

Ex parte Communications  
and Orders

Conference of Superior Court Judges  
Summer Conference 2020(sort of)  
Jeffery B. Foster  
Resident Superior Court Judge

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We should be here.....



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Instead we are here.....



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## Slide 1

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**JF2** Good Morning. I hope everyone is doing well and had survived relatively unscathed thru the Corona Virus scare. Our courthouse in Greenville has been busy getting back up to speed safely and amid sporadic rioting, to try and catch up on all the backlog of cases.

Jeff Foster, 6/10/2020

## Slide 2

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**JF3** While we should be here, after Judge Sermons put in so much work to develop a great summer conference experience, things just didn't happen to work out. I want to thank Judge Sermons for his leadership in putting together

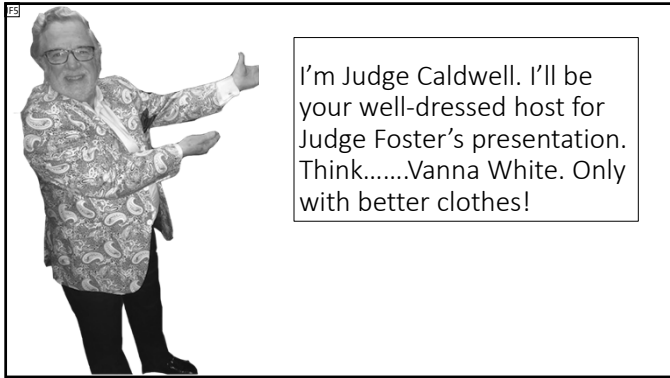
Jeff Foster, 6/10/2020

## Slide 3

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**JF4** This conference instead. I am disappointed mainly because I enjoy seeing all of you so much. Having meals, and drinks, and catching up on what is going on in your lives is one of the best part of conference, not to mention the excellent CJE hours that we get from the School of Government. But I think all of you will join me in saying that the single most anticipated part of the conference is Judge Caldwell's wardrobe, and what new fashion statements he will make. So in that spirit, I have asked Judge Caldwell to help me with this presentation today.

Jeff Foster, 6/10/2020



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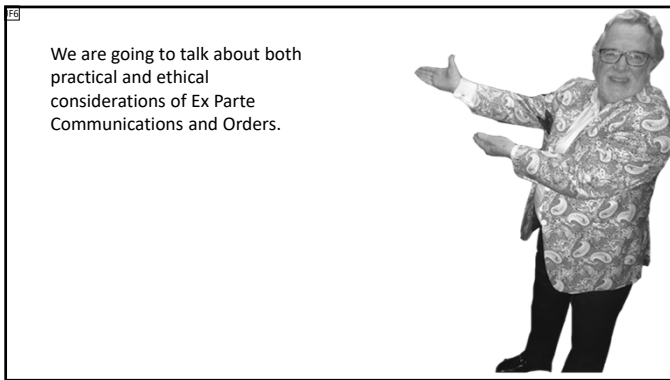
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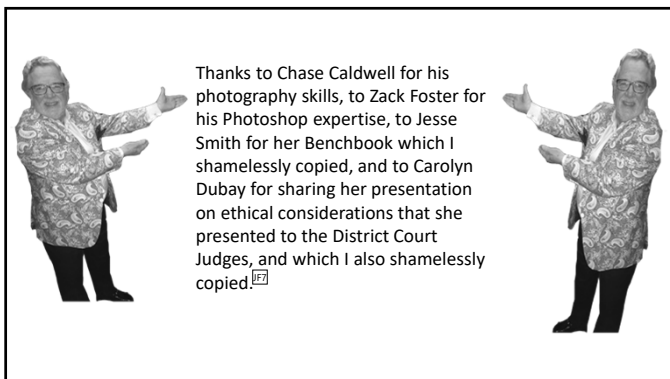
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#### Slide 4

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**JF5** As we cover the topic of ex party orders, we will be treated to the Judges iconic fashion sense as he shares with us the latest in judicial couture.

Jeff Foster, 6/10/2020

#### Slide 5

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**JF6** We are going to spend some time taking about Bothe the ethical considerations of ex party orders and communication as well as some statutory situations where expert communication is important and allowed, if done properly. I have utilized two sources heavily in preparing this presentation. Jesse Smith's Benchbook, and a power point presentation presented by Carolyn Dubay to the District Court Judges. Thanks to both of them for their materials.

Jeff Foster, 6/10/2020


#### Slide 6

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**JF7** Finally Judge Caoldwell and I have our sons Chase Caldwell for photography, and Zack Foster for Photoshop to thank.

Jeff Foster, 6/10/2020

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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Rule 3.5 NC Rules of Professional Conduct

- After April 5, 2018
- (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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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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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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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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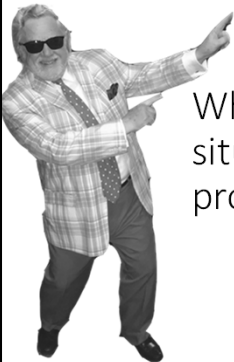
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What are the most common situations where ex parte problems can develop?

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Conversations with District Attorneys or Defense Attorneys regarding calendar matters.

\*"Judge I need to talk with you about a case on todays calendar."

\* "Mr. DA, what do we have on the calendar today?

\* "Judge the other attorney has given me permission to speak with you about this case"



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2. Conversations with represented parties regarding some portion of the case.

• In our roles as judges we run into people that we know or previously represented that want to discuss their legal situation with us. This can create problems that can only be cured by recusal.

• IF ITS NOT ALLOWED BY RULE OR STATUTE, AVOID THE CONTACT!



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Specific Statutory situations where ex parte communication is allowed



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### Criminal Discovery under 15A-908(a)

- Protective Orders. G.S. 15A-908(a) allows either party to apply ex parte to the court, by written motion, for a protective order protecting information from disclosure for good cause, such as substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment. As a general rule, the State is more likely than the defense to seek a protective order.
- See Benchbook "Discovery"

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### Ritchie Motions (Pennsylvania v. Ritchie, 480 U.S. 39 (1987)). (In Camera review of records in criminal cases).

- Sometimes a defendant will file a Ritchie motion ex parte. No published North Carolina appellate case has addressed whether such a procedure is permissible. The North Carolina Supreme Court has held that ex parte motions are proper with respect to defense requests for experts in non-capital cases. See State v. Ballard, 333 N.C. 515, 519 (1993); State v. Bates, 333 N.C. 523, 526-28 (1993). The rationale that applies in that context may lend some support to an ex parte Ritchie request, although the situations certainly differ.
- See Benchbook "Defendants Rights to Third party Records."

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### Funds for Mental Health Expert for Defendant



- The defendant may seek the assistance of a mental health expert by filing an ex parte motion with the court.
- The motion does not ask the court to determine capacity, rather it seeks funds to hire an expert to determine capacity.

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### Temporary Restraining Orders under Rule 65(b).

- A TRO may be issued without written or oral notice to the adverse party or that party's attorney only if the movant:
  - makes the showings required by Rule 65(b); and
  - posts the bond required by 65(c).
- See Benchbook "Temporary Restraining Orders and Preliminary Injunctions"

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### 120 Day Extension of SOL in Medical Malpractice Cases

- May be heard ex parte upon motion of the complainant.



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 A man wearing a plaid jacket, a patterned tie, and sunglasses is pointing his right hand towards the text. He is standing with his left hand on his hip.
 

Judge Caldwell and I look forward to the Fall Conference, where  
 Hopefully we can break bread together, enjoy each others'  
 Company in person, and see the latest in Fall fashions  
 from our Most Fashionable colleague.

Have a great summer!!

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## Slide 21

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**JF1** Jeff Foster, 6/10/2020