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May 5, 2023

Jason Kropf, Chair
Kim Wallan, Vice-Chair
Tom Andersen, Vice-Chair
House Judiciary Committee
State Capitol
Salem, Oregon 97301

RE: Support for SB 807 related to judge blanket disqualifications in criminal and juvenile cases

Dear Chair Kropf, Vice-Chairs Wallan and Andersen, and Committee Members:

My name is Jennifer Schemm Williams. I am a retired lawyer living in La Grande, Oregon. I practiced law for over twenty years with my husband Wes Williams. We had a general practice in La Grande. I focused on research and writing, including preparing contracts, deeds, motions, complaints, answers, and appellate briefs. Wes focused on everything else including client relations and court hearings and trials.

In 2018, my husband was elected judge in Union and Wallowa Counties after a hotly contested race. His opponent was a newly appointed judge, the former Wallowa County district attorney. In early 2020, the Union County district attorney began blanket disqualifying him, followed by the Wallowa County district attorney. Both continue to do so to this day regardless of the facts or circumstances of the case, the defendant or the charges. In my opinion, there is a problem when lawyers can unilaterally remove judges from over half a court's caseload without any oversight. Wes was elected by the people of our community to hear all the court's cases. **People in our community are incredulous that the district attorney can do this without any accountability.**

I began researching the issue and talking with judges about this. I had no idea there would be such widespread support for addressing blanket disqualifications. **I shouldn't have been surprised – unilateral, unchecked power is not consistent with good or fair governance.** I learned there have been unsuccessful legislative attempts in Oregon in the past ten years, including the assembly of a work group of stakeholders that **could not reach consensus on any issue except that any change should be statewide, not focused on large or small districts**.

I researched the laws in other states. Thirty-three (33) states require <u>in every case</u> that the lawyer provide facts showing that a reasonable person would perceive a judge as lacking impartiality. Of the 17 states that allow lawyers to remove judges without cause, 10 states have already taken measures to stop abusive blanket disqualifications, including in 3 states, taking away this privilege in criminal cases and in one state, Wisconsin, taking away this privilege from prosecutors. More information on these measures is included in an explanation following the text of SB 807A (attached).

A group comprised of retired judges, district attorneys, public defenders, and lawyers, including me, and the Senate Judiciary Committee and the judiciary committee staff developed the language in Subsection (7) of SB 807A after considerable input from stakeholders. We felt focusing only on situations where blanket disqualifications truly affect the administration of justice was the solution for Oregon. I would estimate 95% or more of lawyers will be unaffected by the new process described in

Subsection (7) because it is only triggered when the motions filed by one lawyer or office effectively deny the judge a criminal/juvenile docket, well over half a court's caseload. And even then, a judge may still be removed from all these cases if the lawyer proves what is already required in 36 states - 37 states for prosecutors - for every motion in a criminal case: that a reasonable person would perceive the judge as biased.

After developing the language in Subsection (7) and getting some interest from legislators, I began developing a list of supporters, including practitioners and non-lawyers, from across the state. (see written testimony of Citizens for Commonsense Government). **I have yet to talk to a non-lawyer who thinks it's okay that lawyers can remove elected judges from over half a court's cases without any justification**. It nullifies the will of the voters – a very important stakeholder here – and in small judicial districts, it allows the lawyer to judge shop.

Since February, Judge Kantor and I have reached out to retired judges to discuss the bill and ask for their support. The response was strong. (see written testimony of Retired Judges). Many expressed gratitude that the legislature was interested in addressing this issue. Several asked what more they could do to assist in the passage of this bill. Others acknowledged blanket disqualifications have been problems in their districts and considered the process in ORS 14.260 wise and worthwhile. **In the words of one senior judge who was a presiding judge in a large judicial district for 14 years: "[t]his bill is carefully drafted to reflect the legitimate concerns of both the bench and the bar. I support it without reservation."**

Thank you sincerely for your consideration to this matter.

s/ Jennifer S. Williams
Jennifer Schemm Williams

A-Engrossed
Senate Bill 807

Ordered by the Senate March 27
Including Senate Amendments dated March 27

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Provides procedure whereby elected judge may challenge **party,** attorney, law firm, district attorney's office**, defense consortium** or public defender's office that files motions to disqualify judge [*with such frequency as to*] **that** effectively deny judge assignment to criminal or juvenile delinquency docket.

A BILL FOR AN ACT

Relating to disqualification of judges; amending ORS 14.260.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 14.260 is amended to read:

14.260. (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 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. **Except as provided in subsection (7) of this section,** 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.

(5) In judicial districts having a population of 100,000 or more, but less than 200,000, the affi-

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

davit and motion for change of judge shall be made at the time and in the manner prescribed in ORS 14.270 unless the circuit court makes local rules under ORS 3.220 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.

(7) If a party, attorney, law firm, district attorney's office, defense consortium or public defender's office files a motion or series of motions under subsection (1) of this section or ORS 14.270 against an elected judge that effectively denies the judge assignment to a criminal or juvenile delinquency docket in any county within the judge's judicial district, the judge moved against may request a hearing before a disinterested judge. The disinterested judge shall make an objective inquiry 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 party, attorney, law firm, district attorney's office, defense consortium or public defender's office filing the motion under subsection (1) of this section or ORS 14.270. 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 a reasonable person would believe the judge lacks impartiality, the disinterested judge shall take appropriate action, which may include an order preventing the party, attorney, firm, office or consortium from filing a motion or series of motions under subsection (1) of this section or ORS 14.270 against the judge for a period of up to one year. The Chief Justice may issue rules to implement this subsection.

Subsection (7) was developed after: (1) researching the judge disqualification laws throughout the United States; (2) receiving input from stakeholders including Erin Pettigrew when she was with the OJD Office of Legislative Affairs, the OSB Public Affairs Committee (including Bik-Na Han, a deputy district attorney), and representatives from OCDLA; and (3) visiting with and receiving comments, critiques and proposed language from judges, retired district attorneys, criminal defense attorneys, other lawyers and others. After the Senate Judiciary Committee hearing, the Judiciary Committee staff further amended the language for a variety of reasons including input from stakeholders.

Research established that in 33 states, the lawyer must show, at a minimum, a perceived bias or unfairness on the part of the judge by a reasonable, objective person. Of the 17 states that allow judges to be removed without cause, 10 states have taken action to stop abusive blanket disqualifications.

For example, in Idaho and New Mexico, a process involving the state's Supreme Court is triggered when motions to remove a judge are filed with such frequency as to "impede the administration of justice." See Idaho Criminal Rule 25(a) and NM R. Crim. P. 5-106. The first proposed draft for Subsection (7) mirrored this language. Many people, however, were uncomfortable with the language because of the uncertainty of what constituted impeding the administration of justice, and the belief that the Oregon Supreme Court would want to be directly involved. For this reason, we did not adopt the process. As noted below, we did, however, adopt their remedy.

Nevada, Indiana and Wyoming have taken away the ability to remove judges without cause *in all criminal cases.* Wisconsin has taken the ability away from *prosecutors and the state* in criminal cases, but still allows *parties other than the state* to remove judges without cause.

Montana has a $100 filing fee for every motion filed. When the county attorney (district attorney) files the motion, her office must pay the fee. Mont. Code 3-1-804(3). Similarly, when a public defender files the motion, the office of public defense must pay. Given there are at least 1000s of criminal cases filed each year in most every county in Oregon, blanket disqualifications would be prohibitively expensive.

Arizona imposed a rule requiring lawyers, in criminal cases, to say the filing of the motion is not for the purpose of using the rule against a particular judge in a blanket fashion. Personal Communication with the Phoenix Public Defenders office establishes this requirement is ineffective in stopping blanket disqualifications in criminal cases by both public defenders and prosecutors.

Illinois' and Minnesota's Supreme Courts have held that while removing judges without cause is not facially unconstitutional, it may violate the separation of powers doctrine *as applied* when a prosecutor's office blanket disqualifies a judge.

The persons providing comments, critiques and proposed language for Subsection 7 include the following: senior judge **Henry Kantor**, senior judge **Henry Breithaupt**, retired judge **Glen Baisinger**, retired district attorney and retired circuit court judge **Jeffrey Wallace** (and now public defender), retired district attorney **Pete Sandrock**, retired district attorney **Dan Ousley**, retired district attorney and retired public defender **Martin Birnbaum**, retired public defender **Anne Morrison**, public defender **Kati Dunn** (and current board president of the OCDLA), retired attorney **John Frohnmayer**, retired attorney **Jim Kennedy**, and then OJD Legislative Director **Erin Pettigrew**. This language was also provided to the OCDLA, ODAA, DOJ, MCDA, and OSB Public Affairs Committee and changes were made based on their concerns.

After Erin Pettigrew (formerly of the OJD) voiced concern that the triggering process under New Mexico and Idaho laws may be too discretionary (eg., presiding judges and TCAs may differ on what constitutes impediment of the administration of justice), we changed the language to be more direct. Now, motions under subsection (1) must be filed with such frequency that the disqualified judge is effectively denied assignment to a criminal docket. The reason we focused on only these instances is

because, in these situations, the high frequency disqualification motions are certainly impeding the administration of justice by interfering with the presiding judge and TCA's ability to manage the court's docket; and in smaller judicial districts, permitting judge shopping and costing the state travel expenses for out of district judges coming to help with the court's caseload.

Concern was voiced that an office may file only one sweeping motion asking that the judge be removed from all criminal cases. In such a scenario, motions would not be filed with "such frequency" as to trigger the process in subsection (7). Doing so is *not* in accordance with ORS 14.260 and ORS 14.270 which provide timelines and other procedures for filing a motion to disqualify a judge *on a case by case basis*. Nevertheless, this procedure is sometimes allowed. Thus, the first clause of subsection (7) was amended to read:

> "7) If an attorney, law firm, district attorney's office or public defender's office files **a motion or series of** motions under subsection (1) of this section or ORS 14.270 against an elected judge [*with such frequency as to*] **that** effectively den**ies** the judge assignment to a criminal or juvenile delinquency docket in any county within the judge's judicial district. . . "

In cases when a judge is effectively denied a criminal docket due to a blanket or frequent disqualifications, it seemed appropriate that there be independent oversight as to a judge's judicial fitness. Before an elected judge is prohibited from hearing at least half the court's cases, a reasonable person would find the judge lacks impartiality. The people elected the judge to hear the community's cases. Surely it is commonsense that the judge must be deemed partial or biased under an objective standard before denying her the job she was elected to do. The reasonable person standard is a well understood concept with considerable case law discussing whether a reasonable person would perceive that a judge lacks impartiality. Oregon already imposes this standard in its Judicial Code of Conduct 3.10 (a judge shall disqualify herself in any proceeding in which a reasonable person would question the judge's impartiality).

Importantly, this process is permissive. The judge does not need to challenge the motion(s), and may instead work other dockets.

Ms. Pettigrew (formerly of OJD) also voiced concerns about directly involving the Supreme Court as provided for in the New Mexico and Idaho laws. She did not think the Supreme Court of Oregon would want to be directly involved with these trial court motions. As a result, we chose a "disinterested judge" to be the arbiter because this is already the decisionmaker provided in Subsection (1). This, in turn, raised new concerns about whether a "disinterested judge" would include retired judges who certainly seem to be good candidates for deciding these motions. It may be best for Subsection (7)'s language to read: "A disinterested judge, who may be a retired judge, shall make an objective inquiry ....."

As noted above, Subsection (7) imposes the remedy used in New Mexico's and Idaho's disqualification laws. Idaho Criminal Rule 25(a) and NM R. Crim. P. 5-106. These laws provide that a lawyer may lose his or her privilege to remove judges without cause (as in ORS 14.260) for a specified period of time "or until further order of the Chief Justice." In order to provide more certainty to lawyers, we gave Subsection (7) a ceiling, six months. The Senate Judiciary Committee raised this to "up to a year."

Finally, it made sense to permit the Chief Justice to issue rules to implement Subsection (7). There are matters the judiciary is best equipped to address. For example, who appoints the disinterested judge; what are possible "appropriate actions;" what happens if a judge is deemed biased; and what are examples of a judge's bias or partiality from a reasonable person's standpoint?