



CAPITOL INSIDER

OSB Public Affairs Newsletter for Bar Leaders

May 24, 2001

HB 3857: *Gatti* Legislation

In light of the recent Oregon Supreme Court case *In re Gatti*, there has been significant pressure from the law enforcement community to fashion a legislative remedy. As a result, draft language has been proposed that would amend ORS 9.527 to exempt advice on law enforcement undercover activities from prosecution by the bar for willful deceit or misconduct under the statute

The bill allows assistant district attorneys, and federal prosecutors working for a public body or the federal government, to assist in undercover operations even though the activities may require the use of deceit or misrepresentation. The language of the bill also allows attorneys to “participate” in covert activities conducted by public bodies. The proponents of the bill have drafted it broadly to take into account those scenarios where attorneys who are police officers, federal agents, or working on investigations of judicial bribes would need this authority.

A continuing concern of bar leaders is that a legislative fix does not solve the problem because it fails to address the ethical problem lawyers will continue to face in light of the *Gatti* ruling. HB 3857 has already had a hearing and is expected to be voted out of the House Judiciary Committee today. It is likely to move through the Senate at lightning speed.

HJR 7: Judicial Selection

The proposed Judicial Merit Selection Commission (HJR 7) was returned to the House Judiciary Committee by its supporters. Lawyer members Max Williams, Lane Shetterly, Charlie Ringo, and Bob Ackerman, among the most respected legislators of the current session, could have mustered the votes to pass this measure on the House Floor; however, Senate President Derfler’s opposition to the bill in its current form meant that its fate would be uncertain. Senator Derfler is disappointed that HJR 7 no longer provides for confirmation of judicial appointments, which would have been, in his view, a more substantive judicial reform.

Rep. Williams and Rep. Shetterly have concluded that even a successful battle in the House could be politically harmful. It could increase the moderate level of animosity that a growing number of legislators now hold against judges and lawyers. A new wave of rancor toward the judiciary could also reduce the chances of acquiring budget add-backs at the end of this session. In addition to more judge-bashing, intense debates over judicial selection could increase the chances of new and unacceptable system “reforms” receiving consideration in the Senate.

Consequently, HJR 7 is tabled this session. However, it is likely to be a topic of discussion during the interim.

HB 3677: Judicial Construction

Various OSB groups (Procedure and Practice, Litigation, Appellate, and Administrative Law sections) expressed concern over HB 3677 as originally introduced. In response, the OSB Public Affairs Committee formed an ad hoc workgroup made up of representatives from these groups to provide alternative language for the bill. Specifically, the workgroup believed that HB 3677, in its introduced form, did not adequately address the potential situation when perceived legislative intent is exactly opposite the perceived plain language of a statute.

The current version of the bill permits a party to offer legislative history to assist the court in interpreting a statute. HB 3677 also allows the court to limit consideration of legislative history to information provided by the parties. More importantly, the bill allows the court to give such weight to the legislative history that it considers appropriate. This bill has cleared the House and is working its way through the Senate.

SB 437: Privilege Changes

This bill provides that there shall be no privilege for any statement that a reasonable person would understand as evidence of intent to perform an act that constitutes a crime under any state or federal law. Proposed by the District Attorney's Association, this measure asserts that if a person states his or her intent to commit a future crime, the need for public safety outweighs the privacy interest recognized by these privileges.

A number of interest groups, including the bar's Procedure and Practice Committee, had concerns about the extremely broad language of the bill. This bill was amended on the Senate side to address some of those concerns and to exclude application of this measure to the clergy-penitent privilege. At the contentious hearing before the House Judiciary Committee, numerous medically

related professional groups expressed concerns over the broad scope of the bill. Further amendments to narrow the bill's application are expected before it passes out of the House.

SB 140: Death Penalty Bill

Senate Bill 140 exempts persons convicted of aggravated murder from the death penalty if the defendant is found to be a person with mental retardation. At a hearing in late April before the Senate Judiciary Committee, several parties testified in support of the bill, including the Oregon Advocacy Center, the Oregon Catholic Conference, Amnesty International, and Ecumenical Ministries of Oregon.

The committee did not act on the bill at that time; however, there is still a chance that the committee will consider amendments to expand the death penalty by adding the murder of reserve officers and trial jurors or witnesses to the definition of aggravated murder. It is likely that amendments of this nature could seriously jeopardize the possible success of this bill and raises the possibility of a gubernatorial veto.

Workers' Comp – Smothers

At the time this article is written, it is unknown what the impact of Smothers will have at the legislature. The court in Smothers opined that an injured worker may pursue an action in negligence if the alleged injury was to an "absolute" right and the worker had no remedy under the workers' compensation law a person had a remedy right if the alleged injury was an "absolute" right, even though the work-related incident was not a major contributing cause of the injury or disease. This decision has become another reason why some legislators are unhappy with the judiciary.

Other legislative issues that may affect workers' compensation lawyers include: SB

485, which would revise the laws regarding compensability of preexisting, new, and omitted conditions; payment of temporary and permanent disability benefits; claims processing procedures; payment of medical expenses; and SB 316, which clarifies time limits for filing aggravation claims and for requesting reclassification of nondisabling claims.

HB 2687: ADA Bill

HB 2687 would make it an unlawful practice for any public body to exclude a person from participation in, or deny the benefits of the services, programs, or activities of, a public body under the Americans with Disabilities Act. This bill has passed the House and is waiting for hearings on the Senate side, although time may be running out for this proposal because some key senators object to the bill.

Civil Commitment Bills

The House Judiciary Committee recently held work sessions on three bills relating to civil commitment. HB 2396, as introduced, would create a Mental Health Advocacy Program in the office of the Long Term Care Ombudsman and a pilot program in certain counties to provide mental health advocates for people subject to commitment procedures. The committee adopted amendments to allow the Mental Health and Development Disability Services Division to contract with Oregon Advocacy Center to operate the pilot program. HB 2396 passed out of the committee and has been referred to the Ways and Means Committee.

HB 2398 creates procedures for facilities to release certain information regarding a person with mental illness to family members with the patient's consent. A third bill, HB 2394 would allow an investigator in a civil commitment case to conduct criminal background checks through the LEDS system. The bill was amended to allow community health and

developmental disabilities programs to access the LEDS system information. Both HB 2394 and 2398 have passed out of the House and are on their way through the Senate.

Administrative Law Bills

Several bills have been introduced this session that may affect administrative law practitioners. HB2246/HB 3119/HB 3935 was originally introduced to broadly conform local government actions to the Administrative Procedures Act. Currently, the proposal has been limited to allow transfer of an action from one court to another, thus eliminating the need for double filing. Additional legislation proposed would allow practitioners who incorrectly petition for a writ of review, a petition for a writ of mandamus, or an action for declaratory judgment, to refile the action under the correct petition.

Other proposed legislation that will likely pass includes HB 2551 (prohibiting ex parte communication between agency officials), HB 2219 (modifying judicial review of administrative decisions in "orders in other than contested cases"), and SB 402 (modifying the Hearing Officers Panel).

HB 3251: Council on Court Procedures

HB 3251, proposed by the Council on Court Procedures, would amend ORS 1.735(2) to modify the "exact language" requirement for proposed changes to the Oregon Rules of Civil Procedure. Under ORS 1.735, the council has legislative authority to promulgate changes to the ORCP. Notice of any proposed rule change must be given to Oregon lawyers 30 days in advance of council action. This "exact language" requirement has made it difficult for the council to conduct business at its final meeting and still submit a final report to the legislature by the end of December. HB 3251 allows the council to modify a suggested rule change at its last meeting subject to

publication of the changes within 60 days after the meeting.

Eugene; Charles Williamson, Portland; and public member Mary McCauley Burrows, Eugene. Ed Harnden, OSB President, is also an ex-officio member of the PAC.

Policy Legislation

Bill # Summary

Access to Justice (Civil and Criminal Legal Services)

- HB 2938 Pro Hac Vice (appearance fee for out of state attorneys)
SB 80 Continues Public Defense Services Commission until September 1, 2003
SB 145 Creates Public Defense Services Commission

Judgeships and Judicial Funding

- SB 70 Creates new circuit court judge positions
SB 71 Increases salaries of judges of Supreme Court, Court of Appeals, Oregon Tax Court, and circuit court
SB 120 Appropriates money from General Fund to Judicial Department for biennial expenses (\$416 million is the OJD current service level funded budget. The proposed OJD budget from the governor and the legislature is \$400 million.)
HB 2356 Creates Statewide Task Force on Court Facilities

Reforms and Attacks on Judiciary

- HJR 7 Establishes Judicial Merit Selection Commission (modifies current judicial selection process)
HJR 23 Judicial impeachment
HJR 28 Changes manner of appointing and electing judges of Supreme Court

Miscellaneous

- HB 3048 Prohibits insurer from purchasing or acquiring creditor's interest in debt or liability of debtor under certain circumstances (prohibits asset acquisition strategy)
HB 2343 Modifies definition of abuse for purposes of child-abuse reporting
HB 2946 Creates task force on reciprocity (The OSB has begun implementation of reciprocity with WA and ID.)
SB 20/282 Permits commissions for CPAs (creeping MDP issues)

Contacts

The OSB Public Affairs Committee ("PAC") oversees legislative activities and makes recommendations on major policy issues. Chaired by Hillsboro attorney John Tyner, other members include; James Brown, Salem; William Carter, Medford; Malcolm Scott,

If you have questions or comments about this newsletter or legislative issues, please contact the Public Affairs Committee chair John Tyner at (503) 648-5591 or the Public Affairs staff at the bar office at (503) 620-0222 or toll-free in Oregon at (800) 452-8260. You can reach Bob Oleson at ext. 317 or by e-mail at boleson@osbar.org; contact Susan Evans Grabe at ext. 380 or by e-mail at sgrabe@osbar.org.