

Judicial Ethics: Questions New Judges Should Ask Themselves

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Where Can I Get Ethics Assistance?

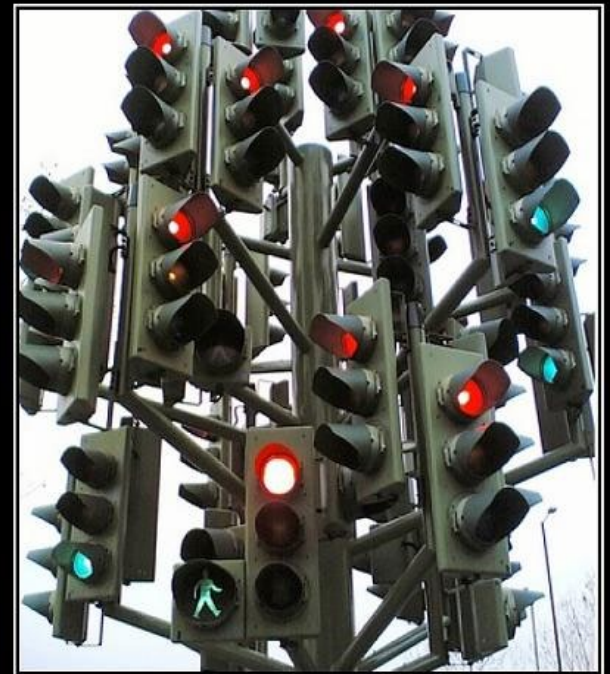


Where Can I Get Ethics Assistance?

Judicial Ethics Committee

Consists of seven judges appointed by the Supreme Court.

May issue a formal ethics opinion on proper professional conduct when requested to do so by a judge.



ANALYSIS PARALYSIS

Then there's always the coin toss method

Where Can I Get Ethics Assistance?

Judicial Ethics Committee

“A Formal Ethics Opinion shall constitute a body of principles and objectives upon which judges can rely for guidance.”

Tenn. Sup. Ct. R. 10A.6

“An opinion may not be issued in a matter that is the subject of a pending disciplinary proceeding.”

Tenn. Sup. Ct. R. 10A.4



ANALYSIS PARALYSIS

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Where Can I Get Ethics Assistance?

Judicial Ethics Committee

- Judge Ross Dyer, Chair
(901) 537-2978



ANALYSIS PARALYSIS

Then there's always the coin toss method

What is the Board of Judicial Conduct?

Disciplinary system's purpose:

“The regulation of judicial conduct is critical to preserving the integrity of the judiciary and enhancing public confidence in the judicial system.” Tenn. Code Ann. § 17-5-101.

Ethical rules are needed to maintain “the highest standards of judicial and personal conduct, and to provide a basis for regulating [judges’] conduct through disciplinary agencies.” Preamble, Tenn. Sup. Ct. R. 10.

What is the Board of Judicial Conduct?

Authority of BJC:

- Exercises “broad powers to investigate, hear, and determine charges sufficient to warrant sanctions or removal” from office.
- Possesses “powers normally exercised by courts of record.”

What is the Board of Judicial Conduct?

Composition: Sixteen members

- Eight current or former judges
- Six non-lawyer/non-judge members
- Two lawyers

Selection: various judicial conferences (5 appointments), speakers of house and senate (8 appointments), governor (2 appointments), and supreme court (1 appointment).

What is the Board of Judicial Conduct?

Divided into:

- Five investigative panels of three members each (at least one current or former judge);
- Three hearing panels of five members each (at least two current or former judges).



What is the Board of Judicial Conduct?

Who is included?

- trial judges (including general sessions, probate, juvenile, municipal judges, and magistrates)
- appellate judges and justices
- senior judges
- claims commissioners

What is the Board of Judicial Conduct?

Who is *included*?

- sitting by special appointment
- candidates for judicial office
- anyone else presiding over a court created by the legislature

What is the Board of Judicial Conduct?

Who is excluded?

- federal judges
- administrative law judges
- workers' compensation judges

What is the Board of Judicial Conduct?

What is included?

- Judicial behavior, not judicial decision-making.



What is the Board of Judicial Conduct?

What is included?

- Judge suffering from a physical or mental disability “that would substantially interfere with the prompt, orderly, and efficient performance of the judge’s duties.”
- BJC can take “appropriate action, including recommendation of removal from office.”

What is the Board of Judicial Conduct?

Range of outcomes (any one or any combination):

- dismissal of complaint;
- warning/reminder;
- private reprimand;
- public reprimand;
- deferred discipline agreement;

What is the Board of Judicial Conduct?

Range of outcomes (any one or any combination):

- impose limits/conditions on performance of duties, including cease and desist order;
- suspension (with pay);
- recommend removal from office;
- immediate suspension upon being charged with a felony.

The Four Canons/Code of Judicial Conduct

- 1. “A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”**
- 2. “A judge shall perform the duties of judicial office impartially, competently, and diligently.”**
- 3. “A judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.”**

The Four Canons/Code of Judicial Conduct

4. “A judge . . . shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.”

Do the Ethics Rules Apply to *Personal Activities?*

“Judges should maintain the dignity of judicial office at **all times**, and avoid both impropriety and the appearance of impropriety in their professional **and personal lives.**” Preamble, Tenn. Sup. Ct. R. 10.

Do the Ethics Rules Apply to *Personal Activities?*

In the Matter of David Ferguson (West Virginia Sup. Ct., April 22, 2020) (90-day suspension).

Judge Ferguson was fishing with his father and received a citation for catching too many fish.

- threw down his court ID
- exclaimed “these charges ain’t going nowhere” and he would be contacting the officers’ supervisors
- defense – incident was “entirely personal”

Do the Ethics Rules Apply to *Personal* Activities?

In the Matter of David Ferguson (West Virginia Sup. Ct., April 22, 2020) (90-day suspension).

Held: “This case is about much more than catching extra fish. . . . [The judge] acted in a completely inappropriate, belligerent, and coercive manner.”



Do the Ethics Rules Apply to *Personal* Activities?

In Re Sandra Plaster (Texas Commission on Judicial Conduct, Aug. 12, 2020) (public warning).

Judge Plaster complained to law enforcement about commercial truck traffic associated with a farm project next to property owned by her family.

- requested state troopers “target” the truck drivers
- “None of them have driver’s licenses since they are Mexican.”

Do Ethics Rules Apply to *Personal* Activities?

In Re Sandra Plaster (Texas Commission on Judicial Conduct, Aug. 12, 2020) (public warning).

Held: The judge's "racially insensitive comments about people of Mexican descent . . . demonstrated an **extra-judicial** activity which cast reasonable doubt on her capacity to act impartially as a judge."

Do the Ethics Rules Apply to *Personal Activities?*

In Re Paul Foley (Texas Commission on Judicial Conduct, Aug. 12, 2020) (public admonition).

Judge Foley called a middle school teacher at her place of employment insisting that she speak with him about the whereabouts of a horse belonging to a family member. The teacher informed the judge that she was in class and could not talk.

- identified himself as a judge
- raised his voice

Do the Ethics Rules Apply to *Personal Activities?*

In Re Paul Foley (Texas Commission on Judicial Conduct, Aug. 12, 2020) (public admonition).

“I know where you are!” in a “rude and hateful manner.”

Held: The judge “exhibited poor demeanor during the call.”

Do the Ethics Rules Apply to *Personal Activities?*

“Judges routinely admonish others to conduct themselves with self-control, show restraint, and avoid confrontation. It is incumbent upon judges to adhere to these same behavioral standards in their own lives.”

Reprimand – TN (2022)

Have I Adequately Cut Ties With My Clients and Former Firm?

- Full-time judges cannot practice law. Rule 3.10.
- Winding up entails terminating both the representation of clients and the business relationship with the firm within 180 days of assuming office.
- ✓ No new clients
- ✓ Letterhead

Have I Adequately Cut Ties With My Clients and Former Firm?

- ✓ Signage in reception areas, conference rooms, lobby, outside the building, etc.
- ✓ Firm website and other social media platforms
- ✓ Advertising/promotional materials
- ✓ Newsletters, blogs, etc.
- ✓ Resolve fee issues with clients and the firm asap

Have I Adequately Addressed My Social/Community Activities?

A judge may not participate in extrajudicial activities that:

- interfere with the proper performance of the judge's duties
- lead to frequent disqualification
- appear to a reasonable person to undermine the judge's independence, integrity, or impartiality
- appear to a reasonable person to be coercive

Have I Adequately Addressed My Social/Community Activities?

- make inappropriate use of court premises, staff, stationary, equipment, or other resources

Have I Adequately Addressed My Social/Community Activities?

- ✓ Am I a member of a governmental entity (board, commission, etc.) that does not concern the law or legal system? Rule 3.4
- ✓ Am I a member of an organization that discriminates on the basis of race, gender, religion, national origin, ethnicity, sexual orientation? Rule 3.6
- ✓ Am I a member of an organization that would come before me? Rule 3.7

Have I Adequately Addressed My Political Activities?

A judge shall not:

- **act as a leader or hold office in a political organization (as defined in the code)**
- **publicly endorse or oppose a candidate for a nonjudicial office**
- **solicit funds for or make contributions to a political organization or candidate for public office (except from family)**

Have I Adequately Addressed My Political Activities?

A judge shall not:

- make speeches on behalf of a political organization
- become a candidate for a non-judicial elective office (“resign to run rule”)

Rules 4.1, 4.5

Can I Still Have Friends?

Judges are not required to remain isolated from other members of the bar or withdraw from society.

“In today’s legal culture friendships among judges and lawyers are common. They are more than common; they are desirable. A judge need not cut himself from the rest of the legal community. . . . Social interactions also make service to the bench, quite isolated as a rule, more tolerable to judges.”
United States v. Murphy, 768 F.2d 1518, 1537 (7th Cir. 1985).

Can I Still Have Friends?

- Guiding principle – judges are prohibited from engaging in *personal* activities that would appear to a reasonable person to undermine the judge's independence, integrity, and impartiality. Rule 3.1
- Use good judgment when attending holiday parties, birthday parties, lake outings, sports events, lunches, trips/vacations with attorneys, business people, etc.
- Disclose the relationship



When Do I Recuse Myself?

A judge who *is* neutral and *appears* to be neutral is a necessary element of justice and an essential requisite for public confidence in the judge's decisions.

Rule: Recusal is required when the judge's "impartiality might reasonably be questioned."
Rule 2.11(A)

Specific instances requiring disqualification:

- ✓ personal bias or prejudice concerning a party or lawyer

When Do I Recuse Myself?

- ✓ personal knowledge of the facts
- ✓ judge or judge's family (within the third-degree) is a party or has an economic interest in the outcome
- ✓ judge served as a lawyer in the case
- ✓ judge might be called as a witness
- ✓ a party, a party's lawyer, or law firm of a party's lawyer contributed to the judge's campaign such that the judge's impartiality might reasonably be questioned

When Do I Recuse Myself?

- ✓ the judge, while a judge or judicial candidate, made a public statement other than in a court proceeding that commits or appears to commit the judge to reach a particular result
- ✓ presided over the matter in a lower court

Disclose conflicts and personal and business relationships with parties, witnesses, and lawyers and let the parties consider, outside the judge's presence, whether to waive disqualification; if so, must be made part of the record.

Rule 2.11

Can I Have an Ex Parte Communication?

Rule: “A judge shall not **initiate, permit, or consider** ex parte communications . . . made to the judge outside the presence of the parties or their lawyers concerning a pending or impending matter.”

Exception: scheduling, administrative, or emergency matters *and* substantive issues are not discussed *and* the judge reasonably believes no party will gain an advantage.

Can I Have an Ex Parte Communication?

Action step: A judge who receives an ex parte communication must promptly notify the parties of the substance of the communication *and* provide them with an opportunity to respond.

Disclose the communication!



Can I Take as Long as I Want to Decide Cases?

Standard: Judges must “perform judicial and administrative duties competently, promptly and diligently.” RJC 2.5(A). This directive includes the specific responsibility of promptly disposing of cases. *Id.* at cmt. 5.

Non-jury cases: A judgment must be entered within **sixty** days of when the case was heard. Tenn. Code Ann. § 20-9-506. A case may not be held under advisement in excess of sixty days “absent the most compelling of reasons.” Tenn. Sup. Ct. R. 11, section III(d).

Can I Take as Long as I Want to Decide Cases?

Motions - may not be held under advisement in excess of **thirty** days “absent the most compelling of reasons.”

Tenn. Sup. Ct. R. 11, section III(d).



Can I Talk About My Cases?

Standard: Public comments on matters pending or impending in **any** court which might reasonably be expected to affect the outcome or impair its fairness are prohibited. RJC 2.10 (A).

Unintended consequences:

- undermines public confidence that the judge will approach cases fairly and impartially

Can I Talk About My Cases?

Unintended consequences:

- gives rise to concerns by those whose legal rights and freedoms are at risk about the fairness of their particular outcome
- making extrajudicial comments about a pending case can lead to disqualification issues
- may be used by the parties to their strategic advantage

Can I Talk About My Cases?

“Any reasonable jurist would know that using a case pending before him or her for their own extra-judicial purposes on social media or elsewhere runs a significant risk of undermining the administration of justice, public confidence in the individual judge, and violating the Code of Judicial Conduct.”

Suspension Order - TN (July 26, 2022)

What Do I Say During a Traffic Stop?

- “Big mistake . . . I’m a judge. I’m not trying to play that up, but.” (Ohio)
- “This will substantially impair my career.” (CA)
- “Don’t you know who I am?” (CA)
- “How can I sit up on the bench and pass judgment on people when I’m being convicted of the same thing?” (Ill.)
- “I am so intoxicated!” (Ohio)

What Do I Say During a Traffic Stop?

- “This will kill me more than the average guy. I’m a judge.” (N.J.)
- “I’m a f**king judge. . . . Come on man.” (N.J.)
- “I’m a judge in this county.” (TX)
- “What do you think you’re doing pulling me over? You better check the registration on this plate soon, mister.” (PA)
- “Is this the way you treat a Supreme Court Justice?” – returning from a judicial conference (N.Y.)

In Re Jessica Recksiedler (Fl. Sup. Ct., April 9, 2015)
(reprimand).

Judge Recksiedler, who had a poor driving record, appeared before the Judicial Nominating Commission and stated that she took the Commission's concerns about her driving history seriously.

She failed to disclose that she received another speeding ticket on her way to her interview with the Commission which made her late for the interview.



Do I Know My Blind Spots?

Disciplinary Counsel v. William Marshall (Ohio Sup. Ct. Feb. 28, 2019) (six-month suspension).

Judge Marshall commented to a prosecuting attorney in court about the state trooper who had ticketed his daughter for speeding:

- “There used to be a code in this county – I’m a judge and he shouldn’t have written my daughter [a ticket].”
- “wanted to get the trooper in trouble”

Do I Know My Blind Spots?

Disciplinary Counsel v. William Marshall (Ohio Sup. Ct. Feb. 28, 2019) (six-month suspension).

- threatened to hold the trooper's actions against other troopers in other cases before him
- saw the trooper in the hallway of the courthouse and called him an "a**hole"

Do I Know My Blind Spots?

In Re Joyce Tomlinson (TN Board of Judicial Conduct, Feb. 1, 2021) (resigned in lieu of formal charges).

Judicial Commissioner Tomlinson engaged in a “tense and angry discussion” with sheriff’s deputies about a pending criminal case involving her granddaughter.

- sarcastic, argumentative, raised her voice, and banged her hands on the table

Do I Know My Blind Spots?

In Re Joyce Tomlinson (TN Board of Judicial Conduct, Feb. 1, 2021) (resigned in lieu of formal charges).

- threatened to call the investigating officer's family
- dared the officer to stop her on the street
- taunted the officer by commenting that he was afraid of her even though he had a gun

Do I Know My Blind Spots?

In Re Joyce Tomlinson (TN Board of Judicial Conduct, Feb. 1, 2021) (resigned in lieu of formal charges).

Standard - a judge shall not permit family, social, political, financial or other interests or relationships to influence the judge's judicial conduct or judgment. Rule 2.4(B).

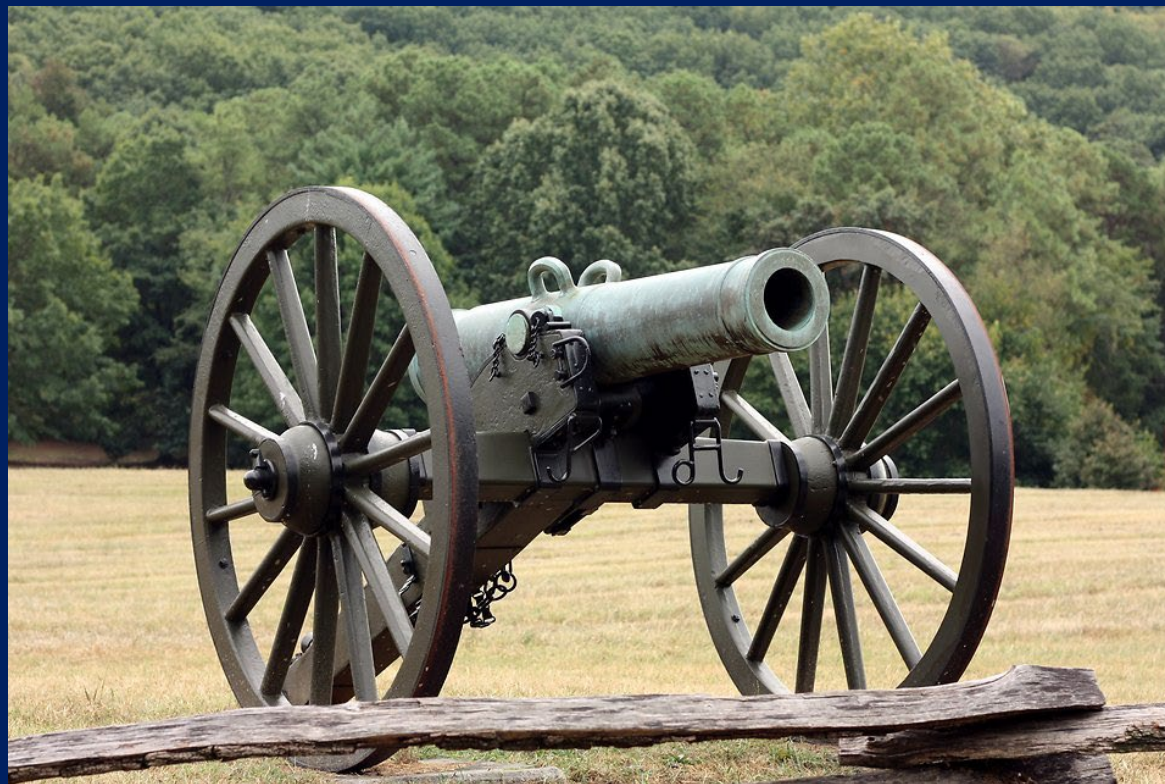
Standard - a judge shall not abuse the prestige of judicial office to advance the personal interests of the judge or others. Rule 1.3.

Can I Use Social Media?

- The reality: majority of judges communicate using social media in one form or another
- Generally accepted view: judges, like anyone else, can use social media; but unlike other people judges have constraints
- Guiding principle: judges are prohibited from engaging in *personal activities* that would appear to a reasonable person to undermine the judge's independence, integrity, and impartiality. Rule 3.1

Use of Social Media

**“Lawyers who choose to post on social media must realize they are handling live ammunition.”
In Re Sitton, 618 S.W.3d 288 (Tenn. 2021).**



Use of Social Media

Best practices: Do not

- investigate the facts using social media
- comment about a case, litigant, lawyer, witness, law firm, on social media
- “friend” a lawyer who appears before you (alternatively “friend” all lawyers)
- “friend” a litigant
- advance the economic or personal interests of another (i.e., praise/criticize a business, law firm, etc.)

Use of Social Media

Best practices: Do not

- use a profile picture in your judicial robe
- get political
- assume that using a pseudonym will prevent someone from discovering the sender is a judge
- assume private electronic communications will remain private

Use of Social Media

Bottom line: While judges may utilize social media, they must “at all times remain conscious of the solemn duties they may later be called upon to perform.” *State v. Madden*, 2014 WL 931031, at *8 (Tenn. Crim. App. March 11, 2014).

Don't say anything online that you wouldn't want plastered on a billboard with your face on it.

Does My Writing Reflect the Transition From Advocate to Objective Decision-Maker?

“The legal analysis, findings of fact, and conclusions of law of a written opinion or order by a judge are not grounds for sanction . . . **[but] the personal views of a judge contained within a written opinion or order by a judge are not protected.**”

Tip: Use as much objective language as possible.

How Will I Respond to the Difficult/Disrespectful Lawyer or Litigant?

You will encounter *that* person.

Rule: “A judge shall be **patient, dignified, and courteous** to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity. . . .” Rule 2.8



How Will I Respond to the Difficult/Disrespectful Lawyer or Litigant?

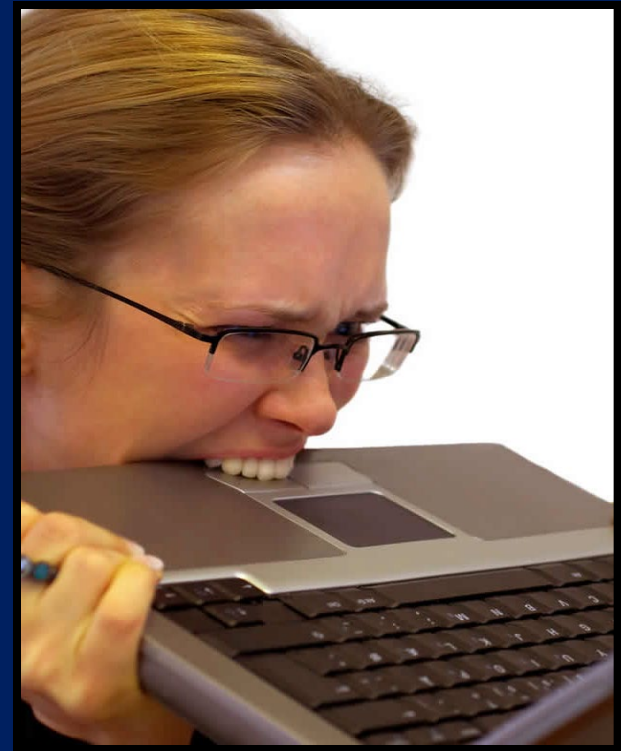
“Regardless of how frustrating or disrespectful a participant in a legal proceeding may be, the judge cannot reciprocate. To the contrary, the more difficult the situation, the more important it is for the judge to remain dignified and composed and not be drawn into an escalating argument.”

Reprimand – TN (2020)

How Will I Respond to the Difficult/Disrespectful Lawyer or Litigant?

Best practices

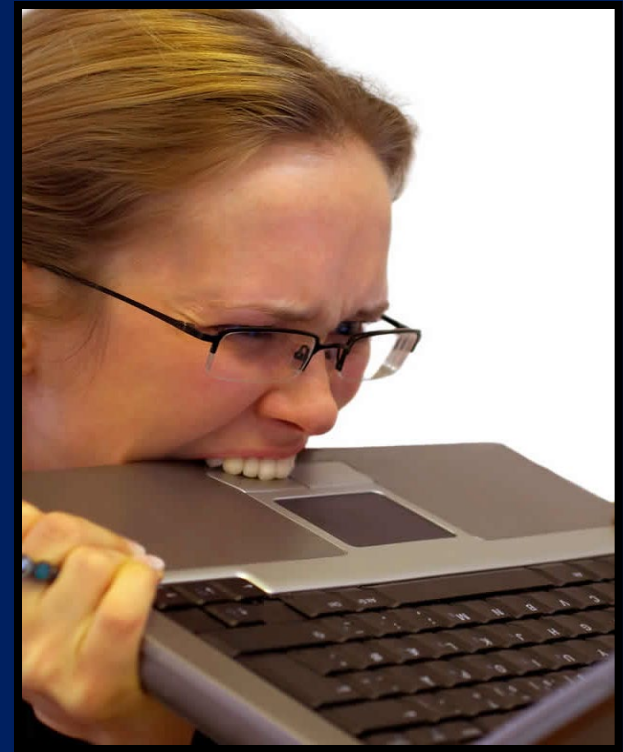
- ✓ actively listen/pay attention
- ✓ know your triggers
- ✓ refuse to be manipulated
- ✓ be patient
- ✓ do not overreact
- ✓ take a recess when necessary



How Will I Respond to the Difficult/Disrespectful Lawyer or Litigant?

Best practices

- ✓ do not swear/curse
- ✓ do not pound the bench
- ✓ do not yell
- ✓ do not disparage
- ✓ do not personalize the encounter
- ✓ do not refer to personal characteristics





“[E]very time a judicial officer engages in misconduct, he or she spends the goodwill of the judiciary as a whole.” *In re Kwan*, 443 P.3d 1228, 1238 (Utah 2019).