OREGON LAW COMMISSION

Date    November 29, 2010
1:30 p.m.          Oregon Civic Justice Center
                   Melvin Henderson-Rubio Hearing Room
                   Salem, OR

MEMBERS PRESENT:        Lane Shetterly, Chair
                        Prof. Bernie Vail, Vice Chair (phone)
                        Judge Bob Wollheim (for Chief Judge David Brewer)
                        Mark Comstock
                        Rep. Chris Garrett
                        Julie McFarlane
                        Hardy Myers
                        Sen. Floyd Prozanski (phone)
                        Dean Symeon Symeonides
                        Prof. Dom Vetri (phone)
                        Justice Martha Walters (for Chief Justice DeMuniz)
                        Mary Williams (for Attorney General John Kroger)

MEMBERS EXCUSED:        John DiLorenzo, Jr.
                        Judge Karsten Rasmussen
                        Scott Shorr

STAFF PRESENT:          Jeffrey C. Dobbins, Executive Director
                        Wendy J. Johnson, Deputy Director and General Counsel
                        Lisa Ehlers, Legal Assistant
                        Ted Reutlinger, Chief Deputy Legislative Counsel

GUESTS:                 Michele DesBrisay
                        Susan Grabe
                        Lisa Norris-Lampe
                        Mickey Serice (phone)

MEASURE/ISSUES HEARD:   Program Committee New Work Group Proposal
                        Recommendations for:
                        Review of ORS 7.211 and Related Provisions
                        Review of Juvenile Statutes, Relating to Access to
                        Juvenile Case File and Records
                        Recommendations of Bills and Reports to 2011 Legislative
                        Assembly:
                        LC 2194
                        LC 2196
                        LC 594
                        LC2201
                        LC 2197
                        Election of Oregon Law Commission Officers
                        Work Group Updates:
                        Child Abuse Improvement
Welcome everyone. We’re joined by Judge Wollheim who is sitting in for Judge Brewer. Let’s look at the minutes from August 3, 2010. Any changes? There is a motion to approve the minutes from the August 3rd meeting. Any objections? None. Motion carried. Let’s hear the Executive Director’s Report. Jeff?

Since we last met, Measure 71 passed, calling for annual legislative sessions. This may allow us a little more flexibility introducing bills. Won’t dramatically change the way the Commission works, but it may allow for a less cyclical workload.

The only other thing I want to mention is the budget. It looks like we will be back in the general fund for the upcoming budget. Wendy has talked with House and Senate leadership staff and they are aware of our funding situation. They have expressed an interest in helping out, but this was all before the election. Wendy do you have any other thoughts?

No. We’re just waiting for leadership to solidify and then we’ll look at what to do next.

We welcome any suggestions from our Commissioners and we will continue to monitor the situation and work with staff at the Capitol.

I’d just like to add that we’ll probably be meeting in December or January and we’ll schedule our legislative reception for February.

Let’s continue to the Program Committee. We have two proposals for projects that have been forwarded to us from the
Program Committee. Who wants to start us with these?

Johnson

We have two new proposals coming to us from the Program Committee and they will be presented by Lisa Norris-Lampe with the Judicial Department. Both are unanimously recommended by the Program Committee and they ask for a tightening of the scope. Both of the proposals revolve around court records and what will happen as the record keeping becomes electronic.

Norris-Lampe

Thank you for having me here today. I’m a staff attorney for the Oregon Supreme Court and I am Chair of an Interdepartmental Committee that was formed by the E-Court program to look at law and policy issues as they relate to an electronic work environment. As part of that group, we came up with two proposals that we would like the Law Commission to help with. Both deal with access to records, with one focusing on adoption records while the other focuses on juvenile court records. The adoption proposal is not as extensive. The way the adoption statute is written, ORS 7.241, it can be read to allow for access to court records only by order for everyone, even for a judge and court staff. We feel we need to take another look at who can have access to the adoption records and what information is appropriate to share with the different parties.

The intent of both of our proposals is not to broaden the idea of access of these files beyond the courts, lawyers of record and perhaps the parties. They are not intended to open a discussion about public access to the records.

As to the juvenile recommendations they are a bit broader. The juvenile statutes represent different policy choices over time about who needs or should have access to juvenile court records. In our review we determined that some of the statutes can be misconstrued and some of the statutes conflict with each other.

The statutory charts attached to the proposal are the work of one of my sub-groups and a significant amount of their time was devoted to plotting our understanding of the current statutes. Again, for scope, our intent is not to broaden who has access to these records, but it is to clarify the concept of the legislative
As to timing for both requests, we understand that this session is too close, so at the Program Committee we discussed working on legislation for the 2013 session, with the discretion to introduce something during the 2012 session, if appropriate. Since our Program Committee meeting, I submitted a recommendation to the E-Court governances regarding a timeline for the implementation of the electronic records. This recommendation has been approved by 2 of 3 governances and it says that we want to delay the availability of electronic court documents until at least August 2012. I am happy to answer any questions.

Commissioner McFarlane, as Chair of our Juvenile Code Work Group, do you have any input regarding this?

I support both of these proposals and I feel they’re definitely doable with this time frame. We need to be aware that these are statutes where there have been some past attempts to open or widen the access to records to juvenile court proceedings. Our task will be to assure that we will not be expanding this access. Overall, though, I support going forward with these proposals.

Lisa, thank you for your clarification concerning scope. If the legislature wants to look at expanding access to records, they can, but that won’t be part of this project.

I sit on Lisa’s Law and Policy Committee as a Bar Representative, and after reviewing these proposals several times, I can say the practical need is out there. I also voice my support of these proposals.

I move that the Oregon Law Commission accept the recommendation of the Program Committee to authorize the formation of an Adoption Case Files and Records Work Group as outlined by the proposal request made by the Oregon Judicial Department and submitted by Lisa Norris-Lampe. The Commission’s acceptance is made with projected completion for the 2013 legislative session, but if possible for the 2012 session.

I also move that the Oregon Law Commission accept the
recommendation of the Program Committee to authorize the formation of a Juvenile Case File and Records Sub-Work Group of the Juvenile Code Revision Work Group as outlined by the proposal request made by the Oregon Judicial Department and submitted by Lisa Norris-Lampe. The Commission’s acceptance is made with projected completion for the 2013 legislative session, but if possible for the 2012 session.

Shetterly

Any objections? Hearing none, the motions are carried. That takes us to a review of the bills and reports to the 2011 legislative session. Let’s start with LC 2194, dealing with Art Law. Wendy?

Johnson

The Commission authorized us to ask for a draft changing an “or” to a “of the”. One issue is the use of artist vs. consignee and there were also some terminology mistakes and so on. We don’t have a new LC draft yet, but you have what we requested from LC in the red line version. I suspect it will be very close to the red line version. Today we’re asking for an expansion of the original scope to include these additional issues and we also are asking for permission for pre-session filing. Commissioner Vetri is on the phone and he started the fix on this. I also consulted with Prof. Vince Chiapetta of Willamette and he confirmed our changes.

Vetri

Wendy handled this well and I support the scope of it for now.

Shetterly

I know we didn’t utilize a full work group for this project, but, with the Commission’s consent, I’m comfortable with the outcome.

Walters

I move that the Oregon Law Commission expand the scope of the art law bill beyond ORS 359.210 to include clean-up of the series of ORS 359.200-359.255 as outlined in the meeting materials.

Shetterly

Are there any objections? None. The motion is passed. Wendy?

Johnson

LC 2196 consists of some clean-up issues for our Elective Share bill from last session. These are clean-up proposals that have come from the Estate Planning Section of the OSB. Commissioners Vail and Shetterly reviewed these changes with
the Estate Planning Section and they agree that the changes fall within the original scope of our project last session. The Bar has forwarded the same legislative proposal. We can either continue to go forward with our proposal or we can defer to the Bar. The Bar has done the bulk of the work on this and we support what they’ve done.

**Myers**

Is it possible to have it filed at the joint request of the OSB and the OLC?

**Grabe**

Good idea. We can definitely do that.

**Shetterly**

I’ll take that as a motion to endorse the OSB’s LC 471 with the request that it be identified as being filed at the request of the OSB and the OLC. What about a report?

**Johnson**

We didn’t do a report because it is really the Bar’s request.

**Grabe**

We can supply some written materials for your website. Perhaps hearing materials.

**Shetterly**

Any further discussion? Any objection? Hearing none we will vacate our LC and will join with the Bar with their LC 471. Next, LC 594.

**Johnson**

LC 594 is a Juvenile Summons Clean-up bill. We are trying to fix the summons forms to include all of the information that is needed to comply with the requirement of the court to provide notice to parents about their right to appeal a decision on jurisdiction or disposition in juvenile court and it also needs to provide a timeline. LC also added the right to counsel from another statute. It’s a very simple bill that had the support of our Juvenile Code Work Group.

**McFarlane**

This is a good bill and the Juvenile Code Work Group did support it for the most part.

**Wollheim**

The summons does not mention that a parent also has a right to have an interpreter appointed for them, so like the right to counsel, perhaps they can add this right to an interpreter from another statute.
<table>
<thead>
<tr>
<th>Shetterly</th>
<th>Let’s hold that and think about it as a possible conceptual amendment as we finish our discussion.</th>
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</thead>
<tbody>
<tr>
<td>Walters</td>
<td>Is the summons handed out at the first appearance or is the summons for the first appearance?</td>
</tr>
<tr>
<td>McFarlane</td>
<td>This is the summons to the trial or most often a call date to a trial, which is handed out at the first appearance. If a parent or guardian isn’t present at the first appearance they are served with the summons.</td>
</tr>
<tr>
<td>Walters</td>
<td>My question is because in 419B.117 it says that at the first appearance the court shall inform verbally and provide a standard notice. It seems like this needs to be given at the first appearance. Wouldn’t you need to do both?</td>
</tr>
<tr>
<td>McFarlane</td>
<td>I agree, but the practice is not to always verbally give the notice. The courts often just use the summons as the notice. We did not address the verbal requirement.</td>
</tr>
<tr>
<td>Shetterly</td>
<td>So they are given some kind of informal notice to get them to court the first time and then this would be what they’re given at that first appearance?</td>
</tr>
<tr>
<td>McFarlane</td>
<td>That’s right.</td>
</tr>
<tr>
<td>Walters</td>
<td>But if they don’t come to that first appearance then a summons is actually sent out for them and then when they eventually do come into court is this handed out again?</td>
</tr>
<tr>
<td>McFarlane</td>
<td>No.</td>
</tr>
<tr>
<td>Walters</td>
<td>Then we need to do some education to make sure the courts do hand this out again.</td>
</tr>
<tr>
<td>Myers</td>
<td>What controls the content of the initial notice? What part of the statute?</td>
</tr>
<tr>
<td>Des Brisay</td>
<td>It’s 419B.020(5)(a)</td>
</tr>
<tr>
<td>McFarlane</td>
<td>419B.117 was submitted by a legislator during the same session as the Juvenile Code’s main re-write of court procedures. They happened at the same time.</td>
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<tr>
<td>Shetterly</td>
<td>I have a question, looking at page three, lines 21-25 this appears to be current law and then we have the same language in bold beginning on page 4, line 29. Why do we have it in both places?</td>
</tr>
<tr>
<td>Johnson</td>
<td>The reason is because the first part is the initial hearing or trial part and the second is the appeal.</td>
</tr>
<tr>
<td>Shetterly</td>
<td>Is the interpreter required at the first hearing?</td>
</tr>
<tr>
<td>Johnson</td>
<td>I don’t know if there are other materials provided concerning interpreters? That may be different with every county. We could always ask our Juvenile Code Work Group to look at it and we could always do a session amendment as needed, but I’m not prepared to do a conceptual amendment for it now.</td>
</tr>
<tr>
<td>Shetterly</td>
<td>That sounds good.</td>
</tr>
<tr>
<td>McFarlane</td>
<td>The statute is 419B875(a).</td>
</tr>
<tr>
<td>Shetterly</td>
<td>Let’s not amend it today, but give it some thought to see if an amendment would be appropriate during session. Any other discussion? If not, I would entertain a motion.</td>
</tr>
<tr>
<td>McFarlane</td>
<td>I move that the Oregon Law Commission authorize presession filing of LC 594 and recommend the bill to the 2011 Legislative Assembly. I also move that the Commission approve the accompanying explanatory report to LC 594 prepared by staff.</td>
</tr>
<tr>
<td>Shetterly</td>
<td>Any objections? Hearing none, the motion is carried.</td>
</tr>
</tbody>
</table>
| Johnson   | You have a one page memo and bill for LC 2201. It’s a placeholder bill in case we want to amend it and take some action on it this session. You’ll recall that we approved Secretary of State Brown’s project proposal to address the Uniform Law Enforcement Access to Entity Information Act. It
addresses the problem of shell companies registering in states and working offshore. NCCUSL approved the Act in July and then Congress didn’t accept that Act. Sen. Levin introduced his own bill and the Treasury introduced amendments to that bill and there are other options floating around also. So, NCCUSL asked states not to go forward with approving the Act until we know what Congress is going to do. So, we just have a placeholder bill in case Congress passes something later this year or during session next year.

Shetterly My only concern is that we may intend it as a placeholder bill, but I’m worried about what others may think. I think we may just want to hold off on things for now and just hold onto it. Does anyone else on the Commission or staff feel otherwise?

Walters Is this going to be ok with Secretary Brown?

Johnson I spoke with Peter Threlkel and he is fine with a placeholder bill.

Shetterly Let’s touch base with him again and let him know we’re not off of the wagon, just pulling back a bit on the reins. My sense is they’ll be fine with that. Without objection we will pass on that motion. Let’s move onto Juv. Fitness to Proceed.

Johnson This is our one failure every session. It never fails because of a lack of support, but because of a lack of funding. You’ll see that LC 2197 is identical to our HB 3220 from last session, dealing with a Juvenile’s ability to aid and assist in their defense. It codifies a procedure for juveniles to raise the issue of their inability to aid and assist. In the report, I changed DHS to OHA in many places to work with the reorganization within DHS. Another development to alert you to is in Linn County. Linn County had seven cases that were heard together and there was an opinion issued that recognized an aid and assist argument. I’m not aware of where this is on appeal, or even if it has been appealed, but Linn and Clackamas Counties have authorized the use of Aid and Assist and have ordered restorative services but we still do not have a statutory procedure to raise the issue. This has the support of all of the players, but does not have the cash.

Myers What was the fiscal on this last session?
Johnson

Less than $1 million for the Biennium.

McFarlane

This is essentially the same bill we have not been able to pass because of the fiscal. But with the Linn Co. opinion we now have encouragement for courts to apply the adult standard. Then they’ll still be faced with the problem of what to do in terms of restorative services. We continue to believe this bill is needed and wholeheartedly support it.

Myers

Were the Linn Co. case or the Clackamas Co. cases appealed?

Johnson

The opinion in Linn Co. is for seven cases lumped together and so we don’t have any case numbers and we’ve had a difficult time trying to track that. I talked with DOJ and they’re not aware of any appeals. For Clackamas, I believe those appeals were withdrawn and didn’t go anywhere.

Shetterly

Let’s update the report with the information about these cases.

Johnson

We will also ask if this will be included in the Governor’s budget and we’ve also been looking for federal grants to help.

McFarlane

I move that the Oregon Law Commission authorize presession filing of LC 2197 and recommend the bill to the 2011 Legislative Assembly. I also move that the Commission approve the accompanying explanatory report, with the addition of the Linn Co. information, to LC 2197 prepared by staff.

Shetterly

Any objections? Hearing none, motion is carried. Onto the election of officers. We were supposed to elect officers in July, so we really need to do so now. I have Chaired the Commission since its inception and I will continue to do so for two more years only. I know that I am honored to be the Chair and Prof. Vail is honored to be the Vice-Chair, but we would welcome anyone else who is interested to please speak up. Since no one else is interested, we will serve again as Chair and Vice-Chair. I will let you know, though, that at the end of the two years I want someone else to take over as Chair. Next on the agenda is the Child Abuse Improvement Work Group.

Johnson

We canceled our fall meetings of this Work Group because the
Work Group came to an impasse. Not so much over any details of the bill, but whether the project should continue. We had been working for about a year on 419B100, which is the juvenile dependency jurisdiction statute as part of an overall request to deal with many aspects such as child abuse reporting and jurisdiction. We started with the jurisdiction statute. In the last few months there were many members of the group who did not feel like we should go forward. Especially the DAs, juvenile judges and parts of DOJ as well. It didn’t seem worthwhile to continue without some guidance from the Commission.

**McFarlane**

Originally our Work Group was supposed to look at child abuse reporting but the group felt that we needed to review the jurisdiction statute first. The motivation for this proposal, originally brought forward in 2006, was coming from a legislative session when there were multiple legislative proposals to deal with the issue. Since then I think the motivation has waned. I feel we should wait and see what happens in this legislature before we go forward with anything. This is especially true since we just approved the juvenile and adoption records proposals.

**Des Brisay**

Feels like the statute was working. The Judiciary sees it as a valuable way to protect children. The current draft would eliminate the courts flexibility. I agree with Julie and Wendy that the project should be put on hold and I ask that you include me if/when the project is taken up again.

**Williams**

DOJ has developed an understanding of what is required and we feel it could be very costly, through litigation, to have to come to a new understanding of what the language says if it changes.

**Shetterly**

In the future, it might be good to have a legislative directive to tackle this.

**McFarlane**

I move that the Commission suspend continuation of the Child Abuse Improvement Work Group until after the 2011 session, and that the Commission revisit the project at that time.

**Shetterly**

The UECA Work Group has had three meetings so far. We are considering UECA’s adoption at the state level. During the course of our meetings, the main point of discussion has been what UECA has to offer in light of DEQ’s established policies. The group recognizes there are gaps in the current policies and they suggest we evaluate if there is a way to use some of the ideas and language from UECA to bolster the current DEQ program. Trying to find a compromise between the existing DEQ program and the UECA. Because this is arguably beyond the original scope of the Work Group, we are coming back to the Commission to get approval for exploring how UECA might fit with the current DEQ program.

We have had great support of Kieran Marion and the NCCUSL staff. I move to revise the charge to the UECA Work Group as follows: The UECA Work Group shall review, in light of UECA, Oregon’s existing law and policy regarding the use of limits on the use of real property as a mechanism for institutional controls in environmental cleanups, and to suggest changes or additions to such laws in order to further enhance the use of such limits. Are there any objections? Hearing none, the motion passes. Next, onto Inheritance Tax.

Chair Shetterly chairs this group and we’ve been meeting regularly since the fall of 2009. We have given a legislative update to the Revenue Committees and that went well. We are tying up the Natural Resource provisions and then we will be close to being done with the project.

It’s been a great Work Group and we’ve covered a lot of distance. We just have a few edges to clean-up. The big unknown is what Congress may or may not do. We’ll have ours drafted and ready to go depending on what Congress does. Next, Real Property Transfer on Death Act.

This project is chaired by Commissioner Comstock. We’ve had three meetings already and have another one tomorrow. We should finish our changes tomorrow and will get it to LC for a draft. It may not be a presession bill.

Again, this is a really impressive Work Group. I think we will have a consensus proposal and I’ve floated it with Estate Planning lawyers and they want it in place now. Seems like
solid support.

Johnson

Also, Susan Gary is serving as Reporter and she served on the NCCUSL group too.

Shetterly

We have one last review, Decisions of Disqualified Public Officials. Jeff?

Dobbins

The Decisions by Disqualified Public Officials, chaired by Commissioner Myers has been around for a few years, but has recently been resurrected. We recently expanded our Work Group and held a meeting. There were questions about whether we even needed to be looking into the issue and so we’re going to do some research into if and how Oregon and other states manages these kinds of problems, with an eye toward working slowly toward a determination of the need for the project and if so, what scope.

Myers

This is an excellent Work Group. When the Commission forays into the law of government versus the law of individual relationships, we are going to almost immediately face the question of whether this is really necessary. I would P.S. what Jeff said by saying that my own view is that we will try to assay what are the principal situations in which the prescribed question may arise and what is the current law governing the outcome of that situation? We need to see if there are gaps in the current law or if there are existing policies in the current law that we think are less than desirable.

Shetterly

Thank you for the report. We will now move onto a possible Commission endorsement of a proposal for a new Uniform Act. This new Act centers around Commissioner Symeonides’ Choice of Law for Non-Contractual Obligations. NCCUSL has asked if the OLC will send a letter of endorsement for the project. Dean, would you like to say a few words?

Symeonides

All this time we consider adopting their Uniform Acts and now they are considering adopting our act. I’m biased, but I feel our Act is very good and other states would really benefit from adopting it. The objective of NCCUSL is to unify the substantive laws of many states and the Conflicts laws would fit very well within their framework.
Especially for our new Commissioners, I would like to point out that only two states have this comprehensive statutory framework and they are Oregon and Louisiana. Dean Symeonides was also instrumental in the efforts in Louisiana. Is there any further discussion? If not, I move that the OLC endorse the submission to NCCUSL of the proposal for the Uniform Act for the Choice of Law for Non-Contractual Claims based on Dean Symeonides’ Oregon Law Commission bill and that the Commission approve that I send a letter of endorsement to the NCCUSL. Any discussion or objection? None. I will get a letter out immediately. This would be a cap in the feather of Dean Symeonides and the OLC. Is there any other business? We are adjourned.

Adjourned at 3:20.
LC 594

Memo – Uniform Law Enforcement Access to Entity Information Act, LC 2201

Report – Juvenile Aid and Assist, LC 2197

Excerpt regarding the election of the Chair and Vice-Chair, from the Policies and Procedures of the Oregon Law Commission

Memo – Child Abuse Improvement Sub-Work Group Update. LC 325

Memo – Proposal of UECA Work Group

Memo – Inheritance Tax Law Reform Project Interim Update for House Revenue Committee

Memo – Proposal for a Uniform Act on Choice of Law for Non-Contractual Claims