

Office of the State Public Defender Administrative Policies

Subject: Substitution of Judges	Policy No.: 115
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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 the OPD Practice Standards.

2.0 PROCEDURE

- 2.1 When a public defender believes that a judge may need to be substituted, s/he should discuss the issue with the supervising attorney (Regional Deputy Public Defender, managing attorney, or Conflict Defender Division Administrator) prior to filing a notice of substitution, barring exceptional circumstances. The Public Defender Division Administrator should be advised about the decision to substitute the judge for cases in their division.
- 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 with the public defender's supervisor.
 - 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 (Attachment A).
 - 2.2.2.1 The completed substitution form is confidential within OPD 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
Central Services Division
44 West Park
Butte, MT 59701

Phone 406-496-6080

ATTACHMENT A

**Substitution of Judge Form
OPINION WORK PRODUCT**

Date _____ Attorney _____

Case Name _____

Case No. _____ JustWare ID _____

Presiding Judge _____

Date Client Consulted: _____

Date Supervisor consulted: _____

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

Supervisor

Date