

Ex Parte

Superior Court Judges
Fall Conference

Chapel Hill, North Carolina

Paul Ross
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NC CJC 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 communication concerning a pending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before a judge.

NC State Bar RPC Rule 3.5(a)(3)

(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;

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“Opinion rules that a lawyer may not communicate *ex parte* with a judge in reliance upon the communication being ‘permitted by law’ unless there is a statute or case law specifically and clearly authorizing such communications or proper notice is given to the adverse party or counsel.”

Defined

“... any communication between a judge and another person about a case made without allowing all parties to that case the opportunity to be heard.”

Cheryl Howell

July 16, 2008

Legal Issue

In any every situation where an *ex parte* communication is imminent or has occurred, the judge must make a legal determination as to whether a statute or case law specifically authorizes the communication

Ethical Analysis Step 1

Is the *ex parte* communication authorized by law?

Yes – Analysis ends

No – Continue analysis

Ethical Analysis Step 2

Have you entered an order/ruling?

Yes – vacate, notice, hearing

No – notice, hearing if needed

Continue analysis

Ethical Analysis Step 3a

Has your ability to remain impartial been compromised?

Subjectively – Do you believe you are now biased?

Yes – Disqualify (analysis ends)

No – Continue analysis

Ethical Analysis Step 3b

Objectively – Is your impartiality now reasonably questioned by others? Is there a motion to disqualify?

Yes – Disqualify or allow another judge to rule on the motion
(continue analysis)

No – Continue analysis

Ethical Analysis Step 4

Should disciplinary action be taken against the person who initiated the *ex parte* communication?

Yes – Continue analysis

No – Analysis ends

Ethical Analysis Step 5a

Has your ability to remain impartial been compromised?

Subjectively – Do you feel you are now biased?

Yes – Disqualify (analysis ends)

No – Continue analysis

Ethical Analysis Step 5b

Objectively – Is your impartiality now reasonably questioned by others? Is there a motion to disqualify?

Yes – Disqualify or allow another judge to rule on the motion
(analysis ends)

No – Analysis ends