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What Lawyers Should Know About Judicial Ethics

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Although lawyers are keenly aware of the Rules of Professional Conduct governing their own conduct, many lawyers are less familiar with the Code of Judicial Conduct applicable to state court judges. The current Oregon CJC, which was adopted in 2013 by the Supreme Court, is patterned generally on the ABA Model Code of Judicial Conduct, which, in turn, was last comprehensively revised in 2007. As public officials, judges are also regulated by state statutory and Constitutional law. The CJC is enforced as a regulatory code by the Supreme Court through the Commission on Judicial Fitness and Disability. Sanctions can range from public censure to removal.

Because the roles of judges and lawyers are different, the CJC is not simply a "judges' version" of the lawyer RPCs. The first 18 RPCs, for example, deal with various aspects of the attorney-client relationship. Given that full-time judges do not have clients, there are no corresponding provisions in the CJC. In fact, the CJC is comprised of only six basic rules (each of which has subparts). Reflecting that numerical disparity, the CJC is in many respects more general than the RPCs.

Despite their variations reflecting the different roles and duties of judges and lawyers, there are several key points where the respective professional rules and related statutory law intersect relatively often. In this column, we'll look at

three: (1) judicial disqualification; (2) *ex parte* contacts; and (3) campaign finance.

Judicial Disqualification

Judges can be disciplined for failing to disqualify themselves under CJC 3.10(A), which generally requires recusal "in any proceeding in which a reasonable person would question the judge's impartiality[.]" In *In re Schenck*, 318 Or 402, 870 P2d 185 (1994), for example, a judge was disciplined under a predecessor to CJC 3.10(A) for failing to disqualify himself in a series of cases following a very public dispute with a local lawyer in a small county in Eastern Oregon.

More commonly, however, lawyers encounter judicial disqualification in its statutory form: ORS 14.210 and ORS 14.250.

The former is "for cause" and in many respects mirrors CJC 3.10(A). It permits the judge both to recuse him or herself *sua sponte* and provides parties with grounds for a motion to disqualify.

The latter is "for prejudice" and is typically used as a procedural mechanism to change the judge assigned to hear a matter. Although ORS 14.250 requires a party or the party's attorney to certify that they believe "that such party or attorney cannot have a fair and impartial trial or hearing before

such judge," the practical bar is very low and these motions are usually granted routinely. In fact, the Oregon Supreme Court in *State v. Pena*, 345 Or 198, 203, 191 P3d 659 (2008), described ORS 14.250 as "an exercise of legislative grace" because "it is not necessary for a party to show that some source of law (such as the state or federal constitution) requires removal of the judge." ORS 14.270 does, however, require that motions under ORS 14.250 "be made at the time of the assignment of the case to a judge for trial or for hearing" and the Supreme Court in *Pena* emphasized the "use it or lose it" character of this remedy.

Ex Parte Contacts

CJC 3.9(A) generally prohibits judges from initiating *ex parte* contacts with parties or their lawyers on the merits. In the *Schenck* case noted earlier, the judge was also disciplined for violating the predecessor of CJC 3.9(A) by initiating a private *ex parte* conversation with the local district attorney about the merits of a pending proceeding. CJC 3.9(B), in turn, requires a judge receiving an unauthorized *ex parte* contact to "promptly notify the parties of the substance of the communication and provide them with a reasonable opportunity to respond."

RPC 3.5(b) mirrors its CJC counterpart by prohibiting lawyers from contacting a judge *ex parte* "on the merits of a cause . . . during the proceeding

unless authorized to do by law or court order[.]" UTCR 5.060 provides a ready example of the "by law or court order" exception by addressing formal *ex parte* proceedings in civil litigation.

Neither CJC 3.9(A) nor RPC 3.5(b) prohibits judges and lawyers from interacting beyond their pending dockets at events ranging from CLE panels to private social events. The key with both is that their interactions cannot involve pending matters that would trigger the respective *ex parte* prohibitions. The ABA in Formal Opinion 462 (2013), which is available on the ABA web site, provides guidance under the *ex parte* rule for judges using electronic social media in particular.

Campaign Finance

CJC 5.1(E) generally prohibits a judge from personally soliciting campaign contributions—while allowing judges to use campaign committees to handle fundraising activities. *In re Gallagher*, 326 Or 267, 951 P2d 705 (1998), illustrates this distinction, with a judge disciplined under CJC 5.1(E)'s predecessor for including a personal note along with a re-election campaign committee flyer for a fundraising golf tournament.

RPC 3.5(a) parallels CJC 5.1(E) by prohibiting a lawyer from "seek[ing] to influence a judge . . . by means prohibited by law." OSB Formal Opinion 2005-38

(2005) emphasizes, however, that lawyers may participate fully in judicial campaign activities. This includes fundraising through the judge's campaign committee as long as the fundraising complies with applicable law.

ABOUT THE AUTHOR

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