

Oregon State Bar

# Senate Bill 812 Task Force

## Motions for Change of Judge

**June 27, 2014**

# Report of the SB 812 Task Force

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## Origin of the task force

During the 2013 legislative session, the legislature considered SB 812. Under the proposed language, in judicial districts with three or fewer circuit court judges, a party may not make more than one motion to disqualify a judge due to a party's belief that they cannot have a fair or impartial trial or hearing before the judge in question. Currently, parties are permitted to make two such motions.

Senate Bill 812 passed the Senate, and was heard in the House Judiciary Committee on May 8, 2013, but was never passed out of the House committee. After the legislative session ended, the chair of the Senate Judiciary Committee requested the Oregon State Bar convene a task force to look into this issue in more detail and report back with recommendations.

The task force included judges, both criminal and civil litigators, family law practitioners, and representatives of the Oregon Judicial Department, the Professional Liability Fund, and the Oregon State Bar.

## Purpose of Senate Bill 812

SB 812 was supported by judges from a number of judicial districts and was promoted as a mechanism to address two independent problems.

First, in small judicial districts, permitting parties to make two motions to change judges can have a significant financial impact on court operations. When a district only has two or three judges to begin with, disqualifying two judges makes it extremely likely that the district will have to bring in a judge from another jurisdiction. This imposes a financial burden on the Oregon Judicial Department, which has to pay the extra expense of bringing in a judge from some distance away to hear the case. In large districts this is less likely to be an issue because the pool of judges is large enough that it is only rarely necessary to bring someone in from another county.

The second problem is the problem of "judge shopping." In a very small district, when a party makes a motion to disqualify a judge, the lawyer can have a very good idea of which judge is likely to be selected as the replacement. In theory, in a three judge district a party could

essentially select which of the three judges they prefer by disqualifying the other two if they are drawn first. In larger counties, while parties may still use motions for a change in judge to eliminate a judge from whom they believe they may get a disfavorable ruling, the party will have little ability to predict which judge will be selected in their place. Proponents assert that this difference results in motions for a change of judge more frequently being used for “judge shopping” in smaller districts.

SB 812 was proposed to address these issues by limiting parties in districts with three or fewer judges to a single motion for a change of judge instead of the two allowed under current law.

### **Value of a single statewide rule**

The task force dedicated significant time to discussing whether it was appropriate to have different procedural rules in different counties. The proponents of SB 812 did not specifically oppose limiting motions for a change in judge in larger counties, but simply felt that it would be less objectionable to limit the legislation to those counties where they felt the current system was most problematic.

Some members of the task force felt that it was a questionable policy to have different rules in different counties. In a practical sense, having multiple rules might prove confusing for practitioners who practice in multiple counties. More fundamentally however, some members felt that there was a due process concern that was implicit in the idea that some parties would have a greater ability to change judges than other parties would. Task force members believed that parties throughout the state should have the same ability to advance their causes in state courts and should not have those abilities hindered simply by geography.

After considerable discussion, a general consensus emerged within the group that maintaining a single statewide rule was preferable to having different rules in different counties.

### **Opposition to limiting parties to a single motion**

Despite the general preference for a single statewide rule, members of the task force did not agree on what the rule should be. Many practitioners felt that overall the current system has worked very well and that it was not appropriate to change the current system simply because it has inconvenient side effects in a small number of counties.

Some practitioners indicated there may be distinct advantages to having two motions for a change of judge. For example, having two motions may makes parties feel more comfortable using one of them. If a party has only a single motion available, then that party may be reluctant to actually use it for fear that the next judge could be more problematic than the first.

Other task force members stressed the importance of parties feeling like they are getting a fair hearing. If a party genuinely feels that he or she cannot receive a fair hearing in front of the

current judge – even if that belief is unreasonable – then moving for a change in judge may be the appropriate response regardless of whether he or she has been forced to do it before. The argument in this case is that the appearance of providing all parties with a fair decision maker is more important than judicial efficiency.

Some task force members argued that if there are motions for a change in judge being made inappropriately in some counties, that problem should be addressed directly. The circumstances of those motions could be investigated to determine whether there is a local cause that results in higher than normal numbers of motions in some districts. Limiting motions by lawyers who are using the process as it was intended to be used will not correct the behavior of a few bad actors, but instead risks doing harm to the overall integrity of the judicial system.

### **Statewide v. local problem**

The task force spent considerable time discussing whether this problem is statewide or whether it appears to be significantly greater in specific geographic locations. Reliable data on this question is difficult to find. However, partial data provided by the Oregon Judicial Department, as well as anecdotal evidence provided by judges and other task force members, appeared to indicate that the problem is much more prevalent in some counties than in others.

The Oregon Judicial Department was able to provide some data to the task force regarding the number of times court staff entered motions for a change of judge into OJIN. This data indicated a very high number of motions to disqualify judges in Klamath and Union Counties as compared to other similar sized counties around the state. The data also appeared to indicate somewhat heightened rates in Washington and Clackamas counties, though this may simply stem from recordkeeping discrepancies between different counties. In numerous cases, smaller counties appeared to have more motions to disqualify than a larger neighboring county (e.g. Josephine recorded a higher number than Jackson).

Unfortunately, different counties do not enter these motions into OJIN in a consistent fashion, which makes comparing statistics across counties problematic. Without more reliable statistics it is impossible to be certain the task force is getting the whole picture.

Additionally, even in cases such as Klamath and Union counties, where it is clear that these motions are used at a higher than normal rate, it is unclear what conclusions should be drawn.

For example, a very high number of motions for change in judge in one geographic location could indicate that many lawyers have serious concerns with one or more of the local judges and seek to remove those judges whenever possible. This could indicate a discrete problem with those judges that should be investigated.

On the other hand, the same number of motions to disqualify could indicate that lawyers in those locations are making a habit of using these motions tactically. This might not imply any problem with the judges, but rather with the lawyers' inappropriate use of the motion. In fact,

this situation might not even imply any particularly inappropriate intent among lawyers, but could stem from a slowly growing local acceptance of more and more expansive uses of these motions. If a lawyer sees other lawyers using these motions to gain a tactical advantage for their clients they may be tempted and indeed may even feel an obligation to do the same thing.

In the later case, limiting the number of motions available to parties might be a reasonable solution, but in the first case it clearly would not be. The task force was not able to determine from the information available if either of these two scenarios is the situation anywhere in Oregon, or if other factors are responsible. The legislature may want to consider directing the Oregon Judicial Department or another appropriate entity to attempt to gather more specific information on the situations in which these motions are used.

### **Procedural concerns with the current approach**

While not directly related to the question of how many motions parties should be entitled to receive, many task force members were interested in exploring the question of what form the act of removing a judge could take.

Under current law, parties are required to file a motion in which they assert their belief that they cannot get a fair hearing in front of the current judge. No inquiry is made into the accuracy or reasonableness of this belief, the only question is whether the party actually has it. Since it is virtually impossible to prove that a party does not have such a belief, these motions are essentially always granted.

There have been periods of time in Oregon where these motions were not summarily granted but were instead argued in an open hearing. Lawyers who have been involved in such hearings seem to universally feel that the hearings were not productive, and, if anything, further strained the relationships between lawyers and judges. No members of the task force expressed a preference that these types of motions be challenged with any regularity.

Some judges felt that the requirement to assert a belief that a client cannot get a fair hearing created unnecessary friction between lawyers and judges. Under the current system, lawyers are required to question a judge's impartiality and the judge has no real opportunity to respond. Some task force members suggested that since this motion largely functions as a preemptory challenge it should be treated as such in the statute. Rather than requiring a motion that must be ruled on, lawyers should be allowed to simply notify the court that they are exercising their right to change the judge without making any accusation regarding the judge's abilities.

However, it is unclear if such a rule would be constitutional. Dismissals of a judge must be for some cause. One case, *Bushmill v. Vandenberg* 203 OR 326 (1955), held that such a dismissal of a judge cannot be purely preemptory without violating the separation of powers doctrine. The task force spent some time discussing how a statute could be worded to get around this problem without the current requirement that a judge's impartiality be questioned.

## **Other Western States**

As a part of this discussion, the task force also looked at how these motions are handled in other states and there does not appear to be a consistent approach. In some states a motion is required, but in others a party simply files a notice with the court. In some states a motion might be required to be accompanied by an affidavit and in others the motion stands alone. Some states also have different rules for civil and criminal cases. In an examination of the 15 western states, the task force saw no evidence that any other states specifically allow more than a single motion for a change in judge. Oregon appears to be unique in explicitly allowing two motions.

However, it should be noted that in both Oregon and the other states, parties would always have the ability to move to remove a judge for cause, regardless of prior motions. This is a separate procedure in which a party is asserting actual bias or some other disqualifying offense on the part of the judge that is decided on its merits. This is a fundamental due process right that all parties enjoy.

One approach to addressing this problem that did appear to have some support within the task force was moving to a procedural system similar to one employed in Arizona. Under the Arizona rule, parties file a pleading entitled "Notice of Change in Judge." This notice does not contain any particular claim regarding the current judge's ability to be impartial, but instead simply contains an avowal by the attorney that the request is made in good faith and that it is not made for any of a list of inappropriate reasons (e.g. for the purpose of delay, for reasons of race, gender or religious affiliation, etc.)

## **Conclusions on the appropriate response**

The task force was not able to come to any final recommendation regarding whether a bill should be drafted for the 2015 session, and if so, what the content of that bill would be. In general the judges involved in the task force were in favor of limiting the number of motions for a change in judge, and the lawyers involved were in favor of remaining at two.

While it is true that most other states appear to allow only a single motion for a change in judge, Oregon's rule is now very much ingrained in the style of practice here. It seems likely that most practitioners would object to a rule change that suddenly limited them to a single change in judge.

Given that these motions appear to be used at a much higher rate in some counties, it is possible that a more detailed investigation into the reasons for this situation would be appropriate. That investigation, however, was beyond the scope or the abilities of this task force. Such an investigation would likely require collecting more information on the use of these motions than is currently collected by the courts.

The task force was also not opposed to legislation that would alter the form that an action to change a judge would take. There did appear to be general support for more of an Arizona style rule, assuming that such a rule can be crafted to survive constitutional scrutiny in Oregon. This change would not, however, address the fundamental question of how many such motions (or notices) should be permitted.