

# ETHICAL ISSUES WHEN LITIGATING MULTIPLE CASES IN THE SAME COURTHOUSE

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**Fair Trial: New Oregon Ethics Opinion on “Affidaviting” Judges**

Mark J. Fucile  
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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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**What's the Issue? New OSB Ethics Opinion on Issue Conflicts**

Mark J. Fucile  
July-August 2007

Imagine this scenario: You are a land use lawyer. A nearby city has adopted a controversial new noise ordinance that appears to have many ambiguities. You have two clients who operate major businesses in that city: one is a company that builds and tests pile-drivers and another is a clinic that assists the chronically sleep deprived. The two businesses are not near each other, but both are planning expansions which will require permit approvals by the city council that will touch on the new ordinance. Your pile-driver client needs a generous decibel count under the ordinance to conduct its quality testing. Your sleep clinic client needs a quiet environment because its patients stay overnight so that clinic doctors can monitor their sleep patterns. Coincidentally, you are scheduled to present their permit requests to the city council on the same day back-to-back. As you are driving to the hearings, you recall that under the "old rules" there was something called an "issue conflict" and wonder what the standards are now under the new Rules of Professional Conduct.

The Oregon State Bar issued a new ethics opinion earlier this year that takes a comprehensive look at issue conflicts under the new rules. The opinion, 2007-177, looks at both what issue conflicts are and what they are not. In doing so, it draws on both the new Oregon RPCs and helpful interpretative guides from the ABA Model Rules and their accompanying comments from which the Oregon rules are now patterned. 2007-177 is available on the OSB's web site at [www.osbar.org](http://www.osbar.org). Like the opinion, this column looks at both what issue conflicts are and what they are not.

***What Issue Conflicts Are.*** Under the former Oregon DRs, issue conflicts were treated as a separate category of conflicts. Former DR 5-105(A)(3) found that issue conflicts only occurred in a relatively narrow setting: "[When a lawyer takes conflicting legal positions for different clients in separate cases and the] lawyer actually knows that the assertion of the conflicting positions and also actually knows that an outcome favorable to one client in one case will adversely affect the client in another case[.]" Again under former DR 5-105(A)(3), conflicts of this kind could be waived by the clients involved.

Like the ABA Model Rules on which they are based, the new Oregon RPCs do not include a specific rule on issue conflicts. Rather, in both issue conflicts are treated as a subset of the general rule on current, multiple client conflicts: RPC 1.7. Under RPC 1.7, current client conflicts exist if: "(1) the representation of one client will be directly adverse to another client; [or] (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 a personal interest of the lawyer[.]”

Unlike the ABA Model Rules, however, Oregon did not adopt the accompanying comments as have many other states. ABA Model Rule 1.7 includes a specific comment (Comment 24) addressing issue conflicts:

“Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that the lawyer’s action on behalf of one client will materially limit the lawyer’s effectiveness in representing another client in a different case. . . . If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.”

The new Oregon ethics opinion essentially fills the gap left when we moved from the old rules to the new but did not also adopt the comments. In doing so, 2007-177 takes an approach that is very similar to both the old rule and the current ABA comment. It defines an issue conflict in very narrow terms:

“The critical question is whether the outcome in Client A’s matter will or is highly likely to affect the outcome of Client B’s matter. This test would be met if, for example, one case is pending on appeal before the Oregon Supreme Court or the Oregon Court of Appeals and the other case is pending at the trial court level and will necessarily be controlled by the forthcoming decision.”

Again like both the old rule and the current ABA comment, 2007-177 also finds that most (but not all) issue conflicts are waivable.

**What Issue Conflicts Are Not.** 2007-177 also outlines when issue conflicts do not exist:

“[Issue conflicts do not exist] every time there are two cases pending at the trial court level in different counties or judicial districts. Whether [they exist] ...when, for example, two cases are simultaneously pending before two different trial court judges in the same county or judicial district will depend on what the lawyer reasonably knows or should know about the likelihood that one case will affect the other under the circumstances in question. For example, the outcome may depend in part on whether the issue is likely to be dispositive in one or both cases or constitutes only a remote fallback position.”

2007-177 also stresses that issue conflicts do not arise when different lawyers at the same firm in different cases take conflicting legal positions for different clients

without knowing of the contrasting positions and their impact: “[I]t would be inappropriate to hold that on pain of discipline, all lawyers at a firm are chargeable with full ‘issue conflict’ knowledge of every other lawyer at the firm. Actual knowledge, or at least negligence in not knowing, must first be proved.”

**Summing Up.** To return to our opening example, the lawyer involved should not have an issue conflict as long as the permit applications for the clients involved will not require the lawyer to take contradictory positions on precisely the same point for the different clients. Nonetheless, the example also highlights that as lawyers increasingly specialize in particular areas of the law, the possibility for issue conflicts between clients in those areas has also increased in equal measure.