



# Capitol Insider

OSB Public Affairs Newsletter for Bar Leaders

## Public Affairs Committee

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## Oregon State Bar Day at the Capitol

The OSB is organizing a day at the capitol on Thursday, March 10 for Oregon State Bar leaders. This event is designed to increase awareness among legislators of the importance to their communities of **indigent defense and a healthy court system**. Like other parts of state government, the courts and indigent defense are threatened with **cuts of 9 percent** to the funding required to maintain current functions.

Legislative leaders and members of the Judiciary will provide pointers on lobbying, and briefings on the current status of the courts' and indigent defense budgets. Staff will set up appointments for you with your legislators, and will talk with you after your meetings about the legislators' positions on the issues you discussed.

Pre-registration is crucial. If you plan to participate, please contact Public Affairs staff at [brichley@osbar.org](mailto:brichley@osbar.org).

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## Revenue Forecast

The March revenue forecast for the 2005-2007 biennium, released on February 25, showed a net increase of \$202.2 million from the previous forecast. These funds are available for the legislature to use to add back some of the items cut as a result of the previous revenue projection. While this is unquestionably good news, revenue is still roughly \$800 million below the amounts needed to maintain existing service levels in state programs.

## OJD/PDSC Budgets

The legislature's Joint Ways and Means Committee has begun consideration of major agency budgets, including the budgets for both the Oregon Judicial Department (OJD) HB 5042, and the Public Defense Services Commission (PDSC) SB 5525. These budgets are in the Sub-Committee on Public Safety, chaired by Sen. Avel Gordly (D-Portland). Other sub-committee members include Reps. Gene Whisnant (R-Sunriver), Bruce Hanna (R-Roseburg), and Gary Hansen (D-N. Portland), and Sens. Richard Devlin (D-Tualatin) and Jackie Winters (R-Salem).

Because the Judicial Department is a separate branch of government, the Chief Justice submits recommended budgets for both OJD and PDSC directly to the legislature, instead of submitting budgets to the Governor. To make the budget as a whole pencil out, however, the Governor submits a recommended budget to the legislature that includes both OJD and PDSC.

The Chief Justice's maintenance level budget request is \$274.5 million general fund for the judicial department. In addition, the Justice Chief requests \$39.6 million general fund for various other needs ("policy packages"), including new judgeships, salary increases, funding for integrated family and drug courts, and other needs. For PDSC, the Chief Justice requested a maintenance level budget of \$175 million general fund, plus an additional \$12 million general fund for PDSC policy packages.

While making no recommendation, the Governor's budget includes \$249.7 million general fund for the OJD and \$159.4 million general fund for the PDSC. These figures represent cuts in excess of nine percent to the Chief Justice's maintenance budgets for both OJD and PDSC – substantial reductions but consistent with those that other agencies face. While no one is formally bound by the Governor's figures, they are significant. Assuming no new revenue and no improvement in the economic forecast, the Governor's budget only balances if these reductions are made. Put differently, these nine percent shortfalls can be made up only at the expense of other agencies.

In addition, the Ways and Means Co-Chairs have asked all agencies to submit plans for an additional ten percent cut from the level in the Governor's budget.

The Ways and Means process for major state agencies is moving in three phases this session. Phase 1 is a general introduction to the agency and its operations in the relevant sub-committee. This phase is complete for both OJD and PDSC. Phase 2 will take place in March and April, and will be an opportunity both for public testimony and for a closer examination of the agencies' budgets. Phase 2 will probably result in a number of options for reductions and add-backs. Phase 3 will be played out after the final revenue forecast in May, and will result in the final agency budgets for the next biennium.

Throughout the orientation sessions and the agency presentations, a strong theme emerged: the public safety system is an interdependent group of agencies, and if one agency receives too much or too little support the other parts of the system will become unbalanced. Agency budgets, therefore, cannot be considered individually without taking into account the other parts of the system. A reduction to indigent defense, for example, may foil a legislative initiative to get tougher on crime: prosecutors cannot charge unless indigent defendants have court appointed counsel at state expense. As PDSC Director Peter Ozanne told the sub-committee, the task is "right size" the components of the system to work together effectively and efficiently.

Adoption of the Governor's budget would have significant effects on civil practice. A nine percent cut would force the judicial department to prioritize the types of cases courts currently handle. The courts' highest priority case types relate to public safety and child safety matters. With respect to the rest, the courts would have to "thin-the-soup" and handle cases as resources allow, or the legislature would have to remove statutory responsibilities for post conviction relief, small claims, property-only domestic relations matters, probate, and a substantial part of the general civil caseload.

Given all the demands on the state's general fund budget, it is difficult to see how the judicial system will emerge from the 2005 session unscathed. The support of the legal community for the judicial department and indigent defense budgets will be crucial in minimizing the damage.

## Cases with Legislative Implications

The Oregon Supreme Court will decide a number of cases while the legislature is in session that will have significant impact on deliberations at the capitol. Among the cases pending in the court are the following:

**PERS Reform Litigation.** The 2003 legislature passed and the Governor signed into law a series of bills related to the Public Employees Retirement System (PERS). The legislature found that past errors in the administration of PERS had resulted in increases in benefits and costs and that “unless immediate steps are taken to reform and stabilize PERS, escalating pension costs will undermine the financial security of PERS, force massive cutbacks in essential government services, eliminate the jobs of many public employees, and destroy the public’s confidence and trust in the governmental institutions of the state.” HB 2003 (Preamble).

The legislature conferred original jurisdiction on the Oregon Supreme Court to resolve challenges to the 2003 legislation. The Supreme Court directed Court of Appeals Judge David Brewer to conduct the pre-hearing phases of the PERS litigation. Judge Brewer submitted his report to the Supreme Court in April, 2004, and oral argument was held on July 30, 2004. At issue was the constitutional validity of almost all of the PERS reforms that the legislature enacted in 2003.

**Bobo v. Kitzhaber, S51565, A120098.** The state is obligated to pay “kicker” refunds to personal income taxpayers when certain revenues received during the biennium exceed by two percent or more the amounts estimated to be received. The plaintiffs in this case contend that the state improperly excluded from the kicker calculation the amount of certain Medicaid payments received during the 1999-2001 biennium. If these payments are included, the 2001 kicker would be increased by \$113 million, which the state would have to pay back, probably in the next biennium. The taxpayers won in the Oregon Court of Appeals. Oral argument was held on January 11, 2005. On February 25, 2005, the Oregon Supreme Court issued a decision in the Bobo case, reversing the decision of the court of appeals, and holding that exclusion of the Medicaid payments from the kicker calculation was permissible.

**Lincoln Interagency Narcotics Team v. Kitzhaber, S50900, S50904, A115401.** Voters passed ballot Measure 3 in November 2000. This measure was a constitutional amendment that substantially curbed the use of civil forfeiture. Among other things, the measure required that a property owner be convicted of a crime before property could be forfeited and required that the proceeds from the forfeited property be used for drug abuse treatment. The court of appeals held that requiring a criminal conviction as a condition to civil forfeiture and imposing restrictions on the use of the proceeds were two substantive changes to the constitution that were not closely related. Therefore, the court held that the measure violated the separate vote requirement of Article XVII, Section 1 of the Oregon Constitution. This case was argued on November 4, 2004.

**Li v. State of Oregon, S51612, A124877.** This case involves the validity of the marriage licenses issued to same sex couples in Multnomah County in March 2004. A trial court ruling was appealed directly to the Supreme Court. While the case was pending, the voters passed Measure 36, which effectively limited state recognition of marriage as a union between one man and one woman. The issues before the court include, perhaps most significantly, whether the passage of the ballot measure renders the issues before the court moot. If not, the court may decide whether marriage-related benefits should be extended to same-sex couples and whether marriage itself should be extended to same sex couples. Oral argument was held on December 15, 2004.

Depending on how the court rules, decisions in these cases may spark debate on both substantive and fiscal issues, and could lead to discussion of the proper role of the judicial branch in the making of public policy. These cases might also generate debate about the appropriate level of funding for the judicial department itself.

### Bills of Interest

<b>Bill #</b>	<b>Summary</b>
SB 475	Imposes pleading requirements for professional liability claims.
SB 476	Provides that upon offer of expert scientific evidence at trial, court must first determine whether theory or technique supporting offered evidence is based on scientifically valid principles and is pertinent.
SB 431	Clarifies exemptions to exclusive jurisdiction of Land Use Board of Appeals to review land use decisions.
SB 432	Converts Land Use Board of Appeals into Land Use Court of Appeals. Provides that Land Use Court of Appeals be within judicial branch and consist of three judges.
SB 216	Allows Attorney General to intervene in class actions to assert claim on behalf of class members who fail to submit statements required for award of damages.
SB 330	Permits court reporter employed by party to charge transcript fees as agreed to between reporter and party employing reporter for preparing transcripts on appeal.
SB 331	Clarifies that in circuit court proceedings where court may use audio reporting techniques, any party to proceedings may arrange for stenographic reporting of proceedings.
SB 254	Directs State Court Administrator to adopt uniform standards for recording proceedings in circuit courts.
SB 323	Redefines "independent contractor" for laws relating to income tax, workers' compensation, unemployment insurance, architects, landscape contractors, construction contractors and others.
SB 441	Limits contingent fee permitted in negligence claim based on amount recovered. Authorizes court to further limit attorney fee under contingent fee agreement in action based on negligence claim.
SB 516	Limits contingent fees permitted in negligence claims. Provides that attorney may not contract for or collect contingent fee if amount of fee would result in attorney being paid in excess of \$500 per hour for services provided by attorney.
SB 333	Increases maximum amount plaintiff may claim in certain tort actions for which court must award attorney fees if plaintiff prevails.
SB 229	Requires that in dependency proceeding in juvenile court, court give preference in placement of child or ward to person with caregiver relationship with child or ward.
SB 921	Requires petitioner for adoption to serve summons and motion and to show cause on certain parents who do not consent to adoption.
SB 287	Creates exception to prohibition on use of hearsay as evidence.
HB 2278	Creates new circuit court judge positions.

HB 2444	Authorizes circuit court to place probationer under supervision of court.
SB 247	Eliminates sunset on laws requiring that University of Oregon School of Law and Mark O. Hatfield School of Government provide certain dispute resolution services.
HB 2676	Increases amount certain witness is entitled to receive for each day's attendance and for mileage reimbursement.
SB 802	Revises guardianship laws.
SB 275	Enacts Oregon Uniform Trust Code.

## Oregon Legislature Membership

There have been a number of changes in the membership of the Oregon Legislature since the opening of session. The House of Representatives has gained two first time legislators and the Senate has picked up a seasoned member.

Rep. Betsy Johnson (D-Scappoose) was chosen by county commissioners to succeed Sen. Joan Dukes (D-Astoria). Sen. Dukes resigned from the Senate following her appointment by Governor Kulongoski to the Northwest Power and Conservation Council. Rep. Johnson will fill Dukes unexpired term representing citizens of Clatsop, Columbia, and parts of Multnomah, Tillamook, and Washington Counties. Brad Witt (D-Clatskanie) was appointed to represent HD 31 after Rep. Johnson resigned her seat to move to the Senate. HD 31 covers Clatsop and Columbia Counties, and a small part of western Multnomah. Witt, a lobbyist for 24 years, has lobbied on several issues including economic and workforce development, natural resources, and workers' compensation.

Most recently, Kevin Cameron (R-Salem) was named by Marion County Board of Commissioners to fill the House seat vacated by former Rep. Dan Doyle (R-Salem). Former Rep. Doyle resigned on Jan. 31 under allegations of campaign finance mismanagement. Cameron, a local business owner, will represent District 19 in parts of Salem and southeastern Marion County.

### Bill Information

To access information about committee hearing schedules, the text of a bill or its status, please visit the Oregon Legislature's website located at [www.leg.state.or.us/index.html](http://www.leg.state.or.us/index.html).