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Testimony before House Judiciary Committee In Opposition to House Bill 2224 (-2 Amendments)

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My name is Erin Olson. I am an attorney in private practice, and I frequently advocate for victims of elder financial abuse. I am testifying today in opposition to the -2 amendments to HB 2224 because: (1) they are inadequate to accomplish what this body intended when requiring mandatory reporting of the financial exploitation of elders and persons with disabilities, and (2) the definition of "wrongfully" that is incorporated into the mandatory elder abuse reporting law is likely to be applied to the statutory civil action for abuse of a vulnerable person contained within the same chapter of the Oregon Revised Statutes.

(1) The proposed amendments are inadequate to protect elders because the list of conduct that is "wrongful" within the amendment -- "deceit, trickery, subterfuge, coercion, harassment, duress, fraud, and undue influence" -- excludes some obvious "wrongful" means frequently employed to commit financial exploitation, including breach of a fiduciary duty, defamation, and other methods that the Court of Appeals has identified as "wrongful" in its application of the term. *Church v. Woods*, 190 Or App 112 (2003):

Conduct generally is "wrongful" if it is carried out in pursuit of an improper motive or by improper means. *See, e.g., Empire Fire & Marine Ins. v. Fremont Indemnity*, 90 Or. App. 56, 62, 750 P.2d 1178 (1988) (defining "wrongful" interference with contractual relations in those terms). "Improper means" must be independently wrongful by reason of statutory or common law, beyond the mere fact of the injury complained of. *Conklin v. Karban Rock, Inc.*, 94 Or. App. 593, 601, 767 P.2d 444, *rev den*, 307 Or. 719 (1989). Improper means, for example, include "violence, threats, intimidation, deceit,

misrepresentation, bribery, unfounded litigation, defamation and disparaging falsehood." *Id.* The use of undue influence also constitutes an "improper means," in that it involves the procurement of an unfair advantage. *See Smith v. Ellison*, 171 Or. App. 289, 294, 15 P.3d 67 (2000) (stating that "the emphasis in undue influence cases should be on the unfairness of the advantage which is reaped as a result of wrongful conduct" (internal quotation marks omitted)). That dual meaning of the word "wrongful," focusing alternatively on the defendant's motives or the means by which property was taken, is sensible in the context of ORS 124.110(1)(a). Accordingly, we adopt it.

Id. at 118-119.

The -2 amendments are reported to arise from difficulties in defining what conduct is "wrongful" for purposes of the mandatory elder abuse reporting law, and particularly, in training lawyers in how to adhere to the law. However, much of the discussion when this issue was before the Elder Abuse Prevention Work Group, its Financial Exploitation Subcommittee, and when it was discussed on listserves among members of the elder law and civil litigation bars, has concerned attorneys' potential civil liability for violating the mandatory reporting law, as well as attorneys' civil liability for perpetrating financial abuse in representing clients. Examples given were whether run-of-the-mill breach of contract actions constitute "financial exploitation" when one party to the contract is elderly. However, the Court of Appeals has indicated that a breach of contract is only "wrongful" for purposes of ORS 124.110 if it involves conduct beyond the mere breach. *Hoffart v. Wiggins*, 226 Or App 545 (2009) (allegations of breach of an investment contract could support a claim under ORS 124.110 with added evidence of wrongful retention of funds).

The definition of "wrongful" adopted by the Oregon Legislature will have meaning beyond just the mandatory reporting law, and it deserves meaningful debate. The effort to protect attorneys through a "gut-and-stuff" for which no meaningful notice to the public has been given would be contrary to the tenets of a meaningful legislative process, and inconsistent with the broad protections this body has afforded vulnerable persons in the past. *See Wyers v. American Medical Response Northwest, Inc.*, 268 Or App 232, 251 (2014) ("We conclude from the legislative history that the abuse statutes have a strong remedial purpose * * *", and " * * * [t]hat history indicates that * * * the legislature intends to offer robust protection for vulnerable persons."). I urge the Committee to reject this bill until a meaningful opportunity to obtain input from broader constituencies is possible.