TO: **Sen. Floyd Prozanski, Chair**
Sen. Kim Thatcher, Vice Chair
Members of Senate Judiciary Committee

FR: **Amanda Dalton**
On behalf of OR District Attorneys Association

RE: **SB 807 - Oppose**

February 26, 2023

Current Oregon Law – Disqualification of Judge

- Allows any party or attorney
- To file a motion
- Supported by an affidavit
- That indicates they believe that they cannot have a "fair or impartial trial or hearing" before the Judge
- Requires the motion be made in "good faith and not for the purpose of delay"
- Does not require specific grounds for the belief be alleged
- Requires the motion be allowed, unless Judge challenges the "good faith of the affiant"
- If the Judge challenges the motion, a hearing is held before a disinterested Judge
- Burden of proof is on the Judge to establish the motion was made in "bad faith or for the purpose of delay"

ORS 14.250 Disqualification of judge:

No judge of a circuit court shall sit to hear or try any suit, action, matter or proceeding when it is established, as provided in ORS 14.250 (Disqualification of judge) to 14.270 (Time of making motion for change of judge in certain circumstances), that any party or attorney believes that such party or attorney cannot have a fair and impartial trial or hearing before such judge. In such case the presiding judge for the judicial district shall forthwith transfer the cause, matter or proceeding to another judge of the court, or apply to the Chief Justice of the Supreme Court to send a judge to try it; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action or suit is of such a character that a change of venue thereof may be ordered, the presiding judge may send the case for trial to the most convenient court; except that the issues in such cause may, upon the written stipulation of the attorneys in the cause agreeing thereto, be made up in the district of the judge to whom the cause has been assigned. [1955 c.408 §1(1); 1981 c.215 §5; 1987 c.338 §1; 1995 c.781 §28]

ORS 14.260 Affidavit and motion for change of judge

(1) Any party to or any attorney appearing in any cause, matter or proceeding in a circuit court may establish the belief described in ORS 14.250 (Disqualification of judge) by motion supported by affidavit that the party or attorney believes that the party or attorney cannot have a fair and impartial trial or hearing before the judge, and that it is made in good faith and not for the purpose of delay. No specific grounds for the belief need be alleged. The motion shall be allowed unless the judge moved against, or the presiding judge for the judicial district, challenges the good faith of the affiant and sets forth the basis of the challenge. In the event of a challenge, a hearing shall be held before a disinterested judge. The burden of proof is on the challenging judge to establish that the motion was made in bad faith or for the purposes of delay.

(2) The affidavit shall be filed with the motion at any time prior to final determination of the cause, matter or proceedings in uncontested cases, and in contested cases before or within five days after the cause, matter or proceeding is at issue upon a question of fact or within 10 days after the assignment, appointment and qualification or election and assumption of office of another judge to preside over the cause, matter or proceeding.

(3) A motion to disqualify a judge may not be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding. A motion to disqualify a judge or a judge pro tem, assigned by the Chief Justice of the Supreme Court to serve in a county other than the county in which the judge or judge pro tem resides may not be filed more than five days after the party or attorney appearing in the cause receives notice of the assignment.

(4) In judicial districts having a population of 200,000 or more, the affidavit and motion for change of judge shall be made at the time and in the manner prescribed in ORS 14.270 (Time of making motion for change of judge in certain circumstances).

(5) In judicial districts having a population of 100,000 or more, but less than 200,000, the affidavit and motion for change of judge shall be made at the time and in the manner prescribed in ORS 14.270 (Time of making motion for change of judge in certain circumstances) unless the circuit court makes local rules under ORS 3.220 (Rules) adopting the procedure described in this section.

(6) A party or attorney may not make more than two applications in any cause, matter or proceeding under this section. [1955 c.408 §1(2); 1959 c.667 §1; 1981 c.215 §6; 1987 c.338 §2; 1995 c.781 §29; 2015 c.272 §1]

**highlighting applied for emphasis*

A lawyer also has ethical obligations when considering whether to file an affidavit for change of Judge under Oregon Rules of Professional Conduct. See OSB Formal Opinion No 2018-193[1]:

> Oregon RPC 3.3(a)(1) provides, in pertinent part:
> (a) A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer…

[1] See enclosed Formal Opinion No 2018-193 – Candor, Independent Professional Judgment, Communication, Seeking Disqualification of Judges [pg. 1- 9]

> Oregon RPC 8.2(a) provides:
> (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard to its truth or falsity concerning the qualifications or integrity of a judge…
>
> Oregon RPC 8.4(a) provides, in pertinent part:
> (a) It is professional misconduct for a lawyer to:
>
> (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law; [or]
> (4) engage in conduct that is prejudicial to the administration of justice

That opinion states that the above:

> Taken together, Oregon RPCs 3.3(a)(1), 8.2(a), and 8.4(a)(3)–(4) prohibit lawyers from making any false statements in an affidavit for change of judge. The critical issue, therefore, is whether Lawyer can truthfully state in an affidavit under ORS 14.260 that: (1) Lawyer believes Defendant or Lawyer cannot receive a fair and impartial trial or hearing before Judge *X*; *and* (2) Lawyer is filing the disqualification motion in "good faith and not for the purpose of delay." As far as the Oregon RPCs are concerned, these are subjective inquiries. Lawyer must consider each question independently in light of the specific facts, procedural posture, and applicable law of his or her case. Only if Lawyer can truthfully answer yes to both questions may Lawyer ethically file an affidavit and motion to disqualify Judge *X* under ORS 14.260.

How does SB 807 seek to change the current process?

- Creates a new challenge process for a Judge
- Only applies to criminal and juvenile attorneys
- Narrows to those attorneys who regularly appears as to "effectively deny the judge assignment" to a criminal or juvenile docket (likely just DA and Public Defender Offices)
- Requires a motion and affidavit asserting facts that outline the Judge's lack of partiality
- Provides opportunity for Judge to provide additional pertinent facts
- Allows a disinterested judge to consider the motions
- Removes current oral hearing process
- Changes standard from "good faith and not for the purpose of delay" to "whether a reasonable person knowing all the facts and surrounding circumstances would believe by a preponderance of evidence that the judge lacks impartiality"
- Switches burden of proof from Judge to show "bad faith or for the purpose of delay" to burden on the petitioning party (DA or Public Defender Office)
- Allows disinterested judge to bar DA/Public Defender Office from filing a motion to disqualify for up to 6-months, regardless of the facts

Amends ORS 14.260:

> **(7) If an attorney, law firm, district attorney's office or public defender's office files motions under subsection (1) of this section or ORS 14.270 against an elected judge**

with such frequency as to effectively deny the judge assignment to a criminal or juvenile delinquency docket in any county within the judge's judicial district, the presiding judge or the judge moved against may require the same attorney, firm or office to support the next motion to disqualify the judge with an affidavit that fully asserts facts upon which the judge's impartiality may reasonably be questioned. When an attorney, law firm, district attorney's office or public defender's office files a motion and affidavit under this subsection, the judge moved against may submit an affidavit providing additional facts and considerations the judge deems pertinent to the issue. A disinterested judge shall make an objective inquiry, considering the motion and affidavits without oral hearing, as to whether a reasonable person knowing all the facts and surrounding circumstances would believe by a preponderance of evidence that the judge lacks impartiality. The burden of proof is on the moving party. If the inquiry establishes that a reasonable person would believe the judge lacks impartiality, the motion shall be granted. If the inquiry does not establish that the judge lacks impartiality, the disinterested judge shall take appropriate action, which may include an order preventing the attorney, firm or office from filing motions under subsection (1) of this section or ORS 14.270 against the judge for a period of up to six months. The Chief Justice may issue rules to implement this subsection.
**highlighting applied for emphasis*

Federal standard - 28 U.S. Code § 144 - Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Filing an affidavit to disqualify a local Circuit Court Judge is not taken lightly by your prosecutors. In fact, it is rarely done as evident by the enclosed OJD data.[2] Currently the law ensures that all parties to a case – the State, the crime victim, the defendant and the defense attorney – feel comfortable appearing before their assigned judge and that they are going to receive a fair and impartial hearing. Prosecutors know what a significant act it is to publicly declare that a judge cannot be fair. In the rare event when we take this action, it is done after a thorough review, attempts to privately discuss the state's concern with the judge, and more often than not conversations with other leaders in the local judicial system to mitigate the administrative inefficiencies that come with having a particular judge disqualified from criminal cases.

[2] Enclosed 'Motions and Affidavits to Disqualify or Change Judge File in Circuit Courts, March 1, 2021 [pg. 10 – 30]

ORS 14.260 allows any attorney appearing in any type of case to disqualify a judge if they believe the judge cannot be fair. A party must file an affidavit attesting to the fact that you have a good faith belief that you cannot have a fair and impartial hearing. The judge who is the subject of the affidavit can challenge the good faith of the affidavit in a hearing before a neutral judge who is not attached to the case.

All parties should feel comfortable with their Judge. The law, as it is currently written, is consistent with this value. SB 807 would change that into an unequally-applied law. If it were to pass, consortium and retained criminal defense attorneys could continue to disqualify judges on behalf of the accused, but it would deny prosecutors and public defense offices the ability to do the same thing to ensure a fair and balanced hearing.

ORS 14.260 is an important protection for litigants in the rare instances in which a judge's bias may be at issue. I have included a handful of public articles highlighting some of these instances.[3] One article even reflects a recent hearing where no bias was found on the part of the Judge.

Their inclusion is not meant to embarrass the parties, but rather highlight the very real and necessary tool the current law provides.

If the Committee is interested in making changes to the current challenge process, we urge you to rely on the existing framework, and to keep the parties perceived fairness and impartiality at the center of the decision making process. If it is the desire of the Committee to more closely align with the federal standard and require that the affidavit state "the facts and the reasons for the belief that bias or prejudice exists" than that can be accomplished without the sweeping, limiting and punitive provisions currently found in SB 807.

We also believe the proposal should be full vetted with a stakeholder group to evaluate the broader judicial fitness process and make recommendations to this body.

We present the following questions specific to SB 807 as you further evaluate the proposal:

- Why should there be two standards for this process? Basically one for individual attorneys and one for DA and PD offices?
- Why does the new language only apply to an "elected judge" not an appointed judge?
- Is the intent to exclude defense consortiums or private practice defense attorneys?
- What does "effectively deny" the judge's assignment mean?
    - Is there a percentage? Who tracks this data? Can parties dispute frequency?
    - Why does the proposed language only reference "impartiality" of the judge but not the current language which reflects the right to a "fair trial"?
    - What if both parties move against the same Judge on different matters?
- Why are the parties no longer able to request an oral hearing? If the aim is a more transparent process this must remain.
- Who is a "disinterested judge"? Who makes that decision that a judge is disinterested and what is the definition? What happens if one of the parties believes that the judge

[3] Enclosed pg. 31 - 49

making the decision is not “disinterested”? Is there an appeal process? How will “disinterest” be evaluated and determined?

- Why does the new proposed 6-month ‘ban’ on future motions to disqualify not provide exceptions or consideration of extreme facts that may be necessary to remove a Judge? This could provide a significant risk to the overall fairness of a case.
- Who covers the cost of counsel for this new motion process? Currently OJD covers legal counsel for Judges. Will they assist in the filing of these response motions?
- What else is meant by “take appropriate action” against the moving party (DA/PD)? Sanctions? Fines? Contempt?
- Can the moving party appeal those sanctions?