

Ex Parte Communication
Panel Discussion
June 2018

1. You presided over a custody case and entered an order granting mother primary physical custody. The order provided that dad would have visitation every other weekend and extensive time with the children in the summer. Eighteen months later, you receive a packet in the mail and do not recognize the name on the return address. Inside there is lengthy letter addressed to you from mom, explaining to you that father's new girlfriend has a substance abuse problem and has been treating the children badly when they are with dad. She asks that you change the custody order to restrict dad's time with the children and to order that the girlfriend stay away from the children. The package also includes copies of photos printed from the girlfriend's Facebook page.
 - i. What do you do?
 - ii. The next day, you answer your office phone. It is mom and she wants to talk to you about the package of information she mailed to you. What do you say?
 - iii. Eventually mom's request for modification comes on for hearing in front of you. Dad has a lawyer but mom is representing herself. Dad's attorney asks to approach the bench and you allow it. He comes forward and begins to talk to you about an evidentiary issue. Mom remains at her table. What do you do?
 - iv. At the conclusion of the hearing, you ask the attorney for dad to draft the order resolving the motion to modify. You receive the proposed order by email, with no indication that mom received a copy. What do you do?

2. Attorney A and Attorney B argue a motion before you. Following the motion hearing, you delay ruling on the motion until a later date or take the arguments under advisement. While awaiting your decision, Attorney A finds additional authority to support his position. Attorney A believes the newly discovered authority is directly on point and may be decisive on the issue argued. Attorney A would like to provide you with the case law and accompanying argument in support of his client's position. What do you do?

3. An attorney representing DSS in a juvenile abuse, neglect and dependency case approaches you in chambers and asks you to sign an order directing a hospital to turn release all medical records regarding the child that is the subject to the juvenile case. What do you say to the attorney?

4. You are in your office behind the courtroom getting ready for a criminal court session. Your door is open and the hallway is full of attorneys and law enforcement officers. The officers are talking rather loudly about several of the defendants in cases scheduled for the day's court session. What, if anything, do you do?

5. On a Monday morning before court, your judicial assistant tells you that her next-door neighbor received a DWI over the weekend. She also tells you that she is very glad "he finally got caught" because he has been drinking heavily for years and she had been worried he would hurt someone while driving through the neighborhood. You go into court and her neighbor's case is on your calendar. What do you do?

6. You are social friends with a local defense attorney. She approaches you in the courthouse one day and asks you to order a bond reduction for one of her clients. She assures you the DA has no objection. Do you sign the order?

7. You are preparing to try a civil case. One of your fellow judges stops by your office to talk before court. When you tell the judge about the case you are getting ready to start, the judge tells you "watch out for that litigant. I'm sure he lied to me during his child support case." What do you do?

8. An attorney comes to your chambers and ask you to sign a show cause order in a custody case. The lawyer hands you the order to sign while telling you details about how the alleged contemnor violated the terms of your custody order. What do you do?

West's North Carolina General Statutes Annotated

North Carolina Rules of Court

Code of Judicial Conduct

Code of Jud.Conduct, Canon 3

Canon 3. A Judge Should Perform the Duties of the Judge's Office Impartially and Diligently

Currentness

The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

A. Adjudicative responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before the judge.

(3) A judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity, and should require similar conduct of lawyers, and of the judge's staff, court officials and others subject to the judge's direction and control.

(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.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law and should encourage similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties; from explaining for public information the proceedings

of the Court; from addressing or discussing previously issued judicial decisions when serving as faculty or otherwise participating in educational courses or programs; or from addressing educational, religious, charitable, fraternal, political, or civic organizations.

(7) A judge should exercise discretion with regard to permitting broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during civil or criminal sessions of court or recesses between sessions, pursuant to the provisions of [Rule 15 of the General Rules of Practice for the Superior and District Courts](#).

B. Administrative responsibilities.

(1) A judge should diligently discharge the judge's administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require the judge's staff and court officials subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. A judge should exercise the judge's power of appointment only on the basis of merit, avoiding nepotism and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

C. Disqualification.

(1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:

(a) The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) The judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) The judge knows that he/she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself/herself about the judge's personal and fiduciary financial interests, and make a reasonable effort to inform himself/herself about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) The degree of relationship is calculated according to the civil law system;

(b) "Fiduciary" includes such relationships as executor, administrator, trustee and guardian;

(c) "Financial interest" means ownership of a substantial legal or equitable interest (*i.e.*, an interest that would be significantly affected in value by the outcome of the subject legal proceeding), or a relationship as director or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, cultural, historical, religious, charitable, fraternal or civic organization is not a "financial interest" in securities held by the organization.

D. Remittal of disqualification.

Nothing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge's own initiative. Also, a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's potential disqualification. If, based on such disclosure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree in writing that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all lawyers, shall be incorporated in the record of the proceeding. For purposes of this section, *pro se* parties shall be considered lawyers.

Credits

[Canon 3A(7) suspended on an experimental basis effective October 18, 1982; amended effective June 13, 1990; Canon 3A(6) amended effective September 1, 1997. Amended April 3, 2003; amended effective January 31, 2006.]

Code of Jud. Conduct, Canon 3, NC R CJC Canon 3
Current with amendments received through April 1, 2018

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NC Rules of Professional Conduct
Rule 3.5 Impartiality and Decorum of the Tribunal
As amended April 5, 2018

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

- (1) seek to influence a judge, juror, member of the jury venire, or other official by means prohibited by law;
- (2) communicate *ex parte* with a juror or member of the jury venire except as permitted by law;
- (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;**
- (4) engage in conduct intended to disrupt a tribunal, including:
 - (A) failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of the intent not to comply;
 - (B) engaging in undignified or discourteous conduct that is degrading to a tribunal; or
 - (C) intentionally or habitually violating any established rule of procedure or evidence; or
- (5) communicate with a juror or prospective juror after discharge of the jury if:
 - (A) the communication is prohibited by law or court order;
 - (B) the juror has made known to the lawyer a desire not to communicate; or
 - (C) the communication involves misrepresentation, coercion, duress or harassment.

(b) All restrictions imposed by this rule also apply to communications with, or investigations of, family members of a juror or of a member of the jury venire.

(c) A lawyer shall reveal promptly to the court improper conduct by a juror or a member of the jury venire, and improper conduct by another person toward a juror, a member of the jury venire, or the family members of a juror or of a member of the jury venire.

(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.**

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the North Carolina Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of provisions. This rule also prohibits gifts of substantial value to judges or other officials of a tribunal and stating or implying an ability to influence improperly a public official.

[2]

[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. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if unrepresented. Ordinarily, an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel or, if there is none, to the opposing party. A lawyer should not condone or lend himself or herself to private importunities by another with a judge or hearing officer on behalf of the lawyer or the client.

[9]

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; March 5, 2015; April 5, 2018

Statutes authorizing *ex parte* communications in District Court

Statutes - general

1A-1, Rule 65(b) Temporary restraining order may be obtained without notice to adverse party upon certain conditions.

7A-39 Cancellation of court in catastrophic conditions. States that nothing in section prevents a judge from exercising any in chambers or ex parte jurisdiction conferred by law during emergency or catastrophic conditions. Seems to apply to all courts.

Statutes – explicit (mostly)

7A-216 Small claims. Judge, magistrate, or clerk may, on oral or written ex parte motion of defendant, or on own motion, order plaintiff to perfect statement of claim before proceeding.

7B-303(d) Abuse and neglect complaints; if director of social services believes juvenile in need of immediate protection, director may seek ex parte order from the court.

7B-323(a1) Court to determine at ex parte hearing whether director made diligent efforts to locate individual for notice.

7B-502(a) Court may issue order for nonsecure custody ex parte.

7B-1003(c) Pending appeal, if court enters ex parte order modifying original order, court shall give notice to interested parties.

7B-1004 After appeal, if court enters ex parte order modifying original order, court shall give notice to interested parties.

7B-2606 After appeal, if court enters ex parte order modifying original order, court shall give notice to interested parties.

50-13.5(d)(3) Temporary order for custody which changes living arrangements may only be made ex parte upon finding that child is exposed to substantial risk of bodily injury or sexual abuse, or substantial risk of abduction or removal from the state.

50B-2 Court may issue ex parte DVPO.

50B-3.1 Regarding existence, surrender of weapons as part of ex parte proceedings.

50C-6(a), (e) Temporary civil no-contact order may be issued ex parte.

95-265 Temporary civil no-contact order may be issued ex parte (Chapter 95, Dept of Labor, Article 23, Workplace Violence Prevention).

- 108A-106(d) Court may issue immediate emergency order ex parte (Chapter 108A, Social Services, Article 6, Protection of Abused, Neglected, or Exploited Disabled Adult Act).
- 108A-117(c) Court may issue ex parte order granting delay of customer notice upon application for subpoena by investigating entity (Chp. 108A, Social Services, Article 7, Protection of Disabled and Older Adults from Financial Exploitation).

Cases

State v. Ballard, 333 N.C. 515 (1993)(criminal defendant is entitled to ex parte hearing on request for appointment of a psychiatric expert).

State v. Bates, 333 NC 523 (1993)(criminal defendant has right to ex parte hearing on request for funds to hire a forensic investigator).

State v. Gray, 347 N.C. 143 (1997) – overruled on other grounds by *State v. Long*, 354 N.C. 534 (2001)(prosecutor entitled to request ex parte order for internal revenue records).

But see

State v. Phipps, 331 N.C. 427 (1992)(indigent defendant is not entitled to an ex parte hearing on motion for expert assistance on fingerprint identification).

See also

State v. White, 340 N.C. 264, 277 (1995)(an indigent defendant's request for an investigator is not entitled to an ex parte hearing because an investigator is more analogous to a fingerprint expert than a psychiatric expert).

State v. Garner, 136 N.C. App. 1, 8-10 (1999)(court discusses Ballard, Phipps, and White, and concludes that defendant was not prejudiced by trial court's denial of an ex parte hearing for an eyewitness identification expert).

State v. Prevatte, 356 N.C. 178 (2002)(court determined no error in denial of defendant's request for ex parte hearing on his motion for new counsel).