33 East Main Street
Suite 500
Madison, WI 53703-3095

Mailing Address:
P.O. Box 2038
Madison, WI 53701-2038

Phone:
608.257.7181

Fax:
608.257.2508

www.murphydesmond.com

Matthew J. Fleming
Direct Line 608.268.5606
Facsimile 608.257.2508
mfleming@murphydesmond.com

MurphyDesmond S.C.
LAWYERS

11 January 2022

VIA EMAIL ONLY

The Office of Legal Counsel
115 E. State Capitol
Madison WI 53707-7863

Re: Petition to Remove District Attorney John Chisholm from Office

You have asked for my opinion regarding the sufficiency of a "Petition to Remove District Attorney John Chisholm from Office," filed with Governor Evers' office by Orville Seymer and six other persons. Based upon my review of the Petition and applicable law, it is my opinion that the Petition suffers from several flaws, both formal and substantive, that render it insufficient to invoke the power the petitioners demand Governor Evers exercise.

I. STATUTORY AUTHORITY AND REQUIREMENTS FOR REMOVAL.

Where statutes describe a standard that applies to the removal of a governmental officer, the power of removal is not left to the unfettered discretion of the removing body or officer, but rather, is subject to the statutory standard. ***State ex. rel. Gill v. Common Council of Watertown***, 9 Wis. 254, 258-259 (1859). In this case, the Governor has the power to remove a district attorney for "cause" pursuant to Wis. Stats. §17.06(3). Wis. Stats. §17.001 defines "cause" to mean "inefficiency, neglect of duty, official misconduct, or malfeasance in office." The Governor can remove a district attorney for cause "only upon written verified charges brought by a resident taxpayer" of the county the district attorney serves.

II. THE PETITION SUFFERS FROM FORMAL DEFECTS.

Wisconsin statutes do not define the formal requirements for the proper "verification" of charges. The court of appeals has noted that "the ordinary meaning of "verify" according to Webster's Third New International Dictionary 2543 (unabr. 1976) is "to confirm or substantiate in law by oath" and that "Black's Law dictionary 1561 (6th ed. 1990) offers a similar definition: "[t]o confirm or substantiate by oath or affidavit."" ***Nielsen v. Waukesha***

Cty. Bd. of Supervisors, 178 Wis. 2d 498, 512-13, 504 N.W.2d 621, 626 (Ct. App. 1993). In ***Nielsen***, the court of appeals determined that the statements of circulators of a petition opposing the creation of a lake management district were properly verified under the following criteria:

> First, each statement recites that it is made under oath. Therefore, the fundamental ingredient which gives a verification its trust and credibility is satisfied. Second, each statement carries the jurat of a notary public, signifying that the "writing was sworn to by [the] person who signed it." *See id.* at 852 (definition of "jurat"). Third, every person giving such an oath is deemed to have been lawfully sworn. Section 887.03, Stats.

The Petition, in my opinion, fails both of the first two prongs of the ***Nielsen*** criteria.

A. <u>The Petition fails to include an attestation to the truth of facts asserted</u>.

None of the statements in the Petition are accompanied by a statement indicating that the petitioners attest to the truth or reliability of the statement. Each signature to the Petition is followed by a notary jurat stating "Subscribed and sworn before me," however, due to the lack of any other statements of attestation in the Petition, it is not clear to what exactly the oath applies.

In order for a verification to provide the "fundamental ingredient" of "trust and credibility" no question should exist as to what the signatory swears under oath to be true. The court in ***Nielsen*** treated the statements made by the petitioner and the notary jurat as separate criteria, supporting the conclusion that a notary jurat alone fails to provide sufficient attestation to the truth of any facts. Without a requirement that the statement itself indicate that the signatory is attesting to the truth of the statements made, nothing on the face of the document defines the scope of the oath taken before the notary.

Since 1861, even statements that could be made upon information and belief in a verified complaint required a specific statement of belief in the truth of the matters asserted and the grounds for such belief. ***Morely v. Guild***, 13 Wis. 576, 582 (1861); ***Crane v. Wiley***, 14 Wis. 658, 662. The purpose of this rule was to bind the conscience of the person making the statement such that "[i]f he makes the affidavit without having reasonable grounds for believing and without believing that all the material facts and allegations are true, in whichever form they may be stated, he is forsworn and, upon the proper proof, may be convicted of perjury." ***Morely***, 13 Wis. at 582. Thus, where a reasonable question exists about what a petitioner is actually swearing to, it is difficult to see how such charges can be deemed properly verified as required by Wis. Stats. §17.06(3).

For instance, it is possible the signatories believed they were swearing only that they were resident taxpayers and wanted Mr. Chisholm removed as DA without having obtained any knowledge or reasonable belief in the truth of the specific statements in the Petition. Also, a variety of statements exist in the Petition that are presented solely as statements of others. The Petition, on page 3., includes descriptions of three incidents, but does not say they occurred. Rather, the Petition states only that "Wisconsin Spotlight" reported the information. Similarly, the Petition says "Wisconsin Right Now" reports that the Milwaukee County DA's office refused to prosecute 4 in 6 felony charges, but makes no statement that the petitioners have formed a belief as to the truth of these reports. Did the petitioners intend to swear only as to the existence of these reports or as to the truth of these reports?

To permit such uncertainty as to the subject of the petitioners' oaths would undermine the requirement that the process of removal occurs only upon the presentation of verified charges.

B. <u>The notary certificates are incomplete</u>.

Notaries public and notarial acts are governed by Wis. Stats. Chap. 140. Wis. Stats. §140.15(1) requires every notarial act to be accompanied by a certificate. The certificate must "[i]dentify the jurisdiction in which the notarial act is performed." Wis. Stats. §140.15(1)(c). Further, under Wis. Stats. §140.15(3), unless authorized by some other law or the applicable law of another jurisdiction, the certificate must also be either: (1) in the short-form prescribed by Wis. Stats. §140.16; or (2) set forth the actions of the notarial officer which must be sufficient to demonstrate compliance with Wis. Stats. §§140.04, 140.05, and 140.06. The certificates in the Petition fail to meet these requirements.

I find no basis to conclude that the certificates in the Petition are subject to any other statutory requirements or laws of another jurisdiction. Comparing the certificates to the short form prescribed by Wis. Stats. §140.16 illustrates both the lack of compliance with the short form as well as failure to demonstrate compliance with Wis. Stats. §140.05.

Wis. Stats. §140.16(3) prescribes the short form for "a verification on oath or affirmation" which is as follows:

> State of ....
> County of ....
> Signed and sworn to (or affirmed) before me on .... (date) by .... (name(s) of individual(s) making statement).
> .... (Signature of notarial officer)
> Stamp
> .... (Title of office)
> [My commission expires: ....]

The certifications on the Petition: (1) fail to state the jurisdiction in which the notarial acts took place contrary to Wis. Stats. §140.15(1)(c); and (2) fail to state the name of the person(s) making the statement(s). Thus, the certificate also fails to demonstrate compliance with the requirements of Wis. Stats. §140.05(3) that the notary has confirmed that the person signing the statement is, in fact, the person the signer claims to be. In fact, it is difficult to determine who several of the petitioners actually are given that the signatures are largely illegible and no printed names exist except for Mr. Seymer's.

Without a proper certificate, it is my opinion that the notary jurat is ineffective and the Petition does not present properly verified charges.

III. THE PETITION FAILS TO STATE CHARGES SUPPORTING REMOVAL FOR CAUSE.

The definition of "cause" supporting removal of a district attorney is "inefficiency, neglect of duty, official misconduct, or malfeasance in office." Wis. Stats. §17.001. Thus, the charges presented to the Governor under Wis. Stats. §17.06(3) must set forth facts which, if found to be true, meet this definition.

The Petition claims that certain events occurred as a result of Mr. Chisholm's "dereliction of duty" and that Mr. Chisholm should be removed for "neglecting his duty." See pp. 3 and 4 of the Petition. Because of these express statements and because it does not appear to me that the contents of the Petition discuss facts relevant to the other elements of "cause," I believe it is reasonable to analyze the Petition in terms of whether it properly states charges for neglect of duty.

In my opinion, the Petition does not properly present charges of neglect of duty. While the Petition certainly describes events that can only be described as tragic, the Petition fails to set forth facts that establish those tragic events were the result of Mr. Chisholm having neglected any duty of his office. In fact, the Petition fails to describe any actions Mr. Chisholm failed to undertake which his duties as district attorney compelled. While the Petition appears intended to charge only a neglect of duty, the failure to include any factual allegations regarding specific conduct on Mr. Chisholm's part relevant to the elements of cause is a fatal defect regardless of which elements the petitioners intended to rely upon.

I have found no published appellate decisions relating specifically to removal of a district attorney by the governor, but with respect to the sufficiency of recall petitions, the court of appeals has held that the analysis is "the equivalent of determining whether a pleading states a claim." ***In re Recall in re Carlson***, 147 Wis. 2d 630, 637, 433 N.W.2d 635, 638 (Ct. App. 1988). It is well established that, in determining whether a complaint sufficiently states a claim

for relief, "[m]ere conclusory assertions that echo legal or statutory standards are insufficient; a complaint's assertions must 'allege the ultimate facts' that support the plaintiff's claims." ***Aon Risk Servs. v. Liebenstein***, 2006 WI App 4, ¶6, 289 Wis. 2d 127, 710 N.W.2d 175; *abrogated on other grounds by* ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, P33, 294 Wis. 2d 274, 717 N.W.2d 781.

The Petition describes four incidents where persons charged with serious offenses were later arrested for very serious offenses committed while out on bail. The most notable incident relates to the highly publicized November 21, 2021 Christmas parade tragedy involving Darrell Brooks. In that situation, it appears that a bail recommendation was made by a junior prosecutor in a manner inconsistent with the office's typical approach. Mr. Chisholm was not involved. The Petition makes no mention of what Mr. Chisholm did or did not do that is relevant to this incident and could be read to suggest that had Mr. Chisholm's policies been followed, a higher bail amount would have been set.

With respect to two other incidents, there are no facts at all relating to actions that should or should not have been taken by anyone from Mr. Chisholm's office, much less Mr. Chisholm himself. As for the final incident, the Petition alleges only that the District Attorney's Office had twice declined to prosecute the accused offender for domestic strangulation.

The Petition seems to rely on a theory similar to the doctrines of *respondeat superior* or *res ipsa loquitur* to hold Mr. Chisholm responsible without the need to make any specific allegations regarding Mr. Chisholm's conduct. In other words, the Petition seems to claim that the fact these tragedies occurred is all the evidence necessary to conclude that cause for removal exists. While I would not conclude that an officer is never responsible for the actions of subordinates, I see no support in the statutes or case-law that cause for removal can be found without findings relating to specific conduct, relevant to the statutory standard, on the part of the officer subject to removal.

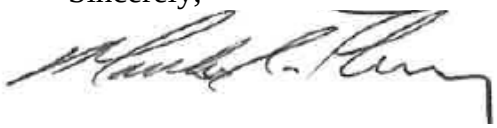
Concluding that neglect of duty has been properly alleged in this Petition is particularly perilous since there are a variety of factors that could have contributed to persons being released on bail that have nothing to do with the district attorney's office or its bail recommendations. Bail is ultimately set by a judge or court commissioner, not the prosecutor. A prosecutor also relies on other agencies, particularly law enforcement, to provide information supporting charges and bail requests. Nor are bail determinations typically made based solely on a single sentence description of the offense as these incidents are presented in the Petition, but rather a variety of factors analyzed in a highly discretionary manner. Without more, the Petition fails to establish neglect of duty or any other "cause" for Mr. Chisholm's removal from office.

CONCLUSION

For the above and forgoing reasons, it is my opinion that the "Petition to Remove District Attorney John Chisholm From Office", filed with Governor Evers' office by Orville Seymer and six other persons fails to meet the statutory standards necessary for Governor Evers to commence the process for removing Mr. Chisholm from office.

Please let me know if you have any questions.

Sincerely,



Matthew J. Fleming

214595
Cc: Erin Deeley, erin.deeley1@wisconsin.gov
Ryan Nilsestuen, ryan.nilsestuen1@wisconsin.gov

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