

EX PARTE COMMUNICATIONS

BRITTANY PINKHAM, EXECUTIVE DIRECTOR
NORTH CAROLINA JUDICIAL STANDARDS COMMISSION

BRIAN OTEN, ETHICS COUNSEL
NORTH CAROLINA STATE BAR



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STATE BAR**

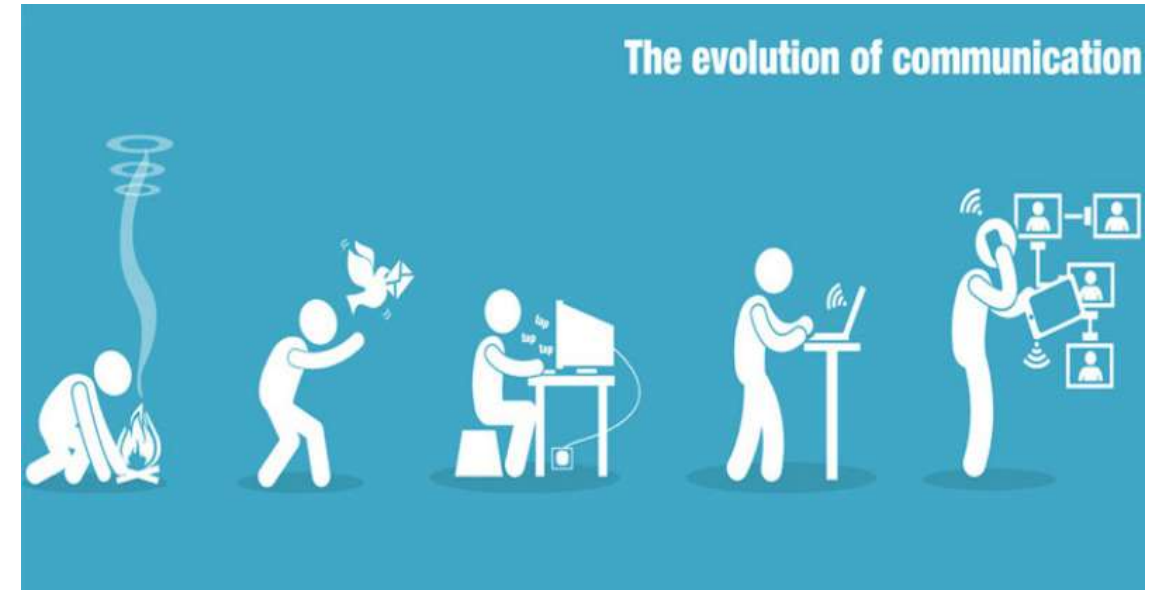
WHY SHOULD I CARE ABOUT EX PARTE COMMUNICATIONS?

- **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
 - 2019 FEO 4: “The Rules of Professional Conduct impose some limits on lawyers’ communications with judges. These limits are designed to ensure fair and equal access to the presiding tribunal by the parties and their representative counsel.”
- **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



THE TIMES, THEY ARE A-CHANGIN'...

- How we do life today is drastically different than 10, 20 years ago.
- Communication between a judge and a lawyer used to be much simpler. Typical methods of communication included:
 - In-person during open court/official proceeding (ALWAYS OK)
 - Written letter (mailed or placed in courthouse box)
 - In-person outside of an official proceeding without opposing counsel (NEVER OK)
- Now, lawyers and judges can still use the above-listed methods of communicating, but also incorporate mediums that are more convenient, more immediate, and (much) more direct, including:
 - Social media
 - Text messages
 - Email
- Like most technology, increased convenience tends to come with increased risk...



RULES OF PROFESSIONAL CONDUCT



RULES OF PROFESSIONAL CONDUCT – RULE 3.5 (IMPARTIALITY AND DECORUM OF THE TRIBUNAL)

- (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.
- Cmt. [8]: All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party.



THE EVOLUTION OF RULE 3.5'S PROHIBITION ON EX PARTE COMMUNICATIONS

Old Rule 3.5

- (a) A lawyer shall not:
- (3) communicate ex parte with a judge or other official except:
 - (A) in the course of official proceedings;
 - (B) in writing, if a copy of the writing is furnished simultaneously to the opposing party;
 - (C) orally, upon adequate notice to opposing party; or
 - (D) as otherwise permitted by law.

Lots of FEOs promulgated under the old rule were still on the books (and causing confusion...)

Removed!

Current Rule 3.5

- (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.



COMMON SCENARIOS

- After hours communication with judges
- Communicating via informal mediums (text messages, emails)
 - Regarding administrative issues
 - Regarding substantive issues (e.g., long text message containing argument on a pending motion to dismiss)
- Excluding pro se litigants from informal communications
- Sending information intended for a judge through court staff
- Interacting/communicating with judges on social media



HYPOTHETICAL

- Lawyer represents Wife/Mom in custody and support action against Husband/Dad.
- Hearing is scheduled for Monday; outcome of hearing is very important to Husband/Dad.
- On Sunday evening, after discovering new evidence, Lawyer sends an email to the presiding judge informing the judge that Lawyer will be requesting a continuance in the morning.
 - Lawyer copies opposing counsel on the email.
 - Lawyer also includes in the email a summary of the alleged new evidence and implications thereof.
- Judge responds to email late Sunday night indicating continuance will be granted absent opposing counsel's objection.
- Opposing counsel does not see the email until Monday.



DID LAWYER ENGAGE IN AN EX PARTE COMMUNICATION OR OTHERWISE VIOLATE THE RULES OF PROFESSIONAL CONDUCT BY SENDING SUBSTANTIVE ARGUMENT OVER EMAIL?

- A) Lawyer engaged in an ex parte communication**
- B) Lawyer did not engage in an ex parte communication, but should not have emailed substantive argument to the judge**
- C) Everything Lawyer did was wrong**
- D) Nothing Lawyer did was wrong**



Communications with Judicial Officials (2019 FEO 4)

Opinion discusses the permissibility of various types of communications between lawyers and judges.



2019 FEO 4 – COMMUNICATIONS WITH JUDICIAL OFFICIALS



- Multiple rounds of publication; 3+ years of discussion
- Serves as a “reset” for ethics advice on ex parte communications
- Seven prior FEOs were withdrawn upon this opinion’s adoption
 - FEOs were based on old/outdated version of Rule 3.5
 - Some FEOs read exceptions into the rules that were inconsistent with the current version of Rule 3.5
- Opinion focuses on informal communications between litigants and judges (e.g., email, text messages, etc.)
 - Opinion does not address clearly permissible communications, such as formal pleadings or argument during public proceedings
 - Opinion also does not address clearly prohibited communications, such as spontaneous, in-person communication between one litigant and the judge about the merits of a case
- Lawyer’s professional responsibility re: ex parte communications applies equally when dealing with opposing counsel or a pro se opposing party





2019 FEO 4 – COMMUNICATIONS WITH JUDICIAL OFFICIALS

- (Inquiries #1-3)
- Direct, exclusive communication between counsel and a presiding judge about a case – including administrative issues – remains a prohibited ex parte communication unless authorized by law or court order.
 - Violates Rule 3.5(a)(3)
- Opposing party/counsel **MUST** be copied on any informal communication with judge about the pending case.





2019 FEO 4 – COMMUNICATIONS WITH JUDICIAL OFFICIALS

- (Inquiries #4 & 5)
- Even if opposing counsel is copied, lawyer may NOT send substantive argument about a pending matter to the presiding judge via informal methods of communication unless authorized by law or court order (court order can include direct instruction/request from the court).
 - Violates Rule 8.4(d) (conduct that is prejudicial to the administration of justice)
- Lawyers can submit substantive argument, proposed orders, etc., to the court via informal methods if invited by the court.



2019 FEO 4 – COMMUNICATIONS WITH JUDICIAL OFFICIALS



Summary:

- Direct and exclusive communication between a lawyer and a judge about a pending matter (unless authorized by law) = ex parte
 - Cure by ensuring opposing counsel/party is copied on communication
- No “administrative issue” exception
- Even if the communication is not ex parte, sending unsolicited substantive argument to the court via informal medium = prejudicial to the administration of justice
- ****Judges can determine what is/is not appropriate****
 - Standing order at outset of case; instruction while case is pending; local rule; etc.



CANONS 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:

- **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



COMMON SCENARIOS

- 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



UNSOLICITED COMMUNICATIONS (AND WHAT TO DO ABOUT THEM)

- Canon 3A(4) specifically says “knowingly initiate [or] consider”
- Canon 3B Administrative Duties – delegation of disclosure to support staff
- When does Canon 3C (Disqualification) kick in?
 - Subjective AND Objective analysis
 - Keep in mind – duty to preside over court as elected/appointed to do & duty to keep the dockets moving (Canon 3A(5))
 - Do not let disgruntled litigants bully you off of cases (FAO 2014-02).
- Duties when unsolicited communications come from litigants vs. court officials
 - Discipline under inherent authority; duty for “appropriate disciplinary measures” under Canon 3B(2) & (3)



PRO SE & TROUBLESOME LITIGANTS

- Canon 3A(4) applies equally to all parties
- Be mindful of how you communicate with all litigants
 - Set the standard early
 - Enforcement
 - Caution: providing legal advice vs. instructions
 - *Perception*



SCENARIOS



SCENARIO #1

- Lawyer gets in a car accident on the way to court; has a hearing scheduled for 10am
- Lawyer sends a text message directly to the presiding judge to inform her about the accident and requests the court hold the case open until the afternoon
- What should Lawyer have done?
 - If insisting on communicating directly with the judge, copy opposing counsel
 - Send through clerk/TCA, ask to inform both judge and opposing counsel



SCENARIO #2

- Lawyer is law school classmates with the presiding judge in a pending case.
- Lawyer stops by judge's chambers to catch up; at the end of the conversation Lawyer mentions that he may be filing a motion to continue tomorrow and asks if the judge will be available next week for a rescheduled hearing.
- What should Lawyer have done?
 - File the motion in the ordinary course
 - Inquire about judge's availability with the clerk/TCA
 - If insisting on communicating directly with the judge, copy opposing counsel (avoid this if possible)
- What should Judge do?
 - Discontinue conversation



SCENARIO #3

- Lawyer is fired up about tomorrow's hearing; sends a text message to the presiding judge (with opposing counsel copied) detailing the reason Lawyer's motion to dismiss must be granted tomorrow.
- What should Lawyer have done?
 - Refrain from offering unsolicited argument via informal medium
 - *Avoiding the ex parte prohibition does not make the communication permissible
 - Argue the motion in court as expected/provided
- What should Judge do?
 - Not respond; perhaps send a reply message to not send such communication



SCENARIO #4

- Judge ran out of time to hear arguments today and tells the parties to submit a summation of their arguments on a pending motion in limine via email, with opposing counsel copied on the email.
- What should lawyers do?
 - Comply with Judge's request. Judge has avoided any ex parte concerns, and Judge has granted permission to the parties to submit substantive argument via informal communication medium.



SCENARIO #5

- Judge is in the middle of a week-long trial. Defendant took the stand in the morning and expects to remain on the stand for the rest of the day.
- During the lunch break, Bailiff approaches Judge and states that Bailiff overheard Defendant talking out in the hall about his testimony, and it was clear to Bailiff that Defendant has lied and plans to continuing lying on the stand.
- What should Judge do?



SCENARIO #6

- Judge is presiding over a trial involving Lawyer A and Lawyer B.
- Judge is “friends” with Lawyer A on a social media platform. Lawyer B does not have an account on social media platform.
- After court concludes for the day and while the trial remains pending, Judge gets on social media and sees Lawyer A has recently posted about the pending trial, commenting that he hopes the trial will conclude tomorrow because he is exhausted and he has a flight to catch that night.
- Judge responds to Lawyer A’s post on social media with the comment, “You will be done tomorrow – guaranteed.”
- Lawyer A subsequently responds to Judge’s comment on social media, “I have a wise judge. Your assistance is appreciated!”
- Did Judge or Lawyer A do anything wrong? Would the answer be different if Lawyer B had an account on social media platform?



TAKEAWAYS

- Purpose is the same: to ensure integrity of judicial system/administration of justice, offer equal and fair access to courts
- Applies equally to all parties
 - Represented or pro se
- Unsolicited, substantive communications are problematic
 - Judge can take corrective action
- Judge can set the standard or rules for communication in a proceeding
- Communication directed to support staff is not ex parte unless intended to be sent to/answered by judge
 - Cannot circumvent ex parte prohibitions by sending it through another person
- **[Judges should be proactive]**





Please don't hesitate to contact us!

Brittany Pinkham, bpm@coa.nccourts.org

(919) 831-3633

Brian Oten, boten@ncbar.gov

(919) 719-9226

ON A DIFFERENT, DISCIPLINE-Y NOTE

- Attorney disciplinary proceedings can be initiated by:
 - The North Carolina State Bar; OR
 - Judges (district or superior court).
- If you are experiencing a difficult attorney and you are considering initiating disciplinary proceedings against that attorney, **call the State Bar for guidance** to ensure you take the steps necessary to effectively initiate a disciplinary proceeding.
 - REMEMBER: you can appoint the State Bar to prosecute the disciplinary matter.
- Contact: Carmen Bannon (919-828-4620)



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