LINN COUNTY JUSTICE COURT DISTRICT 4A

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JAD LEMHOUSE
JUSTICE OF THE PEACE

May 18, 2015

Sen. Floyd Prozanski, Chair
Senate Judiciary Committee
900 Court St NE, S-415
Salem, OR, 97301

RE: HB 3399A Written Testimony of Hon. Jad Lemhouse, Justice of the Peace

Sen. Prozanski, Members of the Committee:

I offer this written testimony in lieu of a personal appearance before the Committee. First, I want to recognize that Rep. Nathanson and the co-sponsors of the bill have made efforts to address many of the concerns that were expressed about the introduced version of this bill. However, 2 problems remain to be addressed. Sections 1 and 4 of the bill require that justice and municipal courts, respectively, "**shall keep a transcript or audio recording of all misdemeanor or felony proceedings**."

Serious difficulties flow from requiring a transcript or audio recording of all misdemeanor or felony proceedings. Here are some problem areas:

- The term "all misdemeanor and felony proceedings" includes: arraignment, all pre-trial proceedings, trials, and all post-conviction proceedings, including probation violation proceedings—it is an all inclusive term.

- The term "all misdemeanor and felony proceedings" would almost certainly be construed to include *ex parte* proceedings such as those resulting in a search warrant or warrant of arrest in which a prosecuting attorney or a peace officer appears before a judge in person or by telephone at any time, day or night, workday, weekend or holiday.

- The arraignment, pre-trial proceedings and post-conviction proceedings on misdemeanor and felony charges often occurs in a place other than the courtroom where trials are held.

- Justices of the peace and municipal judges often hold court in more than one community, but, except for trials, allow persons to appear in the court most convenient to them, though that court is not the court in which the criminal charge is pending.

- Some proceedings are highly confidential and are conducted only in camera, particularly those proceedings wherein a person agrees to be a confidential informant and assist law enforcement obtain evidence against persons of interest.

- What happens if the recording is inaudible, garbled or blank in whole or in part? What, if anything, is the remedy for a defective recording?

- There is a rather serious latent ambiguity in the retention requirement.

Much of what local court judges do is directed to making the criminal justice system work more efficiently and effectively. We conduct arraignments in jails, not just in our courtrooms. When we hold court in multiple communities, we allow persons to appear in the community most convenient to them (except for trials), even though the court in which the person has been charged is a different court than that in which they make their appearance. When we conduct in-custody arraignments, we conduct those proceedings at the court facility we are scheduled to be on that day or time, which is often not the court in which the criminal charge is pending.

From a practical standpoint, it would be well nigh impossible to record and then keep track of all the various recordings that would accrue by reason of the requirements set for in this bill. Let me explain by using my experience, but many local court judges share this experience.

In any week, I arraign a number of persons who are in custody. Because in addition to being Justice of the Peace for Linn County, I also exercise the powers and duties of the municipal judge for the cities of Brownsville and Harrisburg that each has a municipal court. I will see prisoners who have charges pending in the Linn County Justice Court, the Harrisburg Municipal Court and the Brownsville Municipal Court. These in-custody proceedings typically take place in Harrisburg, Brownsville or Lebanon, and, occasionally, the county jail in Albany. The court in which the criminal proceeding is pending is not material for the purposes of conducting the arraignment; what is material is where in Linn County the judge happens to be.

We get the case files to the judge, regardless of the judge's location, so that the judge can handle these matters from disparate courts at a single sitting. Is it possible to record these proceedings? Probably. But how are the proceedings from 3 different courts going to be handled on a single recording? What if the different courts use different recording systems that are not compatible with each other?

How are we going to handle those cases where the judge goes to the county jail to conduct the arraignment? Is the jail required to have a recording system compatible with the court's system to record such proceedings? Is the judge supposed to carry a recorder to the jail or 3 recorders for 3 courts? How does the judge who serves multiple distinct courts with their own distinct recording system handle these complex situations? Recording "all misdemeanor and felony proceedings" is fraught with hidden costs, complexities and inefficiencies.

Often, court proceedings are highly confidential and are conducted only in camera. Of particular concern are those situations where a defendant wishes to work as a confidential informant for law enforcement in exchange for favorable treatment. This Court has participated in 2 such proceedings so far this year, the first of which was successfully concluded by conviction of the targets of the investigations. The confidential informant's assistance was crucial to those investigations. The second such proceeding commenced earlier this month.

The pre-trial conference is a general practice in misdemeanor proceedings. Often those conferences are conducted partly in chambers where the attorneys and judge discuss various aspects of a case in order to reach a resolution of the case. These are confidential, "off-the-record," informal discussions aimed at achieving a prompt and just resolution of the case.

These are but 2 examples of situations where the recording of confidential or sensitive proceedings is highly problematic—and these are all proceedings on misdemeanors or felonies.

Before January 15, 1998, Oregon had a limited jurisdiction court known as the District Court. First established in Multnomah County in 1911 to replace the Portland Justice Court, district courts eventually became established in all but a few counties in central and eastern Oregon and, in later years, became courts of record. Unlike circuit courts, that used shorthand court reporters to record proceedings, district courts used audio recordings to record their proceedings. It was not uncommon for those audio recordings to be inaudible, garbled or blank in whole or in pertinent part. On appeal, such cases were typically returned to the district court for a new trial because the appellate court had no record to review.

Thus the questions naturally arise: What happens if the local court's recording is inaudible garbled or blank in whole or in part? What if anything is the remedy for a defective recording?

There is really only one standard for a record of a court proceeding: it must be a full, true and complete record, regardless of the method by which the record is made. And that is very costly. Nowhere in this bill is there any mention of an appropriation to cover those costs.

The retention requirement set forth in Sections 1 and 4 of the bill present a serious latent ambiguity: When does the 12-month retention period begin to run? At the time the recording is made? Several recordings will be made in the typical action. At the time of final disposition? Final disposition occurs when judgment is entered. But nearly always, the judgment includes a term of probation. If so, does the retention period begin when probation expires or is terminated for any reason? A clear statement of when the retention period begins to run is absolutely necessary.

These problems are just the smallest part of the problems entailed by a requirement that local courts record "all misdemeanor and felony proceedings." There is a simple solution that will avoid the costs, problems and difficulties entailed by this requirement:

Instead of requiring local courts to record these proceedings, require local courts to allow the recording of such proceedings upon timely request at the expense of the requesting party. If a party wants a record, they get one, at any stage of the proceeding—all they have to do is make a timely request. Here is a simple way to avoid the constitutional issues and the practical issues: replace Sections 1 & 4 with an amendment to ORS 8.340 to add language such as follows:

(8) (a) A party to a criminal action in a justice court or municipal court that is not a court of record may request that a stenographic or audio recording be made of any proceeding in

the action involving the requesting party. The party requesting the recording shall make all necessary arrangements and pay all costs involved in making the stenographic or audio record. If a written or printed transcript of the record, either electronic or paper, is made of any proceeding, the reporter shall immediately file a certified copy of such transcript with the court at no cost to the court.
(b) A request under this subsection must be made in a writing filed with the court and served upon the adverse party. The court shall allow a request to record a proceeding under this subsection if the request is filed more than 5 court days before the scheduled proceeding. The court may require that the recording be made by a certified shorthand reporter.

There seems to be no recognition of the existential threat to local courts, especially in small cities and rural areas, posed by a mandatory recording requirement. This threat is significant because of the cost (which poses a constitutional problem), the difficulties and the problems that will be caused, particularly for rural counties and small cities. The only reason the local courts in these communities handle crimes is to have the ability positively affect the quality of life in the community; but, many of these communities can barely afford their courts, now. Requiring recordings will drive up costs; driving up costs will force many communities to abandon prosecution of quality of life crimes in local courts. **The importance of correcting the recording provisions cannot be overstated.**

Finally, there remains a rather picayune technical matter with some language in Sections 6 and 8 of the bill. These sections list qualifications for office and one of the qualifications is:

Possess a Juris Doctor degree.

Again I use myself as an exemplar. I am a lawyer, a member in good standing of the Oregon State Bar. I graduated from an accredited law school, but my law degree (copy attached) says "Doctor of Jurisprudence" not "Juris Doctor." Is there really any difference between Juris Doctor and Doctor of Jurisprudence? Probably not; in fact, both are abbreviated as "JD." But, I think that you can see the potential for mischief here.

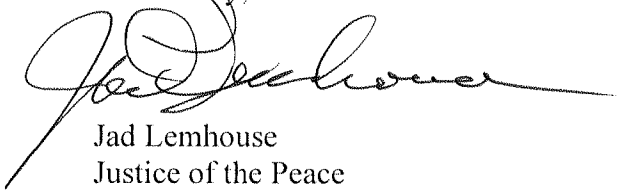
What about a person who has an LLB (Bachelor of Laws), LLM (Master of Laws) or LLD (Doctor of Laws) from an accredited law school. None of those degrees meet the qualification set out in this bill, but an LLB is functionally equivalent to a JD and the LLM and the LLD degrees are both advanced degrees. A simple solution to this problem is to re-word that qualification to something like this:

Possess a law degree from a college or university school of law that is or was accredited by the American Bar Association at the time the degree was awarded.

That change in language does what it appears the drafters intended—require training in the law—without limiting the qualification to a specific degree—Juris Doctor.

The changes suggested here would remove the constitutional and practical problems entailed by the Bill as it is now written, while meeting what appear to be the essential purposes and objectives of the Bill's proponents. If I can be of further assistance in this matter, please contact me.

Yours truly,



Jad Lemhouse
Justice of the Peace

Attachment

THE UNIVERSITY OF OREGON

To all to whom this writing may come, Greetings:

Be it known that **Jad Byron Lemhouse** *having successfully completed the prescribed course of study and having complied with all other requirements established by the University, has been by authority of the State of Oregon declared a*

Doctor of Jurisprudence

and is entitled to all the rights and privileges appertaining to that Degree.

In Testimony Whereof the State Board of Higher Education, upon recommendation of the Faculty, has granted this Diploma, bearing the seal of the University, this twenty-first day of May A.D. 1989.

David Olum
President of the University

Thomas A. Bartlett
Chancellor

Maurice L. Holland

Richard L. Smith