

# Office of the State Public Defender Administrative Policies

Subject: <b>Substitution of Judges</b>	Policy No.: <b>xxx</b>
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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, 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, *prior to filing a notice of substitution, barring exceptional circumstances*. ~~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 should advise the Chief Public Defender about the decision to substitute the judge.

**2.2** The decision to request a substitution of a judge 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 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, the benefits, disadvantages and risks relevant to the situation and the client's objectives. 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 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 disrupt a tribunal. *MRPC Rule 3.5.*
- 3.6** 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.*
- 3.7** 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  
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~~: \_\_\_\_\_

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. 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