Date       August 3, 2010                Oregon Civic Justice Center
           1:00 p.m.                  Melvin Henderson-Rubio Hearing Room
                                      Salem, OR

MEMBERS PRESENT:        Lane Shetterly, Chair
                  Prof. Bernie Vail, Vice Chair
                  Chief Judge David Brewer
                  Mark Comstock
                  John DiLorenzo, Jr.
                  Rep. Chris Garrett
                  Julie McFarlane
                  Hardy Myers
                  Scott Shorr
                  Dean Symeon Symeonides
                  Prof. Dom Vetri
                  Justice Martha Walters (for Chief Justice DeMuniz)

MEMBERS EXCUSED:        Judge Karsten Rasmussen
                      Sen. Floyd Prozanski
                      Mary Williams (for Attorney General John Kroger)

STAFF PRESENT:          Jeffrey C. Dobbins, Executive Director
                      Wendy J. Johnson, Deputy Director and General Counsel
                      Lisa Ehlers, Legal Assistant
                      Dexter Johnson, Legislative Counsel
                      David W. Heynderickx, Special Counsel to Legislative Counsel
                      Raymond Crosiar, Law Clerk for OLC
                      Dan Miller, Law Clerk for OLC

GUESTS:                 Susan Grabe
                        Greg Mowe
                        Jim Nass
                        Matt Shields

MEASURE/ISSUES HEARD:   Thank You to Former Commissioner Greg Mowe
                      Approval of Minutes
                      Executive Director’s Report
                      Project Updates for:
                        Art Law
                        Child Abuse
                        Decisions by Disqualified Public Officials
                        Elective Share
                        Inheritance Tax
                        Juvenile Code Reform: Aid & Assist; Clean-up
                        Uniform Interstate Depositions and Discovery Act
                        Uniform Environmental Covenants Act
Welcome everyone. We will begin the meeting today with a thank you to Greg Mowe. As you know, Greg’s tenure with the Law Commission came to an end in December and we would like to take this opportunity to thank him for his years of service. Greg was with us from almost the inception of the Commission and he served as Chair to many Work Groups, including some of our most challenging, such as Ethics. He has always been an involved, thoughtful, just a really terrific member of the Commission and we will miss his service and company. Greg, we have a plaque to commemorate your time with us.

Thank you Chair Shetterly and the Commission. I appreciate the kind words and have enjoyed my time working with all of you. It has been my pleasure to work with Work Groups, Commissioners and staff and to know that we have accomplished most of our objectives. I have seen the Commission change a lot through the years. In looking forward, I think the Commission is on the right path, seeking alignment with many of the Uniform Acts. That is extremely useful, if fairly unrecognized work. Thanks again for the plaque.

We also want to welcome our new Commissioners. As you know Scott Shorr was appointed by the Oregon State Bar Board of Governors to replace Greg Mowe and this is his first meeting with us. Welcome Scott. Also, just a couple of days ago Speaker Hunt appointed Rep. Chris Garrett to replace Greg Macpherson. We appreciate that Rep. Garrett is also able to join us on such short notice. It’s a pleasure to welcome both of you as Commissioners.

Next on the agenda is the approval of the minutes from September 9, 2009. Any corrections?
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<tr>
<th>Vail</th>
<th>I move that the Commission approve the September 9, 2009, Commission meeting minutes.</th>
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<tr>
<td>Shetterly</td>
<td>Any objections? Hearing none, the minutes are approved. Next let’s turn to Jeff for the Executive Director’s update.</td>
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<td>Dobbins</td>
<td>I would like to introduce the staff, for the new members of the Commission. (introduces himself, Wendy Johnson and Lisa Ehlers) As you probably know, Kristy Nielsen is no longer with us. Her position as Staff Attorney was funded with a grant from DHS, to help with our Emergency Preparedness Liability Work Group last session. That funding ended and Kristy left our office at the end of January of this year. She landed on her feet and is working as an Administrative Law Judge for the State of Oregon. In reviewing these actions I realize we haven’t met in a long time, but we will be meeting more frequently as we head into the 2011 legislative session.</td>
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<td>Shetterly</td>
<td>Next up is a review of our current projects. Wendy?</td>
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<td>W. Johnson</td>
<td>First up is the Art Consignment project that we approved at our last Commission meeting. I’ve been talking with Prof. Vetri and we agree that we shouldn’t need a Work Group. It’s a matter of changing a couple of words, so we’ll request a draft from LC and see if we can get this done without forming a Work Group. Commissioner Vetri, would you like to add anything?</td>
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<td>Vetri</td>
<td>I think this would be appropriate. I’m also going to look at the statute more closely and see if there are any other issues. I’ll provide a memo to staff, describing my findings.</td>
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<td>Shetterly</td>
<td>Even if we skip the Work Group, we’re still going to need a report to accompany our legislation. Dom, will you take the lead with completing a report?</td>
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<td>Vetri</td>
<td>Yes, that’s fine.</td>
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Next up, Child Abuse.

The Child Abuse Work Group has been meeting for quite a few months and we have a LC draft, but there is still work to be done. BeaLisa Sydlik, with LC, has been really helpful. The Work Group has worked really hard on this project, and we’re making headway, but it’s difficult to get everyone on the same page. We have just been looking at dependency issues and if/when we finish this piece of it, we plan on exploring the reporting side of things. We decided early on not to tackle both at once.

Wendy has been a great help with this whole process and has really done her best to keep us on track. Yes, it has been a difficult project, with lots of different viewpoints, but we are hopeful that we will be able to come up with legislation for this session.

Next on the agenda is Decisions by Disqualified Individuals. Originally this was part of our Ethics package, back in 2007 and it explored what to do about decisions or votes that had been made by officials who had subsequently been disqualified, due to ethics infractions. We had a few Work Group meetings at the end of 2008/2009 and then the Commission re-upped the project for further consideration. Our main goal is to determine an appropriate scope. I have been in contact with Commissioner Hardy Myers about the project, and we’ve discussed adding a few members to the Work Group.

I apologize that nothing has been happening with this group. We hope to have an assessment by our next meeting. This is a touchy proposition, especially with local governments. We’ll see if we even have a viable issue.

We have an update concerning Elective Share. This was passed last session with a delay in implementation, so that attorneys could prepare for it. As they were preparing for the new statutes, the Estate Planning Section of the Oregon State Bar came up with about six areas for tweaking and clarification. We’re working with Susan Grabe, with the OSB, and we’re not sure whether any fixes would be introduced as a Bar bill or as an OLC bill, but we’re working together on it and are expecting...
Vail

There is also another draft that the Elder Section is requesting. It’s a little controversial, so I’m not sure the OLC wants to support that draft, but we will probably want to support the Estate Planning draft.

Shetterly

Thank you to Susan and the OSB. This sounds like it will probably just be a matter of bringing the LC draft to the Commission later this year.

Vail

We may decide that we want to form a Work Group, along with the Bar.

Heynderickx

I am working on this draft. The bill that passed gives us time to do tweaks. It doesn’t take effect until 2012.

W. Johnson

It’s actually 2011.

Shetterly

Next up is Inheritance Tax.

W. Johnson

This is a project that comes directly from the legislature, particularly from leadership on the House and Senate Revenue Committees and from the Legislative Revenue Office. The request is basically to look at all of ORS Chap. 118, which is Oregon’s inheritance tax law. As you may have heard, the federal estate tax expired in 2010 and Congress hasn’t taken any action to reinstate it, but it doesn’t affect what we’re doing too much as we are creating a state stand alone system. This Work Group has also met for months and we have been moving along and making some significant changes to Ch. 118. One of the challenges has been to remain revenue neutral, which is one of our directives. Currently we’re a little stuck on the treatment of intangibles, but we’re putting together a sub-work group to try and deal with this issue. All in all, the group is going well and we’ve been very lucky to have the support and efforts of both LC and Legislative Revenue.
It’s been my pleasure to Chair this group. I want to mention that this spring we presented a progress report to the House and Senate Revenue Committees and we’re scheduled to give them another update on September 22nd. One thing we’ve been really working on is coming up with some kind of ramp. Currently you get a credit for an estate up to 1 million dollars. Then, once you have even $1 over that million, you don’t receive the credit and you are hit with a sizable tax. We would like to come up with a ramp, so the jump off of the 1 million dollar cliff wouldn’t be so steep. We also want to be sure that we stay competitive with WA, to make sure people don’t change their residence to avoid an inheritance tax. We’re creating a complete inheritance tax system, so it can be easily understood. We also want to change the name from Inheritance Tax to Estate Tax.

Next, Juvenile Code Reform.

First, we’re looking at Aid and Assist, or Juvenile Fitness to Proceed from last session. The Juvenile Code is silent on determining the fitness of juveniles and we presented a bill during the 2009 session to address this. But, the bill requires services and that generates a fiscal impact and we just couldn’t get out of Ways and Means last session. DHS is again planning on putting it in the Governor’s recommended budget, but it’s going to be another really tight year as far as funding goes. Craig Prins, with the Oregon Criminal Justice Commission, is also helping us by looking for any possible grants that might help with funding for this legislation. The cost will be about 1 million dollars and we’re looking for a champion in the legislature.

There was also an opinion in Lane County that said the adult fitness to proceed statutes apply to juveniles. The word is getting out more since that decision. We really need this statute for juveniles. We’re expecting to have more judges involved this session, and lobbying the legislature.

There hasn’t been an appellate opinion yet.

We also have some Chapter 419 clean-ups. It’s all minor stuff and we’ll have Wendy ask LC to draft something.
Shetterly  | Next, UIDDA.
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W. Johnson  | UIDDA, or the Uniform Interstate Deposition and Discovery Act. The Council on Court Procedures has the authority to change the ORCP, so this started as one of our projects, and we handed it over to the Council for their action rather than to the legislature. I just talked with Don Corson, who was on our Work Group and is on the Council, and he expects that the UIDDA will be approved by the Council at their September meeting.

Dobbins  | Next on the agenda is UECA, or the Uniform Environmental Covenants Act. Lane, do you want to talk about our involvement with NCCUSL first?

Shetterly  | In the Commission’s Enabling Statutes, it states that we’re supposed to work on enacting uniform acts, and this project falls under this charge.

Dobbins  | The purpose of UECA is to ensure the effectiveness of institutional reforms. It basically says that in some cases it is fine to not totally clean up a contaminated patch of land, as long as there are regulations in place with usage restrictions. UECA has been passed in 23 states and there was a small attempt to pass it here in 2005. One of our main questions is how does UECA work with our existing Department of Environmental Quality. We had our first meeting in July and our next one is scheduled for September 1st. Commissioner DiLorenzo is the Chair of this group. John?

DiLorenzo  | This is an intimidating Work Group. It’s loaded with experts from all relevant areas. Our first meeting was basically an overview of the issue. We’re focusing on the need for uniformity. We’re not aware of too many contaminated sites that go over our state lines. We’ll explore this further and explore whether or not there is a need for the uniform act.

Myers  | Have any of our neighboring states passed UECA?

Dobbins  | Idaho and Washington have adopted it, but not California.
Shetterly: Let’s look at the Law Enforcement Access to Entity Information Act.

W. Johnson: We were waiting to see what Congress does with this, and I do have a Congressional update. Sen. Levin has a bill out there that is more onerous than the uniform act. But, we understand that the House is ready to introduce a bill, too.

Shetterly: The Law Enforcement Access to Entity Information Act (also known as ROBA) deals with businesses registering with the Secretary of State Office. This act requires a uniform set of registration requirements, to help identify businesses who might register for the purposes of terrorism or money laundering. Rep. Holvey has been pushing for the enactment of some kind of regulations, but he has agreed to hold back while we figure out what, if anything, comes out of Congress before we go forward with the project.

Myers: Do we have a Work Group pulled together yet?

W. Johnson: Not yet.

Shetterly: Next up, the Uniform Real Property Transfer on Death Act.

W. Johnson: The National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Real Property Transfer on Death Act in 2009. The act provides for the use of transfer-on-death deeds, which allow real property to pass outside of probate in the same way that funds held in payable-on-death bank accounts do. Our Real Property Transfer on Death Act Work Group is considering whether to add this act to Oregon’s statutes. Commissioner Comstock is the Chair of the group and we have our first meeting tomorrow.

Comstock: We have pulled together a great group, with representatives from all of the relevant entities such as title insurance companies, the Estate Planning section and Professor Susan Gary, who has agreed to act as the Reporter for the group.

Shetterly: How about a budget update?
As you may remember, there was a lot of tension last session concerning our budget. We were cut from the Legislative Counsel’s budget, but our budget was eventually included as part of the judicial fees budget. We thank many legislators for really helping us. We were greatly relieved until we learned that while our budget was to be paid through judicial fees, the legislation did not include a mechanism for actually paying us the money. That is, we had a spending limitation but no appropriation. So, we needed to wait until the special session this year and hope that the legislature would create that mechanism. They did and our funding is secure for the moment. While we waited for the Special Session, the State was unable to pay us, and Willamette University basically floated us for quite a few months. We are extremely grateful for Dean Symeonides and everyone else at Willamette.

Currently, our funding is not part of the General Fund, so there is no immediate talk of cuts, as they are not part of allotment, but we’ll obviously monitor our funding closely as we head into the next session. Obviously the budget is going to be extremely tight again.

I would like to echo the gratitude expressed to Dean Symeonides. Willamette was very generous to help us through that rough patch. I would also like to thank Legislative Counsel for their help and would like to thank our friends in the legislature. Rep. Garrett was a lead champion for us and we thank him for that. We’re definitely keeping in close contact with the Legislative Fiscal Office as we head into the next session.

Have we pursued any private grants?

We’ve had grants from other state agencies, but I don’t believe we’ve pursued any private grants.

I would just like to echo Jeff when he says there was a lot of tension last session concerning the budget, but we’re very happy it was resolved and we enjoy our relationship with the OLC.

Thanks to you, Dexter and to your staff for a really solid working relationship.
Heynderickx  The judicial fees are being monitored through the Joint Committee on Court Revenues. Last session the legislature did kind of a hodgepodge and set up an account separate from the general fund. But, this account will probably go away and this money will again be included in the general fund. They are leaning away from dedicated funding. The OLC needs to concentrate on the allocation and also start looking toward the general fund.

Shetterly  Next we’re ready to look at a project proposal from the Oregon Judicial Dept. Usually projects come through our Program Committee, but we just received this proposal and with the time crunch heading into session, Commissioner Myers, Chair of the Program Committee, agreed that we could bring the proposal directly to the Commission.

Nass  I am Jim Nass, the Appellate Commissioner. After hearing all of the projects that the OLC is working on, I’m almost embarrassed to ask the Commission to do more. The Judicial Dept. has been reviewing how our current statutes will work with our new eCourt Program. eCourt will basically replace existing technology systems in the courts and will hopefully streamline processes and create a paper-on-demand environment for court records. Court records would be available to the courts, parties, public and others electronically.

As we reviewed ORS 7.211, we pondered a possible amendment to 7.211, that would permit limited access to adoption files without a court order. Presently, the statute provides that access is totally prohibited unless there is a court order.

We also have some concerns with conflicts and the need for clarification and reconciliation in several statutes relating to access to juvenile case file materials.

Both of these issues are detailed in memos you received and they really come to light as we consider the availability of court records being available via the internet. (see proposals.) The problem is finding a balance between having open access to public records while protecting personal and financial information. There will be interest groups advocating different views of this. We are committed to impartiality and we know the OLC is also.
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<th>Myers</th>
<th>Is there a time frame for this?</th>
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<tr>
<td>Nass</td>
<td>We have postponed public access until June or September of next year. We would like a proposal in place in time for the legislative session.</td>
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<td>Myers</td>
<td>So the Commission would need to finish our work on this in time for the next legislative session?</td>
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<tr>
<td>Nass</td>
<td>That would be best, but it could be later.</td>
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<td>Symeonides</td>
<td>Could this be broken down into two issues?</td>
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<td>Nass</td>
<td>Yes, I think so.</td>
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<td>Vetri</td>
<td>Can you clarify when you would need our Work Group to be done?</td>
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<td>Nass</td>
<td>We will allow internet access to records as we’re able. It’s probably going to be several years before the entire system is in place, anyway.</td>
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<td>Walters</td>
<td>Am I right that research and case law alerted you to some of these issues, even without eCourt?</td>
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<tr>
<td>Nass</td>
<td>Yes, especially the conflicts and questions concerning juvenile court records.</td>
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<td>McFarlane</td>
<td>I’m not sure that this is feasible until the 2013 session. I agree that we could break it down into a current access question and a bigger policy question. The policy question with juvenile court records is likely to be a big fight.</td>
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<td>Vail</td>
<td>Is it impossible?</td>
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<td>McFarlane</td>
<td>I think so, but we could work on current policies.</td>
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<td>Shetterly</td>
<td>Someone needs to work on this.</td>
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Dobbins
There may be a way to deal with current limits on access.

W. Johnson
The adoption records piece is smaller than the juvenile court records piece. Perhaps we could authorize just the adoption project for now?

Walters
This is not a rush project. If we do approve the adoption project, the first job is to determine a narrow scope.

Shetterly
What would the Judicial Dept. think about us doing more scoping before we fully accept taking on this project?

Dobbins
Would we set up a subcommittee of the Program Committee to consider the scope?

Shetterly
No, I think we’ll just have the entire Program Committee consider it.

Myers
We’ll bring in any necessary experts to help.

DiLorenzo
I move that the Oregon Judicial Department Law Reform Project Requests be considered by the Program Committee, with the purpose of narrowing scope. The Program Committee will then return the requests to the OLC for final consideration.

Shetterly
Any objections? Hearing none, this is passed. For our final agenda item, let’s look at Policies and Procedures.

As I remember from our last meeting, we were considering the issue of minority reports presented by the Oregon Law Commission to the Legislature. Mason’s Manual provides for a minority report, supported by as few as one member of a committee. Oregon Legislative rules require a minority report to be supported by at least two members of a committee. We have a two fold question for the Commission. Do we allow for the Commission to send forward minority reports to the legislature and if so, what number of supporters must that minority report have?
Dobbins
We have to keep in mind the resources involved in requesting a separate bill and producing separate materials for a minority view.

W. Johnson
The reports that we present to the Legislature detail the Work Group’s decision process and they also detail any dissention.

DiLorenzo
If someone would like to make a motion concerning minority reports, I have an amendment I’d like to present.

Vail
I move that the Commission amend the Policies and Procedures of the Oregon Law Commission, Provision 4D, to provide as follows: The Commission, and its Work Groups, shall operate in accordance with the Oregon Constitution, applicable statutory provisions, these Policies and Procedures of the Oregon Law Commission, and Mason’s Manual of Legislative Procedure, in descending order of authority. Minority reports shall not be allowed with respect to final actions of the Law Commission.

DiLorenzo
I amend this motion to provide with respect to the last sentence: “minority reports should be allowed with respect to final actions of the Law Commission, if at least two Commissioners serve notice.” As you may know, this all came about in response to a minority report that I filed in conjunction with SB 1092 last session. I was the only Commissioner who had a particular objection to SB 1092 last session, and so I filed a minority report. This report had lots of support in the legislature and was also supported by the DA’s and OEA.

The final bill incorporated most of the minority report. We did not present two bills, rather my minority report contained language that was easily used as an amendment to the original bill.

The Legislature not only likes our collective voice, but they like our individual voices also. Allowing for minority reports is a way to keep dissenters in the tent and not carrying their own agenda to the legislature without the knowledge of the Commission.

Vail

DiLorenzo
Can’t that objective be met with an explanatory report?
With an explanatory report, there is nothing for the legislature to put side by side.

Would the two dissenting Commissioners have to join in one report?

Yes.

What about compromising and making it three Commissioners who would have to agree to do a minority report?

That’s fine with me.

The Commissioners often have strongly held positions. As a Commission we have always looked at all of these positions and have come up with consensus.

Much of what we have done has been done easily through consensus. With controversial topics, though, it is especially important to share different views.

What about LC having to take the time draft different versions?

Amendments will be drafted anyway because dissenters will go to legislators and the legislators will request the amendment.

Maybe it’s better to include the legislators with this.

Dissention doesn’t happen often and this is a way to keep it in the house, so the dissenters are out in the open and not lobbying against the OLC bill behind our back.

There is a potential for confusion in the Legislature. We don’t want to be seen as split and confused. I come down on the side to not allow minority reports. We want to bring forward one product from the OLC.

I’m worried about the tight schedule during session. Is there
any way to make sure we see the minority report in writing before it goes to the legislature, or is there just not always enough time?

Perhaps we come up with an amendment concerning what language would be included in the report?

I am not comfortable with saying we won’t allow any minority reports. We should be able to come up with a compromise on this. What about holding this over until our next meeting?

I agree. Let’s defer this to our next meeting. John, will you work with staff to come up with some proposed language? Let’s withdraw the motion and the amendment to the motion for now. Any objections? Hearing none, the motion and amendment to the motion are withdrawn. Meeting is adjourned.

Submitted By, Reviewed By,

Lisa Ehlers Wendy Johnson
Legal Assistant Deputy Director and General Counsel

EXHIBIT SUMMARY

OLC Minutes from 9/9/09

Memo – OJD Law and Policy Work Group; Recommended Review of ORS 7.211

Memo – OJD Law and Policy Work Group; Recommended Review of Juvenile Statutes Relating to Juvenile Case File Materials

Policies and Procedures of the Oregon Law Commission

These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker’s exact words. For complete contents, please refer to the recording.