HOUSE COMMITTEE ON JUDICIARY CIVIL LAW AND JUDICIAL ADMINISTRATION

April 11, 1991 Hearing Room 357 1:00 p.m. Tapes 73 - 76
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 Carol Wilder, Committee Assistant MEASURES CONSIDERED: SB 427 PH (Oregon State Bar) HB 3279 PH (Attorneys Fees) -- HB 2837 PH (Jurors) HB 2780 PH (Jurors) HB 3349 PH (Liability for Hazardous Substance Release) HB 2828 WS (Witness Fees)

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.

TAPE 73, SIDE A

003 REP. BAUM, CHAIR: Calls the meeting to order at 1:00 p.m.

HB 2837 - PUBLIC HEARING 019 REP. BILL MARKHAM, HOUSE DISTRICT #46: - Request from a number of older people regarding jury duty as part of a pool. - Bill says if you're 70 or older you can choose whether or not to serve. 055 REP. LONNIE ROBERTS, HOUSE DISTRICT #21: - In favor of bill. - Citizens 70 or older are often in ill health. - Is a prudent bill to allow older citizens, by their own decision, to excuse themselves from jury duty. House Committee on Judiciary April 11, 1991 - Page 2 - 070 REP. WALT SCHROEDER, HOUSE DISTRICT #48: - In favor of bill because it's completely voluntary. - Gives people 70 years and older the option of getting out if they wish to. 080 REP. BOB PICKARD, HOUSE DISTRICT #54: - Supports the bill. - Retirement is a time of freedom of choices. 092 REP. DEL PARKS, HOUSE DISTRICT #53: - Supports the bill. - Would be a matter of courtesy to allow them to be excused if they have a physical disability. 105 REP. ROD JOHNSON, HOUSE DISTRICT #45: Supports the bill. 110 REP. LIZ VANLEEUWEN, HOUSE DISTRICT #37: Supports the bill. 122 REP. BOB REPINE, HOUSE DISTRICT #49: Supports the bill.

HB 2780 - PUBLIC HEARING

140 REP. REPINE: - Bill provides that a person can be called for jury duty only every four years. - A person can be permanently excused if they have a permanent physical condition. 160 CHAIR BAUM: Welcomes students from Austria. 175 REP. MILLER: - Welcomes students in connection with Lakeridge High School program. - Wonders whether we would put ourselves in jeopardy of losing the experience and wisdom of those over 70. 194 REP. MARKHAM: If my neigHB or doesn't want to because of an ailment, they should have the option to get out. I don't think it will be a big draw against the pool. 215 REP. MANNIX: Welcomes friends from Austria. Feels a particular affinity because his wife was born in a U.S. Army Hospital in SalSB erg, Austria in 1952.

HB 2837 - WORK SESSION 247 MOTION: Rep. Miller moves HB 2837 to the Full Committee with a Do Pass recommendation.

VOTE: In a roll call vote, the Motion carries with all members present voting AYE. Rep. Clark was excused.

HB 2780 - PUBLIC HEARING

270 MONTE BRICKER, JUDICIAL ADMINISTRATION COMMITTEE, OREGON STATE BAR: - Judicial Administration Committee has no objection to the bill. - State Judicial Administrator's office has a problem with the bill because it reduces the pool of people. - An area of compromise might be to study how this bill affects each of the individual counties to see if it does cause some inconvenience in the various counties. 305 REP. BRIAN: You mentioned Multnomah County has a two-week term and even at that short term the presiding judge doesn't have any d ifficulty going to a 48-month rotation? 307 BRICKER: That's what he represented to me yesterday. 308 REP. BRIAN: Those counties that might be on a one-, two-, or three-month basis, how can they have such a pool problem if on a two-week basis Multnomah County does not? 315 BRICKER: I don't know how much study, if any, has been done in Multnomah County. The judge in Multnomah County said he didn't have any problem with it. I think it might make some sense to study the bill with the individual counties. 322 GREG CHAIMOV, COUNSEL: You have in your packet of materials prepared testimony from the State Court Administrator and one of his comments is that he believes that the first section of the bill, the one extending the time between service from two to four years, would be causing the most substantial problem in the counties with smaller populations. 327BRICKER: The State Court Administrator's office has no objection to Section 2, excusing jurors permanently. It's only Section 1 that troubles them. 332 KINGSLEY CLICK, DEPUTY STATE COURT ADMINISTRATOR: - Monte Bricker covered most of the issues that we were concerned about. - The longer the ineligibility period the more administrative problems may occur in trying to verify previous service. - Only substantive issue is about reducing overall quality of the jury pool and getting into some problems with representativeness and inclusiveness of the population. - We do have different terms of service throughout the different counties. 365 REP. BRIAN: I would look to the members from the less-populated counties to tell us what they think because that seems to be where the problem is. Maybe some of the members who practice in those areas have a better feel for that. 370 CHAIR BAUM: Let's check into this and hold this bill over for subsequent public hearing or work session. - These minutes contain materials which paraphrase and/or summarize statements made during this se&sion. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes. - House Committee on Judiciary April 11, 1991 - Page 4

SB 427 - PUBLIC HEARING

390 JAMES SPIEKERMAN, OREGON STATE BAR: - Testifies in favor of SB 427. - Bill has no controversial issues. - Introduces George Remer, General Counsel for the Oregon State Bar, and Bob Fraser, President of the Oregon State Bar. 427 CHAIR BAUM: Why was there eight No votes, mostly members of the Oregon State Bar? What was their problem with the bill? 435 SPIEKERMAN: - Thought the only problem with the bill was with the overdraft notification portion, which was removed. - In this bill, we are saying if you are a lawyer and you are going to incorporate you should do so under the Professional Corporations Act, not the

Business Corporations Act.

TAPE 74, SIDE A 010 CHAIR BAUM: You don't get eight negative votes in the Senate when the Republicans vote as a block over there. It may have something to do with the fact that it reiterates again that an attorney shall never reject for personal consideration the cause of the defenseless or the oppressed. 032 REP. BRIAN: Just to clarify, this bill continues the current practice that attorneys must either practice privately or like a professional corporation?

040 SPIEKERMAN: As far as professional corporations, in Section 9 it simply provides that if a lawyer is going to incorporate for the purposes of providing legal services, they must incorporate under the Professional Corporations Act, whatever that act provides. That is up before the Legislature at this time. They cannot incorporate under the Business Corporations Act If you have a Professional Corporations Act and a Business Corporations Act it is our position professionals ought to be in the Professional Corporations Act. 052 REP. BRIAN: What about the issue of maintaining the confidences of clients?

055 CHAIMOV: Section 5 takes out the language, "maintain inviolate the confidence and at every peril to the attorney, preserve the secrets of the clients of the attorney". 060 SPIEKERMAN: We're not asking that it be removed from the obligation of an attorney. I'll let Mr. Remer explain what we're doing and it isn't going to result in that much of a change because the obligation will still be there.

065 GEORGE REMER, GENERAL COUNSEL, OREGON STATE BAR: Eliminates the statutory reference, but we still have the disciplinary rule that sets out the same requirement with some delineated exceptions. What has occurred is that the statute does not indicate the exceptions and in essence we end up having an inconsistency that was referenced in a recent Oregon

Supreme Court case, so we are going to be relying on the disciplinary rule as opposed to the statute. The entire disciplinary code is already adapted under a separate statute, 9.490, and it's already a code that has been approved by the membership and the Supreme Court that sets out some exceptions. In essence, the statute makes it very comprehensive that there are no exceptions. We have the disciplinary rules that provide certain exceptions. We just want to make sure that we have consistency because the exceptions are well-grounded in policy considerations and have been in existence in Oregon since the code was adopted in 1971.

082 REP. BRIAN: Some of the exceptions being child abuse reporting? What else?

083 REMER: That is under a separate statutory requirement. Also the possibility of reporting the client's intention to commit a crime, a situation where a client would consent to the revelation of a confidence or secret, and a couple of others. We have the disciplinary rule available if you would like to see it.

085 SPIEKERMAN: The other two are if a court orders an attorney to reveal it or if it's necessary to protect the client's interest. The last exception listed in the disciplinary rules is that if it is necessary for a lawyer who has been sued by a client to reveal that to defend himself. Those are the only exceptions. With those four exceptions you would have still in place exactly the same requirement to maintain the confidences and the secrets.

097 REP. CLARK: With some hesitation I would support that portion of the bill. It seems to me, though, ORS 9.460 sets out some of the cornerstones of the practice of law: to support the Constitution, the cause of the defenseless or the oppressed. There are some things in there that are fairly fundamental and it's not without some dis-ease that I will vote to pull out that portion of the statute.

107 REP. MILLER: Mr. Remer, on p. 1, line 24, the addition of the words "and fit to practice law", what's the reason for that addition?

112 REMER: Essentially, we're trying to synchronize the bar Rules of Procedure, the Admission Rules, and the statute. That requirement is already in those other sets of rules and they have been applied by the Supreme Court in its admission decisions. We're just trying to make sure there's consistency throughout the statutory and the procedural rules on this subject.

118 REP. MILLER: So it's not a lack of confidence that those who are now practicing were unfit?

122 REMER: No. 123 REP. JOHNSON: I'll be moving to add to ORS 9.460 Print 3 a list of the exceptions because this is such an important thing that I wouldn't want there to be any doubt that it had to be maintained. Since the bar can change its code of conduct anytime without the Legislature's O.K., I think this is important enough that we keep it in there. Another concern I've got is if the lawyer didn't disclose a client's secret, and someone got harmed because of that failure to disclose without this protection in the statute it may be that the person harmed could sue the attorney for not revealing the thing. You mentioned that somehow in some other statute these exceptions are already listed somewhere?

137 REMER: No, it's in the Oregon Code of Professional Responsibility, which are all of the disciplinary rules that lawyers have to comply with. Those are adapted by the membership and approved by the Supreme Court. The Supreme Court has to approve any change and so there is that oversight and evaluation before any change is made to any of the disciplinary rules. We're just trying to avoid having lawyers find themselves at odds either complying with the DR, maybe feeling that there's a legitimate application of an exception but then having the statute say that you cannot reveal anything, and there's an inconsistency. It's not fair to lawyers to not know what they're supposed to follow. 148 REP. JOHNSON: So we can fix that by making the statute conform with the rules and the code of conduct.

150 REMER: You could certainly add some provisions such as, "shall

maintain confidences and secrets consistent with the disciplinary rules adapted pursuant to ORS (inaudible)". 152 REP. JOHNSON: "Shall maintain confidences except in the following instances" and then list the six that you've got in your rules right now.

155 REMER: That ends up codifying the disciplinary rules. 156 REP. JOHNSON: I think this is important enough. I would just as soon do it that way as opposed to leaving it open for change without our approval there. 160 SPIEKERMAN: I think the concern you are emanating, Rep. Johnson, are concerns of some practicing lawyers. I talked to four county bar associations in eastern Oregon last week and I was met by a lawyer from Baker City Bar Association who wanted to tar-and-feather me because he thought we were doing away with the privilege totally. It does not do violence to what we're trying to accomplish. If you're more comfortable, we certainly wouldn't have any quarrel with that. 172 REP. EDMUNSON: I'm looking at the statutory Code of Professional Conduct which the amendment would go to. In 9.460 and the duties of the attorneys which include, among others, maintaining confidence as well as under 9.490 under the Rules of Professional Conduct, that the arbitrator of those violations in both cases is the Supreme Court under provisions of 9.527. Either way violations go to the Supreme Court. What would be your reaction if we were to deal with Section 9.527 and leave in the duties of the attorneys as they are presently stated. In 9.527 where the Supreme Court may discipline, suspend, diSB ar, under Section 5 it says, "An attorney is guilty of a willful violation of 460". Then I go down to Section 7 for the Rules of Conduct and it says, "may discipline if a member has violated" without regard to whether or not it is willful" the rule of 490 . As it says now to be disciplined for violating a confidence, it must be a willful violation of confidence as opposed to violating the disciplinary rule which is simply -You break it, you pay. If we were to say under Section 5, Ha violation of the duties of attorneys is not willful if it is in accordance with the disciplinary rules", I think we've solved the problem without taking out of the statute the confidence law. At the same time we're not putting disciplinary rules into statutes. I am hesitant to have the Legislature draft disciplinary rules. I think it's a violation of separation of power. If we simply add a sentence to Section 5 of 527 saying that a violation is not willful if it is in the execution of a professional code of conduct. Then we've solved both problems without the evils of having the Legislature write disciplinary - House Committee on Judiciary April 11, 1991 - Page 7

rules for attorneys. What's your reaction?

230 REMER: I'm trying to get a handle on the change to 5.

232 REP. EDMUNSON: It really isn't a change. Right now it says, "discipline may occur if the member is guilty of willful violation of any of the provisions of 9.460, which includes the one you're trying to delete. If it's a willful violation it would be one which additionally violates the Code of Professional Conduct, then we would interpret "maintain inviolate the confidence, and at every peril to the attorney, preserve the secrets of the clients of the attorney" as maybe it's not a secret if it's information which statutorily, for example, reporting child abuse. That's not a societal secret. Or if the confidence of the client if client has waived it and allowed the disclosure. So you could interpret both of those statutes consistently or that statute consistent with the disciplinary rule.

247 REMER: I would have to think that through. The Code of Professional

Responsibility does have varying standards of culpability so it isn't necessarily correct that just by violating a code provision that you would be guilty of it. The statute says that there is a basis for discipline for a willful violation of 9.60, but that's separate from the code which you can be disciplined for under subsection 7. Then you have to look to the code for the individual rule and whether or not there's an intend standard or a knowledge standard or negligent standard or duty to comply.

262 REP. EDMUNSON: The problem that you see is inconsistency between 460, sub 3, and the disciplinary code, that the disciplinary code excuses some breaches of confidences in specific situations. I'm saying that where those situations arise that would not be considered willful violation of that section. 268 REMER: I see your point. Willful would have to be some kind of additional bad motive or intention, opposed to just complying with one of the exceptions. The only problem with that is the recent case the court raised concern that there appears to be an inconsistency between what the statute says and what the DR permits to be disclosed. We're just trying to avoid lawyers having to worry about that. 286 BOB FRASER, PRESIDENT, OREGON STATE BAR: When I was in Baker, Judge Mylo Pope told us he had spent an extra five weeks in trial because of that particular statute. If you would look at it in light of the fact of who exercises the privilege. Under evidence code the client exercises the privilege. What happened,I think, the attorney was involved in a murder case and he had to let the attorney out of the case. We need to supplement it with something from Judge Pope. It sounded to me as we were discussing it that it was being misused. The attorney was exerting it as opposed to the client. It is on the attorney not to disclose as opposed to the client being able to waive it. That's why Rep. Johnson's approach might be the comfort zone. Because that excludes disciplinary procedures and related events. I was talking from incomplete information but his comment was it took him five extra weeks in this trial and I think that was the concern. What I heard was "Who exerts the privilege?". Under the disciplinary code the client can waive it. I'm not confident under 9.1 the way it's written now that the client could waive it if the lawyer didn't want to. 320REP. BELL: On p. 1, line 24, regarding fit to practice, there's a definition for lack of good moral character, but it doesn't define what "fit to practice law" is. Would you define that for

me?

325 REMER: We'd have to look back at the cases that have been decided under the existing standard. The things that have been looked to are criminal convictions. We had one gentleman that had been convicted of murder in Wisconsin and he applied for admission here. The question was, did he have good moral character, was he fit to practice, and did he have appropriate credentials. The court determined that in that particular instance he had not conceded his culpability even following his conviction and had not accepted the notion of reformation. They denied his application for admission under those circumstances. Someone can reapply and again present their credentials, and hopefully show that they have acknowledged their culpability, are making amends, are reforming and can be trusted to practice law in this state. It's a

combination of factors, but you look to their ability to be objective, fair, honest in their dealings with the client and the general public.
347 REP. BELL: It seems like that's been described in the good moral character. It talks about honesty, fairness, respect for the rights of others, and laws of the state and nation. Why do you need to include that if it's not defined or if it's within that definition of good moral character?

350 REMER: You can possibly have good moral character and not necessarily be fit to practice. You may have an inability to be fair and objective to people. It's a subjectivity. Maybe you have good moral character but may not necessarily be fit based on other types of conduct but it's a relational thing; it's not someone's objective determination that you shouldn't be a member of the bar. It has to be connected to what is required of lawyers. That is specified in other statutory requirements. I would be happy to show you a list of the cases that have come up in the last few years concerning people who had applied and had a screening procedure applied to their situation so you can get an idea of what has kept people out and what has permitted people to come in.

373 REP. MANNIX: It's impossible for us to codify every nuance of fitness and if we start codifying it the next thing you know the court is going to tell us that's an exclusive list. Our answer to that would be, including but not limited to, in which case the list is only a series of examples anyway and we already have case law to tell us what it's all about, so why do we need examples in the statute. Regarding Rep. Edmundson's concern, do you have any idea how long this provision has been in the act and section which will be amended in ORS 9.460 about maintaining inviolate the confidence and at every peril to the attorney to preserve the secrets of the clients of the attorney? It sounds like DD code stuff.

385 REMER: I think it is DD code stuff. There's been that existing inconsistency, where potential peril, since we adopted the professional code of responsibility. It's a recent dilemma that we felt we should try to solve for the benefit of the membership.

395 REP. MANNIX: My problem is the DD code reflects an era when the lawyer was an extension of the client; the lawyer as gladiator; the lawyer as lonely warrior. These days we've recognized through a variety of statutes the role of the lawyer as public servant, officer of the court, someone who has a variety of other obligations, not just obligations to take care of the client's needs. I recognize what you're trying to do here. I would want to include some sort of language that would say, "maintain the confidences of the client at request of client subject to the limitations established by the Oregon State Bar and the Oregon Supreme Court through the Code

of Responsibility". That kind of phraseology would allow to hold out to the public that in the statutory scheme we're still recognizing the need for confidences; but at the same time there are exceptions and we need to look to the courts for the exceptions. What do you think about that?
415 REMER: I like that a little bit better than Rep. Johnson's proposal, but I think they're both addressing the same concerns. I am

concerned about codifying disciplinary rules. I think your approach would more or less say, "consistent with the Code of Professional Responsibility". I would have less problem with your approach. Don't forget, 9.460 is a disciplinary statute, and we've had some confusion about the fact that people were somehow repealing the attorney-client privilege. It's an entirely separate issue under a separate statute. This is just a disciplinary standard and we just want one consistent disciplinary standard. We already have recognized exceptions that have been in existence 19 years and have worked quite well. I think that would aid lawyers to be able to look in one spot to say, "This is when I can reveal information; this is when I don't have to be a gladiator." 430 REP. CLARK: Coming back to the line of questioning that Rep. Edmunson was asking you about, 9.460, sub 4, under current law, "An attorney shall never reject for any personal consideration in the cause of the defenseless or the oppressed". I don't know of very many people that have spent more time and energy to do pro bono work than I have, but we don't honor that. The bar disciplinary statute says that I can be diSB arred for willful violation of that provision.

TAPE 73, SIDE B 045 (REP. CLARK, CONTINUES:) That is a lie. That's not the way the world works. We don't even have comprehensive pro bono requirements for lawyers in this state. How can that statute be on the books? 052 REMER: Over the last few years we have attempted to take a look at this statute 9.460 and I think Rep. Mannix is correct - this is originally from the DD code and it needs modernization particularly like the one on the confidences where there could be an inconsistency. We want one clear standard. That's a troubling provision -- exactly what it's intended to mean, the scope, etc. I'm very concerned about having disciplinary standards that are not enforceable or enforced. I sympathize with what you're saying, that technically if somebody isn't doing what somebody says they should be doing as far as pro bono as it's deemed to be willful that could result in a disciplinary sanction. I don't know that that's the best approach to that problem. 067 REP. MILLER: My question is regarding the same language. You could suggest that particularly those in this committee that are lawyers hear about the cause of the oppressed on a daily basis. We're in deep trouble if we ever reject those pleas and perhaps some would argue we might and we do on occasion. I guess I'm a little uncomfortable with that language being in there. Also that might not be the only language in that particular section that causes some concern, but Rep. Clark raised it and we may need to massage this a little. - 085 REP. MANNIX: I was going to ask them to comment on that. It seems to me that tbis section simply cod)fies the age-old concept exemplified by John Adams defending the British soldiers in Boston in the Boston Massacre that personal consideration without looking at your own personal

interests in upholding the cause of the defenseless or the oppressed. It doesn't mean that you have to go out and hang up a sheet and say that's your line of practice or you're going to take pro bono work. It just says that you shouldn't be looking to your personal interests in the defense of others. That's the way I read it.

097 CHAIR BAUM: The Chair does not intend to hold a work session on this today and that situation might change in the future. This has an

interesting relating clause and problems mentioned throughout this committee meeting as well as Section 9, which the Chair considers a major obstacle to the moving of this bill. Until that's changed and other things happen, I do not intend to have a work session.

HB 3349 - PUBLIC HEARING

112 FRED HANSEN, DIRECTOR, DEPARTMENT OF ENVIRONMENTAL QUALITY: Introduces Mike Downs, Administrator of the Environmental Cleanup Division, and Larry Edelman, Attorney General's Office. - Gives history of federal and state law. Discusses CERCLA (Comprehensive Environmental Response Compensation and Liability Act - also known as Super Fund) which established strict liability for all parties connected with contaminated sites. - Two bills are pending at the federal level which address lender liability. - Supports concept that state law be parallel to the federal law. - Testifies against HB 3349 because through an extension of credit or other type of similar extension of normal lender activity a structure could be established by which an operator could continue to operate and receive protection from liability when both state and federal law would not intend such protection of an activity. 277 REP. BRIAN: You made the comment in explaining the federal CERCLA provision that with regard to liability it would only apply to lenders who were participants of management? 280HANSEN: That is certainly the intent. There are a mixture of cases both in the 11th Circuit and the 9th Circuit that have addressed that issue in different fashions. 286 REP. BRIAN: My question is in the area of what does the phrase, "participant in management", mean because my recollection of the proponent testimony was if a lender took back a piece of property and was operating it, they aren't denying the liability exposure because they're operating it. But they don't want to be liable for the operation of it when they're not participating. They make the loan but they're not out there inspecting the property that they've loaned on and they don't want to be liable for that. My understanding of the proponents was that the bill is trying to get at limiting strict liability where they are not participating in management but are simply lenders. 302 HANSEN: The issue is certainly that HB 3349 is, as we talked with the sponsors, an attempt to be able to make sure that the direct traditional lender responsibilities may be exercised without incurring liability. In relation to the legislation as written in 3349, we believe that it is broader than that and would allow for people to take on nontraditional lending activities but under the guise of being the lender escape liability as provided. We would want to at minimum narrow that; however, under the federal law in the court cases the Fleet Factors decision out of the 11th . These minutes contain materials which paraphrase and/er 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. House Committee on Judiciary April 11, 1991 - Page 11

Circuit which indicated that if one had the capability of exercising management responsibility or exercised financial control that they might be held liable. In a case that came from Oregon out of the 9th Circuit, though, the Berkso case, explicitly they indicated that the lender must have exerted actual control before incurring liability. Generally speaking, we believe that the 9th Circuit will be the controlling approach to that issue, but full resolution must be done at the federal statutory level, we believe.

330 REP. BRIAN: Could you point out where in the bill you feel the door is open for the lenders to go beyond (inaudible)? 332 HANSEN: Section

3 of the law, 3.1A, line 29, basically says that the lender shall be liable under the existing law in which the lender holds a security interest or which the lender holds, controls, or manages, pursuant to the terms of an extension of credit. That is mod)fied in lines 34-36. Nothing in subsection 1 shall relieve a lender from liability rising out of release of a facility if the lender then had actual knowledge or by any act or admission. It shortens those two exceptions. If there are other activities that a lender may be involved in that are really operational that are in fact operating a facility in a normal businesslike fashion where anyone else who was doing that would be held liable if they are under the lender test but do not fill the two requirements on 4, Sub A, B, or C, that they would not be held liable. That is not, as we have talked with the financial institutions, the intent but clearly in our view what the law has proposed would do.
375 CHARLES WILLIAMS, OREGON TRIAL LAWYERS ASSOCIATION: We are concerned not just simply with the environmental cleanup aspects of this bill but primarily with the fact that the bill goes beyond simply a partial repeal of the Super Fund law but goes into giving the banks exemptions from strict liability and negligence under traditional tort law under which they were never held liable before the passage of the state CERCLA laws. In that sense this is yet another bill in a long line of bills before this legislature seeking special treatment for special interests. The bill exempts banks from any personal injury from liability for personal injuries they may cause to others through release of hazardous chemicals or other substances when they take back a business and are in fact operating it. Under the section where it says they are not liable when they are acting other than as a lender, they still see themselves as operating as a lender after they repossess a business or are operating it in the course of selling it. If the lender has an operating business, this bill would exempt them, not just under CERCLA but from their traditional strict liability in court for dealing with hazardous substances. If the bank takes back property and wishes to clean up the property, they are exempt from their own negligence in the cleanup for personal injuries to anyone or for property damage. Our main concern is with the impact of this bill on the court system. The actual knowledge test is a very tough test to meet, on line 13, page 4. If you just look the other way, and you don't actually know something but you had some reason to inquire further but you don't want to inquire further because then you'll get some liability. Bill gives the banks some special treatment in the tort system. We urge that it not be passed.
425 REP. CLARK: If you had actual knowledge or reason to know, which might cause somebody else to fall off the bill on the other hand, I'm trying to get some sense of what you're saying to us.

430 WILLIAMS: I have talked to the bankers. Bankers are acting in good faith and have a legitimate concern that they can't lend money now for cleanups and they can't make loans where they otherwise would be able to. I have also have clients who say they won't lend money to anybody unless they don't need the loan. I think the bankers generally do feel that if they could address the problem here they could fund more cleanups and fund more purchases of property and clean up more property. I understand their problem but our organization truly doesn't feel that they should receive special treatment under the traditional tort law and

under which they were never held liable.

TAPE 74, SIDE B

019 REP. CLARK: Traditional tort law or the federal statutes?

022 WILLIAMS: Federal statutes. If we took a vote of our organization they would probably side with OSPIRG but I am not sure that they feel particularly strongly on the CERCLA aspects of it. They probably would be on the side of the DEQ to maintain a parallel standard with the federal law. 065 REP. CLARK: I can look at some of the things that you mentioned and I can at least dream up some language that makes it better from your perspective but it still might be a reasonable compromise, but it's not worth doing that if ultimately it doesn't make anybody happy. 075 WILLIAMS: Our association's primary concern is with personal injuries, while property damage is important. I would suggest the possibility of exempting personai injuries from the liability exemptions given under tort law under the bill. Simply saying this bill does not apply to common law rights; it applies only to the CERCLA would make it much more acceptable for members. The bankers need to speak for themselves. My feeling is that they feel very strongly they need this bill pretty much the way it is.

095 CHAIR BAUM: Is the position of the OTLA a legal or environmental position? 097 WILUAMS: It's the principal position that people should bear responsibility for their own negligence and for strict liability under the traditional tort system when they possess hazardous substances and make a knowing election to do so. That protection of the civil justice system is their overriding concern.

105 CHAIR BAUM: We would like you to address the comment about banks not loaning money unless the customer doesn't need it. 110 FRANK BRAWNER, OREGON BANKERS ASSOCIATION: I agree with his last comment. We believe that people should bear responsibility for their own negligence, particularly in the area of hazardous waste. Regarding credit availability, our opportunity to extend credit to be a part of the solution rather than part of the problem. We don't want to create orphan sites and that's what we're doing. We want to approach this problem on a positive basis rather than negative. I want to also remind the committee it is a two-part bill--lending and fiduciary. Both have unique problems. I also agree that this is special treatment for special interests -- our borrowers, our depositors, our shareholders, etc. But it goes beyond banking. This is not a banking bill. If you read the definition of fiduciary, it goes far beyond banking and that is one

Of the problems that Mr. Hansen spoke to. EPA rules that may be forthcoming if rules come and there's no federal legislation, we won't have the opportunity to legislate when the Legislature has gone home. Mr. Hansen said if we pass 3349 and there was no action on the federal level it would make little difference. Ann Hill from First Interstate will address what we discussed with Mr. Hansen yesterday.

145 ANN HILL, ATTORNEY, FIRST INTERSTATE BANK: In our meeting yesterday, Fred and I also discussed that we do think that it might make

a difference with regard to the "small stuff" where bank may be willing to take a little bit greater risk if the risk they are taking isn't quite so large. We also discussed that I believe the attitude of the banks is going to be determined in great part by the attitude of Fred on behalf of DEQ. If this bill passes and Fred's attitude is that the Legislature has spoken and this is what the Legislature in Oregon wants the law in Oregon to be, he will abide by that and work within the spirit of that. Then I think the banks will be encouraged despite the fact that federal legislation may not yet have passed. If on the other hand, Fred says he didn't want that legislation to pass, is mad about it, and is going to shove the federal law down our throat, then clearly the banks are going to step back and passage of this bill isn't going to make any bit of difference.

163 REP. CLARK: I take offense to comment. I think it's fair for this committee to assume that any head of any major state agency is going to comply with state law.

165 HILL: Rep. Clark, I certainly didn't mean any offense and I think that the nature of my comment is that all lawyers and certainly bank lawyers in Oregon recognize that the federal law is equally available to any person in Oregon with regard to the hazardous substances law. It is a matter of policy choice which law anybody decides to sue under and the federal law is always available and will remain available.

175 REP. CLARK: But if this Legislature determines that for whatever reason it wants to go one step further I think we can safely assume that the agency given the responsibility for carrying that out will do so.

180 HILL: I'm certainly pleased to hear that.

182 BRAWNER: Let's assume that the federal law passes and there's no Oregon counterpart, we would have the same problem in reverse. In other words, we would have to wait until we could speak in Oregon because then the Oregon law could be used even though CERCLA and the federal law had been handled.

195 DAVE ELLIS, ATTORNEY, FIRST INTERSTATE BANK: Personal injury wasn't thought about when drafting this bill. Banks' big problems in this area have to do with property damage and the costs of cleanup of property damage. In trying to exempt that out of this bill, I would want to urge caution. It would be difficult to craft something that would deal with cleanup levels that have yet to be established by the state. Let me paint a scenario, after passage of this act, a lender takes it upon themselves to clean up a site and does that in accordance with guidance from the DEQ to levels that are acceptable to the DEQ. Fifteen years later because of that cleanup it's alleged that since it could have gone further, someone can contract some horrible disease. The levels for cleanup are not well established that you should do it to certain levels. I think what it is for this Legislature is a question of balancing of policy choices here, balancing whether it - 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. House Committee on Judiciary April 11, 1991 - Page 14

is more beneficial to have the lenders available as a source of funding to do this type of cleanup or to have lenders available to redress a type of personal injury for which as far as I know there has not been a

case in this state. It is something that certainly in any sort of parade of horribles, somebody could say, "What if this?" I think it's an unlikely occurrence.

197 REP. BRIAN: Could you clarify for us the question I raised with Mr. Hansen about the intent of the bill in Section 3. As I understood the original testimony was to secure the liability protection in those cases where strictly a security interest is involved, not where you're managing the property after a foreclosure, for example. The point was advanced that Section 3, 1.A is broader than that and allows for attempts to achieve the liability protection even in the case of control and management of the property.

250 BRAWNER: The intent is if we are in management and we can well find ourselves there, we can be on the site temporarily or have hired somebody, an agent can be operating for us, and if we mess up we are just like everybody else. That's the intent. But just because we're there and it wasn't by our choice to be there and there has been a spill that's occurred prior to that, then we're not responsible.

260 CHAIR BAUM: Let's say we have a receiver appointed in a foreclosure. Pending the outcome of the foreclosure you appoint someone to manage the property. It seems to indicate that the controls are managed pursuant to the terms of the extension of credit. Prior to the foreclosure actually transferring legal title over you get a temporary order. Is that addressed anywhere else in the bill, the liability of what a receiver might have in that situation?

268 REP. CLARK: In answering that question, can you tie in the definition of extension of credit?

270 KEN SHERMAN, JR., OREGON BANKERS ASSOCIATION: Our intent was to cover not the sham transaction which has been described, but to cover the situation where the lender or extender of credit has some relationship to the property and is acting with respect to that relationship in dealing with the property. On the receivership question, it would be subject to Section 3. Why would we think it appropriate to limit the liability of the lender under those circumstances? Simply because we believe presently without that protection against liability there are things happening with regard to contaminating properties that are not in the interests of society. Those properties are being abandoned and are not being addressed by financially responsible parties. I think that if you balance the equities, what's really in the interests of society, that this gets closer. It doesn't give us an absolute shield against liability and it certainly is not our intent to give any shield for the sham, but it is intended to take the legitimate lending situation and provide us with a limited shield against liability so that we can get in, finance the cleanup, and take possession of the property. We'll deal with that property more responsibly than the person who polluted it and we think that's appropriate from a social standpoint. Now maybe we could go to a question that Rep. Clark raised regarding the definition of extension of credit. Is there a particular concern there that I can address, Representative?

313 REP. CLARK: You hit on it in your answer which was in response to the Chair's question, how the definition of the extension credit applies to that? 317 SHERMAN: If I can speak a little bit more about the concern that has been expressed about sham transaction, that certainly is a concern for us. We don't want to be party to legislation

which creates a loophole in the laws that have been very carefully crafted to protect the public against this kind of problem. By the same token I feel very confident that if you look at the existing state and federal Super Fund laws you can concoct scenarios under those existing statutes where you can have a sham. There is a supposed protection for lenders under the existing law. The problem is that it has been so narrowly interpreted by the courts in the last few years. If you look at some of the cases that have already been alluded to, it no longer gives us any confidence to do the things that we think are socially responsible. I am absolutely certain that the sham that might be concocted under the existing law or under this bill is going to be looked at very critically by any court. Courts have demonstrated their vigilance in looking for people who ought not be given the opportunity to take advantage of exceptions in the law. I think that vigilance will continue in the courts. 340 CHAIR BAUM: Subparagraph B under Section 3 addresses what happens if you acquire through foreclosure. I'm pretty satisfied with that delineation. The other one is controls or manages with that subparagraph but B following A seems to say this is the topic of foreclosure covered under B. But it seems to state there that "acquired through foreclosure and held for purpose of disposition and satisfaction of the foreclosed obligation". Would it be a problem to say "acquired after the commencement of foreclosure action and held for purposes of disposition and satisfaction of the foreclosed obligation"? It means that once you file that complaint and get that order for that receivership and they put you in charge, any time from then on that the bank comes into control of the property it then has an obligation to be careful it doesn't contribute to the cause. This would quiet some of the fears I hear from people. 370 ELLIS: I don't think that the concept does any sort of damage to our intent. We would have to look carefully at description of foreclosure because commencement of an action to me means that there is some sort of judicial proceeding or even a nonjudicial proceeding. Foreclosed also includes acceptance of a deed in lieu of a foreclosure, and that happens. 380 CHAIR BAUM: If we leave the foreclosed language in there, we just start it off with (inaudible).

382 ELLIS: But if we were to say, "after commencement of an action". 385 CHAIR BAUM: I just want to see if we can address some of the concerns that some of the members have about that. 388 BRAVVNER: Conceptually, we can agree to that. 390 REP. CLARK: You could use the phrase, "process resulting inn or some such thing. 392 REP. MANNIX: Part of answer may lie in going back through the process to get to this provision. You've got to go back and look how carefully "lender" has been defined, and that we're saying that no lender shall be liable under any law creating strict liability. We didn't say you're not going to be liable any longer regarding gross negligence and general liability kinds of standards. We're only talking about strict liability here. Once we're that now, then we drop into acquire through foreclosure. When you look at the definition of foreclosure, that is pretty narrow. We have the conjunctive here and held for purposes of disposition"; it's not a disjunctive. Once we get there, we've already narrowed this provision down pretty far. My

marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes. . _ . House Committee on Judiciary April 11, 1991 - Page 16

concern would be I realize this is a pretty comprehensively drafted bill. If we start changing phraseology, "acquired through foreclosure" had a consistent meaning through here and I think we hit a trip lever and we start tripping over all these other phrases. Doesn't that little exercise I just went through show that this is a pretty narrow provision anyway?

415 SHERMAN: I think it absolutely does. It took me a long time once we had this draft put together to even be able to think in a cohesive whole about it because you really do have to work very carefully through those definitions. If you take any piece of this out of context, it looks enormously broad, but if you really focus on what you have to do to get to each part of the bill, I think you're exactly right. It is narrowly and carefully crafted.

420 REP. MANNIX: For instance, where you have the concept of personal injury, if there's someone who's injured in the course of a cleanup that's not a strict liability action while some people might want it to be. Normally, you will have the standard personal injury cause of action. I'm not aware as to whether or not the cleanup law says that there is strict liability for someone who falls off a truck during the process of cleanup. I don't think it went that far.

427 CHAIR BAUM: Mr. Brawner, I guess that probably is an appropriate comment. We have the definition of "foreclosure". It doesn't say "receivership" in that foreclosure definition. But it talks about acquiring possession to the property. To me, if it helps clarify some of the member's concern, we'll do it. If it doesn't and causes more problems, we won't. I just want to raise that as an issue that by receivership is one of the things you get under the foreclosure definition "property by receivership".

435 ELLIS: Under the fiduciary section of this bill, receivers are protected. The receiver himself has protection.

TAPE 75, SIDE A

004 REP. CLARK: If you look at Section 3, subsection 3 on page 4, lines 9 and 10, "Nothing in subsection 1 or 2 of this section shall relieve a person from liability rising out of its ownership, operation, custody or control of a facility in a capacity other than as a lender". I think I know what that's supposed to say but I guess I'm just a little bit concerned about it as it relates to the definition of lender. The definition of lender is not crafted around the activity but it is crafted around the person's status as a bank, S&L, credit union, finance company, etc. Does the phrase, "in a capacity other than as a lender" create the fairly definite line that I think the bill intended to create? 020 SHERMAN: I understand the question and I think it's one of the concerns Mr. Hanson expressed about the bill as well. It's our intention that it speak to the activity of lending and that it say we've got two standards. What you may do as a lender deserves one level of protection that we're creating by this bill and what you may do in some other capacity is not to be protected. There is a question to be raised there and as you look at the definition of lender, it's really a status kind of a definition or an activity. If you look at that definition on page 2, line 27 we're talking about persons conducting business as an

institution, state agencies, etc. On line 16, page 3, there we are talking about activities. At least for that part of it, we've achieved what our intent is. Our intention is to focus on the activity and to say in lines 9 and 10, sub 3 on page 4, that if you are a financial institution and you own a property that has hazardous waste in

another capacity as a lender then you're not protected. 050 REP. CLARK: I suspect, Mr. Chairman, that we could come up with some language either in Subsection 3 or in the definition to clarify that the definition of lender is intended to be an activity-related definition and not a status-related definition, at least for purposes of this bill. Rep. Mannix is far better at this than I am at crafting that actual language. I don't think that defeats what you're trying to do as I understand it.

055 REP. BRIAN: If on line 28, page 2, the words were "any person conducting business as" and that goes on from there. That very business could mean the takeback and operation of, but we're saying we want to narrow that back to simply lending. If line 28 were expanded to read, "any person conducting business of lending but not including activities of ownership, custody, operation, or control". Does that get us anywhere?

067 SHERMAN: I believe it's headed in the right direction. I want to be extremely careful as we work this language, but I think the goal is clear and I think we're very comfortable with that clarification.

070 REP. MANNIX: I think that if you changed just a couple of words, everything would fit back together. If you look at line 10 on page 4, if we said, "out of its ownership, operation, custody or control of a facility in any role other than as a lender", we are then defining this in terms of the role that someone plays. Capacity is a nice term of art for lawyers but it may not always be understood. A lender may have different roles to play and we have defined lender here as a particular kind of player. I could say, for instance, if we look at lender we start out saying, "any person conducting business as an institution"...and we go through this list of different kinds of institutions and individuals. Now we've identified then institutions and individuals as lenders; we haven't defined them in terms of the role they are playing and they do lots of things other than lend sometimes. If we said "role" or "in any capacity other than as a lender", the word "any" instead of "a" would suggest that someone may have a variety of capacities (I'm a citizen; I'm a lawyer; I'm a legislator). Do you see what I'm getting at?

100 BRAWNER: Rep. Mannix, when you say that "lender" means and then you've got A, the list of lenders, and then you've got B, that says here's what the lender does, and C, also what the lender does, we want to make it clear, and whatever it takes to make it clear we shall do so, but B and C...

107 REP. MANNIX: O.K., I can see the conjunctive all the way over here on line 18 of page 3, sub B and sub C are added in there and we have very clearly narrowed down the role. Looking at that language, they've obviously done a very nice job of going back and tightening it. 112 CHAIR BAUM: If we add on page 1, under the definition of foreclosure,

the words "by receivership" into that definition that goes on to page 2, would that alleviate any concern about section 3 about the fact that they may be in control and not be in what we define normally as a foreclosure? Is that a problem? In my mind, that makes the whole thing fit together and then we don't have to tinker with it anywhere else.

125 BRAWNER: We concur.

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126 CHAIR BAUM: I think that's intended by that but this will make it clear. I want it at the top of page 2, line 1, by "receivership" right after "in nonjudicial foreclosure proceedings, by receivership..

130 REP. CLARK: There's something that doesn't fit in my mind about including receivership as part of the definition of foreclosure.

135 CHAIR BAUM: They've got it pretty expanded there. I was just trying to get it to dovetail with subparagraph B under Section 3 where it talks about "acquired through foreclosure".

140 REP. MANNIX: I guess the question is whether or not the proponents can live with that phraseology in there.

145 ELLIS: I think that's fine, Mr. Chairman. I don't think it does any damage to the intent. If you look at page 3, line 19, in the definitions of a lender it includes "any receiver or other custodian appointed to take possession". 150 CHAIR BAUM: Do you understand what that does when you read that definition into subparagraph A under section 3? It says, "in which the receiver holds a security interest in which the receiver holds, controls, or manages pursuant to the terms of an extension of credit". You could argue that a receiver can therefore be exempt without any further conduct and be a part of creating the mess. I read the whole bill and that's why I came back to receiver. Receiver is a lender and under subparagraph A it states, "in which the receiver holds a security interest or the receiver holds, controls, or manages is exempt from liability" then you've given him an out. If they've just appointed a receiver, then they can get away. I want to tighten that up. 160 ELLIS: This is a receiver that's appointed to enforce a lender's rights. I think that narrows it down to alleviate your concern. 165 REP. MANNIX: And in connection with an extension of credit. 167 ELLIS: Line 20? 170 CHAIR BAUM: That arguably holds the receiver in a position where the receiver could be in control of property and you could be trying to give him time to work out an extension of credit while you receive the property and they may be out trying to get financing from other folks and arguably could give a bank a way out which may be final. 175 REP. MANNIX: If you could insert, "by receivership", and the Chair likes it, why don't we just do it. 178 BRAWNER: I do believe that it clarifies and we have no problem with the insertion. ~ 180 MOTION: Rep. Mannix moves to amend HB 3349 by inserting the phrase, "by receivership", after "nonjudicial foreclosure proceedings" on line 1 of page 2 of the bill. 187 REP. CLARK: In terms of proper grammatical style, I notice that we're saying "acquire title to or possession of property through", we shouldn't use the word "by" there but just put in

"receivership".

192 VOTE: Hearing no objection, Chair Baum so moves. 193 REP. CLARK: Rep. Mannix, you raised a concern to Mr. Sherman about the phrase "lender" and whether it's a capacity question or a role question. I didn't hear what the outcome of that line of questioning was.

202 REP. MANNIX: On p. 2, line 27, sub A, we went through all of that. I didn't pick up on the fact that on p. 3, line 16, sub B regarding extension of credit, and on line 18 the conjunctive, "any receiver" -- all three of those, A, B, and C are all in the conjunctive and all three have to be met. So you've really narrowly defined the role of the lender anyway. 210 MOTION: Rep. Clark moves to amend HB 3349 on page 2, line 28 in the definition of lender after the words, "after any person" by inserting the words "to the extent that the person is", so that it would read "lender means" sub A "any person, to the extent that the person is conducting business as". VOTE: Hearing no objective, Chair Baum so moves. 226 MOTION: Rep. Mannix moves HB 3349, as amended, to the Full Committee with a Do Pass recommendation. VOTE: In a roll call vote, the motion carries with all members present voting AYE. Reps. Edmunson, Johnson, and Bell were excused. Rep. Mannix will carry.

The committee takes a short break.

HB 3279 - PUBLIC HEARING 270 MICHAEL V. PHILLIPS, OREGON TRIAL LAWYERS ASSOCIATION: Submits written testimony opposing HB 3279 (EXHIBIT B).

360 CHAIR BAUM: How did the English pull this off? 362 PHILLIPS: They have a different attitude about litigation and the role that litigation plays in dispute resolution. There simply is less there, where in fact our efforts at shifting attorney fees have been designed to encourage litigation. It is a less litigious society. It is our view that adoption of this bill is not going to make this a less litigious society. It is going to make it a more litigious one because we're going to be litigating attorney fees as well as everything else. 375 REP. MILLER: As the sponsor of this measure, I want to tell you I'm not against hardworking, caring Oregonians. I appreciate your concern. In your beginning you talked about how this would encourage litigation but in your closing you said it would discourage litigation. Which one of those tracks do you want to be on? 382 PHILLIPS: I think as a general matter it would encourage litigation.

385 REP. MILLER: Even though you're convinced the English system discourages litigation?

387 PHILLIPS: I didn't say that the system discourages it. I said that it is a less litigious society with the attorney fees provision having little or nothing to do with that. It's simply a different view about

how some disputes are being resolved than we do. There's nothing, I would suggest, that indicates that this is going to reduce the amount of litigation. It simply is not a measure that gets at frivolous litigation that's a concern. We already have that provision. It allows attachment of attorney fees to both litigants and their attorneys if they brought frivolous litigation. This bill doesn't do anything about that. What it does do is assure that in some areas we are going to be litigating more things than we already are and we're going to attach to every piece of litigation a rider about some other issue to be resolved by litigation. When I said that I thought it discouraged litigation, I think it affects a body of our politic and discourages those people from litigating who have some assets for which the taking of those assets would be devastating. The bill does not affect the poor, does not discourage them from litigating because a judgment against them for attorney fees doesn't make a lot of difference and can be discharged in bankruptcy without much adverse effect to them. It does not affect assess to the court of the wealthy because it is simply for them a cost of doing business, including the wealthy by virtue of having pooled their assets in an insurance company paying insurance premiums. The only people it discourages from litigating in this state are those who have a modest amount of assets, for losing those by virtue of a judgment and having been wrong in a good faith dispute would be devastating. 418 REP. MILLER: I've got to go testify on another bill, but at the appropriate time I'll state my disagreement. I also suggest that I have a concept I've endorsed before and will probably advance, perhaps even in a bill we saw earlier today, an idea that suggests that those who are involved in frivolous lawsuits, the attorneys should be diSB arred. Would you support that idea?

425 PHILLIPS: I have no quarrel with the notion if somebody is intentionally engaged in frivolous litigation. The problem is the identification of what litigation is frivolous and not frivolous. None of us ought to be engaged in that activity.

430 REP. CLARK: Regarding your comments about the British system, theirs is a less litigious society. It probably has more to do with their culture and their inherent conservatiSMand also with the fact that we've been very specific in this country about what our rights are and we write them down here so people know about them, including a certain segment of society who might not otherwise and might be afraid of the courts. I think you would agree that we have too much litigation in this society. Maybe you wouldn't and I guess I need to ask you that first off.

TAPE 76, SIDE A 002 PHILLIPS: We have a lot and we have it at the same rate that we've had it for 200 years. We have a lot more people and as a result we have a lot more litigation. 005 REP. CLARK: We don't have any more people in this country than we did, effectively so, than we did ten years ago, or twenty years ago, and litigation rates are higher. 008 PHILLIPS: Criminal litigation is a lot higher. But if you look at civil litigation and the civil litigation rates, the rate has remained about the same for years. If you look at studies of federal

litigation and you take out the federal government's multiple lawsuits

against students for - collection of student loans or you take out numerous pieces of litigation about aSB estos litigation because they were brought as individual suits we haven't changed the rate materially at all.

020 REP. CLARK: You apparently have some access to statistics that I don't. I'm curious at your statement that the bill will not discourage litigation among those parties that you term as rich corporate and wealthy individuals. That's because so often those lawsuits are governed by some sort of attorney fee provision either in the statute or in contract.

028 PHILLIPS: A certain number of them are now. The largest litigation among the rich are the antitrust cases which already have a two-way attorney fee provision. No one suggests the level of litigation about that is affected by that attorney fee provision. Much of it is contract action with contract provisions. That's not particularly what I mean. It is those people who have a lot of assets can treat as a cost of their doing business access to the courts. The relative impact on people with few assets is that they can't afford to absorb that cost.

040 REP. CLARK: But if you take the cost of doing business notion, most of my practice involves representing small businesses in business litigation. There are always attorney fee provisions involved, either contract or statute. Those attorney fee provisions are always a factor in settlement or in bringing the lawsuit to begin with. They are a consideration in the mind of the person contemplating filing the lawsuit, in the negotiations for settlement, and all the way through. I've seen dozens of times when someone does not go to trial for a variety of reasons but choose to settle rather than go to trial, largely because of the attorney fee issue. To that extent, I find the logic of the bill persuasive; in fact, I'm undecided on the bill. But to that extent only if that's what the bill is trying to get at I find it persuasive. Do you not share that experience in terms of the effect of an attorney fee provision in litigation?

060 PHILLIPS: Once I find that to be the effect of the bill or the effect of the contractual provision for that group of people, whether private citizens or business for whom an adverse attorney fee award would be disastrous and for a private citizen with modest savings or a small business owner with modest cash flow or modest assets. The people it does not affect are people that are essentially judgment-proof, which in the world we're dealing with broadly of litigation provides for that group of potential claimants an opportunity to extract a premium in order to get out of a case. That is the premium that the adverse party may have to pay attorney fees. I don't see in that any salutary purpose in discouraging litigation. If anything, for that group of potential plaintiffs it encourages it. Maybe that's the choice the Legislature wants to make. It is certainly the choice made by Congress, for example, in enacting Section 198 8. It wanted to encourage those people most likely to be abused by government, poor people, to be sure that they could sue and that they could obtain full recovery and not have to finance it themselves. If the Legislature wants to make that choice, it can make it and could make it quite rationally but it will do so at the expense of some people who will not choose to use the court for the very reasons that you talked about; they can't afford to do it. They can't afford the risk of either being wrong or the risk that they can't prove that they were right which are not necessarily the same thing.
097 JIM SPIEKERMAN, PUBLIC AFFAIRS COMMITTEE, OREGON STATE BAR: One of the committees that has looked at this is the Judicial Administration

Committee and introduces Monty Bricker who will indicate some reservations that the committee has after studying the bill.

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103 MONTY BRICKER, JUDICIAL ADMINISTRATION COMMITTEE, OREGON STATE BAR: The Bar is opposed to the bill and we believe that it requires a great deal of study. It's a terribly complex bill and isn't just as simple as awarding attorney fees to those who win. In fact, that is what it does. It awards mandatory attorney fees to those who win. If you believe that anyone should be entitled to attorney fees if they win the litigation, then you would vote for this bill. I think that if you believe there is too much litigation and you want to reduce the litigation, then this is a good bill and you should vote for the bill. However, if you believe our courts should be accessible to certain people who cannot otherwise come into the courtroom, then this is a bad bill because this bill, in our opinion, would drive out those low income people who simply don't have access to the courtroom generally. Historically, for at least 195 years, the American rule is that you pay your own attorney fees. That rule was first enunciated by the Supreme Court of the U.S. in 1796 and it continues to be the rule today. We've had some exceptions. But in 1796 the Supreme Court took away a $1,600 attorney fee which was a tremendous fee in those days because it said the Rhode Island court that awarded that fee to the plaintiff's attorney because they had won the lawsuit was simply acting contrary to the general rule in the United States. There are certain exceptions: private contracts, statutes which provide for certain attorney fees. The Legislature has created a number of exceptions for what I call socially beneficial legislation. It gives access to the court to those people who normally could not afford to come to court or for those lawsuits which involve very little money but are a problem which have to be addressed. Often the people who are affected are those with low incomes, people with housing problems, consumer finance problems, or income maintenance problems. This legislature has provided that in certain similar instances if you prevail as a plaintiff with your grievance then you would be entitled to attorney fees. Another category is those which involve small sums of money. If those people had to face the payment on their part of attorney fees then they couldn't afford to come into the courtroom. I disagree with the last speaker. I don't think they would automatically take bankruptcy and would not be afraid of this legislation. I think there are a lot of people out there who simply would avoid legislation. In Oregon we award attorney fees for the victims of discrimination. This bill would require the victim, if he or she couldn't prove their case, to pay attorney fees. In Oregon we award attorney fees to shareholders who have to sue to get the corporation's books. If they weren't able to prove their case, then they would have to pay for the shareholders' lawyers. In this state, we award attorney fees to the victims of unlawful trade or collection practices. If they couldn't prove their case, they would have to pay for the corporation's lawyer. We believe that HB 3279 would have chilling effect on litigation which is and should be encouraged for public policy reasons. We are therefore opposed to the bill and believe it should be thoroughly studied by this committee. 210 SCOTT PHINNEY, CHIEF HEARINGS OFFICER, DEPT. OF REVENUE: We have same concerns as Oregon State Bar. Recently the Supreme Court defined what a prevailing party is, and you don't have to win to be a prevailing party. All you have to do is get some measure

of relief from the status quo. That concerns the Department a great deal because of the nature of the type of cases that we have go to court. Our tax appeal process is different than most appeal - processes. We have what's called de novo hearings at all levels of the appeal process. That means you basically start fresh each time you go to the next level of appeal. The Department of Revenue conducts a full evidentiary hearing, makes findings and conclusions, and issues an order. If you appeal that order to the Oregon Tax Court, the Tax Court starts all over again, new witnesses, new testimony, new evidence, makes its own findings and conclusions, and issues an order. Supreme Court can make its own findings from the record developed at the Tax Court. - These minuter 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. - House Committee on Judiciary April 11, 1991 - Page 23

This situation is somewhat unique. A property tax case went to Supreme Court and had to do with valuation of computer equipment. The Department determined that the value of the property was $26.5 million. The taxpayers went to Tax Court. Everybody presented new evidence. The Department looked at more recent data and supported a value of $23.5 million. The taxpayer was seeking between $7-12 million. The Tax Court found completely for the Department and upheld the value at $23.5 million and awarded costs to the Department under the provisions that allow that. The taxpayer appealed to the Supreme Court and claimed that the Department was not entitled to costs because the Department was not the prevailing party. The Supreme Court agreed that the taxpayer was the prevailing party even though the Department won the case because the taxpayer got a reduction from the status quo value of the property. Under this bill, the Department would be forced to pay attorney fees even though the taxpayer lost the case. Because of the definition of prevailing parties that the courts seem to be adopting, you can have people who actually are losing the case but being considered the prevailing party and would be entitled to attorney fees. This bill could inhibit the settlement of cases in court. Any reduction from the status quo would be considered a win for the purposes of determining the prevailing party. It's much less likely that the Department will be willing to settle or compromise a case because it will subject them to automatic awards of attorney fees which can be quite substantial. The tax laws in state are not clearcut. The court is being used to help resolve some very sticky legal issues. This will tend to encourage agencies to take the safe approach, grant relief even though it may be against public interest, to protect them from going to court and suffering the consequences of having attorney fees awarded against them. 332 REP. MANNIX: Wouldn't it be possible, however, to go through the law and select certain sections and make a determination as to the matter of social policy that at least in regard to A provision, B provision or whatever, that this might be the right way to go as opposed to an across-the-board approach. I recognize the legitimacy of your concerns. On the other hand, I've been outraged sometimes at the expense that the government or individuals have had to go to defend against obscene litigation. And yet the court rules and the legislation allow a recovery of attorney fees for frivolous lawsuits. The courts have so narrowly construed it that anybody can sue anybody at any time and end up not having to worry about paying attorney fees when they lose. Is there some compromise position we could achieve and select some statutes where this kind of protection ought to be put in? 350 PHINNEY: The Department is not necessarily opposed to the concept. We wanted you to be aware of some of our concerns in its administration. I think you're

absolutely right. There are cases when attorney fees awards are proper. I'm mostly familiar with the Tax Court and the Supreme Court dealing with tax cases. The Tax Court has started in the past couple of years to award attorney fees for frivolous lawsuits. We also have a provision that allows the court in certain cases to award attorney fees to the taxpayer if the Department's position was completely unreasonable. There was no support for the Department's position in the record at the Department hearing. That's an example of somewhere in between that might work quite effectively. 362 REP. MANNIX: Is part of the problem that we award attorney fees almost like a penalty instead of having a separate sanction provision that says the court ought to sanction somebody? We've almost treated it as a penalty for being frivolous or unreasonable and therefore the courts are very reluctant to make any kind of an award because they're casting judgment about the validity about the action brought by somebody.

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367 PHINNEY: I wouldn't want to try to pose what the intent was when those fees were put in but certainly the effect is that people consider attorney fees for frivolous lawsuits to be penalties. Whether that was what was intended when they were enacted, I'm not sure. 370 REP. MANNIX: Is that because the British tradition and the American tradition have diverged so much? 373 PHINNEY: I'm not a legal historian; I don't know. Regarding a non-filer, someone who is trying to avoid complying with state's tax laws. This type of legislation would encourage withholding information from the Department at the Administrative Hearing level because if you have an ace-in-the-hole piece of evidence and you can spring it on the Department at Tax Court you can win and get your attorney fees paid for. If you brought it at the Department you might still win, but you won't get your attorney fees paid for. That's a bad message to send to people that you may have to go one step further in the process just to get your attorney fees. I don't think this is something we want to encourage. There could be appeals simply on the issue of attorney fees. It would make most litigation more complex and take more time. We don't have a lot of complaints under the current system. The Department is concerned that if this legislation or something like it does go through we need to know what a prevailing party is. Is it someone who gets a dollar relief even though they lose their case or is it someone who actually wins? How do you determine what a prevailing party is on a challenge to an administrative rule? If the administrative rule is amended as a result of the litigation, does that mean someone won or lost? It's not defined in the statute.

425 REP. MANNIX: That's something that I can relate to in terms of my practice as a defense attorney. I often find that I may consider myself to have won the case if the other side won $10,000 for a settlement and we refused to give more than $3,000 and we go to a jury and the jury awards $2,500. I figure we won that case in terms of what the battle was really all about because we thought there ought to be some kind of award made but not what they wanted. Yet in terms of a statute one might say that they were the prevailing party.

433 PHINNEY: Based on the Benjamin Franklin case, it looks like they would be considered to be the prevailing party. When you figure in their attorney fees, they actually would be the prevailing party.

435 REP. MANNIX: What if we move out of the tax arena, maybe your own concern is the tax arena, and said that each party could provide to the court a sealed envelope showing what their last best offer was and then you have a much better idea of who won as the result of the litigation.

TAPE 75, SIDE B

040 PHINNEY: I think if you look at condemnation proceedings there's already that type of provision where the final award is more than the last best offer of the state or county and then there is an entitlement to attorney fees. That kind of thing I think helps quite a bit because then you still have the potential of settlement and an informal resolution of the case which I think is something that we're all trying to encourage in all the legal processes to try to cut down on litigation. . _ . These minutes contain materials which paraphrase and/or summanze statements made during this session. Only text enclosed in quotation marks report H speaker's exact words. For complete contents of the proceed ~gs, please refer to the tapes. House Committee on Judiciary April 11, 1991 - Page 25

050 REP. MANNIX: It's quite a hammer on the civil side for a defense attorney to be able to say, "Here's my last best offer and if you don't prevail under this new standard I also get my attorney fees out of your hide."

052 PHINNEY: That's right. I'm not sure that makes me very happy with the bill. The Department isn't necessarily opposed to the concept, but certainly that would alleviate some of the concern. That has more application in the non-tax area than in the tax area. The other concern we have is how would you measure attorney's fees? Is there going to be cap on the hourly rate that an attorney can charge? Is it a fixed formula? Are there some set standards of how long a particular type of case should take? There could be a lot of swing in the types of awards, the amounts of awards, etc. I'm not sure that is good for the system either. Also the payment of awards? We've got cases that go on for several bienniums. The payment question is another issue that's not addressed in the statute but is a major concern because we could potentially face huge attorney fees awards when you have major multi-national corporations coming in and bringing their in-house counsel, their New York counsel, and their Oregon counsel, and you have five or six attorneys sitting at the table those fees add up very quickly. That's another concern that the bill doesn't seem to address.

088 REP. MILLER: The intention is if you won, you wouldn't worry about attorney fees. If your case was good enough to prevail you don't need to worry how many batteries of lawyers are opposing you as long as your case has merit and prevails. If you lose, you have a problem. 090 PHINNEY: That's true. In a sense of a frivolous lawsuit that's a legitimate point.

095 REP. MILLER: Why should the winner pay your fees? Why do they have to pay for the trouble of prevailing? They didn't need to be there if you or someone else who caused them to be there had acted appropriately.

097 PHINNEY: I'm not sure how that would apply to the type of cases that we deal with. If the County Assessor sets the value of your property and you dispute that, you come to the Department of Revenue. When you go to Tax Court, the Department of Revenue is the defendant. Why should the Department of Revenue pay the attorney fees of a taxpayer

because they don't like what the County Assessor put on their property? I'm not sure that makes any sense. 110 REP. MILLER: Should the taxpayer who was correct pay for the attorney fees? If the assessment was high and they thought it was high and they thought they should pay $16,000 instead of $20,000 and I'll give that to you. Then you say you want $20,000. The court says the taxpayer was right; it was only $16,000. Should they have to pay their attorney fees to prove they were right and you were wrong?

117 PHINNEY: I think they should because taxation is based on doing what works for the overall system. When the counties go out and appraise property, they do mass appraisal. When the Department does assessments and audits, they've used the best information available. There is always the possibility of errors. You're giving people the right to address those problems and allowing them to do that without the need of an attorney. If they are right, then they prevail and they receive the benefit of a reduced valuation.

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135 REP. MILLER: They pay the $16,000 plus get wiped out by their attorney fees.

138 PHINNEY: It should be their decision whether or not to use an attorney. The Department isn't opposed to the concept, but we have some concerns and questions about how this might work. The financial impact on governments is going to be high. Governments have to take action to administer the programs they administer. If you're going to hold them accountable for attorney fees for doing the best job they can do and there's no negligence or malfeasance, I'm not sure that is appropriate.

170 REP. JOHNSON: There's been quite a bit of testimony on this bill that it might disenfranchise lower income people from their court system. If trial lawyers are concerned about that we could add something that would say that any contingent fee arrangements seeks redress. If the plaintiff loses, the attorney for the plaintiff will pay the opposing parties' attorney's fees.

188 PHINNEY: That's an interesting concept. I think that would tend to chill whether or not attorneys would take cases that are questionable.

187 REP. JOHNSON: That's probably what we should be doing, not having questionable cases go forward unless there's good reason for it.

190 PHINNEY: The only caution I would make was brought up by the speaker from OTLA. You have to make a distinction between what's frivolous and what's a good-faith, honest dispute over what the law says. Those are the cases I don't think we want to discourage.

196 REP. BELL: It sounds to me, Rep. Johnson, like you want to become the judge and determine which cases could be heard and which ones wouldn't be heard.

200 REP. MILLER: I want to cite for you a statute we ran across earlier today. "An attorney shall never reject for any personal consideration the cause of the defenseless or the oppressed." So I'm sure that plenty

of counsel would be available. 210 DOUGLASS HAMILTON, OREGON ASSOCIATION OF DEFENSE COUNSEL: Submits and summarizes written testimony in opposition to HB 3279 (EXIIIBIT C).

305 REP. MILLER: If such a system was enacted do you think it would increase or decrease litigation?

310 HAMILTON: I would guess that it may decrease litigation. I would want to know why that was happening, who now had a disincentive to litigate, and make certain that we were not having a chilling effect on a segment of society that may need the courts as much as anyone. It may be the only portion of our current system that answers to them regardless of economic interest. An appropriate attorney fees sanction balanced bill would probably make litigants more responsible. This particular bill which singles out prevailing at the end of trial may increase the number of people who are willing to roll the dice to a conclusion who might otherwise settle to get the attorney fees prize or through using the coercion of the possibility of receiving an attorney fee to get an advantage other than on merit. Our problem and the tenor of our testimony is we don't know what that effect would be and we're fearful that it could be dramatic and that we ought to know more before we go further.

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340 REP. MILLER: I'm always hopeful about pieces of legislation that I've attached my name to that they have some opportunity for passage. One of the considerations in this bill was that we would have a good discussion of the current system and see what improvements could be made within the next few months or over the course of the summer and the coming year.

350 REP. MANNIX: Couldn't we make one reasonable step forward if we simply change the word "frivolous" to the word "unreasonable" in the statute authorizing judges to award attorney fees? Frivolous is such an extremely high standard; it's hard to say anyone's argument is frivolous. It's often a lot easier to understand when something's unreasonable.

360 HAMILTON: It's like obscenity. You can't define it but you know it when you see it.

362 REP. MANNIX: What if we made legislative history by changing "frivolous" to "unreasonable". Right now it's probably one case out of 10,000 they'll find frivolous; we're talking maybe one out of 500.

365 HAMILTON: We need to look at the level of integrity of the case as one item in the award of attorney fees. By changing the word you state the intent but I don't know if you really set a predictable standard that's going to be very easy to apply. I think the standard needs to be changed.

373 REP. MANNIX: I think you could have the standard of object reasonableness, couldn't you, which subjectively you might say it's reasonable for someone to go out and do this but objectively this is not reasonable litigation.

377 HAMILTON: I agree with the general concept, but I'm not sure by changing the words we get to a predictable standard.

380 REP. MANNIX: It certainly couldn't be any worse. 382 REP. BELL: Could you make a supposition about what this would do to malpractice insurance premiums?

383 HAMILTON: I can't.

384 REP. BELL: Would you guess that they would go up dramatically? 385 HAMILTON: I don't think malpractice would necessarily flow from losing a case.

390 REP. BELL: I mean the cost of defending a professional that had malpractice insurance. They would have to add on the extra in case there was any award at all to the other party.

395 HAMILTON: Certainly the potential is there. The defendant is held captive by this bill. It doesn't have a choice of settling. It's there to the end if the plaintiff wants the defendant to have to go to judgement. This bill probably needs a flip side which gives the defendant a way to put the plaintiff in jeopardy. If there were balance, maybe cases would settle earlier; maybe no one would get attorney fees and the premiums would remain the same. I would just be speculating

on this bill. I would think maybe they would go up.

TAPE 76, SIDE B

HB 2828 - WORK SESSION

065 REP. MANNIX: Do these amendments incorporate Bill Linden's suggestion about law enforcement unit?

070 GREG CHAIMOV: No, it does not, but I believe it takes care of the same problem.

073 REP. JOHNSON: Could you explain the difference between the two amendments?

075 GREG CHAIMOV: Bill Linden's amendments simply require the subpoena to go directly to the law enforcement agency rather than through the court. I've included additional language that requires sending the check and other material together so that they arrive at the same thing, but the Counsel amendments makes some additional changes to ensure that secrecy is maintained. 082 REP. BELL: This doesn't include the part about the expert witness versus any witness?

085 GREG CHAIMOV: That's correct. It still would apply only to police officers appearing as expert witnesses. That's not Rep. Minnis's desire but I have written the amendments to maintain the form of the original bill. 090 CHAIR BAUM: This would apply to both male and female officers, regardless of who delivered the check. 095 MOTION: Rep.

Mannix moves Counsel's proposed amendments to HB 2828.

VOTE: Hearing no objection, Chair Baum so moves.

098 REP. JOHNSON: I'm confused about the difference between Section 2 and Section 4. Section 4 talks about police officers who are called as expert witnesses in civil cases and Section 2 refers to whenever police officers are called as expert witnesses by a party. What's the distinction?

110 CHAIMOV: I don't believe that the difference in language is intended to create a different result and it might be appropriate to insert after the word "witness" in line 12 on page 1 "in a civil action".

115 REP. JOHNSON: We are talking about civil actions in this case, right? We're not talking about having DA's pay for policemen to come and testify in criminal cases? 115 CHAIMOV: That's correct. Section 9 of the act specifically provides that the act does not apply to any proceeding in which a public body is a party and presumably the public body would be a party to any criminal proceeding.

123 REP. JOHNSON: Why do we need paragraph 4 then?

125 REP. MANNIX: That's a deposit provision.

127 MOTION: Rep. Johnson moves to amend HB 2828 by inserting "civil" in line 12 after witness to read, "as an expert witness in a civil cas ". VOTE: There being no objection, Chair Baum so moves. 157 MOTION: Rep. Johnson moves to amend HB 2828 by changing line 21 of page 2 to read, "a police offlcer who is called as an expert witness in a civil case". VOTE: Hearing no objection, Chair Baum so moves. 165 MOTION: Rep. Johnson moves to amend HB 2828 by deleting the word "expert" as it appears throughout this bill so that this applies to all circumstances in which a police officer is called by a civil party to come into court, take time off of this job, and take part in a case, even if he is doing nothing but stating the facts that he observed at the scene of an accident. They're being asked to take part in a civil action on behalf of a private party who's either defending a case or prosecuting a civil so it's reasonable that those parties who are bringing the case to bear the brunt of that cost rather than the police agency or the policeman. (Discussion continues.) 185 CHAIR BAUM: I think it can be said of this county if we do this it'll have done its part to raise some revenue for local governments. It will generate a little bit of money. 187 REP. BELL: I want to object to that. I have the feeling that we would get a lot of resentment from public individuals who pay their taxes all of their lives and they have a reason to need a police officer who is involved in their situation and it's on public time, then to have to pay him for his help. I feel that it's asking too much. If you're bringing him in as an expert above and beyond the role of his duty, I can understand that. To ask the individual to pay for that person to come in when he's already a public official and should have some feeling for serving the public, I think it's too much. 202 CHAIR BAUM: I think the public body would be the one receiving the dollars.

205 REP. MANNIX: I remember last session we had a bill about going after workers' compensation benefits for child support and spousal support. It only applied to temporary disabilities, what's called time loss. I asked why we weren't doing it on permanent disability. We got it through the House and the Senate. Two days ago we passed out of the Labor Committee the other half of the package which allows for child support and spousal support out of permanent disability benefits of workers' compensation. I hope that will pass the House and the Senate. If we take too big a bite with this bill, we couldn't even get last session's version of this heard in the Senate. I'm hoping that we can get this through the Senate this time. If we make it anytime you call a police officer, they'll have a real great excuse to not hear the bill at all and I'd like to at least deliver on the expert witness fees, so I'm going to oppose the amendment. 220 CHAIR BAUM: That's two out of five. We kind of have a constitutional problem here.

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230 REP. JOHNSON: I appreciate Rep. Mannix's comments about the Senate. If I had my choice on whether to take this bite or nothing I would prefer to take this bite and next time work on the other bite. As to Rep. Bell's comment, I appreciate that concern but the point I want to make is the public is not asked to pay for the services that the policeman is hired to do. We're talking about someone suing someone in a civil fight over whether or not that person should have gotten injured in the first place and has nothing to do with the true reason the policeman was hired in the first place. He just happened to be a witness. They could have called any number of other people for that.

247 REP. BELL: Rep. Johnson, do you think that the school district should have to pay when the policeman comes over to talk about safety to the school kids?

250 REP. JOHNSON: That's part of his duties.

277 VOTE: In a roll call vote, the amendment to HB 2828 was adopted with a majority of members voting AYE. Reps. Bell and Mannix voted NAY. Reps. Brian, Clark, and Edmunson were excused. 285 MOTION: Rep. Mannix moves to amend HB 2828 in Section 1 to include the following definition, "civil case means any proceeding other than a criminal prosecution". VOTE: Hearing no objection, Chair Baum so moves. 320 CHAIR BAUM: Closes work session on HB 2828. Adjourns the meeting at 4:48 p.m.

Submitted by: Reviewed by:

Carol Wilder Greg Chaimov Assistant Counsel

EXHIBIT LOG:

A - Testimony on HB 2780 - R. William Linden, Jr. - 3 pages B - Testimony on HB 3279 - Michael Phillips - 3 pages C - Testimony on HB 3279 - Douglass M. Hamilton - 6 pages

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