

MEDIA HANDBOOK
ON OREGON LAW
AND COURT SYSTEM

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Introduction

This handbook was prepared by the Oregon Bar–Press–Broadcasters Council to increase cooperation among these professions and provide wider understanding of the Oregon court system among journalists and broadcasters.

Members of the Oregon State Bar, the Oregon Newspaper Publishers Association, and the Oregon Association of Broadcasters shared their expertise to develop this reference manual. Its purpose is to answer the most commonly asked questions concerning the media and courts.

This handbook explains concepts such as common law and statutory law. It answers questions about the ethical boundaries of the media and courts. It explains how ethics rules are enforced and who enforces them. Defamation, privacy laws, public access to government records and rules regarding cameras in the courtroom are among the topics discussed. A glossary of common legal terms concludes the handbook.

The authors have produced a short course on how courts function. The intent of this effort is to enhance understanding between those who use the courts and those who inform the public about courtroom events.

Media Handbook on Oregon Law and Court System

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CHAPTER I: FREE PRESS AND FAIR TRIAL

Several institutions exist in Oregon to help assure the rights of free press and fair trial. Their purpose is to protect both — through cooperation and consultation rather than by confrontation. They include:

Oregon State Bar–Press–Broadcasters Council: This council was established in 1962 by the Oregon State Bar (OSB), the Oregon Newspaper Publishers Association (ONPA) and the Oregon Association of Broadcasters (OAB) to work on matters of common interest to the three professions,

The council is composed of six members appointed by Oregon Association of Broadcasters, six members appointed by the Oregon Newspaper Publishers Association and 12 members appointed by the Oregon State Bar. It operates on a yearly calendar that begins with the September meeting and ends with the May meeting. It meets on the first Saturdays of September, November, February and May, and the meetings are hosted on a rotating basis by the member organizations. If the September meeting date falls on the Labor Day weekend, the September meeting is on the second Saturday.

The council is empowered to act on its own authority, without referring its actions to the parent organizations, but it may not take positions on behalf of its parent organizations.

The chair of the joint council shall rotate annually by its calendar years. For example, in 1997–98, the chair was held by the Oregon State Bar; in 1998–99, the chair was held by the Oregon Newspaper Publishers Association; and in 1999–2000, by the Oregon Association of Broadcasters.

Much of the work of the council is focused on issues of free press and fair trial, but from time to time the joint council organizes and sponsors other activities of mutual benefit to the legal and news professions, such as conferences, seminars and the publication of this handbook.

Any person may bring a matter before the joint council. It can be reached through the central office of any of the three sponsoring organizations: the OSB, ONPA or OAB. The council's bylaws are in Appendix E.

Guidelines for Reporting and Comment on Criminal Proceedings: The first main activity of the joint council was, in 1962, to draft and agree upon a joint statement of principles for news reporting and comment on criminal proceedings, aimed at assuring the public the opportunity to be kept fully informed without violating the rights of any individual. The joint statement is included as Appendix A.

In 1967 the joint council added to this statement a set of guidelines for reporting of criminal proceedings (see Appendix B). These recommendations, often referred to as the “Oregon Bar–Press Guidelines,” are intended to advise reporters, lawyers, law enforcement officials and other involved persons as to what is generally appropriate to say, or not to say, about a criminal proceeding prior to a trial. The guidelines also make recommendations concerning the photographing of criminal defendants.

The guidelines are advisory only. The decision on whether to follow them in a particular case is left to the discretion of the individuals involved. However, they have been approved by the respective conventions of the Oregon State Bar, Oregon Newspaper Publishers Association and Oregon Association of Broadcasters.

The joint council has also established a procedure for dealing with complaints of violations of the bar–press guidelines. Its full text appears in Appendix C. In essence, it calls for the joint council to try to mediate a resolution of the complaint between the parties involved. If this is unsuccessful, the joint council is authorized to appoint a subcommittee to investigate and publish an advisory opinion as to whether a violation of the guidelines has occurred.

Judicial Conference Resolution of 1977: In 1975 and 1976 the joint council considered the constitutional issues raised by judicial restraining orders aimed at limiting news coverage of criminal proceedings, particularly pre–trial proceedings. It proposed a procedure by which a judge, lawyer or journalist

who anticipates a possible fair trial–free press conflict in a particular case can attempt to have the issues resolved by voluntary consultation rather than by issuance of a court order. The Oregon Judicial Conference considered and amended the joint council’s draft and then adopted it unanimously on April 20, 1977, as a recommended procedure for Oregon judges to follow. It appears in Appendix D.

CHAPTER 2: COMMON LAW

The system of law in the United States is unique among nations because of its combination of common law and constitutional hierarchy.

Common law is judge-made law. It is case law. The only way that the judiciary can speak is through individual cases brought to it for resolution. Unlike the other branches of government, the judiciary is not a self-starter. Common law begins when citizens file a case in the courts. Only constituents can invoke the workings of common law.

During the past 40 years, federal, state and local governments have enacted increasing amounts of legislative law. However, rather than lessening the impact of judge-made law, this development has added broader dimensions to the common law. Legislation needs interpreting. Courts construe statutes when required to do so in individual cases. Thus a body of common law develops around the enactment.

Many of the legal problems of the media are resolved by common law processes. Libel and privacy cases are common law torts unfettered by comprehensive legislative enactment or administrative regulation. As a result, reporters, editors, broadcasters and publishers must piece together judicial decisions in order to discover the sometimes complex jigsaw of legality.

Dual Function of Common Law: Case decision in the common law process fulfills two purposes: It resolves the dispute between the litigating parties, and it lays down a precedent on which the future can rely. Thus, it looks backward at a controversy already existent and looks forward to potential controversy not yet in being.

The former function is born out of the need to look at each case anew, to give every citizen a day in court, to examine each case in its own context. It is situational justice; it champions specificity. The latter function, however, is born out of the need to be consistent with the past, to examine previous cases in conjunction with the case at hand. It protects societal security and stability. It fosters generalization.

There is, therefore, a strange mixture of rigid generality with flexible specificity in the common law. The need to be uniform and to apply law consistently in like situations locks common law into fixed rules and principles and regards the common law as a neatly balanced, self-structured system. On the other hand, ad hoc decision-making favors examination of contemporary norms and customs and regards the common law as the reflection of current society.

Justice Oliver Wendell Holmes, Jr., said: "It is the merit of the common law that it decides the case first and determines the principle afterward." He was urging that the value of common law is its contemplation of each dispute as it arises without its own situational justice. Generalizations that single-package all situations should be mere observations after the fact, not controls before the fact. To this extent, common law is anathema to statutory law.

Statutory law applies deductive thinking. The statutory norm becomes the major premise in a syllogism; the alleged fact of a violation is the minor premise. Outcomes in statutory law are arrived at by application of reasoning from the general to the specific, from abstract to reality. (The case by case tenets of common law suggest an inductive approach.)

A case decision by the courts becomes precedent for future cases. This is called the doctrine of *stare decisis* (to adhere to decisions). To what degree should judges follow precedent set by former cases? A great deal of controversy has always existed on that issue.

At one end of the spectrum are judges who look to the former case(s) and theorize some generality from it; the "rule" of the prior case becomes mechanically controlling in all similar future cases. The most strict of these judges will give "the rule" a status akin to statute and will deny even their own power to overturn it. This was the clear law in England until as late as 1965 where not even the highest court in England (Law Lords of the House of Lords) would overturn their own prior decisions.

At the other end of the spectrum, there are judges who regard case precedent as simply persuasive

analogy. Those judges will not consider the decisions of prior cases as settled law in deciding the case at hand. They are, however, influenced (but not bound) by a need to reason uniformly in similar situations, so that outcomes are reached with logical consistency.

Trial courts are committed to the strict view in applying the decision of higher appellate tribunals. Appeals courts are the ones more apt to evaluate the need for *stare decisis*.

Some appellate courts will vacillate in choosing the strict or liberal view of precedent. That ambivalence is usually the product of court personnel changes. Our own Supreme Court of Oregon has wavered on *stare decisis* and the overturning of precedent. In 1955, in *Landgraver vs. Emanuel Lutheran Charity Board*, Justice Walter L. Tooze speaking for a 5–2 majority refused to strike down the court-created charitable immunity doctrine, stating: “Once the court has ascertained and declared that public policy, it becomes the law of the state, and is as binding as a legislative enactment.”

In the following eight years, five new justices reached the court. This new alignment in 1963 overturned the charitable immunity doctrine. Justice Alfred T. Goodwin, writing the majority opinion, said: “It is neither realistic nor consistent with the common law tradition to wait upon the Legislature to correct an outmoded rule of case law. The pull of *stare decisis* is strong, but not inexorable.”

In European countries such as France, courts are neither bound nor influenced by their own decisions nor by the decisions of higher courts. Indeed, a judge is precluded from announcing general rules in a given case; citation to the applicable provision of a written legislative code is all that is necessary.

The European courts are also less centralized, so that district appellate courts rather than a central hierarchical court are more likely the final resort. With detailed codes providing national continuity, there is less need for judicial uniformity or centrality.

Distinguishing Common Law Precedent: The overruling of precedent is, of course, the most drastic result that can occur in the common law. Because overruling precedent disturbs the stability of the common law, judges often employ the tactic of distinguishing precedent rather than overturning it.

One device for ignoring a prior case pronouncement is simply to declare that pronouncement is dictum, a tangential remark not necessary to the decision in the previous case and, therefore, not precedent. Because the judiciary’s power can only be invoked by disputants in controversy, a court cannot broaden its power by going beyond the confines of what is necessary to solve that controversy. Any attempt to do so is mere dictum and not binding.

Another device for distinguishing precedent is to find that facts of the previous case are not analogous. For example, pronouncements in a criminal opinion are not binding in a contract case.

A more candid device for not applying precedent mechanically is the recognition that some precedent is not as compelling as others. The late U.S. Supreme Court Justice Felix Frankfurter urged that cases which were not well researched, carefully argued, or thoroughly considered, should be frankly devaluated on the scale of precedent.

Precedent may be viewed strictly or loosely. It may be strictly construed and held to its narrow environment, thus virtually discarding it as precedent. Or it can be broadly construed and liberally extended to all of its language, thus spreading its mantle over large area of subsequent cases. Whether a given court chooses one or the other deployment depends upon that court’s attitude as persuaded by trends, “trends in the situation or in the times at large.”

Due to the volume of cases and the need to expedite case backlogs, many federal courts and boards have adopted rules whereby certain specified decisions are not to be used as precedent and whereby certain expedited decisions may not be appealed.

Formalization of Common Law Appellate Opinions: There are by-products of this common law system. A case-by-case approach to the law demands the writing and publication of judicial opinions. In the two centuries of American law, more than 3 million judicial opinions have been written and are housed in over 17,000 volumes of cases. The millions of words of judicial opinions written each year

further spawn texts, encyclopedias, and a vast amount of commentary upon the law published in over 500 law reviews and other periodicals, all of which command thousands of pages of indices. Such proliferation unmask the notion that common law is “unwritten” law. On the contrary, it is the most written law.

The essence of the common law is the written judicial opinion. Unlike statute or executive decree, it spars in the marketplace of ideas. In the pattern of editorials or essays, the judicial opinion talks to us, gives us reasons with which we may agree or differ. It discusses. It attempts to persuade. But most of all, it deals directly with the non-antiseptic world of actual behavior between real and specific people.

Common law is born out of citizen dispute. A legal system that develops from those popular origins in contrast to one where laws are propounded sweepingly by the political elite from abstraction and perceived future needs, is arguably more responsive to the spirit and mores of its constituency.

CHAPTER 3: OREGON STATE COURTS

The Oregon Constitution established a supreme court and “such other courts as may from time to time be created by law.” The original Article VII of the constitution provided for circuit courts, county courts, justice of the peace courts and municipal courts. These provisions now have the status of statutes, a result of the adoption of amended Article VII of the constitution on November 8, 1910. This action allowed the legislature to create new courts, such as the tax court. The circuit court is vested with all judicial power, authority and jurisdiction not specially vested in another tribunal.

The geographical, civil and criminal jurisdiction of all trial courts of the state system have been defined by legislative action. Municipal courts are created by local charters, but are subject to legislative directives.

Separate courts of law and equity have never existed in Oregon although some procedural differences between suits and actions were maintained. In 1980, revised criminal proceedings abolished the last vestiges of procedural variations in state trial courts based on cases being historically “legal” or “equitable.” Because it is a constitutional right, the right to a jury trial was not affected by the adoption of the revised proceedings. The procedures unique to trying a case before a court or jury are preserved.

Generally, appeals may be made from decisions of all lower trial courts and tribunals to the appellate courts created by state law. In general, actions at law can be appealed only on issues of law, such as upon an allegedly erroneous ruling by the trial judge. In equity cases, findings of fact can be made by the appellate court based on a de novo review of the record. Trial court decisions on appeal may be affirmed, reversed, or modified and the cause can be remanded for a new trial in the court below. All courts of the Oregon state court system administer both criminal and civil law. Although municipal courts and administrative tribunals are not an integrated part of the Oregon judicial system, appeals from their decisions may be brought in the appropriate state courts.

The Judiciary: The judiciary of the state court system consists of judges elected by non-partisan ballot for six-year terms. Judges of the Supreme Court, the Court of Appeals and the Tax Court are elected statewide. Circuit judges are elected within the judicial district in which they sit. When a judgeship is vacated between elections by retirement, death or resignation the vacancy is filled by gubernatorial appointment. Such positions are subject to election to full six-year terms at the next general election.

Jurisdiction: Oregon law provides that the county courts having juvenile and probate jurisdiction, the circuit courts, the Court of Appeals and the Supreme Court are courts of record (those with reported proceedings). Justice courts and municipal courts are not.

Municipal Court: Municipal courts exist in most Oregon cities; they are established by city charter but controlled in some procedures by state law. The primary function of a municipal court is to decide cases that involve the violation of city ordinances. Such decisions may be appealed to the circuit court.

Municipal judges are appointed by city councils except in two municipalities, where they are elected by the city’s voters. The judges are not required by state law to be attorneys. In a number of cities a position of municipal judge is combined with that of city recorder or some other office.

Justice Court: Justices of the peace operate the justice courts authorized by boards of county commissioners.

Justice court jurisdiction extends to most civil cases where the amount claimed does not exceed \$2,500, except that this jurisdiction specifically excludes cases involving libel, slander, title to real property, criminal conversation, malicious prosecution or false imprisonment. Small claims departments exist

in justice courts where actions for recovery of money or damages of \$1,000 or less may be heard.

Criminal jurisdiction in justice courts extends to all misdemeanors, but defendants may elect to have their cases transferred to a district court or, in the absence of a district court, to the circuit court in the county of arrest. Justice court jurisdiction also includes traffic and other violations. Decisions of justice courts may be appealed to the circuit court.

Justices of the peace are not required to be attorneys and their courts exist in approximately 37 Oregon communities.

County Court: In nine Oregon counties an elected county judge performs certain judicial functions in addition to general administrative duties shared with elected county commissioners. Probate, guardianship and conservatorship cases are heard by the county judge in Gilliam, Grant, Harney, Malheur, Sherman and Wheeler counties. Juvenile and adoption matters are handled by the county judge in Crook, Gilliam, Harney, Jefferson, Morrow, Sherman and Wheeler counties. County court judges are not required to be attorneys. Decisions of county courts may be appealed to the circuit court.

District Court: In 1913 the Legislature established a state district court in every city with a population of 100,000 or more. This was the beginning of the district court, which replaced the justice of the peace court in Multnomah County. Since the original act, district courts have been established in 27 of the 36 Oregon counties.

District courts were abolished by the Oregon Legislature effective January 15, 1998. All former district courts are now circuit courts.

Circuit Court: The circuit court is a court of record exercising all judicial power, authority and jurisdiction not vested in some other court. The court has jurisdiction in all civil and criminal cases, including the trial of felonies. Circuit courts also hear appeals by trial de novo from justice courts and county courts.

The circuit court operates in 20 judicial districts, each of which contains one or more Oregon counties. Each judicial district has one or more circuit judges elected for a six-year term. ORS 3.225 gives general authority, subject to approval of the chief justice, for circuit courts, by rule, to establish specialized subject-matter departments, such as for probate, domestic relations or juvenile cases. Any judge may serve in any department as assigned by the presiding judge of the court. In a few counties the county judge, rather than a circuit judge, hears the cases involving juvenile, adoption, probate, guardianship and conservatorship matters.

Tax Court: The Oregon Tax Court has exclusive jurisdiction in personal income tax cases, corporate excise and income tax cases, property tax cases, inheritance and gift tax cases, and appeals from the supervisory orders of the State Department of Revenue in cases involving the local budget laws.

The Tax Court has a regular division and a small claims division. Limits for small claims actions are based on the amount of tax or property value involved. For example, an income taxpayer disputing a tax assessment or refund of \$500 or less may appeal directly from the tax auditor of the Tax Court small claims division without first appealing to the department of revenue.

The Tax Court has statewide jurisdiction with headquarters and courtroom in Salem, but the court regularly sits in other counties of the state to be closer to where the taxpayer resides or where the property in question is located. Decisions may be appealed to the Oregon Supreme Court.

Land Use Board of Appeals: Established as part of Oregon's land-use laws, the Land Use Board of Appeals (LUBA) is the first state level of appeal of many city and county land use and zoning decisions. Cases brought before LUBA generally cannot be appealed to local circuit courts, and vice versa. The next step from LUBA is the Court of Appeals.

Court of Appeals: Established in 1969, the Court of Appeals consists of 10 judges who are elected by statewide ballot for six-year terms. These judges elect a chief judge of the court from among themselves also for a six-year term.

The Court of Appeals has jurisdiction over all appeals from decisions of the circuit courts and over the review of decisions made by certain boards and administrative agencies of state government.

Parties to Court of Appeals cases may petition the Supreme Court to review Court of Appeals decisions. The Court of Appeals then decides whether to reconsider its decision and the Supreme Court decides whether to review the decisions of the Court of Appeals.

Supreme Court: The Supreme Court is established by the state constitution and consists of seven judges elected for a term of six years who in turn elect one of their own to serve as chief justice for a six-year term.

The Supreme Court is a court of review and in its discretion decides which decisions of the Court of Appeals to review, usually selecting those with legal issues calling for significant interpretation of laws affecting many citizens or societal institutions as well as those involved in the case at hand.

In addition to the review of Court of Appeals decisions, the Supreme Court decides appeals from the Oregon Tax Court and is also empowered to assume original jurisdiction in mandamus, *quo warranto* and *habeas corpus* proceedings.

Oregon law confers administrative authority and supervision over the courts of the state on the chief justice. The Supreme Court has disciplinary authority over members of the judiciary and members of the Oregon State Bar, including the chief justice of the Court of Appeals and the presiding judges of the circuit and district courts. The principal assistant to the chief justice in carrying out court duties is the state court administrator.

The Supreme Court's office and principal courtroom are in Salem, but occasionally the court sits elsewhere in Oregon.

CHAPTER 4: FEDERAL COURTS IN OREGON

Civil practice in the U.S. District Court for the District of Oregon is changing rapidly as a result of the court's increase in filings, number of judges and clerks and the complexity of issues presented. Federal civil practice and procedure are now focused upon pretrial work which is increasingly concerned with committing each party's case to paper.

U.S. District Court for the District of Oregon: U.S. District Courts are created by statute. The state of Oregon constitutes one judicial district. Court is held at Coquille, Eugene, Klamath Falls, Medford, Pendleton and Portland. In addition, court may be held at any place in the district that a judge directs. The judges of the court are appointed by the president, by and with the advice and consent of the Senate.

Each judge, with one exception, has an office in the U.S. Courthouse in Portland. The other office is in Eugene. Regular court sessions are scheduled at the Portland and Eugene court facilities. Special sessions of the court are held in the district court facilities in Medford and Pendleton as business requires. When court sits in Coquille, Klamath Falls or other places, arrangements are generally made for temporary use of state court facilities.

Although district courtrooms are often made available to administrative law judges, arbiters and hearings offices, the clerk's office does not schedule hearings or receive or maintain records for the agencies involved. The administrative staffs of the agencies should be consulted for information concerning any particular case.

Local rules for the United States District Court for the District of Oregon took effect on July 1, 1982. Copies of the local rules may be obtained from the clerk's office for a minimal fee.

Jurisdiction: The territorial jurisdiction of the Federal District of Oregon is identical to the state of Oregon, although its jurisdiction may extend on the Columbia River north of the Oregon boundary.

Generally, jurisdiction of a particular subject matter requires the existence of a federal question which arises under the Constitution, laws or treaties of the United States. As a rule, no minimum monetary amount in controversy is required for federal cases, except cases arising under the Consumer Product Safety Act.

Civil Case Management: Two basic systems are used for assigning cases to judges: the "individual calendar" system, under which a case does not become the responsibility of a single judge until it is actually set for a specific trial date. Until 1981, most cases in the district were processed through a master calendar procedure.

Management of civil cases is now governed by certain additional procedures. Civil cases are classified as "central calendar cases" and "assigned cases." When initially filed, all cases are "central calendar cases" and remain so until assigned to a particular judge. Generally, cases are assigned to a particular judge or magistrate upon the lodging of a pretrial order (an order embodying the terms and stipulations agreed upon at a pre-trial hearing or meeting). Assigned cases also include Social Security cases, class actions and other cases as assigned by the chief judge or the calendar management committee based on the particular nature of the case or because of a judge's involvement or investment of time and effort.

Central Calendar Cases: Central calendar cases are managed on a master calendar concept. A judge will not be assigned until the pretrial order is lodged. The court's local rules governing all motion procedures apply to central calendar cases. An original copy of all documents should be filed with the clerk's office. Scheduling is done by the clerk's office. Appearances, conferences and hearings may be conducted by any judge or magistrate. At the commencement of an action, each party is given a form of

consent to a magistrate hearing all matters and entering judgment, an order establishing a date for completion of discovery within 150 days and for lodging of a pretrial order within 180 days. A motion for extension of such times must be filed before the established date. The motion must be supported by affidavit and set forth good cause and appropriate use of prior time. Upon filing of such a motion for extension of time, a conference will be set before the judge or magistrate monitoring the central calendar on the second Monday after filing in Portland, and in Eugene on the second Tuesday after filing.

Assigned Cases: In all assigned cases, original documents should be filed by the parties with the clerk, and the extra copy should be delivered by the parties directly to the judge to whom the case is assigned. Upon assignment, notification is given to the parties that the case number is changed by the addition of letters indicating the assigned judge or magistrate and that, thereafter, all scheduling including the setting of hearings and trial date is done by that judge or magistrate.

Either at the same time or shortly after the notification of assignment, the parties will be informed of the specific intentions and requirements of the judge to whom the case is assigned. The assigned judge will set a time for a preliminary pretrial conference at which all aspects of the case will be discussed and schedules will be set. The conference may be conducted by telephone.

Special Handling: Certain types of actions receive special handling:

Government actions for recovery of money upon guaranteed student loans and overpayments of Veterans Administration benefits. No conferences or status reports are scheduled. Upon filing of the complaint, each party is given an order establishing a date for completion of discovery (presently 90 days from filing) and for lodging of the pretrial order (presently 120 days from filing).

Actions against the secretary of the U.S. Department of Health and Human Services relating to Social Security benefits or claims for Social Security benefits. Again no conferences, calendar, or status reports are scheduled by the clerk. At the time of filing, the clerk must provide the parties with a copy of the special order for Social Security review cases. Upon submission of the action for summary judgment these cases are assigned to district judges and magistrates.

Civil Action: A civil action is commenced by filing a complaint with the court. Actions arising in the northern section of the district are filed with the clerk in Portland. Actions arising in the southern section of the district are filed with the clerk in Eugene.

Upon filing a complaint the clerk issues a summons and delivers it to the marshal or any other person authorized to serve. Summons can be by anyone who is not a party to the litigation and 18 years of age or older. In most cases in the Oregon District Court, however, the marshal cannot serve summons except in cases involving indigent defendants, seamen, on behalf of the United States and certain circumstances under court order. Upon request of the plaintiff, separate or additional summonses shall be issued against any defendants. Summons can also be issued by first-class mail, following special procedures and forms available through the court.

The summons is "issued" by the clerk when it is signed and sealed by the clerk or clerk's deputy. The time within which a party may answer or otherwise respond is generally 20 days for a party served within the District of Oregon and 60 days when service is made upon the United States or any agency or official thereof.

Motion Practice: Motions are calendared by the clerk's office on the fourth Monday after filing in Portland and on the fourth Monday after filing in Eugene and on the fourth Tuesday after filing in Eugene if the motion does not pertain to discovery. An original copy of the motion and supporting materials are filed with the clerk. Two weeks before the scheduled motion date, a tentative motion calendar is prepared which apportions motions in unassigned cases among the judges and magistrates available for hearing on the calendar day. Approximately 10 to 12 days before the scheduled date of hearing, notice of

the setting is given to counsel by the clerk.

Discovery motions are calendared for the second Monday after filing in Portland, and in Eugene on the Tuesday following the second Monday after the motion is filed.

Upon representation of an attorney that no party affected has an objection to a continuance, the clerk may grant an application to calendar a motion one week later than its regularly scheduled time, in either Portland or Eugene. The application must be made within one week after the motion is filed. Thereafter, continuances may be granted only by the court.

If oral argument is desired on a motion, a request must be endorsed on the motion, statement in opposition or reply to the statement. The determination whether to hear arguments will be made by the judge or magistrate deciding the motion. If no such request is made by any party, the motion will be decided on the written submissions. Special arrangements must be made in an application for a temporary restraining order and motion for preliminary injunction. Ex parte motions upon other central calendar cases are submitted to the clerk's office for presentation to a judicial officer by the clerk. Counsel's appearance will not be required unless requested by the court.

Pretrial Order: A trial judge is assigned to central calendar cases upon lodging the pretrial order. The pretrial order forms the framework for the pretrial conference or conferences.

Agreed facts may be collected from the pleadings, answers to discovery, and additional matter about which there is no dispute. These agreed facts may serve as the basis for motions for summary judgment.

A party's contentions should include contentions of fact and law. These contentions should be sufficient to withstand a motion to dismiss or, if appropriate, a motion for summary judgment and should include appropriate denial of an opposing party's contentions which otherwise may be considered admitted.

Pretrial Conference: Following the lodging of the proposed pretrial order, the assigned judge will schedule a preliminary pretrial conference either by telephone conference call or by personal appearance. The attorney who will try the case must participate in the conference unless permission for substitution is granted in advance. If an attorney does not have authority to discuss settlement, the client or representative of the client with such authority must also be present. In addition to settlement, counsel should be prepared to discuss their estimates of the number of expert and lay witnesses, length of trial, the basic legal and factual questions involved, any special problems anticipated, the dates for further pretrial conferences and for trial and whether the trial is by jury or to the court. Thereafter, the judge or magistrate will issue an order confirming the dates and establishing pretrial requirements.

The trial date will be set by and may only be changed by the judge or magistrate to whom the case is assigned. Usually, all actions are tried where they are filed, either in Portland or Eugene.

The federal rules of evidence apply generally to all civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under the bankruptcy act. During a trial in the Oregon District Court attorneys may not approach the bench or witness without leave of the trial judge. All papers and items submitted to the court or a witness during a trial must be handed to the bailiff.

All exhibits, except those which the court has specifically authorized to be secret, must be marked in advance of the trial and must be reviewed by counsel for all parties. Without leave of court, no exhibits may be introduced at trial that have not been previously marked.

Juries: In a civil case any party may demand a trial by a jury of six or twelve persons. In criminal cases, the number of jurors is 12. Alternate jurors may be selected in such numbers as the trial judge determines. Challenges for cause (bias) are taken orally. Peremptory challenges (discretionary) are exer-

cised in writing.

The Clerk's Office: In addition to maintaining the file, the clerk keeps a “docket” sheet for each case. An abstract notation is made in the appropriate docket of each paper filed, every process issued and all appearances, orders, verdicts and judgments. The date that the order or judgment is actually noted on the docket is the effective date of the order or judgment for purposes of appeal.

Case Numbering: The case number assigned at the time of filing indicates the year in which the case was filed. For example, 99–136 was the 136th civil action filed in 1999. To distinguish cases filed in Eugene, the case number consists of the year followed by four digits beginning with 6, such as 82–6042 was the 42nd case in Eugene in 1982. Suffixes may be added to indicate the judge assigned to the case. The initial “C” stands for Coquille; “M” is Medford; and “P” is Pendleton.

U.S. Magistrates: U.S. magistrates are appointed by the judges of the court. Full–time magistrates are appointed for a term of eight years; part–time magistrates serve a four–year term. Part–time magistrate positions are authorized for Pendleton, Bend and Coos Bay.

Jurisdiction and Powers of Magistrates: The jurisdiction and powers of the magistrates have been broadly interpreted by the U.S. District Court for Oregon. In addition to traditional powers conferred upon U.S. commissioners and their power to conduct trials of minor offenders, a magistrate may be designated to hear and determine any pretrial matter except motions: for injunctive relief; for judgment on pleadings; for summary judgment; to dismiss or quash an indictment or information; to suppress evidence in a criminal case; to dismiss or to prevent maintenance of a class action; to dismiss for failure to state a claim; and to involuntarily dismiss an action. The district judge may designate a magistrate to conduct hearings, and to submit to a judge proposed findings of fact and recommendations for disposition of those motions and for “applications for post–trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.” In these cases the magistrate files proposed findings and recommendations with the court and a copy is mailed to the parties.

The judge will determine whether to conduct a new hearing or hear arguments or may make a determination based on the record developed before the magistrate. Additionally, the judge may accept, reject or modify, in whole or in part, the magistrate’s findings and recommendations, receive new evidence, recall witnesses or recommit the matter to the magistrate with instructions.

The court has further specially designated the full–time magistrates to conduct any or all proceedings in jury or nonjury civil actions and to order the entry of judgments when consent to exercise such jurisdiction is given by the parties. Upon entry of judgment in such a case, an aggrieved party may appeal directly to the appropriate U.S. Court of Appeals from the judgment of the magistrate in the same manner as an appeal from any other district court judge.

Bankruptcy Court: Oregon has four full–time judges of the bankruptcy court. Three are in office in Portland; one is in Eugene. In addition to holding court regularly in Portland and Eugene, bankruptcy judges conduct hearings in Pendleton, Roseburg, Klamath Falls, Medford, Bend, Astoria, Seaside, Tillamook, The Dalles, Coos Bay, La Grande, Lincoln City, Albany, Grants Pass, Salem and Coquille. Initial petitions in bankruptcy filed on behalf of persons residing in Coos, Curry, Douglas, Klamath, Lake, Lane, Jackson and Josephine counties are filed with the bankruptcy court in Eugene. Initial petitions for persons residing in any other county in the district are filed with the bankruptcy court in Portland.

The judges of the court appoint a clerk who appoints deputies who may act in the name and with the authority of the clerk. The principal office of the clerk is in Portland. A divisional clerk’s office is in Eugene. The clerk’s duties include maintenance of court records and the docket and schedules.

Major Areas of Difference Between State and Federal Courts in Oregon: Significant differences occur between state court and federal court systems. These include:

1. Different statutory systems (state Oregon Revised Statutes v. federal United States Code);
2. Different procedures for handling of cases (federal courts tend to allow more discovery);
3. Different privileges as far as excluding evidence (state courts tend to have more evidentiary privileges);
4. Different case law precedents (the likely results of a case may vary greatly depending upon which court suit is brought in); and
5. Different fee and cost structures depending on type of case (the costs to try a case vary greatly between state and federal courts).

Oregon Cases in Other Federal Courts: The federal judiciary includes not only the local U.S. District Courts and regional numbered Circuit Courts of Appeal (Oregon in the 9th Circuit), but a number of specialized federal courts including:

U.S. Supreme Court in Washington, D.C. : The ultimate appeal court, and a special trial court for suits between states;

U.S. Court of Appeals for the Federal Circuit: a national court of appeals in Washington, D.C. with jurisdiction over many types of suits against the United States (monetary claims, taxes, customs, contracts, etc.) and ALL patent appeals from any federal court;

U.S. Court of Federal Claims: a national trial court in Washington, D.C., with jurisdiction over many types of suits against the United States (monetary claims, taxes, customs, contracts, etc.);

U.S. Tax Court: a national trial court in Washington, D.C. for tax refund cases and a few types of other tax cases;

U.S. Court of International Trade in New York City: the trial court for most customs cases and some types of related cases;

U.S. Court of Veterans Appeals in Washington, D.C.: a new court for veterans claims appeals.

Federal Jurisdiction of Oregon Cases in Other States: Besides Oregon cases in the federal courts listed above, federal law allows Oregonians to sue and be sued in other federal district courts, depending upon the facts and nature of the case.

In addition, federal law allows for consolidation of similar cases in multiple district courts into a single federal district court. Typical of these cases are product liability cases, major airline crash cases, etc.

Also bankruptcy courts and district courts handling limitation of liability admiralty cases can force all related cases to be brought in the same proceeding.

CHAPTER 5: STATE CIVIL TRIAL PROCEDURES

In civil cases, an action is started by filing a copy of a complaint with the county clerk, generally in the county of the defendant's residence. A complaint states what the defendant has done wrong, how the plaintiff was injured or damaged and to what degree.

After filing the complaint the sheriff or private process server delivers (serves) a copy of the complaint and a summons upon the defendant. The summons tells the defendant that he or she must "appear" in this case or the other side will win automatically. Appearance is done by filing a legal document (motion, demurrer or answer) with the court. The time for filing an answer, or motion, is within 30 days after the summons is served.

If the defendant is not found, the plaintiff can try again. In some cases where the defendant is not found, service can be upon the public welfare division, the corporation commissioner, the motor vehicles division or by publication in a newspaper of general circulation in the area where the defendant was last known to be. Once the defendant appears, he or she can file motions asking that the service of summons be quashed or disallowed, that the complaint or parts of it be stricken or made more definite and certain. The defendant can file an answer which gives his or her side of the story (affirmative defense or counterclaim), simply deny the complaint, or a combination of these answers.

The court hears legal arguments on motions and can allow or deny all, part or none. Rarely will there be any testimony presented. If the court disallows all or part of a complaint, some period of time, usually 10 days, is allowed to file an amended complaint and the process of motion, demurrer and answer starts again. After the defendant responds, the plaintiff can file motions against the defendant's answer the same as cited above for the defendant.

If the defendant has answered by giving his or her side of the story, the plaintiff then replies by denying the affirmative allegations.

The court hears legal arguments on motions and can allow or deny all or part or none; again no testimony is presented. The "pleadings" are concluded once a complaint, answer and a reply, if necessary, are filed and all motions and demurrers have been ruled upon.

Summary Judgment: The judge decides all or part of the case before trial where facts are not in dispute. Any party can ask for summary judgment by a motion filed at least 20 days after the commencement of the case and no fewer than 45 days from trial. The motion is usually accompanied by supporting affidavits and other relevant documents showing there is no genuine issue as to any material fact; and the moving party is entitled to prevail on all or part of the claim.

The party opposing the motion may respond and support his or her response with affidavits and other relevant documents showing there is a genuine issue of fact of trial, the other side is not entitled to relief or the responding party is entitled to win.

The judge may hear oral arguments and consider all documents and grant or deny the summary judgment. Granting a summary judgment decides the case or part of it just as if there had been a trial.

Trial is defined as a judicial examination of the issues between the parties, whether issues of law or fact. A right to jury trial exists where the value in controversy exceeds \$200. Right to jury trial can be waived, however, by oral or written motion or by failing to appear for trial. There is no jury trial by right in domestic relations, juvenile, equity or mental hearing matters.

The jury panel is drawn from the registered voters of the county. Jury terms are of a length determined by the presiding judge of the circuit court, but can be no longer than two months. By law, suits for \$10,000 or less are to be tried by six-person juries.

At trial the jury is usually 12 persons selected by lot, except that by agreement of the parties there can be a jury of a lesser number — usually six. Challenges to trial jury are for cause or peremptory. Challenges for cause can be of any number and are for such things as being related to a party, having an

opinion as to the outcome and other obvious things. Peremptory challenges are for no reason or any reason, and each side can take three (two in a six-person jury). Where there is more than one party plaintiff or defendant they must join in the challenge.

If a trial is to be a lengthy one, the judge can order selection of up to six alternate jurors. They are selected and participate as regular jurors but are excused when the jury retires to deliberate unless a juror has become ill or has been excused during trial.

The trial procedure usually begins when the jury is called to the jury box and examined briefly by the judge. Plaintiff and defense counsel examine each juror and may challenge for cause at this time. Such challenges are then ruled upon by the judge. At the conclusion of counsel's jury examination (called *voir dire*) they in turn submit written peremptory challenges (three challenges for each side).

When a jury is picked and all challenges are exhausted or waived the jury is impaneled to try the case.

The plaintiff, followed by the defense counsel, presents opening statements which tell the jury what each intends to prove in the case. The plaintiff then calls witnesses for direct examination. The defendant cross-examines plaintiff's witnesses. If the judge allows, the lawyers may be allowed some re-direct and re-cross examination.

After the plaintiff has called all witnesses for direct examination, the case rests in chief. At that time, the defendant may move to eliminate certain parts or all of the complaint because the plaintiff has not proved the case, motions to strike, or to dismiss. The judge rules on the motions, often remarking that before the defendant has put on a case, the plaintiff is entitled to all reasonable inferences from the testimony.

The defense then calls witnesses and plaintiff cross-examines and both may re-direct and re-cross examine. The defendant then rests the case in chief. The plaintiff may then move against defendant's case.

The plaintiff may (or may not) put on witnesses to rebut the testimony of the defense witnesses (not to "prove over again," but to rebut the defense case). The plaintiff then rests rebuttal.

The plaintiff, followed by the defendant, argues the case to the jury. The plaintiff gets the last word and is allowed to present argument rebutting the defendant's argument. (The last word goes to the plaintiff because he or she has the burden of proving the case.)

The judge instructs the jury on the general and specific law of the case. The jury deliberates and must find a verdict by the concurrence of at least nine of their number (in a six-person jury, five out of six must concur).

The judge receives the verdict and the jury is discharged.

Probate Procedure: Probate powers generally include the power to probate and hear contests of wills; to determine heirship; and to control the administration, settlement and distribution of estates of decedents. The judge of the probate court may appoint a commissioner to assist the probate judge. That commissioner may act in most uncontested matters setting up the probate of an estate. The commissioner acts only under the authority of the court and all commissioner orders can be set aside by the court. Unless set aside or modified, however, all commissioner orders have the same effect as if made by the judge.

Domestic Relations Procedure: In Oregon the grounds for divorce are that "irreconcilable differences" have arisen which have caused the "irremediable breakdown" of the marriage. These grounds can exist even where one side does not want a divorce, as that demonstrates that there are irreconcilable differences.

In Oregon any married person can get a divorce simply by filing a petition with the court and maintaining that there are irreconcilable differences which have caused the irremediable breakdown of the marriage. The petition must be filed in the county in Oregon in which the filing party resides. One of

the parties to the suit must have resided in Oregon for at least six months prior to filing. The respondent (the spouse who did not file) need not “answer,” as in an ordinary civil case, but only file a paper saying “respondent appears.”

Either party may ask the court to order the other party to pay temporary child support, spousal support (alimony) or money for filing or attorney fees.

Either party may ask the court for temporary child custody, possession of real or personal property, removal of one spouse from the family home, a restraining order preventing “molesting or interfering with the other or the minor children” or a restraining order preventing either or both from disposing of or encumbering assets. In a court hearing on pre-decree requests the court takes testimony and grants or denies requests such as those listed above. The court may order a child custody study to be made for the purpose of protecting the child’s future interest. This independent investigation helps the court with child custody decisions.

Some courts offer conciliation services authorized by Oregon law. The service is funded by dissolution filing fees and does not cost the parties. The court of its own motion or either party can ask for conciliation services. The court can then suspend the dissolution proceedings for 45 days for conciliation services provided by the court.

Ninety days after filing for dissolution the hearing can commence (90 days can be waived for emergencies). The hearing is conducted as a suit in equity without a judge. The petitioner puts on evidence first. The respondent cross examines and then proceeds when the petitioner has rested the case in chief. The petitioner cross examines and then may proceed with rebuttal evidence if authorized. Then the counsel make closing statements and the court rules.

Often the parties enter into a contract dividing property, providing for custody, support and otherwise settling some or all of the issues. Fault is not an issue in a dissolution. Evidence of causation of the marriage breakdown is irrelevant except as it might bear upon the issue of child custody but only when a direct relationship between fault and custody is shown. The general moral character of a party is not an issue in a custody contest unless it is shown to have a direct effect on the child.

Most dissolutions are obtained when one of the parties has been served with the petition and summons but does not file an answer or appear in court. Often an opposing lawyer is involved but a settlement is made so that the respondent simply agrees to the contents of the petition or the terms of an amended petition or property settlement agreement. Occasionally the opposing counsel or party is physically present at the hearing but does not participate.

Typically the petitioner will testify to the grounds (“irreconcilable differences have arisen causing an irremediable breakdown of the marriage relationship”) and a few other matters and the decree would be granted with the whole thing taking five minutes or less. There is also dissolution by affidavit (mail order divorce?). Some courts may allow a dissolution without a hearing if neither child custody nor support is involved, the parties are co-petitioners or one is in default, the 90-day waiting period has passed and the case is otherwise ready for a hearing or the moving party files an affidavit setting out proof required in a dissolution hearing.

Generally all citizens are allowed access to their courts without the necessity for a lawyer. Several companies sell forms designed to allow persons with no legal training to seek and obtain a dissolution. Some courts require a strict adherence to the rules and others relax the procedure where a party is not represented. But many courts require the intervention of a lawyer where the case is complex, contested, child custody is at issue or where otherwise necessary.

The grounds and other procedures for separation are identical to those for a dissolution. The court shall determine and fix the duration for the separation after which the decree has no effect. The duration can be extended upon motion. The court may decree an unlimited separation. At any time the separation can be changed to a dissolution or dismissed or modified.

Family Abuse Prevention Act: Under this act, a petition may be filed with the court asking for a

temporary restraining order to prevent abuse. The petitioner must show abuse between “family or household members” which causes or attempts to cause bodily injury; fear of imminent serious bodily injury; or causes another to engage in involuntary sexual relations by force, threat of force or duress.

“Family or household member” means spouses, former spouses, adult persons related by blood or marriage or persons who have cohabited with each other within one year of the filing for the restraining order. Petitions and instruction brochures are available from the clerk of the court. There is no filing fee for abuse prevention restraining orders.

The court will hold an ex parte (only one side present) hearing to decide whether or not to grant the relief requested. The court hearing will be held the same day or the day following the filing of the petition.

The court can order temporary child custody, one party be required to vacate the family home, parties be restrained from molesting or interfering with the other or minor children or respondent restrained from entering upon any premises to prevent respondent from molesting or interfering. The order is good for one year. Bail is set for violations of the order. A person who is subject to the restraining order can request a hearing at which the judge may change or cancel all or part of the order. The orders will be entered on the Law Enforcement Data System. A peace officer shall arrest a person where there is probable cause to believe the order has been violated. The judge may release the arrested person on security or on conditional or recognizance release, as in criminal cases.

A hearing is set at which the judge decides whether or not the arrested person is in contempt of court for violation of the order. The penalty can be up to six months in jail and a \$300 fine.

* Oregon Revised Statutes which apply include chapters 16 and 107.

CHAPTER 6: STATE CRIMINAL PROCEDURE

The state criminal procedure includes a set of legal proceedings for both a felony case and a misdemeanor case.

Felony Proceedings

Legal proceedings in a felony case typically follow a series of steps from arrest through review by the Oregon Supreme Court. Though proceedings are generally initiated with the arrest (Step 1), they can also be initiated with the filing of information (Step 3), or the return of an indictment by the grand jury (Step 5). If proceedings are initiated at Step 3 or Step 5, a warrant for the arrest of the defendant is usually issued when the information or indictment is filed.

(1) *Arrest*: A person can be arrested — taken into custody — for the purpose of charging that person with an offense. A police officer can make an arrest if the officer has probable cause to believe that the person has committed a felony. A police officer can issue a citation in lieu of physical arrest for a Class C felony, unless the crime involves domestic abuse.

(2) *Release Decision*: This determination establishes the form of release most likely to assure the defendant's court appearance. Oregon law provides that any person charged with a crime other than murder or treason must be given the opportunity to be released under either:

Personal Recognizance — release upon a promise to appear;

Conditional Release — release that imposes regulations on the activities and associations of the defendant; or

Security Release — release conditioned on a promise to appear that is secured by cash, stocks, bonds, or real property. (This is what historically would have been referred to as posting bail. A defendant is entitled to be released upon posting a security deposit that is 10 percent of the total security amount).

A judge is likely to impose the least onerous condition reasonably likely to assure the defendant's later appearance. A defendant in custody shall have the immediate right to security release or shall be taken before a magistrate without undue delay for a release decision. Release authority may be delegated to a release assistance officer. After conviction, the trial judge has discretion whether to grant release pending appeal.

(3) *Information*: A written accusation is filed with the court charging a person with the commission of a felony offense. If signed by the district attorney, the information is a "district attorney's information." If signed by anyone else (such as a victim), it is a "complainant's information." This is a preliminary document that serves to commence an action, but it is not the final accusatory instrument that will serve as the basis for the ultimate prosecution in circuit court. An information must be accepted and endorsed by the district attorney.

(4) *Arraignment*: A person is arraigned in public hearing in court, usually the defendant's first appearance before a judge. The defendant is advised of the charge and of his or her rights, including the right to remain silent, the right to have an attorney, and the right to have a preliminary hearing within five days if the defendant is in custody or within 30 days if the defendant is not in custody (unless the grand jury considers the case sooner). If the defendant is indigent and requests an attorney, the judge will appoint one.

(5) *Grand Jury*: A group of seven jurors evaluates evidence and determines whether sufficient evidence exists to warrant filing formal charges against the defendant. The grand jury meets in private and is sworn to secrecy regarding the proceedings. At least five of the seven grand jurors must agree before a formal charge is filed. The district attorney generally presents evidence to the grand jury, calling witnesses one at a time, but the district attorney is not present during the grand jury's deliberations. The grand jury may return an indictment if it believes the evidence is sufficient to warrant a conviction by a trial jury.

(6) *Indictment*: This accusatory instrument (formal charge) is filed by the grand jury. This document names the accused and contains a statement of the acts constituting the offense charged. If the grand jury determines there is not sufficient evidence to warrant further proceedings, it returns a not true bill which terminates the case.

(7) *Preliminary Hearing*: A public court hearing determines whether there is sufficient evidence to warrant holding the defendant for further proceedings. The judge must be satisfied from the evidence that there is probable cause to believe that a crime has been committed and that the defendant committed it. If sufficient evidence is not presented to support a criminal charge, the defendant is discharged.

(8) *District Attorney's Information*: This document can be filed for a felony charge if the judge at a preliminary hearing has ruled that there is probable cause to believe that the defendant committed the offense. The filing of a district attorney's information is an alternative to indictment by the grand jury. The Oregon Constitution provides that, without a waiver, no one can be prosecuted on a felony charge unless there has been either a preliminary hearing or the case has been considered the grand jury. A defendant may waive these rights and agree to the filing of a district attorney's information to expedite the proceedings.

(9) *Arraignment and Plea (following indictment or preliminary hearing)*: The defendant first appears in court at an arraignment on an indictment or on district attorney's information. If the defendant is without counsel, the defendant is given an opportunity to obtain counsel before proceeding with the arraignment. If the defendant is indigent, an attorney will be appointed if the defendant requests counsel. The accusatory instrument is read to the defendant and the defendant is given a copy of it and asked how he or she pleads to the charge. Often, a defendant will be allowed a reasonable time to consider the matter before entering a plea. The defendant's plea can be guilty, not guilty, or no contest. A defendant may plead no contest only with the consent of the court; a no contest plea has the same legal effect as a plea of guilty.

(10) *Discovery*: A district attorney and the defendant's attorney are made aware of potential evidence possessed by the other party through discovery. The disclosures required include such things as police reports, the names, addresses, and statements of witnesses, photographs, results of physical and mental examinations, and scientific tests.

(11) *Pre-Trial Motions*: The state or the defendant may request that the court make certain rulings before trial that have a bearing on the case. A variety of issues can be raised pre-trial. Often, the various pre-trial issues raised by the parties are heard at one time in a pre-trial omnibus hearing. The court might consider issues such as suppression of evidence, admissibility of statements by the defendant, and challenges to the sufficiency of the accusatory instrument.

(12) *Trial*: Determination is made as to whether the state has proved the guilt of the defendant beyond a reasonable doubt at the trial, a formal public court proceeding. Both the state and the defen-

dant are entitled to a public trial with 12 impartial jurors. (If both the state and the defendant agree, there can be fewer than 12 jurors. In all other cases, at least 10 of the jurors must agree on the verdict. Both the state and the defendant may waive trial by jury and consent to a trial by the judge. In a jury trial, the judge rules on all questions of law and procedure arising during the trial, and instructs the jurors as to the legal principles they are to apply. The jury decides the factual issues and makes the ultimate decision to whether the state has proved the guilt of the defendant beyond a reasonable doubt.

(13) *Sentencing*: A penalty is imposed upon a convicted defendant at the sentencing. It is the duty of the judge to pass sentence if a defendant has pleaded guilty or has been found guilty. The law establishes maximum sentences for each felony offense. However, sentencing guidelines limit a court's discretion in most felony cases to a sentence below the statutory maximum. Sentencing guidelines apply to crimes committed on or after November 1, 1989, and take into consideration the severity of the crime and the defendant's criminal history. In 1994, Oregon voters passed several ballot measures that set mandatory prison terms for certain crimes.

(14) *Appeal to Oregon Court of Appeals*: Decisions made in trial court can be challenged in an appeal to the Oregon Court of Appeals. The Oregon Court of Appeals is the appellate court having initial jurisdiction to review cases from the trial courts. A convicted defendant has an absolute right to file an appeal with the Court of Appeals. The state can appeal certain pre-trial rulings and sentencing decisions, but cannot appeal a finding of not guilty. The Court of Appeals does not hold trials or hear testimony. It hears legal arguments and reviews the record that has been made in the trial court. Appellate review is generally limited to questions of law and procedure rather than factual findings. That is, possible erroneous rulings by the trial judge are considered, not the jury's evaluation of the evidence. If it is decided that the trial court made an error that affected a defendant's right to a fair trial, the conviction is reversed and the case is generally returned to the trial court for a new trial. There are 10 judges on the Court of Appeals. Cases are generally heard by three-judge panels.

(15) *Review by Oregon Supreme Court*: A decision of the Court of Appeals may be re-examined the Oregon Supreme Court, the highest appellate court in the state court system. The seven-member court has jurisdiction to review decisions of the Court of Appeals. If either the state or the defendant is not satisfied with a decision from the Court of Appeals, a petition can be filed asking the Supreme Court to review the decision. The Supreme Court determines which cases merit review. If review is granted, the court will hear legal arguments, review the record of the case, and issue an opinion that affirms or reverses the decision of the Court of Appeals. The Supreme Court also reviews all death penalty cases.

Misdemeanor Proceedings

Legal proceedings in a misdemeanor case typically follow a series of steps starting with the arrest of the defendant. The proceedings could also be initiated with the filing of a complaint (Step 3), followed by the issuance of a warrant for the arrest of the defendant. Except as described below, the descriptions of procedures followed in a misdemeanor case are the same as those discussed under felony procedures.

(1) *Arrest*: A police officer may arrest a person without a warrant for any misdemeanor committed in the officer's presence, or if the officer has probable cause to believe that the person committed a Class A misdemeanor. A police officer can issue a citation in lieu of physical arrest for a misdemeanor, unless the crime involves domestic abuse.

(2) *Complaint*: This written accusation, verified by oath and filed with the court, charges a person

with an offense other than a felony.

(3) *District Attorney's Information*: This written accusation is similar to a complaint but signed by the district attorney. Either a complaint or a district attorney's information can commence an action and serve as a basis for the prosecution of a misdemeanor case. There is no requirement that there be either a preliminary hearing or grand jury consideration as in felony cases. A complaint can be signed by any person, but must be accepted and endorsed by the district attorney before filing.

(4) *Arraignment and Plea*: Same as for felonies.

(5) *Discovery*: Same as for felonies.

(6) *Pre-Trial Motions*: Same as for felonies.

(7) *Trial*: There are six people on a jury for a misdemeanor charge, and a unanimous verdict is required.

(8) *Sentencing*: No pre-sentence report is required in a misdemeanor case. Sentencing guidelines and mandatory sentences do not apply to misdemeanors.

CHAPTER 7: CRIMINAL RECORDS

Police agencies and district attorneys' offices often receive requests from the press for various criminal records. Access to these records is governed primarily by state statutes and administrative rules. Under Oregon's Public Records Laws, the record of an arrest or the report of a crime is generally available to the public. Records and reports remain confidential only if, and so long as, there is a clear need in a particular case to delay disclosure in the course of a specific investigation.

Public Records Laws: What can be disclosed: If there is no need to delay disclosure, the press may obtain the following information:

The arrested person's name, age, residence, employment, marital status and similar biographical information:

- the offense with which the arrested person is charged;
- the terms upon which the arrested person was released from custody;
- the identity and biographical information concerning both the complaining party and the victim;
- the identity of the investigating and arresting agency and the length of the investigations;
- the circumstances of arrest, including time, place, resistance, pursuit and weapons used;
- such information as may be necessary to enlist public assistance in apprehending fugitives from justice.

This list is illustrative, not exclusive.

Limitations on Access to Public Records: The principal limitations on access to information result both from attempts to protect a defendant's right to a fair trial, and from the exemption in the public records law regarding disclosure of investigatory information compiled for criminal law purposes. This type of information is exempt, unless it is necessary for the public interest.

In interpreting this exemption, the Oregon Court of Appeals rejected two extreme positions: (1) that materials relating to criminal investigations are available if no prosecutions were initiated or all prosecutions were completed; and (2) material once exempt from disclosure is forever exempt. Instead, the court adopted a middle position, in which the agency possessing the information must identify various purposes for keeping such information secret. Thus, criminal investigatory information will not be disclosed if disclosure would:

- Interfere with criminal prosecutions;
- deprive a defendant of the right to a fair trial;
- unreasonably invade personal privacy;
- reveal the identity of a confidential source, or confidential information supplied only by the confidential source;
- reveal non-routine investigative techniques or procedures;
- endanger the life or physical safety of law enforcement personnel.

Because police reports often contain information which, if released, would conflict with one or more of these reasons for secrecy, the press may be denied access to the reports themselves. Instead, the relevant agency will furnish only information from those reports that is not exempt from disclosure under the public records law.

Oregon law permits courts to consider pre-sentence reports before imposing sentence upon defendants convicted of crimes. These pre-sentence reports, prepared by the corrections division or community corrections probation officers, usually discuss the circumstances of the offense, the defendant's

social and family history, his or her present condition and environment and his or her criminal record. Often, pre-sentence reports also contain the results of psychological examinations of defendants and diagnostic opinions by the examining professionals. Under Oregon law, pre-sentence reports are not public records, and access is restricted to sentencing judges, the corrections division, the State Board of Parole, appellate or reviewing courts (when the information in the report is relevant to an issue before the court), the district attorney, the defendant, or his or her attorney and other persons or agencies having a legitimate professional interest in the information. Pre-sentence reports will not be released to the press.

When a person under the supervision of the corrections division (such as an inmate, parolee or person housed in a work release facility) is charged with a new crime, the corrections division, pursuant to its administrative rules, will adhere to the Bar-Press-Broadcasters guidelines for disclosure and reporting of information on criminal proceedings. For those guidelines, see Chapter 1, appendices A and B. Oregon law generally limits access to the full compiled criminal history information kept by the Oregon State Police to law enforcement agencies and certain other government agencies. However, state law (ORS 181.555 and 181.560) also provides that any person, including a news reporter, can obtain some information on the criminal history of an individual.

Procedure for Obtaining Criminal History: The procedure is to apply in writing to the Bureau of Criminal Identification of the Oregon State Police in Salem, identifying as clearly as possible the person about whose record the inquiry is being made. The bureau will give that person 14 days notice that an inquiry is being made about him. The delay is intended to give the person an opportunity to exercise his or her right to inspect his or her own criminal history and to have it corrected if it is wrong. At the end of the 14 days, the bureau will send to the person making the inquiry, information it may have about (a) any conviction of the subject in Oregon, and (b) any arrest in Oregon which is less than one year old and on which there has been no acquittal or dismissal. Included will be information on felonies, on any offense involving sexual misconduct, and on certain drug violations. Records of other misdemeanors will not be reported.

For this service the bureau is authorized to charge a fee for each inquiry. Anyone receiving this criminal history information should use it with care, because the law specifies that the State Police will release it based on similarity of name and description, without confirming it through comparison of fingerprints.

Setting Aside a Conviction or Record of Arrest: Oregon law provides, under certain circumstances, that a conviction or record of arrest may be set aside. Under ORS 137.225, persons convicted of a class C felony, (except for specified child abuse offenses); possession of marijuana when that crime was punishable only as felony, crime punishable as either a felony or a misdemeanor; and any misdemeanor for which a jail sentence may be imposed may move to have conviction set aside. There are specific exceptions, however, when the offenses involve sexual abuse or child abuse. The statute also does not apply to traffic violations or traffic crimes.

A convicted person who qualifies, based on the type of offenses outlined above, after three years from the date of judgment, may apply to the court to set aside the conviction. The sentence must have been completed by then, and the person must have had no further legal problems. A person who is arrested but not charged within a year from the date of arrest or a person who was arrested and acquitted, at any time after the acquittal or dismissal of the case may apply, likewise to set aside the arrest.

The procedure involves applying to the court, supplying a copy of fingerprints to the District Attorney's office to verify the identity of the person making application and, when the application is based upon a conviction, paying a fee of \$80.00 through the state police office.

The statutes further provide that, unless the court finds clear and convincing evidence that granting the motion would not be in the best interest of justice, an order setting aside the record shall be granted.

The defendant may then be considered not to have been convicted or arrested.

There is an exception to the statute, however, for purposes of a civil action in which truth is an element of a claim for relief or affirmation defense, which allows a party to apply to the court for an order requiring disclosure of the official records in the case in the interest of justice. Likewise, if a prosecutor or defendant in a case involving sealed records supplies an affidavit showing good cause, the court may order reopening and disclosure of any records sealed for the limited purpose of assisting in the investigation of the moving party.

CHAPTER 8: JUVENILE COURT

In Oregon, except in certain very limited circumstances, the juvenile court has exclusive jurisdiction over persons under the age of 18. The Oregon Juvenile Code refers to them as either delinquent “youths” or dependent “children.”

Delinquency Jurisdiction: Applies to youths who have committed an act which is a violation, or if done by an adult would constitute a violation of a law or ordinance of the United States or a state, county or city.

In certain circumstances, the juvenile court may waive (or transfer) its exclusive jurisdiction over delinquent youth to adult court after hearing in which the state proves that the youth is not amenable to treatment in the juvenile system and that retaining juvenile jurisdiction will serve neither the interests of the youth or society. Additionally, most juvenile motor vehicle, boating, and game violations are routinely waived into adult court.

Youths charged with committing certain serious felonies after April 1, 1995, are automatically tried and sentenced in adult court.

Dependency Jurisdiction: Applies to children (1) who are beyond the control of their parents, guardian or another person having custody over them, (2) whose behavior, conditions or circumstances are such as to endanger their welfare or the welfare of others, (3) who are dependent for care and support on a public or private child care agency and need the services of the court in planning for their best interests, (4) who have run away from home, (5) who have applied to be emancipated, or (6) whose parent or custodian has either abandoned them, failed to provide for their care or education, has subjected them to cruelty, depravity or unexplained physical injury, or who has failed to provide the care, guidance or protection necessary for their physical, mental or emotional well-being.

Juvenile Procedure – Preliminary Hearing: Whenever youths and children are taken into protective custody and placed outside of their home in either detention or shelter care, they are entitled to a judicial “preliminary hearing.” Delinquent youths are entitled to a judicial preliminary hearing within 36 hours, (excluding weekends and holidays) of being placed in detention. Dependent children and their parents or guardians are entitled to a hearing within 24 hours from the time children are placed into shelter care.

At this hearing, the court notifies the parties of the allegations and sets the matter for a jurisdictional hearing. A “petition” stating the allegations is filed with the court. Counsel is appointed to represent delinquent youths. Counsel is appointed for dependent children and their parents or guardians. The court also determines where youths and children will reside pending the resolution of the matter that brought them before the court.

Delinquent youths may be held in detention for up to 56 days prior to adjudication when they (1) are alleged to have committed any offense which involves infliction of physical injury to another person, (2) are alleged to have committed any felony crime, (3) are on probation or have been conditionally released and there is probable cause to believe that they have violated either their probation or release conditions, (4) have a history of failing to appear, or (5) are alleged to be in unlawful possession of a firearm, and (1) that there is no less restrictive placement which would ensure their future appearance in court or (2) that their behavior endangers the community. Youths held in detention are entitled to a placement review hearing every 10 days.

The court may order that dependent children be immediately returned to their parents or custodians. The court may also order the children continued in shelter care upon making written findings that continued removal would be in the best interests of the children.

Juvenile Procedure — Jurisdictional Hearing: Juvenile court jurisdictional hearings are much like a trial. Parties call witnesses and present evidence. The Oregon Rules of Evidence apply.

When a court determines that a child is under the jurisdiction of the court, this means that the child is under the authority or control of the court.

The court may take jurisdiction over delinquent youths upon a finding that the state has proven allegations of delinquent conduct. The standard of proof is beyond a reasonable doubt. The juvenile court may take jurisdiction over dependent children upon a finding that allegations of child neglect or unsafe conditions have been proven by a preponderance of evidence.

Juvenile Procedure — Dispositional Hearing: A dispositional hearing will follow the jurisdictional hearing when the court finds a youth or child is within its jurisdiction. Youths and children may be made wards of the court, placed on probation with conditions including community service and treatment and be ordered to pay restitution to their victims. Under certain circumstances they may be ordered into the custody of the Oregon Youth Authority for residential placement or placement in a state training school.

Dependent children may or may not be immediately returned to their parents. Parents may be ordered to complete certain requirements necessary to ensure the safety of the child as a pre-condition for the child's return to his or her parent's custody. If the parents fail to remedy the conditions which allowed the court to take jurisdiction, their parental rights may be terminated.

Access to Records: Juvenile records are generally confidential and are withheld from public inspection. They are, however, open to all parties and their attorneys.

The name, date of birth, and basis for jurisdiction over a juvenile is not confidential. Neither are the date, time, and place of any juvenile court proceeding, nor the crime charged in the case of a delinquent youth.

Juvenile court orders regarding emancipated children and orders regarding the disposition of adjudicated delinquent youths are not confidential.

Access to Hearings: All juvenile hearings are open unless the court makes findings that public access would overcrowd the courtroom or otherwise interfere with or obstruct the proceedings.

CHAPTER 9: CAMERAS IN THE COURTROOM

In 1999, the Oregon Supreme Court adopted a number of revisions to the state's Uniform Trial Court Rules that refined the procedures for allowing cameras, both video and still, and audio recording devices to be used by the media in courtrooms. The adoption and revision of Uniform Trial Court Rule 3.180, followed nearly a decade of experimentation with cameras under a temporary Canon of Ethics, the establishment of a court rule and evolutionary revisions recommended by the Oregon Bar-Press-Broadcasters Council.

The text of Uniform Trial Court Rule 3.180 follows:

MEDIA OR OTHER PUBLIC ACCESS COVERAGE OF COURT EVENTS

- (1) Courtrooms. Upon request or on the court's own motion, after notice to all parties, public access coverage shall be allowed in any courtroom, except as provided under this rule.
- (2) There shall be no public access coverage of the following:
 - (a) Proceedings in chambers.
 - (b) Any notes or conversations intended to be private including, but not limited to, counsel and judges at the bench and conferences involving counsel and their clients.
 - (c) Dissolution, juvenile, paternity, adoption, custody, visitation, support, mental commitment, trade secrets, and abuse, restraining and stalking order proceedings.
 - (d) At a victim's request, sex offense proceedings.
 - (e) Voir dire.
 - (f) Any juror anywhere during the course of the trial in which he or she sits.
 - (g) Recesses.
- (3) Limitations on Denial of Public Access Coverage in Courtrooms. A judge may deny a request for or terminate public access coverage only if the judge makes findings of fact on the record setting forth substantial reasons for the denial. The judge may prohibit public access coverage if there is a reasonable likelihood of any of the following:
 - (a) The public access coverage would interfere with the rights of the parties to a fair trial or would affect the presentation of evidence or outcome of the trial.
 - (b) Any cost or increased burden resulting from the public access coverage would interfere with the efficient administration of justice.
- (4) A judge may summarily prohibit public access coverage of a particular witness only if the judge finds on the record that public access coverage would endanger the welfare of the witness or materially hamper the witness' testimony.
- (5) Areas Outside of Courtrooms. The presiding judge may allow public access coverage in any area outside the courtroom that is on the courthouse premises and under the control and supervision of the court. Courts are encouraged to designate an area or areas outside the courtroom that is on the courthouse premises for public access coverage. For areas subject to this subsection, each judicial district, by SLR, may establish, for any court location, procedures for obtaining permission for public access coverage that differ from this subsection or may designate locations where public access coverage is allowed or prohibited. SLR 3.181 is reserved for SLR adopted under this subsection.
- (6) Public Access Coverage Defined. As used in this rule:
 - (a) "Public access coverage" means coverage by means of any public access coverage equipment.
 - (b) "Public access coverage equipment" means any of the following in the possession of persons other than the court or the court's staff: television equipment; still photography equipment; audio, video, or other electronic recording equipment.
- (7) Equipment and Personnel for Public Access Coverage. The court may limit the location of public access coverage equipment. One pool video camera and one pool still camera and one pool tape recorder shall be permitted.

- (a) No public access coverage device shall be operated by more than one person.
 - (b) No person shall use public access coverage equipment that interferes or distracts from proceedings in the courtroom.
 - (c) The video camera must be mounted on a tripod or other device or installed in the courtroom. The tripod or other device must not be moved while the proceedings are in session. Video equipment must be screened where practicable or located and operated as directed by the court.
 - (d) No artificial lighting devices of any kind shall be allowed.
 - (e) Any pooling arrangement required by limitations on equipment and personnel imposed by the judge or by this rule must be the sole responsibility of the persons seeking public access coverage, without calling upon the judge to mediate any disputes involved therein. In the absence of agreement on such issues by persons seeking public access coverage, the judge may exclude any or all public access coverage.
- (8) Upon request, any person engaging in public access coverage of a court event or in a courtroom, courthouse, its premises, or environs under the control and supervision of the court must provide to the court, without expense, or to any other person, if the requestor pays actual copying expense, a copy of any public access coverage the person performed.
- (9) A judge may impose other restrictions or limitations necessary to preserve the solemnity, decorum, and dignity of the court and to protect the parties, witnesses, and jurors. A judge may terminate any or all public access coverage at any point upon finding, based on substantial reasons in the record, that this UTCR or other rules imposed by the judge have been violated.
- (10) Nothing in this rule is intended to limit the court's contempt powers.
- (11) Nothing in this rule shall alter or affect the rules of the Supreme Court promulgated under "Video-Trial Project No. 88-38." Under that project, the audio-video coverage constitutes the entire record. In all other courts, the record shall be preserved with court reporters or audiotape. Restrictions on releasing audio-video coverage in courts participating in the Video-Trial Project shall be set forth in separate rules.

NOTE: Uniform Trial Court Rule 3.180 was adopted by the entire Oregon Supreme Court, and any changes to the rule will be made only with the consent of the Supreme Court.

CHAPTER 10: BROADCAST MEDIA REGULATION

Broadcasting in the United States is one medium which still remains subject to substantial forms of content-based regulation, principally by the Federal Communications Commission (FCC). Justification for this regulation is based on the “public interest” rationale. Essentially that rationale is that there is a quid pro quo between the station operator (“licensee”) and the federal government which issues the operator a license in exchange for an obligation to serve the interest of the community. This obligation requires the licensee to “ascertain the needs of the community” and then provide program service to foster public understanding of those issues. How the licensee provides programming to serve the needs is left to the licensee’s discretion.

“Public Interest” Regulation: Despite the prohibition against censorship in the Communications Act of 1934, the “public interest” standard has spawned substantial regulation in a number of areas which directly relate to the content of the programming which a station may broadcast. These include political editorials, obscene and indecent programming, lotteries, contests and promotions, children’s programming on television, recorded telephone conversations, prohibited advertising on broadcast stations.

(1) *Political Editorials:* For years news and issue-oriented programming was governed by the FCC’s “fairness doctrine,” a doctrine which had its genesis in the political broadcast rules adopted pursuant to §315 of the Communications Act of 1934, as amended. The fairness doctrine was meant to insure that all sides of controversial issues aired over a broadcast station were represented. To do this the rules of the FCC imposed certain affirmative obligation on broadcast stations to identify the “controversial issues” of public importance in its community and to respond to programming, including different points of view, regarding those issues. Thus when a station carried one viewpoint on a “controversial issue” it had an obligation to present the contrasting view.

Although a well-intended idea in theory, the fairness doctrine proved a nightmare to broadcasters. With the growth of political activism, broadcasters were constantly facing claims that they had been “unfair” in covering issues or refusing to present contrasting viewpoints. In response, many stations simply backed away from the coverage of controversial matters. Ultimately the fairness doctrine was repealed by the Commission, a decision which was then later upheld by the appellate courts.

Despite the demise of the fairness doctrine, there are two corollary doctrines which remain in effect. These include the “political editorial rule” and the “personal attack rule.”

The Political Editorial rule requires that if a station editorializes either for or against a candidate for public office, the station must notify the disfavored candidate about the editorial within 24 hours; provide a transcript or tape of the editorial tape and offer the challenged candidate an opportunity to have his or her representative reply to the editorial. In order to avoid creating “equal time” rights, which would be triggered by an appearance of the candidate, the political editorial rule limits the reply to a spokesperson for the candidate.

- (a) The Personal Attack Rule is invoked when a person or group’s character or integrity is impugned during the discussion of a “controversial issue of public importance.” In this instance the station must notify the person or group attacked within one week, provide a script of the program, and offer a reasonable time in which to respond. The rule does not apply to newscasts or to commentary and analysis contained in news broadcasts. The rule is usually invoked in programs involving panel discussions or talk shows.
- (b) Political Candidate Advertising — Candidates for political office enjoy certain access rights to

the broadcast airways. The scope of these rights depends upon whether the candidate is running for a state or local office or a federal office. In the case of a candidate for federal office, any legally qualified candidate is entitled to “reasonable access” to use a station’s facilities, including a right to purchase program length time. “Reasonable access” is not quantified but is subject to the circumstances prevailing at the time of the candidate’s request for time.

State candidates do not have quite the same benefits as federal candidates. In fact a broadcast station has no obligation to provide any time to a candidate for state office, even a candidate for governor. However, if a station chooses to sell political time to a state candidate, that candidate’s opponent is entitled to equal time on that station. Moreover, political candidates are entitled to a discount on the price for the time charged by the station. This discounted rate is known as the “lowest unit charge,” a concept which is very complex because of the wide range of selling practices and pricing formulas employed by broadcast stations. Nonetheless, political candidates are entitled to “lowest unit rate” for any time purchased within sixty (60) days of a general election and forty–five (45) days of a primary election.

In order to qualify for “equal time” and “lowest unit charge” the candidate must appear in the political advertisement. By an “appearance,” his or her voice or visual likeness must appear in the ad. The appearance of the candidate constitutes a “use.” Without a “use” there is no access entitlement nor is there a right to lowest unit rate. Instead, the station has no obligation to sell or, in the event it does sell time on a candidate’s behalf, to charge whatever the prevailing rate is for that air time.

Should a candidate purchase time outside the protected 45 and 60–day periods a station may not charge a candidate any more than would be charged for “the comparable use” of such time by other advertisers. This prevents a station from charging one price to a retail advertiser versus another higher price to an occasional political purchase.

A station is obligated under Commission rules to provide “full disclosure” to a political candidate of the various rates and options available to them. Many stations publish rate cards which set out a variety of advertising availabilities by day and program. Since these are often subject to change, including pricing changes based on the delivery of audience, full disclosure can often be extremely burdensome. However the failure to “fully disclose” all rates and options may result in substantial fines.

The “equal time” obligations imposed on broadcasters is not limited to paid appearances. Instead, if a candidate should make a guest appearance on a morning variety show, his or her opponent has a right to request equal coverage. The “equal time” aspects of the political broadcast rules are further complicated by the various “exemptions” available to candidate appearances on certain programs. For instance, the appearance of a candidate on a “*bona fide* newscast” or news interview does not trigger equal time obligations. And certain talk shows which are syndicated may also be exempt. However, exemptions on major or syndicated talk shows are done on a case–by–case basis.

A station is forbidden by federal law to censor the content or comment of a candidate appearing in a political spot or program. This exemption is absolute and thus in theory allows a candidate to make libelous or obscene statements. Fortunately the law recognizes that a station does not have liability for the defamatory or libelous remarks of the candidate. Nonetheless the problem is often created in the mind of the public that a station is responsible for the remarks of a candidate.

The FCC’s sponsorship identification rules as well as the rules of the Federal Election Commission require that all paid–for political announcements carry certain precise sponsorship identification taglines. These rules even go so far as to specify the size of the letters which appear in a television screen involving a broadcast ad.

Broadcasters are also obligated to maintain a political file which must contain all requests for political time, their disposition, schedule of times provided or purchased, rates charged, the dates aired, etc. The rules require that this information be placed in that file immediately after being received. The FCC takes the position that it is important to candidates to have timely access in order to exercise whatever equal time rights they have. During the heat of a hotly contested political campaign involving multiple candidates, this can impose a significant burden upon a broadcast station.

Political broadcasting takes other guises than political spot ads. This includes political debates sponsored by broadcasters which attempt to put all competing parties on the same platform. If a broadcast station sponsors such a debate, it is exempt from equal time opportunities provided the debate has “genuine news value;” does not allow any candidate to control the format or content of the debate; and does not attempt to advance the candidacy of one candidate over another. In these instances, a station is entitled to invite only the major candidates for a particular office and may disregard minor candidates if the station determines the minor candidate is “not significant.” Moreover, the failure to invite a minor candidate to a political debate does not create any separate “equal time” rights for the minor candidate.

Determining just who is a “legally qualified candidate” is not a simple task. Certain rules have been established in an attempt to define who qualifies. Briefly, they require that the candidate must publicly announce his or her intention to run and be qualified under the applicable law to hold that office. Candidates for presidency or vice presidency of the United States are national candidates and as such must qualify as a candidate in at least ten states. An “opposing candidate” is a person legally qualified for the same office as the legally qualified candidate. Interestingly, candidates for a party’s nomination are not considered to be opponents of candidates seeking other party’s nomination. For instance, when Bill Clinton sought the Democratic nomination in 1992 and ran against seven other Democratic hopefuls, he was not considered an opponent of George Bush during the primary phase of the campaign. This ruling holds despite the fact that the candidate during the primary could be directing his or her remarks and challenging the other party’s candidates in their respective primaries.

(2) *Obscene and Indecent Programming*: “Indecent” programming is that which is “patently offensive as measured by contemporary community standards for the broadcast medium and describes sexual or excretory activities and organs”. On the other hand, program material is “obscene” if “the average person, applying contemporary community standards, would find that the material appeals to the prurient interest; that the material describes or depicts sexual conduct in a patently offensive manner; or taken as whole, the material lacks serious literary, artistic, political or scientific value”. Perhaps the most distinguishing feature between obscene and indecent programs is that stations are barred from carrying any obscene programs.

Not so with indecent material. As a result of the famous George Carlin broadcast of the “seven dirty words” which were determined to be indecent, the Commission adopted a rule that such indecent programming could air but only when the number of the children in the audience was reduced to a minimum, suggesting late evening hours. The Commission vigorously polices “indecent” programming and has levied fines in excess of \$100,000 when it has found a station to have carried such programming. Primarily these fines have been levied against “shock jock” hosts who go through great lengths to explore sexual and excretory activities on the air.

(3) *Lotteries*: The broadcast of any information regarding a “lottery” is tightly regulated under federal statute and FCC rules. “Lottery” is defined as a contest or promotion involving the awarding of a (1) “prize;” (2) based on “chance” selection; and (3) for which a participant must pay “consideration.” All three elements must be present or otherwise the activity is not a lottery under federal law and under most state laws. A prize is anything of value offered in the contest. Chance is present if the award of the prize depends in whole or in part upon chance rather than skill or some other factor within a contestant’s control. (Fishing contests are expressly exempted from the federal lottery statutes.) The final element is “consideration” which usually presents the greatest difficulty in interpreting the lottery statutes and rules.

Consideration not only involves items of value but can be found if the participant has to exert substantial time and energy in order to participate. Consideration is also subject to varying interpretations, depending upon whether federal or state law is applied. Some states hold that requiring the presence of a participant at a drawing is sufficient to constitute “consideration” even though the participant has done

nothing more than register for a drawing. Oregon requires that for consideration to exist, a participant is required to provide some consideration of minimal value. Exerting a modest amount of personal time to participate does not meet that requirement.

Consideration presents other problems because a participant need not pay money to participate in a lottery if he or she is otherwise required to make a purchase to participate. Thus a person purchasing a new car may have a further right to participate with other new car buyers in a drawing for a new television set. The fact that the participant paid full value for one item in order to participate in a promotion at no extra cost is still deemed to be “consideration.”

(a) *State Conducted Lotteries and State Authorized Lotteries* — The federal lottery laws, particularly those affecting broadcasting, were greatly relaxed in 1990. As of that date broadcasters were permitted to advertise lotteries authorized or not otherwise prohibited by state if the lottery was conducted on behalf of (1) a not-for-profit organization; (2) governmental organization; or (3) commercial entities, where clearly the lottery was occasional and ancillary to the primary business of the commercial organization. However, this change in the law did not give broadcasters carte blanche to air ads regarding lotteries. Instead there was a further requirement that the lottery be authorized by the state in which the station was located. Clearly state conducted lotteries can be advertised over radio and television.

Charitable organizations are also permitted to air information regarding their lotteries provided they obtained appropriate authorization or permits from the state government. Occasional commercial lotteries have not benefited very much under the new federal rules because most states, including Oregon, prohibit those lotteries.

Indian Gaming — Another form of gaming or lottery activity which is permitted to be advertised over broadcast facilities is Indian gaming. There are restrictions on Indian gaming ads as the rules require that the gaming and lotteries be conducted on Indian land; that they be operated by the Tribe; that the Indian gaming is permitted under state law where conducted; the state has entered into a “compact” to permit the games where participants “play against the house” instead of each other, e.g. slot machines, blackjack, etc.

(4) *Contests and Promotions*: The FCC has adopted a rule which prohibits the broadcasting of “false information concerning a crime or catastrophe,” if a station knows that the information is false or it is foreseeable that the broadcast will cause “substantial public harm” and such broadcast does in fact cause such harm to occur. Instances where broadcasts have announced that radio stations had been seized by Indians or that a volcano had erupted, or that the country was under nuclear attack, have been deemed the kind of catastrophe which will cause “substantial public harm.” However, stations can engage in creative programming and will not be presumed to propose foreseeable harm if a disclaimer “clearly characterizes the program as fiction” and is presented in a reasonable manner under the circumstances. At the heart of this rule is the goal of avoiding such public hysteria as resulted from the famous Orson Wells’ broadcast of the Martian invasion in 1938. The FCC has stated that the rule is only intended to prevent false reports of crimes and catastrophes and was not intended to prevent “harmless pranks.”

(5) *Children’s Programming on Television*: Under congressional legislation adopted in 1990, television stations are obligated to air at least three hours a week of programming specifically meant to serve the “educational informational needs of children” between 7:00 a.m. and 10:00 p.m. The failure to air this minimum amount of programming has cost television stations dearly with major fines ranging as much as \$150,000.

In addition to airing the programming, television stations must file in their public inspection files on a quarterly basis a report showing their efforts during the previous three months and their proposed efforts for the succeeding quarter to serve the educational and information needs of the children.

Furthermore, television stations must publicize the existing and locations of the reports and file them on an annual basis with the FCC.

In addition to minimum requirements television stations are also limited in the amount of commercial matter which may appear in a children's program. The current limits are that no more than 10 minutes of commercial time may appear on weekend programs designed for children and no more than 12 minutes during the weekdays. These limits apply to those programs designed for an audience of 12 years old and under.

(6) Recorded Telephone Conversations: Both radio and television stations today engage in active news coverage. A regular feature of news coverage is the recordation of telephone conversations. The recordation of telephone conversations brings at least three separate sets of laws into play: the FCC rules, state laws, and the federal criminal code. Federal law allows the recordation of a telephone conversation if only one party has given consent. Thus a newspaper reporter initiating a call to a third party can record that conversation without seeking the recipient's consent. However, if a broadcast station records such a conversation, that does not entitle the station to rebroadcast that conversation over the air as part of its programming. Instead, the FCC rules require that "all parties" must consent *prior to* the beginning of the conversation. It is a violation of the rule to air a recorded conversation if prior consent has not been obtained, even though the party may later consent to the airing of that conversation. Finally, state laws often require that both parties consent to a conversation before it can be recorded.

Thus, even before considering airing a recorded conversation as part of a radio or television program, the broadcaster's first concern is to make sure that all parties consented to the conversation before recordation. The problems with recorded conversations most often surface with morning talk shows where hosts will make random calls to members of the public. Unless that person has been forewarned and has consented to the call, the conversation cannot be recorded or broadcast.

Another area where the unauthorized use of communications arises is in the "intercept" of information transmitted over a discrete frequency. For instance, if newsroom personnel monitor a police channel for the purpose of securing information on accidents or crimes and then utilize that information as part of a news report, the broadcaster is exposed to both civil and criminal penalties for an unlawful intercept. While a news organization may listen to such transmissions, they may not divulge the content of those transmissions.

Competition for being first with the news in broadcasting can be intense. However, the fact that one station attains a news story and airs it does not permit a competing station to rebroadcast that programming without first obtaining the written consent of the originating station. The FCC rules require that copies of written consents for such rebroadcasts be available at the station. The key is the consent of the originating station and not that of the FCC.

(7) Prohibited Advertising on Broadcast Stations

Hard Liquor Advertising— In addition to the limits on the amount of commercial material which may appear in children's programs, there are other areas of content-based commercial matter which are heavily regulated. These include the advertising of alcoholic beverages and the ban on advertising tobacco products.

While there is no federal prohibition against the advertisement of alcoholic beverages by broadcasters, many states do in fact prohibit the advertisement of alcohol other than beer and wine. Oregon bars the advertising of hard liquor ads on any broadcast medium.

Tobacco Products— Congress has banned the advertising of cigarettes and little cigars over broadcast facilities. In 1986 Congress also banned the advertising of smokeless tobacco products such as chewing tobacco and snuff. The law does not bar the broadcast advertising of pipe tobacco or cigars pro-

vided the cigar is not a “little cigar.” Although not addressed it is generally understood that a station may carry advertising for cigarette papers

Fireworks— Under Oregon law, the broadcast of any advertisement for the sale of fireworks, the use or possession of which is “unlawful” in Oregon, is prohibited. Generic ads for fireworks which do not mention specific items prohibited, are probably permissible. Broadcast stations must be careful though because of the dual state–local approach to fireworks regulation which exists in Oregon. Thus a particular fireworks may be permissible under state law but prohibited under county or municipal ordinance. Under those circumstances the ad would be prohibited.

*CHAPTER II: THE FEDERAL FREEDOM OF INFORMATION ACT (FOIA)
THE FEDERAL PRIVACY ACT
OREGON PUBLIC RECORDS LAW*

The Freedom of Information Act (FOIA), 5 USC 552 (1988), and the Privacy Act, 5 USC 552a, are the two general federal statutes governing access to government data. There are many other specialized statutes (like the Internal Revenue Code at Title 26 USC) which govern specific areas and types of records. The law in this area is dynamic and complex. This summary touches only upon some of the main principles of interest to those, like the press, seeking access to government data.

THE FREEDOM OF INFORMATION ACT

Published Data: The easiest federal data to access is the mountain of officially published data. Five types of public data access are provided for officially published data.

(a) Agency Reading Rooms or libraries open to the public: These are generally found in the Washington, DC, area. The biggest and best is the Library of Congress. The National Archives also maintain public reading rooms. Their nearest branch office is in the Seattle, Washington area at the Federal Records Center in Auburn, Wash. Some of these federal libraries are available via computer data links or other services, such as certain data of the Securities and Exchange Commission and of the Patent Office. Individual agencies have to be contacted for information on these services, as well as some general federal data services found in the Washington, DC area and elsewhere in the country.

(b) Federal Depository Libraries: Across the Nation, many larger libraries have signed contracts to act as federal depository libraries, receiving free federal publications in exchange for agreeing to make them available to the public. In the Portland area, the Portland State University Library is the handiest federal depository library.

(c) The Government Printing Office bookstores: Portland has one in the downtown area around 1st and Jefferson. These stores stock and sell popular and topical federal publications on a wide range of subjects.

(d) Government Contract Publishers: Congress and the federal courts, both of whom are exempt from the FOIA, have chosen to make some federal records available only from private publishers at relatively high prices. The worst examples of this are those federal courts who publish their decisions exclusively through private publishers.

(e) Mailing lists: Most federal agencies maintain mailing lists for specific types of data, some of which are free and some of which require paid subscriptions. If one is interested in a particular area and a particular agency, it is always worth checking to see if and how one might get on a particular mailing list. Some of the above data is required to be made available under the FOIA and some is made available under other statutes or regulations.

Non-Published Federal Records: The most commonly sought records under the FOIA are the non-published records maintained by federal agencies. A requester must know two things: What one is looking for, and who has it.

Agencies are not required to create or compile records. Moreover agencies generally charge for both the search time and the copying cost. (Members of the press are entitled to reduced costs in non-commercial situations.) Thus the more a requester knows about what one is looking for and where it is, the cheaper the request will be. Agencies are not required to look for records that are not defined with reasonable specificity.

Requesting Data Under the FOIA:

(1) Call the agency you think has information of interest to you and inquire generally about the following:

- (a) WHO (name, office address, office phone number) is the official agency FOIA contact point;
- (b) WHO (same data again) at the agency might be able to tell you something about agency records you may be interested in; and
- (c) WHERE one can find and read a copy of the agency's FOIA regulations, since any appeal of FOIA matters must be based on compliance with agency FOIA regulations to avoid being rejected in court for failure to "exhaust administrative remedies," i.e. follow agency appeal procedures.

(2) Contact the official contact or other referenced official and just ask for general information about what types of records they might have that meet one's needs, and how and where one might inspect, copy, or get copies of the records.

(3) Before filing an official written FOIA request, discuss the request with the persons who will have to answer it. While some persons may be uncooperative, generally FOIA officials will try to help focus the request to something available readily (reduce search costs), something relatively small in size (reduce copying costs), and something releasable without additional agency review (avoid disputes over exempt materials).

These practical rules can in most cases allow the requester to obtain a minimum number of pages, focused on one's need, with a small or no fee (fees are waived below certain dollar amounts).

Even if a request does involve disputes and appeals over releasability or involve huge numbers of documents, prior coordination with agency FOIA officials will still speed the processing of the request and keep costs to a minimum.

Vaughn Indices and Disputes and Appeals Over Exemptions: The usual procedure when FOIA requests are pursued on exempt documents which the agency opposes releasing is to create an index of the documents (known as a Vaughn index) and to prepare two copies of the documents, one copy which is identical to the original and another copy which has the exempt materials blacked out or whited out or otherwise removed. This excised copy represents what the agency will turn over without dispute, upon prepayment of the appropriate fees. The copies are then forwarded through agency channels to the senior officials with authority to make final agency FOIA decisions. What happens next depends upon the agency and the current policy. Agency and federal policy on what exempt materials are released without protest after review varies with each administrator and Presidential Administration.

Once the requester has a final agency denial (which occurs after one or more layers of review), the matter can be pursued in US District Court if desired. Even in federal court, the Justice Department may decide to release something that the agency refused to release. At other times, for critical policy reasons, the government may fight the release all the way to the United States Supreme Court.

As a practical matter, it is advised to negotiate a release agreement at the lowest agency level possible. Both significant time and cost can be saved by doing so.

Exemptions to FOIA: The nine statutory exemptions are the most complex part of the FOIA, because they include a rainbow range of policies and concerns. Some exemptions are purely discretionary. Some exemptions are based upon other federal law protecting data against release. Some exemptions are waived with minor impacts and inconvenience. Other exemptions protect the lives of federal informers and classified military and security operations personnel or the most sensitive of national secrets. Sometimes a requester can be given data under the FOIA and still be subject to federal criminal prosecution or civil action if the requester uses it or further discloses it.

Exemption Zero—Data Not Covered by the FOIA: Generally only records of the executive branch

agencies are covered by the FOIA. Records of Congress, the President, the courts, state governments, municipal corporations (local governments), and private citizens are not covered by FOIA. Agency records generally include only those records properly part of the agency's record system, established under federal law, and do not include personal notes of government officials that are not part of or required to be part of the official agency records.

Agencies do not have to create records, create compilations, or do anything more than search for and copy existing records.

Exemption One— National Security: Matters that are specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order. This exemption protects classified data and special sensitive data.

Exemption Two— Internal Personnel Rules and Agency Practices: Matters that are related solely to the internal personnel rules and practices of an agency. This exemption protects things like agency exams and tests.

Exemption Three— Special Statutory Exemptions: Matters that are specifically exempted from disclosure by statute (other than 552b of this title), provided such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of matters to be withheld. This exemption covers many types of data covered by other laws.

Exemption Four— Confidential Commercial, Financial, and Trade Secret Data: Matters that are trade secrets and commercial or financial information obtained from a person and privileged or confidential.

Exemption Five— Privileged Agency Memoranda: Matters that are inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency. Executive privilege, attorney-client privilege, and attorney work-product privilege documents are included here.

Exemption Six— Unwarranted Invasion of Personal Privacy Data: Matters that are personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. This exemption is related to the Privacy Act and to generally recognized case-law privacy rights.

Exemption Seven— Law Enforcement Data: Matters that are records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be

expected to endanger the life or physical safety of any individual.

Exemption Eight— Financial Institution Regulatory Data: Matters that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

Exemption Nine— Geological Data: Matters that are geological and geophysical information and data, including maps concerning wells.

In processing FOIA requests, it is common that more than one exemption may apply to a document, in which case each exemption must be reviewed and claimed or waived by the agency. Since the latest published Justice Department FOIA Guide (September, 1993) runs to over 500 pages, it should be noted that this summary is extremely limited and general. The case law is a constant tug-of-war between release and publication and non-release and secrecy.

Pre-Notification Procedures for Exemption Four: The one major new development affecting private parties is President Reagan's Executive Order that sets up pre-notification procedures for release of data covered by Exemption Four (Exec. Order 12,600, 3 CFR 235 (1988)). The effect of this order is to allow "reverse FOIA" suits to bar release of data to competitors.

Comparison of FOIA and Litigation Discovery Procedures: FOIA is a one-sided discovery mechanism against the Government, and gives the Government no comparable rights against other parties. FOIA is limited to official agency records and subject to the exclusions and exemptions provided by law. Discovery procedures are two-sided mechanisms that provide roughly equal rights to all parties and generally cover all available non-privileged information, regardless of its official or unofficial nature.

Time-wise, FOIA is available anytime, whereas discovery is limited to a specific time frame within formal litigation procedures.

Data-wise, the FOIA exemptions and exclusions are far broader than discovery procedures' limits, absent the granting of special protective orders, which are often sought in litigation. FOIA provides for no protective orders, although misuse of certain data may subject a party to criminal prosecution or civil damages.

Cost-wise, FOIA can be far more expensive because, once invoked with its payment guarantee, a party can be deluged with copies of documents as well as very large search-time bills. In discovery parties can generally only charge for the copies, not the search time.

Purpose-wise, FOIA has no limitations, although commercial searches are subject to more challenges and greater costs. Discovery is limited by the scope of the litigation and civil and criminal procedural rules.

THE PRIVACY ACT

The Privacy Act has developed into a regulated release of information act. The Justice Department manual describes the act as giving individuals protection against disclosure, rights of access, and rights of correction. In addition the act provides for uniform fair information practices.

For those systems of records that it applies to, it prescribes publication of periodic listings of agencies' system of records in the Federal Register, along with a description of routine uses. It also requires government agencies requesting information to provide a Privacy Act notice. In addition to the routine uses, the statute lists permitted government uses of the data, including matching programs to cross-check various government programs. One such matching use is the cross checking of tax refunds

for other debts and child support payment debts.

The statute also provides for review and correction of records by the persons whose names or other personal identifiers are used to index the records. The statute was also amended to provide for agency record integrity boards and procedures.

Exemptions and Exceptions: There are important exceptions and exemptions to the act. Besides criminal investigatory and personnel use exceptions, the most important exclusion to the act is that it applies ONLY to SYSTEMS of records in which the indexing system is by personal name or identifier. It has NO APPLICATION to record systems in which other, non-personal-name or identification numbers are used to index the files.

The reason for this exclusion is the fact that, if a system of files is not indexed by personal names, theoretically no one, government or otherwise, can readily access data by name or personal identifier. This is true for paper files, but not necessarily true for electronic files subject to electronic word searches.

The practical impact of this exclusion is that there are a lot of places where personal data may be recorded in government files and records not covered by the act.

Routine Destruction of Records: Most government records are routinely destroyed, with only a small number of determined historical interest preserved. Each agency is required to establish as part of its record management program a routine destruction schedule.

The usual procedure for most government records of no lasting value is to keep the records in an active file somewhere, while in use; then to retire them for a while to archive storage; then to destroy them a set number of years after placing them in archive storage. The time periods vary with the type of record and use. Most accounting data is disposed of within a year or two simply because the huge volume of intermediary records and checks and balances are not required to be saved. Government contract files are routinely destroyed about three or four years after a contract is closed. Even litigation files usually are destroyed around 10 years after the close of the litigation, once all applicable statutes of limitations have expired.

Unofficial Records: Private notes and copies of documents kept by government employees solely for their personal use and not required to be kept as official records and not actually kept as official records are NOT covered by the FOIA or the Privacy Act.

Electronic Records: The official copies of electronic records and systems of records are subject to the same rules as official paper records and systems of records.

However the nature of computer systems and electronic records is such that E-Mail and other systems tend to create a lot of extra unofficial copies in readable and unreadable electronic media. The rapidity of change in both software and hardware, as well as in communication systems, has precluded the same level of control and management of electronic records as paper records, largely because of the automatic backup features of many software systems. Destruction of these records is also complicated by the various types of delete file commands and file restoration programs.

Data security is also more of a challenge with electronic data, as a number of well publicized incidents have demonstrated.

It should be recognized as a practical reality that the challenges of new technology will always be a step ahead of laws and regulations, and that no amount of law and regulation can make a perfect federal information system.

For More Information: Each agency has designated FOIA, Privacy Act, computer systems, and records management officials. These persons should be contacted for more information about a given

area as it applies to a particular agency. These persons are usually known to the agency's lawyers or are agency lawyers themselves.

THE PUBLIC RECORDS AND OREGON'S LAW

"The laws of our country have given us a right — the liberty — both of exposing and opposing arbitrary power ... by speaking and writing the truth." *Andrew Hamilton, defending John Peter Zenger*

Public records document practically every human activity. They follow us from birth to death, from school graduation to retirement. They shadow our movements in daily living, in business, in politics, in ordinary and extraordinary changes in our lives.

They give detail. They allow news reporters to replace mushy generalities with specific facts. Members of the public can rely on documents to get an accurate picture of human interactions

Oregon's Public Records Law: In 1973, Oregon adopted one of the nation's most sweeping public records laws, making virtually every document in government files open to public inspection. The fundamental philosophy of Oregon's Public Records Law, ORS 192.410 to 192.505, is that every government document is open to public view unless it is specifically exempted by the Records Law or another law.

Over the years since 1973, the Legislature has adopted hundreds of exemptions to the public records law's openness, but many records are still available.

Sources of Public Record Information: Oregon Attorney General's Public Records and Meetings Manual — The most useful source of information on Oregon's public records law is contained in the Oregon Attorney General's Public Records and Meetings Manual, which is updated every two years after the biennial legislative session.

It is an inexpensive book — about \$15 — and it contains guidance about the law and how to use it. Being an official "Attorney General's Opinion," the manual offers clear and persuasive instruction on the methods of obtaining public records as well as appealing a denial of one's request to inspect public records. The book is so comprehensive that there is no reason to repeat its contents in this manual. The Attorney General's Manual is available directly through the Attorney General's office or through various state bookstores.

The World Wide Web — In addition, the World Wide Web has become a useful source of information on how to obtain public records, as well as obtaining the records themselves. For example, it is possible to get full-text copies of Oregon laws through the Web by connecting to <http://gopher.leg.state.or.us/search1.html>.

"Open Oregon, a Freedom of Information Coalition," a new organization, has begun helping Oregon citizens obtain public information. Open Oregon has a Web site, www.open-oregon.com, to which Web browsers can connect.

Tips on using the Public Records Law:

- If the record you are seeking is being held by a government agency, you can assume that it is a public record, unless it is specifically exempted by state law.
- You should make a request to the custodian of that record to inspect or copy it.
- If the custodian says the record is exempt from disclosure, you should ask the custodian to cite the exact statutory provision that exempts the record from disclosure.
- If you disagree with the custodian about the exemption, you have the right under the law to seek a ruling from the Attorney General (for state records) or from the local District Attorney (for city and county records).
- The Attorney General's manual provides a form for any petition for a review of a disclosure denial. If you are denied access to a public record by an elected official, your only recourse is to seek redress in

court, since the Attorney General and a District Attorney don't have the authority to rule on elected officials' actions.

CHAPTER 12: DEFAMATION

The importance of a free press is enshrined in the First Amendment to the United States Constitution, which provides that “Congress shall make no law... abridging the freedom of... the press.” The Oregon constitution, however, does not specifically mention a “free press,” but instead provides:

No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right. (*Oregon Constitution, Article I, section 10*)

That provision exists in tension with Article I, section 10 of the Oregon constitution, which provides that “every man shall have remedy by due course of law for injury done to him in his... reputation.” There is an obvious tension between the right to speak freely and the right to seek redress from injuries caused by that speech. This chapter will explore the aspects of defamation law that are most relevant to media entities.

What is Defamation? “Defamation” is the term that has essentially subsumed the older terms of libel, which concerns written or printed defamatory statements, and slander, which concerns spoken defamatory statements. Although the law may sometimes still use the older terms, there is really no substantive difference between the two: both amount to defamation. Defamatory statements can be written, oral, broadcast, or pictorialized.

A plaintiff who sues for defamation must generally prove three things: (1) that a defamatory statement was made or communicated; (2) that the defamatory statement was published, and (3) that the defamatory statement caused the plaintiff to suffer damages.

Oregon courts have set forth the following definition of a defamatory statement:

A defamatory communication is one which would subject a person to hatred, contempt or ridicule, or tend to diminish the esteem, respect, goodwill or confidence in which one is held or to excite adverse, derogatory, or unpleasant feelings or opinions against one.

Newton v. Family Federal Savings and Loan Association, 48 Or App 373, 376, 616 P2d 1213 (1980). A person who is not directly named in the defamatory statement may still bring suit if he or she can prove that persons hearing the remarks would understand them to refer to the plaintiff.

Several types of statements are considered defamatory per se; in other words, the mere utterance of the statement is sufficient to defame someone. Historic examples of statements that are defamatory per se include statements that impute an inability or unfitness to perform the duties of one’s employment, accusations that one has committed a crime, or assertions of unchastity in a woman, or of having a “loathsome disease.” When a statement is defamatory per se, the plaintiff is not required to prove that he or she was damaged by the publication of the statement.

At the other end of the spectrum are statements that are not defamatory as a matter of law. Opinions — defined as statements that cannot reasonably be interpreted as stating actual facts — are protected by the United States and Oregon constitutions and are therefore not defamatory. Nevertheless, when an “opinion” implies the existence of undisclosed defamatory facts, it is actionable as a defamatory statement. Statements that are not defamatory per se nor capable of a defamatory meaning are considered reasonably capable of a defamatory meaning and are almost always resolved by the jury.

The second element a plaintiff must prove is that the defamatory statement was “published.” Publication means merely that the statement was disseminated or reproduced to another person. In the case of a broadcaster, newspaper, or other publisher, the publication will be obvious.

Finally, the plaintiff must show that he or she suffered damages as a result of the publication of the defamatory statement. Although this chapter will discuss in greater detail the types of damages for which a media defendant might be liable, it is worth reiterating here that statements which are considered defamatory per se are presumed to cause damage to a person's reputation.

Oregon's Retraction Statute: Truth is an absolute defense to an action for defamation; if the statement is true, a media defendant cannot be liable for publishing it. The Oregon legislature, however, has provided another way for a media defendant to attempt to insulate itself from some of the damages that might result from a defamatory statement. Oregon's Retraction Statute, ORS 30.150–30.175, provides that a plaintiff may not recover so-called general damages (damages which are not measurable by proof of a specific monetary loss. In the context of defamation, general damages are designed to compensate the plaintiff for the harm to reputation – a harm which is not measurable in a money loss.) unless a correction or retraction is demanded but not published. Otherwise, the only way a plaintiff might recover general damages is if he or she can prove that the media defendant actually intended to defame him or her — a very high standard to meet. Even in that situation, the publication of a correction or retraction may be considered to mitigate the plaintiff's damages.

The retraction procedure allows an allegedly defamed person or his or her attorney to make a written demand for correction or retraction that must be delivered to the publisher of the statement — either personally, by registered mail, or by certified mail, return receipt requested — at the publisher's place of business or residence within 20 days after the defamed person first becomes aware of the defamatory statement. The demand for retraction must specify which statements are false and defamatory and request that they be corrected or retracted. In addition, the demand may refer to the sources from which the true facts may be accurately ascertained. The publisher then has two weeks after receiving the demand for retraction to investigate the demand and determine whether to publish a correction or retraction. The retraction must appear in the first issue published, or first broadcast made, after the expiration of the two-week deadline. The content of the retraction should substantially state that the defamatory statements previously made are not factually supported, and that the publisher regrets their original publication. Finally, the correction or retraction must be published in substantially as conspicuous manner as was the defamatory statement. In other words, a retraction regarding an article that appeared in the front page of a newspaper should not run in the classifieds section.

Publishers and broadcasters would generally be wise to consider publishing corrections or retractions, even when the demand suffers from a procedural defect, because the retraction statute provides a relatively cost-free method of eliminating a potential plaintiff's claim for general damages.

Oregon courts have held that the retraction statute does not violate the Oregon constitution and that it applies only to publishers and broadcasters, and not to individual defendants whose statements happened to be published or broadcast.

In a case entitled Schenck v. Oregon Television, Inc., the Oregon Court of Appeals recently decided that each time an allegedly defamatory statement is republished, the defamed person is allowed a two-week opportunity to demand retraction. In the Schenck case, a television station broadcast a news report in October 1993 that contained an allegedly defamatory statement about the plaintiff. In March of 1994, the same report was re-broadcast. Although he was aware of the October 1993 broadcast, the plaintiff did not demand a retraction until April 11, 1994, within 20 days after the March 1994 broadcast. The Court of Appeals held that the plaintiff's demand for retraction was not untimely — notwithstanding the fact that he had actual knowledge of the defamatory statement five months earlier — because “each publication is a discrete tort.”

Privileges: A media defendant might also be protected by the common law's doctrine regarding privileges. A privilege is a right to make a statement, even if that statement is defamatory. Privileges fall into two categories: absolute and qualified.

An absolute privilege protects the speaker or publisher from any liability for defamation; the privilege is also referred to as “absolute immunity” because the speaker is immunized from liability. The doctrine of absolute privilege arose from the theory that there are certain circumstances in which the ability to speak freely — usually in the context of governmental functions — is so important that it outweighs the interest that an individual has in his or her reputation. Absolute privileges attach to statements made in the course of or incident to judicial proceedings, including statements made by witnesses and parties. An absolute privilege also attaches to statements made during quasi-judicial proceedings, such as proceedings before administrative boards, commissions, and disbarment actions. Statements made as part of a legislator’s duties are also absolutely privileged, although it should be noted that statements made by a legislator to the press outside the actual legislative meeting place and not during the legislative process are not absolutely privileged. Finally, an absolute privilege attaches to publications that are consented to (if the defamed person had reason to know that the published statement might be defamatory) and to statements that are made to carry out a statutory requirement.

Unlike an absolute privilege, a qualified privilege does not bar a defamation claim. Instead, it protects the speaker or publisher from liability unless the plaintiff proves that the speaker had “actual malice”— a term that will be explained in greater detail in the next section — when making the statement. Qualified privileges attach to statements that are either (1) made to protect the defendant’s interest, (2) made to protect the interests of the plaintiff’s employer, or (3) on a subject of mutual concern to the defendant and the person to whom the statement is made. For example, a former employer has a qualified privilege to make defamatory communications about the character or conduct of his or her employees to present or prospective employers. Other examples of statements that are subject to qualified privileges are the fair and impartial reports of judicial proceedings and “fair comment and criticism,” which permits commentary on matters related to government, public employment, or political campaigns.

Media Standards in Defamation Lawsuits: Historically, liability for defamation could be imposed without fault. In other words, regardless of the speaker’s motive, or even his or her knowledge of whether a statement was false, if the statement was defamatory then the defendant was liable. That analysis was changed in 1964 by the landmark case New York Times Co. v. Sullivan. In that case, the United States Supreme Court ruled that the First Amendment protected media defendants from strict liability for defamation when matters of public interest or concern were being discussed. The Court established the rule that when the defamation plaintiff is a “public official” or a “public figure,” the First Amendment shields a media defendant from liability for the publication of a defamatory statement unless it was published with “actual malice” — that is, knowledge that the statement was false or reckless disregard as to whether it was true. Those two inquiries: whether a plaintiff is a public figure and whether the defendant acted with actual malice are the critical matters at the heart of every defamation suit against a media defendant.

Public Figure Plaintiffs: A media defendant can invoke the New York Times rule if the plaintiff is either a “public official” or a “public figure.” A government employee is a public official if (1) he or she has, or appears to have, substantial responsibility for or control over the conduct of governmental affairs, or (2) occupies a position in government that has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it.

Public officials will obviously be limited to persons employed by the government. However, because most plaintiffs will not be government employees, the critical question in most defamation lawsuits is usually whether a plaintiff is a public figure. Media defendants who can establish that the plaintiff is a public figure will have the benefit of the “actual malice” standard, which provides virtually bulletproof protection against defamation plaintiffs.

According to the United States Supreme Court, a person is a “public figure” if he or she achieves such fame or notoriety that he or she becomes a public figure in all contexts, *i.e.*, becomes a household

name. The more common public figure is a person who “voluntarily injects himself or is drawn into a particular public controversy” and is therefore considered a public figure for a limited range of issues. However, the controversy into which the plaintiff injects himself must pre-exist the defamatory publication; a person does not gain notoriety as a public figure simply as a result of the alleged defamation itself. In addition, the mere fact that events surrounding a private individual attract public and media attention does not transform that person into a public figure. Nor does a corporation become a public figure simply by opening its doors to the public, offering stock for sale, or advertising.

What is “Actual Malice?” If the court determines that the plaintiff is a public official or a public figure, then the media defendant can be found liable for defamation only if the plaintiff proves that the defendant acted with actual malice. As already described, a media entity acts with “actual malice” if it publishes a defamatory statement either actually knowing that the statement is false or with “reckless disregard” as to its truth. But what does “actual malice” mean in practical terms? It means that the plaintiff must demonstrate subjective knowledge on the part of the media defendant that the defendant knew that a statement was false or that it in fact “entertained serious doubts as to the truth of [its] publication.” McNabb v. Oregonian Publishing Co., 69 Or App 136, 140, 685 P2d 458 (1984) (quoting St. Amant v. Thompson, 390 US 727, 731, 88 S Ct 1323, 20 L Ed 2d 262 (1968)). Allegations that the defendant relied on statements from a single source, or failed to verify statements received from an adequate news source, or performed slipshod investigation have all been rejected as bases for inferring actual malice. Nor may malice be inferred from the fact that the accusations are of a serious nature, or that a published statement was not “hot news,” which might otherwise justify shoddy investigation. However, actual malice could be inferred from facts indicating that the defendant possessed information contradictory to what was published or that the defendant had serious doubts as to the trustworthiness of the source of its information.

In short, actual malice is not measured by what a reasonably prudent publisher would have published, or should have investigated before publishing. Rather, actual malice concerns only the subjective state of mind of the defendant at the time of the publication. Further, the plaintiff must establish by clear and convincing evidence that the media publisher acted with actual malice. That is a higher standard of proof than the typical “preponderance of the evidence” standard prevalent in most civil lawsuits.

Private Figure Plaintiffs: If the court determines that the plaintiff is not a public figure but instead simply a private individual, then the actual malice standard does not apply. A private individual need only prove that the defendant acted with ordinary negligence in publishing a defamatory statement. In a case titled Bank of Oregon v. Independent News, Inc., the Oregon Supreme Court held that when private figure plaintiffs are involved, media defendants are held to the same standard to which an individual defendant would be held. The Court also noted that the Oregon Constitution does not require that media defendants are treated differently than any other defendant would be in a defamation action.

The implications of Bank of Oregon are clear: when private individuals are involved, media defendants are held to a much higher standard and can more easily be held liable for defamation.

Damages: Assuming that the jury has found liability, what kinds of damages can be assessed against a media defendant? A defamation plaintiff may recover only compensatory damages against a media defendant — that is, damages that compensate him or her for the harm done to reputation. Remember, if the statement is one that is defamatory *per se*, the plaintiff does not need to prove any special damage. In such a case, the plaintiff is entitled to recover general damages, which include harm to reputation, without evidence of the harm incurred. Even where the defamation is actionable *per se*, the plaintiff may recover “special damages” over and above general damages, if he or she pleads and proves that the defamatory statement was a substantial factor in causing that harm. Such special damage may include an inability to obtain employment. However, the Oregon Supreme Court has ruled that media

defendants may not be held liable for any emotional distress, bodily harm, humiliation, or mental anguish that results from the publication of a defamatory statement. Wheeler v. Green, 286 Or 99, 124, 593 P2d 777 (1979). Finally, punitive damages are not allowed in actions for defamation.

CHAPTER 13: ETHICS

In covering an arrest or trial, a reporter may often feel frustrated by what he or she sees as a lack of cooperation from law enforcement officials. In asking questions of officers of the court, the reporter should bear in mind that formal guidelines or professional codes may restrict the amount of information that can be divulged in a particular case. These guidelines include judicial canons, state bar disciplinary rules, state law and the Oregon Bar–Press–Broadcasters Joint Statement of Principles and its accompanying guidelines, included in Chapter 1 as Appendices A and B.

Police Agency Personnel: While some police agencies have public information officers who can be quite helpful, many reporters feel they are being kept from the best source of information. A reporter frustrated by this channel can lodge a grievance with the chief of police. In some police agencies, only certain people may be authorized to talk to the media.

A reporter who feels that the chief of police is being uncooperative can go to the chief's superior, usually the mayor or city council. The head of the state police is the superintendent of the state police. In the case of an elected sheriff, there is no immediate superior.

Jurors: During the course of a trial, the members of the jury are instructed not to discuss the case, except when deliberating among themselves, until the case is concluded. Although there are no restrictions on jurors against talking to a reporter following a trial, they may choose not to.

State and federal grand jury proceedings are secret, even to the listing of jurors who serve on them. State grand jurors are sworn to secrecy for their term of duty while federal grand jurors are instructed to keep their official activities secret permanently. The only time the results of grand jury activities are released is through the return of an indictment or reports.

Attorneys: Attorneys in Oregon are governed by a code of professional responsibility consisting of nine general canons of conduct, supported by specific requirements, known as disciplinary rules, and aspirational guidelines, called ethical considerations. The bar's current code was developed by the American Bar Association to serve as a model of ethical standards for attorney conduct. The code was made binding on Oregon attorneys with its adoption by the Oregon Supreme Court in 1970. In 1983, the ABA approved a new code of professional conduct. That code has not yet been adopted by the state bar.

The State Supreme Court is responsible for establishing and enforcing the standards of ethical conduct for Oregon attorneys. The Court has original jurisdiction to hear disciplinary proceedings and is solely responsible for sanctioning attorney misconduct. Under the Court's statutory authority and rules of procedure, the Oregon State Bar conducts investigations into allegations of unethical conduct by attorneys.

Because of a Supreme Court decision in 1976, disciplinary files of the state bar are available to the public under Oregon's public records law. Any public record retained or prepared by the bar pertaining to the professional conduct of any member of the bar is available for public inspection, unless otherwise exempt under the public records law.

The disciplinary rules regarding attorneys cover all areas of practice, including advertising guidelines and trial publicity. The disciplinary rule which limits extra-judicial statements an attorney may make regarding a case in which he or she is involved is DR 7-107.

The types of information allowable under that rule in a criminal matter include: information contained in public records; the fact that an investigation is in progress; the general scope of the investigation; the identity of the victim of the crime; information on the arrest and investigation; a description of physical evidence seized at the time of arrest other than a confession, admission or statement; substance of the charge; scheduling or result of any step in the judicial proceedings; that the accused denies the

charges made against him or her; and a warning to the public of any danger or a request for assistance.

Areas the attorney is not allowed to discuss include:

- The character, reputation or prior criminal record of the accused (including arrests, indictments or other charges of crime);
- The possibility of a plea of guilty to the offenses charged or to a lesser offense;
- The existence or contents of any confession, admission or statement or the refusal or failure to make one;
- The performance or results of any examination or tests or the refusal or failure of the accused to submit to them;
- The identity, testimony or credibility of prospective witnesses.

During the course of the trial, attorneys and members of their law firm are forbidden to make extrajudicial comments that could affect the outcome of the trial.

In a civil case, an attorney may quote from public records but is forbidden to discuss: evidence regarding the occurrence or transaction involved; character, credibility or criminal record of a party or witnesses; performance or results of examinations or tests or the failure of a party to submit to tests; opinions as to the merits of claims or defenses of a party; or any other matter which may interfere with a fair trial.

These rules do not preclude an attorney from replying to charges of misconduct publicly made against him or her from participating in proceedings of the legislative, administrative, or other investigative bodies.

These rules are based on Ethical Opinion 7–33, which says: A goal of our legal system is that each party shall have his or her case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial to the outset of the trial and may also interfere with the obligations of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

As an added protection for the public resulting from dishonest conduct by attorneys, the bar's policy-making body, the board of governors, established a client security fund. The fund is maintained through annual payments from all active members of the Oregon bar. When a client suffers a loss due to criminal activity or dishonesty by an attorney (losses not protected by malpractice coverage), he or she may file a claim against the client security fund with the state bar. A bar committee is vested by statute with the discretionary power to determine if reimbursement to the client is appropriate. As a prerequisite to having a claim against the fund, the client must have obtained judgment against the attorney arising out of alleged dishonest conduct, or the attorney involved must have been criminally convicted for the offense causing the loss.

Those with complaints against their attorneys follow a procedure that begins with a written complaint, referred to the general counsel of the bar.

Complaints filed with the bar follow a procedure that involves a response from the attorney who is being complained about, investigation by volunteer attorney committees and, where appropriate, referral to the Supreme Court for disciplinary action.

Judges: When an attorney becomes a judge, he or she remains subject to the ethics of the profession but also must follow to a separate ethical code and disciplinary procedures.

The code of judicial conduct was adopted by the Oregon Supreme Court. Seven canons in this code pertain to the integrity of the judiciary, avoidance of impropriety, impartial and diligent perform-

ance of duties, professional activities off the bench, extra-judicial activities, compensation for extra-judicial activities and political activities.

The code is the standard of ethics in this state for all judges, whether serving full— or part-time or if they are attorneys. In many respects it follows a code of judicial conduct adopted by the ABA.

The Oregon Judicial Conference was created by state law as the official professional organization of all appellate, tax and circuit court judges. It has a standing committee on judicial conduct which assists in judicial education and interprets the conduct code in light of inquiries received from judges.

The investigation of formal complaints and recommendations for discipline against judges, however, are in the hands of the Oregon Judicial Fitness Commission. Under the State Constitution, the commission's investigations are confidential unless a judge under investigation requests a public hearing. From its recommendations, the Supreme Court may take official disciplinary action to censure the judge or remove or suspend him or her from office. The commission's record becomes public at this point in the proceedings. The powers of the commission and the Supreme Court were broadened by vote of the people in 1976 and the grounds for discipline were extended to include general incompetence and willful violation of the rules of conduct established by the court.

The commission is comprised of three judges appointed by the Supreme Court, three attorneys appointed by the board of governors and three lay members appointed by the governor with the approval of the Oregon Senate. Each of the commissioners serves for a specified term. A chairperson is elected annually from the members of the commission and, historically, is always a lay member or attorney, not a judge.

The commission meets quarterly. Employees have offices at Northwestern College of Law at Lewis and Clark College, 10015 S.W. Terwilliger Blvd., Portland, OR, 97219.

The commission has no formal procedures by which it accepts complaints. It prefers that complaints be written and submitted to the Lewis and Clark office. Complaints should describe the situation as completely as possible, including who else was present or witnessed the incident.

General complaints that the judge was "unfair," "biased" or "didn't listen to the evidence" are not satisfactory since they give the commission no basis for action. The fact that the judge ruled on the issue in litigation contrary to the way in which the complainant would have liked to have the ruling is not grounds for action. The commission can do nothing about litigation; if a judge rules wrongly, only appellate or other trial courts can correct the misjudgment.

Types of actions for which a judge may be suspended, removed or censured by the Supreme Court include: conviction in a court in this or any other state of a crime punishable as a felony or involving moral turpitude; willful misconduct in a judicial office where the misconduct bears a demonstrable relationship to the effective performance of judicial duties; willful or persistent failure to perform judicial duties; general incompetent performance of judicial duties; willful violation of any rule of judicial conduct established by the Supreme Court; habitual drunkenness or illegal use of narcotic or dangerous drugs.

Federal Government Ethics Rules: The U.S. Government has its own ethics laws and regulations. Generally in federal litigation, only the Justice Department will issue press releases if they are involved in a case. With regard to documents and other materials, release and publication will be based upon the Freedom of Information act and the Privacy Act, as well as rules applicable to court proceedings.

In addition there is a government-wide ethics code applicable to all federal employees (with some variations for Congress, federal judges, and senior political officials.) The Justice Department also publishes its own guidelines and regulations on how it interprets other parties' rights under the attorney-client privilege with regard to official federal investigations.

The best source of information on federal agency activities is usually the agency's own public affairs or press coordination office. The personnel who staff these offices either have or can get the information on a matter that can be publicly released and often will put the information on a

ready-to-use press release form.

CHAPTER 14: HEALTH CARE INFORMATION: OREGON CODE OF COOPERATION

The Code of Cooperation provides a set of guidelines for cooperation between Oregon healthcare providers and the news media. It is devised cooperatively to facilitate accurate, ethical, and timely news coverage of medical and other health-related events. This code balances the patient's right to privacy and well-being with the public's right to receive information.

In the code, all references to "hospital" or "hospitals" include individual facilities, health systems, clinics and provider organizations.

The Oregon Code of Cooperation is published by Oregon Association of Hospitals and Health Systems, with editorial contributions from member hospitals, Oregon Medical Association, Oregon Newspaper Publishers Association, and Oregon Association of Broadcasters. The code is a set of guidelines for healthcare news media relations, and should be adapted to the news media policies of individual facilities.

By agreeing with the code's guidelines, the Oregon news media and healthcare providers acknowledge a shared responsibility to provide accurate public information and to assure patients and healthcare providers that the gathering and reporting of this information does not infringe upon patient privacy, professional medical ethics, or patient care.

In cooperation with the code, each healthcare facility will have a spokesperson available at all times to respond quickly and accurately to news media inquiries. Physicians will be accessible to the news media, either directly or indirectly or through an authorized spokesperson, and will respect media deadlines to an extent consistent with patient privacy and well-being.

News media will seek information through designated spokespersons and will respect hospital regulations regarding entry into all areas of the facility, whether or not a patient has already agreed to be interviewed.

Guidelines for Hospitals and Other Healthcare Facilities: The communications director or officers or designated staff members of Oregon Association of Hospitals and Health Systems (OAHHS) will help the news media get prompt and accurate information on health and hospital subjects.

Each facility will designate an authorized spokesperson who will be accessible to the news media at all times. A hospital spokesperson serves as the primary resource for the news media and assumes responsibility for coordinating exchange of information from and access to the hospital. When requested by a patient or a patient's family, the hospital spokesperson will direct calls to the patient's designated spokesperson.

Unless there are extraordinary circumstances, a written consent to release information should be obtained from the patient, a member of the patient's family or the patient's spokesperson.

All news media in the community served by the hospital should be informed of the hospital's designated spokesperson(s). It is the hospital's responsibility to keep this information current.

When a physician's approval is necessary to release information, the hospital spokesperson will obtain it even if the reporter later speaks directly to the physician.

Before releasing an attending physician's name, the hospital spokesperson must get the physician's approval. However, the spokesperson may acknowledge that a patient is under the care of the hospital staff.

Hospital spokespersons and physicians should be aware that they probably will not be permitted to review or edit interviews before publication or broadcast. Although reporters and editors try to double check information whenever possible, each news organization determines what it will publish or air.

When a hospital invites the news media to cover a patient story, the hospital will provide reporters with requested follow-up information and access consistent with the guidelines in the code and according to the wishes of the patient and attending physician.

The hospital spokesperson is responsible for obtaining information about patients as rapidly as possible without interfering with the health, welfare, or privacy of patients. In compliance with ORS 192.525, 179.505, and other applicable state and federal laws, no information that violates the confidence, privacy, or legal rights of the patient should be given. (*See sections on Psychiatric, Drug and Alcohol Abuse Cases, and Unusual Illnesses.*)

Guidelines for Physicians: The communications director or designated staff members of Oregon Medical Association (OMA) will be available to the news media to help get prompt and accurate information on health and medical subjects. If information is not immediately available to comply with news media deadlines, OMA will inform the news media and, depending on the nature of the request, either continue to gather the information for a later deadline, or refer the reporter to another competent authority as a resource.

Officers, committee chairpersons, or designated spokespersons of OMA are expected to agree to be quoted by name in matters of public interest for the purpose of authenticating medical information. An up-to-date list of OMA spokespersons should be maintained so that OMA can respond quickly to inquiries from the news media.

This policy is not to be construed by OMA members as a breach of the time-honored medical practice of avoiding personal publicity. It is intended only to serve the best interests of the public and the medical profession. To this end, physicians should be introduced only by those titles and credentials/affiliations that are relevant to the particular news-gathering situation.

County and regional medical societies in Oregon are urged to adopt a similar policy for their officers, committee chairpersons, and other designated representatives, and to maintain up-to-date lists of spokespersons for media contact.

In matters relating to the practice of medicine, physicians are encouraged to give information to the news media, as long as it does not jeopardize the physician-patient relationship or violate the confidentiality and privacy of the patient's medical records or legal rights. The physician may choose, however, to provide information through a hospital or OMA spokesperson.

Notifying news media of an event implies that coverage will be welcome. Therefore, speakers at publicized medical meetings should expect to make themselves available to the news media on request, providing that their schedules and commitments to the sponsoring organization are not compromised.

Physicians are not authorized to participate in controversial public discussions as spokespersons for OMA without prior OMA approval.

Guidelines for News Media: The first obligation of physicians and hospitals is to safeguard each patient's life and health. Therefore, representatives of all news media are expected to cooperate by refraining from any action or demand that might jeopardize the patient's health or interfere with orderly operation of the healthcare facility.

On all matters pertaining to hospitals and physicians in the community, representatives of the news media are expected to make every reasonable effort to obtain information from authorized sources before proceeding to publication or broadcast. The news media should not use the name of an attending physician without the physician's consent.

In the case of legal charges against a physician, hospital, or clinic, the reporter is expected to make every effort to verify the charges and offer the accused an opportunity to reply before publication or broadcast.

When using a tape recorder, the reporter must advise the hospital spokesperson, patient, or physician prior to questioning, according to ORS 165.540.

Reporters and photographers are expected to obtain hospital permission and to abide by individual hospital rules regarding media access before entering a healthcare facility for interviews and/or photographs. Access will be arranged if the patient or patient's guardian is willing and his or her condition

permits. The hospital will assist by obtaining written consent from the patient or a responsible family member before videotaping, photographing, or interviewing is permitted.

When seeking information about a trauma patient, reporters will make every effort to obtain the patient's full name and age from police, fire, or other public officials before calling the hospital for a condition report.

Access Restrictions: Hospitals are bound by state and federal laws, and regulations (including Oregon Administrative Rules Chapter 333), and hospital policies that restrict public access to certain service areas and departments in hospital buildings. These sensitive areas include labor and delivery rooms, nursery, operating rooms, intensive care unit, cardiac care unit, emergency treatment rooms, infection control areas, and psychiatric facilities. In emergencies, access to other hospital areas that are normally available to the news media also may be restricted temporarily.

Advance notice of visits by reporters, video crews, or photographers will enable hospital staff to secure space clearance and make arrangements necessary to ensure that electronic equipment used by the news media will not impede patient care. In some areas of the hospital, news people may be required to wear special clothing and have their equipment disinfected or protected.

Release of Information to News Media: All news media inquiries should be directed to the hospital spokesperson.

Information reported over public airwaves (commercial radio and television channels, and police/emergency radio frequency bands) is considered public information. In cases reported by fire or police departments, sheriff, medical examiner, or other public authority, the hospital spokesperson may confirm or respond to inquiries about the following without obtaining the consent of the patient: name, city of residence, sex, age, general description of injuries (as ascertained by medical personnel) within the guidelines described below. If the patient is a minor, names of parents also may be given. No statement may be made as to whether a patient is intoxicated or under the influence of drugs.

In cases not reported by a public authority, the same facts outlined above will be made available if permission has been given by the patient, the patient's designated representative who has power of attorney for healthcare, or a responsible member of the patient's family. The release of information about certain patient situations and conditions is controlled by state and federal law. (*See Psychiatric, Drug and Alcohol Abuse Cases.*)

A prognosis for a specific patient should never be given to the news media or the public.

Patient Conditions Defined: Oregon hospitals agree to use the following standard definitions when describing a patient's condition:

Good: Vital signs such as pulse, temperature, and blood pressure are stable and within normal limits. Patient is conscious, comfortable, and there are not complications.

Fair: Vital signs are stable and within normal limits. Patient is conscious and alert although may be uncomfortable or in pain and may have minor complications.

Serious: Vital signs may be unstable or outside normal limits. The patient is acutely ill or injured and may have major complications.

Critical: Vital signs are unstable or outside normal limits. There are major complications. (Most patients in an intensive care unit are considered critical until ready to be moved to a regular nursing unit.)

Note: “Stable” is not a condition.

Police and Accident Cases: Information about police and accident situations is the most frequent request a hospital receives from the news media. Release of patient information in these situations should follow the guidelines for cases reported by a public authority. The general nature of the accident may be described, such as injury by automobile, explosion, shooting, etc. However, the hospital spokesperson should not enter into any discussion of the circumstances of the accident or its cause. (*See Interviews and Photographs.*)

No information should be given that violates the confidence, privacy or legal rights of the patient. For example, the hospital should not make a statement as to whether a patient was intoxicated, whether injuries were the result of assault or an attempted suicide, whether a patient is suspected of being a drug addict, the circumstances in which a patient was shot or stabbed, or the details relating to an automobile accident and whether there was an arrest.

Further medical information dealing with specific injuries in police and accident cases may be given by hospital spokespersons as follows:

Fractures (except head injuries): Indicate the part of the body involved and whether the fracture is simple or compound. The words “possible” or “probable” should be used when X-ray diagnosis is not available.

Injuries to the head (except fractures): A simple statement may be made that there are injuries to the head. However, it may not be disclosed that the skull is fractured. No opinion may be given regarding severity of the head injury until the condition is definitively determined by a physician.

Trauma and internal injuries: Trauma cases usually involve injuries to more than one body location. A statement may be made that there are multiple trauma injuries. It may be stated that there are internal injuries, and the general site of such injuries may be given.

Unconsciousness: If the patient is unconscious when brought to the hospital, this fact may be stated. However, the cause of unconsciousness may not be given.

Shooting or stabbing: A statement may be made that there is a gunshot or stabbing wound and its position indicated. The hospital spokesperson may not state how the accident occurred (i.e., accidental, suicidal, homicidal, etc.), nor describe the situation under which it took place.

Paralysis, loss of limb: No statement may be made without permission from the family or the patient’s designated healthcare representative. Hospitals and the news media recognize that in cases of paralysis or loss of limb, there is great emotional turmoil for the patient and family. Often the family opts to wait for a short time to tell the patient of the extent of his or her injuries. In such cases, both hospital personnel and the news media will cooperate to ensure that the patient’s privacy is protected.

Burns: A statement may be made that the patient is burned and the hospital spokesperson may identify the area of the body involved. A statement as to the severity and extent of burns may be made if indicated by the physician.

Poisoning: A statement may be made that the patient is being treated for a suspected poisoning. The cause of the poisoning may not be described (such as suicidal, homicidal or accidental).

However, when poisoning is proven to be accidental and reported to public authorities, the hospital spokesperson may confirm the nature of the poisoning. The product ingested should be described generically (such as “weed killer” or “detergent”) and not by trade name. When the ingested material has not been identified, this fact should be so stated.

Battered children: No statement shall be made that a child’s injuries appear to be the result of child abuse, even if an official report has been filed. The nature and extent of injuries may be released according to the above guidelines for cases of public record.

Rape: Every effort will be made to protect the privacy of an alleged rape victim. Names will not be released. No statement will be made concerning the nature of the incident or injuries without the specific written consent of the patient. Once a case is reported to the police, further news media questions should be directed to law enforcement authorities.

Outpatient and Emergency Care: In facilities where outpatient care is provided by medical staffs, hospitals may choose to release information on patients consistent with the guidelines established in this document.

When a patient is brought to the emergency department but is not admitted to the hospital, the hospital spokesperson should respond to inquiries consistent with guidelines established for cases of public record. The statement, “The patient is being evaluated in the ER,” or the “The patient was treated and released,” may be used in place of a condition report.

Psychiatric, Drug and Alcohol Abuse Cases: State and federal laws prohibit the disclosure of any information about psychiatric, alcohol and drug abuse cases (42 USC Section 290; 42 CFR Section 2.1; ORS Chapter 426). This includes confirmation of the patient’s admission to or discharge from a psychiatric, drug or alcohol treatment facility.

When reporters have information from the police or other sources concerning persons who are being treated at psychiatric, drug or alcohol abuse facilities, it is recommended that all such media inquiries be answered, “We cannot, under federal or state law, comment on such a case.”

Organ Transplants: In the case of organ recipient, the hospital spokesperson will confirm or respond to inquiries about the following if permission has been given by the transplant recipient or a responsible adult member of the family: name, city of residence, sex, age, date of transplant, and condition.

In cases of public fund–raising for organ transplants, the hospital should follow the code guidelines for *Newsworthy Persons*.

In the case of organ donors, a potential organ donation will not be discussed by the hospital spokesperson. When a potential organ donor dies, as determined by the attending physician, the disposition of the body will not be revealed. The hospital spokesperson shall refer questions on definition of death to the attending physician. The hospital performing the transplant will not release information about the donor that might ultimately reveal the donor’s identity.

Maternity: Policies on the publication of births vary from hospital to hospital. Hospitals should obtain written consent from the parent before permitting photographs or release of information about newborns.

Questions about drug–affected newborns (babies born to drug–addicted mothers) should be directed to a physician.

Unusual Illnesses: Healthcare facilities will confirm any unusual illnesses or potential epidemics

after such illnesses and conditions have been reported to local health authorities. Names of patients will not be released without permission. HIV patient confidentiality is protected by federal law. The identity of a person tested for HIV or the results of an HIV-related test are confidential (OAR 333-12-270(1)).

Death: While announcement of a death usually is not made by a hospital, such news is public information after next of kin has been notified. If next of kin has not been notified, the news media shall be so advised and asked to refrain from release of news for a reasonable time, as determined in cooperation with the attending physician.

When the patient is of significant prominence, the hospital spokesperson should facilitate timely release of information to the news media. (*See Newsworthy Persons.*)

Information on the cause of death may be given by the hospital spokesperson after receiving approval from the attending physician and members of the patient's family.

If a death becomes the object of a medical examiner's investigation, news media inquiries as to the cause and circumstances of death will be directed to the medical examiner's office.

The name of the funeral home receiving a body may be released to the news media.

Determination of whether a death is a suicide is not within the province of the hospital. A medical examiner is usually the qualified authority for rendering such a judgment. The hospital spokesperson should never release statements asserting suicide or attempted suicide as a reason for hospitalization or death of a patient.

Interviews and Photographs: Media-requested photographs, videotapes, or interviews can be granted with the patient's written consent. When the patient is a minor, permission of a parent or guardian must be obtained.

The patient's physician should be informed of news media requests. For each request, the hospital should obtain in advance a completed, dated and signed patient consent form for photography and videotaping. This consent form should be filed as a permanent part of the patient's record in accordance with individual hospital or health system policy.

Requests to interview or photograph a patient under arrest or in custody are to be referred to the police department or government agency holding jurisdiction.

A hospital may refuse permission to interview or photograph a patient if such actions would interfere with the patient's well-being or the delivery of patient care. However, such circumstances are often temporary and approval may be given when conditions change.

The hospital spokesperson may stay with the news media and the patient throughout the session to provide assistance and to protect the patient's rights as well as the rights of other hospital patients.

News media coverage of unconscious patients, or patients suffering from severe illness or injury, will be permitted only with permission of the patient's family or designated healthcare representative.

Patient Discharges: Once a patient is discharged, the hospital no longer will disclose information about him or her to the news media. All further inquiries should be directed to the patient or the family. However, a hospital may confirm a patient's dates of admission and discharge.

Newsworthy Persons: A person whose activity is a matter of public interest or whose livelihood or success depends on being kept in the public eye (i.e., a sports figure, an elected official, an actor) forfeits some right of privacy.

When a prominent person is hospitalized, the hospital will coordinate with the patient, family, and physician to provide information about the patient's illness in a manner that is consistent with maximum possible protection of the individual's privacy.

The prominent person may elect to name his or her own spokesperson, to whom all requests for information will be directed. When a newsworthy person is in serious or critical condition, the hospital

should arrange for medical bulletins to be issued on a regular basis. These bulletins should be issued by the hospital spokesperson in cooperation with the attending physician, the family and/or designated healthcare representative.

The above practices also may apply to the patient who, whether willingly or not, has been involved in an occurrence of public or general interest and, as a result, becomes hospitalized.

If a patient is hospitalized due to an occurrence that draws public attention, information should be provided by the hospital spokesperson for the duration of the hospital stay, according to the guidelines described in the code under *Police and Accident Cases*.

CHAPTER 15: OREGON'S SHIELD LAW

Oregon's shield law, ORS 44.510 through ORS 44.540, provides broad protection for reporters and others against compelled testimony, production of evidence and searches.

This law protects people connected with, employed by or engaged in a medium of public communication, including print and broadcast media, books, periodicals, pamphlets, wire services or feature syndicates. The protection extends beyond information related to news and includes unpublished notes, out-takes, photographs, tapes or other information, regardless of whether it is related to published information.

The statutes protect reporters from being compelled to disclose: (1) a source of information obtained in the course of work, regardless of whether the information has been published; and (2) unpublished information obtained or gathered in the course of work. Reporters also are protected from searches of their papers, effects or work premises, unless there is probable cause to believe the reporter has committed, is committing or is about to commit a crime.

The protection is not limited to situations where a relationship or pledge of confidentiality exists. The protection is not lost if the reporter: (1) disclosed the information, source or related information elsewhere; or (2) ceases to be connected with, employed by or engaged in a medium of public communication.

Statutory exceptions: There are exceptions and limitations in the statute. It does not apply to: (1) utterances by a government official or employee within the scope of his or her governmental function; (2) political publications subject to certain Oregon laws regulating political advertising and publications; or (3) the content or source of allegedly defamatory information, in a civil action for defamation where the defendant bases a defense on the content or source of the information.

Informant's consent: If the source of the information offers himself or herself as a witness, it is deemed to be a consent to the examination of a reporter or other protected person on the same subject. This provision has not been interpreted or explained in a published Oregon court decision. But it seems obvious that the provision should not affect the shield on anything other than the informant's communication with the reporter or other protected person. The reporter or other protected person could argue this provision does not dissolve the reporter's right to refuse to disclose (even as to the informant's communication with the reporter), because the shield law is a right, not merely a privilege, for confidential communication. In raising this argument, the reporter may argue for state and federal constitutional protection for freedom on the press and against nonessential compelled disclosure.

Protection other than Oregon's shield law: The Oregon shield law protects against Oregon state legislative, executive or judicial officers or bodies. It may govern in federal court if the pending case or proceeding is a civil action and the evidence pertains to an element of a claim or defense to which Oregon law controls. (See rule 501 of the Federal Rules of Evidence.)

However, the Oregon statute will not control in some federal proceedings and usually will not apply at all to proceedings in other states. There is no broad federal shield law for reporters. Some states do not have a shield law either.

An important case development is the recognition by many courts that reporters have a "qualified privilege" against being compelled to give evidence, unless the party seeking the evidence proves that compelling disclosure is essential to the case and the information cannot be obtained elsewhere. Most of these courts base the privilege in the First Amendment of the United States Constitution or in state constitutional protections for freedom of the press and the free flow of information, which would be impaired by forcing reporters to become witnesses or require them to reveal unpublished information.

The Washington Supreme Court adopted a common law qualified privilege to preserve confidential news sources or confidential information, unless the party seeking the information shows that his or her claim is meritorious, the information sought is necessary or critical to the suit or defense, and a reasonable effort has been made to obtain the information elsewhere. In Washington state courts, this doctrine applies in civil and criminal cases. A reporter who is not a party to the action will receive the greatest protection under the privilege. A reporter who is a defendant in the action will receive less protection. A reporter who is a plaintiff will receive little or no protection. (Clampitt v Thurston county, 98 Wn2d 638,658 P2d 641 (1983); state v Rinaldo, 102 Wn2d 749, 689 P2d 392 (1984).

Elsewhere, several states and federal courts approved the reporter's qualified privilege in civil cases; some approved it in criminal cases; and some approved it for "qualified" protection of not only information received in confidence but also non-confidential, unpublished information.

In criminal cases, the defendant's constitutional right to a fair trial may overcome the shield law and qualified privilege.

While there is no broad federal shield law for reporters, there is a federal statute forbidding government offices or employees investigating or prosecuting a crime to search for or seize any work product of someone "reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast or other similar form of public communications in or affecting interstate or foreign commerce." The statute has exceptions and forbids only searches, not subpoenas. (Privacy Protection Act of 1980, P.L. 96-440, 42 U.S.C. sections 2000aa et seq.).

In addition, the U.S. Department of Justice has published a formal policy to minimize Justice Department subpoenas or interrogation, indictment or arrest of news media members or subpoenas of their telephone toll records. These guidelines are not law but demonstrate an intent by the Justice Department to discourage investigative and prosecutorial activities against the news media. Administrative disciplinary action may be taken if the guidelines are violated. (42 U.S.C. section 2000aa-12; Code of Federal Regulations, Title 28, section 50.10).

CHAPTER 16: APPENDICES/GLOSSARY

Appendix A

Oregon State Bar–Press–Broadcasters Joint Statement of Principles

Oregon's Bill of Rights provides for both fair trials and freedom of speech. These are basic and unqualified. They are not ends in themselves but are necessary guarantors of freedom for the individual and the public's rights to be informed. The necessity of preserving both the right to fair trial and the freedom to disseminate the news is of concern to responsible members of the legal and journalistic professions and is of equal concern to the public. At times these rights appear to be in conflict with each other.

In an effort to mitigate this conflict, the Oregon State Bar, the Oregon Newspaper Publishers Association and the Oregon Association of Broadcasters have adopted the following statement of principles to keep the public fully informed without violating the rights of any individual.

1. The news media have the right and the responsibility to print and to broadcast the truth.
2. However, the demands of accuracy and objectivity in news reporting should be balanced with the demands of fair play. The public has a right to be informed. The accused has the right to be judged in an atmosphere free from undue prejudice.
3. Good taste should prevail in the selection, printing and broadcasting of the news. Morbid or sensational details of criminal behavior should not be exploited.
4. The right of decision about the news rests with the editor or news director. In the exercise of judgment, the editor or news director should consider that:
 - (a) an accused person is presumed innocent until proved guilty;
 - (b) readers and listeners/viewers are potential jurors;
 - (c) no person's reputation should be injured needlessly.
5. The public is entitled to know how justice is being administered. However, it is unprofessional for any lawyer to exploit any medium of public information to enhance one side of a pending case. It follows that the public prosecutor should avoid taking unfair advantage of any position as an important source of news; this shall not be construed to limit any obligation to make available information to which the public is entitled.

In recognition of these principles, the undersigned hereby testify to their continuing desire to achieve the best possible accommodation of the rights of the individual and the rights of the public when these two fundamental precepts appear to be in conflict in the administration of justice.

OREGON STATE BAR

OREGON NEWSPAPER PUBLISHER'S ASSOCIATION

OREGON ASSOCIATION OF BROADCASTERS

Appendix B

GUIDELINES FOR DISCLOSURE AND REPORTING OF INFORMATION ON CRIMINAL PROCEEDINGS

It is generally appropriate to disclose or report the following:

1. The arrested person's name, age, residence, employment, marital status and relevant biographical information.
2. The charge.
3. The amount of bail and/or release conditions.
4. The identity of and biographical information concerning both complaining party and victim. Specific information about sexual assault or hate crime victims should be disclosed only when the public's right to know clearly outweighs the victim's or the complaining party's right to privacy or safety.
5. The identity of the investigating and arresting agency and the length of the investigation.
6. The circumstances of arrest, including time, place, resistance, pursuit and weapons used.

It is rarely appropriate to disclose for publication or to report prior to the trial the following:

1. The contents of any admission or confession, or the fact that an admission or confession has been made.
2. Opinions about an arrested person's character, guilt or innocence.
3. Opinions concerning evidence or argument in the case.
4. Statements concerning anticipated testimony or the truthfulness of prospective witnesses.
5. The results of fingerprints, polygraph or mental health examinations, ballistic tests or laboratory tests.
6. Precise descriptions of items seized or discovered during investigation.
7. Prior criminal charges and convictions.
8. Evidentiary details that were excluded in prior judicial proceedings in the same case.

PHOTOGRAPHY

1. Photographs of a suspect may be released by law enforcement personnel provided a valid law enforcement function is served. It is proper to disclose such information as may be necessary to enlist public assistance in apprehending fugitives from justice. Such disclosure may include photographs as well as records of prior arrests and convictions.
2. Law enforcement and court personnel should not prevent the photographing of defendants when they are in public places outside the courtroom. However, they should not pose the defendant.

SPECIAL STATEMENT

1. The above Guidelines are supplemental to and should be interpreted with the "Oregon Bar-Press-Broadcasters Joint Statement of Principles" adopted in 1962 and revised in 1998.
2. The Guidelines are cautionary, not mandatory. They do not prohibit release of, or publication of, information needed to identify or aid in the capture of a suspect or information required in the vital public interest after arrest. Neither do they proscribe publication of information which is already in the public domain.
3. These Guidelines were adopted in 1968 and revised in 1998.

Appendix C

PROCEDURE FOR IMPLEMENTATION OF THESE PRINCIPLES AND GUIDELINES

The Oregon Joint Bar–Press–Broadcasters Council was established to insure continuing attention to these principles and guidelines, and if necessary to propose amendments to them to the governing bodies of the three parent organizations. It may also take appropriate measures to call them to the attention of members of the bar, press and broadcasting professions, and to the public.

Any person wishing to report an apparent violation of these jointly agreed–upon principles or guidelines may do so in writing to the executive secretary of the Oregon State Bar, the Oregon Newspaper Publishers Association or the Oregon Association of Broadcasters. Whichever executive receives the complaint shall forward copies of it immediately to the chair of the joint council and to the executive secretaries of the other two participating organizations. It shall be the duty of the executive secretary of the organization related to the same field as the person or organization against whom the complaint has been lodged to call his or her attention to the complaint by telephone or in writing, and to invite him or her to reply to it, in writing, within seven days. That is, a complaint against a lawyer or judge should be forwarded to him or her by the executive secretary of the Oregon State Bar; a complaint against a newspaper or newspaper person should be forwarded by the executive secretary of the Oregon Newspaper Publishers Association and a complaint against a broadcasting station or broadcaster should be forwarded by the executive secretary of the Oregon Association of Broadcasters.

If, seven days after the complaint has been delivered, the chair of the joint council determines that a grievance still exists, he or she shall call a meeting of the joint council, or a subcommittee thereof, to examine the complaint, any reply which may have been filed, and any other facts which may be available to the joint council. Based on its investigations the joint council may make recommendations to the parties, and any such recommendations made shall be provided to the executive secretaries of the three participating organizations for publication to those organizations' memberships if the respective organizations so desire. The joint council shall have no powers with respect to complaints other than to issue recommendations and to call attention to those recommendations. No recommendations shall be issued unless it has the approval of a separate majority of the representatives of each profession who have taken part in the joint council's proceedings on the matter. The joint council shall have the authority to adopt its own further rules of procedure.

Appendix D

FAIR TRIAL–FREE PRESS RESOLUTION

(As adopted April 20, 1977, by Oregon Judicial Conference, upon recommendation of the Conference Committee on Public Information and the Oregon Bar–Press–Broadcasters Council.)

Be it resolved by the Oregon Judicial Conference that the judges of Oregon attempt to employ voluntary cooperation as a means of preventing conflict between the Sixth Amendment’s guarantee of fair trial and the First Amendment’s guarantee of free speech, and toward this end may request the advice and services of the Bar–Press–Broadcasters Council.

Be it also resolved that:

Judges anticipating a conflict between the two above–mentioned guarantees in a proceeding before their court should attempt to eliminate or reduce such conflict by voluntary consultation conducted on terms of mutual respect among the court, the parties to the proceeding and the news media, and that such consultation on ways to avoid problems may be initiated by the court, the parties or the media;

No judicial order to restrict or delay public information about a pending case be undertaken except as a last resort in exceptional cases and except after voluntary consultation has failed to produce informal, non–coercive assurances that the right of fair trial will be respected;

No such judicial order shall issue unless the interested parties and news media have been given timely opportunity to be heard in open court upon the proposed order; and

No such order may impose direct restraints on the news media.

Appendix E

BYLAWS OF BAR–PRESS–BROADCASTERS COUNCIL

A. The council shall be composed of 24 members, 12 members appointed by the Oregon State Bar and 6 members appointed each by the Oregon Newspaper Publishers Association and Oregon Association of Broadcasters. The appointing organization shall strive to appoint broadly representative members to the council including, for example, trial judges, criminal and civil lawyers, editors, news directors, photographers, and reporters.

1. Members shall have an appointment term of three years.
2. Members can be appointed to a maximum of two consecutive terms.

B. Council leadership

1. Officers of the council shall consist of Chair, Vice–Chair and Secretary.
2. Succession to the Chair shall be from: Secretary to Vice–Chair to Chair.
3. The Chair shall be shared by all three appointing groups on a rotational basis, i.e. in any one given year, the three officer positions shall be held by one representative from each group, providing that over a period of three years, each group will have occupied the Chair for one year.
4. Should a represented delegation wish to remove a council member of theirs, they may do so at any time by a decision supported by a two–thirds majority of all their appointed representatives.
5. An internal chair of each group has the additional authority, acting without ratification by the remainder of the delegation, to remove a committee member from that delegation for nonattendance, upon a member missing three out of any four Council meetings. This removal authority is to be exercised in the discretion of the internal chair.

C. Funding

The Council shall operate without funds, with the in–kind support of the Oregon State Bar, Oregon Newspaper Publishers Association and Oregon Association of Broadcasters. Should the Council wish to conduct some type of program requiring funding, it shall seek funding from the three sponsoring organizations or other voluntary funding sources. The Council shall not become a funded organization for general operations.

D. Purpose

The Council shall exist for the purpose of communication among the Oregon State Bar, Oregon Newspaper Publishers Association and Oregon Association of Broadcasters, and their members. It shall seek to resolve and prevent disagreements and disharmony among them. It shall work to improve communication and understanding among the represented memberships, and shall educate and inform on issues involved the media and the Bar. The Council shall serve as an information clearinghouse and may provide information to all three represented groups on issues of concern to each of them. Member organizations retain their right to withdraw from participation in the Council or any of its activities at any time for any reason.

E. Official Positions

The Council may not take a position on any issue on behalf of the Oregon State Bar, Oregon

Newspaper Publishers Association and Oregon Association of Broadcasters, and does not represent and may not speak on behalf of the membership of the Oregon State Bar, Oregon Newspaper Publishers Association and Oregon Association of Broadcasters. Each of the member organizations retains its right to oppose, support or reject on its own behalf any position taken by the Council, and shall not be deemed by its participation in the Council to sponsor or support any position taken by the Council.

F. Reporting

The Council shall provide each of the three member organizations a written and oral report at least annually, including a delineation of the Council's activities and projects over the past year and a summary of its projects in progress as well as those planned for the upcoming year. Should any substantive changes in those anticipated projects be made during the course of any years, the Council shall immediately advise its three member organizations.

G. Duties of Officers

1. Chair. The Chair shall preside over the meetings of the Council, shall, with the assistance of the Secretary, set the agenda for each meeting, and shall be the spokesperson for the Council in its reporting requirements to the member organizations.
2. Vice-Chair. The Vice-Chair shall substitute for the Chair in any of his or her duties as required because of absence, or other inability to serve. At the close of the term as Vice-Chair, the officer shall at the conclusion of the year of service report his or her planned projects or activities for the upcoming year as Chair, to each of the three member organizations.
3. Secretary. The Secretary shall mail to each member of the Council, and to the office of each member organization, meeting notices for each scheduled meeting, together with the agenda of items to be covered at the meeting. The Secretary shall work in concert with the Chair in preparing the agenda for each upcoming meeting. He or she shall take minutes of each meeting, shall mail copies of such minutes to each member of the Council and the office of the three supporting organizations following each meeting. Such minutes shall be approved or amended by the Council at the next scheduled meeting. Any amendments to the minutes shall also be provided by the Secretary to each member and the Oregon State Bar, Oregon Newspaper Publishers Association and Oregon Association of Broadcasters. By June 1 of each year, the Secretary shall provide each of the three member organizations with a list of those members from its delegation whose terms shall terminate as of August 31. The organizations shall in turn provide the Secretary with a list of those new appointees whose term shall commence as of September 1 by August 1.

H. Meetings of the Council

1. The Council shall have meetings during the year on a regularly scheduled basis, at least quarterly.
2. Ten days notice, by first class mail, shall be required in the scheduling of meetings of the Council.
3. If a majority of the members of the Council desire a meeting, such may be called without the approval of the Chair under the same notice requirement as in 2 above, but with a statement containing the signatures of the majority included with the notice and agenda.
4. Council meetings shall be held in accordance with the requirements of the Open Meetings and Public Records Laws of the State of Oregon.

I. Voting

1. Voting by the Council, when required, shall be in person, and decisions made by majority vote except

as otherwise provided herein.

2. Votes by proxy or other “in absentia” methods are not permitted.

LEGAL GLOSSARY

- ACTION, CASE, SUIT, LAWSUIT:** These words mean essentially the same thing. They refer to a legal dispute brought into court for trial.
- ADVERSARY SYSTEM:** The system of justice in the U.S. and some other countries in which court cases are decided on the basis of evidence and arguments presented by each of the opposing, or adversary, parties who thus have full opportunity to present and establish their opposing contentions before the court or jury.
- AMICUS CURIAE:** (*a me'kus ku're-i*) A “friend of the court”; one who interposes and volunteers information and argument on some matter of law before the court. The court has to give permission before someone can appear “amicus curiae.”
- ANSWER:** The paper in which the defendant answers the claims of the plaintiff.
- APPELLANT:** (*a-pel'ant*) The party appealing a decision or judgment to a higher court.
- APPELLATE COURT:** A court having jurisdiction of appeal and review; not a “trial court.”
- ARRAIGNMENT:** In criminal law, the stage where a prisoner is brought to court to hear the charge against him or her.
- ATTACHMENT:** A remedy by which a plaintiff is able to acquire a lien on property of a defendant for satisfaction of a judgment the plaintiff may obtain in the future.
- BAIL:** To set at liberty a person arrested or imprisoned, on security being taken for his or her appearance on a specified day and place to answer the charges brought against him or her.
- BAILIFF:** A court attendant whose duties are to keep order in the courtroom and to have custody of the jury.
- BENCH WARRANT:** An order issued by the court itself “from the bench” for the arrest of a person.
- BURDEN OF PROOF:** In the law of evidence, the necessity of proving a fact in dispute.
- CERTIORARI:** (*Sur shi-o-ra're*) An order commanding judges or officers of lower courts to certify or to provide records of proceedings in a case to a higher court for judicial review.
- CHANGE OF VENUE:** The removal of a lawsuit begun in one county or state to another for trial.
- CIRCUIT COURT JUDGE:** (see **JUDGES**)
- CIRCUMSTANTIAL EVIDENCE:** Evidence of an indirect nature by which a court or jury may reason from proved circumstances to establish by inference a principal fact.
- CIVIL CASE:** A lawsuit is called a “civil case” when it is between persons in their private capacities; or when the government sues an individual under the law, as distinguished from prosecuting a criminal charge. It results generally in a judgment for the plaintiff or for the defendant and, in many cases, involves the giving or denying of damages.
- CLAIMANT:** One who claims or asserts a right, demand, or claim.
- CLERK:** The clerk usually sits at the desk in front of the judge, is an officer of the court and keeps a record of papers filed. He or she has custody of the pleadings and records of the trial of the case, orders made by the court during the trial, and the decision at the end of the trial. He or she also administers the oath to jurors and all witnesses before they testify and marks all exhibits when they are presented as evidence.
- CLOSING ARGUMENT:** An oral review of the evidence and argument why their clients should win the case, by the attorneys at the end of the case, after all of the evidence is in.
- CODE:** A collection of laws systemically arranged and adopted by legislative authority.
- COMMIT:** To send a person involuntarily to prison or to an asylum or reformatory by lawful authority.
- COMMON LAW:** Law which derives solely from previous legal practice or from the previous decisions of courts.
- COMMUTATION:** The change of a punishment from a greater degree to a lesser degree, as from death

to life imprisonment. In Oregon the governor has the power to commute sentences.

COMPLAINT: The paper in which the person who brings the lawsuit sets forth his or her claims against the defendant.

CONTEMPT OF COURT: Any act calculated to embarrass, hinder or obstruct a court in the administration of justice, or calculated to lessen its authority or dignity. Contempts are of two kinds: direct and indirect. Direct contempts are those committed in the immediate presence of the court; indirect contempt usually refers to the failure or refusal to obey a court order.

CORPUS DELICTI: (*kor 'pus de-lik'ti*) The body (material substance) on which a crime has been committed, e.g., the corpse of a murdered man or woman, the charred remains of a burned house. Commonly used to mean the “body of evidence” indicating that a crime has been committed.

COURTS OF RECORD: Those courts whose courtroom proceedings are recorded by a court reporter. Courts not of record are those of lesser authority, whose proceedings are not recorded.

COURT REPORTER: The court reporter takes down in shorthand or on a machine everything that transpires, which constitutes the record in the case. The notes are subject to transcription later, if necessary.

CRIMINAL CASE: A lawsuit is called a “criminal case” when it is between the state on one side, as plaintiff, and a person on the other side, as defendant, charging the defendant with committing a crime, the verdict usually being “guilty” or “not guilty” and can result in incarceration.

CROSS-EXAMINATION: The questions a lawyer asks the other side’s witness after the other side’s attorney has finished with his or her questions or direct examination.

DECREE: In Oregon, this term has become obsolete. It means the same thing as “judgment,” which now is the technically correct term. A final judgment is one which fully and finally disposes of the litigation; an interlocutory decree or judgment is a temporary or preliminary decree or judgment which is not final.

DEFENDANT: In a civil case, the defendant is the person against whom the lawsuit is brought. In a criminal case, the defendant is the person charged with the crime.

DE NOVO: (*de no 'vo*) Anew, fresh. (See **TRIAL DE NOVO**).

DEPOSITION: Questioning of a witness either orally by a lawyer in front of a court reporter or by written questions and answers, prior to trial. Depositions may be transcribed and under some circumstances may be used in a trial.

DIRECT EXAMINATION: A lawyer’s questioning of witnesses that he or she has called to provide testimony.

DIRECTED VERDICT: An instruction by the judge to the jury to reach a specific verdict, or the entry of such a verdict by the judge in a jury case.

DISCOVERY: A process for finding out relevant facts in a lawsuit before the trial begins. Discovery methods include depositions; inspections (“production”) of documents, things or property; physical or mental examinations of persons; requests for admission of facts; and written interrogatories that the other side must answer.

DISMISSAL WITHOUT/WITH PREJUDICE: Dismissal of a case “without prejudice” permits the complainant to sue again later on the same facts, while dismissal “with prejudice” bars the right to sue again on the same facts.

DISTRICT COURT JUDGES: (See **JUDGES**)

DOUBLE JEOPARDY: Common-law and constitutional prohibition against more than one criminal prosecution for the same acts.

DUE PROCESS: The guarantee of due process requires that every person have the protection of a fair hearing and procedures.

EMINENT DOMAIN: The power to take private property for public use by condemnation.

EQUITY, COURTS OF: Historically, courts which administer remedial justice according to the system of equity, as distinguished from courts of law. Equity courts are sometimes called courts of chancery.

Juries are never used in equity cases. In Oregon, there is no distinction between courts of equity and courts of law, but some lawsuits are still equitable in nature, e.g. injunctions.

EQUITABLE ACTION FOR INJUNCTION: A lawsuit filed to restrain threatened wrongs, injuries, or actions, or to require a person to do specific actions. Equity cases do not use juries. The judge makes all decisions.

EXHIBITS: Objects, including pictures, books, letters and documents, are often received in evidence. These are called “exhibits” and are generally given to the jury to take into the jury room while deliberating.

EX PARTE: (*ex par'te*) By or for one party; done for, in behalf of, or on the application of, one party only and without the other parties being present in court for a hearing.

EX POST FACTO: (*eks post fak'to*) After the fact; an act or fact occurring after some previous act or fact. The Constitution of the United States prohibits ex post facto laws. This means that a person cannot be prosecuted for acts that were not crimes at the time the acts occurred.

EXTRADITION: The surrender of an individual in the custody of one state or nation to another state or nation on its request.

FELONY: A crime of graver nature than a misdemeanor. Generally, an offense punishable by death or one or more years imprisonment in a penitentiary.

GRAND JURY: A jury of inquiry whose duty is to receive complaints and accusations in criminal cases, hear the evidence and find bills of indictment in case where they are satisfied a trial is needed. Grand juries also can initiate their own investigations.

HABEAS CORPUS: (*ha'be-as kor'pus*) Latin for “You have the body.” The name given a variety of proceedings whose object is to bring a person before a court or judge. Usually, a writ of habeas corpus is directed to the official person detaining another, commanding him or her to produce the body of the prisoner or person detained so that the court may determine if the person is legally held or has been denied his or her liberty without due process of law.

INDICTMENT: An accusation in writing issued by a grand jury, charging that a person has done some act, or been guilty of some omission, which, by law, is a crime.

INJUNCTION: A court order that either requires a person to do an act or forbids a person to do an act.

INSTRUCTIONS OR “CHARGE” TO JURY: The outline of the rules of law which the jury must follow in deciding the factual issues submitted to them is called either the judge’s “charge” to the jury or his or her “instructions” to the jury.

INTERLOCUTORY: Provisional; temporary; not final. Refers to court orders pending final judgment in a case.

INTERPLEADER: When two or more persons claim the same thing (or fund) held by a third person, and he or she, making no claim to it him or herself, is unsure which of them has a right to it, he or she may sue the claimants as defendants and require them to interplead their claims so that he or she can get a court order who has the right to the thing.

ISSUE: A disputed question of fact or law is referred to as an “issue.”

JUDGES: In Oregon, the constitution provides that judges of the Supreme Court and other courts shall be elected by the legal voters of the state or of their respective districts for a term of six years, that their compensation shall not be diminished, and that they shall retire at 75 years of age. All judges must be citizens of the United States, residents of Oregon for three years (exceptions noted below), and members of the Oregon State Bar. Supreme Court judges, at the time of their election, must have been admitted to practice before the Oregon Supreme Court. District judges are required to be residents of the county only, unless they are elected in counties with over 500,000 population. In that case, they must be residents for three years. There are no requirements that county judges, municipal judges or justices of the peace be lawyers.

JUDICIAL CONFERENCE: All the judges of the Supreme Court, Tax Court, and circuit courts belong to the Oregon Judicial Conference, which meets at least annually. The conference is charged

by statute with the responsibility of keeping judges aware, through continuous survey and study, of the organization, jurisdiction, procedures, practices, and methods of administration and operation of the various courts of the state, and with the objective of improving the administration of justice in Oregon.

JURISPRUDENCE: The philosophy of law or the science which studies the principles of law and legal relations.

JURY: A certain number of citizens, selected according to law and sworn to consider questions of fact brought to the court for decision.

JURY PANEL: All of the prospective jurors from which the trial jury is chosen.

MANDAMUS: (*man-da'mus*) The name of an order by which a court of superior jurisdiction directs an inferior court or public officer to perform an official act.

MANDATE: A judicial command directing a public officer to enforce a judgment or sentence.

MISDEMEANOR: An offense less than a felony; generally one punishable by fine or imprisonment other than in penitentiaries.

MISFEASANCE: Usually, the improper performance of some lawful act. **MISTRIAL:** An erroneous or invalid trial due to a substantial error that voids the trial.

MOOT: A moot issue is one not settled by judicial decision but no longer in dispute or in need of a decision.

OBJECTION OVERRULED: This term means that, in the judge's opinion, the lawyer's objection is not correct under the rules of law. The judge's ruling, so far as a juror is concerned, is final and must be accepted by the jury.

OBJECTION SUSTAINED: This means that the judge agrees that, under the rules of law, the lawyer's objection was correct. This ruling likewise is not subject to question by jurors.

OPENING STATEMENT: Before introducing any evidence for his or her side of the case, a lawyer is permitted to tell the jury what the case is about and what he or she expects the evidence to be. This is called the "opening statement."

PARTIES: The plaintiff and defendant in the case. They are sometimes called the "litigants."

PEREMPTORY CHALLENGE: The challenge a party may use to reject a certain number of prospective jurors without assigning any reason.

PETIT JURY: The ordinary jury of 12 (or fewer) persons for the trial of a civil or criminal case. So called to distinguish it from the grand jury.

PLAINTIFF: A person who files a lawsuit.

PLEADINGS: The parties in a lawsuit must file in court papers stating their claims against each other. In a civil case, these usually consist of a complaint filed by the plaintiff, an answer filed by the defendant and, oftentimes, a reply filed by the plaintiff. These are called "pleadings."

POWER OF ATTORNEY: A document authorizing one person to act as another person's agent.

PREJUDICIAL ERROR: Synonymous with "reversible error;" an error of sufficient seriousness to justify an appellate court's reversal of a judgment.

PROBATION: In modern criminal administration, allowing a person convicted of some offense to go free, under a suspension of sentence, during good behavior, and generally under the supervision of a probation officer.

PROSECUTOR: One who instigates the prosecution on which an accused is arrested or who presses charges against the party whom he or she suspects to be guilty. Also, the attorney who represents the government in prosecuting a criminal case.

QUASH: To overthrow; vacate; to annul or void a summons or indictment or other document.

QUO WARRANTO: (*kwo wo-ran'to*) An order issuable by the state, through which it demands an individual to show by what right he or she exercises an authority or claims public office which can only be exercised or claimed through a valid grant or franchise from the state.

RECORD: This refers to the pleadings, the exhibits, and the word-for-word record made by the court

reporter of all the proceedings at the trial.

REPLY: The paper in which the plaintiff answers any claims made by the defendant in his or her answer.

REST: This is a legal phrase which means that the lawyer has concluded the evidence he or she wants to introduce in that stage of the trial.

SINE QUA NON: (*si'ne kwa non*) An indispensable requisite.

STARE DECISIS: (*sta're de-si'sis*) The doctrine that, when a court has once decided a principle of law as applicable to a certain set of facts, it will adhere to that principle and apply it to future cases where the facts are substantially the same.

STATUTE: The written law adopted by the Legislature as distinguished from the common law.

STAY: A stopping or temporary halting of a judicial proceeding by order of the court until some future even occurs.

STRIKING TESTIMONY: On some occasions, after a witness has testified, the judge will order certain evidence stricken from the record and will direct the jury to disregard it. When this is done, the jury must treat the evidence stricken as though it had never been given and must wholly disregard it.

SUBPOENA: The document which is issued for service on a witness to compel his or her appearance in court or for a deposition or other hearing. **SUBROGATION:** The substitution of one person in the place of another with reference to a claim, so that he or she who is substituted succeeds to the rights of the other in relation to the claim.

SUBROGEE: One who is subrogated; one who succeeds to the rights of another by subrogation.

SUBSTANTIVE LAW: The law dealing with rights, duties and liabilities, as distinguished from the law regulating procedure.

SUMMONS: An order directing the sheriff or other officer to notify the named person that a lawsuit has been commenced against him or her in court and that he or she is required to appear by a certain time, and answer the complaint or suffer a judgment against him or her.

SUPREME COURT JUSTICE: (See **JUDGES**).

TESTIMONY: Evidence given verbally by a witness, under oath, as distinguished from evidence derived from writings and other sources.

TORT: A tort is negligent or wrongful conduct which causes bodily injury or property damage for which compensation can be recovered in a civil lawsuit. Most torts are the result of negligence such as automobile accidents. Some are intentional, such as libel, slander, assault and battery.

TORT CLAIMS ACT: In Oregon, the traditional doctrine of governmental immunity was ended in large part by legislation enacted in 1967. Under the new law, every public body, including every local government agency, is liable to third parties for wrongful deaths, personal injuries, and property damage that result from governmental operations involving negligent or wrongful conduct, subject to limitations on the amount that can be recovered. This law is commonly referred to as the Tort Claims Act.

TRIAL DE NOVO: (*de no'vo*) A new trial or retrial in an appellate court in which the whole case is gone into as if there had been no trial in a lower court and regardless of the findings and decisions of the lower court.

TRUE BILL: In criminal practice, the endorsement made by a grand jury on a bill of indictment when they find it sufficient to support a criminal charge.

USURY: Charging an illegally high interest rate.

VENIRE: (*ve-ni're*) Technically, an order summoning persons to court to act as jurors; popularly used as meaning the body of people summoned.

VENUE: (*ven'u*) The particular county, city, or geographical area in which a court with jurisdiction may hear and decide a case.

VERDICT: The formal decision or finding made by a jury and reported to the court.

VOIR DIRE: (*vwor dear*) To speak the truth. The phrase denotes the preliminary questioning of poten-

tial jurors by the court and attorneys to determine the jurors' qualifications.

WITNESS: One who testifies, under oath, to what he or she has seen, heard, or observed.

WRIT: An order requiring the performance of a specified act or giving authority to have something done.

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