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**November 2022 WSBA *Bar News Ethics & the Law* Column**

# What Lawyers Should Know About Judicial Ethics

> **The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.**
> **~*State v. Post*, 118 Wn.2d 596, 618 (1992)**[1]

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When it comes to the law regulating the legal system, most lawyers understandably focus primarily on the Rules of Professional Conduct governing their own duties. Many lawyers are less conversant with the Code of Judicial Conduct governing judges. That may be because most lawyers do not typically confront professional issues that intersect with the CJC. There are two areas, however, where lawyers do occasionally touch on the CJC and related statutory law: *ex parte* communications and judicial disqualification.[2] In this column, we'll look at both. Before we do, two qualifiers are in order.

First, as the title implies, we'll focus on these topics from the lawyers' perspective. It is important to underscore, however, that the CJC is not simply a "judges' version" of the RPC. Our opening quote speaks to the uniquely different role that judges play in our legal system. Lawyers represent private and public clients as advocates. Judges, by contrast, have the difficult job of parsing the respective positions and either deciding issues outright or guiding jurors in that process. Reflecting those different roles, the CJC have a much different "look and feel" than the RPC. They are fewer in number than the RPC and in many

respects more general—reflecting judges' roles as neutrals in an adversary system.[3]

Second, we'll focus on Washington state court judges.[4] Federal district and appellate judges are governed by the Code of Conduct for U.S. Judges. The federal code is generally similar to its ABA Model Code counterpart with some modifications reflecting, for example, the fact that federal judges do not run for office.[5]

***Ex Parte Communications***

The "lawyer" and "judge" versions of the respective rules on *ex parte* communication largely mirror each other[6]:

RPC 3.5(b) provides:

> A lawyer shall not:
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> . . .
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> (b) communicate ex parte with . . . [ a judge] . . . during the proceeding unless authorized to do so by law or court order[.][7]

CJC 2.9(A), in turn, reads, in relevant part:

> A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, before that judge's court[.][8]

Both are intended to assure the fundamental fairness of proceedings by keeping all parties involved in substantive communications about a proceeding.[9] The comments to the analogous section of the Restatement (Third) of the Law Governing Lawyers notes in this regard: "Ex parte communication with a judicial official before whom a matter is pending violates the right of the opposing party to a fair hearing and may constitute a violation of the due process rights of the absent party."[10] CJC 2.9(B) requires a judge receiving an unauthorized *ex parte* communication notify the other parties.[11]

The parallel *ex parte* rules clearly apply to traditional contacts such as in-person encounters or surface mail when those communications involve substantive matters pending before the judge involved. *In re Carmick*, 146 Wn.2d 582, 48 P.3d 311 (2002), for example, involved a lawyer disciplined under RPC 3.5(b) for appearing in court without giving required notice to opposing counsel.[12] *In re McGrath*, 174 Wn.2d 813, 280 P.3d 1091 (2012), and a companion decision involving the same lawyer, 178 Wn.2d 280, 308 P.3d 615 (2013), in turn, involved an initial suspension and later disbarment for, among other things, writing substantive letters to judges *ex parte* in violation of RPC 3.5(b).

The *ex parte* rules apply with equal measure to electronic communications. Like their letter counterparts, emails with a judge copying all counsel are not generally considered "*ex parte*."[13] Similarly, electronic social media contacts between a judge and a lawyer are not generally considered "*ex parte*" if they do not concern substantive matters in a proceeding before the judge.[14] For example, social media contacts between a lawyer and a judge who were law school class mates about an upcoming class reunion would not ordinarily violate either the "lawyer" or the "judge" versions of the *ex parte* rules.[15] By contrast, private electronic contacts between the same two over a pending motion in a case in which the lawyer was appearing before the judge would violate those same rules.[16]

***Judicial Disqualification***

The term "judicial disqualification" is used in two distinct senses in Washington state courts. The first, which is sometimes also referred to as recusal,[17] is based on CJC 2.11 and focuses on situations "in which the judge's impartiality might reasonably be questioned[.]" The second, which was formerly called an "affidavit of prejudice," is a statutory procedure at the trial court level under RCW 4.12.050 that is functionally similar to a peremptory challenge of a juror.

CJC 2.11 includes a non-exclusive list of circumstances when judges should recuse themselves, or, in the alternative, when parties may file motions to disqualify them.[18] For example, CJC 2.11(A)(1) requires recusal when "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of facts that are in dispute in the proceeding."[19] This facet of judicial disqualification is often called "the appearance of fairness doctrine."[20] As the name implies, actual prejudice is not the standard.[21] Rather, the test is an objective one framed around the idea that to preserve public confidence in the judicial process a judge should be recused if there is a reasonable basis to question the judge's impartiality.[22] While theoretically broad, the standard does not ordinarily include *de minimus* economic ties or remote former employment.[23] A party generally waives disqualification if, having learned of the potential grounds, the party choses not to promptly pursue disqualification.[24]

RCW 4.12.050, although titled "disqualification," is, as noted earlier, closer conceptually to a peremptory strike of a potential juror.[25] The statute allows a party to remove an assigned judge simply by filing a "notice of disqualification" as long as the judge has not yet made a discretionary ruling in the case.[26] The Supreme Court has emphasized that this is a right granted by statute[27] and that neither actual prejudice nor substantiation of any prejudice is required.[28] The

broad sweep of the right, however, is tempered by the requirement that it be exercised before the judge involved has made a discretionary ruling (subject to a handful of exceptions in RCW 4.12.050(2) such as permitting an agreed continuance). A party may only exercise this right once in a case under RCW 4.12.050(1)(d).[29]

***Summing Up***

Although most lawyers do not interact with the CJC often, the judicial rule on *ex parte* communications parallels lawyers' corresponding duties under the RPC. Similarly, while judicial disqualification is the exception rather than the norm, the distinct time limitation under RCW 4.12.050 makes it imperative that litigators know how this statutory right works.

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[1] The full citation to our opening quote is *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172, *amended*, 837 P.2d 599 (1992) (citation omitted).

[2] This is not intended to be an exclusive list. RPC 1.12, for example, addresses conflict issues when a judge leaves the bench and joins a law firm.

[3] The Washington CJC were last updated comprehensively in 2011. *See generally Matter of Kennan*, 199 Wn.2d 87, 93, 502 P.2d 1271 (2022) (summarizing the history of the Washington CJC). They are patterned generally on their ABA Model Code counterparts and are enforced through the Commission on Judicial Conduct—with the Supreme Court as their final arbiter. *Id*. The CJC, together with many other resources appliable to the judiciary, are available on the Commission's web site at www.cjc.state.wa.us. The ABA Model Code of Judicial Conduct, in turn, is available on the ABA's web site at www.americanbar.org. Washington RPC 8.5(c) addresses the interplay between the RPC and the CJC and generally defers to the latter.

[4] The Washington CJC includes an "application" preface discussing when and to what extent it applies to part-time and *pro tem* judges. The Washington CJC does not apply to either state administrative law judges or tribal court judges.

[5] The federal code is available on the U.S. Courts' web site at www.uscourts.gov.

[6] *See In re Marriage of Clark*, 2021 WL 3929316 at *6 (Wn. App. Sept. 2, 2021) (unpublished) (noting parallel nature of the two rules); *see also* RPC 3.5, cmt. 1 (cross-referencing the CJC).

[7] Communicating with a judge's administrative staff is not ordinarily considered an *ex parte* communication with the judge unless the communication with the judge's staff is intended to "convey substantive information to the judge from counsel and notice is not given to all parties." *In re Marriage of Clark*, *supra*, 2021 WL 3929316 at *7. By contrast, communicating *ex parte* with a judge's law clerk on the substantive aspects of a pending proceeding is likely to be considered an *ex parte* communication with the judge. *See* Restatement (Third) of the Law Governing Lawyers (2000) (Restatement), § 113, cmt. d.

[8] CJC 2.9 includes a number of exceptions, including communications for administrative purposes that do not address the substantive aspects of a proceeding. *See generally State v. Contreras-Rebollar*, 4 Wn. App.2d 222, 421 P.3d 509 (2018) (surveying the "administrative exception"). Similarly, submission of working copies of materials filed or otherwise in the record is not generally considered an *ex parte* communication. *See In re Turner*, 2018 WL 1920072 at *6 (Wn. App. Apr. 24, 2018) (unpublished).

[9] RPC 3.5 is titled: "Impartiality and Decorum of the Tribunal." Canon 2, which provides overarching guidance for the rules in that section of the CJC, is also framed in terms of "impartiality."

[10] Restatement, *supra*, § 113, cmt. b.

[11] This column focuses on *ex parte* communications. Judges, however, are also generally precluded from conducting independent factual investigation by CJC 2.9(C). *See generally* ABA Formal Op. 478 (2017) (discussing constraints on judges doing independent factual research on the Internet). Similarly, trial judges are generally prohibited by Comment 5 to CJC 2.9 from informally consulting with appellate judges in the same jurisdiction about cases before them. *See generally State v. Jenks*, 12 Wn. App.2d 588, 459 P.3d 389 (2020) (discussing this point in the unpublished portion of the decision).

[12] Depending on the circumstances, statutes and court rules may also require notice to opposing parties of court proceedings and the failure to follow such statutes and court rules may violate RPC 3.4(c), which prohibits "knowingly disobey[ing] an obligation under the rules of a tribunal[.]" See *In re Ferguson*, 170 Wn.2d 916, 932-36, 246 P.3d 1236 (2011) (discussing the relationship between RPCs 3.4(c) and 3.5(b)).

[13] *See generally In re Marriage of Clark*, *supra*, 2021 WL 3929316 at *7 (surveying this point).

[14] *See generally* ABA Formal Op. 462 (2013) (discussing judges' use of electronic social media).

[15] *Id*. at 1 ("All of a judge's social media contacts, however made and in whatever context, . . . are governed by the requirement that judges must at all times act in a manner 'that promotes public confidence in the independence, integrity, and impartiality of the judiciary[.]'").

[16] *Id*. at 2 ("A judge must also take care to avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending or impending matters in violation of Rule 2.9(A)[.]").

[17] *See, e.g., Skagit County v. Waldal*, 163 Wn. App. 284, 287, 261 P.3d 164 (2011) (noting that "recusal" and "disqualification" are used interchangeably in Washington practice). If a judge's failure to recuse results in an impartial tribunal, constitutional due process considerations may also arise. *See generally Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S. Ct. 2252, 173 L.Ed.2d 1208 (2009) (summarizing principle); *Tatham v. Rogers*, 170 Wn. App. 76, 90-92, 283 P.3d 583 (2012) (same, citing *Caperton*).

[18] *See also* CJC Canon 3 (addressing conflicts between a judge's personal interests and judicial duties); ABA Formal Op. 488 (2019) (discussing judges' personal relationships as basis for disclosure or disqualification).

[19] *See, e.g., Sherman v. State*, 128 Wn.2d 164, 203-06, 905 P.2d 355 (1995), *amended*, 1996 WL 137107 (Jan. 31, 1996) (remanding to another judge after the judge involved had conducted his own investigation of some facts potentially relevant to the case on remand).

[20] *See generally State v. Gentry*, 183 Wn.2d 749, 761-62, 356 P.3d 714 (2015) (surveying doctrine).

[21] *Id*.

[22] *Id*. In instances not involving actual bias under CJC 2.11(A)(1), a judge may disclose the circumstances that might otherwise give rise to disqualification—such as the judge's spouse

is an officer of a corporate party—and the parties may waive the perceived conflict under CJC 2.11(C).

[23] *See, e.g., Kok v. Tacoma School Dist. No. 10*, 179 Wn. App. 10, 25, 317 P.3d 481 (2013) (*de minimus* economic connection); *Buechler v. Wenatchee Valley College*, 174 Wn. App. 141, 161, 298 P.3d 110 (2013) (remote employment).

[24] *See generally In re Jones*, 182 Wn.2d 17, 42-43, 338 P.3d 842 (2014) (discussing waiver of judicial disqualification in the sense of estoppel); *Tatham v. Rogers*, *supra*, 170 Wn. App. at 96 ("'[A litigant who proceeds to trial knowing of potential bias by the trial court waives his objection and cannot challenge the court's qualifications on appeal.'") (citation omitted).

[25] *See State v. Spokane County District Court*, 198 Wn.2d 1, 11, 491 P.3d 119 (2021) (describing the statutory process as a "right to peremptory removal of a judge"). *See also* RCW 4.12.040 (outlining associated internal procedures at the courts involved).

[26] This process was formerly known as an "affidavit of prejudice." RCW 4.12.050 was amended in 2017 and the amendments eliminated that nomenclature. *See generally Godfrey v. Ste. Michelle Wine Estates Ltd.*, 194 Wn.2d 957, 959, 453 P.3d 992 (2019) (discussing both the amendments and the former terminology).

[27] State and local court rules also regulate implementation of the statute. *See, e.g.,* CR 40(f); Pierce County Superior Court LR 40(f).

[28] *State v. Spokane County District Court*, *supra*, 198 Wn.2d at 11.

[29] *See* Douglas J. Ende, 14 Wash. Prac., Civil Procedure § 10.9 (rev. 3d ed. 2021) (discussing ambiguity in decisional law over application when there is more than one party on a side).