Legislative Testimony

Oregon Criminal Defense Lawyers Association

March 27, 2019

The Honorable Representative Jennifer Williamson, Chair
House Judiciary Committee, Members

Re: Testimony Concerning HB 3249

Dear Chair Williamson and Members of the Committee:

My name is Katie Dunn, and I am here on behalf of OCDLA. I've lived in Oregon since 1997. I've been practicing criminal law since 1998. About nineteen years ago I was hired on as a staff attorney at Metropolitan Public Defender. I've been Multnomah County Director there since 2013.

Thank you for the opportunity to provide testimony in support of The Lawyer-Client Confidentiality Protection Act HB 3249.

The first provision of this Bill ensures that the Lawyer-Client Privilege is protected by codifying a lawyer and a lawyer's representatives' right to privately confer with their client. The Bill creates the logical remedy of excluding illegally obtained evidence derived from a client's private communications, as defined under the existing law.[1]

The second provision updates Oregon law in a way that is near and dear to my heart- jail and DOC visitor logs. Specifically, HB 3249 protects the client's right to confidentiality by creating a second log for legal visitors that cannot be informally reviewed,[2] exempts the legal log from public records production, and provides that any evidence derived in violation of this privilege cannot be used as evidence against the client in court.

Arguably, current law permits anyone to get jail visitors' logs. This is very problematic for folks in jail who are accused of crimes, because this means that anyone can see which experts have visited the accused person. Many defense experts are well-known in the criminal defense community, because we tend to hire experts we are familiar with and ones OPDS knows they can agree to pay their rate. Experts who are known are known for specific topics and issues they typically work with, and it becomes part of their "brand" which becomes automatically associated with their names. For example, if someone can see that a certain doctor is on my client's visitors' list, they can fairly infer that I'm going to raise some claim of trauma, or "battered woman's syndrome," because that's become what that doctor is known for. If someone

[1] O.R.S. § 40.225 (Defining 'confidential communication' as a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication)

[2] The Bill does allow formal review of these records by law enforcement where necessary for DOC, or for investigations.

sees that a well-known polygrapher is on my client's visitors list, then they know that I hired a polygrapher to go and test that client. If no report is later provided, then they can fairly infer that my client took a polygraph test and failed. In other words, experts we use will reveal a defense strategy by their names alone. This puts our in-custody accused clients at a huge disadvantage compared to those who are out of custody. Just by being in custody, these clients lose their privacy, and they unwillingly reveal defense strategy.

I attempted years ago to keep confidential a client's visitors log. We went to a hearing with presiding court, and Multnomah County Counsel was involved, as was the DA. We spent hours briefing the issue and arguing it at hearing. Ultimately, I was unsuccessful.

Earlier this year, I mounted a similar challenge on a different case and was successful in protecting my client's visitors' log. This time we had different county counsel, different framing of the issue, and a different type of case. Again, we spent hours briefing the issue and arguing it. It took up hours of time from all involved – my team, the prosecutor, the judge, judge's staff, and county counsel. In the end, a protective order was issued for my client's visitors' logs, but only after a contentious battle and a sizable amount of time. But this client should not be the only client afforded an opportunity to develop a defense in private without broadcasting my strategy.

We know that the legislature contemplated keeping experts hired confidential.[3] The statute that authorizes hiring experts at state expense explicitly provides that those requests for experts and the details around the hiring of them shall remain confidential.[4] Naturally, if the defense intends to call the expert to testify at trial, we would then disclose the expert's name and the materials they relied upon, but that would be *after* the expert did a thorough job and we had carefully weighed the risks and benefits of calling that expert at trial. Keeping the jail visitors logs public gives everyone an unfair "sneak peek" at the defense strategy, before the defense can even fully develop it.

All accused people deserve the right to a vigorous defense, developed in private. Not everyone accused of a crime can afford to post bail to get out of jail. Those without the financial means to bail out are still entitled to privacy with their legal representation. They do not deserve to be spied on because they don't have money to post bail. We can do better for our accused Oregonians, by affording them the privacy to which they are entitled.

Thank you for listening to my testimony and thank you to the bill Sponsors Madam Chair Williamson and Representative McLane. I am happy to answer any questions about this important proposal.

Kati Dunn
OCDLA Member and Practicing Lawyer

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[3] H.B. 2074, House Committee on Judiciary, April 30, 2003 (2003)(Second hearing, explicitly discussing risk of expenses revealing defense strategies).
[4] O.R.S. § 135.055(9)(b)("The following may not be disclosed to the district attorney prior to the conclusion to the case: Billings for such fees and expenses submitted by counsel or other providers.")

For questions or comments contact:
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