

OREGON LAW COMMISSION

Date October 29, 2015
3:00 p.m.

Oregon Civic Justice Center
Melvin Henderson-Rubio Hearing Room
Salem, OR

MEMBERS PRESENT:

Lane Shetterly, Chair
Chief Judge Rick Haselton
Judge Stephen Bushong
John DiLorenzo, Jr. (on phone)
Hardy Myers
Scott Shorr (phone)
Dean Norman Williams (for Dean Curtis Bridgeman)
Mark Comstock
Justice Martha Walters (for Chief Justice Thomas Balmer)
Aaron Knott (for Attorney General Ellen Rosenblum)
Senator Floyd Prozanski
Rep. Jennifer Williamson (phone)

MEMBERS EXCUSED:

Prof. Bernie Vail, Vice Chair
Julie McFarlane
Prof. Susan Gary

STAFF PRESENT:

Jeffrey C. Dobbins, Executive Director
Laura H. Handzel, Deputy Director
Jenna Jones, Student Office Assistant
Jessica Minifie, Legislative Counsel

GUESTS:

Jim Nass

MEASURE/ISSUES HEARD:

Review and Approval of Minutes
Review and Approval of Program Committee Recommendations
Executive Director & Deputy Director's Report

Speaker	Comments
Shetterly	Good morning. We are grateful for a new Deputy Director, Laura Handzel. We are also very grateful for the work that Philip Schradle did during the interim.
Handzel	Thank you, Chair Shetterly. I think that the Commission is

going to be a good fit for me. I have experience in an academic setting and in legislation. This combines two of my loves. A little bit more about myself, I was most recently worked as the Committee Administrator for the House and Senate Judiciary Committees. Prior to that I worked as a lobbyist for a large, national nonprofit. I have lobbied at the local, state, and even federal level. I've seen capitols all across the nation. Working outside of Oregon always made me wish that I worked here more. That's what originally brought me to work at Lewis & Clark Law School. I developed and ran their Animal Law Program, which is world renown. Thank you to everyone for being so welcoming at the Commission and Willamette's Law School.

Shetterly

Thank you. Any questions for Laura?

Laura has "hit the ground running" as they say and is steeped in the work of the Commission already. The record to beat is 13 years.

Let's start with the first item on the agenda. Do we have any comments or changes on the minutes? Hearing none, do we have a motion?

Myers

I move that the Commission approve March 10, 2015 Commission meeting minutes.

Shetterly

Discussion on the motion?

Motion carries.

Up next we will be talking about new project proposals that have come to the Commission.

Dobbins

Over the years, Jim Nass has been compiling a list of problems with criminal appeals. We are grateful that he has brought this to our attention and that he has done so much work on this so far. If this were to be passed out of the Commission, Jim has offered to be the Work Group Reporter, and I believe Commissioner Shorr has volunteered to be the Work Group Chair. I'll let Jim explain in a little more detail now or he'll take questions if you'd like.

Shetterly

Mr. Nass, why don't you go ahead and give us a brief

summary?

Nass

I have been working with the appellate courts for the last 30 years. Over the past 5-7 years, I have seen the court spend a lot of time and energy on jurisdictional issues on appeals. This is because when people are revising statutes they don't always realize how they are affecting one another. The issue of jurisdiction is an issue that should be "cut and dry." Does the court have jurisdiction or not? In criminal law, jurisdiction has become very complicated. I think that a Work Group of interested people could figure out a way to make the process more clear. The Judicial Department is not a policy making group, but we do want to serve the public. We don't care how it is done, just that it is simple and easy to ascertain.

Shetterly

Thank you, Jim, for a great summary. How long do you think that this project is going to take? Will it be long? Short? Easy? Difficult?

Nass

Chair Shetterly, one always hopes that a project will be easy and won't take long. I think it will take a while for the people of a Work Group to grasp the nuances, but beyond that my goal is not to change the law. I just want to write in what we already do for appealability standards. I don't think that will be bad.

Haselton

Is reviewability encompassed as well?

Nass

Only in the sense that the current statutes do address that. I think it may come up, so by default it will.

Shetterly

I agree. It will be hard to do one without the other.

Nass

I think reviewability helps weed out appeals that have no merit before we get to the stage of making appeals.

Bushong

Is the ability for trial courts to address appeals within the scope? For instance when a defendant is convicted of a crime and a motion gets sent back to the trial court to change their sentence after they've already submitted a request to the Court of Appeals. Who has jurisdiction?

Nass

I believe the Court of Appeals maintains jurisdiction. There is one potential time that happens. It is clearly outlined in ORS 138. It describes that a trial court has the authority, regardless if an appeal has been filed, to change or modify a judgment. If a trial court refuses to change or modify a judgment, the Court of Appeals has deemed it so that action is not appealable in the

Shetterly	past. We'd be interested in the appealability of trial court post judgment instead of the continuation of trial court jurisdiction.
Shorr	Any other questions? Scott, do you have anything to add since you have volunteered to chair it?
Dobbins	No. Just that I am willing to chair it.
Myers	Do we need to modify the scope of the project to include reviewability?
Shetterly	I'll make it part of my motion.
Myers	I think we will stick with a 2017 deadline. Is there a motion?
Shetterly	I move that the Oregon Law Commission accept the recommendation of the Program Committee to authorize the formation of a Direct Criminal Appeals Work Group as outlined by the proposed request submitted by Jim Nass, but with the further understanding that reviewability would be added to the scope of the project. The Commission's acceptance is made with projected completion for the 2017 legislative session.
Comstock	Discussion on the motion? Hearing none. Any objection to the motion? Hearing none, that motion carries. Next up we have Uniform Commercial Real Estate Receivership Act.
	Mr. Chair, Mark Comstock here. I am a commissioner and also an attorney. What you have from me is a brief memo. I have had conversation with others over the last 18 months, who have problems with the Oregon receivership laws or rules. Chair Shetterly provided to me a copy of the Act in early August. He was on the writing group for the Act. The problem in Oregon is that we have a very limited number of statutory provisions on receivership. We currently have ORCP 80 and a little bit of ORCP 82, which are bare bone provisions about how the mechanics of when you can seek receivership and how to seek notice. It doesn't deal with the mechanism of how a receiver can be qualified. It doesn't deal with how to go about claims or the claim process. It is inadequate because it has no provisions for a stay or an act against what the receivership property would be. The statute also has no teeth to it because it doesn't require turnover of property to the receiver, other than it deals with the inherent powers of the court. The case law is dated in a way. Most receivership law is from 1960 back to the 1880s. There was a move for the Oregon State Bar Debtor Creditor Section to

take this on and model Oregon statutes after Washington statutes. Then Chair Shetterly told me about the Uniform Act and the idea came to meld both ideas together. Right now Oregon goes through the channels of bankruptcy for receivership and that can be very expensive. I would like to see this skeleton of law actually finished with some meat on its bones. This will give a road map for judges on how to complete a receivership. The Uniform Act only deals with real estate and that makes it limited in its scope. Washington statutes will help aid the Uniform Act as well. I think there will be easy recruitment for a receivership Work Group.

Shetterly

I think that it is interesting, the interest that this Act has picked up in the last few years of those wanting other processes besides bankruptcy and foreclosure. I think our goal is to eventually expand this Act that only applies to real estate to all of receivership. There may also be some “hip pocket” amendments that the Uniform Law Commission may provide that’ll generalize this for all receivership. A Work Group should be able to use those materials as well. Any questions?

Walters

Why was the Uniform Act narrowly tailored?

Shetterly

I don’t know specifically.

Walters

Is real estate really different than other types of receivership?

Comstock

No. More often than not real estate is somehow involved in a receivership, but it’s not very exclusive.

Shetterly

There will definitely be hybrid situations. It makes more sense to me to go broader. Any more questions?

Dobbins

I want to clarify that if we go broader then we might be reaching into court procedures. How do we go about that?

Shetterly

I think we could get someone from the Council on Court Procedures on the drafting committee or we can send legislation to the Council before we bring it to the Legislature. We have established a precedent with other Work Groups in the past. Any other questions?

Bushong	Are you thinking of amending both the ORCPs and statute?
Comstock	Judge Bushong, yes I think we would in order to capture the “corpus of receivership.”
Shetterly	More discussion? We need to expand the scope of the motion.
Myers	What if we call it the Receivership Work Group?
Shetterly	Yes. I think that captures it.
Myers	I move that the Oregon Law Commission accept the recommendation of the Program Committee to authorize the formation of a Receivership Work Group as outlined by the proposal submitted by Mark Comstock. In addition to the Uniform Commercial Real Estate Receivership Act, it is understood that the Work Group will utilize various Washington statutes and other “hip pocket” amendments to study receivership more generally. The Commission’s acceptance is made with projected completion for the 2017 Legislative Session.
Shetterly	Discussion of motion? Hearing none. Any objections? Hearing none the motion carries. Next up I believe we will talk about the Uniform Collaborative Law Act.
Handzel	Yes. Mr. Chair, we received a project proposal on the aforementioned act from Angela Laidlaw and her firm. Collaborative law is a type of alternative dispute resolution law. The Uniform Act has passed in Washington State and we are interested to see it how it is implemented there. The Program Committee appointed a Study Group to do further research on this Uniform Act and report back findings to the Program Committee. It seems to be an interesting project, and it is in its preliminary stage, but we are excited to see where it goes.
Shetterly	Any questions for Laura? How many states have adopted this act?
Handzel	11 states and the District of Columbia, but the Act is pending in a few states.

- Shetterly Any people you are going to reach out to about this?
- Handzel I have a phone meeting with a Washington State Legislator to talk about how it was implemented there and to gather more information. I am interested in any conflicts with the ethics of representation.
- Shetterly Very good. I think next is the Executive and Deputy Directors Report.
- Dobbins Yes. With the Chair's indulgence, I may do this out of order.
- Shetterly That is fine.
- Dobbins We will start with the budget. The last time we met in March we talked about how the Willamette University College of Law had been working with the Law Commission staff to request more funds from the State for the Commission. Originally, the Law Commission started out half time, but then the work of the Commission expanded. During the transition of Wendy and Lisa leaving, the Law School decided that it was time for the Commission to get more funds from the Legislature. Otherwise the Law School and the students of the Law School were mostly supporting the work of the Commission. We worked with Rep. Williamson and Sen. Prozanski and we ended up receiving an additional \$100,000. The Commission's budget now stands at \$331,000 for the biennium. The primary expenses are salary and benefits for the Deputy Director and Administrative/Legal Assistant and daily expenses. I know that the Willamette University College of Law helps with spaces and things with the understanding that the Commission is doing important work.
- Shetterly Let the record reflect that we are extremely grateful for all that Willamette University College of Law does for us.
- Dobbins We're finally getting back in the "swing of things." I want to thank Laura for bringing lots of lost energy back to the Commission. It's very nice to have someone in a more permanent position. We're excited to see all the important work she will do here for the Oregon Law Commission. While Phil was here, you recall Chris Strum was the Administrative Assistant. Unfortunately, she has been out on extended leave and will continue to be on extended leave for awhile. Fortunately, students like Jenna Jones, who is a senior at the undergraduate campus, and Caitlynn Knopp, a second year law student, have stepped up tremendously. They have basically

	been staffing the Commission and going above and beyond. We appreciate that.
Shetterly	We do.
Dobbins	Now with the funds from the Legislature, I think that we can make the Assistant position at the Law Commission full-time. The Law School has already started work on that, and we are hopeful to have someone by the end of the year. There is definitely forward progress. That said, I think that is the full staffing update. Any comments, questions, and concerns?
Shetterly	I would just say as a follow up, “the Law Commission punches above its weight.” Though it is so thinly staffed, it is very ably staffed. Thank you to everyone on staff.
Handzel	Mr. Chair, I’d like to add that we have a few developments in getting help by getting the law students more involved with the Commission. We are thinking of developing a legislative clinic so students can get credit for working in law and government, but also we want to utilize externs.
Dobbins	We can move on to talk about the 2016 Legislative Session.
Handzel	Our lineup for 2016 includes work from our Juvenile Court Records Work Group. They are trying to clarify and clean up “any other persons” language before their previous measure goes into effect on September 30, 2016. The Work Group itself has a deadline on final language of November 18, 2015. Then we will work with Legislative Counsel to get the language submitted on time. We will be going through on a bill for the House Judiciary. It will not be a standalone bill, but it will be very clear what portion is the Commission’s work. I am thankful for Rep. Barker and Channa Newell for working with us to get a bill vehicle. We are waiting to see if we will be able to get another bill vehicle for our Probate Modernization Work Group for the 2016 Session. If not, it can wait until 2017. We worked a lot on Chapter 111 and will be finishing up in the next few weeks.
Shetterly	We did ORS 112 and we wanted to go back to handle the definitions in ORS 111. The Work Group also will continue on with ORS 113, 114, & 115.
Handzel	Commissioners, I’d like to direct you to the to the “List of Current Work Groups” document. Our Collateral Consequences Work Group from last session stalled in Ways and Means. I

	talked to Ken Rocco at the Legislative Fiscal Office. Both he and Rep. Williamson think that it will be possible to bring this bill back for the 2017 Legislative Session.
Shetterly	It passed unanimously out of the House Judiciary, right?
Dobbins	Yes.
Myers	So the product is the same as when it was passed out of the Commission?
Dobbins	Yes.
Shetterly	We've had this happen before with the juvenile aid and assist bill.
Dobbins	I think the goal here is to simply resubmit the bill during 2017. I think the fiscal for collateral consequences was even less than aid and assist. We just want a clear direction from the full Commission on what to do next.
Myers	Do you want a formal motion?
Handzel	Yes, sir.
Myers	I move that the Commission authorize continuation of the Uniform Collateral Consequences of Conviction Act Work Group and direct the Group to continue its work on legislation for the 2017 Legislative Session. If no changes occur to the language and product put forth in the 2015 Legislative Session, the Work Group has standing authorization to resubmit this bill without any more Commission approval.
Shetterly	Discussion on the motion? Questions?
Walters	When will we introduce it? 2016? 2017?
Shetterly	2017. Any more discussion? Hearing no more discussion, any objections. Hearing none, the motion carries.
Handzel	Now for a few more Work Group updates. First the Adoption Work Group has 37 members, who have worked tirelessly to make Oregon a national model for adoption law. We will be reconvening the Work Group to work further through issues like ICWA, putative father, consent, same sex inclusivity, rehomings, advertising and facilitation.

For election law, Brett Smith, one of our law clerks, has begun researching some of the law. I have spoken with the Co-Chairs, Commissioner DiLorenzo and Commissioner Williamson about getting it up and going. The only thing that concerns me is the bandwidth of the Commission and the size of this project. They don't seem compatible at the moment.

We have a Juvenile Delinquency Judgments Work Group that is in its early stages. I look forward to working with Commissioner Comstock on finding members and getting that started up.

There are a few potential projects that could be coming up. I just want commissioners to have a concept of things that come into the Commission. There is Appellate Judicial Selection Report that Caitlynn Knopp is working on with former Chief Justice De Muniz. It's just summarizing the findings of the research of the Work Group. Next, I was meeting with Rep. Olson and he wanted the Commission to look into earned review for juvenile offenders. It has to do with if offenders do certain things they have the privilege of earned review and could potentially get out early. This project has a cost savings benefit. Eyewitness identifications protocols was brought to the Program Committee by Justice Brewer. It hasn't passed yet, but we are continuing to look further into this issue. It is fascinating. There was also a legislative directive that died in session in the form of HB 3040. It directed the Commission to look into sex trafficking. This bill did not move forward, but it will help highlight one of my goals. I want to meet with every legislator to explain more about the Law Commission and what we can do to help.

Sen. Courtney wrote us a letter on impeachment and asked staff to look into it. It covers Article 7, Section 6 of the Oregon Constitution. There is no formal proposal at this time. We are not sure what the goal is yet.

Shetterly

I do believe that this came up because some people thought we don't have impeachment in Oregon, but rather it has recall. The House wanted the Oregon Constitution to mirror the federal Constitution where the impeachment starts in the House and is tried in the Senate. Sen. Courtney believed it was too political and asked the OLC to work on it. However, there is actually an impeachment statute that we did find. Jeff can you please read it for us.

Dobbins

Sure. This is the amended section 6 from Article 7. It was amended around 1910:

Public officers shall not be impeached; but incompetency, corruption, malfeasance or delinquency in office may be tried in the same manner as criminal offenses, and judgment may be given of dismissal from office, and such further punishment as may have been prescribed by law.

As far as we can tell, this language came from the Chair of the Judiciary at the Constitution Drafting Convention.

Shetterly

This has never been tested. Once a treasurer refused to post a bond, and he almost got impeached. It is very interesting.

Dobbins

Now that we have rediscovered it, it might not be helpful either way. We will probably give the Senator options where to go next. It may be that this is better suited in a political process and not the Law Commission.

Handzel

Chair Shetterly, you are right that this started as a House Joint Resolution. HJR 31 to be exact. It is my knowledge that it was only a placeholder bill. It was sponsored by Rep. Hack.

Next, is protecting children from internet exposure. A Willamette University College of Law Professor, Warren Binford, asked if we could look into/work on language to protect children from internet abuse.

Lastly, we have the Uniform Voidable Transactions Act, which was formerly known as the Uniform Fraudulent Transfer Act. We worked through it at the Program Committee meeting. There is no formal proposal at this time.

Shetterly

Oregon actually adopted the Fraudulent Transfer Act. The goal is to update Oregon's current law since the Uniform Act was updated. It should be simple.

Any question for staff?

Last order of business Aaron Knott will be standing in for Attorney General Rosenblum from here on out. Welcome. We are glad you are here.

Meeting adjourned.

Submitted By,

Reviewed By,

Jenna Jones,
Student Office Assistant

Laura H. Handzel,
Deputy Director

EXHIBIT SUMMARY

March 10, 2015 Oregon Law Commission Meeting Minutes

Criminal Appeals Proposal by Jim Nass

Uniform Commercial Real Estate Receivership Act Proposal by Mark Comstock

Uniform Commercial Real Estate Receivership Act

List of Current Work Group/Potential Projects