



QUEEN'S BENCH

SEPTEMBER 8, 2020

Judge Jean Maurer
Judge Youlee Yim You

NECESSARY
CONVERSATION

—

TRUST AND
CONFIDENCE IN
THE JUDICIARY

The framers of the Constitution were so clear in the federalist papers and elsewhere that they felt an independent judiciary was critical to the success of the nation.

Sandra Day O'Connor

NECESSARY CONVERSATION

TRUST AND CONFIDENCE IN THE JUDICIARY



Why is this critical?



How do we instill confidence in the judiciary?



What is it like to walk into a courtroom and wonder if you are going to get a fair trial?

JUDICIAL BIAS

1) Explicit Bias – “Headline cases”

2) ORS 14.210 – Disqualification of Judge for Cause

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

(a) The judge shall not act as judge if the judge is a party to or directly interested in the action, suit or proceeding, except that the judge shall not be disqualified from acting as such in a case in which the judge is added as a party after taking any official action as a judge in the action, suit or proceeding, and in that case the judge shall be dismissed as a party without prejudice.

(b) Except as provided in ORS 2.111 and 2.570, a judge shall not act as judge if the judge was not present and sitting as a member of the court at the hearing of a matter submitted for its decision. A judge may sign an order or judgment reflecting a decision made by another judge if, for good cause, the judge who made the decision is not available.

(c) A judge shall not act as judge 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) A judge shall not act as judge if the judge has been attorney in the action, suit or proceeding for any party.

JUDICIAL BIAS

Unconscious bias



https://www.youtube.com/watch?v=BA-z4mS_Evg&feature=emb_title

JUDICIAL BIAS

Diversity on the Bench

I wonder whether by ignoring our differences as women or men of color we do a disservice both to the law and society. Whatever the reasons why we may have different perspectives . . . are in many respects a small part of a larger practical question we as women and minority judges in society in general must address.

. . . Personal experiences affect the facts that judges choose to see. My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.

Justice Sonia Sotomayor

The life of the law has not been logic; it has been experience.

Justice Oliver Wendell Holmes, Jr.

JUDICIAL BIAS

***Safford Unified School District v. Redding*, 557 U.S. 364, 382 (2009):**

Justice Ginsberg dissent:

Here, “the nature of the [supposed] infraction,” the slim basis for suspecting Savana Redding, and her “age and sex,” . . . establish beyond doubt that Assistant Principal Wilson's order cannot be reconciled with this Court's opinion in *T.L.O.* Wilson's treatment of Redding was abusive and it was not reasonable for him to believe that the law permitted it.

USA TODAY interview: "They have never been a 13-year-old girl," she said later when asked about her colleagues' comments during the arguments. "It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood."

JUDICIAL BIAS

***Schimenti v. Schimenti*, 181 Conn. App. 385, 402, 186 A.3d 739, 753 (2018)**

Parties in divorce case agreed to modified judgment that husband would pay 50% of wife's golf club initiation fees.

Husband's attorney asked for hearing on intent behind the modified judgment. The court declined, stating the plaintiff was entitled to a membership level at the Innis Arden Country Club equal to that of the defendant at his own club: "Whatever it is, it's going to be the same for her." Regarding the wife's golf history, the judge stated: "Don't care what her golf history is, it's what her future is going to be."

JUDICIAL BIAS

Schimenti v. Schimenti:

In awarding fees, judge stated, “I don’t think it was because I had a misapprehension of facts. I think it was because I took what facts were presented and applied my prejudices, and every judge has—has life history, and life experience that comes out, perhaps, in the way that we rule on certain things. And you happened to have hit a nerve on this one.”

JUDICIAL BIAS

Schimenti v. Schimenti:

[A] trial judge need not leave insights and common sense derived from her life's experience at the courthouse door . . .

Nevertheless, attitudes garnered from personal life experience cannot serve as a substitute for properly admitted evidence at a hearing where the court's mandate is to ascertain the intent of the parties. "Judicial impartiality is the hallmark of the American system of justice." 48A C.J.S., Judges § 247 (2018). The background and experience of a trial judge are disqualifying only if they prevent that judge from assessing the evidence fairly and impartially.

JUDICIAL BIAS

Schimenti v. Schimenti:

In the present case, however, the trial judge's responsibility did not allow her to borrow from her life experiences extrinsic to the law. As the record plainly reflects, the trial judge did not follow her prescribed decision-making pathway but, instead, relied exclusively on her own prejudices born of her life experiences. The court's proper focus should have been on the well established decisional pathway for determining the intent of parties who use ambiguous language in a contract, requiring it to determine the meaning of that language.

JUDICIAL BIAS

Bias and Judging, Allison Harris and Maya Sen, August 30, 2018

Research shows that “characteristics such as race, ethnicity, and gender can sometimes predict judicial decision-making in limited kinds of cases; however, the literature also suggests that these are by far less important in shaping or predicting outcomes than is ideology (or partisanship), which in turn correlates closely with gender, race, and ethnicity.”

The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race, Pat Chew and Robert E. Kelley, March 1, 2013

Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases, Pat Chew and Robert E. Kelley, 2009

JUDICIAL BIAS



CornellResearch

Cornell University, Investigating Judicial Decision Making

“When they sentenced the one-year prisoner first, they gave the second prisoner six years instead of nine,” Rachlinski says. “Because they had just sentenced someone to one year, nine years seemed like a lot, so they lowered the sentence for the second prisoner. When we reversed the order with a different group of judges, they sentenced the nine-year prisoner first, and then they gave the one-year prisoner two years because one year didn’t seem like enough. The numbers anchor on each other.”

“Humans make decisions in two ways—either intuitively, going with a gut feeling or deliberately, using the application of rules and logic. Our results show there is a lot of intuitive decision making going on in the judicial system.”

OPPORTUNITY FOR EDUCATION

Judges'
Opportunity to
Educate
Themselves

Attorneys'
Opportunity to
Educate Judges

EDUCATING JUDGES



- How do you open a judge's mind to other life experiences?
- Can a party prevail despite a judge's particular ideology?
- How do you remind a judge not to rely on intuition?
- Focus on subjective facts versus objective facts. Subjective facts rely on interpretation and human analysis.
- Focus on credibility/plausibility determinations.

EDUCATING JUDGES



- More volume is not necessarily helpful.
- Frame it as a question and then answer it.
- *Influencing and Challenging Judges and Their Decisions in Child Welfare Cases*, American Bar Association

https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/influencing-and-challenging-judges-and-their-decisions-in-child-/

**O.R.S. 14.250
DISQUALIFICATION
OF JUDGE;
TRANSFER OF
CAUSE; MAKING
UP ISSUES.**

No judge of a circuit court shall sit to hear or try any suit, action, matter or proceeding when it is established, as provided in ORS 14.250 to 14.270, that any party or attorney believes that such party or attorney cannot have a fair and impartial trial or hearing before such judge.

In such case the presiding judge for the judicial district shall forthwith transfer the cause, matter or proceeding to another judge of the court, or apply to the Chief Justice of the Supreme Court to send a judge to try it; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action or suit is of such a character that a change of venue thereof may be ordered, the presiding judge may send the case for trial to the most convenient court; except that the issues in such cause may, upon the written stipulation of the attorneys in the cause agreeing thereto, be made up in the district of the judge to whom the cause has been assigned.

O.R.S. 14.260 AFFIDAVIT AND MOTION FOR CHANGE OF JUDGE

(1) Any party to or any attorney appearing in any cause, matter or proceeding in a circuit court may establish the belief described in ORS 14.250 by motion supported by affidavit that the party or attorney believes that the party or attorney cannot have a fair and impartial trial or hearing before the judge, and that it is made in good faith and not for the purpose of delay.

No specific grounds for the belief need be alleged.

The motion shall be allowed unless the judge moved against, or the presiding judge for the judicial district, challenges the good faith of the affiant and sets forth the basis of the challenge.

In the event of a challenge, a hearing shall be held before a disinterested judge.

The burden of proof is on the challenging judge to establish that the motion was made in bad faith or for the purposes of delay.

O.R.S. 14.260
AFFIDAVIT AND
MOTION FOR
CHANGE OF
JUDGE

(2) The affidavit shall be filed with the motion at any time prior to final determination of the cause, matter or proceedings in uncontested cases, and in contested cases before or within five days after the cause, matter or proceeding is at issue upon a question of fact or within 10 days after the assignment, appointment and qualification or election and assumption of office of another judge to preside over the cause, matter or proceeding.

**O.R.S. 14.260
AFFIDAVIT AND
MOTION FOR
CHANGE OF
JUDGE**

(3) A motion to disqualify a judge may not be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding.

A motion to disqualify a judge or a judge pro tem, assigned by the Chief Justice of the Supreme Court to serve in a county other than the county in which the judge or judge pro tem resides may not be filed more than five days after the party or attorney appearing in the cause receives notice of the assignment.

**O.R.S. 14.260
AFFIDAVIT AND
MOTION FOR
CHANGE OF
JUDGE**

(6) A party or attorney may not make more than two applications in any cause, matter or proceeding under this section.

O.R.S. 14.270
TIME OF MAKING
MOTION FOR
CHANGE OF
JUDGE IN
CERTAIN
CIRCUMSTANCES

An affidavit and motion for change of judge to hear the motions and demurrers or to try the case shall be made at the time of the assignment of the case to a judge for trial or for hearing upon a motion or demurrer.

Oral notice of the intention to file the motion and affidavit shall be sufficient compliance with this section providing that the motion and affidavit are filed not later than the close of the next judicial day.

No motion to disqualify a judge to whom a case has been assigned for trial shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding; except that when a presiding judge assigns to the presiding judge any cause, matter or proceeding in which the presiding judge has previously ruled upon any such petition, motion or demurrer, any party or attorney appearing in the cause, matter or proceeding may move to disqualify the judge after assignment of the case and prior to any ruling on any such petition, motion or demurrer heard after such assignment.

28 U.S.C. § 144 BIAS OR PREJUDICE OF JUDGE

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

- When, if ever, do you approach the judge?
- How do you approach the judge?
- Should you use an intermediary?
- Are affidavits the answer?
- Are your perceptions accurate?
- *Ivory Tower Interventions*, Judge Susie Norby, Oregon State Bar Bulletin, July 2020

TO AFFIDAVIT OR NOT TO
AFFIDAVIT?



PROCEDURAL FAIRNESS TO ENSURE FAIRNESS

