

HOUSE COMMITTEE ON JUDICIARY

SUBCOMMITTEE ON CIVIL LAW

May 23, 2005 Hearing Room 357

8:30 A.M. Tapes 85 - 87

MEMBERS PRESENT: Rep. Bob Ackerman, Chair

Rep. Linda Flores

Rep. Bill Garrard

MEMBER EXCUSED: Rep. Kelley Wirth

GUEST MEMBERS: Rep. Greg Macpherson

STAFF PRESENT: Sam Sears, Counsel

Joe O’Leary, Counsel

Louann Rahmig, Committee Assistant

MEASURES/ISSUES HEARD:

HB 2566 – Public Hearing and Work Session

SB 272A – Public Hearing and Work Session

SB 275A – Public Hearing and Work Session

SB 276 – Public Hearing

SB 277 – Public Hearing and Work Session

SB 278A – Public Hearing and Work Session

SB 284 – Public Hearing and Work Session

HB 2146 - Work Session

HB 2591 – Work Session

These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.

TAPE/#	Speaker	Comments
TAPE 85, A		
003	Chair Ackerman	Calls the meeting to order at 8:42 a.m. Announces the order the bills will be heard. Opens a public hearing on HB 2566.

HB 2566 – PUBLIC HEARING

009	Sam Sears	Counsel. Explains HB 2566 provides that the Department of Human Services must encourage the use of mediation in cases involving a parent or guardian in a juvenile dependency proceeding in which the child is taken into protective custody or placed in substitute care. Continues that HB 2566 is a compromise between the parties who originally brought forth HB 3078. Note: The -1 amendments were distributed prior to the meeting (EXHIBIT A).
026	Rep. Gordon Anderson	House District 3. Testifies in support of HB 2566. Advises of discussions with agencies that mediation is better than arbitration. Describes cases where individuals were left without attorney representation. Reports on costs of cases to the state and parents, which would be greatly reduced by mediation.
057	Nancy Miller	Deputy State Court Administrator, Program Operations, Judicial Department. Reports on the federally funded dependency mediation program in the judicial department. Testifies in support of the -1 amendments.
083	Chair Ackerman	Closes the public hearing on HB 2566 and opens a public hearing on SB 272A.

HB 272A – PUBLIC HEARING

096	Joe O'Leary	
-----	-------------	--

Counsel. Explains SB 272A which allows the Board of Bar Governors to establish a deadline for filing nominating petitions for election to the Board; sets forth a process and procedure for the recall of a member of the Board; eliminates the Board authority to create local lawyer assistance committees to investigate complaints against lawyers; and allows the Board to authorize state lawyers assistance committees to monitor and supervise the lawyer placed on bar probation or in a diversion program in connection with a bar disciplinary proceeding.

- 106 Sylvia Stevens Oregon State Bar. Testifies and submits written testimony in support of SB 272A (**EXHIBIT B**). Explains the changes being made by SB 272A.
- 158 Stevens Continues reading from written testimony.
- 171 Rep. Macpherson Refers to other bills relating to licensing of professionals that originated with the Administrative Law Section of the Bar but were resisted by the licensing boards. Asks for her view of the other proposals regarding the procedural rights of licensees.
- 186 Stevens Has no knowledge of the bills to which referred but advises that the Supreme Court issues the licenses so procedures may be different from other licensing bodies.
- 194 Chair Ackerman Closes the public hearing and opens a work session on SB 272A.

SB 272A – WORK SESSION

- 202 Chair Ackerman MOTION: Moves SB 272A to the full committee with a DO PASS recommendation.**

VOTE: 3-0-1

AYE: In a roll call vote, all members present vote Aye.

EXCUSED: 1 - Wirth

- 208 Chair Ackerman The motion CARRIES.**
- REP. ACKERMAN will lead discussion in the full committee.**

- 212 Chair Ackerman

Closes the work session on SB 272A and opens a work session on HB 2566.

HB 2566 – WORK SESSION

214 Chair Ackerman Summarizes the testimony presented in the public hearing.

221 Chair Ackerman **MOTION: Moves to ADOPT HB 2566-1 amendments dated 5/17/05.**

VOTE: 3-0-1

EXCUSED: 1 - Wirth

222 Chair Ackerman **Hearing no objection, declares the motion CARRIED.**

224 Rep. Flores **MOTION: Moves HB 2566 to the full committee with a DO PASS AS AMENDED recommendation.**

VOTE: 3-0-1

AYE: In a roll call vote, all members present vote Aye.

EXCUSED: 1 - Wirth

231 Chair Ackerman **The motion CARRIES.**
REP. FLORES will lead discussion in the full committee.

233 Chair Ackerman Closes the work session on HB 2566.

238 Chair Ackerman Opens a public hearing on SB 275A and SB 276.

SB 275A AND SB 276 – PUBLIC HEARING

244 Joe O’Leary Counsel. Explains that SB 275A adopts the Uniform Trust Code and incorporates much of the existing Oregon statutes on trusts and trust administration. Continues that the major provisions include governing law; principal place of administration; methods of providing notice; appointment of special representatives; methods of creating trusts; and the creation and administration of charitable trusts, pet trusts, spendthrift trusts, and revocable trusts. Refers to the

-3 amendments (**EXHIBIT C**) which change the section on pet trusts and appear to be a clarification of the original section of SB 275A. Advises that SB 276 is wholly included in SB 275. Explains that SB 276 allows trustees to sever trusts unless the terms of the trust expressly prohibits that.

- 286 Chair Ackerman Asks if the -3 amendments to SB 275A need to be adopted.
- 289 O’Leary Answers correct.
- 292 Jennifer Todd Willamette University College of Law. Testifies and submits written testimony in support of SB 275A (**EXHIBIT D**). Reads from her written testimony. Provides history on the development of the Uniform Trust Code.

TAPE 86, A

- 007 Todd Refers to written testimony submitted on behalf of Marion County Circuit Court Judge Claudia Burton (**EXHIBIT E**) and Washington County Circuit Court Judge Rita Batz Cobb (**EXHIBIT F**) in support of SB 275A.
- 015 Todd Submits written testimony on behalf of Portland attorney Ron Bailey, (**EXHIBIT G**); Yamhill County attorney Allyn Brown (**EXHIBIT H**); and Pendleton attorney Tim O’Rourke (**EXHIBIT I**) in support of SB 275A.
- 020 Todd Assures that the study committee did a thorough job of considering all aspects of the original Uniform Trust Code and adapted it to reflect current Oregon law and practices.
- 025 Susan Gary University of Oregon School of Law. Testifies and submits written testimony in support of SB 275A and the -3 amendments (**EXHIBIT J**). Advises that the trust code is default law, and the document that created the trust provides the specifics for the trust. Describes the specifics of the trust code.
- 060 Gary Continues that the study committee approach was to codify existing current Oregon law, making changes only when the uniform act improved Oregon law, and leaving big policy issues for another time when the Legislature can focus on them.

071	Gary	Points out issues of controversy in other states, the rights of former spouses and children who are owed support by a parent, and the trustee's duty to provide information to the beneficiary of a trust.
101	Gary	Discusses annual accountings. Refers to the written testimony prepared by the Uniform Trust Code Study Committee (EXHIBIT K). Provides an outline of the written information presented.
132	Rep. Macpherson	Refers to the -3 amendments which delete language in the original SB 275 that refers to how the property of the trust is to be applied. Asks for an explanation of that change.
141	Gary	Responds that there was concern with the provision that the court could, on its own motion, change a trust that had been created with a particular intent in mind, reducing the amount held in the trust for beneficiaries, in this case animals. Explains the change.
157	Rep. Macpherson	Asks if this is a reversion clause.
168	Gary	Answers correct.
174	Rep. Flores	Refers to Section 26 on creation of trusts induced by fraud, duress or undue influence. Asks if that is a new section of the trust code.
178	Gary	Replies no. Expands on the provisions that address what determines an invalid trust.
189	Rep. Flores	Inquires about the arbiter of undue influence or duress.
195	Gary	Responds that is left up to the court.
201	Todd	Explains the process for bringing a fraudulent trust to court, where the court would decide on entitlement of any remedies.
215	Rep. Flores	Asks if a person can bring suit under a separate civil proceeding.
222	Gary	Answers that it is outside of probate as there is no will, so it would be a separate proceeding by filing a petition indicating that there was a suspicion of fraud.

233	Rep. Flores	Inquires if annual reports are not current practice.
235	Gary	Replies correct.
236	Rep. Flores	Asks if the trustee would have to engage an attorney to provide the annual accounting.
242	Gary	Responds, not necessarily. Explains that the trustee can provide if they have the ability. Continues that the trustee has always had a duty under current law to keep adequate records.
256	Rep. Flores	Is curious how many trustors are going to be happy about having this information provided annually to their intended “down the road” recipients.
261	Gary	Answers that has been an issue of concern, so the Oregon version is more restrictive than the Uniform Trust Code. Adds that another concern is the revocable trust.
301	Rep. Flores	Comments about a substitute recipient of information.
307	Gary	Replies there is no restriction on when a substitute person could be used by the trustor.
311	Rep. Flores	Compares the annual reporting to an estate proceeding. Inquires if a format for an annual accounting is being established.
322	Gary	Answers that if the Uniform Trust Code is adopted, education will be needed on issues such as this. Believes that information already exists.
338	Todd	Adds that under current law, an accounting can be requested by the beneficiary.
356	Rep. Flores	Asks if it is common for a beneficiary to request an accounting.
362	Todd	Replies that the beneficiary can request it informally but if refused, must go to court to obtain.
370	Gary	States that corporate trustees provide that type of information.

- 390 Chair Ackerman Requests brevity in testimony by the next witnesses. States that written testimony was submitted from Rick Bennett, AARP Oregon in support of SB 275A (**EXHIBIT L**).
- 405 Chris Cline Estate Planning Section, Oregon State Bar. Testifies in support of SB 275A. Responds to Rep. Flores' questions about accounting, that it applies primarily to irrevocable trusts after the person who created the trust has died. Continues that the situation in Oregon isn't being changed. Advises that the -3 amendments return the Uniform Trust Code to the statute that was enacted in 2003 allowing for trusts to be created for the benefit of pets.
- 439 Cline Testifies and submits written testimony in support of SB 276 (**EXHIBIT M**).
- 442 Tim Martinez Oregon Bankers Association. Introduces the Association's counsel.

TAPE 85, B

- 021 Ken Sherman Oregon Bankers Association. Testifies and submits written testimony in support of SB 275A (**EXHIBIT N**).
- 028 Randy Covey Oregon Humane Society. Testifies in support of SB 275A and the -3 amendments.
- 043 Chair Ackerman Closes the public hearing and opens a work session on SB 275A.

SB 275A – WORK SESSION

046 Rep. Garrard MOTION: Moves to ADOPT SB 275A-3 amendments dated 5/12/05.

VOTE: 3-0-1

AYE: In a roll call vote, all members present vote Aye.

EXCUSED: 1 - Wirth

049 Chair Ackerman The motion CARRIES.

050 Rep. Garrard

MOTION: Moves SB 275A to the full committee with a DO PASS AS AMENDED recommendation.

VOTE: 3-0-1

AYE: In a roll call vote, all members present vote Aye.

EXCUSED: 1 - Wirth

- 057 Chair Ackerman The motion CARRIES.**
REP. GARRARD will lead discussion in the full committee.
- 058 Chair Ackerman Closes the work session on SB 275A.
- 059 Chair Ackerman Closes the public hearing on SB 276 and opens a public hearing on SB 277.

SB 277 – PUBLIC HEARING

- 065 Joe O’Leary Counsel. Describes SB 277 which clarifies language on trusts for minors. Continues that prior law permitted the delay of transfer of custodial property until the beneficiary turned 21 but was extended in the 2003 session to allow the delay until the beneficiary reached age 25. Explains that SB 277 substitutes “beneficiary” for the word “minor” where appropriate throughout existing statutes.
- 084 Chris Cline Estate Planning Section, Oregon State Bar. Testifies and submits written testimony in support of SB 277 (**EXHIBIT O**). Clarifies that SB 277 deals with situations where there is not a trust. Continues that the Uniform Transfers to Minors Act allows a person to give property to someone acting as a custodian and does not require the compliance aspects of a trust, such as filing a tax return.
- 096 Cline Adds that language in 2003 extended the time to age 25 but still referred to “minors.”
- 112 Chair Ackerman Closes the public hearing and opens a work session on SB 277.

SB 277 – WORK SESSION

- 113 Rep. Flores **MOTION: Moves SB 277 to the full committee with a DO PASS recommendation.**
- VOTE: 3-0-1**
- AYE: In a roll call vote, all members present vote Aye.**
- EXCUSED: 1 - Wirth**
- 119 Chair Ackerman **The motion CARRIES.**
- REP. FLORES will lead discussion in the full committee.**
- 120 Chair Ackerman Closes the work session on SB 277 and opens a public hearing on SB 278A.

SB 278A – PUBLIC HEARING

- 126 Joe O’Leary Counsel. Explains SB 278A which concerns the definition of who may act as a personal representative of a deceased individual for purposes of access to protected health information records under the Health Insurance Portability and Accountability Act (HIPPA). Describes current law which allows only individuals appointed by the court to be personal representatives of the decedent for purposes of disclosure of information under HIPPA. Reads the prioritized list of persons to whom such information could be disclosed if there was no court-appointed representative.
- 145 Kelly Hagan Health Law Section, Oregon State Bar. Testifies and submits written testimony in support of SB 278A (**EXHIBIT P**). Explains the current situation whereby health care providers are prohibited from disclosing information to people who need it. Adds that the list in SB 278A was created in the advanced directives statute for those who can make life and death decisions for people who are unable to make their own decisions.
- 162 Hagan Comments on the amendment made to clarify that the list would become operative in circumstances where a personal representative had been appointed but subsequently discharged, so no existing personal representative would be able to make that decision about disclosure.

- 171 Rep. Macpherson Asks if this would be useful in situations where a descendent is trying to open the medical records of an ancestor to determine a medical condition.
- 177 Hagan Replies that would be one of the circumstances. Adds that a more typical situation is where people are applying for proceeds from a life insurance policy and there has been a question about the cause of death, and the insurer requests medical information.
- 189 Rep. Flores Inquires when a surviving spouse is precluded from obtaining the type of information provided under HIPPA.
- 193 Hagan Answers, in any situation when the spouse does not have standing as a personal representative to obtain disclosure.
- 203 Chair Ackerman Refers to the prioritized list of persons able to obtain this information. Asks how a medical provider would know where that person is on the hierarchy of priorities.
- 207 Hagan Clarifies that the list is authorized to disclose information. Continues that the prioritization of individuals is something that health care providers are familiar with now. Adds that HIPPA provides a verification requirement if the information is going to be disclosed at the behest of someone authorized by someone on the list.
- 223 Chair Ackerman Comments that would be quite a job.
- 224 Hagan Agrees. Advises that the standard use of these provisions is to require an order appointing a guardian, or a marriage license or some other legal document identifying the individual as a person on the list.
- 233 Chair Ackerman Closes the public hearing and opens a work session on SB 278A.

SB 278A – WORK SESSION

236 Rep. Garrard **MOTION: Moves SB 278A to the full committee with a DO PASS recommendation.**

VOTE: 3-0-1

AYE: In a roll call vote, all members present vote Aye.

EXCUSED: 1 - Wirth

243 Chair Ackerman The motion **CARRIES**.
REP. GARRARD will lead discussion in the full committee.

345 Chair Ackerman Closes the work session on SB 278A and opens a public hearing on SB 284.

SB 284 – PUBLIC HEARING

349 Sam Sears Counsel. Explains SB 284 which provides a suspension of all civil statutes of limitation for a period of six months after the death of the attorney for a person if the attorney had agreed to represent the person in the action; the attorney-client relationship with the person is confirmed in writing by the attorney; and the attorney dies before the expiration of time allowed by the statute for the commencement of the action.

260 Michael Zusman Chair, Oregon State Bar Procedure and Practice Committee. Testifies and submits written testimony in support of SB 284 (**EXHIBIT Q**). Advises that the primary beneficiaries of SB 284 are clients of solo practitioners or individuals in small law firms where file review is not automatically handed on to other members of the firm.

284 Rep. Flores Asks if SB 284 arose from incidents that have occurred.

288 Zusman Replies that there were two or three constituents affected.

294 Rep. Macpherson Inquires about professional liability claims under the per se rule for failure to meet a statute of limitations.

303 Zusman Comments that if an attorney is ill, it could be argued in a legal malpractice claim that there was negligence, unless the attorney dies suddenly. Believes SB 284 is a litigation reduction measure and eliminates the possibility of malpractice claims.

318 Chair Ackerman Closes the public hearing and opens a work session on SB 284.

SB 284 – WORK SESSION

321 Chair Ackerman **MOTION: Moves SB 284 to the full committee with a DO PASS recommendation.**

VOTE: 3-0-1

AYE: In a roll call vote, all members present vote Aye.

EXCUSED: 1 - Wirth

327 Chair Ackerman **The motion CARRIES.**

REP. ACKERMAN will lead discussion in the full committee.

330 Chair Ackerman Closes the work session on SB 284 and opens a work session on HB 2146.

HB 2146 – WORK SESSION

340 Sam Sears Counsel. Describes HB 2146 which requires recipients of services from the Department of Human Services (DHS) to execute an assignment of rights to the DHS for any claims for payment for medical care from a third party. Explains that the -5 amendments (**EXHIBIT R**) address concerns raised with the -4 amendments at public hearing.

379 Chair Ackerman Indicates there are individuals who did not have an opportunity to review the -5 amendments prior to this meeting and wish to comment, with concurrence of the committee.

TAPE 86, B

010 Gwen Dayton Oregon Association of Hospitals and Health Systems. Advises of work with DHS on HB 2146 to develop what the department needed while avoiding unintended consequences. Continues that they thought there was consensus on the -4 amendments and were disappointed to see the -5 amendments on which they had no input. States that the -5 amendments seem to retreat to a previous position of the department.

026 Chair Ackerman Asks about the major concern.

027 Dayton Responds that the department needs a bill to bring them into compliance with the federal law that provides for an assignment of

right from a Medicaid recipient to the department, so the department can bring a claim against a provider who may have caused injury to the recipient. Provides an example.

- 037 Chair Ackerman Asks if they are advocating that negligent medical providers should not be subject to subrogation claims.
- 039 Dayton Replies, absolutely not. Advises that they are advocating for the -4 amendments which reflect federal law and that the -5 amendments appear to go beyond the requirements of federal law.
- 050 Lauren Rhoades Oregon Health Care Association. Testifies that they have been working with the department and others and thought there was agreement. Raises concern with the -5 amendments but willing to continue working to reach agreement.
- 062 Chair Ackerman Requests the specific concern.
- 063 Rhoades Responds that it is the independent cause of action that the department would have against health care providers, including long term care facilities, should the department pursue an independent claim.
- 070 Sears Asks for the specific language that goes beyond the -4 amendments that allows this cause of action.
- 074 Dayton Refers to Section 2 of the -5 amendments. Requests that there needs to be a reference back to the assignment subsection as it now is a stand-alone section that appears to create an independent cause of action.
- 085 Dayton Doesn't think that was intended.
- 086 Richard Lane Oregon Trial Lawyers Association. Comments that they agreed with the -4 amendments, but the -5 amendments will lead to significant prejudice to a beneficiary by creating an independent right of action on behalf of the department. Explains the effects of the -5 amendment language.
- 117 Lane Raises concern about competing actions in a jurisdiction. Concludes that there are technical problems with HB 2146.
- 138 Rep. Garrard Asks who is responsible for the -5 amendments.

140	Sears	Cites the parties involved in the discussions.
145	Rep. Garrard	Expresses concern that the people who proposed the -5 amendments didn't talk to anyone else.
152	Chair Ackerman	Comments that the people who worked together reached agreement on the -5 amendments relatively fast.
158	Ronelle Shankle	Department of Justice (DOJ). Advises that HB 2146 was not a DOJ bill but helped facilitate a work group, and indicates the departments who were available to meet. Continues that the rest of the work was by e-mail but doesn't know who was included. Expresses willingness to work on the technical issues.
184	Chair Ackerman	Comments on his participation. Asks how much more time is needed.
200	Shankle	Requests direction from this committee to Legislative Counsel.
208	Rep. Flores	Suggests a deadline of June 1 to complete work.
213	Rep. Macpherson	Indicates that work should be done as soon as possible.
221	Chair Ackerman	Advises HB 2146 will be set for work session June 1.
224	Sears	Offers that HB 2146 could be brought to the full committee for adoption of amendments on Friday, May 27.
230	Bruce Bishop	Oregon Association of Hospitals and Health Systems. Suggests approving the -4 amendments to keep HB 2146 moving and act on additional changes in the full committee.
237	Rep. Macpherson	Agrees.
242	Chair Ackerman	Asks why do that if there is going to be a "fix" to the -5 amendments which would result in -6 amendments.
243	Rep. Macpherson	Responds that the -4 amendments seem to have consensus agreement.

- 248 Rep. Garrard Offers that he would not accept the -4 amendments.
- 250 Chair Ackerman Indicates that HB 2146 will be referred to the full committee on Friday, May 27. Reiterates the issues to be resolved.
- 264 Chair Ackerman **MOTION: Moves HB 2146 to the full committee with a DO PASS recommendation.**
- VOTE: 3-0-1**
- EXCUSED: 1 - Wirth**
- 273 Chair Ackerman **Hearing no objection, declares the motion CARRIED.**
- REP. ACKERMAN will lead discussion in the full committee.**
- 276 Chair Ackerman Closes the work session on HB 2146 and opens a work session on HB 2591.

HB 2591 – WORK SESSION

- 280 Sam Sears Counsel. Explains HB 2591 which prohibits persons from bringing a cause of action for food-related conditions against those involved with selling food; provides exceptions for which a cause of action may be brought by those suffering from food-related conditions; and sets out pleading requirements for actions regarding food-related conditions. Refers to the -1 amendments (**EXHIBIT S**) which define food in accordance with the federal statutes; provide for civil immunity only for those selling food; and clarify actions to which the exceptions of the bill apply.
- 299 Chair Ackerman Wants to confirm there is consensus on the -1 amendments.
- 303 Bill Linden Oregon Restaurant Association. Confirms that the -1 amendments are a result of discussions with the Oregon Trial Lawyers Association. Advises that they agreed on the commonly understood definition of food found in federal code and narrowed the definition of food-related condition. Offers that the -1 amendments provide an opportunity to obtain discovery.
- 331 Linden Describes additional changes that are needed. Advises also that it was not intended for HB 2591 to be retroactive.

388 Richard Lane Oregon Trial Lawyers Association. Agrees to the changes suggested by Mr. Linden.

414 Chair Ackerman Asks if the -1 amendments and the suggested additional changes are acceptable.

416 Lane Answers yes.

418 Chair Ackerman Inquires if both agree to moving the -1 amendments to the full committee with anticipation of another amendment.

417 Linden Replies, yes. Advises the second set of amendments will be ready for the full committee.

TAPE 87, A

002 Rep. Macpherson Asks for the view of overall of policy choices being reflected in HB 2591.

008 Lane Responds that he is troubled by attempting to carve out certain immunities for hypothetical or anticipated problems that may occur in the future. Continues that he is aware of only one case in the country that has survived motions to dismiss and/or summary judgment. Explains that HB 2591 is designed to eliminate a narrow type of action.

027 Chair Ackerman MOTION: Moves to ADOPT HB 2591-1 amendments dated 5/18/05.

VOTE: 3-0-1

EXCUSED: 1 - Wirth

031 Chair Ackerman Hearing no objection, declares the motion CARRIED.

032 Chair Ackerman MOTION: Moves HB 2591 to the full committee with a DO PASS AS AMENDED recommendation.

033 Chair Ackerman States that moving HB 2591 with the -1 amendments to the full committee is in anticipation of the -2 amendments.

