

February 24, 2023

Dear Chair Prozanski and Committee Members:

I am writing about SB 807, which would amend the procedure for disqualifying a judge. As a retired public defender with more than 30 years of experience, I am familiar with ORS 14.260, and I know that that statute can be abused. I support the proposed amendment for the following reasons.

1. The will of the voters may otherwise be nullified.

Oregon's process for choosing judges is based upon the idea that the residents of a community should choose which judicial candidate represents the community's interests and values – we entrust voters with electing their community's judges. But ORS 14.260 can allow a single attorney (or office) to cancel out a community's choice for judge. And ORS 14.260 does not require an attorney to show facts that demonstrate bias, or that the attorney's claimed "belief" is reasonable; instead, one attorney in the right position can prevent an elected judge from hearing cases, simply by stating that the attorney believes that the judge is biased.

Allowing just one person to singlehandedly prevent an elected judge from hearing a substantial number (and possibly entire categories) of cases is to allow a single person to negate the choice of voters. It undermines the democratic process. And across Oregon, individual attorneys have used ORS 14.260 to nullify decisions made by the voters in judicial districts.

Under the proposed change to ORS 14.260, an attorney or office who disqualifies a judge so often as to effectively prevent a judge from hearing criminal or delinquency cases in the judge's district would be required to meet an objective standard. Such attorneys would be required to show facts which would reasonably call the judge's impartiality into question. This amendment would allow disqualifications where valid reasons exist, while also preventing any one attorney from controlling which judges will hear criminal or delinquency cases in a community.

2. ORS 14.260 allows attorneys to make misrepresentations about judges' conduct to a court without ethical consequences.

There is a second significant reason to amend ORS 14.260. As written, ORS 14.260 may be the *only* statute which the Oregon State Bar has interpreted as permitting an attorney to deliberately make misleading misrepresentations to a court without consequences.

Generally, Oregon's ethical rules hold attorneys to a very high standard. The rules prohibit a lawyer from knowingly misrepresenting anything to a tribunal – "whether material or not, whether fact or law, whether orally or in writing." This includes by omitting facts that give a statement context. They prohibit lawyers from offering evidence that they know to be false, and in general, the Oregon State Bar has enforced those standards rigorously. An attorney who intentionally makes a false statement to a court can face severe disciplinary consequences.

However, the State Bar has determined that the rules requiring an attorney to act with complete candor do not apply when an attorney disqualifies a judge under ORS 14.260. Because ORS 14.260 only requires an attorney to say that the attorney *believes* that he or she cannot have a fair or impartial trial or hearing before a judge, the Bar has refused to discipline an attorney even where an attorney has made documentably false or misleading

statements to support a motion to disqualify a judge. The Bar's reasoning is demonstrated by its 2020 decision regarding Union County District Attorney Kelsie McDaniel.

In April 2020, McDaniel began filing motions with the effect of disqualifying one of Union County's judges from hearing the county's criminal cases. McDaniel stated that she believed that the judge could not be fair in any matter involving the DA's office, and filed a 31-page memorandum containing multiple descriptions of the judge's actions and rulings to support her claim that the judge was biased.

A comparison of McDaniel's descriptions against court transcripts and audio records showed that the memorandum contained multiple inaccurate and misleading statements. For example, to show the judge's favoritism toward defendants, McDaniel included a graphic description of an altercation and stated that the judge had refused to impose a mandatory domestic violence no-contact provision – falsely implying that the graphic description had been provided to the court, and that the case involved a domestic violence offense. The memorandum decried the judge's 'leniency' in making a particular release decision – but omitted that the Union County court has a standardized release policy and that the judge's decision complied with the court policy. The memorandum faulted the judge for failing to impose a substance abuse package at a sentencing – but omitted that the law requires the state to show that a defendant has a history of drug and alcohol abuse before the substance abuse package can be imposed, and that the judge had specifically cited the state's failure to make any such showing whatsoever. The memorandum claimed that an incident where the judge started a hearing without a deputy district attorney present showed bias, but omitted facts which established that the judge's action was inadvertent, and that the deputy district attorney had silently slipped out of the courtroom as the hearing was beginning, without notifying the judge or court staff. The memorandum falsely asserted that the judge had altered a motion submitted by the DA's office, and falsely claimed that the judge released several defendants without conditions in instances where records showed that the defendants had not been released at all.

Oregon courts have determined that Oregon's ethical rules require an attorney to act with complete candor toward a court– “a half-truth or silence can be considered to be as much a misrepresentation as a lie.” And in June 2020, I filed a bar complaint that McDaniel had made 16 material misrepresentations in her 31-page memorandum, most often by omitting context that changed the significance of the judge's decisions.

The Oregon State Bar concluded that the wording of ORS 14.260 imposes a different standard of honesty on attorneys when they disqualify a judge. Because ORS 14.260 allows an attorney to remove a judge by just claiming that the lawyer *believes* the judge cannot be impartial, without showing facts that demonstrate bias or that the attorney's belief is reasonable, the Bar concluded that McDaniel's factual descriptions must be viewed as merely reflecting her perspective, and that because her descriptions showed only her “perspective,” she was allowed to omit the full context of the judge's decisions. McDaniel's repeated failure to include the full context of the judge's decisions could not be treated as misrepresentations and McDaniel could not be disciplined, even if her statements had been misleading. ORS 14.260 may be Oregon's *only* statute which has been interpreted to allow an attorney to deliberately provide misleading information to a court. The Bar's decision was covered extensively in the La Grande Observer's October 26, 2021 cover story, “Bar Clears Union County District Attorney Kelsie McDaniel of Ethics Complaint” and in my December 2, 2021 column, “Ethical Standards in Short Supply with DA, State Bar.” Both are attached.

The proposed amendment to ORS 14.260 is necessary to protect voters from lawyers who use the statute to cancel out voters' choices without a reasonable basis. Equally important, the amendment to ORS 14.260 is necessary to close the law's loophole allowing attorneys to deliberately provide false "facts" to a court without sanctions.

Thank you for considering these issues.

Very truly yours,

s/ Anne Morrison

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THE OBSERVER

SERVING UNION AND WALLOWA COUNTIES SINCE 1896

October 26, 2021

TUESDAY EDITION

\$1.50

'I'm really going to miss it'

Customers lament looming closure of Bi-Mart pharmacy

By **DICK MASON**
The Observer

LA GRANDE — Four years ago Heather Rekow of La Grande was stunned. Rekow was at the pharmacy at La Grande's Bi-Mart store to pick up a prescription for an urgent health issue when she saw her bill — one for an eye-popping unexpected \$50.

"I could not believe it," she said.

Rekow needed the medication immediately but did not feel she had the background needed to call her insurance company in an attempt to get it to cover a portion of the expense. Then a Bi-Mart pharmacist came to the rescue. The pharmacist volunteered to make the call and after a few minutes managed to get Rekow's insurance company to bring her share of the bill down to \$50.

Rekow was thankful

See, *Bi-Mart*/Page A5

A legacy of tireless community service

Shelia Evans remembered for her outreach

By **DICK MASON**
The Observer

LA GRANDE — About three years ago Dan Cosner, a member of the Island City Lions Club, one of the Grande Ronde Valley's leading community service organizations, was concerned about its president, Shelia Evans.

"I asked if she was worried about getting burned out because she was taking on so many projects," Cosner said.

Evans' response shed

See, *Evans*/Page A5

Crossing the bar

The Oregon State Bar clears Union County District Attorney Kelsie McDaniel of ethics complaint

By **ALEX WITTWER**
The Observer

LA GRANDE — Union County District Attorney Kelsie McDaniel is free of a complaint that hounded her for almost a year.

Retired attorney Anne Morrison's complaint to the Oregon State Bar against McDaniel stemmed from the prosecutor's action in 2020 to block Circuit Judge Wes Williams from presiding over criminal cases. The bar on Sept. 11 dismissed the complaint.

"My actions were driven at all times by my statutory and constitutional obligations as DA for Union County," McDaniel said. "My representations have been and will continue to be truthful and accurate. When I learn of additional information, I clarify."

The events preceding the complaint, which The Observer reported in April 2020, were based on an 31-page memorandum McDaniel submitted to the court alleging Williams committed dozens of instances of misconduct and that the state could not receive a fair trial under him. McDaniel used the memo as the basis to remove Williams from presiding over criminal cases.

Williams has not spoken about McDaniel's move to sideline him.

"The code of judicial ethics forbids me from making a public comment regarding McDaniel's memo," he said.

Williams, however, offered up a written statement he had prepared.

"My campaign promise to the people of Union and Wallowa counties was that I would honor the principles of equality before the law and that I would treat all with mutual respect and dignity; and protect their constitutional rights. I have and I will continue to remain true to this promise."

Memorandums

Williams was not the first to receive such a memo.

Rod Underhill as district attorney of Multnomah County in 2017 filed a nearly identical memo against Circuit Judge Judith Matarazzo. The Underhill memo covered four areas of concern while McDaniel's memo contains six, and the Underhill memorandum chronicled 10 years of alleged misconduct where as the McDaniel memorandum is from 2019-20, and five of the complaints concern matters in January 2019, soon after Williams took his oath as a judge.

Other district attorneys in Oregon have filed similar motions to remove circuit judges, including in Umatilla, Lane and Klamath counties. And other district attorneys in Eastern Oregon have removed Williams from cases. The Baker County District Attorney's Office confirmed it disqualifies Williams whenever he presides on cases there, though without an accompanying memo.

Oregon law gives attorneys the power to bench a judge. An attorney only needs to file a motion to recuse a judge and provide an affidavit stating they believe they cannot have a fair and impartial trial or hearing before the judge, and the action is in good faith and not for the purpose of delaying proceedings. The affidavits don't require evidence or allegations, such as the ones from Underhill or McDaniel.

The law, however, requires dismissing a judge in each case. The McDaniel memorandum acted as a blanket dismissal of Wil-



"It's very much a nuclear option for something. It doesn't even look like they tried anything else first."

Amber Bevacqua-Lynott

liams for all cases.

"It's very much a nuclear option for something. It doesn't even look like they tried anything else first," said Amber Bevacqua-Lynott, a former Oregon State Bar discipline counsel attorney.

McDaniel's office pulled it off for more than a year, at least up until she took maternity leave earlier this year. The district attorney's office continues to file disqualifications against Williams, though without the memo.

A second look

The disqualifications relegated Williams to a minimal workload. And the memo underpinning the motions drew the scrutiny of Morrison.

She saw an article in The Observer and the 31-page memorandum as unusual — citing multiple occurrences where that judge has shown impropriety and bias. She said using that memo to subsequently sideline the judge was cause for concern.

Morrison obtained copies of the transcripts and public records that were used in drafting the memorandum and set to work.

"When I started comparing what Kelsie McDaniel had said in her memorandum to the actual transcript, I thought there are multiple misrepresentations," Morrison said. "It's not just one. It's not just an accident because it happens over and over and over again. And they're serious misrepresentations, because if you heard the whole story instead of what she was saying in her memorandum, I think your picture of any of those decisions made by the judge might be very different."

She said she found an issue with nearly every single complaint in the memo.

"The DA has essentially lied to the court, which we're not allowed to do," Morrison said, "and I think has lied to the public also about these cases because she has misrepresented so many of them in such an extreme way."

So she sent a complaint of her own to the Oregon State Bar against McDaniel.

Matters of representations

McDaniel's accusations of impropriety cites cases where Williams reduced bail and decided not to jail defendants

against state recommendations. In one case, during pretrial, the memo states, Williams gave advice from the bench to the defense attorney and recommended a key expert witness for the defense.

But according to Morrison's complaint, in that case, nearly 250 pages of transcripts, mostly centered around pretrial discussions regarding suppression of evidence, show Williams gave even-handed direction and advice to the state and the defense. McDaniel did not paint a true picture of Williams' actions, according to Morrison.

McDaniel, through her lawyer Dayna Underhill — wife of former Multnomah County District Attorney Rod Underhill — asked the Oregon State Bar for a prompt dismissal. The response affirmed that none of the allegations against Williams in the original memorandum amounted to ethics violations and McDaniel operated within legal standards and frameworks when writing the memo.

The bar dismissed the ethics complaint, finding McDaniel never misquoted Williams nor made statements that were lies. The bar did, however, examine the allegation that McDaniel had omitted context in the memo but determined McDaniel only needed to show a perception of bias to recuse Williams.

Morrison sticks to her story

Morrison appealed, but the bar reaffirmed its position that McDaniel acted in a lawful way and had done nothing wrong. The Oregon State Bar Professional Responsibility Board also stated the backdrop of the Morrison complaint was based on a political feud between McDaniel and Williams.

"I am pleased that the Oregon State Bar Professional Responsibility Board saw it the same way and dismissed the complaint in its entirety," McDaniel said. "Being the district attorney comes with having to make difficult decisions, but I always strive to do the right thing."

The memo in the eyes of the Oregon State Bar only needed to show what McDaniel believed to be true, even if the addition of context from the court transcripts provided counterpoints to many allegations.

Morrison disagreed with the bar's ruling. "What they're saying is that in this context, she doesn't have to give the full facts," she said. "She only has to give what supports her belief. I was dumbfounded when I read that."

With the bar complaint receiving its second dismissal, however, Morrison's options moving forward are limited.

"I feel that strongly that she has badly misrepresented what happened," Morrison said.

"And, you know, she's the DA. It's her job to hold all of us accountable. If we go out there and violate the law, we should be called into call to account for it.

If we're found responsible for it, we should be held responsible for it. ... I think she should be held accountable for what she does."

Alex Wittwer/The Observer

The Union County Courthouse, as seen on Wednesday, July 14, 2021, sits on the same block as the county's original courthouse.



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WEATHER

Full forecast on the back of B section

	Tonight		Wednesday
	45 LOW		54/43
	Showers around		A shower in spots

CONTACT US

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Issue 126
2 sections, 16 pages
La Grande, Oregon

Email story ideas to news@lagrandeobserver.com.
More contact info on Page 4A.



THURSDAY

SUPPLY CHAIN BOTTLENECK GETS ADDRESSED

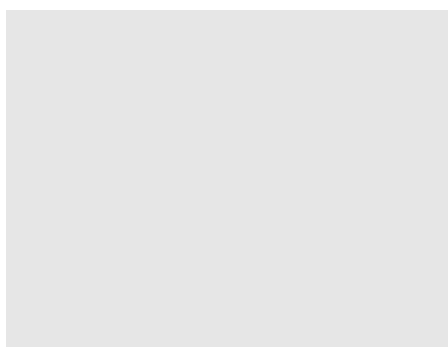
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https://www.lagrandeobserver.com/opinion/columns/thinking-out-loud-ethical-standards-in-short-supply-with-da-state-bar/article_db6e66e0-4982-11ec-9410-2f07250b3d71.html

Thinking out loud: Ethical standards in short supply with DA, state bar

By ANNE MORRISON

Dec 2, 2021



Morrison

As an attorney for more than 30 years, I've always appreciated my profession's theoretical adherence to ethical principles. Law students must complete a course in legal ethics; applicants to the bar must demonstrate knowledge of ethical rules; attorneys must take ongoing training in legal ethics.

Of course I understand that those rules are somewhat aspirational. But still, they exist.

The most significant ethical rules address attorney honesty. Oregon's rules prohibit a lawyer from knowingly misstating anything to a tribunal, whether material or not, whether fact or law, whether orally or in writing. Sometimes, failure to make a disclosure is the equivalent of an affirmative misrepresentation.

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Complete candor to the court is expected, and “a half-truth or silence can be as much a misrepresentation as a lie.” Oregon’s Supreme Court has stated, “The community expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice.”

But what if the bar chooses to abandon its longstanding requirement that attorneys always act with the utmost honesty in their conduct as attorneys?

In April 2020, Union County District Attorney Kelsie McDaniel filed a motion to disqualify Judge Wes Williams from hearing criminal cases in Union County. Although no reason is required to disqualify a judge, McDaniel included a gratuitous memorandum describing scores of incidents that she claimed demonstrated Williams’ bias against the state and favoritism toward defendants, then immediately contacted The Observer to publicize her allegations.

The problem?

A comparison of the memorandum with transcripts of the actual hearings showed that McDaniel repeatedly misrepresented Williams’ rulings — most frequently, by omitting critical context. McDaniel’s memorandum charged that Williams showed favoritism for the defendant when he refused to sentence a nine-time DUII defendant to jail — but omitted the jail’s concern that the defendant’s medical care would nearly deplete the jail’s entire

medical budget.

The memorandum claimed that Williams exhibited bias against the state when he started a hearing with no prosecutor present — omitting the on-the-record discussion that the prosecutor had silently slipped out of the courtroom without notifying Williams, leaving Williams unaware that the prosecutor was absent. Given that an attorney need not provide any reason to disqualify a judge, McDaniel’s purpose in misrepresenting Williams’ actions appeared to be to discredit and defame.

In June 2020, I filed a bar complaint alleging that McDaniel made 16 serious misrepresentations in her descriptions of Williams’ behavior. The bar addressed just two, and dismissed my complaint. Significantly, the bar did not exonerate McDaniel — it never found that McDaniel’s descriptions were accurate or truthful. Instead, the bar dismissed on a technicality, reasoning that because an attorney need not show evidence of bias to remove a judge, the unneeded examples could not be “misrepresentations,” even if inaccurate or untrue.

Instead, any factual discrepancies should be viewed as simply reflecting McDaniel’s “perspective” of Williams’ actions.

The bar’s reasoning contradicts longstanding law that prohibits a lawyer from knowingly misstating anything to a tribunal. Instead, the bar has determined that an attorney’s duty to be honest is now “contextual.” Even if an attorney’s portrayal of events is distorted, or inaccurate, or completely made up, she may still present them as fact if she claims that they are the basis for her “perception” of bias. The bar refused to address the charges of dishonesty on the merits, to the detriment of our entire community.

Days after the Oregon Bar decided that, at least sometimes, providing intentionally misleading information to the court and public does not constitute misconduct in Oregon, the New York Supreme Court suspended Rudolph Giuliani’s license to practice law because Giuliani made “demonstrably false and misleading statements” to the courts and public. That court noted its inherent duty “to protect the public in its reliance upon the integrity

and responsibility of the legal profession”:

“When ... false statements are made by an attorney, it ... erodes the public’s confidence in the integrity of attorneys admitted to our bar and damages the profession’s role as a crucial source of reliable information. It tarnishes the reputation of the entire legal profession and its mandate to act as a trusted and essential part of the machinery of justice. Where, as here, the false statements are being made by respondent, acting with the authority of being an attorney, and using his large megaphone, the harm is magnified.”

It has been discouraging to learn how little value our own county’s district attorney places on the principle of truthfulness. It is even more demoralizing to discover that the ethical standards of our state bar are equally low.

Anne Morrison is a La Grande resident and retired attorney who has lived in Union County since 2000.