

Office of the State Public Defender Administrative Policies

Subject: Substitution of Judges	Policy No.: xxx
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1.0 POLICY

The Office of the State Public Defender (OPD) has established the following procedures to ensure that when a public defender believes that a *district* judge should be substituted in a case, it is handled appropriately according to statute, ethical rules **of professional conduct, and Public Defender Commission Standards. An individual district court judge should not be substituted in every case, barring exceptional circumstances.**

2.0 PROCEDURE

2.1 When a public defender believes that a judge may need to be substituted, s/he must discuss the issue with the Regional Deputy Public Defender, **or with his or her managing attorney in branch offices. and obtain approval. A public defender must obtain prior approval from the Regional Deputy Public Defender for a third or subsequent substitution of an individual judge within any 12-month period.** The Regional Deputy Public Defender ~~must~~ **should then** advise the Chief Public Defender about the ~~problem~~ **decision to substitute the judge.**

2.2 The decision to request a substitution of a judge ~~is one that belongs to the client, in consultation with their public defender.~~ **shall only be made when it is a reasoned, strategic decision and in the best interest of the client. The final decision rests with the public defender, rather than the client, subject to consultation with and approval by the public defender's supervisor, and approval as provided in**

2.1.

2.2.1 Before filing a motion for substitution of a judge, the public defender must first consult with the client regarding the proposed motion, **barring exceptional circumstances.**

2.2.2 This consultation will, at a minimum, include discussion with the client regarding the reasons the attorney believes a substitution is necessary, **and the benefits, disadvantages and risks relevant to the situation and the client's objectives. These reasons will be memorialized in a form that both the public defender and the client will sign after consultation (Exhibit 1).** The public defender and his or her supervisor will sign a form memorializing the consultation with the client and the supervisor (Exhibit 1).

2.2.2.1 The completed substitution form is confidential within the Office of the State Public Defender and will be retained in a secure storage area separate from the case file.

3.0 CROSS-REFERENCE

This policy is based in the following statute and ethical rules:

3.1 Each adverse party is entitled to one substitution of a district judge. *Mont. Code Ann. § 3-1-804(1).*

- 3.2 Although a moving party is not required to state a reason for substituting a judge (*Mont. Code Ann. § 3-1-804(1)*), the Montana Rules of Professional Conduct (MRPC) provide that a lawyer is required to reasonably consult with the client about the means by which the client's objectives are to be accomplished. *MRPC Rules 1.2(a), 1.4(a)(2)*.
- 3.3 A lawyer must exercise independent judgment and render candid advice, referring to considerations of moral, economic, social, and political factors that may be relevant to the client's situation. MRPC Rule 2.1.
- 3.4 ~~A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.~~ A lawyer may make the final decision to substitute a judge; however, a lawyer shall explain the matter to a degree similar to what would be reasonably necessary for the client to make an informed decision regarding the substitution. *MRPC Rules 1.0(g), 1.2(a), 1.4(a)(2), and 1.4(b)*.
- 3.5 A lawyer **shall not seek to influence a judge by means prohibited by law** or may not disrupt a tribunal. *MRPC Rule 3.5*.
- 3.6 ~~Before raising an issue in court, a lawyer is required to first determine (through diligent investigation) that there is a bona fide basis in law and fact for the position to be advocated.~~ *MRPC Rule 3.1*.
- 3.7 A lawyer shall not raise an issue in court for the purpose of harassment, delay, advancement of a non-meritorious claim, or solely to gain leverage. *MRPC Rule 3.1*.
- 3.8 ***It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or to engage in conduct that is prejudicial to the administration of justice.*** *MRPC 8.4*.

4.0 CLOSING

Questions about this policy should be directed to OPD at the following address:

Office of the State Public Defender, Administrative Service Division
44 West Park
Butte, MT 59701
Phone 406-496-6080

EXHIBIT 1

Substitution of Judge Form
~~Attorney-Client Privileged Document~~
OPINION WORK PRODUCT

Date _____ Attorney _____

Case Name _____

Case No. _____ JustWare ID _____

Presiding Judge _____

Date Client Consulted: _____

Date Regional Deputy Public Defender/Managing Attorney consulted and approved if necessary: _____

Reasons for Proposed Substitution _____

Mindful of Montana Rules of Professional Conduct 1.2(a), 1.4(a)(2), 1.4(b) and 2.1, I hereby certify that I have informed my client of the benefits, **disadvantages** and risks **relevant to making an informed decision regarding the substitution of a judge, and my reasons and recommendation.** and that it is his/her decision as to whether to substitute the judge or not. **This form is a memorialization of an opinion work product after a confidential attorney-client discussion.**

Attorney for Defendant Date

Regional Deputy Public Defender/Managing Attorney Date

I, _____, being the defendant in the above-referenced case, have been fully informed by my attorney of the benefits and risks involved in substituting the judge. My attorney has answered my questions and I am informed enough to make this decision.

My decision is

- _____ to move to substitute the judge
- _____ to proceed with the judge I currently have

Defendant Date