

**Testimony before the
House Committee on the Judiciary
Subcommittee on Civil Law
in support of Senate Bill 181
On behalf of the
Oregon State Bar Consumer Law Section
April 28, 2021**

Chair Power and Members of the Committee:

My name is Chris Mertens. I am an attorney in Portland, Oregon. I am here today as a representative of the Oregon State Bar's Consumer Law Section, as the Section's immediate Past Chair. The Consumer Law Section is made up of over 180 attorneys from all parts of Oregon, who represent clients in matters ranging from foreclosures and debt-related disputes to consumer rights matters arising from problematic consumer products and services.

The Oregon State Bar (OSB) is a public corporation and an instrumentality of the court with over 15,000 active members. The Oregon State Bar serves the public interest by: regulating the legal profession and improving the quality of legal services; supporting the judiciary and improving the administration of justice; and advancing a fair, inclusive and accessible justice system.

Senate Bill 181

Under current law, at the conclusion of some civil cases a party to a case may request that their attorney fees be paid by an opposing party. If there is a basis for attorney fees under statute, contract, or case law, and the judge has decided to grant an award of attorney fees to the successful party, the judge determines the appropriate amount based on a statutory list of criteria. SB 181 adds another factor to determining the amount by including whether a case is taken pro-bono or otherwise promotes access to justice. SB 181 does not change the current requirement that the amount of fees be reasonable.

To clarify, "pro bono" means that an attorney is not charging their client. Pro bono does not mean that the attorney is working for free. For example, Legal Aid attorneys, who provide services pro bono, still receive a salary, and thus compensation for their legal work. SB 181's reference to pro bono would apply to Legal Aid attorneys, as well as other attorneys who have agreed to represent their clients without charge to the client, where those attorneys retain the possibility of recovering their attorney fees from the other side if the attorney prevails for their client.

Attorneys who provide pro bono representation (including legal services organizations) on consumer-related claims with fee-shifting statutes sometimes get their fees reduced by a judge due to the pro bono representation or the smaller amounts at issue. The Oregon State Bar Consumer Law Section has heard instances from Oregon attorneys, often in the context of court-mandated arbitration, where pro-bono counsel's fees were reduced on the grounds that the client was otherwise indigent, or the amount at issue was not deemed significant enough, even if the indigent consumer was defending an unfounded lawsuit. This can discourage attorneys from taking pro bono with right to attorney fee cases and it may prevent legal service organizations from providing the best representation for indigent clients.

Senate Bill 181 provides a technical fix to clarify the existing elements considered in determining the reasonableness of fees where there is already an established right to attorney fees. SB 181 will require courts to take the pro bono status of the representation and increasing access to justice for Oregonians into consideration when determining the amount of attorney fees to award. It also allows the court to recognize the true cost to attorneys and legal services organizations who take risks in representing underserved clients pro bono, and ensures that such attorneys are adequately compensated while expanding access to justice for Oregonians most in need.

There are existing sideboards on the fee determination process already in statute. For example, attorney fees may only be awarded when they are specifically authorized. Senate Bill 181 does not expand the right to attorney fees. Pro bono representation and access to justice are not the only factors for the judge to determine the amount of attorney fees, but rather would be included among a list of nine in determining the reasonable amount of the attorney fee award. Finally, as mentioned above, the amended statute already expressly requires that any attorney fee be reasonable.

Thank you for your consideration of SB 181. I am happy to answer any questions.

Chris Mertens

Past-Chair, OSB Consumer Law Executive Committee