

SENATE COMMITTEE ON HEALTH CARE AND BIO-ETHICS

February 25, 1993 Hearing Room C 3:00 p.m. Tapes 16 - 18

MEMBERS PRESENT: Senator Bob Shoemaker, Chair Senator Jeannette Hamby, Vice Chair Senator Joyce Cohen Senator Bill McCoy Senator Gordon Smith

STAFF PRESENT: Barbara Coombs, Administrator Dick Shoemaker, Administrator/Assistant Joan Green, Assistant

MEASURES HEARD: Possible bill introduction SB 423, relating to workers' compensation medical

service fees, WS SB 47, relating to health insurance, WS SB 286, relating to health care decisions, WS

WITNESSES: Rocky King, Administrator, Oregon Medical Insurance Pool Margaret Carley, Legal Counsel, Oregon HealthCare

Association Barbara Glidewell, Patient Advocate, Oregon Health

Sciences University Ted Falk, Oregon Health Decisions Molly Weinstein, Attorney Tina Kitchen, Physician, Mental Health and Disabled

Services Division

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These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes. [--- Unable To Translate Graphic ---]

TAPE 16, SIDE A

006 Chair Shoemaker: Meeting called to order at 3:13 p.m.

WORK SESSION

BILL INTRODUCTION

008 Dick Shoemaker, Administrator: Presents legislative draft packet, Exhibit F.

022 MOTION: CHAIR SHOEMAKER MOVED THE PACKET OF LEGISLATIVE DRAFTS, EXHIBIT F, BE ADOPTED AS COMMITTEE BILLS.

024 VOTE: HEARING NO OBJECTION, SO ORDERED.

SB 423, RELATING TO WORKERS' COMPENSATION MEDICAL SERVICE FEES 025
MOTION: SEN. COHEN MOVED SB 423 BE RE-REFERRED, WITHOUT RECOMMENDATION, TO THE SEN. PRESIDENT'S DESK.

027 VOTE: HEARING NO OBJECTION, SO ORDERED. (EXCUSED: SEN. HAMBY, SEN. McCOY).

SB 47, RELATING TO HEALTH INSURANCE

VERBATIM TRANSCRIPTION

045 Sen. Cohen: Requests that SB 47-2 amendments, Exhibit A, be reviewed.

054 Rocky King, Administrator, Oregon Medical Insurance Pool: "The original language to the bill was, and intent, was to insure that those people who were receiving less than Medicaid benefit levels, the full

Medicaid benefit level, whatever that may be, were still eligible for the pool. So that those who were receiving only partial benefits, prescription drugs only or only in patient services, but no drugs, would then be eligible for the pool to pick up basically the supplemental coverage. Secondly, the intent of the bill was to insure that those people who came off of Medicaid, or excuse me, were on the High Risk Pool, left our pool, went to Medicaid, but were only on for let's say two months or six months, and then became ineligible for Medicaid because of their earnings would be eligible to come back and enroll in the pool. We had in the statutes a limitation that said once you terminated from the pool you couldn't come back for twelve months and that meant some people were really being left high and dry when they lost their eligibility for Medicaid if they had moved originally from our pool. That was the original intent.

075 King: We further defined full benefit levels under Medicaid to mean those defined by the Board so that based on SB , the old SB 27, the

Medicaid prioritization benefits, the Board would be able to make decisions as we changed those benefits if they did change by the Legislature from one session to another. We then came in and made several amendments. Most of those were technical amendments; and I apologize to the committee at that time that the full Oregon Medical Insurance Pool (OMIP) Board did not meet until January 29 to actually endorse even the technical amendments. Primarily they concern giving the Board some authority to make some definitions as it relates to, for example, involuntary termination and things of that nature.

087 King: All the other amendments, except for the original intent, were really technical except for the last amendment which in the engrossed

version LC 47-2, pg. 5 we did add a substantive amendment that would basically make it an unfair trade practice if an insurance agent, an insurance company or a third party administrator referred an individual employee to the medical insurance pool, or arranged for an individual employee to apply to the pool for the purpose of separating that person from the group health care coverage provided in connection with that employee's employment. Senate Bill 1076, passed last session, would basically do that for the 3 to 25 market, but it would not prevent an employee, for example, of 30 employees taking the 2 diabetics or the 2 with multiple sclerosis and excluding them from employment, excuse me from medical coverage, with the group carrier and putting them into the pool. So we introduced this amendment basically to say that you could not dump or redline people into the pool, irrespective of the size of the firm. So that is a general overview of the amendments, Senator.

END OF VERBATIM TRANSCRIPTION

101 MOTION: SEN. COHEN MOVED THE SB 47-2 AMENDMENTS, EXHIBIT A, BE ADOPTED.

103 VOTE: HEARING NO OBJECTION, SO ORDERED.

106 MOTION: SEN. COHEN MOVED SB 47, AS AMENDED, TO THE FLOOR WITH A DO PASS RECOMMENDATION.

108 VOTE: MOTION CARRIED, 5-0.

SB 286, RELATING TO HEALTH CARE DECISIONS

120 Chair Shoemaker: Requests response from the nursing home representatives regarding a letter from the Committee, Exhibit G.

125 Margaret Carley, Legal Counsel, Oregon HealthCare Association: States issues: _ What right does a surrogate have, when a person seems to be

incompetent or incapacitated, and has not previously indicated a preference or signed an advanced directive or a power of attorney for health care decision making. _ In 1987 Congress advanced patients rights. _ No clear case law to refer to. _ Enactment of the patient self-determination act.

178 Carley: Effects of the patient self-determination act: _ Every facility receiving medicare and medicaid funds must give

advance directive forms and information regarding refusal of treatment to the resident upon admission. _ Discusses pamphlet compiled in conjunction with the Hospital

Association. _ Discusses the specialized populations within the facilities, (i.e.

Mentally Retarded/Developmentally Disabled (MR/DD)), and the inability of this population to express a preference upon admittance.

225 Carley: Discusses how the industry has dealt with these laws: _ Developed a paper on system facilities and decision-making capacity. _ A conference will be held for various health care facilities and

personnel on how to address the issue of determining decision-making capacity for the MR/DD population. _ Medical Treatment Cover Sheet.

373 Sen. McCoy: How could anyone honor this unless they were present when it was signed?

375 Carley: Responds. The form is strictly a preference that follows a patient from institution to institution. Discusses need for statute or

case law to guide care givers in situations of this type. Responds to

testimony from a guardian about alleged illegal and criminal activity on the part of nursing facilities, who know that a power of attorney is fraudulent, and yet follow it.

TAPE 17, SIDE A

017 Sen. Cohen: What leads to the feeling of the necessity in having a completed form? Is it the liability issue?

027 Carley: I can't believe it is the self-determination act. On admission, the issues of no code, artificial hydration and nutrition and Do Not Resuscitate (DNR) order are addressed.

041 Barbara Coombs, Administrator: Is there confusion about authorization for withholding or withdrawing routine medical treatment and a DNR

order?

048 Carley: Responds.

050 Chair Shoemaker: Requests the third paragraph of the letter, Exhibit G, be addressed.

051 Carley: Acknowledges a problem with that specialized group in the nursing facilities. Nursing facilities are advised to inquire about

preferences at every care planning conference. Surveyors look for

documentation that these decisions are the residents' preferences, not the families'. There is confusion as to what Oregon law is regarding surrogates.

103 Chair Shoemaker: Discusses study regarding the 30 No Code Orders.

108 Tina Kitchen, Physician, Mental Health and Disabled Services Division: Reviews study. The point was not that nursing homes mismanaged. The

confusion is who is the appropriate surrogates decision maker. This population needs more protections.

124 Sen. Cohen: Of the 15 orders, were they exercised by the next of kin?

145 Kitchen: The 35 people in the study were developmentally disabled; they were not the normal nursing home resident. The traditional way of

looking at decision-making frequently won't work in their best interest.

162 Chair Shoemaker: The health condition did not warrant a DNR order; there was confusion on who could make the call?

168 Kitchen: Responds.

169 Chair Shoemaker: How could anyone authorize a DNR order on a person whose health condition did not warrant it, regardless of surrogacy?

170 Carley: It is more of a moral value on what life is and what you want from life.

185 Chair Shoemaker: That is fine if you are competent, but if you are MM/DD should someone else make those choices?

193 Carley: There should be an individualized determination in every case.

201 Sen. G. Smith: The MM/DD population might need special protection under the law.

214 Kitchen: There is a fine line to give people options for a long, healthy life, but they also need an option for a natural death.

239 Sen. G. Smith: Is it possible for the language of SB 286 to walk that fine line?

244 Kitchen: Responds.

250 Chair Shoemaker: Discusses amendments to SB 286.

270 Coombs: Refers to Exhibits C, D and E.

289 Ted Falk, Oregon Health Decisions: Reviews proposed

technical corrections to SB 286-1, Exhibit B.

399 Falk: Refers to 21 and what he feels the principles of the bill should be: _ Legal rights should be the same regarding withdrawal or continuation

of treatment, whether or not a person has executed an advanced

directive. _ It is preferable to have decisions of life-sustaining treatment made

by caring family and friends, rather than through the courts, when

possible. _ Providers should err on the side of conservative treatment, when they are unsure of their legal authority. There is a need for clear rules and a set of immunities to be established.

TAPE 16, SIDE B

023 Falk: Continues with suggested principles: _ The law needs to encourage consultation and conversation. _ There is a need for a common set of legal standards to govern the

conduct of the health care representative. _ There is a need for a set of obtainable and comprehensive rules for

providers to follow.

058 Falk: Reviews Exhibit E, with the incorporation of his changes. Absent is the condition of progressive illness.

077 Chair Shoemaker: The Alzheimer situation is special. My thinking is the person ought to be allowed to decide, prior to progression of the

illness, at what point they no longer want to be kept alive. This is

not to say that someone who does not decide ahead of time would have

this decision made for them.

087 Falk: Continues with review of Exhibit E, pg. 2.

121 Coombs: We wanted to make the new (f) parallel to the new (d). In both cases there would be a majority.

126 Falk: Continues with review of Exhibit E, (3).

137 Chair Shoemaker: Requests an explanation on 22, which reinserts into the ORS 127.640, and why that is in here.

140 Coombs: ORS 127.640 had been repealed. This puts ORS 127.640 back in. All of the other requirements, on the providers, are voluntary

requirements. In this case it would be a positive duty that the

provider assures these things.

146 Falk: Makes drafting suggestions to Exhibit E: _ ORS 127.605

should be ORS 127.505. _ In the third line and throughout the bill where "withdrawn" is used,

suggests adding "withheld or withdrawn". _ In the third line prior to (2) and (3) insert 11 of the 1993 act and

subsections (2) and (3). _ In two of the three locations where this block of verbiage has

previously occurred the phrase "not medically feasible" has been

deleted. For consistency sake I would delete pg. 1, (c) "is not

medically feasible, or their use". _ Pg. 1, last line insert "withheld or" prior to "withdrawn". _ Pg. 2, ln. 3, insert "made a reasonable effort to consult" after "who has".

201 Chair Shoemaker: I don't think I will buy off on that.

207 Falk: Continues with drafting suggestions to Exhibit E: _ Pg. 2, (a), suggests it read "a guardian of the principal, who is

authorized to make health care decisions". _ There are two (f), the second should be (g).

210 Chair Shoemaker: "Who has been authorized" would indicate that there would have been specific authorization to make health care decisions.

"Who is authorized" would encompass a more general grant of authority to the guardian. Which is more appropriate?

217 Molly Weinstein, Attorney: Reviews guardianship law, as it currently reads. I believe Mr. Falk's wording would be most appropriate.

232 Falk: Continues with drafting suggestions to Exhibit E: _ Pg. 2, (3) "under the supervision of the attending physician"

suggests keeping the language of SB 286, pg. 22, lns. 44-45. _ Pgs. 2-3 subsections (4) (5) could be deleted. They are covered

elsewhere in the bill.

290 Falk: ORS 127.640 says "the attending physician shall determine that . . . (3) have been met." Maybe some thought could be given as to what

the attending physician is suppose to determine.

280 Chair Shoemaker: In my view the attending physician is suppose to determine that the principal has been medically confirmed to be in one

of the following conditions.

282 Falk: If that is true then it would only be conditions of ORS 126 .335 (1). I think that may be appropriate.

294 Chair Shoemaker: I guess it would be to impose a positive

decision on the physician that he is the appropriate one to make that decision,

under (3).

345 Falk: Discusses important conforming amendments: _ The definition of health care representative should include a person who is acting under this section, but only to the extent they are making the decisions that are authorized by this section. _ If ORS 127.640 is maintained the numbering throughout the statute would need to conform.

370 MOTION: CHAIR SHOEMAKER MOVED THE 21 AMENDMENTS, EXHIBIT E, AS DISCUSSED AND FURTHER AMENDED BY MR. FALK'S TESTIMONY, NOT INCLUDING HIS SUGGESTION CONCERNING "CONSULTATION OF CONCERNED FAMILY AND CLOSE FRIENDS".

375 VOTE: HEARING NO OBJECTION, SO ORDERED.

376 Sen. Hamby: Should Exhibit E, pg. 2, ln. 3, read "has made a reasonable attempt to consult with family and close friends;"?

379 Chair Shoemaker: I believe there should be a duty on the part of this person to consult with the family and close friends who are concerned

with the patient's situation. I don't know what "reasonable attempt" adds to it.

402 Sen. Cohen: Refers to pg. 2, ln. 2 we have "located upon reasonable effort". We have reasonableness there. Where was the other proposed

amendment?

414 Chair Shoemaker: On pg. 2, ln. 3, the suggested language was "and who has made a reasonable effort to consult with . . .".

TAPE 17, SIDE B

039 Barbara Glidewell, Patient Advocate, Oregon Health Sciences University: Thanks the committee for adding the advocacy language as reflected in

Exhibit C, pg. 42, lns. 3-5.

060 Coombs: Reviews technical changes in the hand-engrossed bill, Exhibit C.

079 Chair Shoemaker: For the purposes of health care decisions made under the specific decisions of ORS 127.635?

084 Coombs: Correct. Continues with review, Exhibit C. beginning with pg. 4.

117 Sen. G. Smith: Discusses pg. 26, lns. 17-18. Delete the bold to

take out the ability of the court to act in these cases.

118 Consensus.

128 Coombs: Continues with review, Exhibit C, beginning with pg. 44, ln. 25.

136 Chair Shoemaker: Requests Mr. Falk's amendments be discussed, as they relate to the hand-engrossed amendments.

138 Coombs: Reviews Exhibit C, pg. 3, ln. 14, "'Capable' means that neither a court nor the attending physician has made the determination described in the previous sentence."

144 Consensus of committee to pass on that one.

145 Coombs: Continues with review, Exhibit C, beginning with pg. 3, ln. 31 to pg. 4, ln. 2, delete the "," on ln. 31 and all of the text from

"provided" through the end of the sentence. We just put that language in a few days ago.

147 Chair Shoemaker: Let's leave it in.

149 Coombs: It was added to clarify that for the purposes of this act it be separate, but overall they are not separate.

151 Sen. Cohen: Speaks to leave it in.

155 Coombs: Continues with review, Exhibit C, beginning with pg. Pg. 8, ln. 30, delete (1). That would be done if you want the substantive

proposals.

161 Chair Shoemaker: We will deal with the substantive amendments later, let's pass on it for now.

163 Coombs: Continues with review, Exhibit C, beginning with pg. 9, lns. 9-15, this is also substantive. On pg. 9, ln. 18, insert at the end of

this line "Where the forms in this section call for the initials of the principal, any mark by the principal may be accepted to indicate the principals intent." If you were going to accept any mark you could delete "initials".

181 Chair Shoemaker: Where do we call for initials?

182 Coombs: On pg. 10, ln. 27; pg. 11, ln. 26.

183 Chair Shoemaker: Initials are not as anonymous as a check.

193 Sen. Cohen: We would want to make this amendment then?

200 General consensus.

201 Coombs: Continues with review, Exhibit C, beginning with pg. 14, lns. 13 would delete "consistently and".

214 Sen. Cohen: I like the "consistently". It adds description to what we are trying to get at.

223 General consensus.

226 Coombs: Continues with review, Exhibit C, beginning with pg. 15, after ln. 31 we would return to the original bill and insert pg. 10, ln. 1,

which is a straight line. On pg. 16 I didn't engross, there is a substantive proposal to delete the short form.

262 Coombs: Continues with review, Exhibit C, beginning with pg. 21, delete ln. 26.

269 Sen. Cohen: If the short form is deleted I want plenty of room left on the long form to allow people to deal with this in a competent way. 270 General consensus to leave the line.

279 Coombs: Continues with review, Exhibit C, beginning with pg. 23, ln 10, delete "warning", this is in your substantive changes. Pg. 28, ln. 17

delete "is not medically feasible, or their use".

320 Chair Shoemaker: We do want to remove that.

325 Coombs: Continues with review, Exhibit C, beginning with pg. 42, ln. 31 to pg. 43, ln. 11 delete all of subsection 23 (1), after the first

sentence. This is #6 on the substantive proposal, Exhibit D.

329 Sen. Cohen: We had testimony from people that were concerned about this. People wanted to check a box or renew rather than going through

the process again. I think I'm okay with the amendments we have discussed, as long as it is a revalidation.

333 Sen. G. Smith: Agrees.

377 Chair Shoemaker: We will take that out tentatively.

384 MOTION: CHAIR SHOEMAKER MOVED THE SB 281-1 AMENDMENTS, EXHIBIT C, AS DISCUSSED.

387 VOTE: HEARING NO OBJECTION, SO ORDERED.

388 Coombs: Reviews the substantive amendments, Exhibit D.

384 Chair Shoemaker: Discussion of Exhibit D, #5. It should be a rescind or withdraw, not a revocation. The Oregon Medical Association thought

it would cause confusion for someone who once withdrew to then reenter.

396 Sen. Cohen: Agrees.

399 Chair Shoemaker: Discusses dynamics he can see occurring.

416 Coombs: The health care provider must be told.

422 Sen. Cohen: I have concerns about that. What if the providers are moving in good faith on 21, as outlined; then someone comes back in who previously declined the ability to be the attorney-in-fact?

TAPE 18, SIDE A

014 Chair Shoemaker: It is still the person the principal had faith in. We need to make the decision based on what is best for the principal not

the provider.

026 Coombs: Exhibit D, #5 is a no?

027 Chair Shoemaker: Correct. 029 Coombs: Continues with review of Exhibit D, #1.

036 Sen. G. Smith: I indicated a concern. This is of sufficient importance and the short form doesn't fit this circumstance.

041 Sen. Cohen: What does the short form provide?

041 Coombs: You get only the choice to withhold. There is no opportunity to say anything is wanted. The same choice applies to all conditions, I believe.

044 Chair Shoemaker: Where is that in the bill?

045 Coombs: It starts on page 16.

052 D. Shoemaker: What if the short form were an option on the long form?

064 General consensus in considering that option.

069 Coombs: The long form provides choices for each one of the conditions.

076 Sen. Cohen: What if I don't think I would ever have Alzheimers, would I skip that piece?

079 Chair Shoemaker: If you skip it you have not elected it.

080 Coombs: Refers the committee to Exhibit D, pgs. 13-14. Perhaps on pg. 15, after "Additional Conditions and Instructions" (5) and before "Other Documents" (6), insert essentially what is on pg. 17, lns. 30-31 and pg. 18, 1-2.

084 Sen. Cohen: I would like to see it simplified.

088 General consensus.

089 Chair Shoemaker: I would put it on pg. 15, ln. 11, before Additional Conditions and Instructions.

094 Coombs: Continues with review of Exhibit D, #3.

118 Sen. Cohen: They would see that first, and then at the end they would get a piece of the short form?

119 Coombs: It is sort of a combination of Exhibit D, #2 and #3. Continues with review of Exhibit D, #4. This does not appear in the bill.

123 Sen. Cohen: Shouldn't that kind of directive be included under important information?

126 Coombs: I think that Chapter 761 says that it has to appear in 16 point type on the front page. It doesn't say where, so this would specify

location.

131 Sen. Cohen: I have an aversion to that sort of legislation.

135 General consensus.

150 Coombs: Recaps committee's action. _ Yes on 21 _
Modification of #1 _ Yes on #2 and #3 _ Yes on #6

160 MOTION: CHAIR SHOEMAKER MOVED THE AMENDMENTS, AS RECAPPED.

162 VOTE: HEARING NO OBJECTION, SO ORDERED.

160 Meeting adjourned at 5:18 p.m.

Submitted by:

Reviewed by:

Joan Green
Administrator

Dick Shoemaker Assistant

EXHIBIT LOG:

A - SB 47-2 amendments - Staff - 5 pages B - Technical corrections to SB 286-1 - Oregon Health Decisions - 4 pages C - SB 286-1 engrossed amendments - Staff - 47 pages D - Substantive proposals for SB 286 - Staff - 1 page E - Section 21 amendments to SB 286 - Staff - 3 pages F - Packet of LC Drafts - Staff - 3 pages G - Letter - Staff - 1 page