

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.

Measures Heard HB 2354 (Public) HB 2459 (Public)

HOUSE COMMITTEE ON JUDICIARY CIVIL LAW AND JUDICIAL ADMINISTRATION

February 11, 1991 Hearing Room 357 1:00 p.m. Tapes 35 - 37

MEMBERS PRESENT: Rep. Ray Baum, Chair Rep. Marie Bell Rep. Tom Brian
Rep. Kelly Clark Rep. Jim Edmunson Rep. Rod Johnson Rep. Kevin Mannix
Rep. Randy Miller

STAFF PRESENT: Greg Chaimov, Committee Counsel Kathy Neely,
Committee Assistant

WITNESSES: Scott Meyer, Oregon Association of Defense
Counsel (2354) Larry Wobrock, OTLA (2354) Rep. Dwyer (2459) Harl Haas,
Judge (2459) Gary Kahn (2459) Ned Clark (2459) Abby Weisenhaus (2459)
Bill Crisman (2459) Margo and Barry Clift (2459) Thomas Howe, Attorney
(2459) Arva Ford (2459) Thomas and Patricia Jackson (2459)

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TAPE 35, SIDE A

004 REPRESENTATIVE BAUM, CHAIR: Calls the meeting to order at 1:00 p.m.

PUBLIC HEARING ON HB 2354

010 GREG CHAIMOV: Gives an overview of the bill. Amends the wrongful death statute. Currently the Personal Representative has 3 years, this will be extended to 3 years from discovery of the wrongful death. Discusses materials in the packet. There is no fiscal impact.

023 LARRY WOBROCK, LEGISLATIVE CHAIR, OTLA: Offers testimony in favor of HB

235 4. See Exhibit A. Discusses items in memorandum presented to the committee. Discusses Eldridge v. Eastmoreland General Hospital with regard to wrongful death as written up in Exhibit A. The statute of limitations runs from the injury causing death according to the statute.

093 SCOTT MEYER, OREGON ASSOCIATION OF DEFENSE COUNSEL: Offers testimony in opposition to HB 2354. See Exhibits B and C. Discusses items in written testimony. Asking the legislature not to change the law that is working well for Oregon citizens.

134 REP. CLARK: Are there other places in statutes where discovery date is used as the trigger?

SCOTT MEYER: Yes. In negligence actions, most notably medical malpractice and other professional malpractice cases, there is a 5 year statute of ultimate repose in medical malpractice which is another limit

and 10 year for ultimate repose for wrongful death.

144 REP. CLARK: Your specific objection is the unworkability of it.

148 SCOTT MEYER: Current negligence discovery rule is not very workable. It requires a court to determine a subjective feeling of the plaintiff when the person should have known. That is a burden on the judicial system. They are frequently appealed. It is even harder in wrongful death because the decedent is not present.

162 REP. CLARK: If it is a discovery date that we are after and when should that person reasonably have known, it is a reasonable person standard, not subjective knowledge but objective knowledge. It is what that person should have know, correct?

SCOTT MEYER: Yes. In order to make the determination relevant it would be what that person did know.

183 REP. JOHNSON: Would there be any way to address that distinction, between what a lawyer and a layperson would consider an injury, in the statute of limitations so true injury cases are still three years. Is there any half way ground to assess the situation?

192 SCOTT MEYER: Cannot think of language in a bill to accomplish that simply. It would likely be extremely complicated and would open up flood gates of litigation.

198 CHAIR BAUM: Closes hearing on 2354.

PUBLIC HEARING ON HB 2459

218 GREG CHAIMOV: Discusses and gives an overview of HB 2459. Deals with solicitation of clients in automobile cases. The bill prohibits the Department of Motor Vehicles from giving out accident information for commercial purposes. Sponsored by Rep. Dwyer, Rep. Burton, and Rep. Baum. Discusses SB 434 heard on January 30 which is not scheduled for another hearing currently. Discusses the materials in packets. There is a fiscal impact showing a \$50,000 decline in revenues to the DMV if it passes based on the loss of the \$0.24 a piece for reports.

242 REPRESENTATIVE BILL DWYER, CHIEF SPONSOR, DISTRICT 42: Offers testimony in favor of HB 2459. We are talking about the lists not the right to use direct mail and first amendment rights. Election lists cannot be bought for commercial purposes. If people want to do direct mail they are going to have to generate their own lists. This bill deals with the commercial use of state's lists.

286 REP. MANNIX: Wonders if there are other possible sources of this information we are not addressing. Has there been any discussion about other government sources for material that could be turned in to a commercial advantage?

291 REP. DWYER: There may be but have not addressed that. Discusses what is done in the State of Florida. There are some legitimate reasons to have the information, such as insurance companies, and the lawyer representing a specific person. Do not think we ought to lend a legitimacy or compound this every increasing problem in that regard.

324 REP. MILLER: The current law states the Division may charge a fee established under an ORS chapter for furnishing this kind of information. Do you recall what that fee is?

333 REP. DWYER: It depends on whether it is for individual or not. It is expensive for the individual. These people get a good deal from the

state.

362 REP. MILLER: Informed the fee is approximately \$0.24 per record.

REP. DWYER: Discusses what is in the records.

374 REP. MILLER: This does not just effect the attorney's situation, it is for commercial purposes. Is there any one else out there?

381 REP. DWYER: Just those that take the list and endeavor to make money on it. Don't have anyone particularly in mind. Wants the same restrictions to apply to these list as applies to voters lists.

389 REP. MILLER: You don't want them supplied for commercial purposes. How about increasing the fee when the Division is asked to supply these for commercial purposes?

REP. DWYER: If the intent is to raise revenue rather than prohibit this, that may be an alternative. It may restrict some of the practice. But the intent is for them not to use them to solicit business and that is not the answer.

412 REP. CLARK: On line 18 of page 2, "the Division may not release the records to any person who intends to use the record for commercial purposes." Troubled by the use of "intends". Did you give any thought to saying that "no person shall use the records for commercial purpose".

REP. DWYER: When they didn't intend.

TAPE 36, SIDE A

017 REP. EDMUNSON: Commercial purposes includes solicitation of clients by an attorney. It has been interpreted pretty broadly. Would hate to cause problems for other people under that definition. Is that your intent?

023 REP. DWYER: The question was my intent with the bill? The intent was not to preclude those legitimate uses of the insurance companies or the press. You might want to define what commercial purposes should be.

040 HARL HAAS, JUDGE MULTNOMAH COUNTY: Offers testimony in favor of the bill. The bill touches on professionalism of the members of the Bar and fundamental fairness. Discusses competitiveness of the members of the Bar. It is troublesome from a judge's view to have a trial where the scales are not equal. The competency of one attorney is so much higher than the other, judges will kind of help the other along to balance the scales. Insurance companies usually have highly skilled attorneys whereas the plaintiff does not have access to those. Judges believe this problem is acute and are concerned about the inexperienced counsel defending injured plaintiffs against more skilled attorneys.

085 GARRY KAHN: Offers testimony in favor of the bill. The purpose of the proposed amendments is to prohibit the sale and distribution of police accident reports for commercial purposes including solicitation of clients by attorneys. This makes the State of Oregon an accomplice in the business of ambulance chasing. ORS 9.510 is still a law and provides that no attorney shall solicit business at factories, mills, hospitals, etc. In 1988, the United States Supreme Court said a lawyer could send a letter to homeowners who face foreclosure and thereby allow direct mail to targeted people. The rationale was based on the first amendment. The dissenting opinion stated these letters are being sent to unsophisticated people infers a deceptive analogy between professional services and standardized consumer products. The issue is should the State help promote this practice of attorneys. The State and

Local Bars have been making a effort to have lawyers act in a professional manner. Statement of professionalism have been enacted. These letters written to auto accident victims are a blatant attempt by the attorney who sends them to solicit business from people who are often very vulnerable because of the emotional and physical state of the person. This also involves the right of privacy not to have the fact they were in an accident made public. Urges this amendment be adopted.

155 NED CLARK, LAWYER: Offers testimony in favor of the bill. Is upset by the practice of using the State Motor Vehicle Department to build lists to solicit directly personal injury cases. Thinks the real question is lawyers are officers of the court and this is misconduct. Questions the respect people will have for the justice system because of it.

180 REP. EDMUNSON: What is your experience with associations of lawyer who have solicited a case and then passed it off to a trial counsel to try?

199 GARRY KAHN: I do review from time to time the jury verdict information. Most plaintiffs are not represented by the lawyers writing the letter. They have settled before they filed or some of them are referred out.

NED CLARK: No experience with this at all.

215 REP. CLARK: Discusses story of government lawyer who lost his son, and his wife received a letter urging her to sue her husband and for wrongful death of the child. Does that kind of thing actually happen?

GARRY KAHN: Cannot respond to that particular story. Discusses complaints filed with the State Bar.

243 REP. BRIAN: What specific information do you have that draws a correlation between contact by mail and poor representation?

278 GARRY KAHN: First, these lawyer have clients that will tell you they were very satisfied with way case was handled. Is there a direct correlation, I would say lawyers that don't ever take cases to court have not really settled the case for proper settlement, either too cheap, or too quick without knowing full circumstances. Insurance companies like to get cases with lawyers who do not know what they are doing.

287 REP. BRIAN: Would current advertising rules of the Bar allow TV, radio, and paper advertising?

GARRY KAHN: So long as it is not fraudulent or deceptive.

REP. BRIAN: Trying to discern between the form of advertising and the negative result you are discussing.

GARRY KAHN: There is always the possibility of that. These letters display an acquaintance with facts of the particular case. They get the information from the policy report and can write it in way so the recipient believes the lawyer already knows a lot about the case. Believes the injured person is vulnerable and needs assistance. Does not think these attorneys are helping them out in the best way possible.

317 REP. JOHNSON: Discusses the affidavits from accident victims received in the material. All are form documents. How would you respond to their contention that after receiving the letter they became more informed about the process and were able to make a better choice on which lawyer to use.

336 NED CLARK: They are not really informed about the process but have been subjected to a "hard sell". People are use to shutting off radio and TV advertising but there is a personal aspect about a letter addressed to them individually. Believes it is a shock to receive this letter while grieving and believes they don't learn anything about the system, just the first shot of the sales pitch the State helped with. Believes the people in this type of a practice do not have the training, reputation, or skill needed.

378 REP. MILLER: Radio and TV is more generalized. The witnesses target this as sloppy practices. Is this bill the answer? Is it too wide ranging, are there impacts the language would restrict other legitimate purposes?

393 GARRY KAHN: Agrees the language could be tightened up a little. See nothing wrong with the bill specifically stating what the objection is, which is to stop lawyers from soliciting cases from accident victims.

408 NED CLARK: Has proposed amendments drafted by Mr. Williamson. Exhibit D which speaks to the concerns about the broadcast media, etc.

TAPE 35, SIDE B

012 JUDGE HAAS: Line 18, page 2 of the bill starting with the word "for the commercial purposes" to bracket out through line 19 through the word "limited" and then add in its place "for the solicitation of clients by or for an attorney". Would give you a better way. Would read "may not release the records to any person who intends to use the records for the solicitation of clients by or for an attorney."

027 REP. MILLER: Are the Bar's disciplinary rules because of a court decision ineffective to combat this alleged sloppy practice?

031 GARRY KAHN: Every time the Bar receives a complaint objecting to mailed advertising the Bar sends out a form letter which discusses the USSC decision of freedom of speech and cannot do anything unless the letter received is fraudulent or deceptive. Should this information be public at all is another question dealing with rights of privacy.

048 REP. MILLER: Discusses information provided to committee regarding fees charged to clients. This attorney may come froward and state the reason for the objection is those who are making a lot more and charging a lot more are concerned he is doing a better job at getting prospective clients. How do you respond.

059 GARRY KAHN: Never charged a client more than 25% on a case settled without going to court. Have charged 1/3 when taken case to trial. Responds that 10% of nothing is still nothing. These lawyers are charging the same basic fee that I charge because they settle the cases. Discusses a brochure sent to a family of a 13 year old that states representation will be free. Believes it is that way because the rest of the family will be represented also. It is like a loss leader.

081 FRANK POZZI, ATTORNEY: Offers testimony in favor of the bill. Discusses background in private practice. Opposed to soliciting cases. Gives history of issue of solicitation and decisions made by an ad hoc committee he chaired. This committee proposed to forbid direct mail solicitation which in our view was not advertising. This was passed by the Bar and is still in effect. Discusses letters sent by direct mail attorneys. Believes it is a degrading practice. Discusses a way to inform the public this is advertising by placing the word advertising on the letter in big red letters. These lawyers and their clients do not know the real value of their case.

196 ABBY WEISENHAUS, PRIVATE CITIZEN: Offers testimony in favor of the bill. Discusses tragic family accident. Shortly after the accident we began receiving letters from attorneys saying they can help. It put an emotional distress on the family. It is wrong for the State of Oregon to help them get information on the accident and is appalling to find out they pay a substantially smaller fee. We were vunderable at the time.

241 REP. BELL: What could the legal profession have done to be helpful to you at that time? A single letter from a larger source, a place to call for information?

ABBY WEISENHAUS: Maybe something put out by the Bar Association.

259 BILL CRISMAN, PRIVATE CITIZEN: Offers testimony in favor of the bill. Discusses own experience with an accident injury. Received a letter from Thomas Howe. Discusses meeting and letter with Mr. Howe. Was told that my case would bring a lot of money. After the initial meeting, I was unable to reach Mr. Howe personally, always had to go through the secretary. He was unavailable to answer questions. Did not like the idea of him being able to get a copy of the accident report without my knowledge of it. Finally went to another attorney and told Mr. Howe's office and he dropped me like a "hot potato". The meeting in Bend was done in between meetings with other client. Don't see how he could possible cover all the people and give them what they needed. A paragraph from the letter states "an injury diary is enclosed for your use as well as an information brochure. The injury diary may be helpful in documenting your injuries, pain and discomfort and any limitation your injuries have had on your work or day to day activities." Keeping this log would only bring more attention to the pain I felt.

368 FRANK POZZI: Comments on the log, it is foolish to do and the lawyer usually keeps it. Comments on the contingent fee. Many lawyers use this system. Most clients cannot afford an hourly fee.

TAPE 36, SIDE B

031 REP. MILLER: Discusses TV advertising and yellow page advertising that state if case is not won, the client does not pay.

FRANK POZZI: Does not approve of that. Discusses reasons for firm placing ads.

BILL CRISMAN: States in the letter there will be no attorneys fee if don't win.

058 MARGO CLIFT, PRIVATE CITIZEN: Discusses death of 16 year old son. We received letters from attorneys at the same time we received sympathy cards. It is a difficult time to consider what might be rightly yours. Believes people need to be informed of legal rights, but there must be a more gentle way to inform people of this. Information on a general basis at the mortuary would be the best way. I found it difficult to read the letters when they came. Did not know auto accident records were sold to someone to use this way to make money on the death of my child.

BARRY CLIFT, PRIVATE CITIZEN: Reiterates how hard it is to receive those letters. Was offended by the wording in the letters. I am very offended by the State of Oregon allowing anyone to make money by supplying or using this material. Wonders about the fairness in the price of obtaining the materials. For the State to supply the information is wrong. Someone answering this letter is selling themselves short.

174 THOMAS HOWE, ATTORNEY: Offers testimony in opposition to the bill. Has been sending letters to accident victims since 1987. Wants to go on record stating I do care what US Supreme Court said and think the case previous cited is not mistake. See Exhibit E. Discusses all the material in the packet given to the committee. Discusses experience with accident victims with regard to the information given out in letter sent. Has sent out over 20,000 letters and have carefully documented complaints by the accident victims. Out of that 15 have complained. For every one person that has complained 133 have called appreciating the information, responding positively. Over 2,000 have responded out of the 20,000 mailers and only 15 have complained. Insulted by the argument that we are shabby, sell clients short and don't do a good job. I try cases. Lawyers are upset about this because of the attorneys fees direct mailers offer. Discusses these fees.

254 REP. CLARK: How often do you end up not able to settle the case and have to go to trial or take it up on appeal?

THOMAS HOWE: National averages are about 90% to 92% of all cases settle and we are real close to that. Discusses lawyers fees and draws an analogy to a real estate agent. Accident victims will be sending the committee letters concerning their opposition to the bill. The Bar will sanction an attorney if they are misleading, untruthful and if there is no disclaimer of advertising outside on the envelope. Has some constitutional problems with this bill. The OSB submitted a bill to the Supreme Court requiring the word "ADVERTISING" in red on the envelope and the letter, both sides. This is how angry they are at direct mail. The Oregon Supreme Court did not adopt this rule because it was a restriction of commercial free speech. This is a signal that the Supreme Court would have a problem with this bill as well if the intent is to prohibit commercial free speech. Believes this bill will be attacked under Constitutional grounds.

336 REP. CLARK: Back to comment about complaints received, what were the numbers again?

THOMAS HOWE: Mailed over 20,000 mailer since 1987, 15 complaints were received from accident victims. Lawyer have complained. There were 3 complaints in 1990. Over 2,000 have responded positively. Discusses Ralph Nader article in packet of information.

364 REP. CLARK: Back to line of questioning. How many complaints total have you received? How many filed with OSB ?

THOMAS HOWE: Would estimate about 70-80 by lawyers. All have complained to the bar by letter. Don't have the figure broken out about members of the public complaining to the Bar.

385 REP. CLARK: It is 2,000 total? Trying to corrolate some of the numbers to compare to own direct mail with personal business.

THOMAS HOWE: This would have a higher response than normal direct mail because it is targeted.

392 REP. BELL: This issue is about fees. I would like to know, without getting into excellent or sleazy lawyer doing this, if you really have the victim in mind, are you making any effort as a group to send one mailing with some options versus taking this on individually.

THOMAS HOWE: That makes a lot of sense. Keeps track of who is doing direct mail. If OSB was concerned about helping people they ought to send a brochure.

REP. BELL: If they did, would you resist?

THOMAS HOWE: Absolutely not. People are receiving the information when they need it most.

TAPE 37, SIDE A

018 REP. CLARK: Will accommodate this subcommittee on the time.

020 PAT JACKSON: Discusses personal experience. Received one letter only and had choices in dealing with this. At the time we considered the letter a godsend and was not offended to receive the letter. Concerning the right to privacy, the news told me that my daughter was in critical condition. We wanted to settle out of court. The money was not an issue.

039 THOMAS JACKSON: It was a very emotional time. We did receive only one letter. The letter answered some questions. The company I worked for offered the company attorney who ended up representing the insurance company. We decided to respond to Mr. Howe. He was very accommodating. Mr. Howe stated that we did not really need him with this open and shut case.

074 ARVA FORD: The letter was professionally written. The information I needed was in it. Discusses personal experience as an accident victim. When you take this right away, you take away my right to get information.

132 REP. MILLER: You did not characterize this letter as solicitation but just information?

ARVA FORD: Yes.

REP. MILLER: Would you be offended if the letter stated that it was advertising?

ARVA FORD: It did. Would be offended by the example of the red words.

REP. MILLER: Would you read it?

ARVA FORD: Yes.

REP. MILLER: Even though it had advertising right on it?

ARVA FORD: Yes. Appreciated the information.

143 THOMAS HOWE: This [the red lettered "ADVERTISEMENT"] does not make the profession look dignified. The label.

CHAIR BAUM: Depends on what it is used for. We will have to continue a public hearing on this bill a week from today. Invites those who did not get to testify to come back.

Submitted by: Reviewed by:

Kathy Neely David Harrell Assistant Office Manager

EXHIBIT LOG:

A - Testimony on HB 2354 - Lawrence Wobbrock - 4 pages
B - Testimony on HB 2354 - Scott Meyer - 3 pages
C - Testimony on HB 2354 - Oregon Association of Defense Counsel -
3 pages D - Amendments to HB 2459 - Charles Williamson - 2 pages E -

Testimony on HB 2459 - Thomas Howe - 61 pages F -Testimony on HB 2459 -
OSB - 3 pages