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BILL BRADBURY
SECRETARY OF STATE

5000 Meadows Road, Suite 150
Lake Oswego, Oregon 97035

July 26, 2004

**PUBLIC COMMENT
VIA FACSIMILE TO (503) 373-7414**

Secretary of State
Elections Division, Room 141
State Capitol
Salem, Oregon 97310

Re: Public Comment on draft ballot title for Proposed Initiative Petition No. 3

Dear Secretary Bradbury:

The undersigned elector is a registered Oregon voter and hereby comments on the draft ballot title for Proposed Initiative Petition No. 3, proposing a statutory amendment, for the General Election of November 7, 2006. The undersigned's comments are as follows:

COMMENT ON DRAFT BALLOT TITLE CAPTION

Pursuant to ORS 250.035(2)(a), the draft ballot title must reasonably identify the subject matter of the measure. Even if a caption is literally accurate, the overall subject matter of the measure must be conveyed in the caption. As noted by the Oregon Supreme Court, "[m]any people will not be advised by the title of a significant change embodied in the text of the measure but not effectively signaled in the Caption or Question of the ballot title." Crumpton v. Kulongoski, 321 Or. 279, 282 (1995). As currently drafted, the ballot title caption fails to accurately convey the subject matter of the measure and is confusing.

Under the current draft, the ballot title caption inaccurately states that the proposed ballot measure "caps" attorney fees that may be charged to plaintiffs. The proposed ballot measure does not "cap" legal fees that may be charged to an injured plaintiff in a personal injury action or in a case involving wrongful death. Rather, the measure "limits" attorney fees either to the lesser of the negotiated fee (Section 3)(2) or \$100,000 (Section 3)(1). It may be argued that the word "caps" versus "limits" is semantics, but it is submitted that the true purpose of the initiative petition is to limit the amount of attorney fees which may be charged as opposed to placing a cap thereon.

The current draft ballot title is confusing in that it posits that the limit would apply to multiple plaintiffs in multiple cases. The word "plaintiff" is plural as is "case." As written, the ballot title is confusing and potentially misleading in that the ballot measure does not propose to apply the "limit" to multiple plaintiffs in multiple cases.

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The caption of the draft ballot title should be revised to reasonably and correctly identify the subject matter of the measure, and I suggest the following revisions to achieve that end (language to be inserted is set forth in bold and language to be deleted is noted with a strikethrough):

**LIMITS CAPS ATTORNEY FEES CHARGED TO PLAINTIFFS IN
PERSONAL INJURY, DEATH CASES (OTHER THAN CLASS ACTIONS).**

COMMENT ON RESULT OF "YES" VOTE STATEMENT

Pursuant to ORS 250.035(2)(b), the ballot title must include a simple and understandable statement that describes the result if the proposed ballot measure is approved. Consistent with the comments set forth above, the "Result of 'Yes' Vote" statement is misleading in that the words "plaintiffs" and "cases" are in the plural form when they should be singular. To address the issues set forth above, the statement should be revised as follows:

RESULT OF "YES" VOTE: "Yes" vote limits to \$100,000 the attorney fees charged plaintiffs in a personal injury or wrongful death cases other than in certified class actions.

COMMENT ON RESULT OF "NO" VOTE STATEMENT

Pursuant to ORS 250.035(2)(c), the ballot title must include a simple and understandable statement that describes the result if the measure is rejected. The Result of 'No' Vote" statement is flawed. Nowhere in the "Result of 'No' Vote" statement are "attorney fees" referenced. The lack of such reference makes the statement either inaccurate or misleading. Further, the word "cap" is again used when the word "limit" should be used as referenced above. It is interesting to note in the "Result of a 'Yes' Vote" Statement, the Attorney General uses the word "limits" as opposed to "caps."

To accurately reflect the Initiative Petition, the word "limit" should be used. To address the concerns, the "Result of 'No' Vote" statement should be clarified as follows:

RESULT OF "NO" VOTE: "No" vote retains current law lacking monetary ~~cap~~ **limit** charged by attorneys to plaintiff in personal injury, wrongful death cases allowing attorney fees to be negotiated.

COMMENT ON SUMMARY

Pursuant to ORS 250.035(2)(d), the ballot title must include a concise and impartial statement summarizing the measure and its major effect. As referenced above, the Attorney General incorrectly suggests that the limit imposed by Initiative Petition No. 3 applies to all plaintiffs in a civil action, which assertion is misleading. As noted above, there may be situations involving multiple plaintiffs arising from a single occurrence. Under the ballot measure, the limit on attorney

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fees would apply to each plaintiff. As written, the ballot measure would permit the attorney to charge each plaintiff separate and distinct legal fees of up to \$100,000.

Again, the Attorney General uses the word "cap" in the next to last sentence of the Summary. However, in other instances in the Summary, as well as in the "Result of 'Yes' Vote," the Attorney General uses the word "limit." For consistency and accuracy, it is submitted that the word "limit" better describes the effect of the measure and should be used in place of "cap."

To account for the issues set forth above, we suggest the following revisions to the summary (language to be inserted is set forth in bold and language to be deleted is noted with a strikethrough):

SUMMARY: Current law places certain requirements and restrictions on contingent fee agreements between attorneys and their clients, but current law does not regulate the amount of the fee that can be negotiated between an attorney and the client, providing that the resulting fee is neither excessive nor illegal. Measure limits to \$100,000 the amount of attorney fees that an attorney can charge **a plaintiffs** in a civil actions for damages arising out of bodily injury or death, not including certified class actions. The limitation does not include actual expenses and costs reasonably incurred by the attorney(s). Limitation applies only to attorney(s) representing the injured party (plaintiff). ~~Cap~~ **Limit** applies regardless of the number of attorneys involved or the amount of the settlement or award obtained. Other provisions.

By my count, the summary proposed above has 125 words. Thank you for your consideration of the comments set forth above.

Sincerely,

Michael D. Crew

MDC:mb

Comment Letter (1) 07.26.04

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

LAWYERS

Steven C. Berman
of Counsel

July 26, 2004

RECEIVED
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BILL BRADBURY
SECRETARY OF STATE

Via Facsimile and Regular Mail

Bill Bradbury
Secretary of State
Elections Division
Room 141 State Capitol
Salem, OR 97310-0722

Re: Initiative Petition No. 3 (2006).

Dear Secretary Bradbury:

This firm represents Arwen Bird regarding the ballot title for Initiative Petition No. 3. Ms. Bird is an elector in the State of Oregon. This letter is written in response to your office's press release, dated July 13, 2004, which invites comments on the draft ballot title to Initiative Petition No. 3, for the November 7, 2006 general election.

Initiative Petition No. 3 ("the Initiative") would enact a statutory amendment to restrict the freedom of contract between attorneys and individuals (or their legal representatives) in personal injury or wrongful death actions. The caption, yes/no statements and summary contained in the draft ballot title do not comply with the requirements of ORS 250.035 and should be revised.

The Initiative is the latest attempt by the Oregon Medical Association (the "OMA") to restrict injured individuals' access to justice. Last year, the OMA filed three similar measures to restrict the rights of injured individuals to contract with attorneys of their choosing; those ballot titles were extensively litigated, and after numerous petitions to (and opinions from) the Oregon Supreme Court, the Court certified a ballot title that complied with the statutory requirements. See Crew v. Myers, 336 Or 535, 87 P3d 656, reconsideration granted, 336 Or 635, 89 P3d 1181 (2004) (discussing flaws with Attorney General's certified ballot title). Although Initiative 128 (2004) applied only to actions against health care providers and entities – and the current Initiative purports to apply to all claims for bodily injury or death – the Court's opinions in Crew addressed many of the same issues that arise here. Accordingly, the final certified ballot title for Initiative 128 (2004) should serve as a starting template for the current Initiative; by so doing, your office can help prevent unnecessary litigation.

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I. The Draft Ballot Title for Petition No. 3 Does not Comply with the Statutory Requirements.

A. The Caption.

ORS 250.035(2)(a) provides that a ballot title must contain "a caption of not more than fifteen words which reasonably identifies the subject matter of the state measure."

The caption in the draft ballot title is flawed in multiple respects. First, the draft ballot title uses the phrase "caps attorney fees charged to plaintiffs." That phrase is confusing, and also inaccurate. The initiative does not purport to serve as a total "cap," rather it is a limitation on attorneys' fees, up to \$100,000.

The word "cap" is also politically charged. Cap is the term consistently used by tort reform activists to miscast the effect that their proffered legislation will have on the rights of injured individuals. It is typically used to describe a limitation on damages, not a limitation on fees. Accordingly, "cap" is a word loaded with an established political meaning; its use here is improper, and may cause confusion among voters.

The second flaw with the caption, which is substantial, is that it does not address the main import of the Initiative. The Initiative substantially restricts the freedom of injured individuals to contract (as they choose) with a lawyer. That is the clear intent and purpose of the measure. However, the Initiative would not place a similar restriction on defendants. In other words, plaintiffs would have their hands tied; defendants would not be restricted as to whom they could hire or how much they could spend. However, the limitations placed on electors' rights by the Initiative are not mentioned at all in the caption.

The third flaw with the caption is the use of the word "cases." A "case" is something that is filed in court. However, the Initiative, by its own terms, applies not just to judgments, but also to "settlements." Many personal injury matters are resolved before a case ever is filed in court. The caption, as written, would mislead the public into believing that the fee restriction applies only to fully litigated matters.

The use of the word "charged" and the use of the phrase "class actions" in the caption are misleading. It is inaccurate to describe contingent attorneys' fees as "charged" to a plaintiff. The fees are, in fact, contingent; no fee is earned by the lawyer if the plaintiff does not receive recovery. Accordingly, in those scenarios, there is no "charge." When recovery is obtained, the lawyer's fee comes from the settlement or judgment funds paid by the defendant. It is the defendant, not the plaintiff, who is "charged" the fee.

Moreover, in personal injury claims or wrongful death claims where the plaintiff is entitled to recover attorneys' fees from the defendant (due to a statute, or contractual provision), the attorneys' fees are, in fact, "charged" by the court to the defendant. Again, the plaintiff is "charged" no fee by his lawyer.

Finally, in class actions, the fees earned by the plaintiffs' lawyers are awarded by the Court. ORCP 32N. Those fees are assessed separately against the defendant for the benefit of the class. Again, there is no fee "charged" by the plaintiffs' counsel to the class. Accordingly, the caption is misleading, because it implies that attorneys' fees are charged to plaintiffs in class actions; they are not. The reference to class actions should be withdrawn from the caption.

The caption implies that in each of the foregoing scenarios, a fee is "charged" to the plaintiff by plaintiff's counsel. However, in each of those scenarios, the fee is actually assessed against, paid by, and "charged to" the defendant.

Commentor Bird recognizes that part of the ambiguity in the caption comes from the fact that the Initiative improperly uses the word "charged" to describe how fees are assessed in personal injury and death cases. However, the Court repeatedly has held that inaccurate language in an initiative should not be replicated in the ballot title if that language will have the effect of misleading or confusing the voters. See, e.g., Kain v. Myers, 336 Or 116, 120, 79 P3d 864 (2003); Krumpton v. Kulongoski, 321 Or 297, 282, 869 P2d 1211 (1995).

The phrase "attorney fee" in the caption also is inaccurate, because the initiative applies, "regardless of the number of plaintiff's attorneys or defendants." In other words, the initiative applies to all attorneys that may be representing one individual plaintiff. Accordingly, the singular "attorney," as opposed to the plural "attorneys," is misleading.

The caption also fails to mention that the Initiative would apply to all personal injury and death claims, regardless of the level of fault of the tortfeasor. As the Court explained in Crew, the caption must convey to voters the full scope of the measure, including the relative degree of fault ascribed to the tortfeasor in any given claim. Although the word restrictions in the caption may be too limited to include the phrase "intentional, reckless, negligent or otherwise," an all encompassing adjective (such as "all") conveys the full reach of the Initiative, and should be included.

A more appropriate caption would read:

**RESTRICTS INJURED INDIVIDUAL'S RIGHT TO HIRE ATTORNEY FOR
ALL PERSONAL INJURY OR DEATH CLAIMS**

Alternatively, a caption that parallels the caption in the ballot title certified by the Court in the prior attorneys' fees initiatives pursued by the OMA in the last election cycle would provide:

**LIMITS PLAINTIFF'S ATTORNEYS' FEES (BUT NOT DEFENDANTS'
ATTORNEYS' FEES) IN ALL PERSONAL INJURY, DEATH CLAIMS**

B. The Yes/No Statements.

ORS 250.035(2)(b) requires that the "yes" and "no" statements in a ballot title contain "simple and understandable statement[s] of not more than 25 words that describe[] the result if the measure is" approved or rejected.

The "yes" and "no" statements in the draft ballot title are flawed for the same reasons that the caption is flawed.

An additional flaw in the "no" statement is the use of the word "lacking." "Lacking" is another politically charged word. "Lack" is defined as a "deficiency or absence of something needed, desirable or customary," "something missing or needed," or "to be without or deficient in." Webster's Encyclopedic Unabridged Dictionary (2001) at 1073. In other words, the word lacking implies that there is something wrong, missing or deficient with current law. That appears to be the political position of the proponents of the Initiative; however, that certainly is not a matter of fact. The word "lacking" is politically charged and judgmental, and should be withdrawn from the "no" statement.

More appropriate yes and no statements would be:

"Yes" vote restricts rights of injured individuals (or their legal representatives) in personal injury or death claims to negotiate fee agreements with attorneys.

"No" vote retains current law allowing individuals (or their legal representatives) in personal injury or death claims to negotiate fee agreements with their attorneys.

Alternatively, yes/no statements that would parallel the yes/no statements in the ballot title certified by the Court in the prior attorneys' fees initiatives pursued by the OMA in the last election cycle would provide:

"Yes" vote limits plaintiff's attorneys' fees (but not defendants' attorneys' fees) in all claims arising out of personal injury or death (maximum \$100,000).

"No" vote retains current law, which imposes no set monetary limitations on plaintiff's attorneys' fees for claims arising out of personal or death.

C. The Summary.

ORS 250.035(2)(d) requires that the ballot title contain a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effects." The summary in the draft ballot title is deficient for the reasons listed above, and for the following additional reasons.

The summary is misleading, because it focuses (and only discusses) contingent fees. However, the Initiative applies to both hourly and contingent fee cases. Because of the summary's isolated discussion of only contingent fees, voters would be misled by the summary to thinking that the Initiative applies only to contingent fee cases.

The first sentence of the summary is misleading. The statute purportedly amended by the Initiative, ORS 20.340, does not place "restrictions" on contingent fee agreements. Rather, it addresses certain provisions that must be contained in contingent fee agreements. That is different. The use of the word "restrictions" is misplaced.

The second sentence of the survey uses the phrase "civil actions," which, as discussed above, is under-inclusive. The Initiative applies, regardless of whether any action has been filed in court.

The third sentence of the summary is unnecessary and confusing. The Initiative does not mention actual expenses or costs. There is no reason to discuss with voters what the Initiative does not affect. Indeed, that is misleading. It is improper to focus on one aspect of the world of law not affected by the Initiative when a whole realm of legal matters are not affected by it. Moreover, the current phrasing could lead voters to believe that when cases are resolved outside of trial, the plaintiff's lawyer necessarily recovers full costs and expenses. It is well known that in many contingency (and even hourly) cases, plaintiffs' lawyers are forced to "eat" costs and expenses, especially when there is no recovery for the plaintiff.

A more appropriate summary would read:

Current law does not restrict attorney-client agreements for attorney's representation of injured individuals or their legal representatives in personal injury and death cases, unless the fee is excessive or illegal. Measure limits attorneys' fees for lawyers for injured individuals (and their legal representative) in claims for personal injury or death. Measure applies to all claims arising out of personal injury or death, regardless of whether the defendant acted maliciously, intentionally, recklessly, negligently or otherwise. Measure limits fees in all such cases to \$100,000, regardless of the result achieved, the extent of the harm suffered, the number of attorneys representing the injured party or the number of defendants. The measure does not apply to defendants, whose right to contract would not be restricted. Other provisions.

Alternatively, a summary that parallels the summary in the ballot title certified by the Court in the prior attorneys' fees initiatives pursued by the OMA in the last election cycle would provide:

Current law places no limit on fee agreements between injured individuals, their spouses, or legal representatives and the attorneys who agree to represent them, unless the resulting fee is excessive or illegal. Measure limits attorneys' fees in all claims for personal injury or death to a maximum of \$100,000, regardless of the result achieved or whether the injuries were caused by actions that were malicious, intentional, reckless or otherwise. Measure applies to litigation, arbitration, mediation and settlement. Limitation applies regardless of the number of attorneys representing the injured individual and regardless of the number of individuals or entities against whom claims are made. Restriction does not apply to attorneys' fees for attorneys for the individuals or entities that caused the injury or death. Other provisions.

Thank you for your consideration of these comments. Please notify me immediately when a certified ballot title is issued.

Very truly yours,

 Steven C. Berman

SCB:scb
cc: client

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BILL BRADBURY
SECRETARY OF STATE

July 26, 2004

The Honorable Bill Bradbury
Secretary of State
Elections Division
141 State Capitol
Salem, OR 97310-0722
Fax: (503) 373-7414

Re: November 2006 Initiative Petition #3 (limits attorney fees) (Ballot title comments)

Dear Secretary of State Bradbury:

I am an Oregon elector, and submit these comments in response to the Secretary of State's request for comments on the draft ballot title for this proposed initiative.

The Draft Caption

The draft Caption does not reasonably identify the subject matter of the measure, as required by ORS 250.035(2)(a).

The fundamental problem with the draft Caption is the word 'charged.' First of all, attorneys' fees based on a contingency arrangement (which the measure does cover) are not 'charged' in the common meaning of the word; the attorney does not send the client a bill for a specific amount for services rendered. The attorney and the client agree in advance that the attorney will get a percentage of the recovery (if any).

Second, the use of the word 'charged' is highly politicizing, and renders the caption less than 'reasonable.' It creates the impression that this is a plaintiffs' consumer protection measure that will require attorneys to offer their services at a lower cost than they currently do. In fact, of course, attorneys can simply refuse to work on personal injury cases if they do not believe the potential fee is large enough to justify the risk and effort they are putting in.

Indeed, the obvious true intent of the drafters of this measure is to reduce the number of personal injury or wrongful death lawsuits, by reducing the number of attorneys willing to take them on - or, to put it another way, to limit plaintiffs' options by prohibiting them from agreeing to *pay* attorneys more than \$100,000. The Caption could read:

**LIMITS AMOUNT INDIVIDUAL PLAINTIFFS IN PERSONAL INJURY,
DEATH CASES CAN PAY ATTORNEYS TO \$100,000**

(The undersigned suggests 'individual' as a modifier as a way of addressing the class action issue without using up too many words.)

An alternative to either the 'charge' or 'pay' option is to simply state that the measure **LIMITS PLAINTIFFS' ATTORNEY FEES**. This would be consistent with the approach that the Attorney General's office has taken with other fee limitation measures (see, for instance, titles for initiatives 85 and 86 for 2004.)

The Caption should also make it crystal clear that this measure would limit the options of only *one* party to an action. In Novick v. Myers, 330 Or 351, 356 (2000), the Supreme Court concluded that when a campaign finance measure imposed different limits on different types of potential contributors, the Caption should convey that fact. Although the reference to 'plaintiffs' is obviously useful in this regard, to fully convey the implications of the measure the disparity should be spelled out.

The undersigned submits the following alternative:

LIMITS INDIVIDUAL PLAINTIFFS' ATTORNEY FEES IN PERSONAL INJURY, DEATH CASES TO \$100,000; DEFENDANTS' UNLIMITED

The Draft "Result of 'Yes' Vote"

The draft does not provide a "simple and understandable" description of the result of passage of the measure, as required by ORS 250.035(2)(b). Again, the use of the word 'charge' suggests that the measure is a 'plaintiffs' consumer protection' measure that will force attorneys to work for less. And the word 'charge' does not really describe what happens in contingency fee cases.

In addition, the true 'result' of passage of the measure would be to establish an unequal system in which defendants in personal injury or death cases would be able to spend unlimited amounts on attorneys, but plaintiffs would not. The creation of such a two-tiered system is a fundamental change in the law, that the draft should make clear. The draft does not make this point in a 'simple and understandable' fashion.

The undersigned submits the following alternative:

RESULT OF "YES" VOTE: "Yes" vote limits plaintiffs' attorney fees in cases involving personal injury or death to \$100,000; defendants' attorney fees unlimited; class actions exempt.

The Draft "Result of 'No' Vote"

The draft does not provide a "simple and understandable" description of the result of defeat of the measure, as required by ORS 250.035(2)(c). For one thing, the phrase "lacking monetary cap charged to plaintiffs" is very confusing and not 'understandable.'

In addition, the draft does not make clear two important points: that under current law, there are no specific caps on *any* attorney fee agreements of any kind (a point critical to the readers' understanding of the extent to which the measure departs from existing law), but that fees *may not be excessive or illegal*.

The undersigned submits the following alternative:

RESULT OF 'NO' VOTE: "No" vote retains current law: no specific caps on any plaintiffs' or defendants' attorney fees, allowing fees to be negotiated; excessive, illegal fees prohibited.

The Draft Summary

The draft Summary does not quite effectively and impartially "summarize the measure and its major effect," as required by ORS 250.035(2)(d), because of, again, the use of the word "charge." To say that the limits the amount of attorney fees that an attorney can charge plaintiffs in certain civil actions suggests, again, that this is a consumer protection measure that will force attorneys to work for less – rather than a measure that will limit plaintiffs' options by limiting what they can agree to pay. This renders the Summary less than impartial, and ineffective and potentially misleading in summarizing the measure's effect.

Otherwise, the draft Summary is reasonable. The undersigned submits the following alternative:

SUMMARY: Current law places certain requirements and restrictions on contingent fee agreements between attorneys and their clients, but current law does not regulate the amount of the fee that can be negotiated between an attorney and a client, provided that the resulting fee is neither excessive nor illegal. Measure limits to \$100,000 the amount of attorney fees plaintiffs may pay in all civil actions for damages arising out of bodily injury or death, not including certified class actions. The limitation does not include actual expenses and costs reasonably incurred by the attorney(s). Limitation applies only to attorney(s) representing the injured party (plaintiff). Cap applies regardless of the number of attorneys involved or the amount of the settlement or award obtained. Other provisions.

Thank you for your consideration of these comments.

Sincerely,

Steven Novick
1653 SE Nehalem #4
Portland OR 97202
(503) 233-1429