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March 5, 2002

John M. Junkin
Bullivant Houser Bailey PC
888 S.W. 5th Ave, Suite 300
Portland, OR 97204

Re: League of Women Voters-Medford

Dear John:

You will recall that I visited with you by phone several days ago regarding the local League of Women Voters' efforts to modify the Jackson County Charter.

You advised that you would be willing to furnish advice and consultation regarding several aspects and issues of the initiative ballet measure or measures that the League might propose. (These would necessarily be initiative measures; the present County Commissioners have no interest in referring the measures to the voters.)

The issue areas are:

1. The League would like to, in one initiative measure, raise the number of Commissioners from 3 to 5, and provide that Commissioner positions be not full time employment positions. Would, in your opinion, this combination violate ORS 203.725? You and I are familiar with Armatta v. Kitzhaber, 327 Or. 250 (1998), Dale v. Keisling, 167 Or App 394 (2000); Sager v. Keisling, 167 Or App 405 (2000); and Swett v. Keisling, 171 Or App 119 (2000), in which the courts interpreted identical language in what seemed to me to be rather stringent fashion. Although I have not yet read the case, I understand that the Oregon Supreme Court dealt with the same language in Lehman v. Bradbury, 333 Or. 231 (2002), the recent term limits case.

2. The League committee desires to establish a policy-making, i.e. legislative type, Board of Commissioners in which the Board members do not function as full time employees, thus hoping to reduce their time spent meddling in the administrative functions of the professional administrators. Specifying these Board-

members as "part time" is one way of doing it, although I suppose you could not stop a Board member from spending a lost of time at the court-house if he/she wants to. Also, "part time" does not have the specificity which some of us would like. Another suggestion is to limit or cap the pay which such Board members can receive. Do you have thoughts on this?

3. Is there any legal problem with making one initiative contingent on the passage of another?

4. We would like to consider the possibility of doing a charter revision, as opposed to amendments. As you know, reference is made to charter revision in ORS 203.720, however it seems clear that the single subject rule applies only to charter amendments, ORS 203.725, and not to charter revisions. The problem is that the statutes are silent as to the criteria for charter amendments and charter revisions. (Also the procedure is lacking in the statutes; do ORS 203.730 et seq apply?) I understand you have access to some appellate briefing on the subject of distinguishing between amendments and revisions. Your enlightenment on this subject would be appreciated.

You advised that you would be willing to advise the League at a reduced rate of $180 per hour. I have obtained authority to contract for your service up to four hours.

Yours Very Truly,

William A. Mansfield
WAM:sf

Approved:

Eileen Adee, Chapter President

Jean Milgram, Committee Chair

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April 12, 2002

Attorney-Client Privileged

Via Facsimile and U.S. Mail

William A. Mansfield
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Re: *Charter Amendments*

Dear Bill:

Per your instructions, we have spent four hours analyzing the four issues you raised in your letter of March 11, 2002. With the *caveat* that four hours is very little time to do a thorough analysis of these issues, we offer the following opinions and comments.

1. **Changing Number and Employment Status of Commissioners.**

In our opinion, if artfully crafted, this combination need not violate ORS 203.725.

In *Armatta v. Kitzhaber*, 327 Or 250 (1988), the Oregon Supreme Court laid out the proper tests for compliance with the Oregon Constitutional provisions which are echoed in ORS 203.725; namely (1) separate vote requirement, and (2) single subject requirement. Essentially, the separate vote requirement focuses upon the form of submission of an amendment, as well as the potential change to the existing document; in this case, the county charter. Although the *Armatta* test interprets Article XVII, section 1 (separate vote) and Article IV, section 1(2)(d) (single subject), rather than ORS 203.725, we are of the opinion that the *Armatta* test would be used by a reviewing court to analyze compliance with ORS 203.725. Although in 1979 the Attorney General wrote (at 39 Or AG Op. 605) that a proposed county charter amendment is not required by the Oregon Constitution to be limited to a single subject, the Attorney General also opined that the legislature could require, by statute, that amendments to county charters be in accordance with the single subject rule, under the language of Article VI, section 10 of the Oregon Constitution. That is exactly what the legislature did in 1983 by adopting ORS 203.725.

In *Lehman v. Bradbury*, 333 Or 231 (2002), the Supreme Court undertook an analysis of the term limits amendment and applied the separate vote test from *Armatta*. The Court phrased the test as whether the initiative measure proposed to the voters two or more changes to the constitution that were substantive and were not "closely related;" if so, the initiative measure would violate the separate vote requirement.

In our opinion, the change of the number of commissioners from three to five, and reducing the hours required of the commissioners, are sufficiently "closely related" to withstand judicial scrutiny. Essentially, it appears the League would like to get the same amount of work from the County Commissioners, but performed by five commissioners rather than three. We do not have a copy of the Jackson County Charter to analyze the potential change to the existing charter, as would be required under *Armatta*. However, it should be possible to phrase the initiative measure in a manner that satisfies one goal - the goal stated above.

Also in *Armatta*, the Supreme Court stated that the single subject requirement focuses upon the *content* of a proposed law or amendment by requiring that it embrace only one subject and matters properly connected therewith. The *Armatta* court stated that there must be some unifying principle logically connecting all provisions of the initiative measure in order to pass constitutional muster. Again, the unifying principle the League seeks to promote is that the County get the same amount of work out of its commissioners, yet performed by more commissioners. We believe that principle would survive judicial scrutiny under the *Armatta* test for the single subject requirement.

2. **Language of the Amendment.**

The initiative measure should be crafted in a way to satisfy both *Armatta* tests. Reviewing the charter language setting out the responsibilities and duties of the County Commissioners is probably a necessity for writing the proper initiative measure. We do share your belief that it would be extremely difficult to prevent a Board member from spending a lot of time at the courthouse if they want to. We also share your concern that "part-time" would not be sufficiently descriptive of the desired limitation on activities.

One way this might be accomplished is to describe the current work load and pay scale of the commissioners, if possible, then require that the same work load and aggregate pay scale be divided between five commissioners, rather than three. In the 1980 Washington County Charter Amendments, this issue was discussed at length by the County's Charter Review Committee. Ultimately, an amendment was proposed and passed by the voters that identified the County Chair to be elected for the County at-large with the only identified duties being to run the Board meetings. The other four commissioner positions are elected from four geographical districts of the County, with no assigned duties in the Charter.

However, the Charter went on to provide the Chair with a significant salary, while the District Commissioners, by Charter, have much smaller salaries (all salaries are subject to a Charter imposed annual increase cap). There is no limitation in the Charter as to the amount of work the commissioners are to perform (i.e. Chair vis-à-vis District Commissioners) and to a greater extent a commissioner's commitment is subject to their other commitments. However, as a practical effect, the Chair has sufficient compensation to be a full time commissioner with attendant responsibilities as such, while the majority of the District Commissioners (unless retired or financially independent) have other jobs to support themselves and family and assume fewer County responsibilities.

If you were to put in to one initiative measure (1) a change in the number of commissioners, and (2) cap their pay, without more, you would be closer to violating the separate vote or single subject requirements. The way to phrase this would be to accomplish both things in one description.

3. **Contingent Initiative.**

Although this seems to occur on the ballot from time-to-time, it is our opinion that making one initiative measure contingent upon the passage of another would probably violate the separate vote requirement of ORS 203.725. The *Armatta* separate vote rule has been expressed, as "you can't make it impossible for voters to express their will on each subject, separately." Making two separate initiative measures contingent upon each other would seem to be an inherent violation of that separate vote requirement. However, you should probably not have to resort to this if the language is properly crafted in accordance with the requirements set out above.

4. **Charter Revisions.**

Again, you should probably be able to avoid this drastic action by following the above requirements. In reviewing ORS 203.710 *et seq.*, you are correct that the single subject and separate vote rules apply only to charter amendments, under ORS 203.725, not to charter revisions. You are also correct that the statutes are essentially silent as to the criteria for charter amendments, versus charter revisions, and that there is no specific procedure for charter revisions clearly set out in the statutes.

However, we note that *Armatta* points out that a revision of the State Constitution cannot be done via the initiative process; it must be a legislative process. The question then becomes whether this principle would apply to revision of a county charter.

If the County Charter specifies a method for revision of the Charter, this would supercede the remaining provisions of ORS 203.710 *et seq.*, with the exception of ORS

203.725. Absent such a method contained within the Charter itself, it is our opinion that a reviewing court would likely read ORS 203.720 to require the legislative process method of revision as the default method for revising a county charter. The fact that ORS 203.730, *et seq.*, set out a method for "proposing" a county charter would, in our opinion, cause the court to apply those provisions to a revision of a county charter, as well. Setting up a charter committee means that the revision is brought to the voters "legislatively," rather than via the initiative process. In essence, proposing a revision to the charter means proposing a *revised charter* to the voters.

Please let us know if you would like further assistance with this interesting proposal.

Very truly yours,

John M. Junkin

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