

HOUSE COMMITTEE ON JUDICIARY

SUBCOMMITTEE ON CIVIL LAW

February 24, 1997 Hearing Room 357

1:00 P.M. Tapes 28 - 29

MEMBERS PRESENT:

Rep. Lane Shetterly, Chair

Rep. Judith Uherbelau, Vice-Chair

Rep. Roger Beyer

Rep. Jo Ann Bowman

Rep. George Eighmey

Rep. Floyd Prozanski

Rep. Charles Starr

Rep. Larry Wells

STAFF PRESENT:

David J. Amesbury, Counsel

Lisa Fritz, Administrative Support

MEASURE/ISSUES HEARD:

HB 2306 - Work Session

HB 2349 - Work Session

SB 256 - Work Session

SB 241 - Public Hearing

SB 268 - Public Hearing

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 28, A		
007	Chair Shetterly	Calls the meeting to order at 1:17 p.m.
<u>OPENS THE WORK SESSION ON HB 2306</u>		
015	Dave Amesbury	Committee Counsel Discusses HB 2306 and -1 amendments to the bill.
038	Rep. Beyer	I've never seen a case where someone has tried to amend the "relating to" clause. Is that common?
041	Rep. Prozanski	That was my concern as well. I think this would make things much more narrow and open up different interpretations.
051	Rep. Starr	Is the bill is too broad to fit within the clause without changing the "relating to clause?"
053	Amesbury	That is correct. The "relating to" clause is narrower than the body of the bill.
056	Rep. Starr	We should get that answer right away from the Chief Clerk of the House.
062	Rep. Beyer	We've heard another bill on the same issue: HB 2416. I thought we were going to wait and work the two together. I am not comfortable with proceeding until we find that answer.
064	Chair Shetterly	We can find that out, but I'd like to go through some of the substantive changes.
067	Dave Hicks	Department of Justice (DOJ) Explains proposed amendments to HB 2306. The only two changes I have are the ones Mr. Amesbury mentioned.
081	Rep. Bowman	I believe Rep. Uherbelau, in subcommittee, was referring to where the sheriff could not reasonably deliver this information in a timely manner, and some additional service would take place. This would mean that, in order to get the information there faster, you must pay someone for an express delivery.
089	Rep. Uherbelau	I was talking about expedited services. Sometimes you have a summons and complaint to serve that has to be done immediately, and the sheriff is not going to get it around in time. The process server would also be doing this service faster than normal, and that's where the extra cost is usually assessed.
096	Rep. Eighmey	I think Rep. Bowman's concern is addressed in 2C, line 18.
099	Jim	Oregon Collectors' Association Submits written testimony concerning HB

	Markee	2306 (EXHIBIT A). Discusses raising sheriffs' fees and mileage fees.
150	Markee	Continues testimony.
180	Rep. Eighmey	I think \$25 is a reasonable figure. The only thing I am concerned with is the elimination of the 75 miles. Are you suggesting that we eliminate it in both references (2B, line 17 and page two, line 24)?
188	Markee	I'm not suggesting you eliminate it at all. I'm telling you what I believe legislative history has been and what earlier legislation was intended to do.
196	Rep. Eighmey	If we were to eliminate both, that would mean you could charge mileage for one mile, both for private and sheriff?
202	Markee	I believe so. That would be something that could be charged in addition to any service.
224	Rep. Beyer	Why is there any maximum cap in the law? If we just let the market happen, it would, usually, drive prices down as more people get into the business and competition increases.
233	Markee	That's true in most cases. Explains why the market works well for "heavy users" of the process service but not for everyone.
262	Rep. Uherbelau	I have a different interpretation than Rep. Eighmey. I don't think authority is there for a per mile charge. If we take 75 miles out in both places, there is no other authority for the sheriff to get mileage, but that's different for process servers. If we take it out, we're taking that away from the sheriffs.
281	Markee	I agree with that interpretation. I took Rep. Eighmey's comment to mean the removal of the 75 miles, not the entire section.
285	Rep. Eighmey	I did mean that. Explains his interpretation of (possible future) deletions.
297	Markee	I thought your intent was simply to allow them mileage. This will probably require a vote of the people in the county to increase the sheriff's fee for that county. Continues testimony.
310	Chair Shetterly	If we were going to change to \$25, we would just add before that "not more than" on page one, line 31.
325	Rep. Bowman	It seems to me that a profit has been made for a long time on this \$20 fee, and I'm not that interested in raising it to \$25, until there has been just as many years without that profit. Are we in the business of assisting people and making profit, or are we in the business of getting these documents out in a timely manner?
342	Rep. Uherbelau	I don't read this (EXHIBIT A) as showing profit. These figures are just indicative of inflation. The figures have no connection to the true cost of the service. Correct?
354	Markee	That's absolutely correct. I believe in the past, there was a different philosophy. I think we're in a very different world today.
368	Rep.	I agree with that. The reason I would suggest increasing it is not to increase profit. The intent behind allowing the sheriff to be there to begin with, as the safeguard for those who could not go out and deal with a process server, is that we could be sure there would be a nice, set, reasonable fee for that

	Eighmey	person who would go in once or twice in their lifetime. We have been subsidizing those individuals for years, and I want to continue doing that. The only thing I would suggest is we might want to put in there "not less than twenty but not more than twenty-five."
399	Chair Shetterly	I think that would be appropriate.
401	Rep. Beyer	Why don't we make the sheriff's fee extremely high, so we don't subsidize them through property taxes, etc.? Then, if there are special cases where the sheriff should be doing it, he/she could still do it, but it would give a better opportunity for the market to come in and let private people do the same job.
420	Chair Shetterly	Comments on private competition in rural areas.
TAPE 29, A		
020	Dave Barrows	Oregon Association of Process Servers Testifies in favor of HB 2306 and the amendments drawn up by the DOJ. Suggests an additional amendment on page one, line 16 (a "." after mileage and delete the remainder of the line, as well as line 17).
038	Rep. Prozanski	Gives an example of extra cost and mileage.
042	Barrows	My guess is that the court would not approve it.
052	Rep. Uherbelau	I think we have to recognize that this section is what we can get from the court. Our negotiations are in section two. When we look at this, we have to consider how much we want the court to allow. In other words, how much do we want from the court system?
055	Barrows	The way the language is written now, if a process server were to travel 74 miles, round trip, there would be no reimbursement for any mileage, but if they traveled 76 miles, they would be reimbursed.
062	Rep. Beyer	It seems we are getting back to where we started. What is this going to change?
067	Barrows	The operative language is on page two, lines 18-20. That's the language that deletes the recovery of costs and disbursements. Under current law, a private process server can charge what is a negotiated fee. When the party that hired the server wants to go to court to recover fees given to the server, the court is bound to not give them any more than a sheriff would get. It's just not fair to the people who have to use the service. On page one, we put some restraints on that. We would suggest that the 75 mile is too narrow. That's the reason for our proposed amendment.
082	Rep. Beyer	If we take out lines 18-20, on page two, and lines 2-26 on page one, we would be back where we should be.
086	Barrows	If we deleted all of the front page and left the second page, it would serve our purposes. We would be back to Mr. Markee's bill.

090	Chair Shetterly	The purpose was to expand the recovery of costs.
091	Russ Spencer	Oregon State Sheriffs' Association Civil process is not profitable for sheriffs. In Multnomah county, the sheriffs offer the service for \$20, and it costs \$32 per incident. There is also a safety issue. There are times when you want a deputy sheriff there to serve this process because there is a physical danger involved with presenting this document, and you pay for that. Rep. Beyer suggested raising the sheriffs fee to get us out of the business all together, and I would have no problem with that. However, I believe we are statutorily required to perform this service. I would guess that many sheriffs would be opposed to raising and spending money in order to bring this to the people for a vote.
140	Spencer	Continues testimony. I'm sure we would be supportive of Rep. Eighmey's suggestion of "not less than \$20 but not more than \$25."
145	Paul Snider	Association of Oregon Counties I also like Rep. Eighmey's idea. Comments on procedures involving sheriff and process servers.
169	Rep. Bowman	How did you arrive at the cost of \$32 for each service?
172	Spencer	Mr. Smith from Capital Investigations told me that.
177	Rep. Uherbelau	If we did drop everything after mileage, would we want to put some guidelines in about which standard we follow?
189	Barrows	My suggestion would be to let the judge decide.
193	Chair Shetterly	Reiterates all the changes that have been suggested.
228	Rep. Uherbelau	In section three, the way it's worded is very confusing.
247	Chair Shetterly	I really don't want to make all the changes on the fly now. The Speaker's desk makes the call on whether to change the "relating to" clause.
256	Rep. Uherbelau	I don't think we have to make that change. We can just ask Legislative Counsel to do that.
261	Rep. Prozanski	Since we are taking a different approach on the mileage that's under section one, should we make changes to section two, subsection four, as well?
269	Rep. Eighmey	No. The sheriff is not going to charge unless it is over 75 miles.
272	Rep. Bowman	I feel like we're setting up two different systems, and I don't understand why.
280	Rep. Eighmey	Explains differences between rural Oregon and more populated Oregon, as well as the sheriff's and process server's role in those different communities.
314	Chair Shetterly	This makes sure there is a lower cost option for people who, otherwise, might have to pay mileage for service at closer locations.
316	Rep. Bowman	If I were someone that needed to serve papers would I know that I have that option? How would I get that information?
	Chair	It probably varies from county to county. In my county, if you were to file

321	Shetterly	your own documents and ask the clerk there, they would tell you.
325	Rep. Uherbelau	Anybody over 18, who is not a party of a lawsuit, can serve the papers.
330	Chair Shetterly	What is the preference of the committee?
338	Rep. Eighmey	I think we should set this over for a week and get the Speaker's thought on the "relating to" clause. I would leave section three to the discretion of Legislative Counsel.
349	Rep. Wells	What was the issue we were discussing regarding the "relating to" clause?
357	Chair Shetterly	This bill addresses more than service of process, and the concern was that the subject of the bill is broader than the "relating to" clause.
<u>OPENS WORK SESSION ON HB 2349</u>		
400	Dave Amesbury	Committee Counsel Discusses HB 2349 and the proposed amendments to the bill (EXHIBIT B).
TAPE 28, B		
020	Ingrid Swenson	Oregon Criminal Defense Lawyers' Association The measure does two things that concern me: (1) the evidence of clothing of a victim in a sex case may not be admitted into evidence if it is for the purpose of showing either incitement or consent, and (2) evidence of clothing may come in for other purposes. Discusses her concerns regarding HB 2349.
070	Rep. Prozanski	I went through the example you sent to the members, and I feel your analysis of the example that starts on page one is wrong. I had interpreted that verbal was okay, but now I can see where even verbal may be prohibited. The door is going to be open to allow this type of testimony if it is a rebuttable piece of evidence. The defense should be free to present this evidence in favor of the witness.
099	Swenson	There is no provision for that. It is prohibited under the bill that that would come in for that purpose because it doesn't relate to a motive or bias and isn't necessary to explain scientific or medical evidence. It would have to come in, only, under (d), where it would be constitutionality required to be admitted. Therefore, in every case, you would have to argue the constitutionality of letting that evidence in, and I suppose it's a matter of degree. In some cases, the court might find that due process required the admission of the evidence, where another court may not let the evidence in, and we would have to

		develop appellate law on that issue. I suggested you delete any reference to consent, and that would prohibit use of evidence, relating the victim's clothing, to show incitement. That accomplishes the intent of the bill. But, if you delete reference to consent, on line 11 and line 26, then if you used evidence of the victim's clothing to show consent, you could only get it in after an in camera hearing, showing one of these other factors.
121	Rep. Uherbelau	It sounds like what you are saying is that we would leave the absolute prohibition, but we would take out the consent. If we took out the consent, it wouldn't have to be in the exceptions because we're not prohibiting it in any manner.
128	Swenson	The way this bill was drafted, there is one provision for incitement and consent, and the other covers all other purposes. So, by default, if you take out reference to consent, it would become one of those "any other purposes" that would be covered in the other section of the bill, and that's where you would have the in camera hearing. If you took "consent" out of the provision above, it would become part of the second provision.
137	Rep. Uherbelau	So you are going to leave in, in section three, the words "indicated consent?"
140	Swenson	I would take it out because, if you take it out in section one and section three, then it is treated like any other kind of evidence, unless it meets these criteria.
149	Chair Shetterly	Incitement and consent are absolutely prohibited in lines 10-12, so consent is only in section three because it is absolutely prohibited previously.
152	Swenson	That's correct.
154	Rep. Eighmey	I think the intent of the bill was very simple. First of all, there is a distinction between incitement and consent. There is a broad difference. Some woman who is fully clothed in flannel may incite someone, but that does not give consent. Traditionally, the case has been that the consent is implied in the erotic, exotic nature of the clothing, and therefore, that is why I put incitement and consent in. I want to prohibit both attempts to do so, and I did think of the difference between the verbal and the physical. That's why verbal was not included in here at all: to prohibit that type of introduction and discussion. It was the use of the physical as evidence of consent or incitement that I prohibited, and I don't think it prohibits verbal in here whatsoever. Secondly, I also took into consideration that I wanted a catch-all protection because I am very protective of defendants rights in this type of case. That's where I think your exception, to the fact that if the alleged victim says, "and he shredded my dress off of me," and there is evidence that, in fact, the dress is whole, that would be constitutionally protected, and I do want that argued. I don't think that should be allowed automatically. I still do not agree with your interpretations. Like I said earlier, a flannel may incite someone, but it does not give consent. I have proposed an amendment to expand this to sexual harassment (EXHIBIT B).
207	Rep. Uherbelau	I am in favor of the bill, but I do have some concerns. Have either of you looked into other states to see if there is some alternate language that can be used?

222	Rep. Eighmey	No, but I'm willing to. We can hold this off until next week to do some research.
228	Chair Shetterly	I'm happy to put this over for another week.
230	Rep. Uherbelau	Do you think if we added sexual harassment, in a sense, we're detracting from this very important issue, and it should be handled separately?
234	Chair Shetterly	Closes Work Session on HB 2349.
		<u>OPENS WORK SESSION ON SB 256</u>
260	Ron Bailey	Private Practice Lawyer in Portland, Oregon and a member of the Estate Planning Section of the Oregon State Bar Discusses SB 256 and gives background and examples regarding the bill. Submits written testimony, in support of SB 256, for Bernie Vail, Professor at Northwestern School of Law, on behalf of the Estate Planning Section of the Oregon State Bar (EXHIBIT C).
310	Bailey	Continues testimony.
328	Chair Shetterly	Why carve out the exceptions for will contests based on forgery or revocation? What's the difference between that and duress or undue influence or lack of capacity? I think your testimony answered that fairly well in saying that, on one hand you have the objective nature of the evidence, and forgery doesn't reflect the testators intent.
337	Bailey	That's correct.
338	Rep. Uherbelau	You are in favor of the bill as it is now?
339	Bailey	Yes.
346	Rep. Uherbelau	In section five, where it tells who it applies to, it seems as though it can apply to even those cases where probate has begun, and you're moving along in the process, so long as a judgment hasn't been entered. Was that the intent, or was the intent that it should not be effective, except for those probates or contests, etc. that happen after the effective date?
351	Bailey	The intent was to apply to any contest in which a judgment has not been entered. We are attempting to codify what is Oregon law and clarify it to some extent.
359	Rep. Uherbelau	I have a problem doing this without giving notice.
372	Bailey	That's a good point. It does seem, to us, that there needs to be a cut-off point.

		Gives example.
387	Rep. Uherbelau	I'm not talking about when the will is drafted. I'm talking about the period of time before the action is commenced. Explains the reasoning behind her concerns.
TAPE 29, B		
006	Bailey	We have no problem with that.
009	Rep. Beyer	In the example you used earlier, if he contests and loses, the clause means he gets zero. Is that correct?
012	Bailey	That's the typical terrorem clause, yes.
015	Rep. Beyer	It's not just that he has to lose before he gets zero, right?
017	Bailey	Responds using an example. Explains how and why an terrorem clause would be negated.
032	Rep. Beyer	It seems, to me, that this is not really doing anything. We are simply reaffirming what is already happening.
037	Bailey	Responds and cites cases. Most say that terrorem clauses are valid no matter what, but we are carving out two exceptions: forgery and revocation.
042	Rep. Beyer	But, you're saying that that's already the case, and if anyone challenges a will and wins, the will is thrown out, whether there are these exceptions or not.
047	Bailey	Yes, but this goes beyond that. Explains why.
050	Rep. Wells	Are these clauses really necessary?
065	Bailey	Well, there are two competing views, but the overriding view is that the person writing the will should get what he/she wishes, and that's why they're upheld in so many jurisdictions.
070	Rep. Eighmey	There is always one relative somewhere that wants to contest the will, whether they are in it or not. I have been able to prevent this by terrorem clauses. I'm a little concerned with section two, subsection three, why are we not limiting the cause there as well? Forgery and revocation are the only two clauses they can bring on behalf of their beneficiary.
100	Bailey	The incapacitated person, for who the contest is being brought, shouldn't have to be penalized for the decision of the fiduciary. The protected person should not have to be penalized. The fiduciary is in a very difficult position. If the fiduciary brings it and loses, then the protected person loses out altogether.
109	Chair Shetterly	If the protected person can only bring a contest for one of those two reasons, shouldn't the fiduciary be limited to the same two reasons as well? Do we need to give the protected person greater latitude, through the fiduciary, then

		they would have if they were not incapacitated?
115	Bailey	One of the primary causes, for which someone might bring this, is undue influence or that the person was incapacitated. Those are a little harder to prove, but if a fiduciary, for example, felt that the testator were incapacitated, the fiduciary's choice is (1) to bring the action, under the possibility of losing, and have the risk of the protected person getting hurt, or (2) to not bring the action and have the risk of the protected person getting hurt (because they are not getting their fair share). It is broadened for the fiduciary, but the fiduciary is really acting on behalf of another. Our view is that the fiduciary should have a little wider choice.
125	Rep. Uherbelau	I wouldn't have a problem broadening it, if we limited it to minors and incapacitated persons, but you're also including the financially incapable. There are many who cannot handle their business affairs, but they are completely capable for other purposes.
133	Bailey	The phrase "financially incapable" is a phrase that is used in the "chapter for conservatories." It is the definition of a person could have a conservatorship appointed for him/her.
136	Rep. Uherbelau	Just because someone can't take care of their business affairs doesn't mean they are not competent for other purposes.
144	Rep. Eighmey	I'm still concerned about broadening it for these other classifications because, if we are to be consistent with forgery, we could give immunity to the fiduciary because the fiduciary's responsibility is very broad, and they must exercise it to protect the beneficiary. I think we could give them immunity under this particular circumstance, if we include that there are only two courses of action. If you broaden it, the fiduciary will sue for everything. If they don't, they will be liable for failing to exercise fiduciary capacity.
161	Chair Shetterly	The fiduciary can only be responsible for failing to do an act that they have the authority to do. Comments on particular instances and processes of fiduciaries.
175	Rep. Eighmey	If am the fiduciary, and I don't bring for those two reasons, am I failing to exercise my fiduciary responsibilities?
180	Bailey	Section two, subsection one, requires probable cause for bringing those actions.
185	Chair Shetterly	I'm okay with that. Rep. Uherbelau, you had a problem with section five, do you want to propose an amendment?
192	Rep. Uherbelau	I do have a problem with making this effective against people who have already made their wills and end up having a contest. I would want an amendment correct just part one of section five.
204	Chair Shetterly	Your amendment would change section five to read, "sections two and four of this Act apply to all contests of will and challenges to trusts commenced on or after the effective date of this Act".
208	Rep. Uherbelau	MOTION: Moves to AMEND SB 256 on page 2, in line 4, after "SECTION 5.," delete "Except as provided in subsection (2) of this

		section," and on page 2, in line 5, after "trusts," delete ", whether" and on page 2, in line 5, after "commenced" delete "before,".
		VOTE: 8-0
212	Chair Shetterly	Hearing no objection, declares the motion CARRIED.
226	Rep. Bowman	MOTION: Moves SB 256 to the full committee with a DO PASS AS AMENDED recommendation.
		VOTE: 7-1 AYE: 7 - Rep. Bowman, Rep. Eighmey, Rep. Prozanski, Rep. Starr, Rep. Uherbelau, Rep. Wells, Rep. Shetterly NAY: 1 - Rep. Beyer
231	Chair Shetterly	The motion Carries. REP. EIGHMEY will lead discussion on the floor.
241	Chair Shetterly	Closes Work Session on SB 256.
<u>OPENS WORK SESSION ON SB 241</u>		
265	Carl Myers	Legislative Consultant for the Oregon State Bar Submits written testimony (EXHIBIT D) in favor of SB 241.
303	Rep. Eighmey	I think this is a reasonable request that would also save time for the Supreme Court.
309	Rep. Beyer	Is this attorneys protecting attorneys?
311	Chair Shetterly	If anything, this is probably tougher on the sanctioned attorneys. Explains why.
315	Rep. Bowman	Are there any lawyers, who have gone through this practice, that don't think this is a good idea?
		We have not heard from any of the sanctioned lawyers, but this does not deny

328	Myers	them the right to have that review. It eliminates the automatic review.
340	Chair Shetterly	Closes public hearing on SB 241. Adjourns at 3:00 p.m.

Submitted by, Reviewed by,

Lisa Fritz, Sarah Watson,

Administrative Support Office Manager

EXHIBIT SUMMARY

A - HB 2306, written testimony, Jim Markee & Associates, Inc., 4 pages.

B - HB 2349, proposed amendments, Legislative Counsel, 1 page.

C - SB 256, written testimony, Bernie Vail on behalf of the Oregon State Bar, 2 pages.

D - SB 241, written testimony, Carl Myers for the Oregon State Bar, 1 page.