




EX PARTE COMMUNICATIONS  
DISTRICT COURT JUDGES SUMMER CONFERENCE 2019

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### WHY THE RESTRICTIONS ON EX PARTE COMMUNICATIONS?

Problems with Ex Parte Communications:

- Undermines Fundamental Fairness
  - denies the absent party the right to respond and be heard
- Undermines Confidence in the Impartiality of the Judge
  - creates perception of ability to influence the judge
- Undermines the Adversarial System
  - Adversarial testing is necessary to vet facts and information presented to the finder of fact and judge
  - In *ex parte communications*, misleading or false information can be given to the judge without the benefit of adversarial testing
  - Jeopardizes search for the truth and justice




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### NC CODE OF JUDICIAL CONDUCT

**Canon 3A(4):**  
A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, **except as authorized by law, neither knowingly initiate nor knowingly consider ex parte or other communications concerning a pending proceeding.** A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge.


- **PLUS**, always remember the general provisions:
  - **Canon 1:** "personally observe" standards of conduct to preserve the integrity and independence of the judiciary
  - **Canon 2A:** conduct yourself "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"
  - **Canon 2B:** do not allow your "family, social or other relationships to influence" your judicial conduct or judgment



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### COMMON SCENARIOS INVOLVING EX PARTE COMMUNICATIONS

- Communicating with other judges
- Communicating with attorneys or prosecutors
- Communicating with parties or witnesses
- Communicating with *pro se* parties
- Communicating with law enforcement
- Communicating on social media
- Conducting independent research



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### FORMAL ADVISORY OPINIONS

- **North Carolina Formal Advisory Opinion 2009-03**
  - It would be inappropriate for a judge to utilize a listserv for the specific purpose of obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge.
- **North Carolina Formal Advisory Opinion 2010-01**
  - A judge may enter an *ex parte* order for an attorney to be admitted to practice *pro hac vice*, provided all parties receive notice of the motion as required by law and have an opportunity to object.
- **North Carolina Formal Advisory Opinion 2010-08**
  - Within the context of a civil proceeding, a judge may not ethically enter an *ex parte* order under HIPAA for the production of medical records by a records custodian, unless an *ex parte* procedure is expressly authorized by statutory or case law. An order is not considered to have been issued *ex parte* if it is entered with the consent of all parties, or all parties are provided proper notice and have an opportunity to be heard.



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### SAMPLING OF SUPREME COURT DISCIPLINARY DECISIONS INVOLVING *EX PARTE* COMMUNICATIONS

- *In re Martin, 340 N.C. 248 (1995)*. Judge censured for *ex parte* communications with law enforcement personnel and court personnel regarding criminal cases involving the children of the judge's friends.
- *In re Totten, 365 N.C. 458 (2012)*. Judge censured for initiating *ex parte* communications with a defense attorney in a DWI case to avoid requiring defendant to have interlock device. While still on the bench but without the ADA present, Judge asked defense counsel to prepare an order avoiding the interlock requirement. The attorney provided an order suppressing the BAC test results and the ADA was brought back into the courtroom, but was not given the opportunity to make substantive arguments on the entry of the order. The order itself contained false information and erroneous conclusions, which the Judge did not notice because he did not carefully review it.
- *Ex Parte Disposition of Criminal Cases*: the first 8 Supreme Court disciplinary cases (1975-1981) involved actions of district court judges in dismissing criminal cases outside of open court sessions.



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### Rule 3.5 NC Rules of Professional Conduct

**(a) A lawyer representing a party in a matter pending before a tribunal shall not:**

- (3) Unless authorized to do so by law or court order, communicate *ex parte* with the judge or other official regarding a matter pending before the judge or official

**(d) For purposes of this rule:**

- (1) *Ex parte* communication means a communication on behalf of a party to a matter pending before a tribunal that occurs in the absence of an opposing party, without notice to that party, and outside the record.
- (2) A matter is pending before a particular tribunal when that tribunal has been selected to determine the matter or when it is reasonably foreseeable that the tribunal will be so selected.

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### Formal Ethics Opinions

- **RPC 237:** Lawyer may not communicate w/judge before whom a proceeding is pending to request an *ex parte* order unless opposing counsel is given adequate notice or unless authorized by law.
- **97 FEO 3:** Lawyer may engage in *ex parte* communication w/judge re: scheduling/administrative matter only if necessitated by the administration of justice or exigent circumstances, & diligent efforts to notify opposing counsel have failed.
- **98 FEO 13:** Restricts informal written communications w/judges to avoid the appearance of improper influence.
- **2001 FEO 13:** Lawyer may not communicate *ex parte* with a judge on the grounds that the communication is “permitted by law” unless there is a statute or case specifically & clearly authorizing such communication.
- **2003 FEO 17:** Lawyer may only provide judge w/additional legal authority post-hearing if permitted by rules of tribunal & if opposing counsel cc’ed.
- **PROPOSED 2019 FEO 4:** Except as prohibited by law or court rule, communications w/judge are within the discretion & preference of the judge and/or tribunal.

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When is an *ex parte* communication authorized by law?

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