

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks

report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

Measures Heard SB 421 (PUB) SB 427 (PUB) SB 405 (PUB) SB 374 (PUB) SB 396 (PUB)

SENATE COMMITTEE ON THE JUDICIARY

January 23, 1991Hearing Room C 1:15 p.m.Tapes 6 - 7

MEMBERS PRESENT:SEN. JOYCE COHEN, CHAIR SEN. JIM HILL, VICE CHAIR  
SEN. PETER BROCKMAN SEN. JIM BUNN SEN. JEANNETTE HAMBY SEN. BOB  
SHOEMAKER SEN. DICK SPRINGER

STAFF PRESENT: BILL TAYLOR, COMMITTEE COUNSEL MARK THORBURN,  
COMMITTEE ASSISTANT

WITNESSES: SEN. SHOEMAKER

GARY CONKLING, TEKTRONIX, INC., PRECISION CASTPARTS CORP., BOHEMIA INC.,  
AND ELECTRO SCIENTIFIC INDUSTRIES, INC.

HENRY HEWITT OF THE STOEL RIVES LAW FIRM REPRESENTING TEKTRONIX, INC.,  
PRECISION CASTPARTS CORP., BOHEMIA INC., AND ELECTRO SCIENTIFIC  
INDUSTRIES, INC.

ALLAN LEEDY, TEKTRONIX, INC.

JAMES SPIEKERMAN, VICE PRESIDENT, OREGON STATE BAR

GEORGE RIEMER, GENERAL COUNSEL, OREGON STATE BAR

WENDELL KUSNERUS, ATTORNEY FOR US BANCORP REPRESENTING THE  
DEBTOR-CREDITOR SECTION, UNIFORM LAWS COMMITTEE, AND THE BUSINESS LAW  
SECTION OF THE OREGON STATE BAR

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TAPE 6, SIDE A

SB 421

004 CHAIR COHEN: Calls meeting to order 1:15 pm. Introduces Gary Conkling.

012 GARY CONKLING, TEKTRONIX, INC., PRECISION CASTPARTS CORP., BOHEMIA INC., AND ELECTRO SCIENTIFIC INDUSTRIES, INC.: In favor of SB 421. Will be speaking with Henry Hewitt, who's present, and others who are not. Will, with Hewitt, give background of bill.

022 CHAIR COHEN: If others not here yet when you're done, we'll discuss other matters until get here.

024 HENRY HEWITT OF THE STOEL RIVES LAW FIRM REPRESENTING TEKTRONIX, INC., PRECISION CASTPARTS CORP., BOHEMIA INC., AND ELECTRO SCIENTIFIC INDUSTRIES, INC.: SB 421 would strengthen Oregon's existing laws regarding takeovers. Refer to written testimony (Exhibits A and B)

099 CHAIR COHEN: What are the specific requirements to negotiate about?

103 HEWITT: It will only affect the ability of the bidder to do certain transactions after an acquisition that were with itself so that if bidder or another seeking acquisition wants to merge it into the parent or sell it's assets and use proceeds to pay off parent company debt or other transactions that were for the benefit of the acquirer, and may not be to the ongoing benefit of the target company, then the statute would apply and those kind of transactions would be prohibited for three years unless they're approved by the ongoing shareholders approved by the target company in advance of the acquisition or the acquirer acquires at least 85% of the shares.

115 So we're going to make them acquire 85% or negotiate an agreement before doing anything that has to do with selling, consuming, or mortgaging?

117 HEWITT: Correct.

118 CHAIR COHEN: What about moving out of state?

119 HEWITT: They can do that. This does not prevent any kind of thing that they might do with a third party or independent of a transaction in which the acquirer would benefit. They can conduct business as they thought it was best conducted so long as they do not benefit differently from other shareholders.

125 CHAIR COHEN: Who decides who is benefiting from some particular action?

130 HEWITT: Ultimately, it's the courts. Important to note that the legislation brings about negotiation and resolution. Lists examples. If shareholder complains that a company is being unreasonable in not accepting proposal, there is a wide body of law relating to acquisitions with respect to the obligation and duty of the board to look out for those constituents and, if they're not, the courts will dictate that they act otherwise. We'll prepare a summary to cut through the technical details. Most acquisitions that occur will not be affected by this statute.

169 SEN. HILL: In those states with more stringent acts, what features do they have?

171 HEWITT: Gives examples of stiffer provisions. Notes that they're very controversial and designed to prevent bidders and acquisitions while approach in proposed act is to insure that parties are encouraged to negotiate issues while looking out for shareholders, the company, employees, and the community.

187 CONKLING: Proposed act is result of considerable negotiations and is attempted balance. Must also be mindful of the Commerce Clause against which these measures are evaluated. One of tests is whether the Williams Act is frustrated by a state statute or whether it is possible to comply with the state statute and the Williams Act. Courts have held that as to business combination statutes with these features, the Williams Act is not frustrated nor is someone left unable to comply with both.

212 CHAIR COHEN: Stand down until other witnesses on bill arrive.

216 SEN. HILL: Announces potential conflict of interest; he's an employee of Mentor Graphics.

SB 427

223 CHAIR COHEN: Introduces witnesses.

230 JAMES SPIEKERMAN, VICE PRESIDENT, OREGON STATE BAR: SB 427 is the vehicle for all proposed changes in the Bar Act. Summarizes paragraphs in written memorandum by George Riemer, General Counsel, Oregon State Bar regarding sections one through five of the bill. (Exhibit C)

338 SEN. SHOEMAKER: Are you asking that, rather than having any statutory requirement regarding attorney-client confidentiality, that we rely upon the rulemaking authority of the Bar?

348 SPIEKERMAN: Yes, but we don't anticipate the rules to change from time to time. Change in rules have to be approved by Supreme Court.

354 SEN. SHOEMAKER: But we will be allowing someone other than lawmakers to decide upon the questions of relationship between attorneys and clients?

360 SPIEKERMAN: That's correct.

362 GEORGE RIEMER, GENERAL COUNSEL, OREGON STATE BAR: ORS 9.460 is really a disciplinary statute. Disciplinary rules also in effect. We want one clear standard. This does not affect the other statute creating the attorney-client privilege; this deals only with the disciplinary consequences of violating a confidence.

388 SPIEKERMAN: Summarizes memo's comments on Section 6 of the bill.

402 CHAIR COHEN: You're looking to move away from any prescribed cap for lawyers to pay to the Client Security Fund?

404 SPIEKERMAN: Yes.

411 SEN. SHOEMAKER: Permit the Bar's Board of Governor to reduce the

assessment?

414 SPIEKERMAN: Yes.

416 SEN. SHOEMAKER: Gives total discretion regarding the Client Security Fund assessment to the Board of Governors?

419 SPIEKERMAN: Yes.

422 CHAIR COHEN: In last six or eight years, have you established a better confidence level with the clients' attorneys? Remembers days when people really wanted the cap.

429 SPIEKERMAN: Remembers opposition to having any fund at all. Cap was originally at \$15, then increased to \$25.

437 CHAIR COHEN: So there's enough confidence out there that the attorneys recognize the fund has to be and that they're benefiting from it.

443 RIEMER: The Bar's membership has approved the \$25 assessment. Problem is that we've had a fair number of recent claims and the amount of money the assessment generates was not enough to make a viable Client Security Fund.

461 SEN. HAMBY: As to Section 5 of bill, wants example of where the current statute may impose a duty on lawyers beyond that which is imposed by the Bar's disciplinary rules.

476 RIEMER: Statute implies that there are no exceptions to lawyers' duty to maintain confidences; disciplinary rules allows for exceptions.

TAPE 7, SIDE A

034 SEN. SHOEMAKER: The disciplinary rules are in both statute and rules?

036 RIEMER: The disciplinary rules are adopted pursuant to authority vested in the Board of Governors, the Supreme Court, and the membership by ORS 9.490.

042 SEN. SHOEMAKER: What is the statutory confidentiality requirement that will remain in place after this bill?

044 RIEMER: The attorney-client privilege. (Exhibit D)

045 CHAIR COHEN: That privilege is found in ORS 40.225.

049 RIEMER: ORS 9.460 is referenced in another section of the Bar Act which says if you violate this statute you can be disciplined. Can also be disciplined for violating any of the disciplinary rules. This is really a disciplinary statute rather than dealing with the perimeters of the attorney-client privilege.

055 SEN. BUNN: If you determine the exceptions, where are the limits to the exceptions that you can make?

063 RIEMER: The limits are in the process of adoption of disciplinary rules; have three tiers of approval before additional . . . .

069 CHAIR COHEN: What we're really looking at is what are the outside limits of exceptions to confidentiality and what are limitations of breaches of confidentiality that will be in the statute.

074 SEN. BUNN: If limits on in ORS Chapter 40 or are fairly vague, we are potentially giving you the authority to exempt virtually anything and everything. Questions wanting to give away statutory protections.

081 SPIEKERMAN: Summarizes memorandum's comments on sections seven through ten of the bill. Working with banking association to work out some wrinkles in the proposed Trust Account Overdraft Notification Program and asks that hearings on this be postponed until we can come up with something to satisfy the banks.

124 CHAIR COHEN: The hearings will be postponed.

126 SPIEKERMAN: Summarizes memorandum's comments on sections eleven through

thirteen of the bill.

138 SEN. SHOEMAKER: The bill will also allow lawyers to incorporate as nonprofit corporations. Please explain why.

141 RIEMER: Think that comes up in context of legal aid and public defender offices.

145 SEN. SHOEMAKER: What about the liability of partner in a nonprofit corporation to the clients of that corporation? Does the nonprofit corporation law provide a protection against liability as the business corporation law does?

149 RIEMER: I'd have to check into that. Legal aid attorneys are required to have professional malpractice liability insurance.

- On attorney client privilege issue, whatever is established under ORS 40.225 becomes the standard under DR 4-101(A). Discusses the exceptions under DR 4-101(C).

190 CHAIR COHEN: But we could still put these exceptions into the statute?

195 SEN. BUNN: If there are no anticipated changes in the exceptions, might it not be safer to bring statute into compliance with the rules? Does ORS 40.225 put burden on client to prevent disclosure?

209 SPIEKERMAN: The lawyer cannot breach the confidence.

211 SEN. BUNN: Then phrase "the client has the ability to prevent" means lawyer cannot disclose, not that client may prevent if they choose to act.

215 RIEMER: It's just an added feature where client could also attempt to prevent in anticipation of lawyer recklessly or intentionally deciding to violate the privilege.

220 SPIEKERMAN: Stresses that most rules for the disciplining of lawyers are adopted by the Board of Governors and approved by the Supreme Court. Just saying that the disciplinary rule should be consistent.

235 SEN. BUNN: Is there any difficulty from the Bar's point of view of amending statute rather than removing the section?

240 RIEMER: Can study that.

243 CHAIR COHEN: This will be the first of many bills the committee will have to deal with regrading confidentiality issues; asks members to get grasp of privileges of various types, whether medical or attorney-client.

261 SEN. SHOEMAKER: "Might be well to put on the record, since we're having this discussion, about the role of ethics rule on a lawyer's duty to maintain the confidences of a client and maybe you could speak to that. If a lawyer discloses the confidence of a client, then he is not only subject to discipline, but he's also violated an ethical rule that applies to him. Can that lead to liability? It could certainly lead to disciplining and disbarment and those things. But it's a sort of set of almost laws that apply to lawyers in the conduct of their affairs."

272 RIEMER: Would have good case to make that if a lawyer breached the privilege that the client would have a cause of action.

288 SEN. HILL: For sections three and four, as to financial responsibility for someone who's trying to be admitted to the practice of law, what are you to get there if someone were not to pay these bills?

294 RIEMER: Doesn't pay bills, ignored their financial obligations, and multitude of things that would reflect them to extend that they would not be handling client's money properly.

308 SEN. HILL: Respect for the law and appreciation of the rights of others; what are you trying to get at there?

311 RIEMER: Have had lawyers involved in civil disobedience; if they intentionally violate the law, is there an explanation? Drug possession. Have very thorough process to determine whether law violations justify not allowing them to be members of the Bar.

325 SEN. HILL: If talking about someone demonstrating, is it that they are arrested or participated in civil disobedience?

332 RIEMER: Convictions. The lawyer makes that choice, but the Bar has to evaluate whether you are one who is going to be living and abiding by the law.

343 SEN. HILL: Talking about civil rights demonstrations?

347 RIEMER: Private life and civil activities not something the Bar will be concerned about. If you get involved in criminal conduct which results in conviction, the Bar has the right to review that. Doesn't mean that it's going to disqualify him, but at least a careful examination is made. Number of cases on this; trying to make statute consistent with the standard that's used.

364 SEN. HILL: And an appreciation of the rights of others; what's that.

366 RIEMER: Discusses example of refusal to abide by judicial order to

abide by child support order.

372 SEN. HILL: Isn't that financial responsibility? What does "appreciation of rights of others" mean?

379 RIEMER: Example of filing frivolous lawsuits.

393 SEN. HILL: We're talking about applicant here, so we're talking about someone who hires attorneys to file frivolous lawsuits.

396 RIEMER: Lawyers have great responsibility and the Bar wants to make sure that people in that position are respectful of rights of others.

402 SPIEKERMAN: Thinks he's talking of someone filing on their own.

406 RIEMER: Don't want people with that orientation, once they have license, to do what they will to damage others without good faith basis for doing so.

413 SEN. HILL: Look at each case and decide if they've gone over certain limit?

421 SPIEKERMAN: That and a lot of other things.

426 SEN. HILL: Seems somewhat broad. Want specific examples of what you're getting at.

450 RIEMER: Up to the Supreme Court to admit people; Board of Bar Examiners only making a recommendation. There are safeguards. Bar has no political litmus test for admission. We're talking about what we're looking for in good, competent, and honest lawyers and the credentials that need to be presented to justify giving someone the license to practice law. Offers to provide examples of case law of how these standards have been applied.

473 SEN. BUNN: When dealing with participants of demonstrations, don't you end up with dangerous subjective test of what's justified and what's not?

TAPE 6, SIDE B

038 SPIEKERMAN: Yes, as with the existing law requiring them to be of good moral character. With checks and balances, subjective standards have not been abused, but they are necessary.

045 SEN. BUNN: Isn't determination of a frivolous lawsuit also subjective?

048 SPIEKERMAN: Yes; gives example of extreme conduct by person that is not the kind of person we'd want as member of the Bar.

055 SEN. SHOEMAKER: "Want to have on the record the process of appeal from that decision of the Board of Bar Examiners; it is the Supreme Court of the state that ultimately may decide that application and you have to put your trust somewhere."

059 BILL TAYLOR, COMMITTEE COUNSEL: What kind of criteria have you applied in the past in judging an application when someone is charged with criminal trespass and when civil disobedience with political connotations was involved?

065 RIEMER: My experience where person whose already member of the Bar has been engaging in illegal conduct. Have process that reports conviction to the Supreme Court, a board that makes recommendation whether lawyer should be suspended, and a sanction criteria that are quite complicated that takes into consideration lots of things.

083 TAYLOR: Has anyone been sanctioned who's a lawyer or been denied admission solely on the issue of criminal trespass where there was a civil disobedience issue involved.

087 RIEMER: Not in Oregon; discusses one case in which no sanction was imposed.

096 SEN. HILL: Do you sanction lawyers who file frivolous lawsuits?

100 RIEMER: Have one case pending review before Supreme Court right now.

109 SEN. HILL: So they can be sanctioned?

110 RIEMER: Yes. Whole area of what is frivolous is complicated.

114 SEN. HILL: When someone has to go before the Supreme Court, do they have to hire counsel?

116 RIEMER: Yes.

117 SEN. HILL: How long will it usually take to go up through the Supreme Court?

118 RIEMER: Probably a year. Describes process.

125 SEN. HILL: Wants specific information about what Riemer is talking about.

132 SEN. HAMBY: Wants to clarify that the witnesses will review the notion of incorporating DR 4-101 into statute.

137 CHAIR COHEN: Thanks witnesses. Returns to SB 421

SB 421

140 CHAIR COHEN: Introduces Allen Leedy.

144 ALLAN LEEDY, TEKTRONIX, INC.: Refers to written testimony (exhibit E) and wants to emphasis three things:

- The state has a compelling interest in the subject matter of the legislation. Bill will not prevent takeovers, but will diminish likelihood that takeovers will take place without the involvement of the board of directors of the target company and diminishes the likelihood that takeovers would be financed by break up strategy in which assets of target company will be sold off.

- SB 421 and the existing control share statute are complimentary.

- Bill would fundamentally change the environment for companies' task of restoring themselves and preserving their value.



183 SEN. SHOEMAKER: Bill will change present environment?

185 LEEDY: The existing law and the bill strengthen the hand of the board of directors of playing a role to get the best deal for the constituencies that they represent.

203 SEN. SHOEMAKER: Does Tektronix and other companies conduct business in climate of fear of hostile takeover and will this bill change that climate?

207 LEEDY: Strategies not based on fear of takeover, but should the situation actually arise, the bill gives the board of directors a negotiating position.

220 SEN. SHOEMAKER: Then the bill is to prevent anticipated problems that are occurring in other states?

224 LEEDY: That's correct.

228 SEN. BUNN: Are there examples of companies similar to Tektronix that have been taken over with wholesale layoff of employees? Is it more common for bits and pieces to be sold and people still employed?

237 LEEDY: Gives example of the RCA Corporation.

250 SEN. HILL: For the business combination act, prior testimony says it addresses conduct by a bidder following successful tender offer. Does this mean after the acquisition has been made?

256 LEEDY: Yes. This bill would prevent certain transactions after a change in control of a company unless certain things happen in advance of a change in control.

SB 405

273 CHAIR COHEN: Introduces witnesses.

281 WENDELL KUSNERUS, ATTORNEY FOR US BANCORP REPRESENTING THE DEBTOR-CREDITOR SECTION, OREGON STATE BAR: In favor of SB 405. Refers to written summary. (Exhibit F) Explains how ORS 86.095 works and what Section 3 does and its requirement for magic language.

340 CHAIR COHEN: The magic language is disclosure?

342 KUSNERUS: Yes. The language has to be there at the inception; cannot add it later.

354 CHAIR COHEN: Not a disclosure after the fact by saying that this is in fact what's happened to the consumer?

355 KUSNERUS: That's correct.

356 CHAIR COHEN: It has been extended and there is x amount of penalties in terms of gratuities we're going to give you or collect from you for this privilege of extending it.

359 KUSNERUS: That's correct. This is a provision in a preprinted form that tells the world that renegotiation at some point in the future is a possibility. Standard forms often don't include the language. Nonlawyers will not be familiar with this provision of the law with dire

consequences.

396 CHAIR COHEN: What happens after you do this? Concerned about recutting the deal that somebody knows, from consumer point of view, what to expect.

414 KUSNERUS: The agreement between lender and borrower is voluntary. Lender has no power to bump interest rate. Consumer knows everything because the consumer agreed to the deal. As to the public, there is no provision to disclose to anybody else what has happened.

451 SEN. BUNN: Second mortgage holders are helpless to prevent change in terms of the first mortgage?

TAPE 7, SIDE B

020 KUSNERUS: That's correct. We've been discussing matter with Oregon Mortgage Banker's Association. We've got some ideas about what can be done and we may be able to reach a solution. Also, most people assume that that kind of renegotiation is a possibility. And the kinds of changes involved here are relatively small; the only change that would actually affect the second mortgage holder is an increase in the mortgage rate. As to the extension of the loan . . .

043 CHAIR COHEN: But the extension you can do already based upon the current law.

045 KUSNERUS: By extension, means adding the payments to the end of the loan. And that result can be accomplished by current law simply by holding off on foreclosing. The execution of new notes is just a change in piece of paper and does not see how that affects the second lien holder.

- This bill would apply only prospectively; existing mortgages would be governed by ORS 86.095 as it now exists.

- Wants to work with Oregon Mortgage Banker's Association and come up with compromise.

076 CHAIR COHEN: OK. Have asked Bill Taylor to draft language to make sure that bill has prospective application and asks Kusnerus to work with Taylor on it.

SB 374

108 SEN. SHOEMAKER: This is correction of an oversight from the last session. This bill makes it clear what the liability is of a director of a nonprofit corporation. Liability would be limited to gross negligence or intentional misconduct. For legislative history, intentional "means a state of mind about the consequences of an act or omission, not about the act itself, and extends not only to having in mind a purpose or desire to bring about the given consequences, but also to having in mind a belief or knowledge that the given consequences are likely to result from the act, and that this state of mind exists when the act occurs."

144 CHAIR COHEN: Calls for questions; hearing none, excuses witness.

145 SEN. SPRINGER: Do we have in writing the quote just read?

147 TAYLOR: Everyone has copy of letter he sent to Sen. Shoemaker on January 8, 1990; definition just read is there. (Exhibit G)

151 SEN. SHOEMAKER: One change from language in letter; uses "likely" instead of "substantially certain."

SB 396

165 WENDELL KUSNERUS, ATTORNEY FOR US BANCORP REPRESENTING THE UNIFORM STATE LAWS COMMITTEE, DEBTOR-CREDITOR SECTION, AND THE BUSINESS LAW SECTION OF THE OREGON STATE BAR: Bill repeals ORS Chapter 76 i.e., the Bulk Sales Act. Explains what the Bulk Sales Act does and its defects. (Exhibit H) Reasons for repeal:

- The act is a major burden on the sale of businesses.
- The act gives creditors very little protection.
- The creditors have much better and cheaper ways of protecting themselves.
- Consequences of noncompliance are too harsh.

335 SEN. HILL: How many states have repealed the Bulk Sales Act?

336 KUSNERUS: None. This is a 1989 recommendation of the National Conference.

358 SEN. HILL: Has this been circulated enough so that there is no opposition to this?

360 KUSNERUS: It's certainly been publicized in Oregon; don't know if people who'd oppose this have found out or not.

368 SEN. SHOEMAKER: What is the alternative that protects the creditor?

371 KUSNERUS: The purchase money security interest.

374 SEN. SHOEMAKER: How about unsecured creditors?

379 KUSNERUS: The alternative is not to extend unsecured credit, but secured credit which is very easy to do under UCC Article 9.

386 CHAIR COHEN: Adjourns at 3:05 PM.

Submitted by:

Reviewed by:

Mark Thorburn  
Committee Counsel

Bill Taylor Committee Assistant

EXHIBIT LOG:

A - Testimony on SB 421 - Henry Hewitt - 5 pages B - 6/18/90 Wall Street Journal Article - 2 pages C - Memorandum RE: on SB 427 by George Riemer - 5 pages D - ORS 40.225 - 1 page E - Testimony on SB 421 - Allan Leedy - 2 pages F - Testimony on SB 405 - Wendell Kusnerus - 1 page G - Letter

to Senator Shoemaker from Bill Taylor - 2 pages H - Testimony on SB 396  
- Wendell Kusnerus - 2 pages