

**SB 867 STAFF MEASURE SUMMARY**

**House Committee On Judiciary**

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**Prepared By:** Adrienne Anderson, LPRO Analyst

**Meeting Dates:** 4/18

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**WHAT THE MEASURE DOES:**

Provides that the proponent of a declarant's hearsay statement can offer the hearsay statement as substantive evidence if the proponent can prove by a preponderance of the evidence that the opposing party caused the declarant to become unavailable.

**ISSUES DISCUSSED:**

**EFFECT OF AMENDMENT:**

No amendment.

**BACKGROUND:**

Under both the Fifth Amendment to the U.S. Constitution and Article 1, section 11 of the Oregon Constitution, a defendant has the right to confront the witnesses against them in a criminal trial. Hearsay statements are not permitted to be offered as substantive evidence unless an exception applies. Under the current law, if the proponent of an unavailable declarant's hearsay statement wishes to offer the declarant's hearsay statement as substantiative evidence, the proponent must show that they are unable to procure the declarant's attendance by process or other reasonable means. The court has held that "process" refers to the proponent serving a declarant with a subpoena, but it does not refer to more intrusive forms of process. The court has also held that "other reasonable means" be read in conjunction with "process" if process via service of subpoena is not possible because the declarant is beyond the subpoena's reach. "Other reasonable means" is based on the totality of the circumstances, including: the proponent's efforts to procure the declarant's attendance beyond service of a subpoena; the resources available to the proponent; available options that the proponent did not pursue; any limit on the proponent's efforts; the likelihood that additional efforts would procure attendance; and the wrongful conduct by the defendant. Wrongful conduct by the defendant is one factor, but not the only factor the court will look to when determining whether a declarant is unavailable.

Senate Bill 867 would permit the proponent of a declarant's hearsay statement to offer the statement as substantive evidence if the proponent can show by a preponderance of the evidence that the opposing party caused the declarant to be unavailable and as a result, the declarant is not present to testify, without having to show that the proponent was unable to procure the declarant's attendance by process or other reasonable means.