TESTIMONY REGARDING SB 1557 —
CHANGES TO CONTEMPT OF COURT PROCEDURE

Before the House Committee on Judiciary, Oregon State Legislature
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Submitted by:
Maureen McKnight, Retired Judge
Formerly Chief Family Court Judge of the Multnomah County Circuit Court

Chair Kropf, Vice-Chairs Chotzen and Wallen, and Members of the Committee:

My name is Maureen McKnight and I am a Retired Judge. I served on the Multnomah County Bench for 17 years where I was the Chief Family Court Judge and a member of the Oregon Judicial Department's State Family Law Advisory Committee. Prior to that time, I had a 22 year career at Legal Aid Services here in Oregon. As a Retired Judge, I have been a member of several Oregon Judicial Department committees, including the workgroup that has worked for several years on the changes to contempt of court procedure represented by this bill. I am speaking today both for myself and for the Oregon Judicial Department.

Background

I want to set out first a little broader context to explain why the proposal seeks multiple rather than isolated changes. As you may know, contempt of court matters are neither civil nor criminal cases, but *sui generis* – of their own kind. And we have 3 types of contempt of Oregon:

- Summary contempt – addressing misconduct in the presence of the court, which this bill does not address
- Remedial contempt – seeking sanctions that would *compel compliance* with a court order Historically these were filed as a motion in the same case that produced the order that allegedly was violated, such as motion in a divorce case to compel a party to return personal property that a divorce judgment awarded to the other party. This type of contempt is the predominant focus of SB 1557, and
- Punitive contempt – seeking sanctions that would *punish noncompliance* with a court order, such as violation of a restraining order or even nonpayment of support. Only District Attorneys, Assistant Attorneys General, and City Attorneys can bring these cases and the

criminal statutes apply to them (except for jury trials). Our bill addresses this type of contempt only in 2 limited contexts.

On remedial contempts, the one to compel compliance and most frequently brought by private litigants, OJD's transition to eCourt resulted in an awkward fit since some of the sanctions seemed "criminal" in that jail time and fines were a possibility but the contempt proceeding is neither criminal nor civil. Such cases did not fit cleanly into a "civil" case structure in the court's digitalized case management system and some interim steps were taken by Uniform Trial Court Rule to address the inconsistencies. Those steps also turned out to be problematic and the court workgroup then recommended a clean break – to make remedial contempts their own independent case, just as a punitive contempt case is. So in 2023, HB 2225 made that change at OJD's request along with a few other minor amendments. What the workgroup has realized in monitoring implementation, however, is that multiple additional changes were needed to address comprehensively the unique nature of remedial contempt, **as local courts were proceeding in various ways with remedial contempt as an independent action** (some like a straight civil case with an Answer or Response, others keeping the Order to Appear approach that the current statute allows, some a combination). The inconsistent practices have been confusing for litigants, staff, and judges. And our workgroup – which had several judges -- knew that with remedial contempts being brought most frequently in the family law context, with many self-represented litigants bringing them or defending them, judges needed flexibility within this consistent legal structure.

So SB 1557 provides that uniform procedural structure -- and it allows for the flexibility where judges need it.

<u>Amendments</u>

Section 1 of the bill addresses the major procedural changes, amending ORS 33.055.

The first change the bill makes is to **make uniform the nomenclature for the parties**, requiring the moving party to be the plaintiff and the served party the defendant.

The bill **also lists in Section 1 exactly what the initiating documents must include and denominates the underlying document as a complaint**. No summons is needed but the bill also requires an affidavit or declaration under penalty of perjury to support an ex parte Motion for an Order for the Defendant to appear. That **"Order to Appear" model** :

- is the long standing practice from when remedial contempts were part of the same case as the underlying order and

- is a procedure that most local courts retained when the ”separate case” requirement was enacted in 2023
- would now be the mandated rather than optional approach under the current statute

Aside from make practice consistent statewide, making the Order to Appear procedure mandatory facilitates the use of model court forms.

Other amendments in Section 1 of the bill authorize the court to **dismiss the action at any time if the judge believes a prima facie case has not been made.** This often happens, frankly, at the time the motion & declaration for an Order to Appear is submitted. Self-represented litigants sometimes file contempt matters seeking sanctions for nonpayment of property division awards or other matters for which contempt does not lie. We wanted the judge to be able to end the matter there, rather than spending resources on service of the other party and taking up docketed hearing time for a matter than can't proceed.

Amendments to subsections 6 & 7 of ORS 33.055 address the procedure if the Judge *does* sign the Order to Appear.

- the Defendant is ordered to appear on a **specific date and time**, and whether the **appearance is in person or remote** must be addressed. Practically speaking, this date must be more than 21 days out, due to deadline of optional response.
- the Defendant is to be served with the complaint, ex parte motion and the supporting declaration in the **manner provided by ORCP 7D** and if in-person service cannot be made, alternative methods are allowed by court order
- the **Defendant's atty must be served under ORCP 9, if the Defendant has an attorney** in the matter that produced the order allegedly violated
- and the Defendant **may but need not file a responsive pleading**. This choice allows the court to proceed to the merits, if appropriate, on the date of that first appearance or continue the matter instead. Not requiring a responsive pleading also avoids any self-incrimination issues from self-represented litigants. If the Defendant does file an Answer, **a 21 day deadline is imposed**. That day will be *before* the Appearance date so that the hearing could proceed on that day if appropriate.

Continuing with the situation of the Order to Appear being signed:

- **ORCP 83 on provisional process applies** (ex parte orders often banning harm, sale, or concealment of property)
- the Court **may dismiss if Plaintiff fails to appear** at the hearing

Amendments to subsection 9 of ORS 33.055 address what happens if the **Defendant does *not* appear at hearing:**

- Gives the Court **discretion to set the matter over**,
    - and issue an order or warrant for arrest under contempt statutes not being changed (now in Section 3 of the bill) ,
    - or take other appropriate action, including hearing a request that a default be taken
- **Allows a Plaintiff to seek an order of default** under ORCP 69 and to satisfy the proof requirements for that default (regarding age of majority, capacity and protective proceedings, and military service) by sworn testimony rather than requiring documentation[1] and
- **If the court finds it appropriate to *proceed* with the contempt showing and enter sanctions in the Defendant's absence**, gives the court the **option to find the Defendant in contempt of court** if the burden of proof is satisfied (clear and convincing if confinement is not sought; beyond a reasonable doubt if confinement is sought; both terms not changed) **and – if appropriate -- order sanctions to compel performance**
    - but where the Defendant did not appear, the court cannot order a sanction of confinement (if that sanction was sought)

Whether or not the Defendant appears, subsection (13) of ORS 33.055 allows the Court :

- **To hear the matter and find contempt proven (or not) and if proven, enter sanctions but also**
- **the <u>option</u> to find contempt but *not* enter sanctions and instead continue the matter on the condition the Defendant cure the contempt by complying**
- **require payment of atty fees and costs --** even if the case is finalized without sanctions because the Defendant cured the noncompliance *as a result of the complaint*. This latter provision changes case law that disallowed attorney fees in this situation**.**

The bill also retains -- but renumbers- current provisions requiring a contempt defendant appearing without counsel to be informed of the right to retained counsel, and if indigent and confinement is sought, to appointed counsel.

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[1] The bill explicitly changes ORCP 69's requirement for a motion for default supported by an affidavit or declaration by allowing testimony instead. Similarly, the federal Servicemembers Civil Relief Act requires that the default showing regarding military service be made by affidavit or other written documentation meeting that statutes' standards. 50 U.S.C. § 3931(b). However, the Servicemembers Act applies only to "*civil* actions and proceedings." %0 U.S.C. § 3931(a). As stated above, contempt of court matters in Oregon are not civil proceedings but *sui generis.*

Section 2 of the bill clarifies that controlling statute (ORS 33.065) for *punitive* contempt in stating that imposition of such sanctions can include remedial sanctions but both are contingent on the the *finding* of contempt, with care taken to use "finding" rather than "conviction." This word choice is intended to reinforce the fact that one is not convicted of a crime when found to be in contempt of court even when punitive sanctions are imposed.

For contempts seeking remedial sanctions *or* punitive sanctions, the bill also sets out in Section 6 **venue provisions** that current ORS chapter 33 does not. It adopts three venue choices:

- the court that issued/entered the underlying order (pulling from existing practice & established case law),
- the county where violation occurred, and (pulling from criminal and civil procedure),
- and the county where the Defendant resides at commencement (pulling from civil)

But because the Family Abuse Prevention Act (FAPA) already has a specific statute on venue for any contempts of that Act at ORS 107.728, SB 1557 leaves venue for FAPA contempts as is -- where the action arose or the county that issued the underlying FAPA order

Finally the bill at Section 6 make explicit in the punitive contempt statute (ORS 33.065) what is now a explicit in the criminal code, and applied to punitive contempt by virtue of just general language in ORS 33.065(5). Said differently, since criminal law provisions apply to punitive contempt proceedings by what ORS 33.065 says, that general language includes the procedures for raising objections to venue and the resultant waiver of those objections if the criminal code provisions regarding same are not followed. The **application of those specific criminal venue objection statutes is specifically referenced in the punitive contempt statute to make sure they are not missed.**

I appreciate your time and your consideration of my remarks. I believe others have testimony regarding Section 7.

Maureen McKnight

judgemaureenmcknight@gmail.com