

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.