



Ex Parte Communications

District Court judges summer conference 2018

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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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
- Communicating with parties or witnesses
- Communicating with *pro se* parties
- 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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Rule 3.5 NC Rules of Professional Conduct

Before April 5, 2018

- A lawyer shall not:
 - (3) communicate *ex parte* with a judge or other official except:
 - In the course of official proceedings;
 - In writing, if a copy of the writing is furnished simultaneously to the opposing party;
 - Orally, upon adequate notice to opposing party; or
 - As otherwise permitted by law

After April 5, 2018

- Lawyer representing a party in a matter pending before a tribunal shall not:
 - 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

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.

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

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