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## Chapter 8

# **Judicial Ethics: How to Make a Record with a Hard Charging Judge and What You Need to Know About the Commission on Judicial Fitness and Disability**

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**Judicial Ethics :**  
***How to Make a Record with a  
Hard Charging Judge and  
What You Need to Know About  
the Commission on Judicial  
Fitness and Disability***

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BY: AMANDA ALVAREZ THIBEAULT  
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# How to Make a Record with a Hard Charging Judge

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HOW WE WISH JUDGES RESPONDED WHEN  
MAKING A RECORD ON AN ISSUE THEY DON'T  
AGREE WITH

<https://www.youtube.com/watch?v=1jQP0Y2T2OQ>

(start clip at 2:01—and watch the Judge)

WHAT IT'S ACTUALLY LIKE

<https://www.youtube.com/watch?v=jsJu4-McmF0>

(start clip at 58 seconds, end at 1:34)

# What are the rules?

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- What rules govern us, the lawyers?
  - [Oregon Rules of Professional Conduct](#)
  - Specifically: Rules 1.1 (Duty of Competence), Rule 3.1 (Meritorious Claims and Contentions) and 3.5 (Impartiality and Decorum of the Tribunal )
- Rule Text
  - Rule 1.1--A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
  - Rule 3.1-In representing a client or the lawyer's own interests, a lawyer shall not knowingly bring or defend a proceeding, assert a position therein, delay a trial or take other action on behalf of a client, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law, except that a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration may, nevertheless so defend the proceeding as to require that every element of the case be established.
  - Rule 3.5(d)-A lawyer shall not....engage in conduct intended to disrupt a tribunal

# WHAT DOES IT ALL MEAN?

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Taken together, the rules mean:

Even when a judge is shutting you down, Rule 1.1 requires that you competently represent client, and that means preserving issues and making a record even if you're going to get yelled at.

You **SHOULD NOT** be making a record of claims that are not meritorious or are otherwise indefensible under 3.1 (**But remember the Ryan Scott Rule**) and you can't intentionally act out just to disrupt the situation under 3.5.

# Preserving issues for appeal in front of a hard charging judge—the do's and don'ts

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## DO'S

- Scream internally
- Call Laura Graser, afterwards, if there may be a mandamus issue. She has a contract with OPDS and can assist on appointed cases with Mandamus issues. Hi Laura!
- Remember that trying to preserve the issue is what matters: *State v. Barajas*, 247 Or. App 247 (2011) (and no, that citation is not a typo ☺ )

## DO NOT'S

- Scream externally
- Get yourself held in contempt because the judge isn't letting you preserve an issue (see *Barajas*), unless, you know, you really want to go for it
- More on contempt in a moment...

Some notes  
about *Barajas*,  
247 Or. App.  
247 (2011)

Facts: Bench trial. When it came time for the defense attorney to do closing, the court summarily announced that it was going to “waive closing argument” and starting making findings. Defense tried to object and was cut off.

Issue: Did defendant properly preserve the issue of wanting to put on her closing even though she really didn’t get to say anything about it?

Ruling: Yes. Even though the defendant did not expressly tell the trial court that she wished to present a closing argument and had a right to do so. Still preserved because it was the court who simultaneously created the issue and then also denied an opportunity for objection.

PUT DIFFERENTLY: WHERE THE TRIAL COURT JUDGE SHUTS YOU DOWN WHEN YOU’RE TRYING TO PRESERVE AN ISSUE, YOU’LL PROBABLY BE FINE

But read *Barajas*. It talks a lot about the relaxed preservation standard in circumstances like this and is good to have handy.



# Some notes about Summary Contempt

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If you're worried about a judge holding you in contempt, consult:

ORS 33.096—Summary Imposition of Sanction

Summary contempt is only appropriate where “a person commits contempt of court in the immediate view and presence of the court.” Further, the sanction may be imposed **for the purpose of preserving order in the court or protecting the authority and dignity of the court**”

If you would like to know more about an example of what ISN'T summary contempt....feel free to talk to Dean Smith about his experience with the issue in Washington County (Hi Dean!)

So, you think  
you got a  
fitness  
complaint...

Who you  
gonna call?

Hint: Not  
Ghostbusters

### 📍 Contact & Location Information



👤 **Executive Director**  
Susan Isaacs

☎ **Telephone**  
[503.626.6776](tel:503.626.6776)

📠 **Fax**  
503.626.6787

@ **Email**  
[judicial.fitness@oregon.gov](mailto:judicial.fitness@oregon.gov)

✉ **Mailing Address**  
Commission on Judicial Fitness and  
Disability  
PO Box 1130  
Beaverton, OR 97075

# Resources

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GO TO THEIR WEBSITE:

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

- Every relevant rule is there
  - Commission Rules
  - Oregon Code of Judicial Conduct
  - Relevant ORS already pulled for you!

# The Basics—Commission on Judicial Fitness and Disability

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## Who?

- Three public members, appointed by the Governor and confirmed by the Senate
- Three lawyers, appointed by the Oregon State Bar Board of Governors
- Three judges, appointed by the Supreme Court.
- Executive Director: Susan Isaacs

## How to get in touch?

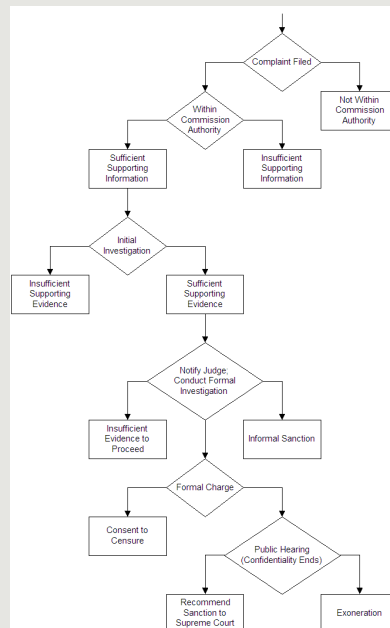
- Literally however you want, so sayeth Susan Isaacs
  - Phone
  - Email
  - Online complaint form
  - Fax
  - Letter
  - Smoke Signal
  - MySpace message

# Does the commission have jurisdiction?

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- Commission does **NOT** have jurisdiction over the following:
  - Municipal Court Judges
  - Administrative Judges
- Important point:
  - Commission is **never** going to advocate for more jurisdiction. If it bothers you that the commission does not have jurisdiction...we'll talk more about that at the end

# How does the complaint process work?



## **Step 1: FILE A COMPLAINT**

Contact the commission through your preferred method, they will send you a complaint packet

**For any in custody clients:** Can send a letter directly to the commission and they will send a packet.

**Commission wants this process to be accessible to everyone**

# What happens next?

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## Preliminary Investigation

### **Commission has no discretion**

- They examine **every single complaint**
- **Really think about this**
  - Susan Isaacs is 1 half-time employee and the commission examines every single complaint
  - Every single complaint is handled seriously

## **Process takes some time**

- Commission meets 6 times a year
- When they meet, go through every single complaint
- Susan will have prepared a summary about the complaint, the issues, etc. but commission still reviews everything.

# What happens with most complaints?

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By and large most complaints get dismissed

- Complaints like:

- “Judge wouldn’t let me call a witness to the stand.”

- When investigated....turns out judge just sustained a single hearsay exception

- “Judge made the wrong legal ruling.”

- **NOT REALLY GROUNDS FOR A JUDICIAL FITNESS COMPLAINT**

- But what about when a judge refuses to sentence someone after a Supreme Court opinion tells them the sentence should be x and then they on the record say they refuse to follow that opinion? Something tells me we’ll probably find out in the future...



# If a judge found in violation?

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## Informal Disposition Letter

- Letter gets sent to a judge providing their position
- **Those letters stay confidential, secret, and do not ever get revealed**

## Prosecution

- **Happen rarely**
- For a detailed look at how a prosecution goes, including jurisdiction issues etc.:
- *Inq. Concerning a Judge Day*, 362 Or. 547 (2018)
- Supreme Court Opinion regarding the commission's prosecution of Judge Day resulting in prosecution

## A note about privacy and ORS 1.440

### Why is everything so confidential?

- Because the statute makes it that way! Examples:
  - ORS 1.440(1)—documents filed with the commission (aka complaints) remain confidential unless they become evidence in a hearing
    - Even a judge cannot call and find out the details of the complaints against them if they are dismissed and/or end up with informal dispositions
  - ORS 1.440(3)—Commission members are not allowed to disclose or use any investigation, testimony, or documents which are not public records for **any other purpose other than in connection with their official duties**.
  - A judge who is the subject of a complaint and proceedings therein can request that the commission **state the disposition of the complaint and the reasons for its decision** when the commission finds that fairness requires such a comment

# But hey y'all, I don't like all this secrecy

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I don't like that the commission is forbidden from discussing matters of such public importance

I don't like that the public will never find out if a judge has a list of complaints a mile long so long as none of them are sustained

I don't like that even where a complaint has an informal disposition (aka the commission finds that it has some merit) that the public will never get to hear about it

I don't like that municipal court judges aren't subject to the commission

**WHAT CAN I DO ABOUT THIS?!?!**

# Take it to the legislature (Hi Mary Sofia!)

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- The Commission on Judicial Fitness is statutorily governed
- The last time the bulk of the statutes were updated was in 1997
- That's twenty-two years ago.

Put differently, if you don't like the cloak of secrecy around these issues, they need to get changed in the legislature

# Questions, Comments, Complaints?

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