

Chair Prozanski, Vice-Chair Thatcher, and Members of the Judiciary Committee,

Re: Senate Bill 180-2 Would Benefit from Some Clarification

I am an attorney who has provided legal services to numerous clients regarding defamation issues. My practice is neither restricted to nor concentrated on any particular type of client. I routinely represent clients who believe they have been defamed as well as clients accused of defamation. Defamation law is a complicated and nuanced field which involves the balancing of the right to speak freely with the right to not be harmed by false statements. Clarity of law is critical to being able to properly navigate advise clients regarding their rights in regard to matters involving expression. Addressing some ambiguities in SB 180-2 would permit persons dealing with defamation issues to better assess where they stand with respect to engaging in expression or pursuing a remedy for false and damaging statements.

Here are some of the issues that warrant attention.

- **“action for defamation”** The bill clearly applies to the tort of defamation, which consists of libel and slander. The tort of false light, which is a type of privacy tort, also pertains to the making of false or misleading statement about a person and is similar to defamation although the false light tort requires that the statement be highly offensive and the measure of damages is somewhat different for the two torts. Creating a statutory privilege for defamation claims will be a little practical benefit to a party who can be sued for the false light tort. It would be helpful to practitioners and parties alike if the statute were amended to state whether it encompasses claims for false light.
- **“malice”** Oregon law recognizes two forms of malice. Common law malice refers to whether a defendant had an intent to injure the plaintiff and generally requires a finding that the defendant acted out of spite or ill will. Actual malice pertains to whether the defendant knew the statement was false or acted with reckless disregard of its truth or falsity. The bill would be clearer if it were amended to expressly state the intended type of malice.
- **“reasonable belief”** The statute does not state whether the reasonable belief must be objective or subjective. Under an objective standard, reasonableness is determined by viewing a situation from the standpoint of a hypothetical reasonable person, and does not consider the actual person’s physical or psychological characteristics. The subjective standard looks at whether the belief of a person who had particular mental and physical characteristics would have been reasonable to that person. For example, a person who has experienced multiple abusive incidents with law enforcement while growing up might view a particular encounter with a law enforcement officer as discriminatory whereas the majority of persons would believe no discrimination occurred. Adopting a subjective standard would likely greatly expand the number of persons who could successfully assert this statutory privilege.
- **“counterclaim”** Subsection 3 of the bill provides a rather draconian remedy that will have a chilling effect on persons who have meritorious defamation claims. In light of the malice requirement in subsection 2, the availability of this remedy could encourage abuse of the

privilege provided in the bill. At the very least, the bill should require that a defendant establish an absence of probable cause to bring the defamation action in order to be awarded the damages provided in subsection 3. Similarly, the “entitlement” to punitive damages seems extreme considering the punitive provision for three times the economic and noneconomic damages suffered by a defendant. Existing Oregon law requires that judges act as gatekeepers regarding claims for punitive damages and there appears to be no compelling reason to depart from this practice.

The committee should give serious consideration to the fact that people value their reputations, and that defamatory conduct can cause defamed persons to lose their employment, suffer damage to personal relationships, and experience lowered standing in their communities. The high standard for being permitted to assert a defamation claim embodied in SB 180-2 will in many instances have the practical effect of precluding the ability to bring legitimate defamation claims. While there are certainly valid reasons to encourage victims of sexual assault, harassment, and discrimination to speak freely, such freedom should not be made so broad as to permit abuse.

Thank you for consideration.

Bert Krages
Attorney at Law