

## FORMAL OPINION NO 2018-193

### Candor, Independent Professional Judgment, Communication, Seeking Disqualification of Judges

#### Facts:

Lawyer practices primarily in *ABC* County and represents Defendant in a personal-injury litigation. Judge *X*, a circuit court judge in *ABC* County, is assigned to preside over the case. Lawyer has no reason to believe that Judge *X* has any specific bias against Lawyer or Defendant personally. However, Lawyer believes that Judge *X* has a reputation for doing just about everything that can be done to support personal-injury plaintiffs—e.g., by consistently construing facts and law against personal-injury defendants, by frequently granting motions to add punitive damages, by refusing to grant summary judgment to personal-injury defendants, etc.

Lawyer is considering whether to file an affidavit and motion for change of judge pursuant to ORS 14.260.<sup>1</sup> Lawyer believes that there are potential pros and cons to doing so. Lawyer is also concerned, however, that if Lawyer moves to disqualify Judge *X* in Defendant's case he will need to start regularly filing similar motions against Judge *X* in all of Lawyer's personal-injury cases. As a result, Lawyer's reputation could be tarnished. For example, one or more other circuit court judges in *ABC* County may take offense and treat Defendant or Lawyer's other clients more harshly. In addition, Lawyer's ability to represent other clients before Judge *X* in non-personal-injury cases, or when the time for filing an affidavit for change of judge has passed, could be adversely affected.

#### Questions:

1. May Lawyer file an affidavit for change of judge against Judge *X* in Defendant's case?

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<sup>1</sup> Historically, such affidavits were referred to as "affidavits of prejudice," although that terminology no longer appears in the current version of ORS 14.260.

2. May Lawyer consider the impact that filing an affidavit for change of judge could have on Lawyer's other clients or the Lawyer's reputation generally?

3. Must Lawyer advise Defendant about Judge X's reputation and the option to potentially disqualify Judge X?

**Conclusions:**

1. See discussion.
2. No, qualified.
3. See discussion.

**Discussion:**

One method for seeking a judge's disqualification in Oregon is set forth in ORS 14.250 to 14.260.<sup>2</sup> Under ORS 14.260(1), a lawyer or party may (but is not required to) seek disqualification of a judge by filing a motion and supporting affidavit stating 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." ORS 14.260(1). The affidavit need not state specific grounds for the attorney's or party's belief. ORS 14.260(1). In addition, the motion *must* be granted unless the challenged judge contests disqualification. ORS 14.260(1). If contested, the challenged judge bears the burden of proof to establish that the attorney or party filed the affidavit in bad faith. ORS 14.260(1).<sup>3</sup> The motion and affidavit must be filed within certain statutory time limits, and a party or attorney may not file more than two affidavits in any one case. ORS 14.260(4)–(6).<sup>4</sup>

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<sup>2</sup> Additional grounds for disqualification are set forth in ORS 14.210.

<sup>3</sup> See also *State ex rel. Kafoury v. Jones*, 315 Or 201, 207, 843 P2d 932 (1992).

<sup>4</sup> For a more thorough discussion of motions and affidavits for change of judge under ORS 14.260, see 1 *Criminal Law* § 12.6-2 (OSB Legal Pubs 2013).

1. *May Lawyer File an Affidavit for Change of Judge against Judge X?*

The first question implicates the ethical restrictions that govern a lawyer's decision as to whether to file an affidavit for change of judge when there is concern about a judge's perceived reputation against a certain class of litigants, rather than the specific parties or attorneys in the case.<sup>5</sup> There are several relevant Oregon Rules of Professional Conduct (RPCs).

Oregon RPC 3.3(a)(1) provides, in pertinent part:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . .

Oregon RPC 8.2(a) provides:

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard to its truth or falsity concerning the qualifications or integrity of a judge . . . .

Oregon RPC 8.4(a) provides, in pertinent part:

(a) It is professional misconduct for a lawyer to:

. . . .

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law; [or]

(4) engage in conduct that is prejudicial to the administration of justice . . . .

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<sup>5</sup> We emphasize that this opinion does not address whether a judge's reputation for bias against a certain class of litigants is or should be a proper basis alone for disqualification under ORS 14.260—that issue is for the legislature and courts to decide. This Committee is authorized to construe statutes and regulations pertaining directly to lawyers, but not to construe substantive law generally. *See* OSB Formal Ethics Op No 2006-176 (rev 2015). This opinion addresses only the circumstances under which an attorney's filing of an affidavit for change of judge under ORS 14.260 is *ethically* permissible under the Oregon Rules of Professional Conduct.

Taken together, Oregon RPCs 3.3(a)(1), 8.2(a), and 8.4(a)(3)–(4) prohibit lawyers from making any false statements in an affidavit for change of judge. The critical issue, therefore, is whether Lawyer can truthfully state in an affidavit under ORS 14.260 that: (1) Lawyer believes Defendant or Lawyer cannot receive a fair and impartial trial or hearing before Judge X; *and* (2) Lawyer is filing the disqualification motion in “good faith and not for the purpose of delay.” As far as the Oregon RPCs are concerned, these are subjective inquiries. Lawyer must consider each question independently in light of the specific facts, procedural posture, and applicable law of his or her case. Only if Lawyer can truthfully answer yes to both questions may Lawyer ethically file an affidavit and motion to disqualify Judge X under ORS 14.260.

As to the first question, Lawyer must consider whether his or her concern about Judge X is significant enough that Lawyer honestly believes that Defendant cannot receive a fair and impartial trial or hearing before Judge X. However, even if Lawyer concludes (after conducting this analysis) that he or she honestly believes that Defendant or Lawyer cannot receive a fair and impartial trial or hearing before Judge X, that does not end the inquiry. Lawyer must then consider the second question—can Lawyer truthfully state that the motion would be brought in “good faith and not for the purpose of delay”?

In considering the second question, Lawyer must draw a careful distinction between seeking to disqualify Judge X to ensure a fair and impartial proceeding for Defendant versus doing so to obtain a tactical advantage in the litigation. The former situation would constitute good faith; the latter would not. For example, it would not be “good faith” for Lawyer to file a motion to disqualify Judge X if Lawyer’s primary reason was to delay resolution of the case, or to maximize the chances that a more favorable judge will be assigned to Defendant’s case, or as an attempt to get Defendant’s case transferred to a more favorable venue.<sup>6</sup> Using an affidavit for change of judge as a means of judge or forum shopping, or for other strategic advantage, constitutes bad faith and, thus, Lawyer would violate Oregon RPC 3.3, Oregon RPC 8.2, and Oregon

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<sup>6</sup> These examples are not intended to be exhaustive.

RPC 8.4 by filing an affidavit and motion to disqualify a judge primarily for those reasons.

2. *May Lawyer Consider the Impact Filing an Affidavit for Change of Judge Might Have on Lawyer's Other Clients or Lawyer's Own Reputation?*

Filing an affidavit for change of judge can have significant consequences for a lawyer. Lawyers may be concerned about the effect that filing such an affidavit could have on their own reputation or practice, or on their other clients in the future. This is particularly true for lawyers who practice in smaller counties where the local Bar and pool of available judges are relatively small, and for lawyers who typically represent only one class of litigants (such as in criminal and personal-injury contexts).

Oregon RPC 2.1 provides, in pertinent part, that “in representing a client, a lawyer shall exercise independent professional judgment.” In addition, Oregon RPC 1.7(a) provides, in pertinent part:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

....

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interest of the lawyer . . .

The duties to exercise “[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client.” ABA Model RPC 1.7, cmt [1]. Generally speaking, Oregon RPC 2.1 and Oregon RPC 1.7 require a lawyer to make decisions with only his or her client's interests in mind, not the lawyer's personal interests or the interests of other clients or third parties.<sup>7</sup>

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<sup>7</sup> For a broader discussion on the duties to exercise loyalty and independent judgment, see the Annotation to ABA Model RPC 2.1.

In the context of a disqualification motion, this means that Lawyer must evaluate whether to file an affidavit for change of judge on a case-by-case basis, without regard to Lawyer's personal interests or the interests of others. Lawyer may consider only the impact that seeking disqualification of Judge X could have on Defendant's case. Lawyer may not consider the effect, if any, that seeking Judge X's disqualification could have on Lawyer's own practice, or on Lawyer's other current or future clients or cases.

Moreover, if there is a significant risk that Lawyer's analysis of the disqualification issue in Defendant's case will be materially limited by his or her concerns about Lawyer's personal interests, or the interests of other clients or third parties, then under Oregon RPC 1.7(a)(2) Lawyer must withdraw from the representation unless Lawyer's continued representation complies with the requirements of Oregon RPC 1.7(b).

This is not to say that Lawyer may never consider the potential impact a disqualification motion would have on Lawyer's own credibility, reputation, or relationship with Judge X or other judges in ABC County. Lawyer may ethically consider such factors to the extent Lawyer believes they could impact Lawyer's representation of *Defendant*. For example, it would be permissible for Lawyer to consider whether filing an affidavit against Judge X could negatively affect how other judges in ABC County (who might preside over Defendant's case if Judge X is disqualified) might treat Lawyer or Defendant in Defendant's specific proceeding.

3. *Whether Lawyer Has a Duty to Advise Client about the Option to file an Affidavit for Change of Judge*

Question No. 3 asks whether Lawyer has an affirmative duty to advise Defendant about Judge X's reputation and the potential option to file a motion to disqualify Judge X.

Oregon RPC 1.4 provides:

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

In addition, Oregon RPC 1.2(a) provides, in pertinent part:

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

In this hypothetical, the first question is whether there is even a decision for Lawyer to potentially discuss with Defendant. In other words, Lawyer must determine initially whether he or she can even file a motion to disqualify Judge X. If Lawyer has concluded that he or she cannot legally *and* ethically file a motion to disqualify Judge X (see discussion in Part 1 above), then there is nothing to discuss with Defendant, and Lawyer would have no duty under Oregon RPCs 1.2 or 1.4 to advise Defendant of any potential option to file an affidavit against Judge X.<sup>8</sup>

If, however, Lawyer has concluded that he or she could legally and ethically file an affidavit for change of judge against Judge X, Lawyer has a duty under Oregon RPC 1.2 and 1.4 to reasonably consult with Defendant about that decision. At a minimum, Lawyer should inform Defendant about the basis of his or her concerns about Judge X, the available options and procedure under ORS 14.260, and the potential advantages and disadvantages to filing a motion to disqualify.

In doing so, Lawyer must disclose sufficient information for Defendant to intelligently participate in a discussion about whether to file

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<sup>8</sup> Of course, should Defendant ask Lawyer to explain why a motion to disqualify cannot be filed, Lawyer would need to provide a reasonable response to the client inquiry under Oregon RPC 1.2(a).

an affidavit for change of judge. As the *Restatement (Third) of the Law Governing Lawyers* states:

The lawyer’s duty to consult goes beyond dispatching information to the client. The lawyer must, when appropriate, inquire about the client’s knowledge, goals, and concerns about the matter, and must be open to discussion of the appropriate course of action. . . .

[The level of consultation is measured by a standard of reasonableness and] depends upon such factors as the importance of the information or decision, the extent to which disclosure or consultation has already occurred, the client’s sophistication and interest, and the time and money that reporting or consulting will consume.<sup>9</sup>

The timing of that discussion will depend on the specific circumstances of the representation and how potential disqualification issue arises. The identity of a judge is an important issue in any case, and, if feasible, lawyers should consult with their clients *before* making a decision about whether to file an affidavit for change of judge. In some situations, however, a lawyer may need to decide about filing an affidavit for change of judge without any reasonable opportunity to consult with the client beforehand—such as when the lawyer faces an impending deadline or when applicable rules or substantive law requires the lawyer to either file the affidavit immediately or risk waiver. If reasonably necessary under the circumstances, a lawyer may decide whether to file an affidavit for change of judge without first consulting with his or her client; however, even then, the lawyer must reasonably inform the client about the lawyer’s decision within a reasonable time thereafter.

Finally, there may be circumstances where the lawyer and client, even after consultation, disagree about whether to file a disqualification motion. Such a decision goes to the “means,” not the “objectives,” of the representation. Moreover, filing a motion to disqualify is not one of the enumerated decisions listed in Oregon RPC 1.2(a) that is expressly reserved to the client (e.g., whether to accept a settlement). Accordingly, the lawyer is ethically permitted to make the final decision as to whether

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<sup>9</sup> *Restatement (Third) of the Law Governing Lawyers* § 20 cmt c (2000).

to seek disqualification, even over his or her client’s objection, provided the lawyer has adequately consulted with the client, as discussed above.<sup>10</sup>

In the criminal context, we note that the lawyer may need to consider other factors besides ethical considerations in resolving such a disagreement. Criminal defendants possess constitutional rights that are not implicated in civil cases. “[T]he decision-making authority of a criminal defendant is therefore broader than that of a client in a civil matter.”<sup>11</sup> Criminal defense lawyers should consider, among other things, whether the decision to file an affidavit for change of judge in his or her client’s specific case implicates the client’s fundamental rights under the Sixth Amendment. That issue is beyond the scope of what this Committee can opine on.

**Approved by the Board of Governors, March 2018.**

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<sup>10</sup> Of course, the client retains the ultimate right to resolve any disagreement by discharging the lawyer. See Oregon RPC 1.16(a)(3); ABA Model RPC 1.2, cmt [2].

<sup>11</sup> Annotation to ABA Model RPC 1.4 at 36–37 (citing various authorities).

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* chapter 4 (withdrawal from employment), § 7.4 (client communication), § 7.5-1 (abiding by client’s decision), § 8.4-1 (false statements to tribunal), § 8.11 (conduct prejudicial to administration of justice), § 9.2-1 to § 9.2-1(a) (personal-interest conflicts), § 10.2-2(a) (current-client conflicts), § 15.10 to § 15.10-2 (disqualification of judges), § 16.4-14(a) (conflicts and liability exposure), § 18.3-1 (communication with client) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* chapter 8 (conflicts of interest), § 20 (lawyer’s duty to inform and consult with client) (2000).

