

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 429, WS SB 401, WS SB 382, WS SB 427, WS SB 393, WS SB 405, WS SB 104, PH SB 463, PH

SENATE COMMITTEE ON JUDICIARY

February 25, 1991 Hearing Room C 1:00 p.m. Tapes 40 - 42

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 Kate Wrightson,
Committee Assistant

WITNESSES: Jerome Barton, International Law Section,
Oregon State Bar Joseph West, Real Estate Section, Oregon State Bar
Steve Rhodeman, Oregon Credit Union League Bob Oleson, Oregon State Bar
Sylvia Stevens, Oregon State Bar Charlie Davis, Oregon State Bar George
Reimer, Oregon State Bar Frank Brawner, Oregon Bankers Association
William Linden, State Court Administrator Justice Wally Carson, Oregon
Supreme Court John Kauffman, Clackamas County Clerk Judge John Jelderks,
Oregon Circuit Court David Knowles, Executive Director, Judicial Fitness
Commission Richard Page, Judicial Fitness Commission

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TAPE 40, SIDE A

002 CHAIR COHEN: Calls hearing to order at 1:10 p.m.

SB 429, SPECIFIES LIABILITY OF PROFESSIONAL PROVIDING ADVICE OR SERVICES
IN

CONNECTION WITH SALE OR PURCHASE OF SECURITIES, WORK SESSION

009 TAYLOR: Reviews intended purpose of SB 429. Introduces -1
amendments (Exhibit A).

032 CHAIR COHEN: Confirms intended purpose of bill.

042 SEN. SPRINGER: Moves that -1 amendments be adopted.

047 CHAIR COHEN: Asks if committee has objections to adoption of -1 amendments.

048 HEARING NO OBJECTIONS, CHAIR COHEN SO ORDERS. SENATOR HILL WAS EXCUSED.

049 SEN. SPRINGER: Moves SB 429, so amended, to the floor with a "do pass" recommendation.

052 MOTION: PASSES UNANIMOUSLY, SENATOR HILL EXCUSED.

SB 401, ENACTS UNIFORM FOREIGN-MONEY CLAIMS ACT, WORK SESSION

058 TAYLOR: Reviews intended purpose of bill. Introduces -1 amendments (Exhibit B). -Introduces memo from Mark Thorburn (Exhibit C).

073 CHAIR COHEN: Was the Treasurer's office consulted on this?

074 TAYLOR: The Dept. of Insurance and Finance has been consulted. -Submits letter from Cecil Monroe (Exhibit D).

081 JEROME BARTON, INTERNATIONAL LAW SECTION, OREGON STATE BAR: I have not checked with the Treasurer's office; we have checked with Insurance & Finance, and with the Oregon Bankers Association.

086 CHAIR COHEN: Holds SB 401 for another hearing, pending contact with the Treasurer's office.

SB 382, SPECIFIES USE OF LINE OF CREDIT INSTRUMENTS FOR RESIDENTIAL OR COMMERCIAL PURPOSES, WORK SESSION

091 TAYLOR: Reviews intended purpose of SB 382. Submits -2 amendments (Exhibit E). -Controversy centers on issue of construction loans: lines 1 to 4 of the -2 amendments. -Both -1 (Exhibit F) and -2 amendments have this controversy.

125 SEN. SHOEMAKER: Requests clarification of proposed amendments.

128 CHAIR COHEN: I am aware of no controversy on line 20 of the original bill. Testimony suggested that we delete some material in that line, but I don't think that is necessary. -An amendment was offered which made that change, which met with Committee approval; that change resulted in -2 amendments. -Controversy has since arisen with respect to the -1 amendments, dealing with principal amount being exceeded by advances to complete construction.

148 JOSEPH WEST, REAL ESTATE SECTION, OREGON STATE BAR: Controversy is in lines 1 to 4 of SB 382-1. -Bill describes the kinds of advances, made by lender, that retain priority date as of the recording date of the document. Sets forth that construction advances have a priority date effective the recording date of the document. -In order to retain priority, advances must be of a certain amount and extent: controversy arises over what that extent and amount should be. Bill provides that advances made to complete construction, even if they exceed mortgage or trust deed's face amount, retain that priority date. -Real Estate Section has adopted amendments which provide that the construction advances retain priority only to the extent of the face amount of the mortgage or trust deed.

175 CHAIR COHEN: That is not included in the -1 amendments?

176 WEST: That is correct.

177 CHAIR COHEN: Have you given your amendments to Mr. Taylor?

178 WEST: Yes.

186 CHAIR COHEN: How does line 13 of the -1 amendments limit construction loan to the amount of the original mortgage or trust deed?

191 WEST: That language is in the bill (page 2, lines 1 to 4), which states that advances may exceed the face value of the instrument. -We propose changing that so that outstanding advances may not exceed the face value.

208 CHAIR COHEN: That change is not in the -1 amendments?

209 WEST: No. Lines 1 to 4 of the -1 amendments would also be deleted.

221 CHAIR COHEN: Clarifies proposed amendments.

226 WEST: Confirms proposed amendments.

232 STEVE RHODEMAN, OREGON CREDIT UNION LEAGUE: Amendments address concern that a junior lien holder would not have control over their position, if construction advances could exceed the maximum principal amount of the instrument.

253 CHAIR COHEN: Requests counsel to have Legislative Counsel draft new amendments. -Schedules bill for another hearing, pending amendments.

257 WEST: The Debtor-Creditor Section of the Bar has looked at SB 382, and they think the original bill is satisfactory. -The question is to what extent you would want to protect a construction lender.

271 CHAIR COHEN: We will take that into account at the next hearing.

278 TAYLOR: The Debtor/Creditor Section proposed the -2 amendments. -The Real Estate Section is proposing the -3 amendments.

288 SEN. SHOEMAKER: Will we hear advocates of both positions?

292 CHAIR COHEN: We have already had two hearings on this bill. Our choice is really a policy question on limitation of construction loans.

301 SEN. SHOEMAKER: I see the issue; I just need more information to make my decision.

SB 427, MODIFIES SEVERAL PROVISIONS RELATING TO OREGON STATE BAR, WORK SESSION

311 CHAIR COHEN: Reviews intended purpose and history of bill.

322 BOB OLESON, OREGON STATE BAR: Submits written testimony (Exhibit G). -This is the first hearing on the section which concerns the overdraft notification program. -We have met with the Oregon Bankers Association to improve the bill, though they still do not support it.

334 SYLVIA STEVENS, OREGON STATE BAR: Testifies in favor of SB 427. -SB 427 is enabling legislation, similar to that in thirteen other states. -Banks would notify Oregon State Bar when lawyer's trust account is overdrawn. This would be a statutory exception to the privacy accorded to bank records. -Banks would be allowed to charge "reasonable" fee to lawyer for maintenance of reports and notification of Oregon State Bar. -When the Bar receives such notification, Bar staff would perform a review or audit. No action would be taken if no wrongdoing had

occurred. -This program will uncover misappropriation of client funds. 2% to 8% of Bar members in other states with this kind of program get these notifications annually; most are not cases of wrongdoing, but some are. -This program will not catch clever thieves. Instead, it usually catches substance abusers or people with similar problems. If we catch one person, it's a good bill. -In 1989, The Bar's Client Security Fund made payments of about \$200,000 to a variety of claimants. Such trends will increase. The Fund pays \$25,000 per claimant, but the rest of their loss is irrecoverable. -This program would impose administrative burdens on the banking industry, and also on the Bar and on lawyers whose fees support Bar administration. -The concerns of the banks are important, but they do not override the public protection which this bill provides.

400 CHARLIE DAVIS, OREGON STATE BAR: Testifies in favor of SB 427. -Overdraft notification would offer opportunity for protection of persons whose trust accounts are in legal hands. It would create obligation to see that those accounts are properly handled. -Problems will not happen often, but when they happen, we need this program.

TAPE 41, SIDE A

007 SEN. SHOEMAKER: One of the banks' main objections is the high cost of setting this up. -Is the Bar prepared to pay that tab and reimburse the banks?

014 STEVENS: We had not contemplated paying those costs. I don't know what other states with this program have done about that. -Software is available for this process. -Banks will charge lawyers whatever they think is a reasonable fee for administration.

024 CHAIR COHEN: What is the penalty now for misusing client trust accounts?

025 STEVENS: It violates disciplinary rules. Penalties depend on severity of misconduct; they range from censure to disbarment.

032 SEN. HAMBY: In your testimony, you include legislation from New Jersey which speaks to financial institutions that agree to report overdrafts to the Bar. -Is this bill mandatory or permissive?

035 STEVENS: In New Jersey, banks are not required to participate, but lawyers are required to maintain accounts in participating banks.

037 SEN. HAMBY: Is that how SB 427 would operate?

038 OLESON: That is what we intend. The -1 amendments (Exhibit H) are more flexible than the original bill. -We tried to work with the banks to resolve questions of cost and administration. -The -1 amendments come from our meetings with the banks.

054 SEN. SHOEMAKER: This bill does not seem to mandate banks' participation, but provides rules to follow if they choose to participate.

058 STEVENS: Yes. This is not a mandate. -Banks which choose to participate would be required to follow these rules, and lawyers would be required to maintain their accounts in a participating bank.

062 CHAIR COHEN: Requests explanation of -1 amendments.

067 GEORGE REIMER, OREGON STATE BAR: Explains -1 amendments. -Banks are not required to participate in program. -Set up procedure for Board of Governors and Supreme Court to implement program. -Provide immunity for banks against any claims arising from their participation. -Allow banks to charge fees for administrative costs.

084 SEN. SHOEMAKER: As I read this bill, banks may charge lawyers a "reasonable" fee for maintenance of the program. -I think that "reasonable" cost would include amortization of setup cost.

091 REIMER: That is certainly a possibility. -No other states with this program require lawyers to pay. -That would be a bank business expense. -The bill is here to protect the public, and we all end up paying for this.

099 SEN. SHOEMAKER: I am concerned with the language. -Am I right that it is not the intent of the drafters for "reasonable cost" to include amortization of setup cost?

101 REIMER: That was not our original intent.

105 SEN. HILL: How big is this problem?

106 REIMER: We are not receiving any notifications now. -If we find an intentional misappropriation of client funds, we disbar the attorney. Approximately two lawyers are disbarred each year for misuse. -Refers to written testimony for occurrences in New Jersey.

123 SEN. HILL: I would like instances which have occurred in Oregon.

124 REIMER: I would have to check my files. -We have had many Client Security Fund claims.

135 SEN. HILL: Within the last five years, how many instances of misappropriation of funds have you had?

136 REIMER: Eight to ten instances of disbarable misconduct. -This bill is intended to see that people are properly administering trust accounts.

149 SEN. HILL: This is voluntary for the banks? If you enact these rules, I assume that a bank which chooses not to participate would not be held to them.

151 REIMER: It is voluntary. -Lawyers must use banks that participate. -This is a business decision for the banks.

173 SEN. HILL: How many of these accounts are there?

174 REIMER: Approximately 5000 to 5500 lawyer trust accounts. -There are about 5500 practicing attorneys in Oregon.

180 STEVENS: Each practicing attorney has at least one of these accounts.

184 SEN. SHOEMAKER: Asks about the extent of the problem. -When you have a case of account abuse, do you have access to the account records? -What have you found on review of those records, and to what extent have you found overdraft abuse?

192 REIMER: We have not been targeting overdrafts. We have been doing comprehensive audits, to establish that abuse has actually occurred. -One bank told us that they could go into their records now, and identify overdrawn lawyer trust accounts. That would be subject to

report under this bill.

203 SEN. SHOEMAKER: Would that answer your desire in drafting this bill?

204 REIMER: Yes. We want early intervention, to keep a small problem from growing.

205 SEN. SHOEMAKER: I don't think you have built your case to impose those costs on the banks.

212 STEVENS: The Client Security Fund receives numerous claims because of account abuse. We have limited resources to help these people, but they still look to the Bar for retribution. -Program has been successful in other states. -This would be less invasive and less difficult to implement than a random audit program.

244 CHAIR COHEN: Requests explanation of random audit program.

246 REIMER: Not many states have a random audit program. -Lawyers would pay for it eventually. -All legal accounts are in a pool, which is audited randomly for compliance. It may uncover something, it may not. -Such a program is truly random; impropriety would be uncovered only by chance. -Our program depends on overdraft evidence for investigation, which is more reliable and less intrusive.

265 CHAIR COHEN: That would depend on your point of view.

267 REIMER: Lawyers would not be inclined to like a spot audit program.

294 FRANK BRAWNER, OREGON BANKERS ASSOCIATION: Testifies in opposition to SB 427 . Submits and summarizes written testimony (Exhibit I).

336 CHAIR COHEN: Why can't you just send a regular "NSF" notice to the Bar?

340 BRAWNER: We don't know which accounts are lawyer trust accounts. -Estimated costs for one bank to implement the program are \$55,000. -Continues to review written testimony.

TAPE 40, SIDE B

025 SEN. SHOEMAKER: Concerning breach of confidentiality, isn't a trust account different, because lawyer is trustee for the client's money to use it in ways which the client has approved? -Does this bill brings the Bar in as a co-participant in the fidelity of the account? -If you look at it that way, do you still have a problem with the confidentiality question?

032 BRAWNER: Yes. There is no process to notify the account's owner or attorney that we are making an overdraft notification, nor is the client notified.

041 SEN. SHOEMAKER: I'm still concerned about costs. If the banks could work it out with the Bar, so that the Bar would pick up the costs, would that ease your concerns?

047 BRAWNER: We would still have the confidentiality issue. -If SB 427 passes, most smaller banks will not participate due to the cost. The largest banks would like it to pass, because they would get most of the business.

064 WILLIAM LINDEN, STATE COURT ADMINISTRATOR: Submits proposed amendment (Exhibit J).

068 JUSTICE WALLY CARSON, OREGON SUPREME COURT: Reviews proposed amendments. Testifies on section 4 of bill, which concerns the oath-taking procedure. -Prefer adoption of rule, rather than statute.

107 CHAIR COHEN: You would be satisfied with changing it to a rule, and nothing more?

109 CARSON: Yes.

117 SEN. SHOEMAKER: Moves for adoption of amendments submitted by the Judicial Department, dated 2-25-91.

119 CHAIR COHEN: Asks if committee has objection to adoption of the Judicial Department amendments.

123 HEARING NO OBJECTIONS, CHAIR COHEN SO ORDERS.

128 SEN. HAMBY: Mr. Brawner, what is your opinion on a random audit program?

130 BRAWNER: I see no reason not to support a random audit program with proper notification and so forth. -Under these circumstances, it makes more sense.

137 SEN. HILL: Are there any states that have no problems implementing this sort of program?

139 BRAWNER: Idaho. They have few accounts, and most are with the state's two largest banks. -They are doing this manually, because nobody can find this software referred to by the Bar.

149 SEN. HAMBY: I hope that the Bar will pursue any statutory language needed for random audit.

152 SEN. SHOEMAKER: I'm not persuaded that this needs fixing. -The Bar should pick up the costs. -The Bar and the banks should work it out together, not us.

167 SEN. BUNN: Sections 8 and 9 should be deleted. -Random audit makes sense to me.

175 SEN. SPRINGER: Supports the Bar position.

177 CHAIR COHEN: I don't think we need more information before we make our decision.

186 SEN. BUNN: Moves that SB 427 be amended by deleting sections 8, 9, and 10.

191 MOTION: PASSES, WITH SENATORS BROCKMAN, BUNN, HAMBY, SHOEMAKER, HILL, AND COHEN VOTING AYE, SENATOR SPRINGER VOTING NAY.

200 SEN. HAMBY: Moves SB 427, so amended, to the floor with a "do pass" recommendation.

203 MOTION: PASSES, WITH SENATORS BROCKMAN, HAMBY, SHOEMAKER, SPRINGER, AND COHEN VOTING AYE, SENATORS BUNN AND HILL VOTING NAY.

SB 393, CHANGES RECORDING DUTIES OF COUNTY CLERKS, WORK SESSION

211 TAYLOR: Reviews intended purpose of bill. Submits -2 amendments (Exhibit K).

224 JOHN KAUFFMAN, CLACKAMAS COUNTY CLERK: Submits hand-engrossed bill with

-2 amendments (Exhibit L).

229 TAYLOR: Reviews proposed amendments, which concern Sections 6 and 7 of the bill.

244 CHAIR COHEN: This bill affects both counties and the people who need to record documents.

250 KAUFFMAN: The Oregon Land Title Association has approved this language, the Association of Oregon Counties supports the bill, and the Bar has no position. Frank Brawner can speak for the banks.

256 BRAWNER: The Oregon Bankers Association supports the hand-engrossed version of the bill.

263 CHAIR COHEN: The hand-engrossed bill encompasses all amendments?

266 KAUFFMAN: Yes.

268 CHAIR COHEN: Moves for adoption of -2 amendments, as reflected in the hand-engrossed bill dated 2-22-91. -Asks if committee has objection to adoption of amendments.

271 HEARING NO OBJECTIONS, CHAIR COHEN SO ORDERS. SENATOR SPRINGER WAS EXCUSED.

277 SEN. HILL: Moves SB 393, so amended, to the floor with a "do pass" recommendation.

281 MOTION: CARRIES, WITH SENATORS BROCKMAN, HAMBY, SHOEMAKER, HILL, AND COHEN VOTING AYE, SENATOR BUNN VOTING NAY, AND SENATOR SPRINGER EXCUSED.

SB 405, CHANGES REGULATIONS OF ADJUSTABLE RATE INSTRUMENTS RELATING TO REAL PROPERTY, WORK SESSION

288 TAYLOR: Reviews intended purpose of bill. Submits -1 amendments (Exhibit M).

302 CHAIR COHEN: Our only question from earlier hearings was the effective date of the bill.

309 TAYLOR: All interested parties are satisfied with the amendments.

316 CHAIR COHEN: Moves for adoption of -1 amendments, dated 1-28-91. -Asks if committee has objection to adoption of -1 amendments.

318 HEARING NO OBJECTIONS, CHAIR COHEN SO ORDERS.

320 SEN. BUNN: As we have amended this bill, we have taken care of the question of existing loans. -In the future, a situation could arise for holders of second mortgages, where the conditions (such as balance) of the first mortgage could change. The holder would then be subject to a renegotiated balance.

332 TAYLOR: That could be the case.

335 SEN. BUNN: I am uncomfortable with creating a situation where the

conditions of a first mortgage could change after a second mortgage has been taken. I am particularly concerned with a change in the balance owed. -That will undermine second mortgages.

346 SEN. BROCKMAN: Requests example of how such a situation would arise.

350 SEN. BUNN: Negotiations of interest rate in relation to balance due, where the interest rate would change and thus change the balance of the mortgage. -Absolutes need to be set: when you take a second mortgage, certain things should be locked in on the first mortgage, such as balance due. -We are removing that protection, and opening opportunities to be unfair to future holders of second mortgages. -Amended bill does not affect current holders of second mortgages; the amendments are a great improvement.

364 TAYLOR: We may be talking about current law. -Certain actions are provided which may be done without affecting the priority of the mortgage, including renegotiation, increase of underlying obligation, extension of terms, and others. -Bill removes ambiguity in subsection 3 of ORS, which implied that these actions had to be explicitly stated in the mortgage agreement.

390 SEN. BUNN: I thought that the right to renegotiate needed to be explicit in the agreement, in order to afford protection for the holder. -Under this bill, we are removing even that ambiguous language. -I don't have to worry about losing that right unless it is in the document.

403 SEN. SHOEMAKER: I had not realized that. -A second lender may not be in a position to protect himself because he doesn't know about this.

412 CHAIR COHEN: You can already change all of these things.

415 SEN. SHOEMAKER: If the second lender is shrewd, the holder may be subject to unfair renegotiation, and there is no warning to the holder that this might happen.

422 BRAWNER: We are not opposed to the amended version of this bill. -Those people in the business of second mortgages will know that this is possible to do. -Problems arise when you are trying to rework a loan, perhaps to reduce the interest rate, and there is no magic language to renegotiate; then you must proceed with foreclosure. -Under current law, don't have the option of dealing with those kinds of circumstances. -As of the effective date of this bill, all first mortgages may be renegotiated on the basis of the items listed in the statute.

TAPE 41, SIDE B

010 SEN. BUNN: I understand the issue, but a sophisticated lender can deal with this. The average person can't. -I'm not willing to open this problem area.

015 SEN. HILL: Would it be worth it to see if the bill's proponents can address this question?

018 CHAIR COHEN: It seems very clear to me. Either you have an opportunity to renegotiate, or you don't.

025 SEN. BUNN: As amended, the bill deals with future situations. -The lending institutions have the ability to include this language that would protect their interests. If they don't do it, they become the

victim. -A mortgage holder might read the fine print, in good faith, and not find anything. That person might still be victimized because of the changes that we would make with this bill. -Let the lending institutions put the language in for their own protection; then nothing will be taken away from the holder.

035 SEN. SHOEMAKER: Clarifies meaning of "adjusted, renewed, or renegotiated." -This wouldn't involve any new lending, as I understand it, but only involve changing the terms of payment. -No effect on principal, although the interest rate may be affected.

042 TAYLOR: Section B uses the language "increase in underlying obligation." -Reviews language of Section B.

049 SEN. SHOEMAKER: It increases the principal in a certain way, or the possibility of increase is there?

051 TAYLOR: Yes.

052 SEN. SHOEMAKER: If you defer the interest and add it to the principal balance, then you compound the interest. An additional loan is not involved. -Does that ease your concern?

056 SEN. BUNN: It's still a problem. -If I were giving a second mortgage, I would look at the conditions of the first mortgage in order to ascertain whether the second mortgage could be repaid on a certain schedule. -The first mortgage could be renegotiated without my knowledge, with conditions that were unacceptable to me as issuer of a second mortgage. I would still be subject to my earlier decision, even though I was affected by these changes made without my approval.

065 TAYLOR: In that situation, the primary lender would foreclose if they felt that something could not be worked out. That would cut off your interest, unless there were special circumstances in the foreclosure sale.

071 SEN. BUNN: I understand that possibility.

072 CHAIR COHEN: Refers to testimony presented by the Debtor/Creditor Section of the Bar (Exhibit N). -Asks pleasure of the committee on this bill.

087 SEN. BROCKMAN: Sen. Bunn's concerns have made me want to investigate this further.

091 SEN. HILL: Moves adoption of the -1 amendments, dated 1-28-91.

093 CHAIR COHEN: Asks if committee has objections to adoption of the -1 amendments.

095 HEARING NO OBJECTIONS, CHAIR COHEN SO ORDERS.

SB 104, SPECIFIES USE OF OREGON EVIDENCE CODE IN PROCEEDINGS OF COMMISSION ON JUDICIAL FITNESS AND DISABILITY, PUBLIC HEARING

107 JUDGE JOHN JELDERKS, OREGON CIRCUIT COURT: Reviews intended purpose of bill. Submits article in support of bill (Exhibit O). -Oregon Evidence Code is not followed in Judicial Fitness Commission hearings. -Commission has historically tried to abide by Code, but is not bound to follow it; nor is it bound to follow the Rules of Evidence presented in the Administrative Procedures Act. -Since the Legislature created the Commission, you are the appropriate body to set standards for evidence. -Oregon Evidence Code is fair and understood by those most involved in Commission proceedings.

164 CHAIR COHEN: Requests witness to halt testimony, in order for bill introduction.

BILL INTRODUCTION

168 CHAIR COHEN: Introduces three LC drafts. -LC 3044, relating to crime, at the request of Partnership for Responsible Drug Policy. -LC 2927, relating to therapeutic use of marijuana, at the request of Partnership for Responsible Drug Policy. -LC 1463, relating to forfeiture, at the request of Senator Cohen. -Notes that introduction does not imply support of bills. -Asks if committee has objections to introduction of these as committee bills.

186 HEARING NO OBJECTION, CHAIR COHEN SO ORDERS.

SB 104, SPECIFIES USE OF OREGON EVIDENCE CODE IN PROCEEDINGS OF COMMISSION ON JUDICIAL FITNESS AND DISABILITY, PUBLIC HEARING CONTINUED

188 CHAIR COHEN: Requests Judge Jelderks to continue testimony. -How much stronger a case will be needed, if a citizen brings a concern about a judge before the Commission under the Evidence Code?

193 JELDERKS: I don't think that the case would have to be stronger. -Production of witness instead of hearsay, for example.

204 CHAIR COHEN: This would not make it too difficult for a regular citizen?

211 SEN. HILL: Are we discussing what evidence can be admitted, versus the weight which would be given to certain kinds of evidence? -These are obviously sensitive hearings. What is the purpose of these proceedings? -I am more concerned about reliability of evidence. If something is reliable, what is the problem with hearsay?

236 JELDERKS: The Evidence Code was established to ensure reliable evidence. -If I were going to be defrocked, I would want firsthand evidence at the hearing. -Judges often have very skilled counsel, who would know how to prepare a case under the Code.

252 SEN. HILL: That's good if you have a skilled lawyer, but suppose your lawyer is not so good and doesn't know how to present your case. -What is the composition of the Commission?

256 JELDERKS: There are ten members: three judges, three lawyers, three public members, and an executive director.

261 SEN. HILL: These are legal people; they are not going to be fooled by bad evidence. They are capable of judging the credibility of evidence. -Why not consider all evidence available? -You're concerned about admissibility; I'm concerned about weight given to evidence.

282 JELDERKS: The Judicial Fitness Commission was set up to investigate complaints. -A formal hearing only results if substantive evidence exists. -In one case, evidence was required by Chair of the Fitness Commission which would not have been admissible in a lawsuit. -Evidentiary practice is set by a majority of Commission members, and is thus changeable.

320 SEN. HILL: How is evidence handled in the Administrative Procedures Act?

322 JELDERKS: The APA explicitly removes judicial hearings from its

purview. -If it did apply, evidence considered applicable by "reasonably prudent individuals" would be admissible.

328 SEN. HILL: There is no relevancy?

330 JELDERKS: Cites Administrative Procedures Act.

335 SEN. HILL: It seems that you want to change from an administrative procedure to something more formal, and I don't know whether that is necessary. -Are all Commission procedures public?

347 JELDERKS: Yes, except for trials where a judge is thought to be disabled.

358 DAVID KNOWLES, EXECUTIVE DIRECTOR, JUDICIAL FITNESS COMMISSION: Testifies in opposition to bill. -Judicial Fitness Commission has nine members: three lawyers, three judges, and three public members. The Chair rotates between legal and public members each year. -We are advisors to the Supreme Court. At the conclusion of our hearings, we adopt findings of fact, based on very substantial evidence. Findings support Commission's recommendation for type of sanction. Only the Supreme Court can sanction a judge; we only offer recommendations. -We are only an advisory body, because of the Supreme Court's de novo review ability. -Evidentiary rules are highly technical and difficult to implement, especially for public members.

TAPE 42, SIDE A

007 CHAIR COHEN: Is the basis on which you accept evidence for the final Commission hearing what is at issue here? -The Supreme Court can choose whether they will use evidence which you accepted, can't they?

012 KNOWLES: That is correct. -They have de novo review powers.

016 CHAIR COHEN: How public are your proceedings, especially at the point where Mr. Page made the questionable admission of evidence?

020 KNOWLES: Someone had filed a complaint, and we were holding a hearing on that complaint. -Trial attorneys were present, and evidence objections were made by both sides. -Those objections were ruled upon from a "reasonable person" standard, because we do not have written rules about evidence before our Commission. -We are creating our own rules, which we intend to adopt unless the Legislature directs us otherwise. Those rules will adhere to the Administrative Procedures Act standards.

036 RICHARD PAGE, MEMBER, JUDICIAL FITNESS COMMISSION: -Commission is reasonably prudent in admission of evidence. -In the hearing referred to by Judge Jelderks, I requested the judge's medical records as evidence. Those records were not appropriate to admit, and we did not receive them as evidence. Instead, we sealed them and gave them to the Supreme Court, for their discretionary use.

054 SEN. SHOEMAKER: If the Supreme Court has de novo power, do they normally exercise that, or do they normally rule on the record?

058 KNOWLES: To my knowledge, they have not used that power.

065 SEN. SHOEMAKER: I am concerned that the Supreme Court could apply their own evidentiary standards if they used their de novo power. -It might lead to an anomaly of two standards of proof, and might lead to contrary decisions based on evidence allowed.

074 KNOWLES: The standard of evidence in Bar disciplinary hearings is the Administrative Procedures Act, not the Oregon Evidence Code.

077 SEN. SHOEMAKER: Would this bill then lead us to consider the appropriate standard of evidence in Bar procedures?

079 CHAIR COHEN: Yes.

080 SEN. SHOEMAKER: Is the Supreme Court inclined to change the rules of evidence for other professional disciplinary hearings?

084 JELDERKS: No. Judges are entitled to due process, just like anyone else with a dispute.

087 SEN. SHOEMAKER: If the Administrative Procedures Act is adopted, would you be comfortable with that?

089 JELDERKS: It's better than the vague unwritten rules that exist now. We want to know what the rules are, in advance of the hearing. -I think that the Oregon Evidence Code is easy to understand; I am more comfortable with it than Mr. Knowles appears to be.

108 SEN. HILL: If the Commission has public members, then the Administrative Procedures Act is easier because they are not legally trained. -I agree that there should be rules, but I'm not sure what they should be. Would the Commission support adoption of the Administrative Procedures Act?

117 PAGE: Yes. We are ready to adopt the Administrative Procedures Act as our rules of evidence.

124 CHAIR COHEN: Adjourns hearing at 3:10 p.m.

Submitted by: Reviewed by:

Kate Wrightson Bill Taylor Assistant Counsel

EXHIBIT LOG:

A - Amendments to SB 429 - Staff - 10 pages B - Amendments to SB 401 - Staff - 3 pages C - Testimony on SB 401 - Staff - 6 pages D - Testimony on SB 401 - Staff - 1 page E - Amendments to SB 382 - Staff - 1 page F - Amendments to SB 382 - Staff - 1 page G - Testimony on SB 427 - Bob Oleson - 11 pages H - Amendments to SB 427 - Bob Oleson - 1 page I - Testimony on SB 427 - Frank Brawner - 9 pages J - Amendments to SB 427 - William Linden - 2 pages K - Amendments to SB 393 - Staff - 2 pages L- Amendments to SB 393 - John Kauffman - 10 pages M - Amendments to SB 405 - Staff - 1 page N - Testimony on SB 405 - Staff - 1 page O - Testimony on SB 104 - Judge John Jelderks - 12 pages