

# EXTRA DRY AND EXTRA-JUDICIAL:

## A WineLover's Guide to Judicial Ethics

The wine connoisseur reads the label's "extra dry" to mean that the wine is *not* dry. Does extra-judicial mean *not* judicial? "Judicial power" is the phrase found in state and federal constitutions and thanks to John Marshall, the power to say what judicial power is *is* also one of the powers of the judiciary. Recent (inherent) authority on this point is provided by *Anderson v. ABA*, 91 P.3<sup>rd</sup> 271 (Alaska)[Supreme Court has "inherent authority to regulate the practice of law"].

There may be some circularity here, but let's digress to another exercise: if a distant observer were to list all of the things that judges had the power to do, the observer would have to list the power to make the list as one of the powers. The alert reader can refer back to Bar Rag 4, November-December 2003, in which the Russellian paradox is mooted; Tortoise is torturing Achilles with endless listmaking. Russell and Carroll struggled with much the same problem, describing a designed interaction in venue.

Back to *extra-judicial*. Is it everything that is not judicial? Or is it a turf of its own, lying just about the horizon of judging, of somewhat less scope than judging? A doughnut; perhaps not an extra-fat one. Take what judges do, as time and motion, in chambers and on the bench. Where do they extra-judge?

Some answers can be found in Canon 4 of the Code of Judicial Ethics. "A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations." Do's and don't's abound, with a poverty of do's. Judges attend fundraisers, give speeches, write, buttonhole lawyers and powers-that-be, are solicited to exhibit The Robe on the dais or letterhead of some organization that has a blade to grind, fine or blunt.

In 2003 the Alaska Supreme Court amended RPC Rule 6.1, titled "Pro Bono Publico Service": a lawyer should "aspire to render at least 50 hours of pro bono publico legal services per year", which, for judges, may be fulfilled by participating "in activities for improving the law, the legal system or the legal profession." The Judicial Conduct Commission's Advisory Opinion #2004-01 applies this aspirational standard to judges. It may be worthwhile

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to ask how the Supreme Court came to tell judges what to do (extra-judicially) by telling lawyers what to do in RCP 6.1.

Article IV, Section 4 (Alaska Constitution) requires that judges be “licensed to practice law in the State” and codelaw (for each level of the judicial pyramid) elaborates that they must be “engaged for not less than [ ] years immediately preceding appointment in the active practice of law, and at the time of appointment be licensed to practice law in the state.” AS 22.05.070 and so forth. But a judge who is “sitting as a judge in a state ... court” is deemed to be engaging in “the active practice of law,” which may supply, in reverse, the authority for constitutional bodies such as the Supreme Court and Judicial Conduct Commission to regulate the extra-judicial conduct of judges, when lawyering is regulated, so that judges are deemed to be lawyering when they judge.

Of course, judges “may not practice law ... ” via AS 22.05.130, so this codelaw tells us that *if* judges judge then they are actively practicing law *but if* they practice law, then they are breaking the law. And now we know (perhaps) that when judges extra-judge they are also deemed to engage in the “active practice of law.”

Which leaves us with the Supreme Court talking to judges as lawyers in Rule 6.1, rather than addressing judges quâ judges as the Commission has (at least) done this spring.

So what's going on out there in Canon 4-land? Plato's *Gorgias* may have an answer. I can tell you a story and exercise my performance talent to entertain you; I'm taking a chance here. I can try to persuade you of some point, for the purpose of getting you to articulate a shouldness to my satisfaction. Now the risk is even greater. But if I try to get you to persuade me, I have taken on the greatest risk, if only because I have to get you to buy into a designed interaction between us, in which you're working hard, but I'm working harder. The heavy lifting of getting persuaded is so freighted with pain that Plato said it was the same pain that a doctor must inflict on his patient to restore health. So it hurts when your soul is improved in dialogue, at least when you're in venue with Socrates.

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Plato contrasts this heavy lifting with rhetoric, which, he says, is designed to flatter the listener. It wouldn't make any difference what you say to your dialogue partner: the sophist, the rhetorician and the advocate have got the easier job. "What is there greater than the word which persuades the judges in the courts ... ." 452e. Gorgias is speaking and Socrates turns this position around. The "power to convince" makes the persuadee that one with the more difficult job, her soul accepting restraint, chastisement and even pain for the sake of justice. (Lawyers were condemned to traffic in lesser virtue, at least until Aristotle created the art of corrective justice.)

Now imagine that judges step outside of the relationship of advocate and persuadee (a word too ugly to be kidnapped) and let them comment on how that interaction is designed. A judge might explain to pro se litigants how to make a motion in court, or how to write an opposition to a written motion. This is exactly the place where Socrates pontificates, to the utter disgust of his host Callicles and fellow guests: how should *they* behave in discourse with Socrates. Of interest here is that Socrates browbeats each and every one of these men in the art of persuading Socrates, and, in so doing, Socrates makes himself the evening's butthead. Socrates, at Plato's literary whim, is goading his fellow participants in dialogue to persist in *their* persuasive efforts, so that *his* soul may be bettered.

On the other hand, we have the Supreme Court to thank for directing judges to do something with their judicial talent, in extra-judicial turf. When judges show litigants *how to's* and *what not to do's* they render service that falls within Rule 6.1. The Supreme Court justices were much more genteel in calling on this aspirational effort than Socrates in the *Gorgias*; perhaps that's because, in the last 24 centuries, we've all learned a lot about making venue work.

*Apparatus*

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