 1997. He will be greatly missed. We also recognize and thank all of the Judiciary Committee counsel and staff who assisted the Commission throughout the legislative session.

## 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:

John Adams – Law Clerk
Summer 2011 – Spring 2013

Mae Lee Browning – Law Clerk
Summer 2012 – Present

Sarah De La Cruz – Law Clerk
Summer 2012 – Present

Chad Krepps – Law Clerk
Summer 2011 – Spring 2012

## 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 address gaps in the law and areas of the law that were confusing, conflicting, inefficient, or otherwise meriting law reform or improvement.

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 and legal 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. The Commission has been housed in the Oregon Civic Justice Center since 2009.

To carry out its purposes, the Commission is made up of fifteen Commissioners pulled from a unique combination of entities within the state of Oregon, including four individuals appointed by legislative leadership including two current legislators; three from the judicial branch including the Chief Justice, Chief Judge of the Court of Appeals, and a trial court judge; the attorney general; a governor's appointee; the deans (or their representatives) from each of the three law schools in Oregon; and three representatives from the Oregon State Bar. These Commissioners lead the Commission's various law projects each biennium by chairing work groups composed of experts in the given area of law reform.

## Commission Law Reform Project Selection and Reform Process

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.

Once a law reform project has been approved by the full Commission for study and development, a Work Group is formed. Over 200 volunteers serve on Commission Work Groups, and each biennium these volunteers contribute well over 2000 hours of professional time to law reform. 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 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. The Commission 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, adopted with amendments, or ultimately fail, the Commission's commitment to thoughtful public policy formation, and the value of memorializing the decisions made in developing the laws, cannot be overstated.

# Oregon Law Commission Meetings

The Oregon Law Commission held six meetings from July 1, 2011 through June 30, 2013. 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:

| | |
|---|---|
| December 12, 2011 | Willamette University |
| January 25, 2012 | Willamette University |
| October 3, 2012 | Willamette University |
| December 12, 2012 | Willamette University |
| March 20, 2013 | Willamette University |
| April 1, 2013 | Willamette University |

Minutes for the Commission meetings are available at the Oregon Law Commission's office. They also may be viewed at the Oregon Law Commission web site, http://www.willamette.edu/wucl/centers/olc/reports/index.html

The Commission is required to hold regular 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: http://www.willamette.edu/wucl/centers/olc/calendar/index.html

# Program Committee
2011-2013

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 2011-2013 biennium:

Hardy Myers, Chair
Chief Justice Paul J. De Muniz
Julie H. McFarlane
Sen. Floyd Prozanski
Lane Shetterly
Scott Shorr

The Program Committee held three meetings from July 1, 2011 through June 30, 2013 at the indicated locations on the following dates:

| | |
|---|---|
| August 25, 2011 | Willamette University |
| November 9, 2011 | Willamette University |
| November 20, 2012 | 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: http://www.willamette.edu/wucl/centers/olc/reports/index.html

## 2012 and 2013 Sessions Bill Summary:

### Bills Presented by the Oregon Law Commission to the Legislative Assembly

During the 2012 and 2013 Legislative Sessions, the Oregon Law Commission recommended seven bills to the Legislative Assembly. The following is a brief summary of the recommendations:

1. **HB 4035 (2012 Session)** The bill updated secured transactions laws in ORS Chapter 79. The bill was based on recommendations of the Uniform Law Commission (ULC) and American Law Institute (ALI) as a part of a nation-wide U.C.C. update. Chapter 79's last major revision occurred in 2001, and this bill addressed issues that arose in the last ten years.

2. **SB 592** The bill revises the Oregon Uniform Trust Code. The Uniform Trust Code was adopted in Oregon in 2006, and the bill provides a number of changes to the code that will improve and clarify practice. The amendments continue to balance the interests of trust beneficiaries with the need for efficient administration of trusts.

3. **SB 622** The bill defines and clarifies the two types of files containing juvenile court records that are to be maintained by the juvenile court (to be named record of the case and supplemental confidential file). The bill also clarifies and details persons entitled to inspection rights and persons entitled to copy rights of the two files. The bill addresses longstanding problems and is particularly necessary as the juvenile courts transition to an eCourt environment.

4. **SB 623** The bill revises and clarifies requirements for a petition to adopt a minor child, and the bill requires the filing of an Adoption Summary and Segregated Information Statement with the petition. The bill specifies persons authorized to inspect and copy sealed adoption records, providing predictable rules and lifting requirement to get a court order in many circumstances.

5. **HB 2833** The bill enacts the Uniform Unsworn Foreign Declarations Act and thus allows those abroad to provide a statement that is subject to penalty of perjury to be used in Oregon without having to go to a United States embassy to have the statement sworn to a third party.

6. **HB 2834** The bill enacts the Revised Uniform Law on Notarial Acts, updating Oregon's law of notarial acts. The integrity of the notarial act process as well as access to notaries is improved.

7. **HB 2836** The bill establishes standards and procedures for determining fitness of youth to proceed on a delinquency petition. The bill codifies a requirement to suspend delinquency petitions when a youth is unable to aid and assist. The bill requires the Oregon Health Authority to develop guidelines for conducting evaluation of fitness of a youth to proceed and to administer a program to provide restorative services to youths.

**Commission's Pending Law Reform Agenda for**
**2015 Legislative Session**

The following is a list of projects approved by the Commission for the 2013-2015 interim and sessions:

1. Adoption Review (a continuation of our Adoption Work Group from 2013)
   This Work Group will focus on substantive adoptive law, including post adoption contact agreement enforcement, counseling requirements, consent, and revocation of consent.

2. Probate (a modernization of Oregon's probate code)
   This Work Group will review ORS Chapters 111-117. In the process, the Work Group will consider recommending a non-intervention method that allows personal representatives to handle the administration of estates with less court involvement. The pleading process, discovery, and motion practice for probate court could all use more clarity and specificity. The Work Group will also likely improve the creditor claim process and cross-border administration of assets.

3. Uniform Collateral Consequences of Conviction Act
   This uniform act requires a compilation of all collateral consequences contained in state laws and regulations, including both automatic bans and discretionary penalties. The act would provide procedural rules to facilitate notification of collateral consequences to criminal defendants before, during, and after sentencing. The uniform act also provides for two different types of relief from collateral consequences to lift certain automatic bans and meet specific needs of convicted persons to successfully reintegrate to society. A Work Group will review the Act and make recommendations for Oregon.

4. Appellate Judicial Selection (a continuation of our Appellate Judicial Selection Work Group from 2012-13)
   This Work Group will continue to look at the issue of whether the method for the selection of appellate judges should be changed. Presently, Oregon uses a system that includes both gubernatorial appointments (when a vacancy occurs mid-term) and state-wide elections (when there is a regular vacancy.) Money and politics related issues are of great concern with judicial elections and reelections, and a Work Group is looking at opportunities to improve the system.

5. Decisions by Disqualified Public Officials (an ongoing project)
   This Work Group is focused on providing statutory guidance regarding when official actions are void or voidable because the public official was legally disqualified under a government ethics law or otherwise. In addition, this project focuses on the status of such decisions or transactions including whether they are automatically void, whether they are voidable, who may bring suit to void such official actions or decisions, and under what circumstances such actions or decisions are valid despite being acted on by a disqualified official.

6. Child Abuse (a continuation of our Child Abuse Work Group from 2009-11)
   This Work Group will continue with reviewing and revising current statutes within the juvenile code to provide clearer guidelines for mandatory child abuse reporters as well as related issues including, but not limited to, the dependency jurisdictional basis, child abuse reporting training, liability, and overlap with criminal law standards and jurisdiction.

# 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.

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## Amendments to the Oregon Uniform Trust Code

## Work Group Report

## SB 592

Prepared by:

Professor Susan N. Gary
University of Oregon School of Law
Oregon Law Commissioner

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 March 20, 2013.

## I. Introductory summary

The law of trusts in Oregon was overhauled, effective January 1, 2006, with the adoption of much of the Uniform Trust Code. Over the past several years, several additional modifications have been made to the Oregon Uniform Trust Code (the "OUTC"). However, as lawyers continued to work with the OUTC in practice, lawyers identified a number of places where amendments to the OUTC could improve results for people working with or using trusts. Settlors, trustees, and beneficiaries, as well as their advisors will benefit from the proposed revisions.

## II. History of the project

A committee of the Estate Planning and Administration Section of the Oregon State Bar identified a number of issues that should be addressed by legislative action. The committee worked for several months and developed a proposal that the committee presented to the Executive Committee of the Estate Planning and Administration Section. Due to the complicated nature of some of the issues, the committee was unable to develop legislation that the Executive Committee of the Section could approve. The Executive Committee thought having a broader group – a Work Group of the Oregon Law Commission – work on appropriate legislation would produce better results. Susan Gary, a member of the Estate Planning and Administration Section, and Charles Mauritz, chair of the committee, worked with Wendy Johnson, Deputy Director and General Counsel of the Oregon Law Commission, to develop a proposal for the Oregon Law Commission. The Oregon Law Commission approved the creation of a Work Group in November 2012.

Due to the significant work already completed on the project by the Estate Planning and Administration Section, and because those who use trusts and the Oregon Uniform Trust Code would benefit from adoption of the amendments as soon as possible, the Work Group's goal was to prepare a bill for the 2013 session. The Work Group met several times in January and February, completing its work in time for legislative counsel to complete work on the bill by the deadline. The Work Group included representatives from the original committee, other members of the Estate Planning and Administration Section who disagreed with some of the original proposals, a representative from the charities division of the office of the Attorney General, a representative of the Oregon Bankers' Association, and Legislative Counsel.

Work Group members included Chair, Prof. Susan N. Gary, University of Oregon School of Law and OLC Commissioner; Susan Bower, Oregon Dept. of Justice; Bill Brewer, Hershner Hunter LLP; Christopher Cline, Wells Fargo Bank; John Draneas, Draneas & Huglin PC; D. Charles Mauritz, Duffy Kekel LLP; Hilary Newcomb, HAN Legal; Robert Saalfeld, Saalfeld Griggs PC; Lane Shetterly, Shetterly Irick & Ozias and

Chair of OLC; Jeff Thede, Thede Culpepper Moore Munro & Silliman LLP; Vanessa Usui, Duffy Kekel LLP; Matthew Whitman, Cartwright, Whitman, Baer PC; Ken Sherman, Jr., Sherman Sherman Johnnie & Hoyt. Staff members included Prof. Jeff Dobbins, Executive Director of the OLC; Dave Heynderickx, Special Counsel to the Legislative Counsel; Wendy Johnson, Deputy Director and General Counsel of the Oregon Law Commission; BeaLisa Sydlik, Deputy Legislative Counsel.

## III. Statement of the problem area and objectives of the proposal

The proposed legislation seeks to balance the interests of beneficiaries in trusts with the need for efficient administration of trusts. The amendments facilitate the use of nonjudicial settlement agreements for trust modification, provide a means for a trustee to get advance authorization for certain actions through notice to beneficiaries, and provide a number of clarifying changes to delegation rules, removal, and the appointment of advisers that should improve the administration of trusts. Some of the amendments follow common estate planning practices.

## IV. Review of legal solutions existing or proposed elsewhere

David English, Reporter for the Uniform Trust Code, provided comments on the original proposal, and his comments informed some of the Work Group discussions. The Work Group also considered the language of the Uniform Trust Code and in one case the amendment made in this bill returns the language of the Oregon statute to the language of the Uniform Trust Code because Oregon had adopted that section with non-uniform language.

## V. The proposal

**Section 1:** This section adds two new definitions to the ORS 130.010:

(15) "Remote interest beneficiary" means a beneficiary of a trust whose beneficial interest in the trust, at the time the determination is made, is contingent upon the successive terminations of both the interest of a qualified beneficiary and the interest of a secondary beneficiary whose interests precede the interest of the beneficiary.

(17) "Secondary beneficiary" means a beneficiary, other than a qualified beneficiary, whose beneficial interest in the trust, at the time the determination of interest is made, is contingent solely upon the termination of all qualified beneficiary interest**s** that precede the interest of the secondary beneficiary.

The OUTC provides for certain rights of notice to be given to different categories of beneficiaries. The current OUTC provides for "beneficiaries," "qualified beneficiaries," and "permissible distributees." The intention of the amendment is to create two new categories of beneficiaries, "remote interest beneficiaries" and

"secondary beneficiaries." The purpose of the new categories is to provide that in some circumstances notice need not be given to beneficiaries whose interest is so remote that they will likely never benefit from the trust. Trustees have sometimes found it difficult to obtain consent for needed modifications if consent must be obtained from all beneficiaries and some beneficiaries' interests are remote. Beneficiaries who know that they will likely never receive anything from the trust may fail to respond to requests for consent. The purpose of the amendments will be to limit the necessary notice in situations where a beneficiary's interest is remote. A remote interest beneficiary is a beneficiary that is at least third in line and in many situations fourth in line. The definition of secondary beneficiary is necessary to create the desired definition of remote interest beneficiary.

**Note:** The definitions of remote interest beneficiary and secondary beneficiary were amended by the Work Group and approved by the Commission after the initial bill was filed. The amendments are reflected in the descriptions provided by this report.

**Section 2:** This section amends ORS 130.045, the section that provides for nonjudicial settlement agreements on matters involving a trust. The amendment changes the persons who may enter into an agreement and clarifies the effect of filing the agreement in court. The current definition includes as "interested persons" who may enter into an agreement "beneficiaries of the trust who have an interest in the subject matter of the agreement." That provision is changed to "qualified beneficiaries." Thus, all qualified beneficiaries can be parties to the agreement without a determination that each one is interested in the subject matter.

The Attorney General is an interested person under the current definition if the trust is a charitable trust, and that provision is clarified so that the Attorney General will be an interested person whether the charitable trust is subject to the supervision of the Attorney General (as an Oregon trust) or not. This change is needed so the Attorney General can represent the interests of an Oregon charity that is the beneficiary of a trust created and operating outside Oregon. If a trust includes a gift to a charity and the settlor reserves the power to change the name of the charity (the identity of the beneficiary), the Attorney General represents the interests of all charitable beneficiaries so that a named charity that may not remain a beneficiary will not be an interested person for purposes of the agreement.

The changes to ORS 130.045 clarify that if the agreement is not filed with the court, the agreement will be binding only on the parties to the agreement. If the parties file the agreement with the court and provide notice of a right to object to beneficiaries, the agreement will be binding on all those who receive or waive notice, if no one objects. If someone objects and a hearing is held, the decision of the court will be binding on all beneficiaries of the trust and all parties to the agreement. If the court does not approve the agreement, the agreement will not be binding on any beneficiary or party.

The time period for objections is decreased from 120 days to 60 days. The longer time period impedes the ability of trusts to accomplish modifications in an efficient manner, and 60 days allows ample time for objection.

**Section 3:** This section amends ORS 130.170 to confirm that a trust created to distribute funds to charities is a charitable trust. Because the definition of charitable trust defines as a charitable trust a portion of a trust devoted to charitable purposes, the changes clarify that if the charitable interests are negligible or if the charitable beneficiaries are all remote interest beneficiaries, the portion of the trust held by charitable beneficiaries will not be considered a charitable trust. For example, if a trust provides for three generations of family members, with multiple people at each generation, and then provides a contingent remainder interest in a charity so that the charity takes only if all family members die before the trust terminates, the contingent remainder interest will not be considered a "charitable trust" for purposes of the OUTC.

**Section 4:** This section adds a cross-reference to ORS 130.195.

**Section 5:** ORS 130.200(1) provides that if a settlor and all beneficiaries consent, a court can approve a modification of an irrevocable trust. Section 5 limits the beneficiaries who must consent to beneficiaries other than remote interest beneficiaries. Even if not all beneficiaries agree, ORS 130.200(5) permits a court to approve a modification if the court could have done so under the section with the consent of all beneficiaries. Consistent with the change to ORS 130.200(1), this subsection is changed to exclude remote interest beneficiaries from the beneficiaries who would have been required to consent.

Under ORS 130.200 the settlor's power to consent to modification can be exercised by an agent acting under a power of attorney only if the terms of the trust authorized an agent to consent to modification. Section 5 permits the authorization to occur either in the terms of the trust or in the grant of the power of attorney. This changes conforms Oregon law to the Uniform Trust Code.

**Section 6:** Section 6 amends ORS 130.215, the provision that permits termination of a trust if the value of the trust property is too small to justify the cost of administration. The change will permit termination if the trustee is a beneficiary, so long as the trustee is not a qualified beneficiary (someone currently receiving distributions or who will receive distributions if the trust terminates).

**Section 7:** This section amends ORS 130.305, which governs spendthrift provisions. The amendment adds a clarifying subsection that states that entering into a settlement agreement is not, by itself, a transfer in violation of a spendthrift provision.

**Section 8:** This section changes the language to clarify that a court may order execution against an amount a trustee is required to distribute.

**Section 9:** A new subsection in ORS 130.315 provides that creditors cannot reach assets in a trust solely because the trustee holds a discretionary power to pay taxes or to reimburse the settlor for taxes paid. Property becomes subject to creditors only if the property is subject to a power of withdrawal greater than the amount of the annual exclusion or, if the donor was married, twice that amount. Assets in an inter vivos marital deduction trust will be deemed contributed by the donor's spouse. Assets contributed to a trust by a settlor will not be subject to claims of the settlor's creditors if someone else is given a non-general power of appointment.

**Section 10:** This section explains which provisions of the OUTC apply to revocable trusts. The changes clarify that the statutory rules apply to trusts that were revocable on the occurrence of an event or until the settlor's death.

**Section 11:** This section amends ORS 130.555 to clarify when a child will be considered a pretermitted child for purposes of a revocable trust. A child will not be considered pretermitted if the settlor acknowledges or mentions the child by name or by class either in the trust instrument or in the settlor's will. The amendment links the rules that apply to wills and revocable trusts so that the law will apply consistently in a situation in which a settlor has both a will and a revocable trust. Section 11 amends the statute so that a child will be covered if the child is born or adopted while the settlor is alive but not after the settlor's death unless the child is in gestation at the settlor's death.

ORS 130.555 currently gives a pretermitted child the share the child would have received if the settlor had died intestate, with no trust. Section 11 incorporates the provisions from the intestacy statute into ORS 130.555, so the statute now directly states the share to which a pretermitted child will be entitled.

**Section 12:** This section amends the provision in ORS 130.610 on delegation of duties by a co-trustee to another co-trustee. Section 12 adds language to make clear that a delegation or a revocation or termination of a delegation must be in writing.

**Section 13**: This section amends ORS 130.615 to provide that a vacancy in a charitable trust can be filled by unanimous agreement of all qualified beneficiaries and the Attorney General. The current version of the subsection requires the agreement of all charitable beneficiaries, which would include remote interest charitable beneficiaries and secondary charitable beneficiaries. The change will make it easier to fill a vacancy in a trusteeship, and the Attorney General can protect the interests of any charitable beneficiaries who are not qualified beneficiaries.

**Section 14:** ORS 130.630 authorizes the court to remove a trustee if removal "best serves the interests of all of the beneficiaries" and certain other requirements are met but only if "[r]emoval is not inconsistent with a material purpose of the trust." A trustee can always argue that a settlor's choice of trustee is a material purpose of the trust, which has made removal under this provision difficult. Section 14 amends

the subsection to permit the court to remove the trustee if the other requirements are met unless the trustee establishes "by clear and convincing evidence that removal is inconsistent with a material purpose of the trust."

**Section 15:** ORS 130.630 states the duties of a trustee who has been removed or has resigned. Section 15 provides that the successor trustee or the court may require the departing trustee to prepare a final report, and if the departing trustee is required to prepare a final report, the trust must pay reasonable fees and costs.

**Section 16:** This section clarifies rules on fees paid to trustees by adding two subsections. Compensation must reflect the total services provided to the trust by co-trustees or by third parties such as financial advisors, so that the trust is not paying duplicative fees.

**Sections 17 and 18:** A trustee has a duty of obedience to carry out the terms of the trust (ORS 130.650) and a duty of loyalty to administer the trust solely in the interests of the beneficiaries (ORS 130.655). These duties could suggest to a trustee that any modification of a trust would be a violation of one or both of these duties. Section 17 amends ORS 130.650 and Section 18 amends ORS 130.655 to clarify that the mere existence of these duties does not require a trustee to object to a modification of a trust.

**Section 19:** ORS 130.710 requires the trustee to keep the qualified beneficiaries informed about the administration of the trust. The current statute requires a trustee who leaves office to send a report to the qualified beneficiaries. The amendment states that the former trustee must send the report if the successor trustee or the court requires it.

**Section 20:** This section clarifies ORS 130.725(22) to indicate that distribution of trust property may include payments in cash or in kind.

**Section 21:** This section rewrites ORS 130.730 to provide more clarity in the trustee's duties on termination of a trust and the effectiveness of a release executed by a beneficiary.

**Section 22:** ORS 130.735 provides rules for the appointment of a person who will act as an adviser to the trustee. Section 22 adds a sentence indicating that "[t]he appointment may provide for succession of advisers and for a process for the removal of advisers." Section 22 also adds a provision on removal of an adviser by the court.

**Section 24:** This section creates a new section in ORS chapter 130. The new section states that if a trustee is permitted or obligated to divide a trust into separate shares for separate beneficiaries, each share will be deemed a new trust and the trust from which the new trust is created will be deemed to terminate.

**Section 25:** This section creates a new section in ORS chapter 130. The new section creates a process by which a trustee can give a beneficiary notice of a proposed action and then proceed with the action if the beneficiary does not object within 45 days. The notice to the beneficiary must clearly inform the beneficiary of the right to object and the way to object and must provide sufficient information for the beneficiary to make an informed decision about whether to object. The beneficiary must object in writing. If the beneficiary does not object the beneficiary is barred from taking action against the trustee in connection with the action. The notice process does not apply to a number of types of self-dealing transactions between the trustee and trust, including, among others, settlement of trust accounts or the trustee's report, actions involving property sales or exchanges between the trustee and the trust, and settlement of actions by the trust against the trustee. The new section lists the types of actions to which the section does not apply.

**Amendment on Abatement:** An amendment to the Bill will add a new section to the OUTC. The new section will apply the abatement rules from probate law to property being distributed from a revocable trust. As with property distributed under a will, the new section will provide that after the payment of creditors and expenses of administration, the trustee will first pay specific gifts (identifiable items), then general gifts (fungible gifts like gifts of money), and then the residuary gifts.

**Note:** The abatement amendment was accomplished with the -1 amendment approved by the Senate Judiciary Committee. The Commission approved the amendment after the initial filing of the bill. The amendment is reflected in the description provided by this report.

## VI. Conclusion

These amendments to the OUTC will improve trust law for Oregonians and will benefit settlors, trustees, and beneficiaries, as well as their advisors. The bill should be adopted because the amendments will improve the operation of the law with respect to trusts.

**Note:** The House Judiciary Committee adopted an amendment to clarify the duty of loyalty requirement. The amendment was considered a friendly amendment requested by Rep. Hicks.

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# Juvenile Records

# Work Group Report

**For SB 622 (2013)**

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Approved by the Oregon Law Commission
at their Meeting on April 1, 2013

## I. Introduction

Today, the Oregon Revised Statutes (ORS) contain three chapters of law dedicated to juvenile law—ORS 419A, 419B, and 419C. However, up until 1993, Oregon law had one chapter that was known as the Juvenile Code—Chapter 419. The splitting of the chapter was done to address the diverging approaches to delinquency and dependency cases. That is, the state guiding principle for both of these types of cases was no longer "best interests of the child." Instead, delinquency cases are now based on the principles of "personal responsibility, accountability and reformation within the context of public safety and restitution to the victims and to the community." ORS 419C.001. Oregon's juvenile delinquency law is now placed primarily in ORS Chapter 419C. Dependency cases remain centered on "best interests of the child" with a focus on the family, promoting each child's right to "safety, stability, and well-being." ORS 419B.090(2). Oregon's juvenile dependency law is now primarily found in ORS Chapter 419B. The third chapter of Oregon law that is focused on juvenile law is ORS Chapter 419A—this chapter is known as the administrative chapter and applies to both dependency and delinquency cases.

Four key terms are used throughout the three chapters of Oregon juvenile law to refer to juveniles involved in these two types of cases. The terms are child, ward, youth, and youth offender. In summary fashion, "child" simply means an unmarried person who is under age 18; "ward" means a person within the jurisdiction of the court under the dependency chapter; "youth" means a person under age 18 who is alleged to have committed a violation or a violation of a law or ordinance; and "youth offender" means a person who was found to have committed a violation or a violation of a law or ordinance and is within the jurisdiction of the court under the delinquency chapter. See ORS 419A.010. In both types of juvenile cases, key other participants in the case include the juvenile's parents, the Department of Human Services (DHS), the Oregon Youth Authority (OYA), the county juvenile department, the district attorney, the attorney general, the Citizen Review Board (CRB), and defense attorneys.

Juvenile courts in Oregon generally have jurisdiction over all juvenile dependency and delinquency matters. Juvenile court records are to be kept separate from the other records and proceedings of the circuit courts. ORS 7.230. The clerk of the court is responsible for maintaining a court record for each case. ORS 419A.255. The courts typically hold a "legal file" for pleadings, etc., and a separate "social file" for reports and other material relating to history and prognosis. ORS 419A.255. Like most states, Oregon has long had law and policies that generally make juvenile court records confidential, and access to them is highly restricted.[1]

[1] All jurisdictions have confidentiality provisions to protect abuse and neglect records from public scrutiny. Federal statutes that fund education, social, health, drug abuse, alcohol abuse, and mental health services require the state to maintain juvenile court record confidentiality provisions as well. Examples include CAPTA (Child Abuse Prevention and Treatment Act ), HIPAA (Health Insurance Portability and Accountability Act), FERPA (Family Educational Rights and Privacy Act) and 42 U.S.C./42 C.F.R. Part 2 (consolidated alcohol and drug abuse confidentiality protections).

Oregon statute specifically prohibits public access to juvenile court records. See ORS 419A.255. The work group intended to make no changes to public access rights. That is, the bill neither is intended to expand nor increase public access. Rather, the focus of the work group's work was clarifying access rights of parties in juvenile cases. Permitted access to identified individuals and entities is enumerated in statute. The primary juvenile court record access rules and exceptions are provided in the administrative chapter of the juvenile law at ORS 419A.253 to 419A.257 and thus apply to both juvenile dependency and delinquency cases. Other access rules, however, are scattered throughout the ORS. Most juvenile court records are indeed also exempt from public records laws under ORS 192.502(9). ORS 192.502(9) provides that public records are exempt if disclosure of information or records is prohibited or restricted or otherwise made confidential or privileged under Oregon law. It is primarily the restrictions in ORS Chapter 419A that make the records exempt from public records laws.[2] ORS 192.496 also generally exempts from public records mental and physical health records, records of persons held in custody or lawful supervision of a state agency or a court, and student records.

Note, however, that while access to juvenile court records is restricted, Oregon juvenile court proceedings themselves are open. See State ex rel. Oregonian Pub. Co. v. Deiz, 289 Or. 277 (1980). In that case, the Oregon Supreme Court issued a writ of mandamus requiring the juvenile court judge to permit the Oregonian to attend hearings in a juvenile delinquency proceeding. The Court held that the trial judge's application of state statute to bar the press' presence violated The Oregon state Constitution's open courts clause found in Art. 1, sec. 10).

It is important for Oregon's law to precisely provide rules regarding who is entitled to inspect and/or copy juvenile court records for both juvenile dependency and delinquency cases. The laws presently are imprecise, and practice is inconsistent in Oregon's counties.

## II. History of the Project and Statement of the Problem:

In July 2010, the Oregon Judicial Department (OJD) referred review of Oregon's statutes relating to juvenile court records and files to the Oregon Law Commission. Specifically, OJD and the State Court Administrator requested review and improvement of ORS 419A.255. The request noted the "(n)eed for clarification regarding party access to full legal file contents in both delinquency and dependency cases" as well clarification of public access rules. In addition, the request noted circuit courts' inconsistent interpretations of the phrase "other filings with court" used in ORS 419A.255(1); some courts place records in the legal file rather than the social file based on this ambiguous phrase. The request noted that "[s]tatutory clarification regarding the contents of each file ["social and legal file"] would assist the courts in protecting case information." OJD requested particular clarity on the proper handling of "social file" materials (e.g. processing, attachment to orders/judgments, disclosure responsibilities, etc.). Lastly, OJD requested that statutes that require that records be "returned" or permit "inspection" of records but

[2] See Attorney General's Public Records and Meetings Manual 2010, footnote 124, available online at http://www.doj.state.or.us/public_records/manual/pages/public_records.aspx#_ftnref124

not copies of records be reviewed in light of the impending transition to electronic court records. OJD's referral came from recommendations of a Law and Policy Work Group created as part of OJD's eCourt Program. That Work Group had several smaller groups focusing on various substantive law areas; the Juvenile Group and a separate Juvenile Social File Group identified the juvenile court file issues. In order for eCourt to function well, access rules must be clear regarding court records.

The Oregon Law Commission approved the formation of a work group to review and make recommendation regarding juvenile case court files and records laws at its meeting on November 29, 2010. A work group[3] was formed in 2012 with Commissioner Julie McFarlane serving as Chair. The work group began meeting in November 2012 and met five times to complete the recommended bill.

## III. Objectives of the Proposal

The Work Group recommends SB 622 to the 2013 Legislative Assembly. The objective of the bill is to provide more clear rules for access to juvenile court records. Specifically, the goal was to define the two types of files containing juvenile court records that are maintained by the juvenile court and detail who is entitled to inspection rights of the two types of files and who is entitled to copy rights of the two types of files. To accomplish this objective, a new definitions section is created (See Section 1) and the present juvenile court records laws, found in ORS 419A.253, ORS 419A.255 and ORS 419A.256, are significantly revised (Sections 2-4). In addition, ORS 419A.257 is repealed and instead the substance is improved and incorporated into ORS 419A.255.

## IV. Review of Legal Solutions Existing or Proposed Elsewhere

The Work Group reviewed existing Oregon statutes and discussed practice in Oregon, with a goal of clarifying Oregon law and to codifying best practices. Staff did research other state's juvenile records laws on specific issues throughout the project, but no one state or uniform act was relied

[3] Voting work group members included Julie McFarlane, OLC Commissioner and Chair; Susan Amesbury, Oregon Dept. of Justice; Brad Berry, Yamhill Co. DA's Office; Tom Cleary, Multnomah Co. DA's Office; Nancy Cozine, Office of Public Defense Services; Linda Guss, Oregon Dept. of Justice; Prof. Leslie Harris, Dorothy Kliks Fones Professor at the University of Oregon School of Law; Cherie Lingelbach, Oregon Youth Authority; Michael Livingston, Oregon Judicial Dept.; Tim Loewen, Yamhill Juvenile Dept.; Judge Maureen McKnight, Mulnomah Co. Circuit Court; Sarah Morris, Dept. of Justice; Rem Nivens, Oregon Youth Authority; Lisa Norris-Lampe, Oregon Supreme Court; Becky Osborne, Oregon Judicial Dept.; Wendy Peterson, Washington Co. Juvenile Dept.; Mickey Serice, Oregon Dept. of Human Services; Tahra Sinks, Attorney at Law; Shannon Storey, Office of Public Defense Services. Work Group advisors included Caroline Burnell, Oregon Dept. of Human Services; Presiding Judge John Collins, Yamhill County Circuit Court; Richard Condon, Attorney at Law; Maurita Johnson, Oregon Dept. of Human Services; Tom Vlahos, Oregon Dept. of Human Services.

upon. Oregon's juvenile code is unique and really required state-specific solutions to address the current problems, ambiguities, and omissions.

## V. The Proposal

The Work Group's recommendations are reflected in SB 622 and session amendments. A section-by section explanation of the bill and recommendations follows:

### Section 1

This section codifies new definitions to be used in ORS 419A.253, 419A.255 and 419A.256 (Sections 2-4 of the bill).

The definition of "person" in subsection (1) was added as that term is used several times in the records provisions and presently "person" may be mistakenly read so as to only cover individuals. The bill's new definition, which expressly covers individuals and also covers public bodies, makes it clear that "person" includes state and local government entities , e.g. the juvenile department, OYA, DHS, and the court.

Subsection (2) defines "prospective appellate attorney"; this new term is needed to address the court-appointed attorney realities and practice for juvenile court appellate work. If a child, ward, youth, youth offender, parent, or guardian has a retained attorney, then that attorney has access to court records as provided by ORS 419A.255 because that attorney is officially an attorney of record. However, when a person needs court-appointed counsel on appeal, the practice of Oregon Public Defense Services (OPDS) is to have prospective appellate counsel preliminarily examine a case before becoming the official attorney of record. Prospective attorneys, authorized by OPDS, will review the register and portions of the lower court record to determine if an appealable judgment exists, whether any conflicts exist, etc.. While this review is being done, the attorney is a prospective attorney and not the attorney of record. It is important for such "prospective attorneys" to have access to portions of the juvenile court case file and essentially be treated like attorneys of records for access purposes; this term thus is used in the newly revised access rules in section 3 of the bill when attorneys are referenced. In short, the group agreed that the statutes should clearly provide that the attorneys for parties should automatically have access to all case-specific information provided to the juvenile court.

Subsection (3) defines "record of the case," and subsection (4) defines "supplemental confidential file." These are the two new terms that will define what have commonly been referred to by the bench and the bar as the "legal file" and the "social file" of a court file in a juvenile case. Providing statutory definitions has been long overdue—inconsistency and confusion with respect to what shall be maintained in each file has been the norm. The new definitions provide needed detail and direction to courts, parties, state and local government and attorneys.

Specifically, subsection (3), of the bill lists in more detail the filings, records, and papers that are to be maintained as comprising the record of the case. The list provided in present ORS 419A.255(1) served as the starting point for this definition, but the list in the bill is expanded to provide further direction and specificity.

Answers, affidavits, and judgments were specifically added to the list; these three types of documents are very commonly filed and they simply were missing from the old list.

The work group also decided to require that both local citizen review board (CRB) findings and recommendations as wells as guardianship report summaries be maintained in the record of the case. See Section 1(3)(a)(D) and (E). Present law requires both of these materials be filed with the court but it has been unclear as to which file to maintain them. The CRB is an arm of the juvenile court and is a part of the judicial department; as such, OJD and the CRB supported placement of CRB reports in the record of the case. Such practice also seems to be the practice in most counties. See Section 6 discussion below for more explanation of guardianship reports and the new summary sheet.

ORS 419A.256(1)(a) already has provided that transcripts of a juvenile court proceeding are to be maintained in the record of the case. The addition of transcripts to the list in Section 1(3)(a)(G) thus is simply a cross reference addition to promote consistency and clarity.

Section 1(3)(a)(H) specifies that "exhibits and materials offered as exhibits but not received" are now also included in the "record of each case." This is an important new provision recommended by the work group after long discussions. Exhibits are physical or documentary evidence and should be consistently treated as such and made a part of the official record of the case. Exhibits that are offered but not received also need to become a part of the record of the case so that the court's ruling can be challenged on appeal if necessary. Juvenile court practitioners need to be more consistent in this area. Nothing in this bill is intended to change the court's exhibit maintenance practice or authority provided in ORS 7.120(2). ORS 7.120(2) permits courts to destroy or return to parties exhibits offered or received after the case becomes final and not subject to further appeal. Courts would experience a storage problem if courts were required to maintain all exhibits indefinitely.

Note that the bill provides that record of the case covers "supporting documentation." See Section 1(3)(a)(C) (covering supporting documents filed with the court) and Section 1(3)(a)(F) (covering supporting documents filed by the court itself). The group struggled with the wording here, but it is meant to be a catch-all that covers a variety of supporting documents-- but most specifically it is meant to cover attachments to motions, orders, and judgments as those are common practice. It may also cover correspondence. Note that attached supporting documentation becomes part of the record of the case by virtue of the filing, even if it does not become evidence.

Section 1(3)(a)(I) is the record of the case definition's catch-all provision. It is meant to cover other documents that are to be a part of the record of the case as provided elsewhere by statute or caselaw. An example is the list provided for in ORS 419A.253. .

Section 1 (4) defines "supplemental confidential file" which has for decades has been commonly referred to as the "social file." Note, however, that the phrase "social file" is found nowhere in Oregon statute. The bill will finally codify a name for this file, albeit not the social file. A new name was deemed necessary because the file does not contain only "social" information and it is

not socially available as that term is now understood with social networking today. This file is really a holding place for records and materials that do not qualify as part of the record of the case, are not admitted into evidence, and are not part of the case on appeal. It has traditionally been used to hold materials relating to "history and prognosis" of the child, ward, youth or youth offender. The Oregon appellate courts have held that "history and prognosis" refers to records regarding the medical, psychological, and social (personal and family) background of juveniles as well as predicted future status or condition of the juvenile.[4] Records include such materials as OYA education and treatment reports, school records, DHS reports, medical reports, and mental health reports. Many "history and prognosis" reports are required to be periodically sent to the court and practice has been to put them in this file. This practice of keeping two files is unique to juvenile court and perhaps one day it should be phased out, but that would require significant time and require a new law reform work group. The bill provides specifically that reports filed with the court under ORS 419B.440 shall be maintained in the supplemental confidential file. These are reports that are required when a public or private agency (generally DHS) has guardianship or legal custody of a child or ward. ORS 419B.440. Reports are required every six months or more frequently if the court so orders. The report contents are provided for in ORS 419B.443, but include descriptions of problems or offenses necessitating placement with the agency, descriptions of the care and treatment provided for the child or ward, school placements and credits earned, etc. The Group recommends that these routine reports, though required to be filed with the court (see ORS 419B.446), should not be maintained in the record of the case due to their contents. Practice today has varied on where these reports are maintained. The bill also specifies in (4)(a)(A) and (B) that this file shall contain reports and materials that are not part of the record of the case that are not offered or received as evidence in the case. This provision parallels with the record of the case definition, which includes evidence offered and received as well as evidence offered but not received.

Section 1 of the bill also provides explicitly that both the "record of the case" and the "supplemental confidential file" include traditional paper records as well as electronic records. See Section 1(3)(b) and (4)(b). These references clarify that electronic court processes extend to juvenile case records. Further Oregon eCourt details are not needed in the chapter but instead will be handled by court rule, etc. OJD will evaluate any system configuration and court rule needs following the passage of this bill.

**Section 2**

This section amends ORS 419A.253. This provision is a relatively new section of the juvenile code that provides a procedure for a judge in juvenile court to rely upon information in a report, document or other material that a party has not asked the court to take judicial notice of nor has any party offered the actual report, document or material containing the information as an exhibit. At times there are materials in the court file that have not been made part of the record of the case because there is not an attorney present to offer the evidence. This happens most often when a

[4] See e.g, Kahn v. Pony Express Courier Corp., 173 Or App 127, 141-42 (2001).

state agency appears without counsel. Other common instances prompting this procedure occur when letters are written to the court and when records are forwarded to the court from other states. This statute allows the judge to act whether requested or not; indeed, it is a judge's responsibility to act. To do so, the statute requires the judge to identify the report, material or document on the record and allow an opportunity for objections by the parties before taking judicially notice of information or marking and receiving into evidence a report, material, or document as an exhibit. Work Group member, Judge Maureen McKnight, reminded the Work Group that "there is no juvenile court slide for the way things get in to evidence. They get in by judicial notice, stipulation, evidence, or testimony. There are only four doors." Judges and practitioners need to conform to approved practice in this area if the parties want the court to rely on certain information or the court wants to rely on a record or information – it needs to be properly in evidence.

This statute provides a useful evidentiary procedural tool but it needs to be followed correctly. Thus, the bill revises this section for readability and to clarify misunderstandings that continue to occur in juvenile court practice, particularly with respect to judicial notice of information. In short, a judge can take judicial notice of a fact or law but a judge cannot take judicial notice of a particular document, report or other material. Rather, the judge can take judicial notice of a fact or law in a document, report or other material. Revised subsection (2) now emphasizes more and specifies more clearly that if the court takes judicial notice of a fact or law under this section, it must specify both the source of the fact or law and the fact or law that is judicially noticed. The court shall make this identification by causing a list to be made; the list may be either included in the court's order or judgment or set out in a separate document attached to the order or judgment. See Section 2(2). The provision is consistent with the series in ORS 40.060 to 40.090 which governs judicial notice generally. The provision also uses "fact or law" throughout to emphasize what is judicially noticeable. Note that a judge will more commonly judicially notice facts in these cases, but tribal regulations are an example of a law that may be judicially noticed.

This section adds a new subsection (3) to the statute to specify that both exhibits marked and received by a judge under this statute and any list of information judicially noticed by a judge under this section are to be maintained as part of the record of the case. Note however that a list alone is insufficient to properly judicially notice information. The judge must identify the source and what is judicially noticed. The list provided by this section is really an organizational tool to help introduce the information into evidence. Subsection (4) goes on to provide that if an appeal is taken, the exhibits, lists, and "(a)ny report, material or other document containing judicially noticed facts or law as identified on the list" shall all be made of the record of the case on appeal.

ORS 419A.253(3) in present law is moved over to 419A.255(9). The subsection ensures appellate court access to juvenile court records when reviewing juvenile court orders or judgments. See also ORS 419A.200(10)(d) (protecting juvenile court records on appeal). This issue is better addressed in ORS 419A.255 by providing clear inspection and copy rights to the appellate courts there.

**Section 3**

This section amends ORS 419A.255. This section provides that both the record of the case for each juvenile case and the supplemental confidential file shall be withheld from public inspection. That is, this bill continues the longstanding state policy that juvenile case records are to be treated different from other civil and criminal case records--that is, juvenile records are generally confidential.[5] To be entitled to inspection or copy rights, a person must be listed in the statute's exceptions that provide access.

Subsection (1)(a) provides that the clerk of the court shall maintain the record of the case and the supplemental confidential file.

**INSPECTION—RECORD OF THE CASE**

Subsection (1)(b) of the bill provides a new list of who shall be given access to inspect the record of the case (formerly known as the legal file). Present ORS 419A.255(1) is broken up more with semicolons and new paragraph letters to make the section more readable. The following already have access to the record of the case under ORS 419A.255(1) and will continue to in the bill's Section 3(1)(b): child; ward; youth; youth offender; parent or guardian of the child, ward, youth or youth offender; surrogate; person allowed to intervene in a proceeding involving the child, ward, youth or youth offender; court appointed special advocate; and attorneys for persons listed.

The work group recommends adding some persons who presently do not have explicit access to the record of the case.

The four additions provided for in the bill include:

1. <u>The judge of the juvenile court and those acting under the judge's discretion</u> (Section 3(1)(b)(A))

   ORS 419A.255(1), presently is silent as to juvenile court access to the legal file but 419A.255(2) does specifically provide juvenile court access to the social file. The bill specifies juvenile court inspection authority as well as copy authority for both the full record of the case and the supplemental confidential file to provide consistency. Most would interpret court record provisions to permit court access axiomatically but because only present ORS 419A.255(2) specifically mentions the juvenile court, it has created an interpretation problem.

2. <u>Guardian ad litem for the parent</u> (Section 3(1)(b)(G))

   A guardian ad litem is not a party but is a representative of the parent. ORS 419B.234(2). Still, the court may appoint a guardian ad litem only if a parent lacks substantial capacity either to understand the nature and consequences of the court proceeding or give direction and assistance to the parent's attorney due to the parent's mental or physical disability or impairment. ORS 419B.231(2). Thus, the work group concluded that a guardian ad litem should be afforded the

[5] Mental commitment (ORS 426.160 and 427.293) and adoption case (ORS 7.211) records are also generally confidential and withheld from public inspection in Oregon.

same access rights to juvenile court records that a parent is provided. Note that guardian ad litems must be lawyers or mental health professionals. See ORS 419B.234(1)(a). Practice in most counties has been for guardian ad litems to have access.

3. Service providers in the case (Section 3(1)(b)(J))

   Service providers (counselors, therapists, doctors, etc.) have long been provided both inspection and copy rights to the "social file" but were omitted from access to the "legal file." The bill thus adds service providers to the list of persons allowed to inspect and copy the record of the case. Presently they are getting copies of the record but it sometimes is problematic because they must get the record from a different source rather than the court. For treatment and service these records are often needed by the service providers. The Work Group considered defining service providers but concluded that it was not unnecessary and would be difficult as services needed vary a great deal by case.

4. Prospective appellate attorneys (Section 3(1)(b)(L))

   As explained above in the definition section provided in Section 1, prospective appellate attorneys need access to the record of the case. They need to run conflict checks, etc. before it is determined whether they will represent a person in the case. The statute has long provided attorney access but the bill will now cover prospective attorneys as well.

   Note that Section 3(1)(b)(M), (N), (O), and (P) are all listed in bold in this section. These paragraphs provide inspection rights to the district attorney, assistant attorney general, juvenile department, DHS, and OYA. This is not a change to the law; however, because these persons were provided the same access to the record of the case by reference in ORS 419A.257(1). ORS 419A.257 has been repealed by this bill and instead that statute has been folded into ORS 419A.255.

5. Any other person allowed by the court (Section 3(1)(b)(Q))

   Note that at the end of the list of persons entitled to inspect the record of the case there is a catch-all provision that allows the court to permit other persons in inspect the record of the case. See Section 3(1)(b)(Q). This is an explicit provision granting the court authority and discretion. Many maintain, however, that the court already has this authority, but this provision certainly clears up any ambiguity.

**COPIES—RECORD OF THE CASE**

Subsection (1)(c) of Section 3 provides a list of who is entitled to copies of the record of the case. Presently, ORS 419A.255(1) provides explicit copy rights to the record of the case (i.e. the legal file) only to the attorneys. In addition, present law, in ORS 419A.257, provides copy rights to the district attorney, assistant attorney general, juvenile department, DHS, and OYA.

The work group recommends adding some new persons explicit copy rights to the record of the case in this provision.

The additions provided for in the bill include:

1. The judge of the juvenile court and those acting under the judge's discretion (Section 3(1)(c)(A))

   This addition seems axiomatic—of course juvenile court and appellate judges and their staff need to be able to work with copies of records to do their jobs.

2. Service providers in the case (Section 3(1)(c)(D))

   Service providers are listed in paragraph (b)(J) and thus the bill includes them in the list of persons entitled to copies of the record of the case under the series provided in paragraph (c)(D). As explained above, service providers have long been provided both inspection and copy rights to the "social file" but were omitted from access to the "legal file." The bill thus adds service providers to the list of persons allowed to both inspect and copy the record of the case. Presently they get the record but it sometimes is problematic because they must get the record from a different source rather than the court. For treatment and service these records are often needed by the service providers.

3. Court Appointed Special Advocates (CASA) (Section 3(1)(c)(D))

   Court Appointed Special Advocates are listed in paragraph (b)(K) and thus the bill includes them in the list of persons entitled to copies of the record of the case under the series provided in paragraph (c)(D). CASAs are deemed a party in ORS chapter 419B juvenile dependency proceedings. ORS 419A.170(1). CASAs are to investigate all relevant information in a case and monitor all court orders. ORS 419A.170(2). And specifically, ORS 419A.170(7) provides that upon presentation of the order of appointment of the CASA, "any agency, hospital, school organization, division, officer or department of the state, doctor, nurse or other health care provider, psychologist, psychiatrist, police department or mental health clinic shall permit the court appointed special advocate to inspect and copy. . . any records relating to the child or ward involved in the case. . ." Thus, due to the nature of a CASA's duties and the explicit broad record access provided in 419A.170, the work group concluded that CASAs should be included within the list of persons entitled to copies of the record of the case in this section of the bill. The present omission from ORS 419A.255 seems to be a mistake.

4. Prospective appellate attorneys (Section 3(1)(c)(D))

   Prospective appellate attorneys are listed in paragraph (b)(L) and thus the bill includes them in the list of persons entitled to copies of the record of the case under the series provided in paragraph (c)(D). As explained above in Section 1, prospective appellate attorneys need to inspect and have copy rights to the record of the case. They need to run conflict checks, etc. before it is determined whether they will represent a person in the case. The statute has long provided attorney access but the statute needs to cover prospective attorneys as well.

   Again, note that the district attorney, assistant attorney general, juvenile department, DHS, and OYA are listed in bold in paragraphs (b)(M) to (b)(P) and thus the bill includes them in the list of persons entitled to copies of the record of the case under the series provided in paragraph (c)(D).

This is not a change to the law; however, because these persons were entitled to inspect and copy the record of the case by reference in present ORS 419A.257(1). ORS 419A.257 is repealed by this bill and that statute is incorporated into ORS 419A.255.

5. Any other person allowed by the court (Section 3(1)(c)(E)

Also note that at the end of the list of persons entitled to copies of the record of the case there is a catch-all provision that allows the court to permit other persons to receive copies. See Section 3(1)(c)(E). This provision is an explicit new provision that gives the court authority and discretion. Such a provision was advocated by several in the Work Group to clearly allow the court flexibility to permit parents, guardians, and guardian ad litems to obtain copies of the record of the case in cases when the court finds it appropriate. Others maintain that the court already had this authority but the provision clears up any ambiguity. The Commission agreed that the court was in the best position to rule on such issues and wanted to provide clear authority.**SPECIAL NOTE ON COPIES—RECORD OF THE CASE—PARTIES IN THE CASE**

Finally, the bill provides new language in subsection (1) of ORS 419A.255 that provides an entitlement to copies of the record of the case to both "a party to the extent permitted under ORS 419B.875(2) or 419C.285(2)" and "a guardian ad litem for a parent to the same extent the parent is permitted copies under ORS 419B.875(2) or ORS 419C.285(2)." See Section 3(1)(c)(B) and (C). This language is admittedly awkward. It essentially maintains the status quo of Oregon law by referring to existing law in Chapter 419B and 419C that provides parties[6] in the case with the right to copies of certain records of the case. ORS 419A, on the other hand, presently provides for no explicit copy rights to parties in the records provisions and this bill at least fixes that conflict by recognizing the related "copy" provisions and listing them in this section of the bill.

Note that both the parties and the copy rights are different in dependency and delinquency cases. Many of the parties have access and copy rights already under another enumerated subsection. Thus, it really is the parent or guardian that is a party to the case to which this paragraph primarily applies (it does also cover certain intervenors, including tribes). Again, the bill maintains status quo by referring to both the rights provided in ORS 419C.285(2) and ORS 419B.875(2) to parties. ORS 419C.285(2) provides that the rights of parties in a delinquency proceeding include the right to notice of the proceeding and copies of the pleadings." ORS 419B.875(2) appears more expansive and provides that parties' rights in dependency proceedings include the "right to notice of the proceeding and copies of the petitions, answers, motions, and other papers." The phrase "other papers" is ambiguous in present law. Some argue the phrase includes a number of records in a file while others contend it is quite limited. The main disagreement is whether parties are entitled to copies of psychological reports of parents and children filed with the court under this provision. Many of Oregon's judges and judicial officers are very protective of these reports and maintain that the law does not presently permit the

[6] ORS 419C.285(1) lists the parties to a delinquency proceeding. The parties are different at the adjudication and dispositional stages of the proceeding. ORS 419B.875(1)(a)lists the parties in the juvenile court for dependency

provision of copies of psych reports nor as a matter of policy should Oregon law be changed to provide copies to parties.[7] They reason that such reports contain highly personal information--often concerning sexual abuse and behavior details, medical and mental health information--that if disclosed to others or placed on the Internet would be highly humiliating and damaging to children. Such material would detrimentally effect their future. Others, primarily defense attorneys for parents, however, maintain that parties need such records and especially psych reports to effectively parent, obtain adequate services and treatment for their child or themselves, and to effectively defend themselves in the case. They argue it is a due process issue—and when they are denied copies of such key records their constitutional rights are violated. They also maintain that ORS 419B.875(2) coupled with the U.S. Constitution indeed require access and copies.

Some Work Group members were particularly concerned with denying copies of certain aspects of the record of the case to parties who are unrepresented. Indeed, unrepresented parties may have a stronger due process claim. Present law makes no distinction for the unrepresented—although anecdotally there are not many who are unrepresented. The bill continues to allow attorneys for the parties to have copies of the record. Many in the Work Group argued that to not also expressly permit unrepresented parties to have copies puts them at an unfair and significant disadvantage. Still, others countered that providing an opportunity to inspect the record, which would include the ability to take personal notes from the records, etc. is sufficient to comply with due process requirements. See above discussion regarding revised ORS 419A.255(1)(b) which provides inspection rights to listed persons, including parents. All agreed that to also deny inspection rights would certainly deny parents due process. Practice in some counties is for parents to review records in court chambers or the attorney's office; they return the copies before leaving. The Work Group considered amending the statute to allow copies to unrepresented parties if coupled with protective orders restricting re-disclosure and use.

In the end, the Work Group could not reach consensus on this policy issue of what specific record of the case copy rights parties in juvenile court should be entitled to under Oregon law. Thus, no changes were made relating to current party copy rights in the bill. The choices essentially discussed were to allow parties explicit full copy access, allow parties copy access but with restrictions on certain records (e.g. psych evaluations), allow only unrepresented parties copy access, and/or allow unrepresented parties copy access with restrictions and/or protective orders. The issue will likely be litigated if the legislature does not address the policy issue. Note that the group did agree that whatever the statutory and constitutional copy rights are of parents (ambiguous though it remains), a guardian ad litem should have the same rights. Thus, the bill does add Section 3(1)(c)(C) to include guardian ad litems for a parent to the same extent the parent is permitted copies under the listed statutes. For some counties, this could act to cut back on copy access as guardian ad litems often do receive copies in practice.

[7] See e.g., Standing Order 1201.00000, dated November 28, 2012, signed by Chief Family Court Judge, Maureen McKnight and Presiding Judge, Nan Waller of Oregon's Fourth Judicial District. (4)(a)

**SUPPLEMENTAL CONFIDENTAL FILE**

Section 3, subsection (2), of the bill addresses inspection and copy rights rules with respect to the supplemental confidential file. See discussion above of Section 1(4) for explanation of this file which contains "history and prognosis" reports and material. Subsection (2)(a) provides that "history and prognosis" reports and material will continue to be privileged—whether maintained in the supplemental confidential file or whether they ultimately become part of the record of the case. Attaching "history and prognosis" material to a motion will not make the material lose its privileged status. The work group found it very important to keep this material privileged to preclude public access to these sensitive records. The bill also continues to provide specifically that "history and prognosis" reports and material shall be withheld from public inspection. This subsection also specifies that "[o]nce offered as an exhibit, reports and other material relating to the child, ward, youth or youth offender's history and prognosis become part of the record of the case." This clarification is intended to help emphasize to the bench and bar proper evidentiary procedure and curb misuse of the "supplemental confidential file." In short, if parties want reports or materials in the supplemental confidential file to be relied on, they need to be offered as an exhibit, become evidence, and then be maintained in the record of the case. This clarification also is intended to clarify that, once supplemental confidential file material becomes part of the record of the case, it is subject to the access rules that apply to the record of the case.

**INSPECTION—SUPPLEMENTAL CONFIDENTAIL FILE**

Subsection (2)(b) of this section provides a list of who shall be given inspection access to the supplemental confidential file as that file is newly defined in Section 1. The first sentence of existing ORS 419A.255(2) is significantly revised and broken apart with semi-colons to clarify inspection rights in the provision and provide a new list in the bill's subsection (2)(b). The first sentence of present ORS 419A.255(2) has long caused confusion and been inconsistently applied because it is susceptible to a variety of interpretations due to the complex modifying clauses and awkward punctuation. The confusion has particularly centered on what the phrase "attorneys of record" modifies. Many members of the bench and bar read the first sentence to essentially allow inspection of this file only by the judge, services providers and attorneys for a long list of persons. Other members of the bench and bar, however, read the sentence to also allow inspection by parents, guardians, CASAs, surrogates and intervenors. They argue for example, that CASAs and surrogates don't have attorneys and thus to read "attorneys of record" to modify these persons does not make sense. While the Work Group also could not agree on the present law's meaning, all on the Work Group agreed that present law is confusing and in need of revision.

Existing law, in the second and third sentence of ORS 419A.255(2) also provides both inspection and copy rights of this file to school superintendents and their designees (for delinquency cases if youth offender resides in district), service providers, and attorneys. The wording of the third sentence is vague as to which attorneys are covered in these sentences but "attorneys of record" for the child, ward, youth or youth offender are clearly also provided in the first sentence. Practice is for all attorneys to get copies.

In the end, the work group compromised and agreed upon the list provided in subsection (2)(b) to finally address the inspection rights ambiguities. The significant change is that the bill clearly provides that now all parents, guardians, and guardian ad litems for parents in juvenile court proceedings will have inspection rights to the supplemental confidential file--- with the qualification that for delinquency proceedings they will need either the consent of the youth/youth offender or authorization of the court. This could be no change in practice in some counties but a change in others. Depending on how one reads present law, the following persons may have been added to the list of persons given inspection rights to the newly labeled "supplemental confidential file":

1. Parent or a guardian of the child or ward in a dependency case (Section 3(2)(b)(B))

   The Work Group had no objection to clearly providing parents or guardians inspection rights to this file in dependency cases. This tends to be practice today in most counties, and due process may require this approach. If there are problems with access, the court and parties have other tools, namely protective orders that can be used to restrict access.

2. Guardian ad litem for the parent of a child or ward in a dependency case (Section 3(2)(b)(C))

   The provision for guardian ad litems for parents is a new addition, but an important addition as a guardian ad litem is a representative of the parent. ORS 419B.234(2). The court may appoint a guardian ad litem only if a parent lacks substantial capacity either to understand the nature and consequences of the court proceeding or give direction and assistance to the parent's attorney due to the parent's mental or physical disability or impairment. ORS 419B.231(2). As explained earlier in the report, the work group concluded that a guardian ad litem should be afforded the same access rights to juvenile court records that a parent is provided.

3. Parent or guardian of the youth or youth offender in a delinquency case (if the youth or youth offender consents or the court authorizes inspection) (Section 3(2)(b)(D))

   The Work Group found that restricted access was necessary in delinquency cases because a parent or guardian is not a party in a delinquency proceeding until the dispositional stage. In addition, the OYA stressed how progress can be seriously impeded if information is shared with parents, family members, etc. To allow unrestricted access would also be a significant change in present practice. OYA and the juvenile departments, with the Attorney General's support in public records opinions,[8] have long held that parents and others do not have inspection rights to this file in delinquency cases under existing ORS 419A.255. See also ORS 192.496(3) (providing that records of a person who is or has been in custody or under the lawful supervision of a state agency, a court or a unit of local government, are exempt from disclosure to the extent disclosure would interfere with rehabilitation). That is, they contend that today only if the youth

[8] See e.g, Oregon Attorney General Public Records Order, June 28, 1996, issued to Leslie L. Zaitz, Publisher of Keizertimes, at 5-6.

or youth offender consents or the court otherwise permits access may parents or guardians inspect this file. The phrase "except at the request of the child, ward, youth or youth offender" in present ORS 419A.255(2) provides support to OYA's practice of requiring the youth offender's consent or court approval before disclosure of "history and prognosis" reports and material. OYA and the juvenile departments were supportive of clarifying this issue and Section 3(2)(b)(D) is intended to simply codify the practice that is working today. This provision is also consistent with the bill's Section 5 which provides access rules for records created or maintained by or on behalf of OYA and the juvenile department.

4. Guardian ad litem for the parent of the youth or youth offender in a delinquency case (if the youth or youth offender provides consent or the court authorizes inspection) (Section 3(2)(b)(E))

   Again, with this provision in the bill, the Work Group recommends affording guardian ad litems the same rights as parents. This addition is consistent with that principle.

5. Attorneys or prospective appellate attorneys for listed persons (Section 3(2)(b)(G))

   This new paragraph is meant to only clarify the law. The Work Group did not believe that substantive changes were made generally by this paragraph's addition as attorneys in practice always receive copies; however, there is a small addition with Section 3(2)(b)(G)(vi). Because guardians ad litem were added in Section 3(2)(b)(E), it was logical to also add attorneys of guardians ad litem to the list with (vi). Also, as discussed earlier in this report, it is necessary to cover prospective appellate attorneys when attorneys are included.

6. Court Appointed Special Advocates (CASAs) (Section 3(2)(b)(J))

   Due to the nature of a CASA's duties and the explicit record access already provided in 419A.170, the work group concluded that CASAs should be included within the list of persons entitled to both inspect and obtain copies of the record of the case in this section of the bill. If present law omits them (depends on how one interprets present ORS 419A.255(2)), it seems to be a mistake. Providing copy rights is also consistent with present practice.

7. Any other person allowed by the court (Section 3(2)(b)(O))

   This is a catch-all provision that gives the court discretion to allow inspection rights to others. Some believe the court already has this discretion.

**SUPPLEMENTAL CONFIDENTIAL FILE--COPIES**

Subsection (2)(d) provides a list of who shall be entitled to copies of the supplemental confidential file. Presently, ORS 419A.255(2) and ORS 419A.257(1) provide copy rights to service providers, superintendents (and their designee in delinquency case if youth offender resides in district), attorneys, district attorneys or assistant attorneys, the juvenile department, DHS, and OYA.

This bill adds the following persons to the list of persons given copy rights to the newly labeled "supplemental confidential file":

1. The judge of the juvenile court and those acting under the judge's direction (Section 3(2)(d)(A))

   Again, the work group felt this was axiomatic but adding courts dispels any questions.

2. Court Appointed Special Advocates (CASAs) (Section 3(2)(d)(I))

   This is an addition to ORS 419A.255, but in the CASA statutes it seems CASAs have copy rights already. See ORS 419A.170. Thus, this addition resolves any conflict.

3. Any other person allowed by the court (Section 3(2)(d)(J))

   This is a catch-all that gives the court discretion to allow access to others. Some believe the court already as this discretion. See e.g. ORS 419A.255(3).

In short, the persons entitled to a copy of the supplemental confidential file continue to be necessarily limited.

Subsection (2)(e) of Section 3 is just renumbered. It maintains existing law but makes conforming changes and also deletes the requirement to "return" copies to the court and instead requires service providers, school superintendents and designees to "destroy" copies of reports or materials obtained in the supplemental confidential file. Returning copies doesn't presently work well, most do not comply, and return of electronic records is not feasible.

Subsection (3) maintains present law but makes conforming changes for terms and cross-references. This subsection is written in the passive and is confusing. Some attorneys and judges read subsection (3) to restrict the court on who the court can allow copies to be provided but others read it to restrict redisclosures by persons who receive copies from the court. This section remains ambiguous and unamended as the work group could not agree on redisclosure rules.

Present law's subsection (4) is deleted and moved to ORS 419A.256 in Section 4 of the bill to consolidate the juvenile court transcript provisions.

New subsection (4)(a) provides some redisclosure and use prohibitions and restrictions. This provision is moved over from current law, presently located in ORS 419A.257(3) as ORS 419A.257 is repealed by the bill in Section 5. No substantive changes are intended. It restricts usage and disclosure of records if obtained through the court, for certain identified persons.

Subsection (4)(b) is moved over from present law in ORS 419A.257(2). It continues to permit sharing of records between permitted persons. The new "person" term is substituted for "agency or person" for clarity.

Subsection (5)(a) to (c) is renumbered for organizational purposes; this provision is found in present law at ORS 419A.255(7)(a) to (c). The provision is substantively the same; the bill's defined terms are substituted as necessary.

Subsection (6) is renumbered because of the insertions before it. One change is made to add a cross reference to subsection (8). The bill's subsection (6) continues to list information (as opposed to records) that is not confidential in juvenile delinquency cases. In present law it is unclear who shall disclose this information—most often to the press. Practice is that it is the juvenile department that prepares the information and releases it. The revised (8) now clarifies that the court or the juvenile department may disclose this information.

Subsection (7) is renumbered because of the insertions before it. One change is made to add a cross reference to subsection (8). The bill's subsection (7) lists more information (as opposed to records) that is not confidential in juvenile delinquency cases; the information in this section has some timing restrictions in order to protect victims and not harm investigations. In present law it is unclear who shall disclose this information—most often to the press. Practice is that it is the juvenile department that prepares the information and releases it. The revised (8) now clarifies that the court or the juvenile department may disclose this information, unless otherwise directed by the court.

Present law's subsection (7)(a) to (c) is deleted in the bill here as it is renumbered and moved to subsection (5)(a) to (c).

Present law's subsection (8) is revised to permit both the juvenile court and the juvenile department to disclose the information under subsections (6) and (7) of this section. Since the court maintains the records that contain the necessary information, the work group agreed it was proper for the court to also have authority to disclose this information.

Subsection (9) is new to ORS 419A.255, but it is existing law that is simply moved over from ORS 419A.253(3). It is a provision that assures the appellate court's access to the juvenile court records when reviewing a juvenile court order or judgment. The Work Group recommended moving it for organizational reasons.

Subsections (10) to (12) are maintained verbatim but simply are renumbered because of the inserts above them.

**Section 4**

This section primarily moves ORS 419A.255(4) over to ORS 419A.256 as a new subsection (2) so as to assemble the transcript provisions all in the same provision. Thus, with this bill, subsection (1) provides that once prepared, a transcript of a juvenile court proceeding becomes a part of the record of the case and thus is subject to the "record of the case" rules described above for inspection and copying. Then, subsection (2) goes on to provide that if the court finds that the child, ward, youth, or youth offender or parent or guardian of the child, ward, youth or youth offender is without financial means to purchase the transcript, the court shall order payment in the manner used in criminal cases. Subsection (3) continues to provide inspection rights of the audio, video or other recording of a juvenile court proceeding to listed persons but not copy rights. Subsection (3) is revised to reference the new list of persons in ORS 419A.255(1)(b)(A) to (P) who have inspection rights to the record of the case instead of keeping the present list. The

present list in subsection (3) omits many persons, including the state agencies, the district attorney, and juvenile departments, etc. by mistake.

Some work group members renewed their objection to not expressly providing for unrestricted rights to copies of the record of the case to parties (see Section 3(1)(c)(B) providing limited rights) here because transcripts are a part of the record of the case. They maintained that having a copy of the transcript is required for parties under the Due Process Clause—particularly unrepresented parties. As discussed above in Section 3, the Work Group could not reach consensus on this issue.

**Section 5**

This section repeals existing ORS 419A.257. The substance of that section instead has been improved and folded into Section ORS 419A.255 (Section 3). The statute was moved because it had always worked in conjunction with 419A.255 anyway but was unnecessarily confusing. The ORS number, ORS 419A.257, will now be used to address access rules regarding certain OYA and juvenile department records. The provision will now provide that a juvenile's "history and prognosis" records that are created or maintained by or on behalf of the Oregon Youth Authority or the juvenile department are privileged and shall be withheld from public inspection. The juvenile may consent or the court may authorize disclosure of such records. This section is derived from current practice and present ORS 419A.255 which makes "history and prognosis" records confidential and privileged. Since ORS 419A.255, as amended by the bill, will now focus on court records, OYA and the juvenile department needed this statutory provision addressing their own history and prognosis records that may or may not also be in the court files. This Section provides in subsection (2) that OYA and the juvenile department may disclose records to listed persons. This list tracks the same list in ORS 419A.255. Furthermore, the section parallels present ORS 419A.257. Subsection (3) of Section 5 requires persons to preserve the confidentiality of materials obtained under this section. That is, this provision prohibits unauthorized redisclosure. This language is duplicated from present ORS 419A.255(2). Subsection (4) also restricts disclosure but allows disclosure for special education purposes and other limited purposes. Wording is duplicated from ORS 419A.255(3) as the restrictions and exceptions are to be the same. Note that parents are not included in the list with access, but attorneys for parents may have access. This is line with current practice as parents are not parties in delinquency cases. Subsection (5) of Section 5 allows disclosure when there is an emergency, i.e. a clear and immediate danger to another or society. Protections and restrictions on the use of such emergency disclosures are also provided in subsection (5). This subsection is modeled on ORS 419A.255(7) of existing law as the immediate danger exception is to be the same. In short, the access rules regarding "history and prognosis" records created or maintained by or on behalf of OYA or the juvenile department are not intended to be changed by this Section. Practice should not change. Instead, the authority for the access rules, the restrictions, and exceptions are intended to be clearer as the OYA and the juvenile department will now have a stand-alone provision that is not interwoven with the juvenile court's records provision.

**Section 6**

This section amends the guardianship report requirements, found in ORS 419B.367 of the juvenile dependency code. When a juvenile court appoints a guardian for a ward, the court requires the guardian to file a written report with the court roughly every 30 days. The amendment to subsection (3) makes it clear that the guardianship report itself is to be maintained in the juvenile court's supplemental confidential file under 419A.255(2). In addition, subsection (3) requires the filing of a new "summary sheet" at the time of filing the guardianship report. The "summary sheet" must simply identify that a report was filed and include both the date of submission of the report as well as the name of the person who submitted the report. The summary sheet shall be maintained as part of the record of the case under ORS 419A.255(1). Existing law has been ambiguous as to whether the guardianship report shall be filed in record of the case or the "social file"—it just noted that it must be made a part of the court file. Practice has varied in counties but the work group agreed that the best practice is to have it filed in the more restricted supplemental confidential file as guardianship reports contain detailed information regarding the nature of visitations and contacts between relatives, including siblings (other minors), but to have the fact of the filing -- reflected in the summary -- maintained as part of the record in the case. The ambiguous language ("cause the report to become part of the juvenile court file") has been deleted in this section of the bill at page 8, line 13. Renumbering is also done to accommodate inserts to this section.

**Sections 7-10**

These sections largely make conforming cross-reference amendments to address the renumbering of ORS 419A.255 and the repeal of ORS 419A.257. Section 8 also amends ORS 419A.200 by adding a new paragraph to (10) to address an omission at the appellate courts. Audio and video recordings of oral proceedings on appeal will be treated in the same manner as such recordings at the trial court in Section 4. See ORS 419A.256.

**Section 11**

This section provides that all sections of the bill apply to proceedings commenced on or after the effective date of the Act. That is, there are no retroactive provisions and there is no emergency clause with this bill.

**Miscellaneous**

The work Group considered adding custodial parent to the list of persons with inspection access to the record of the case and the supplemental confidential file. Such persons are not the legal parent or guardian and thus have no access. If the party statutes are amended during session, the group agreed that a conforming change should be made in this bill.

## VI. Conclusion

This bill amends juvenile court records statutes in ORS Chapter 419A and creates new provisions; the provisions apply to records in both juvenile dependency and delinquency proceedings. As Commissioner Julie McFarlane said during the Work Group's last meeting,

"access to records depends on what door you knock on. If you knock on DHS's door, their record statutes apply, if you knock on the court's door, these sections will apply." With this bill the two juvenile record files are better defined in new Section 1 of the bill—they are now referred to as "the record of the case" and the "supplemental confidential file." Both files remain confidential and are to be withheld from the public. The bill more clearly enumerates the persons who, however, are entitled to inspection rights and copy rights for each file. The access rules for juvenile court records are complex, have been confusing, and have long had unintended omissions. In addition, some of the present provisions no longer reflect practice or good policy. This bill helps shore up some of these shortcomings and will assist as the courts transition to an electronic court environment. Some issues remain unresolved and will require further work in sessions to come. The bill, SB 622, is a consensus product that should be adopted to improve this area of law.

**Note:** The Senate Judiciary Committee adopted the -2 amendment. That amendment replaced the bill as the Work Group had not finished its work and recommendations before the bill was filed. The -2 amendment is reflected in the descriptions provided by this report as it contains the Work Group's and Commission's collective recommendations. The House Committee on Judiciary adopted two amendments during session, the -10 and -11. Youth, Rights and Justice (YRJ) presented the -10 amendment. It simply delays the effective date of the catch-all phrase, "any other persons allowed by the court" that is used several times in Section 3 of the bill. That phrase gives explicit authority to judges to release juvenile court records to others. The delay was requested to allow the appellate courts more time to rule on pending litigation involving YRJ and the Oregonian regarding access of court records by others. The Oregon Judicial Department presented the -11 amendment. That amendment adds a cross reference to ORS 7.120 to make it clear that the courts need not keep exhibits maintained by parties but that those exhibits are still a part of the record of the case. This is present practice.

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# Adoption Records

# Work Group Report

# SB 623

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Approved by the Oregon Law Commission

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## I. Introduction

A child may only have one set of legal parents at a time. An adoption proceeding is the court proceeding by which one new parent or set of new parents are legally substituted for a former parent or set of parents. In an adoption proceeding, a new prospective parent petitions the court for a judgment holding that the minor child is adopted and by all legal intents and purposes, the same as if born to the new parent. Adoption procedure essentially requires two steps—the termination of one parent-child relationship and the creation of a new one. The different types and circumstances of each adoption make the law complex:

> "Adoptions may be characterized according to the kind of individuals being adopted-- minors or adults, born in this country or foreign born, with or without special needs, with or without siblings. They may also be characterized according to the kind of individuals who are adopting -- married couples, single individuals, stepparents, individuals previously related or unrelated to an adoptee. Another way to characterize adoptions is according to the type of placement -- direct placement by a birth parent with an adoptive parent selected by the birth parent with or without the assistance of a lawyer or an agency, or placement by a public or private agency that has acquired custody of a minor from a birth parent through a voluntary relinquishment or an involuntary termination of parental rights. A fourth way to characterize adoptions is by the nature of the proceeding -- contested or uncontested."[1]

With this complexity in the law, the court records filed in adoption cases also necessarily vary significantly. Oregon's statutes prescribing adoption case filing requirements and regulating access to the adoption court file have not been reviewed and revised for decades. Technology and the public's perception of adoption have also been changing dramatically over this time. This law reform project recommends amendments to Oregon's adoption laws to improve filing requirements and court file access rules as well as make a variety of needed procedural and substantive adoption clarifications and changes.

[1] Uniform Adoption Act Report, National Conference of Commissioners on Uniform State Laws, at 2 (1994).

## II. Background Information

### Oregon Adoption Law Sources and History

Adoption was not recognized at common law. Thus, adoption proceedings in Oregon are exclusively statutory. Oregon's adoption statutes are found primarily in a series in ORS Chapter 109. ORS 109.305 to ORS 109.410 provides the adoption case filing requirements, as well as the substantive and procedural rules. The state's Voluntary Adoption Registry follows this series at ORS 109.425 to ORS 109.507. The Voluntary Adoption Registry was created in 1983 to assist adoptees, birth parents, biological siblings, and other eligible persons in learning more about an adoption that was finalized in Oregon. DHS's Adoption Services Unit is responsible for maintaining records on all adoptions going back to the early 1920's. Adoptees become eligible to use the registry when they are adults, i.e. at age 18. DHS and licensed adoption agencies maintain and operate the registry. See ORS 109.450. When there is a match, information is exchanged. ORS Chapter 418 regulates adoption agencies and provides for the care and placement of dependent children. Namely, the Department of Human Services is provided power to protect and care for homeless, dependent, and neglected children, and is given administrative authority for adoptions in Oregon. Lastly, ORS Chapter 419B provides statutory provisions relating to termination of parental rights and provides that after terminating the rights of a parent, the court may place the minor in the legal custody of a public or private institution or agency that is authorized to consent to the adoption of the minor.

In the November 1998 General Election, Ballot Measure 58, a citizen's initiative was passed by Oregon voters. The measure restored the right of adoptees who were born in Oregon to access their original birth certificates at age 21. (Adult adoptees had the right to access their original birth certificates under previous Oregon law from 1941 to 1957.) The measure was immediately challenged by several birth mothers who had put children up for adoption, which delayed instituting the measure for a year and a half. The courts upheld the legality and constitutionality of the measure and the measure remains codified in the Vital Statistics chapter of Oregon's statutes at ORS 432.240(1).[2] See Does 1-7 v. State, 164 Or. App. 543 (1999), rev. den. 330 Or. 138 (2000).

[2] "Upon receipt of a written application to the state registrar, any adopted person 21 years of age and older born in the State of Oregon shall be issued a certified copy of his/her unaltered, original and unamended certificate of birth in the custody of the state registrar, with procedures, filing fees, and waiting periods identical to those imposed upon nonadopted citizens of the State of Oregon pursuant to ORS 432.121 and 432.146. Contains no exceptions."

**History of the Project:**

In July 2010, the Oregon Judicial Department (OJD) referred review of ORS 7.211 to the Oregon Law Commission. ORS 7.211 is the main statute relating to adoption case court records; it provides that adoption records are to be sealed and cannot be accessed except pursuant to court order. Specifically, OJD and the State Court Administrator asked the Commission to consider whether to permit limited access to adoption files without a court order. That consideration "would include circumstances in which party access may be appropriate; whether lawyer access should be permitted, including to facilitate access on appeal; and whether, regarding access by parties or lawyers of record, a distinction should be made between pleadings and reports." The request noted that consideration would require a detailed study of the various contextual circumstances in adoption cases.

OJD's referral came from recommendations of a Law and Policy Work Group created as part of OJD's Oregon eCourt Program. That Work Group had several smaller groups focusing on various substantive law areas; the Domestic Relations Group identified the adoption court file issue. As part of the Oregon eCourt Program, the Oregon circuit courts are transitioning to an updated case management system, electronic documents and case files, electronic filing, and, eventually, some remote electronic access by external system users to certain case file documents. The new case management system and electronic document repository has been installed as of this writing in three judicial districts, with pilot electronic filing operating in one district. Installation in several additional districts, together with full electronic filing capabilities in those districts, is planned for 2013; the remaining courts will follow on a rolling schedule through 2016. The remote electronic access component remains in the planning stages; in general, OJD has worked to verify the access rules for various court documents in various case types, so that system programming is not inconsistent with state law.

In December 2011, the Oregon Law Commission accepted OJD's request and approved formation of an Adoption Work Group to address adoption records as well as other substantive adoption issues. The records issues were to be addressed in time for recommendations to be presented to the 2013 Legislative Assembly to provide clarity in the law to later assist with the statewide Oregon eCourt transitions. The Work Group was authorized to continue after the 2013 session to address other substantive issues for recommendation to the 2014 and/or 2015 legislative sessions. The Work Group was formed in September 2012 and included members with a

variety of viewpoints and adoption experience.[3] The Work Group met five times from September 2012 to February 2013.

## III. Statement of the Problem

Current Oregon statutes can be read to preclude judges and staff from reviewing a court adoption file without a court order. In addition, parties in an adoption case and their lawyers of record clearly cannot review their own court case file, absent a court order, due to ORS 7.211. Such preclusions are inefficient and incompatible with normal court procedure in pending cases (pre-judgment). As circuit courts move to electronic court files, this inefficiency will be even more apparent and cumbersome. Certain reports and information, however, should continue to be restricted in certain circumstances; clear rules and procedures are needed to direct courts, clerks, parties, and lawyers. Care must be taken to codify access rules that address safety and privacy concerns in adoption cases and continue to appropriately restrict certain documents and information. Lastly, post-judgment court file access restrictions in present law unnecessarily impede appeals and continued adoption services. In short, appropriate access to an adoption court file should be permitted in statute; present law does not provide access short of a court order.

[3] Work Group members included the Chair and Oregon Law Commissioner, John DiLorenzo, Jr. There were members representing the various interests of the State of Oregon: Judge Rita Cobb, Washington Co. Circuit Court; Cynthia Bidnick, Oregon Judicial Department; Carmen Brady-Wright, Oregon Dept. of Justice; Caroline Burnell, Oregon Dept. of Human Services; Lois Day, Oregon Dept. of Human Services; Lisa Norris-Lampe, Oregon Supreme Court; Becky Osborne, Oregon Judicial Dept.; Kathy Prouty, Oregon Dept. of Human Services; Gail Schelle, Oregon Dept. Of Human Services and Joanne Southey, Oregon Dept. of Justice. Membership also included the following private attorneys: John Chally, Bouneff & Chally; Jane Edwards; Whitney Hill, Youth, Rights & Justice; Susan Moffet, Dexter & Moffet; Robin Pope, Attorney at Law and John Wittwer, John Wittwer Lawyers. The following members represented Adoption Agency/Services: Shari Levine, Open Adoption and Family Services; Robin Neal, Catholic Charities, Pregnancy Support and Adoption Services; David Slansky, Journeys of the Heart. The Work Group also included the following members of the public: Melissa Busch; Ansley J. Dennison Flores; Michele Greco and David Tilchin. The following people followed the Work Group as interested parties: Rep. Margaret Doherty, Oregon State Representative; Susan Grabe, Oregon State Bar; Professor Leslie Harris, Univ. of Oregon School of Law; Sunny Moore, Public Participant; Ron Morgan, Public Participant; David Nebel, Oregon State Bar; Mickey Serice, Dept. of Human Services and Tamera Slack, Public Participant. The public participants included adoptees, adoptive parents, and birth parents. Staff included MaeLee Browning, Willamette University College of Law, law clerk; Professor Jeff Dobbins, Oregon Law Commission; Wendy Johnson, Oregon Law Commission and BeaLisa Sydlik, Deputy Legislative Counsel.

## IV. Objectives of the Proposal

The Work Group recommends SB 623 to the 2013 Legislative Assembly. The bill provides clear rules for accessing adoption case court records. To accomplish this objective, ORS 7.211 is repealed and replaced with a new section – Section 6 of the proposed bill – to provide revised court record access rules. This new section will be placed in the ORS Chapter 109 adoption law series. (See Section 3 making the section part of the series.) This new section continues the practice of sealing adoption case court records from the general public, but spells out court, petitioner, DHS, adoptee, and consenting persons (usually birth parents) access rules. A court order will no longer always be necessary to inspect and copy records in all circumstances as new exceptions are provided in Section 6. This new section will provide clarity, efficiency, and consistency for the courts, parties, and practitioners. When a court order is required for access, a person may continue to file a motion with the court requesting to inspect and copy sealed records.

## V. Review of Legal Solutions Existing or Proposed Elsewhere

The Work Group reviewed and discussed existing practice in Oregon and worked to codify best practices. The Oregon State Bar's Family Law CLE[4] contains an Adoption Chapter that was reviewed extensively by staff. In addition, the Work Group considered portions of the Uniform Adoption Act of 1994 proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL).

## VI. The Proposal

The Work Group's recommendations are reflected in SB 623. A section-by-section explanation of the bill and recommendations follows:

**Section 1**

This section amends ORS 109.304, the definitions section for the adoption series in ORS Chapter 109. The definition of "home study" is revised to make it clear that home studies can be completed by DHS, Oregon licenses adoption agencies, adoption agencies in other states, and other public agencies. The revised definition also is consistent with DHS' administrative rules. See OAR 413-120-0010(2). A new defined phrase was added that is used throughout the bill, "records, papers and files." This new phrase is defined to capture all documents, writings, information, exhibits,

[4] Oregon State Bar Family Law CLE, Volume 3, Chapter 17: Adoption; Assisted Reproduction, John Chally and Sandra L. Hodgson, 2002 and 2008 supp.

and other filings in the record of the case for an adoption proceeding. The main documents in the record are the Adoption Summary and Segregated Information Statement and exhibits that accompany the Statement as well as the petition and exhibits attached to the petition. Those filings are expressly mentioned in the definition as are motions and the judgment.

**Section 2**
This section amends ORS 109.309. This statute will now be focused on jurisdiction, venue, and the basic filing requirements for an adoption.

Subsection (4) is deleted because it relates to adult adoptions and the rest of the statute is focused on adoption of a minor child. The provision is also unneeded as it is repeated in ORS 109.329, which is the adult adoption provision. Existing subsections (6) and (7) are deleted from this statute and instead these detailed petition requirements are folded into a new separate provision in Section 4 that lists the petition requirements. The new subsection (6) refers to the petition requirements described in Section 4. The requirement for a home study that used to be in ORS 109.309(6)(a)(C) now appears in amended ORS 109.309(7); the authority to waive the home study is also clarified and moved from (6)(a) to new (7). Subsection (8) is amended to clarify and consolidate the placement report requirements; subsection (6)(c) is moved over to (8)(a) and ORS 109.304(3) is moved over to (8)(c). New subsection (10) is moved over from existing (7)(d). New subsection (12) lists in detail the filings that are required before a court may grant a judgment of adoption rather than simply listing cross-references. Paragraphs in the new (13) are deleted in this provision and instead moved over to the petition provision in Section 4(1)(h). Thus, required Indian Child Welfare Act statements must be included within the adoption petition; this move is in conformity with present practice.

**Section 3**
This section simply makes the new sections of law, Sections 4 to 6, part of the adoption series in ORS Chapter 109.

**Section 4**
This new section of law consolidates and organizes the requirements regarding the petition for an adoption. This new section will help make court processing functions easier for court clerks as the petition and the attachments to the petition will now be consistent for registry entry, and separate documents will be minimized. Presently many statements and documents are filed separately. While not a form, this section will make petitions more uniform. The bill requires notarization of the petition as this often is done in practice but more importantly the UCCJEA (Uniform Child

Custody Jurisdiction And Enforcement Act) requires a verified statement or affidavit. Oregon and 49 other states have adopted the UCCJEA. See ORS 109.701 et seq. The work group wanted to avoid repetition of materials and information and thus the notarization is required.

Subsection (1) of this section lists the content requirements for a petition for adoption. Subsection (2) lists the requests that must be made to the court in the petition (i.e. these items are placed in the prayer for relief section of the petition). Subsection (3) lists the exhibits that must be attached to the petition. Subsection (4) provides that the petition and documents attached as exhibits to the petition are confidential. Subsection (5) provides the service requirements for the petition for adoption, exhibits, and materials required under new Section 5. DHS must be served with copies of the petition, the Adoption Summary and Segregated Information Statement, and the respective exhibits attached to them. In the case of an adoption in which one of the child's biological or adoptive parents retains parental rights, additional persons may also require service. The text of subsection (5) is taken largely from language in ORS 109.309(7) that was simply moved over to consolidate the petition provisions in this new section.

In writing Section 4, the Work Group and staff reviewed the Family Law CLE Adoption Chapter, focusing on the provided forms and sample filings. The Work Group also looked at forms and samples of documents provided by attorneys in the Work Group. The requirements codified in this section thus reflect accepted practice for items to include in the petition among most adoption attorneys. Tweaks were made to existing law to provide consistency in terms and provide best practice.

Rather than have parties file many different forms, exhibits, and statements at different times with the court, with this bill section the work group has consolidated most of the adoption filing requirements into the petition, thereby minimizing the register activity required by the clerk. Prior to this bill, the law has been unclear as to what must be in the actual petition and what just must be provided at the same time the petition was filed. See e.g. ORS 109.309(6)(a) (existing law providing that petitioner "shall also file at the time of filing the petition" listed items). Section 4 contains clear cross-references to various statement and document requirements that have long existed throughout Oregon's adoption law series; they are now organized in a list of requirements that must be provided to the court in the actual petition or as an attachment to the petition.

A select group of requirements and information, however, expressly shall NOT be included in the petition or attached to the petition. Instead, the group recommends

segregating the most personal and confidential required information and exhibits relating to the birth and adoptive parents and the adoptee be filed with the court via a new Adoption Summary and Segregated Information Statement and as attachments to the Statement. Section 5 provides for those requirements. The goal was to provide an organizational tool for parties, DHS, and the courts to use, to provide both a summary in one location of the key information in the case as well a segregated packet of the most sensitive information in the case. The Section 5 segregated material should be given the most protection and when deciding motions to grant access to adoption records; courts should be particularly circumspect with allowing access to Section 5 segregated material. In addition, Section 6(5) provides that an individual whose consent for the adoption is required under ORS 109.312 (most often this is the birth parent), should be granted access to the court file except for good cause. However, Section 6(5) provides that such individuals shall be excluded from inspecting and copying segregated records provided for in Section 5.

**Section 5**

This section provides that when an adoption petition is filed, a separate Adoption Summary and Segregated Information Statement (ASSIS) shall also be filed concurrently. This new statement is akin to the "Facesheet" document that is already required to be filed with Oregon's Department of Human Services. See DHS Form 213. It is also similar to the CIF (confidential information form) that is a segregated form required in Oregon domestic relations cases. See UTCR 2.130. Petitioners have not been required to file the Facesheet with the court (although some do), but the group determined that such a summary document would be helpful to all, and would segregate names and contact information of the parties that may not be included in the petition and can be highly confidential—particularly in closed adoption proceedings. Much of this information is presently required in the petition. See ORS 109.309(6). With the reworking of the petition requirements and this new Statement, a great deal of duplication is avoided. In addition, with this section, other more sensitive adoption exhibits must now be attached to the ASSIS as segregated documents, rather than filed with the petition or filed separately. In short, the Adoption Summary and Segregated Information Statement with the required attached exhibits described in this section will segregate the most sensitive adoption information and documents and provide an organizational tool to court clerks, the court, and the parties to control inspection and copy access to the court record.

The documents and information required by this section were viewed by the work group as the most sensitive and in need of the most restricted access. In addition to the summary information that is listed out in requirements of subsection (1), three exhibits must be attached to the summary. The three exhibits are listed in subsection

(2) and include the following: a) a home study or written evidence regarding a home study; b) the adoption report (this is the form used by the Center for Health Statistics to create a new birth certificate); and c) the medical history. The group discussed confidentiality needs at length, including the right to information and the needs of safety and privacy. The group determined that these three required exhibits (which are important adoption requirements today), should be handled differently than other records as they include financial information, detailed family background information (including information regarding third parties), medical history (including psychological, social, and physical), and contact information. Section 6 provides the inspection and copying access rules; specified persons are excluded from access to the information contained in the ASSIS and information attached to the ASSIS (for cases filed before the Act, the same documents are also excluded). In addition, courts continue to have discretion to provide court orders allowing access, but the segregated ASSIS provides the court with a means of permitting access to other materials excluding the ASSIS information and attachments, if the court thinks that such limited disclosure appropriate.

Subsection (3) provides that a home study need not be attached if the requirement has been waived. This in conformance with existing law; the home study requirements are now detailed in Section 2(7) of the bill. Note that if a home study requirement is not waived, the home study itself is never required to be attached. This has been existing law but some courts have nonetheless required the actual home study. The bill strives to clear up this issue by consistently using the phrase “home study or written evidence that a home study has been approved” to describe the requirement. The “written evidence” generally is a summary, noting the date of the study, the findings, etc.

Subsection (4) requires the petitioner to update the ASSIS when information changes or becomes known.

Lastly, subsection (5) provides that the ASSIS and exhibits submitted with it are confidential and may not otherwise be inspected or copied except as provided in the two enumerated adoption law statute series. The main exceptions are enumerated in Section 6. In addition, subsection (5) provides that the ASSIS and exhibits submitted with it must be segregated in the court record. The bill does not provide for how this segregation will be done but the work group's understanding is that the Oregon eCourt Program has tools for designating documents as subject to heightened access restrictions.

**Section 6**

This section begins in (1) with a statement of existing law (brought over from ORS 7.211) that requires that court records in adoption cases shall be maintained separately from the general records of the court. As explained in the "History of the Project" section of this report, the courts are transitioning to a new case management system as part of the Oregon eCourt program. Adoption records are given heightened security measures in the management system and thus will continue to be maintained "separately" from the general records – albeit in an electronic manner. The bill does not further define this requirement, but instead provides flexibility to OJD to develop its case management system. Subsection (2) goes on continue to provide that all records in adoption cases are to be "sealed." Existing law, in ORS 7.211(1) (which will be repealed with this bill), provides that the records are sealed at the time of "entry of the judgment." Current ORS 7.211(1) also inferentially provides that adoption records are confidential both pre- and post-judgment as it has prohibited the clerk or court administrator from disclosing to any person, without a court order, "any information" in the records. Section 6(2) fixes any ambiguity by providing that all records that are filed with the court, "both prior to entry of judgment and after entry of judgment" are "to be sealed." The subsection provides that records shall not be unsealed except as otherwise provided in the main adoption law series[5] (which includes the Section 6 provisions) or the adoption registry series.[6] The main exceptions to the court order requirement, which are new, follow in subsections (3) to (8) of Section 6.

The group discussed at length who should have access to court adoption file records and what access they should have. In developing rule recommendations, the group resorted to drawing out a matrix with the following individuals/entities: adoptive parents (petitioners), attorneys of record for the petitioners, consenting persons (usually birth parents), DHS, judge/ court staff, the minor adoptee, the adoptee once reaching age of majority, and other persons (relatives, public, etc.).

In the end, the group recommended that the judge/court staff, petitioners, attorneys of record for the petitioners, and DHS would have inspection and copy rights to the full record of an adoption case without a court order at all times—i.e. prior to entry of judgment and after entry of judgment. The group found no reason to restrict access to these individuals and entities. This recommendation is reflected in Section 6(3) and

[5] ORS 109.305 to ORS 109.410.

[66] ORS 109.425 to ORS 109.507.

(4). This does reflect a policy change in Oregon, i.e., to not require a court order for such access. However, in practice, these individuals and entities all are provided access to the court file—currently, it just takes extra time and effort.

The group recommends that the minor child in the adoption proceeding (adoptee) also have access to the court file without a court order when they have attained eighteen years of age. See Section 6(4)(b). The group provided one main restriction—that the adoptee would not have access to the home study or evidence of a home study, which is one of the attachments to the ASSIS—except upon motion and order of the court with good cause. The group reasoned that the home study has particularly sensitive information about the adoptive parents, other relatives, finances, etc. To require disclosure of that information could be chilling to future adoptive parents. If an adoptee wants access to court records from their adoption proceeding, present law and practice requires adoptees to file a motion with the court requesting access to their file pursuant to ORS 7.211; some courts routinely allow inspection and copying of the file by granting the court order, while others do not. ORS 7.211 provides no real direction to the courts to make their determinations; instead, judges have full discretion. This leads to inconsistency in practice and consistency is needed. The group recommended that the statutes should provide clear rules when possible and where not possible, judicial discretion should be tempered with more guidance and standards for courts to follow when determining motions. Presently, judges generally review the file before deciding on a motion for access. Judges are essentially reviewing a file to determine if there are "dangers" that the court should protect the adoptee from and if access is in the best interest of the parties. Some complain that some judges today essentially are reviewing the file to see if there is disparaging information, hurtful information, or embarrassing information that perhaps should not be disclosed to protect the adoptee. However, adoptees maintain that when they are adults they should be treated as such, and they assert that such review of their file by the courts continues to infantilize them. They assert that they can handle the information and that they have a need and a right to know their history. While not an easy decision, the work group generally agreed that while protecting a minor child adoptee is important, the role of protector is generally no longer appropriate at the age of majority and thus access should be provided automatically, with the exception of retaining judicial discretion as described regarding the home study.

The Work Group believes that requiring disclosure of records to Oregon's adoption records to adult adoptees is supported by existing Oregon law and is a logical extension of the law today. First, Oregon's Constitution provides for open courts and it militates towards providing more access to court proceedings and records. The "open courts" clause of Article I, section 10, of the Oregon Constitution provides, in

part: "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay[.]" Second, since 1983 Oregon law has allowed release of identifying information necessary for identifying a birth parent, a putative father, an adult adoptee, and an adult genetic sibling through the state's voluntary adoption registry. See ORS 109.460 and ORS 109.490. An adoptee is considered an adult that is eligible to register when they reach age 18. See ORS 109.425(4). That is, at age 18 Oregon adoptees who are matched in the registry already receive the contact information regarding their birth parents. Third, an adoptee, at age 18, has a statutory right to their genetic, social, and health history. See ORS 109.500. The disclosure of this history is presently handled by a public or private organization licensed or authorized under the laws of the state to place children for adoption. See ORS 104.500 and ORS 109.425(5)(defining agency). Indeed, ORS 109.500(2) provides that the medical history report that is disclosed may be in the form prescribed by DHS under ORS 109.342. The medical history required under ORS 109.342 is filed originally with the court. See ORS 109.342(1). It would be consistent to simply allow adoptees to get the original report filed with the court. Fourth, upon reaching age 21, ORS 432.240 provides that adoptees "shall be issued a certified copy of his/her unaltered, original and unamended certificate of birth in the custody of the state registrar." This information provides identifying information that makes it possible for adoptees to find their birth parents. Fifth, existing ORS 7.211 has long provided courts with discretion to release the adoption court file to adoptees.

The Work Group discussed whether it should recommend requiring access to the court records when the adoptee reached 18 or 21. The Work Group recognized that Ballot Measure 58 had used 21 for political reasons. The Work Group believed for policy reasons that 18 was more appropriate as the adoptees are adults at 18 and should be treated as such. In addition, it was consistent with other provisions using age 18. Thus, the bill reflects this preference. The Work Group also considered permitting adoptees to destroy or remove items in the court record at age 18—namely their medical history—but in the end decided against including such a provision.

Section 6(5) provides that after a judgment has issued in an adoption proceeding (it is final) and the minor child adoptee has attained eighteen years of age, an individual whose consent for the adoption was required may file a motion with the court to inspect and copy the adoption court record. In most cases, the person whose consent was required would have been the birth mother and if known, the birth father. If the birth parent was not living, a guardian or next of kin would often have consented. In short, this subsection provides that birth parents must file a motion with the court to access adoption case court records. This procedure is the same as that required under existing law at ORS 7.211. However, new Section 6(5)(b) goes on to provide more

direction to the court as it provides that the court shall grant the motion to inspect and copy records to these individuals for good cause shown. That is, the work group believed that the presumption in effect should be that birth parents should be allowed to inspect and copy the court file. And only for good cause should the motion be denied. The good cause standard is meant to continue to give courts discretion in granting or denying requests for access. That is, the court can find good cause (or not) based on what the requestor shows but also based on the court's review of the records and input, if any, from adoptive parents or adult adoptees, if they are provided notice. A good cause standard, coupled with the presumption, provides helpful guidance to the court that is missing in present law. The new section does exclude certain documents from inspection and copying—those most sensitive documents that are segregated in the ASSIS and provided for in Section 5. For cases filed prior to this act, the documents will not have been attached to an ASSIS. Thus, this section expressly excludes the same exhibits, namely the home study, the adoption report, and the medical history that are required by Section 5(2). Note that some will have provided the information for the medical history and signed it and thus they may be able to get a copy under new Section 6(6), described later in this report. It is primarily the home study that the group felt should not be provided. With this new procedure, among other documents, the birth parents will generally be able to inspect and copy the adoption petition, attachments to the petition and the adoption judgment.

Some adoptions are involuntary and include state action. In this situation, DHS or an out of state agency is involved with the adoption case, which is typically preceeded by a juvenile court dependency proceeding that includes the termination of parental rights or the release and surrender of parental rights for purposes of adoption under ORS 418.270. Indeed, a parent's parental rights are terminated for the purpose of freeing the minor for adoption. See ORS 419B.500. A parent's rights can be terminated by the state by agreement, or upon various court findings including: a single or recurrent incident of extreme conduct (ORS 419B.502), that the parent is unfit by reason of conduct or condition seriously detrimental to the minor (ORS 419B.504), that the parent has failed or neglected without reasonable or lawful cause to provide for the basic physical and psychological needs of the minor (ORS 419B.506), that the parent abandoned the minor (ORS 419B.508), or that the minor was conceived as the result of an act that lead to the parent's conviction for rape (ORS 419B.510). The listed grounds for termination of parental rights are serious and often involve serious criminal conduct by the parents or situations that presented serious safety issues to the minor. In these cases, upon entry of an order terminating the rights of the parent, the court generally permanently commits the minor to DHS and then DHS (rather than the birth parents) consents to the adoption of the minor. See ORS 419B.527(1)(a) (court may commit minor to institution or agency) and ORS

109.316 (DHS may consent to adoption). Alternatively, parents involved in a juvenile dependency proceeding may choose to release or surrender their parental rights to DHS for purposes of adoption. See ORS 418.270 and ORS 109.316. Largely due to safety reasons, the Work Group unanimously agreed that these DHS adoptions should be treated differently than other adoptions regarding access to the court records. To fulfill their state function, DHS needs willing persons to adopt these children; safeguards to ensure the protection of the child and the new adoptive parents are very important. That is, the group agreed that the presumption should be that identifying information should be protected and not disclosed to the birth parents. In some circumstances, where safety is not an issue, the cases may be very open from the beginning and even include continuing contact agreements. However, the default rule recommended for court records is found in the bill's Section 6(5)(c). It provides that when DHS consented or has the authority to consent to the adoption, a parent may not inspect or copy the ASSIS, exhibits attached to the ASSIS, or materials described under Section 5 (for cases prior to this Act). In addition, for records that the court permits to be disclosed, the name, address or other identifying information of any individual or entity other than the parent filing the motion contained in the records must be redacted or otherwise not disclosed. Parents in these DHS cases may file a motion with the court to inspect or copy court records not excluded. The court may grant the motion for good cause. As explained above, the good cause standard gives the court broad discretion. The court can find good cause (or not) based on the request, the records, and the input of others. In short, this provision is in step with existing law requiring a court order for inspection or copying, except that the bill specifies that for DHS adoptions, listed materials and identifying information may not be disclosed. As explained above, practice has been inconsistent in the counties and it is important to guide the courts in this area.

Section 6(6) is a new provision that provides another exception to the court order requirement for signors of records. The Work Group reasoned that if a person signed a record, paper, or document that is filed in the case, that person should be able to inspect and obtain a copy of the document, without having to get a court order. The group reasoned that in such a case, the person has necessarily seen the document before and there should not be barriers to getting another copy. The group recognized that occasionally a DHS case record may have both an adoptive parent's and birth parent's signature on the bottom of a document but the adoptive parent signs last. In such case, the DHS provision in (5)(c) governs.

Section 6(7) provides that DHS and other licensed adoption agencies may, without a court order, access, use or disclose information or records, papers, or files in the record of an adoption case that are in their possession for the purpose of providing

adoption services or the administration of child welfare services. This provision was developed due to existing problems with ORS 109.440 which can be read so restrictively as to essentially prevent DHS and adoption agencies from using records to do their legally required job. Moreover, the work group noted concerns that ORS 7.211 could be interpreted to apply to adoption records in the possession of DHS and therefore that DHS was prevented from accessing its own records, without a court order, for purposes of providing adoption services or for the administration of child welfare services. In the end, the work group also recommended repeal of ORS 109.440. See Section 7 discussion.

As discussed above, Section 6 provides rules for inspecting and copying various parts of the court record in an adoption case. These new rules provide that a court order will no longer be required by those most affected by the adoption proceeding in specified circumstances. However, if an individual or entity seeks access to inspect or copy record(s) and doesn't have express authority to access records, a court order will still be required. See Section 6(8). The existing procedure of filing a motion to inspect and copy will continue to be used. See Section 6(8). Note however, that the specified restrictions in Section 6 supersede the more general provisions of Section 6(8) due to the introductory phrase, "except as provided in this section."

The work group expressed particular concern with persons not a part of the adoption proceeding gaining access to the court's adoption records, including newspapers, employers, insurance companies, and "nosy" friends, relatives, and neighbors. Re-disclosures and the posting online of sensitive personal information were of particular concern as some documents are protected by other laws (e.g. HIPAA). Presently practice varies throughout the state—some courts allow access with court orders regarding certain persons, and others do not. The work group agreed it would be best to require notice to the affected persons in such circumstances before any disclosures were made by the court. However, more drafting and discussion is needed to make such a notice requirement procedurally function and address policy concerns. The work group will continue over the interim to address other more substantive adoption issue and will include this issue in their law reform project. The bill thus retains status quo on this issue. Courts will still need to find good cause, and it is hoped that judges will be circumspect. Indeed, the Commission notes that judges should consider contacting parties before disclosure if possible.

Section 6(9) is taken from existing law found in ORS 7.211(1) and expanded to also clearly cover DHS. In short, an adoption judgment is often needed to receive continued adoption services after the case is finished and it is important to emphasize that the clerk or court administrator shall not be prevented from certifying or

providing copies of a judgment of adoption to the petitioner, petitioner's attorney of record and DHS.

Section 6(10) is taken from ORS 7.211(2) and simply clarifies that Section 6 does not affect disclosure that is permitted under the voluntary adoption registry series at ORS 109.425 to 109.507.

Section 6(11) permits the courts to impose and collect fees for copies and services provided under this section. The courts are already reviewing adoption case files and providing copies but this section makes it clear that the court has authority to impose and collect fees. The work group recognized that the issue of court fees and how they are appropriated has been a legislative battle. Still, the work group noted that a continuous appropriation of collected fees to OJD would help offset the costs courts incur servicing requests for disclosure of adoption files.

Section 6(12) provides that when the court grants a motion to inspect, copy or disclose records, the court shall order a prohibition or limitation on re-disclosure unless good cause is shown.

Lastly, Section 6(13) gives authority to the court to establish procedures to verify the identity of those requesting access to court records before disclosure is made.

The chart below summarizes the access rules provided for in Section 6 of the bill:

| | Petitioner (e.g. adoptive parent) and Petitioner's Lawyer | Court/ court staff | DHS | Adoptee (child) | Consenting person (e.g. birth parent) | Signor of document (except if contains another's signature) | Others/ public |
|---|---|---|---|---|---|---|---|
| Prejudgment- without court order | ● | ● | ● | | | ● | |
| Post-judgment- before adoptee is 18 -without court order | ● | ● | ● | | | ● | |
| Post-judgment - adoptee is 18 or older- without court order | ● | ● | ● | ● (Excluding home study) | | ● | |
| Court order – pre or post-judgment | | | | ● | ● Presumption of access when adoptee is 18, excluding Adoption Summary and Segregation Information Statement, home study, medical history, and adoption report. DHS case exception— presumption of no identifying info provided. | | ● Good Cause Required Redisclosure prohibition or limitation required unless good cause shown |

**Section 7**

This section repeals both ORS 7.211 and ORS 109.440. ORS 7.211 is replaced by Section 6 in this bill. The Work Group determined that it was better policy to put the court records provision regarding adoption cases in the adoption series in Chapter 109 rather than have it isolated in ORS Chapter 7, which is a chapter that applies to records and files of the courts. Existing ORS 7.211 was difficult to read and highly redundant and the group recommended substantial policy changes to ORS 7.211 as well. See Section 6 discussion above. Still, some of the text of ORS 7.211 remains but it is renumbered in the revised Section 6.

The group recommended the repeal of ORS 109.440 as well—frankly because no one could articulate its purpose. The provision is focused on the protection of adoption information rather than records. It seems to say that no person or agency can share information regarding an adoption to anyone except as permitted by the voluntary registry or if permitted by court order. This is too broad. This can be read to prohibit parents from talking to their children about their own adoption. It can be read to prohibit agencies from doing their job. In short, it was unanimously viewed as unnecessary and a problem in existing law. Instead, Section 6 is the better vehicle to regulate confidentiality of records and information as well as the redisclosure of information and records.

**Section 8**

This section revises ORS 419B.529 which is a provision in the juvenile dependency code which provides for an adoption procedure known as a petitionless adoption. The procedure is permitted in limited DHS adoptions. The amendments made in (1)(a) correct existing law as it presently fails to accurately reflect the federal Indian Child Welfare Act requirements for voluntary termination of parental rights. See 25 USC sec. 1913. The amendments made in (2) ensure consistency with the Chapter 109 adoptions and how records are segregated. With this bill, petitionless adoptions will also require the filing of an Adoption Summary and Segregated Information Statement (provided for in Section 5) and require the prescribed exhibits attached to it. Practitioners, courts, and clerks should take careful note of renumbered (5). The work group heard feedback that some counties do not always separate out adoption records from juvenile court records as required by existing law. Section 8(4) is revised to make it clear that the juvenile court may enter a judgment of adoption in a petitionless adoption where the parents released and surrendered their parental rights, and thus there was no order of permanent commitment. Section 8(5) simply continues that separation requirement by referring to Section 6 instead of the repealed

ORS 7.211. Section 6(1) is taken from ORS 7.211 and it continues to provide that the clerk or court administrator "shall keep a separate record of the case for each adoption proceeding filed with the court." This continued requirement is important to ensure confidentiality and proper protection of the adoption records because juvenile records are afforded different protections and are governed by different disclosure rules.

**Section 9**
This section corrects cross reference inaccuracies in present law and makes conforming changes.

**Section 10**
This section makes Legislative Counsel form and style changes to an existing statute in the adoption series.

**Section 11**
This section modestly amends ORS 109.329, the adult adoption provision. The work group was focused on adoption of minor children and decided not to address adult adoptions at this time. The amendment to (6) simply makes it clear that the new law provided for in this bill is inapplicable to adult adoptions.

**Section 12**
This section simply makes a citation conforming change to ORS 109.332. Section 4 is the new petition provision and thus it is appropriately substituted in this section.

**Section 13**
The change in this section to ORS 419B.527 corrects a cross-reference mistake in present law.

**Section 14**
The changes to ORS 109.400 made in this section include Legislative Counsel form and style changes and a conforming cross-reference change because ORS 7.211 is repealed by the bill.

**Section 15**
The deletion in ORS 109.430 is of ORS 7.211 as that provision is repealed by the bill.

**Section 16**
This section contains the operative date provisions for the bill. Section 16(1) provides that certain sections of the bill are prospective only. The listed sections here

have to do with changes to adoption filing requirements. The group agreed that cases that are final or pending should not have different requirements imposed upon them.

However, Section 16(2) provides that the new records disclosure provision, provided for in Section 6, applies both retroactively and prospectively. That is, it will apply to all adoption case court records. The work group discussed at length the policy and political pros and cons with having the new records provisions apply retroactively, as well as the potential impact on the courts. In the end, the work group decided that it was very important to make the changes effective immediately – both prospectively and retroactively. The reasons for the changes are described in detail in Section 6.

## VII. Conclusion

SB 623 should be adopted in order to clarify and improve the law surrounding court records in adoption cases. With this bill, numerous technical corrections and revisions are made to improve the law and make adoption practice consistent. The number of documents filed in an adoption case is significantly reduced because the adoption petition requirements have been revised and consolidated to avoid repetition. This bill promotes efficiency by dispensing with the present requirement that all persons or entities must obtain a court order to inspect or copy adoption case court records. Instead, the bill provides for new access rules, utilizing an important organization tool for identifying important summary information and segregating the most sensitive and confidential adoption information and records. Adoptees, upon reaching 18 years of age, are ensured timely access to their court file and birth parents are provided more predictable access as well. Petitioners, practitioners, DHS, and the courts will also have necessary access to court records.

**Note:** The Senate Judiciary Committee adopted the -2 amendment. That amendment replaced the bill as the Work Group had not finished its work and recommendations before the bill was filed. The -2 amendment is reflected in the description provided by this report as it contains the Work Group's and Commission's collective recommendations.

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# UNSWORN FOREIGN DECLARATIONS ACT

## Work Group Report

## HB 2833

Proposal prepared by Chad Krepps
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Law Clerk (2011)

Explanatory Report prepared by John D. Adams
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Law Clerk (2012-13)

Approved by the
Oregon Law Commission on
April 1, 2013

## I. Introduction:

The Uniform Law Commission (ULC) drafted and passed the Uniform Unsworn Foreign Declarations Act (Act) in 2008. The creation of the Act came as an effort to both harmonize the procedures of state courts with that of federal courts, as well facilitate the ability of declarants outside the United States to provide declarations or statements for use either (1) in U.S. court proceedings or (2) in non-court proceedings.

In Oregon, unsworn declarations may be used in both federal (28 U.S.C. 1746) and state court proceedings (ORCP 1E). Those declarations, if given under penalty of perjury, do not have to be in an affidavit or "sworn" in front of a notary or third person qualified to give an oath. Therefore, federal and Oregon law are consistent and permit those outside the United States to give testimony or provide a statement through a declaration without needing to provide the statement in an affidavit while under oath before a third party.

However, there may be instances under Oregon law where a formal affidavit under oath is required to accomplish an act in Oregon. For instance, certain state agencies require affidavits and do not provide for declarations. This proposed law will allow those abroad to provide a statement that is subject to penalty of perjury to be used in Oregon without having to go to a United States embassy to have the statement sworn to a third party.

## II. Statement of the Problem:

Currently, under 28 U.S.C. 1746, unsworn foreign declarations are recognized in federal courts as valid and receive the same recognition as a sworn statement so long as the unsworn statement contains an affirmation that substantially meets the requirements set forth in the federal statute. Oregon law also allows for unsworn declarations to be admitted in Oregon court as long as the declaration is subject to penalty of perjury. *See* ORS 45.010 and ORCP 1E. However, there are instances under Oregon law where an affidavit, sworn before a third person, may be required. *See e.g.*, ORS 109.450; 109.460 (the Department of Human Services maintains a voluntary registry of adoption records open to those family members who provide an appropriate affidavit). The uniform act provides an easy solution that is recommended to all states.

Individuals in the U.S. routinely go to a notary public, often at a local bank, to get statements and declarations notarized – i.e. sworn. These statements are admissible in state and federal court. When overseas, there are no notary publics to visit. Instead, an individual in a foreign country must go to a U.S. consulate or embassy and give their sworn statement in the same manner that an individual living in the U.S. can go to a notary public. Such sworn statement is equally admissible in a federal court as in a state court. After 9/11, access to U.S. consulates or embassies, even for American citizens living abroad, has been greatly curtailed. This has made it increasingly difficult for properly sworn statements to be made. Due to the existence of § 1746, this limited access to consulates and embassies has not had as significant an impact on federal proceedings as it has to

state proceedings. However, with limited access to authorized officials in US consulates and embassies, it is increasingly difficult for foreign declarants to provide admissible declarations to state proceedings. This act allows a foreign declarant, so long as they meet its requirements, to provide an admissible declaration to a state proceeding without needing to access U.S. officials authorized to administer an oath.

## III. History of the Project:

The Oregon Law Commission (the Commission) has reviewed and recommended several previous acts from the Uniform Law Commission (ULC), also known as the National Conference of Commissioners for Uniform State Laws. The goal of the ULC is to harmonize state laws; this Act seeks to harmonize state laws, as well as harmonize state court and federal court procedures.

Since its approval by the ULC in 2008, this Act has been enacted in the following seventeen states: Alabama, Colorado, Connecticut, Delaware, District of Columbia, Indiana, Michigan, Minnesota, Montana, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Tennessee, Utah, Washington, and Wisconsin. This year, Idaho, Nebraska, and Massachusetts have also introduced the Act in legislative bill form; in Idaho, the Act was introduced as a court rule. Washington enacted the Uniform Unsworn Foreign Declarations Act in 2011. In short, Oregon's neighboring states, save California, have either enacted the uniform act or are in the process of doing so. Washington House Bill 1345 passed without amendment and featured language identical to that of the uniform act, save portions intended to be inserted to reference state statutes.

In federal courts, proper unsworn foreign declarations have been as valid as sworn statements since 1976. At that time, the U.S. Congress enacted 28 U.S.C. § 1746, which expanded the use of unsworn declarations.

Since the Act does not conflict with Oregon law and is seen as noncontroversial, the Commission did not create a work group for this project and bill. Instead, the Commission submitted the Act to the Legislative Counsel's office to draft into a bill. Commissioners Lane Shetterly and Scott Shorr along with Commission staff reviewed the request to Legislative Counsel and reviewed the bill.

## IV. Section by Section Analysis and Explanation of the HB 2833:

**Section 1. Short title:** This section formally identifies sections 1 through 8 of the bill as the content identified as the Uniform Unsworn Foreign Declarations Act.

**Section 2. Definitions:** Section 2 sets out the definitions of the terms of art and other important terms. These definitions control for the content of the Act only; however, later sections of HB 2833 update statutory definitions at ORS 162.055 for the laws of criminal perjury (ORS 162.065) and false swearing (ORS 162.075).

**Section 3. Applicability:** This section limits the Act's applicability to declarants who make unsworn declarations while outside the boundaries of the United States. While in the United States, declarants may use notary publics.

**Section 4. Validity of unsworn declaration:** Section 4 establishes that an unsworn statement is entitled to the same recognition for situations that requires or permits the use of a sworn statement, as long as the statement complies with all of the requirements set out in sections 1 through 8 of this Act. Affidavits are one example of commonly used sworn statements. Subsection 2 of this section lists the exceptions for which an unsworn statement will NOT suffice in place of a sworn statement: in depositions, taking an oath of office, an oath required before an official other than a notary public, declarations to be recorded pursuant to Oregon's property recording laws, and for oaths required for a witness attesting to a will.

Section 4 also has the only two substantial instances of Oregon law being added to the uniform act. The ULC directs adopting states to insert the appropriate sections of state real estate law and will attesting as exceptions. For Oregon, the needed recording law cross-reference is "the recording laws of this state, including but not limited to ORS 205.130 and ORS chapters 92, 93, 94, 100 and 105." This exception is in Section 4(2)(d) of the bill. The exception for attesting witnesses to a will is made by referencing ORS 113.055 and is in Section 4(2)(e) of the bill.

**Section 5. Required medium:** This section merely directs that an unsworn statement must be presented in the same medium, if Oregon law requires a specific medium, as an acceptable sworn statement.

**Section 6. Form of unsworn declaration:** Section 6 sets out a sample form for recording an unsworn statement and specifies that the declaration must be made under penalty of perjury. Section 6 provides that the unsworn declaration must be in substantially the same form as the sample form.

**Section 7. Uniformity of application and construction:** This section speaks to the presumption of interpreting the Act in a manner that promotes uniformity among the states that enacted the Act. An effort to promote uniformity of interpretation is made in all of the ULC's uniform laws with this type of provision. This provision essentially directs courts and practitioners to look to how other states are interpreting the Act and to strive for consistency.

**Section 8. Relation to Electronic Signatures in Global and National Commerce Act:** This section addresses the possible preemption of state law under the federal Electronic Signatures in Global and National Commerce Act. This section specifically avoids the preemption of state law that would otherwise occur under this federal statute.

**Sections 9-17. Conforming Amendments:** These sections acknowledge that ORCP 1E already permits unsworn declarations in lieu of any affidavit required or allowed by the Oregon Rules of Civil Procedure. Conforming changes are made in these sections to allow this bill's new procedure to be used when appropriate too – as an alternative to the ORCP 1E method when the declarant is outside the U.S. **(Note:** Changes in these sections were approved by the Commission, and were presented to the Legislative Assembly as -1 amendments as the issues were addressed after the bill was filed. The Report reflects the amendments.**)**

**Section 18. Perjury:** This section is outside the substantive content of the uniform Act, but is necessarily included in the bill so that the current definition section within Oregon's "Perjury and

Related Offenses" section, found at ORS 162.055, is updated and conforms to the bill to include a statutory definition for "unsworn declaration." The new definition is found at ORS 162.055(5).

**Section 19. Perjury:** Like section 18, this section is also outside the substantive content of the uniform Act, but is included in the bill to add "or a false unsworn declaration" to Oregon's perjury statute so that perjury occurring in an unsworn statement can be prosecuted with the same force of law as a sworn statement.

**Section 20. Perjury:** Like sections 18 and 19, this section makes an Oregon conforming amendment to add "or a false unsworn declaration" to the false swearing statute so that the act of stating a falsehood in an unsworn statement can be prosecuted with the same force of law as a sworn statement.

**Section 21. Captions:** This section merely provides that the captions in the Act are for the reader's convenience and do not become part of statutory law. This is a standard Legislative Counsel provision.

**Section 22. Operative Date:** This section is included to prevent any possible ex post facto application of the modifications to ORS 162.055, 162.065, and 162.075. That is, the amended criminal provisions only apply to unsworn declarations made after the effective date of the Act. The new provision and the amended provision apply to unsworn declarations made on or after the effective date of the bill.

## V. Conclusion:

The Uniform Unsworn Foreign Declarations Act is an uncontroversial but helpful tool that would harmonize Oregon state courts with the federal courts by allowing more flexibility for declarants to make unsworn declarations while outside of the United States. The Act fits within current Oregon law with only minor adjustments to definitions and does not present a change to the rights of parties in litigation. The Act merely alleviates some of the difficulties experienced by declarants outside the United States who face adversity in seeking to have their statements officially sworn via consular officials. This procedure should not increase the number of statements made – rather it simply will change form – from sworn to unsworn.

## VI. Appendix:

The Uniform Unsworn Foreign Declarations Act with comments is attached.

(Due to the size of the appendix, it is not reprinted in this Biennial Report. It is, however, available online at the Commission's website http://www.willamette.edu/wucl/centers/olc/groups/2011-2013/uufdc/index.html. The uniform act was submitted to the legislature and is available on OLIS.)

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# REVISED UNIFORM LAW ON NOTARIAL ACTS

## Work Group Report

## HB 2834

Proposal prepared by Chad Krepps
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Explanatory report prepared by John D. Adams
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Law Clerk (2012-13)

Approved by the
Oregon Law Commission on
March 20, 2013

## I. Introduction:

The Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL)) created the Uniform Law on Notarial Acts in 1982 to provide a uniform standard for notaries public across jurisdictions. In 2010 the Uniform Law Commission drafted the Revised Uniform Law on Notarial Acts (RULONA) to update and modernize the original Act and include electronic records and electronic commercial transaction laws. Like the original Act, RULONA provides a minimum standard for the laws regarding notaries public and brings uniformity to the notarization of electronic records as that medium continues to gain popularity.

## II. History of the Project:

RULONA is a comprehensive revision of the original Uniform Law on Notarial Acts; the original Uniform Act was enacted in Oregon in 1983. The majority of the original act as Oregon adopted it has not been amended since its original enactment into law.

Oregon Law Commission Work Group member Tom Wrosch, of the Oregon Secretary of State's Corporation Divisions, served as an advisor to the national RULONA drafting committee. The Oregon Secretary of State's office and Uniform Law Commissioner Lane Shetterly both requested that the Commission review RULONA for possible adoption into Oregon law. Until now, the Oregon Legislative Assembly has not considered implementing RULONA into Oregon law.

The Oregon Law Commission staff assembled the RULONA work group in the summer of 2012 by direction of the Program Committee of the Oregon Law Commission and with the Commission's approval. The work group's mission was to evaluate the RULONA and determine how to best reconcile it with Oregon's current law, found in ORS Chapter 194. Members of the work group included: Chairperson Professor Bernie Vail, Lewis & Clark Law School; Dee Berman, Oregon Association of County Clerks; Lisa Ehlers, Oregon Law Commission Legal Assistant and Notary Public; Mike Eliason, Association of Oregon Counties; Amber Hollister, Oregon State Bar; Pat Ihnat, Fidelity National Title; Renee Koleen, Curry County Clerk; Diane Schwartz Sykes, Oregon Department of Justice; Kenneth Sherman, Sherman Sherman Jonnie & Hoyt; and Tom Wrosch, Oregon Secretary of State's Office. Staff for the work group included Ted Reutlinger, Legislative Counsel Office, and Wendy Johnson, Oregon Law Commission.

The work group held meetings on July 11, 2012, August 8, 2012, September 17, 2012, and November 9, 2012. Further discussion occurred via email in November and December. Ted Reutlinger circulated a draft of the bill, LC 243, prior to the July 11, 2012, meeting. The first draft represented an attempt to translate RULONA into traditional Oregon statutory vernacular and formatting. The work group spent the July 11, August 8, and September 17, 2012, meetings reviewing the provisions of LC 243 with discussion of the new RULONA provisions and current Oregon law found at Chapter 194. The work group focused much of its attention on the heart of LC 243—sections 1 through 40. In light of the comments and the consensus reached on the issues discussed during the July, August and September meetings, Ted Reutlinger drafted a revised version of LC 243 that was circulated to work group members via email on November 26, 2012. After receiving corrections to that draft, Ted Reutlinger circulated a final draft via email on December 21, 2012. In February 2013, LC 243 was introduced in the House Judicial Committee at the request of the Oregon Law Commission as HB 2834.

## III. Statement of the Problem:

RULONA is an update of the notary law that addresses the societal, technological, and economic changes that have occurred since the promulgation of the first Uniform Law on Notarial Acts in 1982 and the codification of the Act in Oregon in ORS Chapter 194 (Notaries Public Chapter). Of primary concern is the dramatic increase in the use of electronic records in commercial, governmental, and personal transactions. There have been several uniform acts regarding electronic transactions, which many states have adopted, that place electronic records on par with tangible paper records.[1] These acts all recognize the validity of electronic notarial acts.[2] However, the only mention of electronic documents in Oregon's notarial acts law is found at ORS 194.582, which provides only that electronic signatures may be used whenever an electronic document requires a signature. That is, the Notaries Public Chapter still fails to address electronic documents. Oregon added this electronic signature reference in 2001 when Oregon passed the Uniform Electronic Transactions Act. RULONA would fully update Oregon law to include processes and rules for notarization of electronic documents. Also, as a uniform act, RULONA seeks to unify disparate state treatment of notarial acts on tangible media and electronic media, unify notarial procedure, and generally ensure the integrity and reliability of notarized transactions.

## IV. Why Enact Now?

To date, North Dakota and Iowa have adopted RULONA into their state laws. Nevada introduced the bill this year. In order to realize the efficiency afforded by the uniform nature of the act, the ULC urges each state to enact RULONA as soon as possible to ensure consistency across jurisdictions.

RULONA has received widespread endorsement by practitioners and stakeholders. The American Bar Association's Real Property Section and Science and Technology Section endorsed RULONA and the American Bar Association's full House of Delegates endorsed the Act. In addition, the National Notary Association, the American Society of Notaries, and the Property Records Industry Association all endorse RULONA. The Oregon Secretary of

[1] *See e.g.*, Uniform Electronic Transactions Act (1999) ("UETA"), codified at ORS 84.001-84.070, in 2001. The federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 96 (2010) ("ESign") and Uniform Real Property Electronic Recording Act (2004) ("URPERA") were not enacted in Oregon but have been enacted in 25 other states.

[2] UETA §11; ESign §101(g); URPERA §3(c).

State's office similarly supports RULONA. Oregon's present statutes are particularly out of date.

## V. Section-by-Section Analysis and Explanation of the Bill:

**Section 1. Short title**: This section provides the name of the act and allows for easier keyword searches once the Act is integrated into the Oregon Revised Statutes.

**Section 2. Definitions:** The corresponding section in current Oregon law is ORS 194.005(1) – (8) and ORS 194.505. RULONA continues many definitions found in Oregon law that are generally equivalent. However, some nonuniform definitions were carried over from current Oregon law due to unique circumstances in Oregon law, along with a few new nonuniform definitions that were added to reduce confusion.

One example of carrying over current Oregon law into HB 2834 is the definition of Commercial Paper (ORS 194.005(1)). This definition is found in HB 2834 at Section 2(3). The work group determined that it is necessary to maintain consistency for those who use this chapter in combination with negotiable instrument law found in ORS Chapter 73.

One source of new definitions is the work group's effort to clarify which state officials have notarial authority as part of their official position. This effort arose because of several work group members' concern that there is general confusion about which officials in Oregon have authorization to carry out notarizations and/or acknowledgments under color of statutory or other legal authority. The work group identified many positions of public officials in local government that are believed to rely on or have explicitly requested the authority to perform notarial acts and acknowledgments as part of their official duties. The work group also found that Oregon laws do not properly identify all of these eligible groups in a central statutory location. In section 2, the bill defines "clerks of a court of the state", "in a representative capacity", and "judge" to clarify and detail who has authority. See HB 2834 §2(2), (6), (7) and §9(1). To reduce confusion, the work group decided it is best to formally identify and list these officials in statute. Oregon's complex judicial organizational structure (i.e. with county judges, justices of the peace, etc.) makes it particularly necessary to spell out.

The work group reached a consensus to remove the definition of "good moral character" found at ORS 194.005(3) because of the ambiguous and unworkable nature of the standard as used to evaluate the ethical conduct of notaries public. Instead, the HB 2834 provides new language for identifying acts that preclude prospective notary public applicants from receiving or renewing a commission. That provision is found in section 22.

To maintain consistency with current Oregon law, the work group agreed that RULONA's references to "or embossed on" should not be used because all documents must be affixed with the notaries public official stamp. An embossment cannot be substituted for an official stamp. However, a notary may both emboss and stamp a document. See ORS 194.031(1)-(7). The work group found Oregon's policy better than the uniform act in this area because photocopies do not pick up embossing marks.

**Section 3. Authority to perform a notarial act:** The content of this section is similar to current Oregon law found at ORS 194.012, 194.100, and 194.158(1), which all pertain to the scope of the notary public's position. RULONA adds and Oregon would adopt new language in this provision that codifies a conflict of interest rule. However, it must be noted that this conflict of interest rule was already in practice because the Oregon handbook for notaries public provides that notaries should not notarize documents for which they have a beneficial interest. Unfortunately, the phrase "direct beneficial interest" is not defined in the Act. It must also be noted that transactions are voidable if a notary performs a notarial act with respect to a record to which the notary has a direct beneficial interest. The work group decided against trying to specify exactly what interests are covered under "direct beneficial interest," and intentionally chose to leave the issue for the courts to settle as it will continue to be a fact-specific issue. While ORS 194.100 previously codified a conflicts rule, that rule only applied to banks and financial institutions. With HB 2834, all notaries will be covered.

**Section 4. Requirements for certain notarial acts:** This section is substantially similar to ORS 194.515(1) to (5). The requirements contained in this section identify what is involved when a notarial officer takes an acknowledgment of a record, takes verification on oath or affirmation, witnesses or attests a signature, or certifies or attests a copy of a record. The bill also directs that matters involving the making or noting of a protest of a negotiable instrument are located at ORS 73.0505.

**Section 5. Personal appearance required:** Although this section is a new provision, ORS 194.515(3) already implies a "presence" requirement anyway and that has actually been the practice. Section 4(c) formally adopts a presence requirement by mandating that "the individual making the statement or executing the signature" appear before the notarial officer. Appearance by webcam does not meet the presence requirement.

**Section 6. Identification of individual:** This section brings significant changes to Oregon notary public law. The first change is that while current Oregon law requires current identification to be used, RULONA (and now HB 2834) allows identification that expired not more than three years prior to performance of the notarial act. See Section 6(2)(a). The purpose for this policy is to be less restrictive to sections of the population who frequently do not have up-to-date identification because they no longer drive or have less opportunity to timely renew their identification. The thought process behind this policy in RULONA is that the identification is not truly less capable of being used to identify the individual in the weeks, months, and even a couple years after it expired. More importantly, to restrict notarization in such a way that disallows individuals who have difficulty maintaining current identification creates an additional barrier for these individuals to conduct normal business and only exacerbates their alienation from normal participation in essential civic activities. The elderly, the hospitalized, and undocumented immigrants were noted as three groups that have particular problems with present identification requirements. That is, while many of these individuals may have an expired driver's license that is no longer valid for driving, that same driver's license still serves as an adequate way to identify the individual.

While most commercial notary interests are in favor of the expired identification provision because it will ease business transactions involving individuals who often do not have current identification, other commercial interests (notably, banks) expressed concern that allowing pieces of identification to be valid beyond their expiration date would violate accepted commercial practices. The work group acknowledged this concern, but the work group also noted that two provisions of the new bill would mediate the risks in the expired identification provision. First, according to section 6(3), notaries are permitted to request that the individual seeking the notarial act provide additional

information or identification credentials to confirm the identity of the individual. Second, section 7 allows a notary public to refuse to perform a notarial act if the notary is not satisfied that the individual has the necessary competency and capacity, that the individual's signature is not knowingly and voluntarily made, or because the individual has not provided sufficient identification credentials necessary to confirm the identity of the individual.

The second significant change in this section involves the credible witness identification. The RULONA allows the witness to be unknown to the notary as long as the credible witness can produce valid identification and knows the person seeking the notarial act. See section 2(2)(b). Previously, only credible witnesses personally known to the notary could serve to identify the individual seeking the notarial act. Like the new expansion to allow the use of expired identifications, the policy behind this provision in RULONA is to increase access to notarial acts, especially in communities where notaries are less prevalent and more individuals struggle to maintain current identification.

In light of the variety and variation of physical descriptions currently in use on some pieces of government-issued identification cards and documents, the work group also discussed the need for additional clarification on what would be accepted. The work decided on recommending that the individual's signature and picture be required on the identification. See section 6(2)(a) and (b). Having this standard ensures reliability in verification.

**Section 7. Authorization to refuse to perform notarial act:** As mentioned in the discussion for section 6, there is no requirement in the act that a notary is compelled to perform a notarial act. Thus, the notary always retains the right to refuse to perform a notarial act if the notary has legitimate concerns about authenticity, identification or capacity of the individual requesting performance. A notary has broad discretion over whom the notary agrees to provide notary services, except for situations involving unlawful discrimination prohibited by law (e.g. civil rights, etc.). This position codifies existing policy previously found in the Oregon Notary Handbook.

**Section 8. Signature if individual unable to sign:** Work group members summarily confirmed that this is an important new section since it allows a proxy to sign for individuals who are temporarily disabled or permanently disabled. An individual can still use a signature stamp if they have one (see definition of signature that is a "tangible symbol"). A tangible symbol can include a stamp, an X, a signature, etc. Compare ORS 194.578. This new section fixes what has been a simple but real problem (e.g. a person with a broken arm, etc.). Work group members noted that there is a similar provision for wills that allows a proxy.

**Section 9. Notarial act in this state:** As mentioned in section 2 above, the work group gave serious consideration to clarification of precisely which state officials are authorized to perform notarial acts. Additionally, the work group received requests from government officials who already perform duties similar to notarial acts, some of whom previously had authority to perform notarial acts in the recent past (county clerks had clear authority before the court reorganization). In part to reduce confusion and to improve access to notarial acts, the work group modified the language of RULONA (section10) and current Oregon law (ORS 194.525) to clarify that county clerks (or the county appointee, for counties that do not have the county clerk position), clerks of the court, and all forms of municipal and county judges—including justices of the peace—have authority to perform a notarial act under HB 2834. This special language is necessary to cover Oregon's unique judicial forms that vary throughout the state.

Similar to the current law found at ORS 194.525(2), section 9 now includes subsection 2, which clarifies that the notarial acts performed under the authority of other states, federally recognized Indian tribes, federal authority, and recognized multinational or international governmental organizations all have the same effect under the law of Oregon as if performed by an Oregon notary public.

**Section 10. Notarial act in another state:** This section is essentially the same as ORS 194.535, and thus has no difference from current law other than to reduce any redundancy present in ORS 194.535(2). The work group recognized that Oregon adopted the Uniform Acknowledgment Act, which is the foundation for this and similar statutes. In short, Oregon will generally recognize notary acts performed in another state.

**Section 11. Notarial act under authority of federally recognized Indian tribe:** The content of this section corresponds to current Oregon law found at ORS 194.558. In short, Oregon will generally recognize notary acts performed under authority of federally recognized Indian tribes.

**Section 12. Notarial act under federal authority:** While this section corresponds to current Oregon law found at ORS 194.545, the work group discussed the possibility of clarifying the section by identifying the individuals that have been granted authority to perform notarial acts under federal authority. For instance, it was suggested that subsection (1)(b) could include a list of individuals in the military that are authorized to perform notarial acts under federal law. The goal behind this would be to allow individuals questioning whether someone holding him or herself out as having notarial powers could be easily confirmed.

Research revealed, however, that the federal authorization underpinning this grant of authority is not conducive to reproduction within this statute, and thus the ultimate goal of making it easier to ascertain the legitimacy of the a notary operating under federal authority would not be helped by attempting to include all of the military officials (or any of the other individuals authorized under federal authority) in HB 2834. That is, the list in federal law is long and complicated and not conducive to listing within Oregon statute.

**Section 13. Foreign notarial act:** Aside from a change of terms from "foreign nation" to "foreign state," this section remains substantially the same as current Oregon law found at ORS 194.555. A reference to an official seal has been omitted to reflect the change away from embossing in favor of an official stamp only. In short, Oregon will generally recognize notary acts performed under the jurisdiction of a foreign state or an international governmental organization.

**Section 14. Certificate of notarial act:** Much of the current law on certificates of notarial acts has been retained from ORS 194.565. This section provides that a notarial act must be evidenced by a certificate and the details of the certificate requirements are listed. As mentioned earlier, the work group agreed to remove any reference to "or embossed on" (usually mentioned in tandem with stamping) in RULONA because of the earlier work group decision that embossing alone should remain insufficient under Oregon law due to the photocopying problems inherent with embossing.

Also, the work group agreed that the HB 2834 should retain the current law found at ORS 194.565(1) that allows the notary to correct the date of expiration on the certificate for errors. It states "omission of [date of expiration] information may subsequently be corrected." The work group expanded this provision to allow notaries to subsequently correct any information included or omitted from the certificate (see subsection 14(2)). The work group's rationale for allowing a notary to correct all

aspects of the certificate come from the notion that if the notary is otherwise trustworthy enough to maintain his or her commission and make corrections to the date of commission expiration, the notary might as well be able to correct or include any information that was omitted from the certificate. The valid but unlikely concern with forged certificates is valid in either circumstance, and is not intensified by the expansion of the notary's power to correct the certificate. In the end, the work group decided that the undue cost and delay associated with receiving notarized documents with an invalid certificate warrants notaries having the authority to correct invalid certificates.

The work group also agreed that the form certificate should be revised to also "contain the name of the person for whom the notarial act is performed[.]" (See section 14(1)(d)). This seemed like an omission in RULONA.

**Section 15. Short form certificates:** This section includes only minor changes to existing law that deal with change of phrasing from "seal" to "stamp," (explained above), and dropping the "(and Rank)" from the form with the understanding that title is sufficient. Otherwise, it is essentially the same as current Oregon law under ORS 194.575. Although the work group entertained a suggestion that this section could be referred to as simply "form certificates," the work group decided to keep "short" in the title in cognition that long form certificates are still valid and some people still use them.

**Section 16. Official stamp:** Much of the substance of the RULONA version of this section essentially already exists in Oregon law by administrative rule. See OAR 160-100-0100. One issue that the work group considered is whether the requirement specified in ORS 194.031(1) for black ink should be maintained in light of an interest expressed by some clerks to have the standard change to blue ink to order to make the stamp more legible. However, the work group determined that other states have reversed course after experimenting with colors other than black after discovering that colors do not photocopy well. HB 2834 would ultimately replace ORS 194.031(1) with section 16(2): "[the stamp must] [b]e a legible imprint capable of being copied together with the record to which it is affixed or attached or with which it is logically associated." The work group further decided that any requirement regarding ink color could be achieved by rulemaking power, as provided in Section 26 of the act, to allow for flexibility and compromises.

**Section 17. Stamping device:** Current law found at ORS 194.154(1)(a) requires the notary to return the stamping device to the Secretary of State when the notary's commission is resigned or revoked. ORS 194.154(1)(b) directs a notary whose commission expires under normal conditions to destroy the seal (stamp) as soon as it is reasonably practical. HB 2834 reflects a policy change in RULONA that instructs notaries who are resigning their commission to also disable the stamping device by destroying, defacing, damaging, erasing or securing the device against use, instead of notaries returning the stamp to the Secretary of State. The work group decided that it is best not to burden the Secretary of State's office with retrieving and receiving stamps of notaries whose commissions had expired or voluntarily resigned. However, it is important for notaries whose commissions have been revoked to be required to return their stamps because these notaries can no longer be trusted to destroy their stamps.

**Section 18. Journal:** The work group devoted a significant portion of at least two meetings discussing the rules surrounding recording rules for journaling, exceptions to journaling, and who is to maintain possession of the notary's journal after the notary's commission ends.

Like the rules for destroying or remitting the notary's stamp to the Secretary of State after a notary's

commission ends, journals pose a similar problem of what to do with a notary's journal when a commission ends because of death, non-renewal, resignation or revocation. Current Oregon law, found at ORS 194.154(2), requires the notary to "dispose of the notarial journal and records pursuant to rules adopted by the Secretary of State within 30 days after the effective date of the resignation, revocation or expiration, whichever occurs first." Additionally, ORS 194.154(3) allows former notaries who intend to reapply for a commission within 90 days after expiration to delay disposal of the journal until the expiration of that period. The difficulty with the current system, according to work group members with experience at the Secretary of State's office, is that it puts a significant burden on the Secretary of State to store old notary journals, and enforcement is impossible. Work group members, however, also expressed the competing interest for keeping the journals in the possession of the Secretary of State to make the record accessible for verification purposes.

RULONA provides flexibility for journal policy by allowing states the option to select one of two different courses of action. One option directs the notary public to retain the journal and inform the Secretary of State's office of where the journal is stored. Another option would direct the former notary public to transmit the journal to the commissioning agency or an approved repository approved by the commissioning agency.

The work group determined that the benefit of having the Secretary of State receive the journal is greatest when a notary's commission has been revoked because the journal may be important evidence for prosecuting the notary. As a result, the work group drafted HB 2834 to maintain current law that requires a notary whose commission has been revoked to remit the notary's journal to the Secretary of State's office within 30 days. (Section 18(7)).

RULONA's policy for notaries public that die or are adjudged incompetent corresponds to current Oregon law; the deceased notary's personal representative must submit the notary's journal to the Secretary of State. For notaries public that resign or let their commission expire, HB 2834 requires the former notary to "retain the journal for 10 years after the performance of the last notarial act chronicled in the journal." (Section 18(1)). Additionally, HB 2834 allows notaries to enter into agreements with their employer to keep the notary's journal after their employment ends, as current Oregon law allows. (Section 18(10)).

RULONA also allows flexibility for states to choose whether to limit notaries public to one journal. ORS 194.152(1) permits notaries to maintain "one or more chronological journals of notarial acts." The work group elected to maintain the current language in recognition that maintaining only one journal is impractical given current practices of notaries operating separately in commercial setting as part of the notary's employment and outside of their employment. Still, one journal is preferred and the journaling should be chronological.

Although the work group decided to adopt the new policy in RULONA directing the notary to make entries in the journal contemporaneously with the performance of the notarial act under subsection (3), subsection (4) allows single entries to suffice for certain duplicate notarial acts or situations involving multiple statements or signatures on the same date for the same person.

Also, while RULONA does not make any allowance for exceptions to the journaling of notarial acts, HB 2834 subsection (11) provides nonuniform exceptions to journaling currently codified in ORS 194.152(1) including the following: (a) recording a protest of commercial paper; (b) administering an oath or affirmation; (c) certifying or attesting a copy of a document; (d) taking an affidavit; (e) verifying a billing statement for media advertising; and (f) taking a verification upon oath or

affirmation. The Oregon State Bar remains the main proponent for continuing the exceptions to journaling. Law offices conduct a lot of notarizations and requiring journaling is time consuming.

**Section 19. Notification regarding performance of notarial act with respect to electronic records:** This section reflects an acknowledgment in RULONA that many forms of electronic notarization are found in the market and no one electronic system has become the de facto standard. Because electronic notarization remains an area that continues to experience significant changes on a regular basis, the work group determined the regulation of electronic notarization remains best left to the Secretary of State to control under its rulemaking authority as this section provides.

**Section 20. Commission as notary public; qualifications; no immunity or benefit:** This section deals with the application and qualifications for becoming a notary. The language laying out the application process intentionally allows flexibility for the Secretary of State's office to shift from receiving paper applications by mail to receiving online applications.

The work group removed the citizenship requirement found in RULONA notary public qualification requirements as it determined *Bernal v. Fainter*, 467 U.S. 216 (1984), to still be good law. The Court's conclusion in that case was the State of Texas violated the Equal Protection Clause by prohibiting noncitizens from applying for a commission as a notary public. This holding has not been overturned, despite evidence that several states seem to maintain prohibitions that are in violation of the Court's holding.

The work group wrestled with a requirement in current Oregon law that requires that the notary public "be a resident of this state . . . or be a resident of an adjacent state and be regularly employed or carry on a trade or business within this state at the time of appointment." ORS 194.022(1)(b). While some states have opened up their notary public laws to be effective outside of their state (i.e. Virginia's notaries public can lawfully electronically notarize in California), work group members chose not to follow this approach because of worries that it leads to great difficulty in tracking down and enforcing violators of the notary public statutes. Instead, the work group opted to maintain RULONA's language that an applicant must "be a resident of or have a place of employment or practice in this state."

This section also includes nonuniform language meant to clarify the type of crimes or adjudications that would prevent an individual from being able to become a notary. ORS 194.022(e) and (f) currently provide that an applicant for notary commission or renewal must not have had a notary commission revoked within the five year period preceding the date of application. The applicant must also not have been convicted of a felony or "of a lesser offense incompatible with the duties of a notary public during the 10 year period preceding the application." The list of these offenses that are incompatible are provided by rule in 160-100-0510. The new language about "fraud, dishonesty or deceit" is meant to parallel the contents of section 22, which regulates the grounds for denial, revocation, suspension and other acts which are inconsistent with the principles of being a notary public. This section includes a 10-year look-back period prior to the time of application; thus, an individual who has committed a felony earlier than 10 years ago is not automatically barred from being granted a commission. The work group considered the value of having a rule that essentially prevents a person with a felony conviction from ever being a notary, but the work group ultimately decided that this idea is too severe because of the overly harmful employment repercussions that are likely to result from the inability to have the level of responsibilities that come with being a notary public. Collateral consequences to conviction should be thoughtful and constrained.

Additionally, while RULONA continues the tradition in many jurisdictions that requires notaries to procure a surety bond prior to being receiving a commission, the work group agreed that Oregon should continue to not impose bonding requirements. The work group's reasoning is that bonding requirements only tend to shift the regulation of notaries' qualifications to the bonding issuers, and the protection that bonding offers tends to be a trivial amount that does not provide a meaningful remedy to the victims harmed by improper notarial acts.

The work group also decided that four year commission term remains the most appropriate term length because it allows commission renewals to coincide with continuing education needs and the need to maintain accurate contact information for notaries public.

**Section 21. Examination of notary public:** This bill continues to require applicants for notary commissions to pass an examination administered by the Secretary of State.

**Section 22. Grounds to deny, revoke, suspend or condition commission of notary public:** This section contains rules for revoking a notary's commission. The analogous section in current law is ORS 194.166. The work group restructured RULONA's language for this section because the arrangement of clauses made for a needlessly compounded list of qualities that apply to a list of sub-clauses. Instead, HB 2834 consolidates the section without any loss of meaning and reduces the redundancies. Section 20 and 22 work together to address qualifications and grounds for denying, revoking, suspending, and conditioning commissions.

**Section 23. Database of notaries public:** This section requires the Secretary of State to maintain an electronic notary database; the Secretary of State's office already maintains a voluntary listing of notaries. The new database would permit the public to look up a notary public's commission status.

**Section 24. Prohibited acts:** This section shares many similarities to current law codified at ORS 194.166. It is updated to remove unnecessary references to no longer applicable rules, and to cross reference definitions from other statutes (for instance, "immigration consultant," as defined in ORS 9.280). This section also maintains enhanced nonuniform posting requirements for advertisements found at ORS 194.162(3), which requires a statement in English about the inability of the notary to give legal advice and the requirement that fees for services are posted according to the terms found at ORS 194.164. In short, having a commission as a notary public does not authorize a person to practice law or act as an immigration consultant. This section restricts advertising to help prevent deception regarding a notary's authority. Subsection (7) is a new important requirement – it provides that a notary public may not withhold original records provided by a person that seeks a notary act.

**Section 25. Validity of notarial acts:** This section helps maintain the validity of a notarial act even if a notary fails to complete the act correctly. This provision is new with RULONA.

**Section 26. Rules:** This section pertains to the Secretary of State's rulemaking authority, which is still treated as being very broad, and comes from ORS 194.335. The only significant change is the editing of this section to remove any reference to bonding.

***Application Fee, Investigation, Change of Address***

**Section 27. ORS 194.020 repealed:** Section 28 replaces current ORS 194.020 regarding the application fee.

**Section 28. Application fee:** This section sets out a $40 limit for the non-refundable application fee, which maintains the current limit under Oregon law for applicants seeking a commission as a notary public.

**Section 29. ORS 194.024 repealed:** This section repeals ORS 194.024 regarding the applicant's consent to a background check and Section 30 is enacted in lieu thereof.

**Section 30. Investigation of applicant; consent:** This is a new provision authorizing a background check of applicants for a commission as a notary public.

***Commercial Paper***

**Sections 31 – 40:** These sections are drawn directly from [194.070, 194.090, 194.100, 194.130, and 194.150]. HB 2834 represents no notable changes from the current law, and alters RULONA only to use language commonly used in Oregon (e.g. "personal representative" instead of "executor.") In short, these sections continue to provide that a notary public may protest commercial paper procedures, including record keeping requirements for protests are also maintained.

***Specific Oregon Provisions/Miscellaneous Changes***

**Section 44. Action for damages or injunction; attorney fees and costs; employer's liability:** This section continues and improves upon current Oregon law found at ORS 194.200 Instead of providing a remedy for only a select number of injuries caused by notaries who perform prohibited acts, section 44 now provides a remedy for eleven violations of section 24. In addition, in subsection (2), the provision now allows the Attorney General to bring a civil action. Present law only allows the Secretary of State to enforce on behalf of injured persons. The remedies made available are also made more consistent, and equitable relief is available.

This revised section also includes a new six-year statute of limitations in (4) which was recommended by the work group based on six years being a common standard for similar causes of action under Oregon law.

**Section 45 and 46. Attorney General to investigate or prosecute violation; payment of expenses:** This section maintains current law codified at ORS 194.330 and renumbers it. This provision allows the Secretary of State to direct the Attorney General to take charge of an investigation or prosecution.

**Section 49. Uniformity of application and construction:** This section is essentially an interpretation provision that reminds courts that "consideration must be given to promote uniformity of the law with respect to the subject matter of sections 1 to 50" of this Act. As other states apply the law, uniformity in application is expected.

**Section 51.** This section would amend ORS 194.980 clarify that the Secretary of State may impose a civil penalty for each violation of any provision of sections 1 to 50 of the Act or any rule adopted by the secretary under the same sections of this Act. Form and style changes are made throughout this section as well.

**Sections 54 to 57.** These sections make conforming changes to largely reflect cross-reference citation changes necessitated by the new act. Section 56(2) contains bold language that is already in existing law. The Work Group concluded that it is more appropriately located in Section 56, rather than ORS

194.040 of present law. The provision now provides for both the authentication powers the Secretary of State has and does not have. The statement of powers not afforded to the Secretary of State is necessary to clarify common misperceptions in accessible statutory form.

**Section 61.** Save for the penalties section (194.980, 194.985, and 194.990), all of Chapter 194 is repealed with this bill. Several provisions are essentially retained from present law, but are renumbered to create a new series as provided in this bill.

Specifically, ORS 194.005 and 194.505 are replaced by section 2. ORS 194.010, 194.012, 194.014, 194.020, and 194.022(a)-(c) are replaced by section 20. Other sections subsume the remainder of ORS 194.022. ORS 194.024 is repealed by section 29 and section 30 is in lieu of it. ORS 194.028 is replaced by section 21. The content of ORS 194.031 is primarily replaced by section 16. ORS 194.040 is repealed; subsection 1 is essentially replaced with the maintaining of a database requirement in section 23 and subsection 2 is moved to ORS 177.065 in Section 56. Multiple sections subsume ORS 194.043. ORS 194.047, ORS 194.052 and 194.063 are repealed; these provisions regarding change of address and name as well as renewals and resignations are not replaced as they will be handled by administrative rules. Section 31 repeals ORS 194.070 and it is replaced by section 32. Section 33 repeals ORS 194.090 and it is replaced by section 34. ORS 194.100 is repealed by section 35 and replaced by section 36. ORS 194.130 is repealed by section 37 and it is replaced by section 38. Section 39 repeals ORS 194.150, and it is replaced by section 40. ORS 194.152, 194.154, and ORS 194.156 are subsumed by section 18. ORS 194.158 is subsumed by section 3 (though section 24 now has the title "prohibited acts"). ORS 194.162 is subsumed by section 24. ORS 194.164 is repealed by section 41, and it is replaced by section 42. ORS 194.166 and ORS 194.168 are replaced by section 22. Section 43 repeals ORS 194.200 and section 44 replaces it. Section 45 repeals ORS 194.330, and section 46 replaces it. Section 26 replaces ORS 194.335. Section 4 replaces ORS 194.515. Section 9 replaces ORS 194.525. Section 10 replaces ORS 194.535. Section 12 replaces ORS 194.545. Section 13 replaces ORS 194.555. Section 11 replaces ORS 194.558. Section 14 replaces ORS 194.565. Section 15 replaces ORS 194.575. Section 8 replaces ORS 194.578. ORS 194.582 is subsumed by several sections of the bill. Section 49 replaces ORS 194.585. Section 1 replaces ORS 194.595. Section 47 repeals ORS 194.700 and it is replaced by section 48.

***Miscellaneous Transition Provisions***

**Section 64. Operative date:** HB 2834, if passed, would become operative September 1, 2013. The timing of this operative date is meant to efficiently coincide with a change in systems at the Secretary of State's office. Nevertheless, this section also allows the Secretary of State to take any action prior to the operative date to allow the secretary to carry out sections 1 to 50 of the Act.

**Section 65. Effective date:** This Act will take effect on its passage. The emergency clause provision was requested by the Secretary of State's office as the office is writing the update to finish some of its programming.

## VI. Conclusion

The Revised Uniform Law on Notarial Acts would put in place an updated structure and rules to address both the increasing non-uniformity between states and the ever-growing use of technology. The Act makes improvements in the law to provide a system that will better support the integrity of notarial acts. The comprehensive rewrite of Oregon's notary chapter provided for in this bill

represents a consensus product among key stakeholders and will aid all Oregonians who need notarial acts performed.

**VII. Appendix** [Revised Uniform Law on Notarial Acts with comments]

(Due to the size of the appendix, it is not reprinted in this Biennial Report. It is, however, available online at the Commission's website http://www.willamette.edu/wucl/centers/olc/groups/2011-2013/rulna/index.html. The uniform act was submitted to the legislature and is available on OLIS.)

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# Juvenile Code Revision Work Group: Juvenile Aid and Assist Report

# HB 2836

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From the Offices of the Executive Director
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Approved by the
Oregon Law Commission on
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## 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 Oregon Law Commission's 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 included 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,

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 Law Commission's 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, the bill 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. 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 approved the draft for recommendation to the Legislative Assembly at its meeting on February 11, 2009. HB 3220 passed out of the House Judiciary Committee, but died in the Ways and Means Committee during the 2009 legislative session.

On February 25, 2010, Linn County Judge Carl Brumund issued a written letter opinion relating to the issue of whether youths may raise an aid and assist issue at all in a juvenile delinquency proceeding in Oregon. The opinion addressed motions filed on behalf of several youths in Linn County as Judge Brumund had requested that the motions be consolidated for argument purposes. Brandan Kane of the Linn County District Attorney's Office argued the matter on behalf of the state, and Jody Meeker and Mark Taleff argued the matter on behalf of the youths. The parties agreed that the concept of "aid and assist" is not addressed in the Oregon juvenile code nor the Oregon Constitution. The court looked to the U.S. Constitution as the only relevant source of law for the issue. The court cited a line of U.S. Supreme Court cases that held that a criminal defendant is protected by the Due Process Clause of the 14th Amendment and as such cannot be compelled to stand trial if the defendant lacks the capacity to understand the nature and object of the proceedings against him, lacks the capacity to consult with counsel, or lacks the

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Clackamas County; Summer Gleason, Clackamas County District Attorney's Office; Judge Kip Leonard, Lane County; Tim Loewen, Yamhill County Juvenile Department; Bob Joondeph, Oregon Advocacy Center; Patricia O'Sullivan, Department of Human Services; Andrea Poole, Marion County District Attorney's Office; Mickey Serice, Department of Human Services; Karen Stenard Sabitt, Attorney in private practice; Ingrid Swenson, Office of Public Defense Services; Timothy Travis, State Court Administrator's Office; Janette Williams, Department of Human Services; Dr. Laura Zorich, Licensed Clinical Psychologist. Throughout the years additional people reviewed and provided edits, including but not limited to, Markus Fant, Clackamas County Juvenile Dept.; Leah Craft, Oregon Health Authority; Michael Livingston, Oregon Judicial Dept.; Christina McMann, Douglas Co. Juvenile Dept.; Kurt Miller, Marion Co. DA's Office.

capacity to assist counsel in preparing a defense. (Citing Dusky v. United States, 362 US 402 (1960); Drope v. Missouri, 420 US 162 (1975), and Godingey v. Moran, 509 US 389 (1993)). Judge Brumund's opinion goes on to explain that the 14th Amendment protections associated with adult criminal prosecutions do extend to juvenile delinquency proceedings. The opinion concludes that a youth must meet the Dusky standards of competency before the youth can be compelled to be adjudicated in an Oregon juvenile delinquency proceeding for conduct which, if the youth were an adult, would constitute a crime. Judge Brumund relied also on the Oregon Court of Appeals decision of State v. LJ, 26 Or App 461 (1976), to bolster the conclusion that fundamental fairness rooted in the 14th Amendment's Due Process Clause requires applicability of the Dusky competency test to juvenile delinquency proceedings. In LJ, the Oregon Court of Appeals concluded that the defense of mental disease or defect (i.e. insanity defense) made available by statute to adults, was also available to juveniles under essentially a fairness theory. At the end of the opinion, Judge Brumund states that the adult "aid and assist" statutes, ORS 161.360-161.370, are applicable to juveniles. The opinion is not binding on other Oregon courts and there was no appeal.

The Juvenile Code Revision Work Group submitted the bill again to the Commission for recommendation to the 2011 Legislative Assembly, and the Commission recommended the bill on November 29, 2010. The Commission noted that the recent Linn County opinion points out further the immediate need for a juvenile "aid and assist" law because application of the adult standards and procedures for "aid and assist" is inappropriate for juvenile court. This bill is identical to the 2009 bill except for references made to the Department of Human Services (department) which underwent a re-organization recently. The legislature created a new agency, the Oregon Health Authority (authority) and some of the duties in this bill belong with the authority and not the department. LC has made these changes throughout the new bill draft. SB 411(2011) passed out of the Senate Judiciary Committee and made progress in the Ways and Means Committee, but it too remained in the Committee upon adjournment.

## III. Statement of Problem Area

Although parties currently raise fitness to proceed issues in juvenile delinquency proceedings, the Oregon statutes provide no guidance for courts or parties. This has led to confusion and inconsistency. In fact, some Oregon circuit court judges have denied a fitness to proceed challenge due to lack of statutory authority, while others courts have allowed a challenge and found that it is indeed the responsibility of the court to ascertain the capacity of the youth to aid an assist once that capacity is placed in doubt. Some Oregon courts have found that if the youth lacks capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense, the youth may not be subject to trial. Some courts are creating their own process while other courts are applying the adult procedures from ORS 161.360 to 161.370. Some defense attorneys are reluctant to raise or may be ignorant of the defense because there are no juvenile aid and assist statutes. Some counties take custody of youth when they are alleged to have committed a crime and wait to adjudicate until the youth can assist, while other counties simply dismiss cases when the youth cannot assist. Routine dismissal of such cases in some counties has led to repeat offenses, frustration, and a general public safety problem. In some counties, the Oregon Health Authority also has been required to provide restorative in cases where aid and assist issues are raised despite a statutory procedure. A

consistent structure for the state to follow is simply not in place. Not only does this raise issues of fairness, but it implicates constitutional due process rights. In short, Oregon's gap in the law makes it 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 administering restorative services. Setting out statutory standards will protect youths by ensuring that they will not be adjudicated without being able to assist and cooperate with counsel. In addition, it will protect the public by ensuring 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 bill.

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 to be 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 Oregon Health Authority (OHA) 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 OHA for 2011-2013 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

[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.

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 procedure in place. This is an issue that is not essential to the workability of the bill and thus the work group recommends that it 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 statute provides that a defendant may be unfit to proceed if as a result of *mental disease or defect* the defendant is unable to aid and assist in his or her defense. This proposal is broader because it allows a youth to raise the issue of fitness if he or she is unable to assist as a result of a "*mental disease or defect or another condition*."

In addition, this section provides that a court may not base a finding of unfitness solely on the inability of the youth to remember the acts alleged in the petition, evidence that the youth was under the influence of intoxicants, 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.

[3] See ORS 161.370(12)

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 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 OHA 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 OHA 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 10 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. The section 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 OHA 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 24 days after the report is filed. The court must file a written order within 10 days after the hearing is held 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 OHA.

Section 9

This section requires OHA 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 (OHA) to provide restorative services. The sub work group agreed that a specific provision providing statutory requirements of OHA would address those concerns.

Section 10

Section 10 requires OHA 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, OHA 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 OHA, 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, OHA 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 OHA 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. The section also provides that if a youth is removed from their placement, the youth is to be returned immediately upon conclusion of the restorative services.

Section 12

This section amends existing ORS 419C.150 and allows pre-adjudication detention of the youth for an additional 28 days under certain limited circumstances when a motion regarding fitness to proceed is pending. The amendment allows for an extension for more than an additional 28 days if expressly agreed to by the youth and the court determines that detention before adjudication on the merits should continue.

Sections 13 and 14

These sections provide that sections 3 and 9 of this bill become operative immediately, while the others will not become operative until January 1, 2014. This allows OHA some time to establish standards for both conducting evaluations and providing restorative services before the other elements of this bill become operative.

**Note:** A spiral booklet of supporting materials was also submitted to the House Judiciary Committee and the Joint Ways and Means' Public Safety Sub-Committee during the legislative session as legislative history for HB 2836. Due to the size of the booklet, it is not reprinted in this Biennial Report. It is, however, available online at the Commission's website (http://www.willamette.edu/wucl/centers/olc/groups/2011-2013/juv/index.html) and it is available on OLIS.

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**UCC Article 9 Work Group**

# KEEPING SECURED TRANSACTIONS LAW EFFECTIVE

## Explanatory Report for HB 4035

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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
January 25, 2012

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 private business transactions by establishing a clear and predictable framework for borrowers and lenders, buyers and sellers, payors and payees, etc. Perhaps the most important type of business deal governed by the UCC is the secured transaction, which is a loan accompanied by personal property collateral (as opposed to mortgages on real property, which is largely left to state-specific non-uniform law). The rules for secured transactions, which appear in UCC Article 9 (ORS Chapter 79 in Oregon), are the subject of the present bill.

In particular the bill resolves a set of practical problems that have arisen since 2001, when the bulk of Article 9's current rules went into effect in Oregon and across the nation. Chief among the problems resolved are (a) the way in which public notice is communicated of secured loans incurred by individuals, (b) the way in which public notice is communicated of secured loans incurred by organizations such as corporations or limited liability companies, and (c) the reliability of collateral taken by a lender in situations where the borrower's location changes from one state to another. The bill also provides a set of transition rules devoted to creating a smooth shift from the rules that are currently on the books to the bill's improved substantive rules.

The UCC as a whole is jointly sponsored by the Uniform Law Commission ("ULC")[1] and the American Law Institute (the "ALI"). When sufficient cause arises, these two organizations occasionally recommend revisions or amendments to portions of the UCC for enactment by the states, and such a recommendation was the genesis of the current bill. A substantial part of the UCC's business-enhancing value stems from the fact that all 50 states, plus the District of Columbia, Puerto Rico and the U.S. Virgin Islands, have enacted virtually identical versions of the UCC with only very minor substantive deviations. As a result, the U.S. national economy is much more closely knitted together than it would otherwise be, as parties to business transactions are freed from the uncertainty or high research costs that would result from each state's laws differing from the laws of other states.

Enactment of this bill is important for keeping Oregon a part of the above-described national framework of commerce. Ten states[2] have already adopted the Act; an additional ten states[3] have already introduced it during these early days of 2012; and introductions and enactments in all of the remaining states are expected during 2012. As explained below, the sound workings of the UCC system call for nationwide effectiveness of the bill's provisions by July 1, 2013, and for that reason we believe the bill should be acted upon during the coming short Oregon legislative session.

[1] The ULC is also known as the National Conference of Commissioners on Uniform State Laws ("NCCUSL").
[2] Washington, Indiana, Minnesota, Nebraska, Nevada, North Dakota, Puerto Rico, Rhode Island, Texas, and Washington.
[3] District of Columbia, Florida, Kentucky, Massachusetts, Michigan, New Hampshire, Ohio, Oklahoma, South Dakota, and Virginia.

II. History of the Project

The substance of the bill's proposed amendments was promulgated by the ULC and the ALI in 2010, following a process of study and revision of existing Article 9. First, in 2008 a review committee of the UCC's Permanent Editorial Board[4] issued a report identifying a number of specific issues to be considered for statutory changes. Then, the ULC and the ALI appointed a Joint Review Committee (JRC) to review the report and draft any recommended changes to the statutory language, or to the UCC's Official Comments. In this task, the JRC was assisted by a number of advisors and observers, including those from the American Bar Association, the American College of Commercial Finance Lawyers, and a working group of lenders under the auspices of the American Bankers Association. In 2009, the ULC and the ALI considered the first draft of the amendments at their respective annual meetings. In 2010, both organizations approved the proposed amendments and recommended them for enactment by the states. The American Bar Association has also endorsed the proposed amendments.

As noted above, 20 states have already formally moved toward enacting the amendments and similar activity is afoot in all other U.S. jurisdictions. There is no opposition to the amendments.[5]

The Oregon Law Commission Work Group was first convened in October, 2011 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: John Davenport, Davenport & Hasson LLP; Walter Gowell, Haugeberg Rueter Gowell Fredericks Higgins and McKeegen PC; Dave Hilgemann, Garrett Hemann Robertson, P.C.; Joe Hobson, Ritter Hobson LLC; Andy Morrow, Lane Powell PC; Ken Sherman, Sherman Sherman Johnnie & Hoyt LLP; and Thomas Wrosch, Commercial Registries Manager at the State of Oregon Corporation Division, Secretary of State's Office. Statutory drafting was carried out by Sean Brennan, Oregon Deputy Legislative Counsel. Oregon Law Commission support was provided by Deputy Director Wendy J. Johnson, Law Clerks Chad Krepps and John Adams, and Legal Assistant Lisa Ehlers. Oregon State Bar assistance was provided by David Nebel. The Work Group's Chair was Lane Shetterly, Chair of the Oregon Law Commission. The Work Group's Reporter was Carl S. Bjerre, University of Oregon School of Law.[6] The Work Group was also assisted by the following advisors: Barbara Bradley, Legal Aid Services of Oregon; Paul Cosgrove, Lindsay Hart Neil Weigler; Lana Cully, Oregon Department of Transportation; Sarah Filcher; Susan Grabe, Oregon State Bar; Amy Joyce, Oregon Department of Transportation; John McCulley, Agricultural Cooperative Council of Oregon; Jim Markee, Markee & Associates; and Peter Threlkel, Oregon Secretary of State's Office.

[4] The Permanent Editorial Board is a committee made up of members of the ULC, the ALI, and the American Bar Association (ABA).

[5] In Kentucky, a bill containing the amendments was vetoed in the last legislative session, but this was only because of an extraneous issue relating to federal tax liens. That federal tax lien issue is not present in either the ULC/ALI recommendations or the present Oregon bill, and even in Kentucky the bill has now been reintroduced without the extraneous issue and is expected to pass.

[6] The Work Group's Reporter was also a member of the JRC referred to above. He thanks Douglass Barron for excellent research assistance with this Report.

As is usual in the case of the UCC, the ULC and ALI process resulted in Official Comments for each statutory provision, as well as for some current statutory sections that the bill does not amend. 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 and enacting this bill. The Official Comments to amended Article 9 are included as Appendix A.)

## III. The Major Problem Areas

### *A. Public Notice of an Individual Debtor's Secured Loan*

A lender having a security interest under UCC Article 9 can protect itself against other creditors of the same debtor by giving public notice of the security interest. This is usually done by filing a simple document, called a financing statement, in the filing system maintained by the Secretary of State's office. The act is roughly akin to recording a mortgage, but for personal property collateral. Financing statements describe the collateral for the loan and identify the debtor, and because the financing statements are publicly available, prospective lenders are able (and expected) to check the filing system before making the loan. (To take one example, if a lender takes a security interest and the debtor files bankruptcy, the lender's recovery in the bankruptcy will be protected if the lender correctly filed its financing statement before the bankruptcy. To take a second important example, if two lenders both take a security interest in the same property and then the debtor borrower is unable to repay both loans, the lender who first correctly filed a financing statement will be paid in full before the other lender.) In this way, when the system works properly, any lender can ascertain whether some past lender's security interest already ranks ahead of its own.

The problem is that the debtor's name is the key to the filing system (that is, prospective lenders will look for other lenders' financing statements by checking under the name of the borrower), but that, when the debtor is an individual, there is no clear guidance on what counts as the debtor's name. In the United States a person may have several different names, or several different versions of a single name, all of which are equally legitimate for the purpose of conducting business transactions. Specifically, existing UCC § 9-503 (ORS 79.0503) requires that a financing statement contain the debtor's name; otherwise the financing statement is not effective to protect the lender. Yet the existing statute does not contain any guidelines as to how an individual debtor's name should be determined, and this has presented substantial difficulties for filers and searchers (not to mention courts), because individuals do not necessarily have a single name. An individual may have one name on his passport, another name on his driver's license, and a third name on his tax return.[7] A person may also be known in his or her community by a name that is not reflected on any official document at all, but that is nonetheless the person's legitimate name for borrowing and lending purposes. This situation can cause litigation and uncertainty when the debtor's name listed on a financing statement is distinct from what is alleged to be the debtor's "real" name. In this absence of legal certainty, a prospective

[7] Edwin E. Smith, *A Summary of the 2011 Amendments to Article 9 of the Uniform Commercial Code*, 42 UCC L.J., Art. 4, at 351 (2010).

secured lender may be unable to make educated lending decisions, and may be at risk when relying on collateral.

Illustrating this problem, one court declared a financing statement listing the debtor as "Chris Jones" was ineffective, on the asserted grounds that the debtor's legal name was Christopher Gary Jones.[8] In another case, a court found that the financing statement should have provided the debtor's full legal name, Richard Morgan Stewart, IV, even though the debtor signed an application for credit as "Richard M. Stewart" and a security agreement as "Rick Stewart," and authorized the financing statement to provide his name as "Richard Stewart."[9] Numerous cases could be cited and discussed.

This problem of individual names actually has two facets. The first facet is a problem of filing: a lender making a secured loan cannot be certain that it is filling out the financing statement using the correct version of the individual's name, and the security interest might not be respected in bankruptcy or similar situations. The second facet is a problem of searching: a lender *considering* making a secured loan cannot be certain that it is searching for other lenders' financing statements using the correct version of the individual's name, and the loan might be made based on an incorrect belief that the lender is first in line.[10]

*B. Public Notice of an Organizational Debtor's Secured Loan*

Under current law, the name to be used on a financing statement when the debtor is an organization such as a corporation or a limited partnership (a "registered organization") is clearer than for individual debtors, but still subject to an important ambiguity. UCC § 9-503(a)(1) (ORS 79.0503(1)(a)) requires "the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized." The problem is that this formulation wrongly suggests that there is one and only one such public record. In fact, there may be several records, showing different forms of a name, including among others (a) the certificate of incorporation, certificate of limited partnership, or other analogous document submitted by the organization's sponsors for the purpose of creating the organization (showing the intended name, e.g. Alpha Shoes, Inc.); (b) the Secretary of State's reflection of this name in its databases (showing inaccurate transcriptions of the intended name, in some states more than others, e.g. Alfa Shoes, Inc.); (c) an amended certificate of incorporation that changes the original name (e.g. Beta Shoes, Inc.); and (d) a doing-business certificate (often showing a wholly different trade name, e.g. Al's Main Street Shoe Store). This ambiguity creates problems for searchers and filers analogous to those discussed above for individual debtors.

[8] *Morris v. Snap-on Credit, LLC (In Re Jones)*, 2006 WL 3590097, at *3 (Bankr. D. Kan. Dec. 7, 2006).
[9] *Morris v. Snap-on Credit, LLC (In Re Stewart, IV)*, 2006 WL 3193374, at *2 (Bankr/ D. Kan. Nov. 1, 2006)
[10] In fact, these problems have been severe enough that some states have even enacted non-uniform statutory provisions attempting to improve the situation. These individual-state solutions have tended to worsen the problem rather than improve it, because they are drafted in an unclear matter, and because they undermine the national uniformity that helps borrowers from one state transact with lenders in another.

*C. Reliability of Collateral When Debtor's Location Changes*

UCC Article 9 takes care to protect a secured lender's collateral even when the debtor's location changes, but current law is inadequate to address turnover collateral such as inventory or accounts receivable in this situation.

Debtors may change their jurisdiction, with the result that a new state's law would control the filing of financing statements or other perfection-related actions. For example, if the debtor is an individual residing in Washington, financing statements should be filed against the debtor with the Washington Secretary of State's office, but if the same individual changes her residence to Oregon, then financing statements should be filed against her with the Oregon Secretary of State's office. See UCC §§ 9-301(1) and 9-307(b)(1), ORS 79.0301(1) and 79.0307(2)(a).[11] But if a secured lender made the loan before the debtor's move, then the secured lender is ordinarily given a four-month grace period of continued perfection under the new state's law, so that the financing statement filed in Washington remains effective under Oregon law for the four months, during which time the lender is expected to discover the move and file a new financing statement in Oregon. UCC § 9-316(a)(2), ORS 79.0316(1)(b). (Correspondingly, Washington's enactment of UCC § 9-316(a)(2) provides the same grace period to a secured lender to a person who moves from Oregon to Washington.) The problem is that this grace period only applies to collateral in which the secured party's security interest was perfected at the time of the debtor's move; in other words the grace period does not currently apply to after-acquired property.

After-acquired property is property that the debtor acquires after the secured loan was made, but is nonetheless collateral for the loan. It is particularly important for property such as inventory and accounts receivable, which by their nature are subject to turnover and are often covered by after-acquired property clauses. A secured lender making a loan to debtor whose important property is, say, jewelry that the debtor sells to customers, needs to be protected not only in the jewelry items that the debtor owns on the date of the loan, but also in the jewelry items that the debtor acquires later, while the loan is still outstanding, in replacement of the original items that routinely get sold. UCC Article 9 ordinarily protects the lender in this after-acquired property – but it does not do so for after-acquired property acquired after the debtor moves to a new jurisdiction.

In the example above, if the Washington resident took out a loan using her jewelry inventory as collateral, and then moved to Oregon and her current jewelry were sold and replaced by new jewelry within the four months, the lender would be left with no collateral at all. Thus, existing 9-316 creates a potentially dangerous situation for the holders of security interests in after-acquired property, forcing them into the choice between wastefully monitoring their debtors over short time periods, or risking losing their collateral. Such a burden is out of keeping with both the pace of modern commerce and the transaction-protecting purpose of the UCC.

[11] Similar examples could be given for debtors that are registered organizations and migrate rather than merge, and for debtors that are non-registered organizations and change the location of their place of business or chief executive office.

*D. Reliability of Collateral Following Merger*

The problem just discussed in connection with a debtor's change of jurisdiction has a close parallel when the debtor merges or otherwise combines itself into an out-of-state entity. Technically such cases do not involve a single continuing debtor which changes jurisdictions, but rather a change from one debtor (incorporated or otherwise organized in, say, Washington) to another debtor (incorporated or otherwise organized in, say, Oregon). Here too, UCC Article 9 takes care to protect a secured lender's collateral, but current law is inadequate to address turnover collateral such as inventory or accounts receivable.

In these out-of-state merger situations, if a secured lender made the loan before the merger, then the secured lender is ordinarily given a one-year grace period of continued perfection under the new state's law, so that the financing statement filed in, say, Washington remains effective under Oregon law for the one year, during which time the lender is expected to discover the merger and file a new financing statement in Oregon. UCC § 9-316(a)(3), ORS 79.0316(1)(c).[12] (And again, correspondingly, Washington's enactment of UCC § 9-316(a)(3) provides the same grace period to a secured lender to a Washington borrower who merges into an Oregon entity.) The problem here, just as above, is that this grace period does not apply to after-acquired property.

As an example, if ABC Inc., a Washington corporation, took out a loan using its jewelry inventory as collateral, and then merged into ABC Inc., an Oregon corporation, and the current jewelry were sold and replaced by new jewelry within four months after the merger, the lender would be left with no collateral at all. Here too, existing law creates a potentially dangerous situation for the holders of security interests in after-acquired property, forcing them into the choice between wastefully monitoring their debtors over short time periods, or risking losing their collateral.

## IV. The Bill's Solutions to the Major Problems

*A. Public Notice of an Individual Debtor's Secured Loan*

In order to provide more certainty for both filers and searchers, the bill would provide a rule making clear that any of the following names for the debtor would be sufficient on a financing statement: (1) the debtor's name as shown on the debtor's driver's license (assuming the debtor holds an unexpired Oregon driver's license, otherwise an Oregon state-issued identification card); (2) the individual name of the debtor, without further guidance, as under current ORS 79.0503, or (3) the debtor's surname and first personal name. HB 4035 § 12(1)(d).

[12] The one-year grace period here is longer than the four-month grace period discussed above, because this section applies not only to easily-discovered events such as mergers, but also to difficult-to-discover events such as ordinary sales from an original owner to a separate owner. On the other hand, the post-merger grace period added by the bill for after-acquired property, discussed in Part IV.D below, is limited to four months because ordinary non-merger sales do not involve the after-acquired property problem with which the bill is concerned. If a Washington corporation merges into an Oregon corporation, after-acquired inventory or accounts receivable are routinely involved, but if a Washington corporation remains independent and simply sells some of its property to an Oregon corporation, only the immediate property is sold, and no turnover collateral is implicated.

The Work Group's recommendation on this issue is unanimous. Under the recommended rule, the debtor's unexpired driver's license name would provide a "safe harbor," under which filers and searchers who follow Article 9's rules can be sure of the effectiveness of their actions.

At the same time, the recommended rule would protect other lenders who, perhaps because they are one-time or nonprofessional lenders and do know Article 9's intricacies, might use forms of the individual's name other than that which appears on the driver's license. These lenders would still be protected as long as they used either a legitimate individual name as under current ORS 79.0503, or the debtor's surname and first personal name.[13] (In the Work Group's unanimous view, it would *not* be desirable for the bill to legitimize *only* the driver's license name. One can easily imagine situations where such a narrow rule would create a trap for the unwary. For example, suppose that in 2010 the debtor acquires a driver's license correctly showing her name as Alice Maiden-Name, and further suppose that in 2011 the debtor marries and begins using the name Alice Married-Name in her business matters. If this debtor obtains a secured loan without getting a new driver's license, nonprofessional secured lenders would be much more likely to file a financing statement under the married name than under the old and generally inaccurate maiden name. The Work Group concluded that it would be illogical and unduly harsh to penalize a lender who did not know to file under the old name.) Overall then, the recommended rule provides certainty for those who know the rules, while also allowing a desirable degree of flexibility for those who are not experts in the system.[14]

*B. Public Notice of an Organizational Debtor's Secured Loan*

The bill clarifies the correct name of a registered organization to be included in the financing statement. Under the bill, the name to be provided is "the name that is stated to be the registered organization's name on the public organic record most recently filed with . . . the registered organization's jurisdiction of organization that purports to state, amend or restate the

[13] The amendments proposed by the ULC and the ALI invite states to choose between two alternative solutions on this issue. In adopting the solution just explained, the bill chooses one of those alternatives, which is sometimes called the "safe harbor" approach because of its combination of certainty and flexibility. The other alternative, which is sometimes called the "only if" approach because of its strictness, was rejected by the Work Group for reasons that are explained in the text. Among the states that have enacted the Act, most have adopted the only if approach, but the Work Group is of the firm view that the safe harbor approach is sounder and creates a better system. We also note that our neighboring state of Washington is one that has adopted the safe harbor approach as we recommend, and that the high volume of cross-border business between Oregon and Washington makes this an important additional reason for Oregon to adopt the safe harbor approach as well.

[14] One might argue that a stricter rule, permitting only the driver's license name without any flexibility for non-experts, would theoretically make it easier for a prospective secured lender to search for prior filings. The Work Group rejected this argument for several reasons. First, the increased easiness of searching comes only at the expense of unwary filers who might not know to follow the stricter rule. Second, searching is hardly burdensome even under the current rules, because electronic searches of the Secretary of State's database of filings are free and nearly instantaneous. Third, any increased ease of searching is probably illusory, because federal tax lien notices are not necessarily filed under the driver's license name, yet virtually every prospective lender searching for prior financing statements will also search for federal tax lien filings. See 26 U.S.C. § 6323(f)(3) (name used on federal tax lien notices is subject only to IRS regulations, not other law); *In re Spearing Tool and Manufacturing Co., Inc*., 412 F.3d 653 (6th Cir. 2005). And fourth, during the bill's five-year period of transition between the current and revised rules (see Part IV.E below), financing statements filed before July 1, 2013, under names other than the driver's license would continue to be effective, if they were effective under current law.

registered organization's name." HB 4035 § 12(1)(a). "Public organic record," in turn, is defined in pertinent part as "the record initially filed with or issued by a state . . . to form or organize an organization and any record filed with . . . the state . . . that amends or restates the initial record." HB 4035 § 1(ooo). The effect of this language is to clearly designate the name as it appears on the current version of the certificate of incorporation, certificate of limited partnership, etc. As a result, searchers and filers can carry out their lending decisions with confidence.

On a related point, the bill clarifies the definition of registered organization to which the above rule applies. The new definition covers, in pertinent part, any organization "formed . . . by the filing of a public organic record with . . . the state." HB 4035 § 1(rrr). This directly reflects standard practice in which a corporation, limited partnership, or the like is formed by the filing of the certificates described above. (The same section of the bill also clarifies that a common-law business trust, though formed by private action rather than public filing, is nonetheless a registered organization, if the state's statute governing business trusts requires that the trust's organic record be filed with the state.)

*C. Reliability of Collateral When Debtor's Location Changes*

The bill extends the four-month grace period to after-acquired property. HB 4035 § 6(8). It does so by providing that "a financing statement filed before the [debtor's] change [of location] pursuant to the law of the jurisdiction designated in ORS 79.0301(1) [i.e. filed in Washington, in our example above] . . . is effective" regarding "collateral to which a security interest attaches within four months" of the change. Secured parties with security interests in after-acquired property are thereby relieved of the dilemma of either constantly checking upon their debtors' locations or of losing their collateral. The amendment remedies the distinction between the treatment of previously acquired and after-acquired property.

*D. Reliability of Collateral Following Merger*

The bill extends the same four-month grace period to after-acquired property following a merger as it does to after-acquired property following a single debtor's relocation. HB 4035 § 6(9). It does so by providing that "a financing statement naming an original debtor . . . is effective to perfect a security interest in collateral acquired by a new debtor before, and within four months after" the merger. (The terms "original debtor" and "new debtor" are defined in current ORS 79.0102(ggg) and (ccc) respectively and are not changed by the bill. They may be conveniently understood as referring to the non-surviving and surviving entities in a merger.) Here as above, secured parties holding after-acquired property as collateral are relieved of the dilemma of either constantly checking for mergers by their debtors or of losing their collateral.

*E. Transition Rules, Including Uniform Effective Date*

In a nationally integrated statutory design such as UCC Article 9, it is important for all relevant jurisdictions' rules to lead to the same result; otherwise unjust results could be reached by forum-shopping, and the fluidity of reaching interstate loan agreements so important to a "uniform" commercial code would be severely impaired. For this reason, every state adopting

the Act is taking care to provide for its version to become effective on the same "uniform effective date," namely July 1, 2013. See HB 4035, § 28. In order for Oregon to stay in step with the other 52 jurisdictions, it is important for the bill to move through the legislature during the current legislative session.

Other technical questions might also arise as a result of the shift from current law to the bill's new substantive rules, and these are addressed in HB 4035, §§ 20-27. These "transition rules" are closely modeled on previous transition rules that were used when Oregon and the other 52 jurisdictions moved in 2001 from older law to current Article 9. They are designed to balance the interests of parties who have already successfully entered into transactions under existing law with the interest of the legal system in moving, in due course, to a reliable and universal application of the new rules.[15]

V. Conclusion

The bill should be adopted because it provides well-tailored solutions to practical problems that are impeding secured transactions under current law, while also keeping Oregon's law of commercial transactions substantially uniform with that of its sister states, to the benefit of the state's and the nation's economy from improved flow of cross-border commerce.

**Note:** The House Business and Labor Committee adopted a -2 amendment regarding certificate of title vehicles that was done at the request of John Deere Finance to clarify existing law. The amendment makes it certain that if a vehicle is not a clearly titled vehicle, then a creditor is to use the UCC method for perfecting a security interest in the vehicle that is used as collateral for the loan. The amendment cross references the UCC rule regarding titled property (ORS 79.0311) into the vehicle code in ORS 803.097. In addition, the amendment tweaked the list of vehicles exempt from the certificate of title requirements. That adjustment creates a catch-all for various agriculture/forestry vehicles to make it clearer that they are indeed exempt from the title requirement. Thus, a creditor must use the UCC method for those vehicles.

[15] For example, a financing statement filed before the bill takes effect, and meeting the requirements of ORS chapter 79 before its amendment by the bill, generally remains effective even after the bill's operative date, for up to five years. See UCC § 9-805(b), HB 4035 § 23(2).

Of course this protection of pre-operative-date financing statements extends only to financing statements meeting the requirements of all applicable ORS chapter 79 sections as in effect before the bill's operative date, including the sections that the bill does not amend. HB 4035 § 23(2) enumerates the sections of ORS chapter 79 that are being amended by the bill, and states that pre-operative-date financing statements must meet the requirements of those sections as they existed before the bill's operative date, but this enumeration should not be misunderstood as protecting pre-effective-date financing statements that fail to meet other currently applicable ORS chapter 79 requirements as well. (For example, current ORS 79.0502(1)(c) requires that a financing statement indicate the covered collateral, and this section is not listed in HB 4035 § 23(2) because it is not being amended by the bill, but its absence from the § 23(2) list does not mean that a pre-effective-date financing statement that did not indicate the covered collateral would somehow be protected. On the contrary, ORS 79.0502(1)(c) continues to apply to pre-operative-date financing statements, even after the bill's operative date, precisely because the bill does not amend it.)

Similarly non-restrictive interpretations are intended of the other bill sections containing similar enumerations of the ORS chapter 79 sections being amended by the bill.

## 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 as described in ORS 173.338.

(2) The Oregon Law Commission has 15 members, as follows:

(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;

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

(f) Three persons appointed by the Board of Governors of the Oregon State Bar;

(g) The Attorney General, or the Attorney General's designee;

(h) The Chief Justice of the Supreme Court, or the Chief Justice's designee;

(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

(k) One person appointed by the Governor.

(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.

(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.

(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. [1981 c.813 §1; 1997 c.661 §1; 2009 c.114 §1]

**Note:** Section 2, chapter 114, Oregon Laws 2009, provides:

**Sec. 2.** (1) The member of the Oregon Law Commission who is serving on the effective date of this 2009 Act [May 21, 2009] 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. [2009 c.114 §2]

**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.** (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. [1981 c.813 §2; 1987 c.879 §3; 1997 c.661 §2; 2009 c.114 §3]

**173.328 Commission meetings.** The Oregon Law Commission shall meet 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. [1997 c.661 §5; 2009 c.114 §4]

**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 Legislative Counsel assistance.** 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. [1981 c.813 §§3,4; 1997 c.661 §6; 2009 c.114 §5]

**173.338 Law revision program.** (1) The law revision program conducted by the Oregon Law Commission may include, but 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.

(b) 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) Recommendation for changes in the law 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 statutes repealed by implication or held unconstitutional by state and federal courts.

(2) The commission shall study any topic that the Legislative Assembly, by law or concurrent resolution, refers to the commission. [1997 c.661 §3; 2009 c.114 §6]

**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.** The Oregon Law Commission shall file a report at each regular session of the Legislative Assembly that 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. [1997 c.661 §4; 2009 c.114 §7]

**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 Work groups.** (1) To aid and advise the Oregon Law Commission in the performance of its functions, the commission may establish work groups. Work groups established by the commission may be continuing or temporary. The commission shall determine the representation, membership, terms and organization of work groups and shall appoint work group members.

(2) Members of 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. [1997 c.661 §10; 2009 c.114 §8]

**173.355 Solicitation and receipt of gifts and grants.** The Oregon Law Commission may solicit and receive funds from grants and gifts to assist and support its functions. [1997 c.661 §9]

**173.357 Disposition of moneys collected or received by commission.** All moneys collected or received by the Oregon Law Commission shall be paid into the General Fund of the State Treasury. Such moneys are continuously appropriated for and shall be used by the commission in carrying out the purposes for which the funds are received. [1997 c.661 §11]

# Program Committee Selection Criteria

In addition to the guidance of ORS 173.338, the Oregon Law Commission approved the following criteria for the selection of law reform projects for development by the Commission:

## Selection of Issues for Study/Development of Legislation

The Commission should select issues for study/development of legislation based on the following criteria:

A. Source of Work Proposals (Priorities)
   1. Legislative Assembly proposals approved by resolution, legislative leadership or committee chair;
   2. Judicial branch proposals approved by the Chief Justice of the Supreme Court, Judicial Conference or State Court Administrator;
   3. Legislative Counsel proposals;
   4. Law school proposals;
   5. Oregon State Bar section proposals;
   6. Commission member proposals; and
   7. Other sources

B. Nature of Issues
   The Commission should give highest priority to private law issues that affect large numbers of Oregonians and public law issues that fall outside particular regulatory areas administered by state agencies.

C. Resource Demands
   The Commission should select issues that available staff and the Commission can finish within the time set for study/development of legislation.

D. Probability of Approval by Legislature/Governor
   The Commission should select issues that can lead to legislative proposals with a good prospect of approval by the legislature and Governor.

E. Length of Time Required for Study/Development of Legislation
   The Commission should select issues that include both those permitting development of proposed legislation for the next legislative session and those requiring work over more than one biennium.

# Program Committee:
## Project Proposal Outline

**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
Attn: Hardy Myers, Program Committee Chair
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
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 173.357. 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. It is recommended 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). 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."

Less formal examples are found in other law reform organizations. 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." 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." (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 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. Symeon Symeonides, Dean Emeritus of the College of Law, 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 staff 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. State of Oregon funding is matched by Willamette University to provide staff services to 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 members appointed by the Senate President and Speaker of the House (at least one sitting Senator and Representative), the Chief Justice of the Oregon Supreme Court, the Chief Judge of the Court of Appeals, a circuit court judge, 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 fifteen Commissioners, currently over one hundred 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.