

OREGON LAW COMMISSION

February 6, 2003
2:30 p.m. Tapes 1-2

Capitol Building, Hr. Rm. 350

MEMBERS PRESENT: Representative Lane P. Shetterly, Chair
 Senator Kate Brown, Vice Chair
 Steven K. Blackhurst
 Chief Justice Wallace P. Carson, Jr.
 Professor Sandra A. Hansberger
 Professor Hans Linde
 Gregory R. Mowe
 Attorney General Hardy Myers
 Martha L. Walters
 Representative Max Williams, II

MEMBERS EXCUSED: Dean Symeon C. Symeonides
 Professor Bernard F. Vail
 Professor Dominick R. Vetri

STAFF PRESENT: David R. Kenagy, Executive Director
 Wendy J. Johnson, Assistant Executive Director
 Rosalie M. Schele, Administrative Assistant

MEASURE/ISSUES HEARD:

- Approval of Minutes from December 18, 2002 Commission Meetings
- Executive Director's Report – Summary of 2003 Oregon Law Commission Bills and Biennial Report
- Bill Drafts and Reports
- Work Group Updates
- Other Business

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 tapes.

TAPE/#	Speaker	Comments
TAPE 1, A 01	Chair Lane Shetterly	<p>Calls to order the meeting of the Oregon Law Commission at the Capitol Building, Room 350 in Salem at 2:45 p.m. Reminds everyone about the Legislators' Reception to follow the meeting.</p> <p>Asks for approval of the minutes. Refers to the minutes of the last Oregon Law Commission meeting (Exhibit A).</p> <p>Moves that the Commission approve the December 18, 2002 Commission meeting minutes. Asks for objections and hearing none, the Chair approves the minutes. Vote 9-0. So ordered.</p>
17	David R. Kenagy	<p>Asks for the Executive Director's report.</p> <p>Refers to the handout, Summary of 2003 Oregon Law Commission Bills, (Exhibit B). Explains that 14 bills have been assigned to the House and Senate Judiciary Committees, the Public Body Definition bill has gone to the House General Government Committee, and the Environment and Land Use</p>

		Committee has the Eminent Domain bill. Reminds everyone that the Third Biennial Report (Exhibit C) has been given to the Commissioners and will be presented to the Legislators and public at the reception at 4:30 this afternoon.
34	Chair Lane Shetterly	Reaffirms that it is good that the bills have gone to different committees. Recognizes Senator Kate Brown.
40	Senator Kate Brown	Explains that one of the Juvenile Code Revision Work Group bills that was presented to the Senate Judiciary Committee had a high fiscal impact (SB 70) and they will work with Legislative Fiscal as well as the court system to make sure their concerns are addressed in a non-financial way.
45	Chair Lane Shetterly	Declares that anything with a fiscal impact this session will be delayed and sent to the Ways and Means Committee until the end of the session. Thanks, David Kenagy, Rep. Max Williams and Wendy Johnson who were at the hearing yesterday when most of the Senate bills concerning juvenile law matters were presented, while the Chair was in Washington D.C.
		Continues on the agenda to the Judgments Work Group bill draft and report (Exhibit D).
61	David Heynderickx	Presents information on the Judgments bill (Exhibit D) which is an abridged version of LC 1090 because the unabridged version is so lengthy with 632 pages. It will soon be available on the website. Most sections not in this abridged handout (Exhibit D) are mechanical, including the elimination of the term, decree. The meat of the bill is here in the handout. There were 14 meetings and the Judgments/Enforcement of Judgments Work Group is one of the larger Oregon Law Commission Work Groups with a wide variety of people. The project grew significantly as they progressed but the going was slow. At the first meeting they talked about “what is a judgment,” and the first six meetings focused discussion on this definition and other definitions. There was not time to handle all the issues, for example, how to foreclose mortgages.
		Mentions that the Chair of the Work Group, Rep. Max Williams, arrived and asks how the Commissioner would like for the discussion to proceed.
138	Rep. MaxWilliams	Expresses thanks to David Heynderickx for his valuable role in the Work Group and for the report that he wrote. Acknowledges the contributions of the Work Group and others who are here today including Jim Nass, Randy Jordan, Bradd Swank, Irene Taylor, and Ronelle Shankle. Announces that there are a handful of issues that needed to be left for the future because of time restraints.
170	Chair Lane Shetterly	Comments that the Judgments Report does a good job to explain the bill and asks if anyone wants to discuss the bill.
174	Chief Justice Wallace Carson	Comments that the Work Group did a great job and the Judgments Report gives a suburb explanation of the difference between law and equity. Explains that he was on the losing side of the <u>Zidel</u> case (see Judgments Report) and was delighted to see that it was noted for perpetuity the problems of the case.
195	David Heynderickx	Wants to mention one section, number eleven, which is probably the most significant of the bill. Referring to the Judgments Report, explains that many practitioners have been

surprised to have a case remanded by an appellate court to the trial court when the appellate court *sua sponte* discovers that the record is lacking a decision by the trial court on one of the claims that dropped out of the case early in the proceedings. Subsection (3), in combination with the definition of “general judgment” (page 3 of LC 1090), provides a clear rule: If you make a claim in the action, and you think you prevailed on the claim, you must be sure that it is somehow incorporated in the general judgment or it will be dismissed with prejudice. This rule was something that was discussed at great length. This is a major change in the case law and it is something that practitioners need to be aware of.

- 244 Chair Lane Shetterly Asks for clarification that this does not affect inadvertent judgments – parties can seek modified judgments.
- 249 David Heynderickx Responds that you would then be into ORCP 71, and would have to show excusable neglect, etc. to get a corrected judgment. ORCP 71 also recognizes the courts’ inherent authority to correct its own judgment. The judgment document is what controls; practitioners need to make sure it says what the parties believe the resolution is.
- 282 Professor Hans Linde Goes back to the issue of whether there is a need to talk about equity anymore, and asks, “Did you work through the prospective orders, injunctions, etc.?”
- 307 David Heynderickx Affirms that they thought about those issues as in the classic example of the divorce decree where they need to go back and do modifications. Explains that there are three types of judgments in the bill - a limited judgment to decide less than all issues that were presented to the court, a general judgment to resolve all remaining issues that were outstanding, and a supplemental judgment which is entered afterwards. Refers to page 124, section 101 which provides that a judgment entered under chapter 107 (domestic relations) may be altered or modified only by the entry of a supplemental judgment.
- 344 Professor Hans Linde Agrees that domestic relations is the primary area. Asks about institutional injunctions -- for example, those that say how to operate a jail, bus children, etc. Parties may want to be able to go back and amend such judgments. Also asks whether this would limit appellate courts’ ability to use equity to amend judgments, without sending it back (*i.e.* using *de novo* review).
- 358 David Heynderickx States that the principle provision for scope of review had to be tweaked to deal with law and equity. Articulates that the existing law talks about suits at law and at equity and these can clash with the ORCP.
- 374 Professor Hans Linde Maintains that he thinks this means they can amend the judgment at the appellate level without having to send it back.
- 378 David Heynderickx States, “Yes.” Adds that the court can also decide something is not an appealable judgment despite the label. Old statutes could be read to bind the appellate courts’ hands. The bill would make the courts’ discretion clear.
- 402 Phil Schradle Refers to section 11, subsection 3 (page 14 of LC 1090), and wants clarification that if anything is not explicitly expressed in the general judgment, it is nevertheless gathered up and incorporated into the general judgment and thus dismissed with prejudice. It also includes everything that cannot be decided by

supplemental judgment. There is express authority in the bill for doing domestic relations judgments by supplemental judgment. Asks if there must be express authority to do something by supplemental judgment. It sounds like a general judgment here adjudicates any and all claims that are outstanding whether or not they are expressed in the judgment or not.

425 David Heynderickx Asks if he is concerned with the supplemental judgment.
427 Phil Schradle Clarifies that he wants to make sure he understands correctly that if a general judgment gets issued, then whether or not it addresses all claims that are outstanding, basically it does by implicit reference. Also, how is it determined whether something can or cannot be addressed by supplemental judgment because it seems that there is a final judgment on all claims.

439 David Heynderickx Reads the definition of supplemental judgment in section 1 which indicates that by law it can be rendered after a general judgment has been entered in the action that affects a substantial right. States that the Work Group however did not define the word, law, in this case.

465 Professor Hans Linde Asks if the Judgments Report states this comment about the word, law.

470 David Heynderickx States that it does not say anything, but there are going to be changes to the bill.

471 Professor Hans Linde Comments that it might be a good idea to state that.
477 Chair Lane Shetterly Asks if others have questions and calls on Martha Walters.
479 Martha Walters Commends the project and Judgments Report and wants to know if the Oregon State Bar groups have seen the bill.

490 David Heynderickx. Responds that many of the Work Group members were members of different sections of the Oregon State Bar and were reporting back to their groups.

TAPE 2, A

01 Martha Walters Explains that it would be good to know which groups saw the bill and report so that the Commissioners would know who actually looked at it.

02 Chair Lane Shetterly Points out that the bar is represented in the audience and they will also take it back to the appropriate sections.

04 Rep. Max Williams Clarifies that almost every meeting of the Judgments/Enforcement of Judgments Work Group was at the Oregon State Bar offices and there were many members of the bar attending, including the appellate section, debtor/creditor, and others.

12 Bob Oleson of Oregon States that sections involved were primarily ones that have been State Bar mentioned.

13 Martha Walters Addresses David Heynderickx and asks if “it doesn’t become a lien unless it says general judgment on it and has the provisions that are required.” Wonders if it works prospectively only or whether it works for things that have not been right up until this date.

18 David Heynderickx Refers to section 45 on page 50 that addresses each of the different sections explaining retroactive applications because some of these things should only apply to judgments but, on the other hand, if you look at what we call extensions, we do not care when the judgment was entered only that this is the rule on

how one goes about getting the extension. Randy Jordan from DOJ, a member of the Work Group, has been looking at all the amended sections to see where we need to add specific retroactivity provisions on the amended sections.

37 Greg Mowe Comments on Cleve Abbe's Memorandum on behalf of the Oregon Land Title Association and, since he does some of that work, he finds some of Cleve Abbe's comments are well founded. When one gets into the tension between a judgment claim holder and a *bona fide* purchaser there may be a situation where prior liens have been paid off in the transaction and the effect is to give somebody something for nothing.

48 David Heynderickx Explains that it is interesting because there is an existing statute that says one thing and the courts see it as something different in respect to who wins between a judgment lien holder and the holder of an unrecorded interest in property. This issue has turned out to be more contentious than one would have imagined. This is an issue the Work Group members are still looking at. Cleve Abbe and Randy Jordan as well as some of the other people have raised the issue. It ties into one of the parts that is not finished in this bill which is on sale and execution. Notes that section 14 on page 17, subsection 2, lines 24-26 is where it shows up as well as in three other places.

82 Chair Lane Shetterly The motion will be to move LC 1090 for introduction but it does not foreclose amendments that will come back to the Commission when they are substantive enough to need Commission endorsement. Encourages the Work Group to work out the issue.

90 David Heynderickx Mentions that one solution is to maintain the *status quo* until they can think it through and find a better, more comprehensive solution.

95 Chair Lane Shetterly Comments about putting the Judgments bill in on the House side.

96 Rep. Max Williams Contends, "Assuming that the Speaker finds the subject matter relevant."

97 Chair Lane Shetterly Retorts, "Well, it is a judgment call." (Laughter and various comments follow.)

101 David Heynderickx Asks David Heynderickx if there are some other sections he wants to talk about.

Concludes by emphasizing sections 14 and 15 on the lien effect of judgments. We might look at it again because it is a hard issue. Discusses an example of someone being paid up on child support and wanting to sell their land, they can sell it free and clear. That is not true of delayed payment type judgments. You cannot sell the property free and clear. There is so much in this bill draft, it is hard to determine what is important to discuss. Another big item is if one submits a judgment form and it is not labeled as a general, limited or supplemental judgment, the clerk is not supposed to enter it in the register but return it to the judge. In those circumstances the judge must be asked to label it and that will be an irritation. Another big concern is if someone labels it a general judgment when it is meant to be a limited judgment. "That is a hazardous thing to do." It is hazardous because of the presumption that all other claims are dismissed. The significance of all this may not be

		understood by practitioners – a classic scenario is the summary judgment when a general judgment may be inappropriately issued when a party wants out of the suit. There was a lot of concern about that. See section 13 of the bill. There may be work needed on this issue because there may be situations for abuse. These two things are the big items that change things for the practitioner. This concept may need further massaging.
185	Chief Justice Wallace Carson	Thanks the Judgment Work Group members but can only hope there is more luck on the breakdown of judgments into three categories than the courts have had for twenty years. There is no such thing as a “judgment order” but the courts still see them. There will need to be a mechanism to instruct practitioners.
193	David Heynderickx	Agrees that this is a concern because the statute now says, “the court shall enter an order” and then it says “an order may be reduced to a judgment” or “the order may be entered as a judgment” but this makes no sense. Order has become confused in the minds of lawyers who think somehow it becomes a judgment. They might be referring to the judge making a decision as the order, and then reducing it to a judgment. Wants to briefly mention section 11, subsection 2 (page 14 line 31), where the language indicates that the general judgment incorporates the previous written decisions of the court that decide one or more claims in the case and that are not judgments. It is consistent with the terms of the general judgment and the limited judgment and all the other judgments but it reflects an express determination by the court that the decision be final. This is aimed to pick up all the decisions that are made during the course of litigation such as an order after a motion on rule 21. The idea was to incorporate all of those decisions as part of the judgment, as they should be. The word, “express” overstates what is needed and should be eliminated; this is discussed in the Report. Possibly it should say, “if it reflects a determination by the court.” The desire here is to get at Rule 21 orders.
247	Rep. Max Williams	Refers to a note that Justice Hans Linde passed to him; it refers to the impact of the lien obligation on continuing judgments (payment plan, structural settlements, etc.). Indicates to David Heynderickx that it is important to take some time to discuss the lien obligation issues today with the Commissioners.
259	David Heynderickx	Responds that in the case of settlement arrangements or delayed payments, it is his understanding on these that the delayed payment schedule is seldom written into the judgment and, even if it was, he doesn’t think it would affect the lien because it is still there. Thinks they are handled separately.
282	Professor Hans Linde	Wonders if the judgment calls for periodic payments (not family law) and if the money is not yet owed, can one sell their property free and clear. Asks where the bill addresses that.
291	David Heynderickx	Asserts that the lien attaches with the exception of child support and the general rule is in section 14 subsection 2. The title companies did not want to change this.
305 312	Professor Hans Linde Chair Lane Shetterly	Clarifies that even if payments are not yet due, the lien attaches. Asks if there are other questions.

314	Rep. Max Williams	Points out that this conversation is an example of the captivating discussions that the Judgments Work Group has experienced in the last four years and he hopes the Commission enjoyed the small taste of that experience.
318	Chair Lane Shetterly	Comments that there has been a specific suggestion to amend the Judgments Report to explain the reference to the word “law” in the definition of supplemental judgments which includes statutory and decisional law.
329	Rep. Max Williams	Moves that LC 1090 be presented to the 2003 Legislative Assembly, with the recommendation of the Oregon Law Commission, including the conceptual amendment to the Judgments Report that Chair Shetterly stated concerning the word law in the definition of supplemental judgments. Also moves that the Oregon Law Commission adopt the Judgments Report, dated February 6, 2003, to accompany LC 1090.
329	Chair Lane Shetterly	States that there is the motion that LC 1090 be presented to the 2003 Legislative Assembly, with the recommendation of the Oregon Law Commission, including the conceptual amendment concerning the word law in the definition of supplemental judgments. Also moves that the Oregon Law Commission adopt the Judgments Report, dated February 6, 2003, to accompany LC 1090. Asks for objections and hearing none, approves the motion. Vote 10-0. So ordered.
		Notes that amendments are anticipated and staff will keep the Judgments Work Group and Commission apprised.
		Recognizes the next Work Group is the Administrative and Judicial Child Support Orders with Commissioner Sandra Hansberger chairing that group.
361	Sandra Hansberger	Makes a brief statement, thanking Jean Fogarty from Department of Justice, Doug McKean who drafted the bill in Legislative Counsel office, and some members from the Administrative and Judicial Child Support Work Group who were very helpful, including Ronelle Shankle and Bradd Swank who are here today. Asks Ronelle Shankle, Judge Maureen McKnight, Carl Stecker and Carol Anne McFarland to come forward to help explain the bill and answer questions. Summarizes that the reason for the bill is to resolve a longstanding problem in family law. Refers to the handout which includes the bill draft, LC 1587, the Administrative and Judicial Child Support Orders: Resolution of Multiple Orders Report, a letter from the State Family Advisory Committee (SFLAC) and two pages of flowcharts. (Exhibit E) Explains that the Work Group had support from the State Family Advisory Committee (who wrote the original proposal) and they worked closely with Dave Gannett who is an attorney in private practice. Gannett has been on the executive committee of the Family Law Section of the Oregon State Bar, and he made frequent reports back to them. The section seems to be in support of the bill. Asks Judge McKnight to make a statement about the background history of the project.

415	Judge Maureen McKnight	Reports that they have been working to resolve this problem for the past ten years and it was not until the Oregon Law Commission got involved that they were able to make progress on the issue. The problem is that certain courts and the child support agencies have jurisdiction to address child support orders; technology does not exist to let the two fora know about the existence of other orders. Therefore multiple orders will exist. In the last few years, they have seen better paperwork generated but there is a need to provide a method for resolving the conflict between terms of two or more court orders, two or more agency orders, or multiple agency and court orders. This bill provides a process to address this issue by, among other things, creating the presumption that the last order controls.
488	Sandra Hansberger	Opens the discussion for questions and points out that Bradd Swank is here to help with comments or questions, too.
497	Chair Lane Shetterly	Asks if there are any questions.
TAPE 2, B		
20	Martha Walters	Thanks the Work Group especially for the flowchart (Exhibit E). Asks, if one of the judgments is from another state and one of them is inconsistent, can the bill take care of that problem.
27	Ronelle Shankle	Introduces herself as from the Department of Justice. Refers to another area of Oregon laws for interstate orders, which is in chapter 110. That chapter and not this bill would address the scenario that Commissioner Walters questions.
34	Martha Walters	Clarifies that, if one of the orders is from another state, chapter 110 must be used.
36	Chair Lane Shetterly	Explains that the panel had a nodding of heads to affirm the answer of yes. Asks if there are other questions.
42	Chief Justice Wallace Carson	Gives an explanation that when he worked in Marion County he saw this need. This is a major change in direction; he thanks them and is confident that it will work.
53	Sandra Hansberger	Moves that LC 1587 be presented to the 2003 Legislative Assembly, with the recommendation of the Oregon Law Commission. Also moves that the Oregon Law Commission adopt the Administrative and Judicial Child Support Orders Report, dated February 6, 2003, to accompany LC 1587.
55	Chair Lane Shetterly	States that there is a motion that LC 1587 be presented to the 2003 Legislative Assembly, with the recommendation of the Oregon Law Commission. Also moves that the Oregon Law Commission adopt the Administrative and Judicial Child Support Orders Report, dated February 6, 2003, to accompany LC 1587. Asks for discussion and, hearing none, carries the motion. Vote 10-0. So ordered.
62	Wendy Johnson	Calls on Wendy Johnson to report on HB 2272 of the Juvenile Code Revision Work Group. This bill HB 2272, Juvenile Code Revision – Summons, (Exhibit F) is back as a matter of formality because at the last meeting of the Oregon Law Commission it was noted that there were some items to clean up in the report. The amendments to the bill have not been made but will be. The bill is set for hearing on February 18 th with the House Judiciary Committee.

		Today we just need to approve the Juvenile Code Revision: Summons Report.
74	Chair Lane Shetterly	Requests everyone to look to the top of page 2 to see the operative language in the Juvenile Code Revision: Summons Report.
79	Chief Justice Wally Carson	Wonders if it really is a choice of oral rather than verbal; speech means oral and written includes verbal.
82	Chair Lane Shetterly	Suggests that they will make that conceptual amendment, changing verbal to oral.
83	Wendy Johnson	Agrees that is correct and points out that the same correction is needed in the footnote.
85	Chair Lane Shetterly	Moves that the Oregon Law Commission adopt the Juvenile Code Revision: Summons Reports, the Majority and Minority Reports, dated February 6, 2003, to accompany HB 2272 including the conceptual amendments changing the word verbal to oral in the Minority Report on page 2, line 4; and Majority Report on page 4, sections 3 and 5 and footnote 4.
		Asks for discussion and, hearing none, carries the motion.
		Vote 10-0. So ordered.
		Refers to the next Oregon Law Commission meeting on February 24, 2003; it will be devoted to the presentation of the Judicial Review Report and bill draft. Asks the Commission if the meeting time of 2:30 would work best for most people.
		Notes that Rep. Max Williams has left but there was discussion in the halls about a Legislative Counsel bill draft that he requested. In concept it is to create a structural tie between the Oregon Law Commission and the Uniform Commissioners on State Law. In his absence and based on the personal conversation the Chair had with Rep. Williams, the intention appears to be to give the Uniform Commission a home in the Oregon Law Commission, but the draft does not seem to reflect these intentions. The draft is now out and if anyone has any specific concerns please check directly with Rep. Max Williams. It is not an Oregon Law Commission bill draft, and in his absence it may be best not to discuss it more now. The Chair comments that he has related the basic substance of the bill and discussion will be tabled.
140	Attorney General Hardy Myers	Asks if the Chair or David Kenagy has had a chance to review the Governor's balanced budget for the Oregon Law Commission which is included within the Legislative Counsel.
147	David Kenagy	Explains that he has not had a chance to discuss this with Legislative Counsel, Greg Chaimov.
149	Attorney General Hardy Myers	Requests to have an update in the next meeting on the balanced budget in respect to the Commission.
151	Martha Walters	Refers to Rep. Max Williams' bill about the Uniform Commissioners on State Law and welcomes a tie-in between the two organizations. However, she explains that she does have some questions about the membership, noting it would be asking a lot for people to make the commitment to be a member of both Commissions. She would like to talk about other ways to make the two work together better.
160	Chair Lane Shetterly	Affirms her ideas and thinks that this is precisely one of the

areas that Rep. Williams did not intend. Comments that it is not uncommon for a bill draft to look different than what one intended.

States that there is 30 minutes until the Oregon Law Commission Reception with the talk scheduled for 5:00 p.m. Compliments the Oregon Law Commission staff on the Biennial Report. Thanks everyone and adjourns at 4:00 p.m.

Submitted By,

Reviewed By,

Rosalie M. Schele,
Administrative Assistant

David R. Kenagy,
Executive Director

EXHIBIT SUMMARY

A – Minutes from December 18, 2002 Commission Meetings

B – Summary of 2003 Oregon Law Commission Bills

C – Oregon Law Commission Biennial Report

D – Judgments/Enforcement of Judgments Bill Draft and Report

E – Administrative & Judicial Child Support Orders Bill Draft and Report

F – Juvenile Code Revision – Summons HB 2272 and Report