

WAIT, WAIT, DON'T TELL ME

Judicial Conduct Edition

Live from the Gus J. Solomon Inn Meeting at the Sentinel Hotel

April 16, 2024

BLUFF THE LISTENER

With your host, John Devlin.

Bluff the Listener (Host: John Devlin)

JUDICIAL MISCONDUCT EXAMPLES: State Court

A judge said to a public defender: “You know, if I had a rock, I would throw it at you right now. Stop pissing me off. Just sit down.” He then said: “If you want to fight, let’s go out back and I’ll just beat your ass.” The lawyer and judge left the courtroom. See <https://www.youtube.com/watch?v=jAv1QUkHFSY> The lawyer and judge got into a physical altercation. The judge was removed from the bench. See <https://www.floridabar.org/the-florida-bar-news/court-removes-brevard-county-judge-murphy/> (NB: If we have the technological capability, we could show the video.)

A judge routinely emailed with her staff in a mocking and ridiculing way about parties, jurors, attorneys, and court employees. Some of the emails were printed, laminated, and hung on the wall. The judge resigned after someone made a complaint. See <https://www.abc15.com/news/local-news/investigations/abc15-exposes-horrific-conduct-by-judge-staff-in-major-cases>

A judge used nicknames for various attorneys and interns who appeared before him. Those nicknames included “Bun Head,” “Ms. Dimples,” and “Shorty.” He also repeatedly commented on the physical appearance of female attorneys appearing before him. The judge was given a “severe public censure.” See https://cjp.ca.gov/wp-content/uploads/sites/40/2020/03/Kreep_3_Cal.5th_CJP_Supp._1.pdf

A town justice kept a gun underneath the bench while court was in session. He brandished the gun at a litigant, then bragged about the incident to various people, including other judges and a cousin who was a journalism student. The justice stipulated that he was not justified in brandishing the gun at the litigant. The justice was removed from the bench. See <https://cjc.ny.gov/Determinations/P/Putorti.COA.Decision.2023-10-19.pdf>.

JUDGE, THAT WAS NOT OKAY.

Now what?

with guests: Michael Turner & Gabriel Watson

Filing a Complaint against a Judge in Oregon (Michael Turner / Gabriel Watson)

Go to Commission on Judicial Fitness & Disability Website:

<https://www.courts.oregon.gov/programs/cjfd/pages/default.aspx>

The Rules & Laws Applicable to the CJFD are here:

<https://www.courts.oregon.gov/programs/cjfd/rules/Pages/default.aspx>

Review the OREGON CODE OF JUDICIAL CONDUCT RULES BEFORE FILING:

<https://www.courts.oregon.gov/rules/Other%20Rules/CodeJudicialConduct.pdf>

There is an online form for filing a complaint (see next slides); it is available here:

<https://www.courts.oregon.gov/programs/cjfd/complaint/Pages/form.aspx>

(Practically, you can also submit a letter that conveys all of the same information.)

Most of the process for the complaint after you file it is confidential. A summary of the process is on the website (see next slides); it is available here:

<https://www.courts.oregon.gov/programs/cjfd/complaint/Pages/process.aspx>

COMM. ON JUDICIAL FITNESS PROCESS

The screenshot shows a Google search page for the query "judicial misconduct oregon". The search results are as follows:

- Search Results:** About 765,000 results (0.34 seconds).
- Result 1:**
 - Source: Oregon Judicial Department (.gov), <https://www.courts.oregon.gov/programs/cjfd/pages>
 - Title: **Commission on Judicial Fitness and Disability : State of Oregon**
 - Snippet: **The Commission on Judicial Fitness and Disability reviews complaints** about Oregon state judges and justices of the peace and investigates when the alleged ...
- People also ask :**
 - What are four types of judicial misconduct?
 - What would be an example of misconduct in the judicial system?
 - What are two ways that judges are held accountable to citizens?
 - Can you sue a judge for violating my constitutional rights?
- Result 2:**
 - Source: Oregon Judicial Department (.gov), <https://www.courts.oregon.gov/cjfd/complaint/pages>
 - Title: **Oregon Judicial Department : Complaint Form**
 - Snippet: Instructions. These instructions explain how to file a complaint with the Commission on Judicial Fitness and Disability using the **online complaint form**. ... To ...
- Knowledge Panel (Right Side):**
 - Definition:** What constitutes judicial misconduct
 - Proof:** How to prove judicial misconduct?
 - What to do:** What to do about judicial misconduct
 - Handling:** How is judicial misconduct handled
 - 4 more
 - Feedback

COMM. ON JUDICIAL FITNESS PROCESS

Oregon Judicial Department : C... X +

courts.oregon.gov/programs/cjfd/complaint/Pages/complaintform.aspx

How Do I? Online Services Forms/Rules/Fees Self-Help Opinions & Law Library Programs & Committees

Complaint Information
Commission on Judicial Fitness and Disability

Home > Programs > Programs and Committees > Commission on Judicial Fitness and Disability > Complaint Information > Complaint Form

Complaint Form

- CJFD HOME
- MEETING INFORMATION
- COMPLAINT INFORMATION
 - Complaint Process
 - Complaint Form
 - Customer Service Feedback Form
- MEMBERS
- RULES & LAWS

Note: If you have technical difficulties with the submission of this form, please include all the information in the form in an email and send it to judicial.fitness@oregon.gov.

File a Complaint

Fields with an asterisk are required fields.

Contact Information

Name (required)*

Telephone (required)*

Email Address (required)*

Address

Address

City

State

Convert Video Files... BOPNationalProgra... District of Oregon C... LII 38 CFR Part 74 - VE... Vets First Verificatio... SlimLine Series Gas... How to get a list of...

Self-Help Opinions & Law Library Programs & Committees

General Allegations

Type of allegation(s). Check all below that apply.

- The judge's plea of guilty or no contest or a finding of guilty to a crime punishable as a felony under Oregon or federal law or of any other crime that involves moral turpitude under such law.
- A disability that seriously interferes with the performance of judicial duties that is, or is likely to become, permanent.
- Willful misconduct in office or persistent failure to perform judicial duties.
- Habitual intemperance (addiction to alcohol or drugs).
- Conduct prejudicial to the administration of justice that brings the judicial office into disrepute.
- A violation of the Oregon Code of Judicial Conduct (see attached code).
- Other.

Statement of Facts

Date and Time of Allegation

Name of Judge (required)*

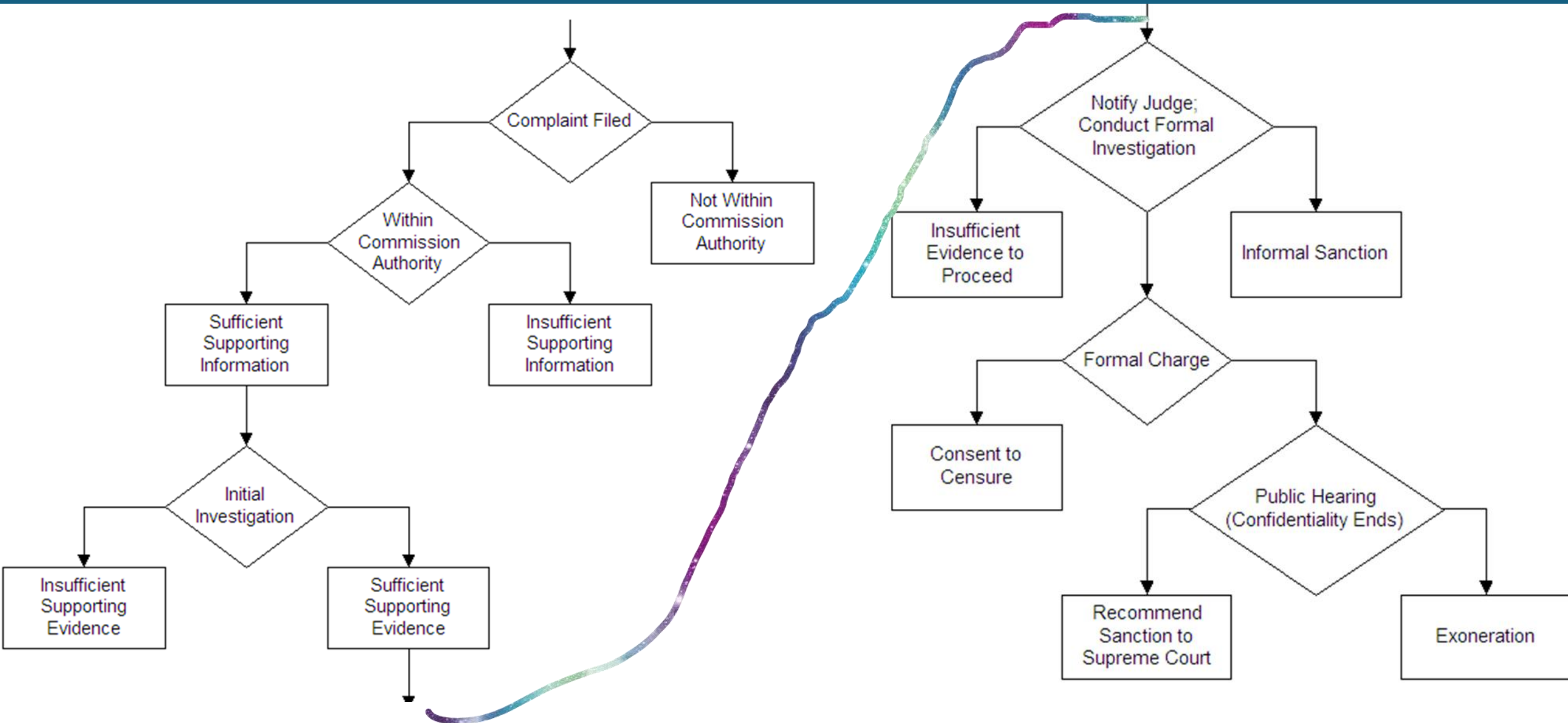
Type of Court

City of Judge

County of Judge

Case Name

COMM. ON JUDICIAL FITNESS PROCESS




I SWEAR: THAT JUDGE CAN'T BE FAIR.

WHAT DOES IT MEAN TO "AFFIDAVIT" A JUDGE?

Hand delivered to you by:

Kendall Gourley-Paterson, Chris Heywood & Elli Tillotson

IS "AFFIDAVITING" A
JUDGE THE SAME OR
DIFFERENT THAN
IDENTIFYING
INFORMATION THAT
WOULD DISQUALIFY A
JUDGE?



Information that may disqualify a judge could be one of your considerations when deciding whether to file a motion for a new judge, but the approach you may want to take is slightly different.

HYPOTHETICALS

A.

Dog Walking Buddies.

I know my client and Judge Washburne walk their dogs together every Saturday. Judge Washburne is on the misdemeanor trial rotation this month and my case is on call on the misdemeanor docket. Should I affidavit Judge Washburne?

B.

Former Clerk

I know that the associate working with opposing counsel used to clerk for Judge Tam. I think Judge Tam will try to be neutral, but I think opposing counsel may have an advantage knowing the Judge's quirks. If Judge Tam is appointed to my case, should I affidavit her?

C.

Ill Prepared Presentation

I just found out that Judge Reynolds was appointed the motions judge in my case. Last time I appeared in front of Judge Reynolds I was unprepared, and I think he will not take anything I say seriously. Should I affidavit him?



KNOW YOUR RULES

ORS 14.250

Standard for Affidavit of a Judge.

Any party or attorney believes that they cannot have a fair and impartial trial or hearing before that judge.

ORS 14.260

Process for Affidavit of a Judge

File a Motion and Affidavit supporting your belief that your client cannot have a fair and impartial trial/hearing
Cannot affidavit a judge who has already made a ruling on any motion or demurr.

An attorney can only motion for a new judge twice in the same case.

Must file within the timeframes described in the rule.

ORS 14.270

Time to Make the Motion

If a judge is appointed in a live judicial proceeding, you must make an oral motion at the time of assignment, and file your written motion and affidavit within one judicial day.



AFFIDAVIT REQUIREMENTS

The affidavit of party/attorney must contain the following:

1. Belief that party/attorney cannot receive a fair or unbiased hearing or trial before the judge.
2. The motion is made in good faith.
3. The motion is not made for purposes of delay.



CHALLENGING AN AFFIDAVIT

(CASE BY CASE-ORS 14.260(1))

- The judge affidavited or the presiding judge, may challenge an affidavit of a judge for a particular case.
- A hearing on the issue will be heard in front of a disinterested judge.
- The burden is on the challenging judge to prove that the affidavit was not filed in good faith or was for purposes of delay.



CHALLENGING AN AFFIDAVIT

(BLANKET AFFIDAVITS-ORS 14.260 (7))

- A new rule that applies to "blanket affidavits" by attorneys or law firms.
- Only applies to criminal or juvenile delinquency dockets.
- The blanket affidavit(s) must effectively deny the elected judge assignment to criminal or delinquency dockets.
- The judge themselves must request a hearing and the hearing will be heard in front of a disinterested judge from another judicial district.
- The disinterested judge shall make an objective inquiry:
 - Whether the motion(s) effectively deny the judge assignment to the criminal or juvenile delinquency docket(s).
 - Whether there is a reasonable good faith belief that the judge lacks fairness or impartiality. The burden of proof is on the attorney or law firm that filed the motion(s) for a new judge.

MULTNOMAH COUNTY ~ SLR 7.045

- Deadline to NOTIFY & FILE A MOTION FOR A NEW JUDGE :
 - For all matters assigned at Call, Case Assignment, or Scheduling Conferences with the presiding judge, as well as attorneys present at *ex parte*, when a judge is assigned, you MUST immediately announce your intent to file a motion for a new judge. You then have one judicial day to present the motion, affidavit, and proposed order at *ex parte*.
 - For all matters assigned to a judge in any other manner, a party has one judicial day from ACTUAL NOTICE of the judge assigned to appear at to present the motion, affidavit, and proposed order at *ex parte*.
- Must serve copies of the (1) Motion (2) Affidavit (3) Proposed Order on all parties not in default and on the judge being disqualified BEFORE appearing at *ex parte*.
- Must present originals and one copy each of (1) Motion (2) Affidavit (3) Proposed Order at the 1:30 *ex parte* docket. Criminal and Civil cases will present at the presiding *ex parte* docket. Family Law cases will be presented at the family law *ex parte* docket.

CLACKAMAS COUNTY

- Clackamas SLR's are silent as to specific procedure for disqualifying a judge.
- Local practitioners indicate that e-filing the affidavit, motion, and order is sufficient to disqualify the judge in question.
- For criminal practitioners, Clackamas Presiding has circulated a form that can be filled out and filed into the case, which can be used as an alternative/substitute to filing an affidavit, motion, and order.

WASHINGTON COUNTY

- Motions to Disqualify Judge pursuant to ORS 14.250–270 shall be filed in the calendaring department, located in room 100j of the Justice Services Building.
- A motion for change of judge shall be served on all opposing parties and the affected judge.
- As soon as the case is assigned to a particular judge at case assignment, parties shall orally advise the case assignment judge of the intent to file any affidavit of prejudice. After making the oral advisement, party must file their written motion, affidavit, and order filed in the calendaring office by close of business on the next judicial day following case assignment.
- A bench copy of the motion, affidavit, and order shall be delivered to the chambers of the challenged judge or, if not practicable, to the calendaring office simultaneous to filing the originals.
- Affidavits outside of this window will be denied as untimely.

BLUFF THE LISTENER

With your host, Varro Clarke

Produced by Simon Whang

BLUFF THE LISTENER – FEDERAL JUDGE EDITION

Varro Clarke and Simon Whang

- New statement on US Supreme Court ethics: [Code-of-Conduct-for-Justices_November_13_2023.pdf \(supremecourt.gov\)](#)
- Federal court ethics: [Ethics Policies | United States Courts \(uscourts.gov\)](#)

Today's topic: Too Close, Too Old, Too Tough

If a lawyer is sleeping with the judge on a case, an opposing party would want to know. That's the position opposing litigants are taking on cases that involve Jackson Walker, the largest law firm in Texas. Lawyer Elizabeth Freeman wasn't just a bankruptcy partner at the firm, she was also a partner to **U.S. bankruptcy Judge David Jones**. That is, if you consider being involved in a years-long relationship and sharing a house together a partnership. And, if we're keeping score, she is also his former law clerk. While Ms. Freeman never personally appeared in court before her boyfriend, the Jackson Walker firm appeared in at least 26 cases before Judge Jones. Judge Jones awarded the firm \$13 million in fees. The U.S. Trustee, and lawsuits by opposing parties, seek the return of those fees, alleging conflicts of interest, ethical lapses by failing to disclose the relationship, etc. Judge Jones defended his conduct by saying he and Freeman are not married, and therefore he had no monetary interest in Jackson Walker cases. Judge Jones avoided a prolonged ethics investigation and sanctions by the Fifth Circuit when in the eleventh chapter, er, hour, he resigned from the bench. He claims immunity from the civil lawsuits. Should he lose, he can always file for bankruptcy.

<https://news.bloomberglaw.com/bankruptcy-law/kirkland-jackson-walker-named-in-bankruptcy-judge-ethics-suit>

<https://www.reuters.com/legal/litigation/law-firm-was-urged-disclose-partners-romance-with-texas-judge-us-trustee-says-2024-03-01/>

In the DC Court of Appeals decision handing down a one year judicial suspension, the language does not bury **Judge Pauline Newman**, but praises her. She is “a friend” “highly valued and respected” “the most beloved colleague” and “a heroine” with an “exemplary and storied career” spanning nearly 4 decades. Judge Newman was one of the first judges appointed to the DC Federal Circuit, which hears patent and trademark issues. At 96 years old, she is the oldest active federal judge, a position with a lifetime appointment and no retirement age. The decision notes that Judge Newman appears no longer capable of performing the duties of her judicial office, and may be experiencing significant mental problems leading to reduced productivity and concerning behavior. One staffer described her as “ranting, rambling, and paranoid” which could describe a number of judges and is not itself cause for removal. While a forensic psychiatrist and a neurologist both found Judge Newman mentally fit, the judicial committee sought more rigorous examination by their own experts, which she declined. It's difficult to fire a federal judge. Judge Newman's colleagues cannot remove her from office, permanently suspend her, or even force her to submit to examination. Hence her suspension is for one year, non-renewable. And she hasn't been suspended for her inability to perform her job. Her “crime?” Failure to cooperate with the

investigation. Judge Newman's position? "I am not physically disabled; I am not mentally disabled. I may talk too much, but that's always been true."

<https://www.washingtonpost.com/dc-md-va/2023/09/20/newman-suspended-federal-judge-retirement/>

U.S. District Judge Mark Pittman has been sanctioned by Fifth Circuit Court of Appeals for being overzealous in...sanctioning lawyers. Mark Pittman presides in the Northern District of, you guessed it, Texas. This marks Mark Pittman's third strike by the Fifth Circuit. In Pittman's first brush with his Fifth Circuit Overlords, a plaintiff failed to retain local counsel in a case and the judge *sua sponte* dismissed the lawsuit. The Fifth Circuit called that "demonstrably unwarranted." His second go around involved a personal injury lawsuit against Spirit Airlines where the plaintiff failed to timely file a certificate of interested persons. The Fifth Circuit found Judge Pittman's dismissal of *that* case "overkill" and an abuse of discretion. This third strike involved decided less stakes. Judge Pittman ordered both lawyers on a sexual harassment lawsuit to file affidavits certifying that they completed reading lawyer conduct rules. The lawyers read the rules, but instead of submitting notarized affidavits—given harsh winter conditions that made it difficult to seek notaries—they filed unsworn declarations. Bad move. Judge Pittman fined each lawyer \$250, and chastised "lazy lawyers in glass towers" for not following his order. The Fifth Circuit found that Judge Pittman's sanction was not only an abuse of discretion, but also unwarranted since federal law allows lawyers to file either an affidavit or a declaration. No word yet on whether Judge Pittman will appeal or otherwise seek against the Fifth Circuit sanctions for sanctioning him for sanctioning lawyers.

<https://www.law.com/nationallawjournal/2023/11/07/5th-circuit-calls-out-judges-sanction-against-lawyer-as-abuse-of-discretion-again/>

"WELL, RECUSE ME."

A discussion led by the wild & crazy:

Hon. Cheryl Albrecht

RECUSAL AS A CONSTITUTIONAL RIGHT

- *Marshall v. Jerrico, Inc.*, 446 US 238 (1980): The due process clause entitles an impartial and disinterested tribunal in both criminal and civil cases.
- *Winthrow v. Larkin*, 421 US 35, 47 (1975): To make out a claim for unconstitutional bias, the plaintiff must "overcome a presumption of honesty and integrity" on the part of decisionmakers.

WHEN IS RECUSAL REQUIRED?

Oregon Code of Judicial Conduct 3.10

- (A) A judge shall disqualify himself or herself in any proceeding in which a reasonable person would question the judge's impartiality, including but not limited to the following circumstances:

ORS 14.210

- (1) A judge shall not act as such in a court of which the judge is a member in any of the following circumstances:

RULE 3.10

(1) The 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.

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has an interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

RULE 3.10

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person has an economic interest in the subject matter in controversy or is a party to the proceeding.

(4) The judge, while a judge or judicial candidate, has made a statement, other than in a court proceeding, judicial decision, or opinion, that commits or reasonably appears to commit the judge to reach a particular result or rule in a particular way in the proceeding

ORS 14.210 - SPECIFIC GROUNDS

ORS 14.210 does not have the same "catchall" as Rule 3.10. Limited to:

- (a) If judge is a party to or directly interested in an action;
- (c) If the judge is related to any party, or to the attorney for any party, or to the partner or office associate of any such attorney, by consanguinity or affinity within the third degree;
- (d) If the judge has been attorney in the action, suit or proceeding for any party.
- (e) If the judge on appeal presided over the case being reviewed.

OBJECTIVE STANDARD = "APPEARANCE OF IMPROPRIETY"

Caperton v. A.T. Massey Coal Co., 556 US 868, 885 (2009): The objective standards of the due process clause do not require proof of actual bias. The issue is whether the judge's interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

PROCESS FOR RAISING RECUSAL

- *State v. Ovalle*, 325 Or App 538 (2023): A party's due process right to trial before an impartial judge may be secured and enforced through recusal, removal, or disqualification, any of which may be prompted administratively, by a party's motion, or by the court's own motion.

DISQUALIFICATION VS. PREJUDICE

- *State v. Ovalle*, 325 Or App at 546: When parties assert actual bias or prejudice, they need to make factual allegations that support a finding of such bias or prejudice, as distinct from the “conclusory statements” that are allowed under ORS 14.250. (Citing *State v. Langley*, 363 Or 482 (2018))
- When an actual conflict arises under ORS 14.210 or is otherwise alleged in factual terms of constitutional magnitude, that conflict can be readily examined as a matter of fact under the evidence code, because it is specific and concrete and, thus, susceptible to objective measurement. In such instances, it does not matter when the conflict arose, only that a conflict exists and must be evaluated on the merits question of whether recusal or disqualification is required. *Ovalle* at 546.

SUA SPONTE RECUSALS IRL

- Prior representation of a co-defendant in a memorable case.
- Judge participated in a settlement conference or hearing in which judge heard confidential information about case.
- Judge's spouse is associate with an attorney's firm.
- Litigant was in a treatment court before the judge.
- An attorney who is a good friend.
- An attorney who recently worked as the judge's clerk.

SUCCESSFUL REQUESTS FOR RECUSAL IRL

- When judge made statement in a hearing that jurors might view evidence a certain way as a basis for supporting his decision, and was quoted in the newspaper as making a finding.
- A judge who made his displeasure about an attorney's scheduling practices known on the record.
- A judge's former dissolution lawyer who made the request for the judge to be recused.
- A litigant who requested the judge recuse herself when he falsely stated he was having a sexual relationship with the judge's daughter who worked at the courthouse.

AS A MATTER OF FACT AND LAW

- *State v. Espinal*, 315 Or App 264, 265–266 (2021): Reasonable person would not question impartiality when a judge has no present memory of past events. (Judge was reminded after a bench trial verdict in a murder case that she'd represented the victim six years prior in a DUI case.)
- *State v. Langley*, 363 Or 482, 502 (2018): Judge who was former Oregon DOJ attorney not required to recuse herself in a capital resentencing there was no showing the judge had any prior knowledge about the facts and had not worked with State attorneys in any division or unit at DOJ.
- *Matter of J.E.D.V.*, 326 Or App 149, 159–160 (2023): Recusal at party's request was not required when an ex parte contact did not consist of information relevant to a matter of law or fact before the judge.

IT ALL DEPENDS

Best for judge to disclose and address on the record one way or the other. Recusal will likely depend on type of hearing.

- Social media friends.
- Inn of Court Pupilage Group.
- Former client where judge remembers a little bit from 20 years ago.
- Case was open in a firm when the judge worked there as an attorney.
- Litigant says they filed a judicial fitness complaint and it is clearly specious.

YES, I CAN DECIDE MY OWN SALARY

- Moro v. State, 354 Or 657 (2014)

Rule of necessity allowed Oregon Supreme Court to decide issues regarding PERS. There were no pro tem judges available who were not also covered by PERS.