



CAPITOL INSIDER

OSB Public Affairs Newsletter for Bar Leaders

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Final Days and Judgeship(s)

By Bob Oleson

Legislative leaders are committed to terminating the 2001 session by July 1. Most pundits will conclude that the current set of lawmakers were at least moderately productive. However, our state's flat economy and big funding commitments to the education sector mean that our elected leaders are finding it difficult to fully maintain other programs.

The Judicial Branch is no exception when it comes to facing serious funding restraints. Decisions about what gets "added back" to the base budget are likely to be made during this week. Judicial salary increases, family court assistance, and a court facilities commission are still high on the list.

Always interesting to observe is the grass roots work done by interested constituents to secure new trial court positions. Legislators tend to actively cooperate with local lawyers because it is a good example of bringing home some important "bacon" to their community.

In recent sessions the so-called "Gleaves Committee" study and accompanying list of needed new judgeships has made this process more objective and defensible. There is a good chance that at least four or five new positions will be created in the final days of the current session. However, they would

probably be filled in January 2003 via election. But the process still has a political component. The recipients of any positions will be the counties where lawyers and judges have worked the hardest to forge partnerships with their legislators. Expect Jackson and Washington counties to be at the top of any such list. It should also be noted that Deschutes County may make the list – a county that has a powerful legislative delegation which is closely aligned with Bend-area lawyers and court officials. There may be a lesson here for other local legal communities.

HB 3642: Criminal Forfeiture

Ballot Measure 3 limited the scope of civil forfeiture by requiring a criminal conviction and made it less practical economically because of the limits placed on cost recovery. HB 3642, introduced at the request of law enforcement, proposes a structure for criminal forfeiture in Oregon that would act as a deterrent to criminal activity and allow that a portion of the proceeds go to local law enforcement agencies and to drug treatment programs.

HB 3642 repeals existing forfeiture provisions in certain criminal statutes and subjects to criminal forfeiture the proceeds of all felonies and Class A misdemeanors. It requires conviction and proof beyond a reasonable doubt that property is subject to forfeiture. The bill also establishes procedures for criminal forfeiture and specifies the

distribution of forfeiture revenue. The bill has a sunset clause of July 31, 2005. HB 3642 passed the House and has been referred to the Senate Judiciary Committee.

HB 2206: Like-Kind Exchanges

HB 2206, filed at the request of the Department of Revenue, clarifies certain valuation references in property tax statutes to conform to the constitutional limitations on assessed value imposed under Ballot Measure 50. As amended, the bill also modifies provisions regarding deferred taxable gains realized in like-kind property exchanges when the property acquired is located outside Oregon. This amendment was proposed in response to a recent tax court decision regarding the taxability of §1031 like-kind exchanges. The OSB Tax Section provided comment on the proposed amendments to the Department of Revenue. The bill also expands eligibility for the Rural Medical Practice personal income tax credit. Both the Senate and the House have passed HB 2206.

SB 114: Genetic Privacy

This bill was introduced at the request of the Genetic Research Advisory Committee and shepherded through the legislature by Sen. Peter Courtney. To protect the privacy of individual genetic information, the proposal provides a private cause of action and imposes civil penalties for violations of genetic privacy statutes. It also creates the crime of unlawfully obtaining, retaining, or disclosing genetic information, and extends statutory protections to blood relatives of the person whose genetic information was obtained. SB 114 establishes rules and procedures regarding genetic research and provides that genetic information may be used for anonymous research only if the person was notified that the sample might be so used and did not object. The bill has an emergency clause and takes effect on its passage. It is likely to be signed into law.

SB 667: DNA Testing

SB 667 allows a person convicted of certain crimes to petition a court for DNA testing. It requires the identity of the perpetrator to have been at issue during trial and that the evidence, assuming exculpatory results, would reverse the conviction or reduce the sentence. It establishes procedures for filing a motion, specifies uses for completed test results, and orders an interim committee to evaluate the operation of the bill's provisions. A motion seeking DNA testing must be filed within 48 months of the effective date of this bill. SB 667 passed the House and must be sent to the Senate for concurrence.

HB 3461: Probation Violation

Currently, an offender who violates the terms and conditions of probation may be placed in jail or receive other punishment. The length of the sentence or punishment is guided by rules of the Oregon Criminal Justice Commission. HB 3461, introduced at the request of the Oregon Association of Community Corrections Directors, eliminates the limits on custodial sanctions imposed by those rules. Instead, it allows the Department of Corrections to adopt rules regarding the length of sanctions, setting a limit of 60 days per violation.

Some concerns have been raised that this bill shifts the balance of power from judges to parole officers by allowing the Department of Corrections to establish the length of the administrative sanction by administrative rule. HB 3461 passed the House and has been referred to the Senate Judiciary Committee.

Want to Have an Impact?

The Board of Governors Appointments Committee will soon be appointing members to its regulatory boards, committees, councils, affiliated commissions, and bodies. To be considered for the annual appointment

process, your volunteer opportunity form must be filed with the bar no later than July 20, 2001. Annual appointments are normally made in October and November; however, members may volunteer at any time during the year. Volunteers are also being recruited for other activities, including bar program support, public service, and the New Lawyers Division.

To obtain a form or more information go to the bar's web site at www.osbar.org or contact Carol Guile at 1-800-452-8260, or 503-620-0222, ext. 308.

HB 3040: Patient Protection

HB 3040, a product of the Governor's Work Group on Patient Protection convened during the interim, creates various protections for enrollees of health benefit plans. It modifies existing provisions governing continuity of care, patient referral to specialists, the accessibility of services, and the external review process. The bill provides that an insurer that has agreed to be bound by the decision of an independent external review organization is subject to civil penalty if it fails to comply with the decision. If the insurer has not agreed to be bound by such decisions and fails to comply, the enrollee has a private right of action for damages. The Governor signed HB 3040 on May 30, 2001.

SB 167: *Troxel*

The recent United States Supreme Court decision in *Troxel v. Granville* limited the extent to which a state can order third-party visitation rights over the objection of a parent. SB 167 addresses this issue by creating a presumption in visitation disputes that a legal parent acts in best interests of the child. It also creates a presumption in custody disputes that it is in best interests of child to be in the custody of a legal parent and specifies the showing required of a nonparent to overcome these presumptions.

In addition, the proposal permits a court to appoint an independent expert or panel of experts to investigate, examine, or evaluate a party or child involved in a domestic relations suit or to assist the court and parents in creating and implementing parenting plans and resolving parenting-time disputes. Although this bill has passed both houses, it is now stalled because the Governor is considering a veto. The odds are now against the bill being enacted.

The OSB Family Law Section supports this bill. However, some lawyers connected to the gay community are concerned about the bill's effect on the nonbiological parent of a child when a gay couple splits up. These opponents of the bill believe that the parental presumption in custody cases is unnecessary and that the means to overcome the presumption in the bill are excessive, placing the legal rights of the parents too high in relation to the rights of children and psychological parents.

Interested parties also disagree about how much litigation will be generated by the failure to enact this bill to clarify the *Troxel* case in Oregon. Part of the lesson in this age of term limits is that all of us who want changes must pay more attention to interim work groups on these complicated topics.

SB 654: Body Wires

In 2000, the Oregon Supreme Court in *Fleetwood* held that a law enforcement officer must have a court order to use a body wire. The decision was based on interpretation of Oregon statutory law, not on constitutional grounds. Introduced at the request of the Portland Police Bureau, SB 654 is a response to the perceived impracticability of such a requirement.

The bill allows the use of a body wire, without a court order, if there is probable cause to believe that the suspect is engaged in a drug crime or prostitution, or if there is probable cause to believe that the suspect has

committed a felony and obtaining a court order would be unreasonable under the circumstances. SB 654 provides that the contents of a recorded communication must be kept confidential, and that the evidence is not inadmissible solely because of a failure to obtain a court order. It establishes as a defense to a criminal or civil action good-faith reliance on authority in using a body wire without a court order. Also included is a provision allowing a judge to issue an order permitting a wiretap to investigate prostitution cases. SB 654 has an emergency clause and thus takes effect on passage. This bill is expected to pass this session.

Legislative Highlights Publication

The bar publishes a compilation of the legislative highlights after every session. The focus of the book is legislation that will affect the practice of law in Oregon. Authors explain the substance of each bill and explain how it will affect the actions that lawyers take or the advice that lawyers give to clients.

The book will be available in early September. Watch for an announcement in the *OSB Bulletin* or call the OSB Order Desk (503-684-7413 or 1-800-452-8260, ext. 413) **after September 15.**

SB 920/HB 2664: DNA Samples

Two measures are proceeding that would expand the scope of the current Oregon law requiring a person convicted of any of several specified felonies to provide a blood or buccal sample at the request of the appropriate law enforcement agency. SB 920 proposes to include persons convicted of any felony, persons under supervision as a result of a felony conviction, and juveniles who commit any of several specified acts. HB 2664 adds to the list of crimes for which samples must be obtained but requires samples only from persons convicted in Oregon.

Both SB 920 and HB 2664 require that before the Department of State Police

may transfer a sample or disclose information, the receiving party must agree to destroy the sample or information on notification of a reversal of the conviction that created the obligation to provide the sample. SB 920 passed out of the Senate Judiciary Committee and has been referred to Ways and Means. HB 2664 passed out of the House Judiciary Committee and has also been referred to Ways and Means.

OSB Scorecard

Bar section and committee bills have moved through the legislative process at rapid speed. The following is a list of bills introduced this session by the bar and its sections and committees:

Summary	Status
HB 3260: House of Delegates governance changes	6/4 Gov. signed
HB 2938: <i>Pro hac vice</i> appearance fee	5/29 Gov. signed
HB 2372: Simultaneous testimony	6/12 H. Speaker and S. Pres. signed
HB 2374: Prevailing party attorney fees	6/12 H. Speaker and S. Pres. signed
HB 2375: Nonparty depositions	5/30 Gov. signed
HB 2361: Allows stipulation w/o waiving appeal rights.	6/5 passed H. concurred in Sen. amendments
SB 118: Minority shareholder rights in closely held corp.	6/8 Gov. signed
HJM 3: Resolution to eliminate discrimination against women	Dead
HB 2363: Unlawful trade practices act	Dead
HB 2364: Medicaid payment for guardianship fees/ costs	4/6 Referred to Ways & Means
HB 2365: Continued validity of power of attorney	6/12 H. Speaker and S. Pres. signed
HB 2366: Medicaid trust and protective proceedings	5/29 Passed House, Referred to Ways & Means
HB 2367: Notice in guardianship/conservatorship	6/12 H. Speaker and S. Pres. signed
HB 2368: Review of advanced directives in protected proceedings	6/12 H. Speaker and S. Pres. signed

SB 120: Notice to creditors after death of settlor	Passed Sen., Recommend Do Pass House w/amndmnts 5/30
SB 123: Uniform transfers to minors act	5/30 Gov. signed
SB 122: Uniform disclaimer of property interest act	5/30 Gov. signed
SB 124: Divorce judgments by affidavit by stipulation	6/4 Gov. signed
SB 713: Counseling for consenting birth parents	6/6 Sen. concurred in House amendments and repassed
HB 2369: Clarify conflict of interest for public officials	President signed, Speaker signed 5/23
HB 2370: Technical clean up of ORS Chs. 197 & 215	6/13 Passed Sen., Passed House.
HB 2371: Defines de novo review after admin. hearing	6/12 H. Speaker and S. Pres. signed

HB 2096: Executions

Filed by the Governor at the request of the Department of Corrections, this bill adds representatives of the media to the list of persons who must be invited to be witnesses at executions. It also permits the superintendent of the institution to allow those present at an execution to view the procedures preceding the administration of the lethal injection by means of closed-circuit television. The bill declares an emergency, with its provisions to take effect on its passage. The Governor signed HB 2096 on May 29, 2001.

HB 3502: Energy Deregulation

Currently, statutory language calls for the Public Utility Commission (PUC) to protect customers and the public generally by establishing rates for utility services that are fair and reasonable. This bill, proposed to encourage continued investment in telecommunications and energy infrastructure, requires the PUC to balance the interests of the utility investor and the consumer in establishing fair and reasonable rates. It defines rates as fair and reasonable when they provide sufficient revenue for

operating expenses and capital costs and an adequate return to equity holders. The House rejected a minority report that would have amended the bill to include provisions delaying certain portions of the upcoming deregulation of the electricity market. HB 3502 has passed both the House and Senate.

OSB Public Affairs

The OSB Public Affairs Committee (“PAC”) oversees legislative activities and makes recommendations on major policy issues. Chaired by Hillsboro attorney John Tyner, other members include; James Brown, Salem; William Carter, Medford; Malcolm Scott, Eugene; Charles Williamson, Portland; and public member Mary McCauley Burrows, Eugene. Ed Harnden, OSB President, is also an ex-officio member of the PAC.

If you have questions or comments about this newsletter or legislative issues, please contact the Public Affairs Committee chair John Tyner at (503) 648-5591 or the Public Affairs staff at the bar office at (503) 620-0222 or toll-free in Oregon at (800) 452-8260. You can reach Bob Oleson at ext. 317 or by e-mail at boleson@osbar.org; contact Susan Evans Grabe at ext. 380 or by e-mail at sgrabe@osbar.org.