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Fair Trial:
New Oregon Ethics Opinion on "Affidaviting" Judges

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Judicial disqualification comes in two forms in Oregon state trial courts. The first is "for cause" under ORS 14.210 and generally parallels Oregon Code of Judicial Conduct Rule 3.10. The respective statute and rule address conflicts on the judge's part such as when the judge was involved in the same proceeding as a lawyer before taking the bench. The second is "for prejudice" under ORS 14.250 and allows a party to seek disqualification of an assigned judge if the party or the party's attorney "believes that such party or attorney cannot have a fair and impartial trial or hearing before such judge." Of the two variants, disqualification under ORS 14.250 is far more common and is generally known as "affidaviting" a judge.

The term "affidaviting" comes from a companion provision to ORS 14.250—ORS 14.260, which requires an affidavit with language mirroring ORS 14.250 supporting a motion for disqualification. ORS 14.270, in turn, requires that a motion and affidavit generally be filed at the time of assignment or if oral notice is given at the time of assignment by the close of the next judicial day. The Supreme Court in *State ex rel. Kafoury v. Jones*, 315 Or 201, 205, 843 P2d 932 (1992), held that the requisite belief simply has to be subjective and "not the objective truth of that belief." Given that low bar, the Supreme Court in *State v.*

Pena, 345 Or 198, 203, 191 P3d 659 (2008), described ORS 14.250 as "an exercise of legislative grace."

Despite that low bar, ethics issues remain in "affidaviting." The Oregon State Bar last year released Formal Opinion 2018-193 that addresses three areas in particular: (1) is a judge's perceived leaning for or against a particular class of litigants an appropriate basis for an affidavit as a matter of ethics? (2) may the lawyer consider the impact that filing an affidavit might have on the lawyer's other clients or the lawyer's reputation? (3) does a lawyer have a duty to advise a client about the availability of the "affidavit" process? In this column, we'll survey all three.

Basis of the Affidavit

The first area Opinion 2018-193 discusses is predicated on a hypothetical in which the judge does not have a specific bias against the particular parties or attorneys in the matter concerned but is perceived as being more or less favorable to particular classes of litigants—such as plaintiffs in personal injury cases or defendants in criminal cases.

As noted earlier, the Oregon Supreme Court has held that the "belief" that an attorney must have to satisfy the statute is subjective rather than objective. Various provisions of the Rules of Professional Conduct—including RPCs

3.3(a)(1), 8.2(a) and 8.4(a)—prohibit false statements. Opinion 2018-193 acknowledges that the inquiry under ORS 14.260 is subjective. Therefore, if a lawyer truly believes that the client cannot receive a fair and impartial trial and the affidavit is not made for the purposes of delay, then Opinion 2018-193 concludes that the subjective standard is met and the affidavit is proper. The opinion cautions, however, that simply using the "affidavit" process for forum shopping would constitute bad faith.

Impacts Beyond the Case Involved

Opinion 2018-193 notes that RPC 2.1 requires a lawyer to exercise independent professional judgment and that RPC 1.7(a)(2) prohibits a lawyer from representing a client if the lawyer's representation will be materially limited by either the lawyer's duty to another client or the lawyer's own interest. Opinion 2018-193 (at 6) finds, therefore, that "[i]n 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 [L]awyer's personal interests or the interests of others."

Duty to Advise

Under RPC 1.4(b), a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding

the representation." Similarly, RPC 1.2(a) requires a lawyer to "consult with the client as to the means by which . . . [the objectives of the representation] . . . are to be pursued." Opinion 2018-193 takes a nuanced view of the duty to advise. On one hand, it reasons (at 7) that if the lawyer believes that there is no legal or ethical basis to file an affidavit, "then there is nothing to discuss . . . and Lawyer would have no duty . . . to advise[.]" On the other, it concludes (at 7) that if a lawyer believes that an affidavit is an available tool, the lawyer "has a duty to . . . to reasonably consult with . . . [the client] . . . about that decision."

Opinion 2018-193 recognizes that although ideally the consultation with a client should precede the decision to "affidavit" a judge, time constraints may require the lawyer to make a decision on the spot when a judge is assigned—such as at docket call or a similar assignment setting. In that event, the opinion counsels that the lawyer should discuss the issue within a reasonable time after the decision. Finally, if the lawyer and client disagree, the opinion defers to the lawyer—viewing the decision to disqualify a judge as going to the "means" rather than the "objectives" of the representation.

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