From: Pete Sandrock, retired Benton District Attorney
Henry Kantor, Senior Circuit Judge, Multnomah County
Dan Bunch, retired Circuit Court Judge, Klamath County
Kati Dunn, Executive Director, Elkhorn Public Defender
Jennifer Schemm Williams, retired attorney

Re: SB 807- Support

February 29, 2023

Dear Chair Prozanski, Vice-Chair Thatcher, Members of the Committee:

At the February 27 hearing for SB 807, there were a few questions asked that we would like to answer. Senator Linthicum asked if blanket disqualifications ever lasted very long and whether they are truly a problem. The answer is yes to both questions. Here are some of the long-term ones we know of:

1. Judge Cameron Wogan from Klamath County. He was removed by the district attorney from every criminal case for over ten years until he retired in April 2021.

2. Judge Eva Temple from Umatilla and Morrow Counties. She has been removed from the criminal docket based on the Umatilla DA's blanket disqualification since July 2018.

3. Judge Wes Williams from Union and Wallowa Counties. He has been removed by the district attorney from every criminal case since April 2020.

4. Judge David Orr from Jackson County. He, who was a deputy district attorney for 15 years before becoming judge, has been removed by the district attorney from every criminal case since July 2021.

There may be other long-term disqualifications that we are unaware of because they did not get media coverage. While a relatively few judges get blanket disqualified to this extent, a greater problem is **the chilling effect it has on other judges' rulings**. In Judge Dan Bunch's written testimony, he explained:

> "Blanket disqualification can be a bullying tactic to get a judge's political attention, or to ensure that other judges in the Circuit fall in line.
>
> Judicial decision making must be independent of such pressure. Do you want a judge entertaining this thought? "If I do what I believe is legally correct under the facts of this case, I might get removed from the criminal docket?" It's a predictable but disturbing consequence of blanket disqualification."

Jeff Wallace, a former district attorney and circuit court judge also discussed this in his written testimony filed with OLIS (and in the binder we provided to you at the hearing).

> "[T]his undue influence by district attorneys affects the independence of the trial judiciary. Just the threat that, if you don't rule in a certain way, or rule against the State too often, or possibly make an unpopular ruling in one

individual case, you may get "blanket disqualified", for the rest of your career, is enough to influence a judge's decision making process."

Another question asked of Amanda Dalton, the lobbyist for ODAA, was whether the current law and legal ethics code prevent improper blanket disqualifications. While she said yes, the panel in support of SB 807 says NO for the following reasons.

1. The current process in ORS 14.260(1) does <u>not</u> provide the judge with a realistic opportunity to challenge a blanket disqualification even when the judge believes the lawyer is disqualifying for improper purposes. The judge must prove that the lawyer's *feelings* that a judge is unfair are *in bad faith*. That is virtually impossible to prove. Senior Judge Rob Nichols of Lake County, a former district attorney, explained in his written testimony:

   "I agree with [the] content and specifically that portion [of the Retired Oregon Circuit Court and Appellate Judges' written testimony] that **the current process "does not provide a realistic opportunity for a judge to contest a disqualification."** In consulting with other attorneys and judges, I was advised that based upon the statute, case law, and processes that if I challenged a disqualification I would not prevail. I did not contest any Motion to Disqualify."

The citizens of Lake County had to recall the district attorney to stop the blanket disqualifications, a daunting task. Judge Nichols' and the Retired Judges' testimony are in the binder we provided to you at the hearing.

2. **The lawyer's ethical code of conduct**, despite the opinion stating that lawyers can be disciplined if they use blanket disqualifications for improper purposes, **will never stop blanket disqualifications even if used for political purposes or judge shopping.** There is simply no way to establish that a lawyer's belief for removing a judge is for improper purposes. Furthermore, an Oregon State Bar disciplinary counsel recently dismissed a complaint against a district attorney for making multiple material misrepresentations in a motion to blanket disqualify a judge, explaining that **under ORS 14.260, no ethical rules are violated when a lawyer takes a judge's statements and actions out of context so long as her recitation reflects the lawyer's *perspective* that the judge is biased.** *See* Testimony of Anne Morrison, submitted on OLIS for the February 27, 2023 hearing (in the binder provided to you at the hearing). **If SB 807 passes**, an attorney will no longer be able to take the judge's statements and actions out of context when blanket disqualifying him or her. The "reasonable person" standard is objective, and **the attorney will need to accurately represent the judge's statements and actions when claiming a judge is biased**.

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We also wish to reiterate that Subsection (7) in SB 807 is extremely narrow in scope. It is universally supported by non-lawyers, as well as by many retired district attorneys, public defenders and judges (see binder with written testimony in support of SB 807, including that of 45 judges from 19 counties[1]). **It is designed to address only those blanket disqualifications that substantially interfere with the administration of justice**. That is why this provision only applies to district attorney's and public defender's offices who have the ability to remove a judge from all criminal and juvenile delinquency cases – over half a court's caseload.

When the process is triggered in the proposed Subsection (7), it applies the well-known and understood "reasonable person" standard. Thirty-six (36) states already apply this in every criminal case. One more, Wisconsin, requires it of the prosecutor/state in every criminal case. ODAA implied it would be better to adopt the federal standard**.** That is interesting since the reasonable person standard is less onerous to establish for a lawyer than showing the judge has a "personal bias or prejudice" against a party as required in the federal law, 28 USC §144.

We are also open to removing the language that the disinterested judge may prohibit an attorney from filing motions under ORS 14.260(1) for up to six months. This consequence came from Idaho's and New Mexico's criminal procedure rules where the lawyer can lose the right for up to a year. **Importantly, should an attorney lose the right to use ORS 14.260 for a period of time,** during that time, if the lawyer believes a judge will be unfair, **he or she can still remove the judge by doing what litigants must already do in 36 states – prove that a reasonable person would perceive the judge as lacking impartiality.** *See* ORS 14.210 (removal for cause) and Judicial Code of Conduct 3.10 (a judge must remove him or herself whenever a reasonable person would question his or her impartiality). The party's right to have an impartial judge is never denied.

And finally, we appreciate Ms. Dalton's statement that filing blanket disqualifications against judges is not taken lightly by district attorneys. For this reason, they should appreciate the opportunity to show that a reasonable person would also find the judge lacks impartiality. **This transparency and factual basis would certainly make the citizens who elected the judge feel less discounted**. In retired district attorney Dan Ousley's words:

> "In my 20 years as a district attorney, I never blanket-disqualified a judge. Had I done so, however, I believe the process provided for in SB 807 should have been required. The people elected the judges to hear their community's cases. If I am going to remove the community's judge from all criminal cases, common sense dictates that I provide the people with proof that their chosen judge would be considered biased in the eyes of a reasonable person."

See written testimony of Dan Ousley (in binder).

Thank you for your consideration and time spent on this matter. It is important to so many people.

[1] Since submitting this letter, three more judges from three more counties have joined in support, bringing the total number of judges to 48, from 22 counties.