

Testimony in Opposition to SB 302

Senate Health Care and Human Services Committee

March 14, 2013

Dear Chair Monnes Anderson and committee members:

Thank you for allowing the Administrative Law Section of the Oregon State Bar to provide testimony opposing Section 6(2) of SB 302. This provision concerns the assessment of costs in disciplinary proceedings by the Oregon Health Licensing Agency.

The Administrative Law Section is composed of attorneys who represent private citizens and public agencies, as well as administrative law judges. The section works to ensure the public's access to administrative justice. Section 6(2) of the bill provides the agency with authority to assess and collect the costs it incurs in the hearing process against the person who requests the hearing, and has an onerous effect on the public's access to contested case hearings. The prospect of having the agency assess the agency's investigation and hearing costs, as well as its attorney fees, against a party creates a profound deterrent to exercising the right to request a hearing. Accordingly, the Administrative Law Section opposes this particular section of SB 302, and its application to agencies being added to the oversight authority of the Health Licensing Agency.

SB 302 makes Section 6(2) applicable to twenty boards. For example, Section 6(2) applies to barbers, athletic trainers, cosmetologists, and dietitians under current law. SB 302 also extends this cost provision to the new boards added to its oversight, including the Board of Psychologist Examiners, Occupational Therapy Licensing Board, Oregon Board of Naturopathic Medicine, Board of Medical Imaging, and the State Mortuary and Cemetery Board. Instead of spreading regulatory costs over the entire tax base or even the entire profession, the agency's costs are assessed against a single pocket book.

The recovery of these costs is only available to the agency and is not available to parties who prevail in contested case hearings. But even if licensees could recover their costs and attorney fees in these agency proceedings, this kind of simple reciprocity--like in judicial proceedings--will not suffice here. An independent judge does not make the determination in these cases. The agency is the finder of facts and final decision-maker. The agency would be required to sacrifice its own budget to absorb defense costs and attorney fees, should the licensee be allowed to prevail in a hearing. There is already an economic incentive for agencies to prevail in these proceedings and reciprocity would enhance that incentive.

Likewise, there is already a strong incentive for a licensee to avoid the headache and the financial costs inherent in challenging an agency's action by requesting a hearing. The costs to the

licensee are already formidable. The added threat of having to also pay the agency's costs and attorney fees can provide the final and insurmountable barrier to requesting a hearing for a licensee who disagrees with the agency. The licensee simply cannot afford to pay her way and the agency's way, too, in order to seek justice in a proceeding where the outcome is controlled by the agency issuing the final order.

The threat of these assessments is a very powerful deterrent to the exercise of the right to request a hearing. The authority to assess costs in Section 6(2) should be deleted, not extended to more agencies in SB 302.

Respectfully submitted by,

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On behalf of the Administrative Law Section of the Oregon State Bar

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