TESTIMONY ON HB 4133A:
REVIEW OF LAWS THOUGHT TO BE OUTDATED, OBSOLETE OR DUPLICATIVE

February 25, 2014

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As an attorney with 35 years of experience in legislation, administration, and litigation, I oppose HB 4133A as written and suggest an amendment, if some form of this bill proceeds.

The original bill called for reviewing existing laws to identify those thought to be outdated, obsolete, duplicative, unconstitutional or contrary to federal law. I testified particularly against this sort of review with regards to "constitutionality," and I have attached that testimony (February 3, 2014). The House removed that part of the bill but left the parts about reviewing for laws thought by Legislative Counsel and/or the Department of Justice to be "outdated, obsolete or duplicative of other laws"

As noted in my testimony to the House Rules Committee:

> Further, I have learned that meaningful statutes may well appear to be outdated, obsolete, or duplicative to an attorney who is not an expert in that particular field. For example, many statutes use legal "terms of art" with which the youngish attorneys at Legislative Counsel and the ODOJ may not be familiar. The term "just and reasonable" may seem perfectly understood by the attorney who does not specialize in utility law. But it probably is not correctly understood by that attorney.
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> In addition, this new review process would place the average person at a further disadvantage to those represented by full-time lobbyists and attorneys. The bill authorizes Legislative Counsel and ODOJ to conduct reviews of all existing statutes, every two years, but specifies no process and no opportunity for public scrutiny or involvement.

The lobbyists and attorneys representing the big-time interests would no doubt suggest to Legislative Counsel and ODOJ dozens of statutes for repeal, requiring those who benefit from such statutes to someone become aware of those suggestions and run to Salem to counter them in an unspecified process--and then later go to the Oregon Legislature to contradict, if necessary, the conclusions of Legislative Counsel and ODOJ.

If someone believes that an existing statute falls into one of the categories set forth in this bill, that person can now go to the Legislature and suggest repeal. Implementing that suggestion would require public notice and hearing. Instead, HB 4133 establishes a process for Legislative Counsel and ODOJ to prepare bills repealing any number of statutes without public scrutiny or involvement, leaving the public the uphill battle, after the fact, to persuade legislators that those entities are incorrect.

Further, having this review conducted biennially seems excessive. In the few other states with similar programs, statutes are reviewed about every 10 years. This is the cycle of the California Law Revision Commission, for example. Reviewing all statutes for obsolescence, etc., will have a cost. An attorney cannot simply assume, for example, that two different sections of law that appear to be similar are actually duplicative. Such determinations will require interviewing experts in those legal fields and leaders among those who are affected by each statute. Attorney time doing this is not cheap.

I suggest that this bill not be passed or should be amended so that the review takes place on a rolling 10-year basis, so that Legislative Counsel and/or the ODOJ reviews one-fifth of ORS in each biennium. Even then, this bill is likely to result in substantial cost and to further disadvantage average persons in protecting their legal interests before the Legislature.

TESTIMONY ON HB 4133:
REVIEW OF LAWS THOUGHT TO BE OUTDATED, OBSOLETE, DUPLICATIVE, UNCONSTITUTIONAL OR CONTRARY TO FEDERAL LAW

February 3, 2014

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As an attorney with 35 years of experience in legislation, administration, and litigation, I oppose HB 4133 as written and suggest amendments, if some form of this bill proceeds.

Reviewing existing laws to identify those thought to be outdated, obsolete, duplicative, unconstitutional or contrary to federal law seems harmless enough. But my experience indicates otherwise. For example, in 2001 the Attorney General of Oregon reported to the Oregon Legislature that the statute requiring political advertisements pertaining to state and local races to identify the author or source of the advertisement was "unconstitutional," citing ***McIntyre v. Ohio Elections Commission***, 514 U.S. 334 (1995). I opposed the repeal, pointing out that the circumstances in ***McIntyre*** (an individual placing leaflets about a school levy measure on car windshields) were quite different from the application of the Oregon law (to candidate races, in particular). My testimony to the 2001 Legislature is appended. But the Oregon Legislature went ahead and repealed the statute. Later, federal and state courts have routinely upheld disclaimer requirements essentially identical to the repealed Oregon law.

Even the infamous decision in ***Citizens United v. Federal Election Commission***, 558 U.S. 310 (2010) upheld, on a vote of 8-1, the requirements in the McCain-Feingold Act requiring that any advertisement pertaining to a candidate for federal office by anyone, including persons and organizations not connected with a candidate, "must include a disclaimer that '_____ is responsible for the content of this advertising.'" "It must also display the name and address (or Web site address) of the person or group that funded the advertisement." ***Citizens United***, 558 U.S. at 365-66.

So "constitutionality" is often in the eyes of the beholder. Since an Oregon Attorney General at one point believed such disclosure requirements were unconstitutional, Oregon no longer has that disclosure statute.

Further, I have learned that meaningful statutes may well appear to be outdated, obsolete, or duplicative to an attorney who is not an expert in that particular field. For example, many statutes use legal "terms of art" with which the youngish attorneys at Legislative Counsel and the ODOJ may not be familiar. The term "just and reasonable" may seem perfectly understood by the attorney who does not specialize in utility law. But it may well not be correctly understood by that attorney.

In addition, this new review process would place the average person at a further disadvantage to those represented by full-time lobbyists and attorneys. The bill authorizes Legislative Counsel and ODOJ to conduct reviews of all existing statutes, every two years, but specifies no process and no opportunity for public scrutiny or involvement. The lobbyists and attorneys representing the big-time interests would no doubt suggest to Legislative Counsel and ODOJ dozens of statutes for repeal, requiring those who benefit from such statutes to someone become aware of those suggestions and run to Salem to counter them in an unspecified process--and then later go to the Oregon Legislature to contradict, if necessary, the conclusions of Legislative Counsel and ODOJ.

If someone believes that an existing statute falls into one of the categories set forth in this bill, that person can now go to the Legislature and suggest repeal. Implementing that suggestion would require public notice and hearing. Instead, HB 4133 establishes a process for Legislative Counsel and ODOJ to prepare bills repealing any number of statutes without public scrutiny or involvement, leaving the public the uphill battle, after the fact, to persuade legislators that those entities are incorrect.

Further, having this review conducted biennially seems excessive. In the few other states with similar programs, statutes are reviewed about every 10 years. This is the cycle of the California Law Revision Commission, for example. Reviewing all statutes for obsolescence, etc., will have a cost. An attorney cannot simply assume, for example, that two different sections of law that appear to be similar are actually duplicative. Such determinations will require interviewing experts in those legal fields and leaders among those who are affected by each statute. Attorney time doing this is not cheap.

HB 4133 would also allow Legislative Counsel and ODOJ to suggest repeal of statutes on the basis that they effectively have been ruled unconstitutional, because similar laws have met that fate. Again, they will in some cases be unaware of the distinctions among statutes in specialized areas of the law. If this bill proceeds, I would amend 1(1)(b)-(c) to read:

> Have specifically been determined by the Oregon Supreme Court to be unconstitutional under the Oregon Constitution; or
>
> (c) Have specifically been determined by the Oregon Supreme Court, the United States Court of Appeals for the Ninth Circuit or the United States Supreme Court to be unconstitutional under the United States Constitution or wholly preempted by federal law.

I would delete reference to the Ninth Circuit, because Ninth Circuit decisions are not final and are often overturned by the U.S. Supreme Court. They provide no stable basis for repealing on Oregon statute.

DANIEL MEEK TESTIMONY TO 2001 OREGON LEGISLATURE ON HB 2581

[Note: The 2011 Oregon Legislature went ahead and repealed ORS 260.522, under the rationale that it was unconstitutional.]

Current law (ORS 260.522) requires, with limited exceptions:

> "[N]o person shall cause to be printed, posted, broadcast, mailed, circulated or otherwise published, any written matter, photograph or broadcast relating to any candidate or measure at any election, unless it states the name and address of the person responsible for the publication, including a statement that the publication was authorized by the person."

This is Oregon's basic statute requiring that persons, including corporations and labor unions, identify themselves when publishing campaign messages, so that voters can take into account the source of the message and the financial interests which motivate it. Similar statutes exist in 49 states.

Attorney General Hardy Myers has for 4 years told the Legislature that requiring such disclosure is unconstitutional under a 1995 United States Supreme Court decision (***McIntyre v. Ohio Elections Commission***), although his official 1999 Opinion No. 8266 concedes that ORS 260.522 may survive a First Amendment challenge:

> In short, until the Supreme Court revisits this issue, only two absolutely clear conclusions exist. First, a statute prohibiting an individual from distributing issue-related leaflets violates the First Amendment. Second, no case yet holds that prohibiting anonymous broadcasts violates the First Amendment. Beyond these conclusions lies speculation. **Perhaps some statutes prohibiting anonymity could survive a First Amendment challenge. We do not know that for certain, nor do we know what those statutes, if they exist, would look like. It is not impossible that ORS 260.522 is such a statute.**

The ***McIntyre*** decision stressed its applicability only to anonymous leafletting:

> "Our opinion, therefore, discusses only written communications and, particularly, leaflets of the kind Mrs. McIntyre distributed.

514 U.S. 334, 348 (1995).

I argued to the 1997 Legislature that the Attorney General's interpretation was not correct. The statute was not repealed.

Since 1997, several state supreme courts and federal courts have upheld tagline requirements as applied to advertisements for candidates, and the United States Supreme Court has declined to overturn those decisions. In ***Seymour v. Elections Enforcement Com'n***, 255 Conn. 78, 762 A.2d 880 (Conn. 2000), the Supreme Court of Connecticut upheld a disclosure statute, finding compelling state interests in:

1. preventing actual or perceived corruption in candidate elections;

2. advancing the state's ability to investigate and enforce campaign finance laws;

3. preventing fraud and libel.

The U.S. Supreme Court just last week (June 29, 2001) declined to overturn this Connecticut decision.

Other courts have upheld disclosure statutes:

Doe v. Mortham, 708 So.2d 929 (Supreme Court of Florida 1998)

Gable v. Patton, 142 F.3d 940 (6th Cir. 1998), certiorari denied U.S. Supreme Court, 525 U.S. 1177, 119 S.Ct. 1112, 143 L.Ed.2d 108 (1999).

Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637 (6th Cir. 1997) certiorari denied by U.S. Supreme Court, 522 U.S. 860, 118 S.Ct. 162, 139 L.Ed.2d 106 (1997).

In his 1999 Opinion, Attorney General Myers cited no state supreme court decision overturning a statute requiring source disclosure on political ads on First Amendment grounds. He cited only one decision, that of a lower court in Louisiana, as so holding.

The present beliefs of Attorney General Myers should not cause this Legislature to repeal ORS 260.522. The Oregon Supreme Court has never ruled this statute unconstitutional. Future Attorneys General could return to the long-held view that this statute should be enforced.