

WRITEN TESTIMONY OF BRENTLEY FOSTER ON HB 3998 ON MARCH 3, 2021

Chair Bynum, Vice-Chairs Noble and Power, and Members of the Committee,

My name is Brentley Foster. I have practiced law for just over 19 years, 17 of which have been in Oregon, and over 15 of which have been as a Deputy District Attorney. I currently serve as Chief Deputy District Attorney for Jefferson County, a judicial district with three judges.

In my current position, I represent the State of Oregon in the most serious criminal cases that can occur under Oregon law. I am aware that the recitation of the types of crimes I prosecute can be distressing, but I would respectfully submit that if the mere mention of the word “rape” or “murder” is upsetting, imagine the anguish being a victim of one of those crimes, or having a loved one who is the victim of one of those crimes, or even having a loved one accused of one of those crimes, and learning that the judge assigned to the trial has never tried a criminal case.

The right to a fair trial for every side of a dispute is absolute. The State has as much right to a fair trial as a defendant; a civil plaintiff has just as much right to a fair trial as a defendant. “Fair”, however, doesn’t just mean “unbiased” or “impartial”. “Fair” also means “appropriate in the circumstances”. That definition or a version of it is found in the Oxford English Dictionary- “just or appropriate in the circumstances”; Macmillan Dictionary- “reasonable, morally right”; Collins Dictionary- “reasonable, morally right”; and even at Vocabulary.com- “just- used especially of what is legally or ethically right or proper or fitting. . . .reasonable, sensible-showing reason or sound judgment. . . . equitable, just -fair to all parties as dictated by reason and conscience”. This interpretation is consistent with Oregon law and common sense. There is no reason to use the term “fair and impartial” if fair simply means “impartial” in the first place. It means much more.

In Jefferson County, the District Attorney’s Office elected to remove a judge with extremely limited criminal law experience from major cases after requests to the presiding judge not to assign him those cases until he was more experienced went unheeded. This decision was not made lightly and was not based on any animus or dislike for the judge; it was simply because the office recognized that a fair trial would be virtually impossible with a judge with no criminal law experience. Put another way, we would never entrust a murder trial to a brand new deputy district attorney with no criminal law experience- to do so would be reckless to the point of near misconduct and would be wholly unfair to the victim’s family expecting justice. As such, how could it be any less reckless to entrust a murder trial to a brand new judge with no criminal law experience? A judge with no prior criminal experience doesn’t suddenly obtain it by putting on a robe. Major cases constitute enormous expenditures of resources for both the State and defense. One wrong decision negates it all and can result in the case being overturned and starting all over again. Such a result is not justice or closure for either side, nor is it a reasonable expenditure of public funds, and it most definitely is not fair. A child sex abuse victim does not deserve to have his or her case used as training wheels or a learning experience for an inexperienced judge, nor does an individual accused of such a heinous crime deserve a judge unfamiliar with the nuances of such an important case.

Any judge will tell you there is much more to being a judge than simply having a license to practice law, yet a license is the only requirement for the position. Under Oregon's system, an attorney who has never set foot in a courtroom can be elected or appointed judge and preside over a murder trial or complex civil case on his first day in office. In no way does such a system provide a fair trial for any participant, and in no other profession is someone new to a position and potentially grossly inexperienced particular areas of that position charged with such enormous responsibility. Teachers are not made principal on their first day of teaching just because they have a teaching license, a medical student doesn't graduate one day and conduct brain surgery the next. A real estate agent can't sell a house without being sponsored by a broker for their first two years, but a judge can take the bench and decide the most serious issues in the justice system on day one, no experience required, no questions asked. How is that justice for Oregonians?

Allowing a judge with limited or no experience in a practice area to preside over cases that are literally life-and-death to the litigants is in no way "appropriate under the circumstances", "reasonable or morally right", "proper or fitting", "sensible", or "fair to all parties as dictated by reason or conscience". including the judge. At present, the remedy for that scenario is to allow a party who believes he or she will not receive a fair trial to remove up to two judges from a case through the filing of a motion. Prudently, the motion is not required to set forth particularized facts, a practice that allows parties to avoid making a public record of information that could potentially embarrass the questioned judge and create headlines and sensation that benefit no one. The statute does, however, allow the judge to request a hearing should he or she disagree with the motion and wish to challenge the good faith of the moving party. This system assures equity and dignity to the parties, the judge, and the system itself. There is simply no reason to change it. Moreover, the proposed changes would create a significant inequity that is difficult to justify-- parties in wealthier communities with more judicial resources would be able to recuse a judge, but parties in poorer communities with fewer judicial resources would not. There is already significant discontent in Oregon's rural communities about perceived disparities in the treatment those areas receive from the State compared to their wealthier and more metropolitan neighbors; now is not the time to fan those flames. This body's time would be better spent developing legislation to require the judiciary to create proficiency standards for new judges or establishing limits on practice areas for new judges with no practical experience in those areas. Such measures would ensure that a presiding judge was sufficiently experienced to preside over any matter he or she was assigned rather than limit a party's ability to seek a fair trial.

I am aware that another witness provided a list of articles covering cases where prosecutors have removed judges from some or all cases in their jurisdictions. The purpose of this list was ostensibly to show how ripe for abuse the current statute is. Instead, in those cases where facts are available, a review of those articles demonstrates the precise need for the statute and for a prosecutor to have the ability to remove a judge just as a defense attorney does. In Multnomah County, Judge Matarazzo was demonstrably not following the law, to the point of having her decisions overturned on appeal, and when the District Attorney's Office dared to appeal her ruling, she announced she could "barely conceal her contempt". Is that fair? Is that impartial? In Benton County, Judge Holcomb flat out refused to hear a motion by the State in a serious case and had a pattern of delaying written opinions on her rulings that operated to prevent the State from appealing them. That information is not contained within the articles previously submitted to this Committee, but can be found here:

https://www.gazettetimes.com/news/local/lawyers-support-heiser-s-claims/article_efc25e1c-0938-

[538f-8432-70985221a0c9.html](https://law.justia.com/cases/oregon/supreme-court/1988/306-or-610.html). In Union County, a 31-page affidavit filed by the District Attorney documented multiple incidents of failing to follow the law and ignoring victim's rights. In Columbia County, there were concerns about Judge Callahan's mental state and/or use of alcohol. When one examines the available information about these motions, it is clear they are not arbitrary or capricious, or made as a result of one negative decision or an effort to get a more "state-friendly" judge. Were that the case, any affected judge could attack the good faith of the affiant and request a hearing. Yet none have. These articles demonstrate time and time again that the prosecutors who have filed these motions have done so after significant consideration and deliberation, sometimes over a period of years. Furthermore, the article about Judge Mooney in Lane County confirms that the Oregon Supreme Court has reviewed and upheld Oregon's current statute. Interestingly, a review of that case (<https://law.justia.com/cases/oregon/supreme-court/1988/306-or-610.html>) establishes that prior versions of the statute required specific allegations before the legislature (wisely) modified the statute to remove the requirement. But the proposed legislation wants to undo that progress? Why?

Of the nine examples provided to this Committee, three of the listed judges are now retired, and one has been appointed to the Oregon Court of Appeals. More importantly, of those nine examples, only five occurred within the past five years, and those five judges account for barely over 5% of Oregon's sitting circuit court judges. Oregon's District Attorneys are clearly not abusing the law to "judge shop". None of the articles cited to this Committee establish that premise. Oregon's District Attorneys are acting within the law to represent the people of the State of Oregon and ensure that the people of the State of Oregon receive a fair trial. We should be allowed to continue to do so.

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