

Ex Parte (generally)
In Drug Court (specifically)
and Drug Court Support

District Court Judges Summer
Conference

Wilmington, North Carolina

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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;

NC St Bar 2001 FEO 15

“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

Ex Parte & Specialty Courts

The NC CJC does not specifically address *ex parte* communication in the context of specialty courts.

2007 ABA Model CJC Rule 2.9, Comment [4]

“A judge may initiate, permit, or consider *ex parte* communications expressly authorized by law, such as when serving on therapeutic or problem solving courts, mental health courts or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.”

NY ACJE Opinion 04-88

- Judge may engage in *ex parte* communications with court personnel but must give notice of content and nature
- Judge may consider *ex parte* communication at staffing and court appearances from drug court team members provided consent given

NC Advice

Ex parte communication in the context of drug treatment court is permitted when authorized by statute or case law.

What about drug court
funding, incentives and
support?

NC CJC Canon 4C

A judge may appear at a public hearing before an executive or legislative body or official with respect to activities permitted under Canon 4A or other provision of this Code, and the judge may otherwise consult with an executive or legislative body or official.

CJC Canon 4 Activities

- Cultural or Historical activities
- Legal system
- Economic system
- Educational system
- Governmental system
- Administration of Justice

NC CJC Canon 4C

... A judge may not actively assist such an organization in raising funds but may be listed as a contributor on a fund-raising invitation. A judge may make recommendations to public and private fund-granting agencies regarding activities or projects undertaken by such an organization.

Funding

- Judges may appear at public hearings before, and otherwise consult with, an executive or legislative body or official regarding drug court operations and funding.
- Judges may make recommendations to public and private fund-granting agencies regarding drug court operations and funding.

Incentives

Judges may not solicit donations for prizes and incentives from individuals or organizations. The Judicial Standards Commission recognizes a distinction between funding required to operate the court and rewards given to defendants who successfully complete the program.

Public Support

Publicly speak and write articles for publication explaining drug court operations, extolling benefits provided to individual defendants, the criminal justice system and the community, and lamenting cuts to the program due to lost funding. However, judges may not ask for donations or funding.

Support Organizations

A judge may serve as an officer or director of organizations that provide services to the courts as per Canons 4C and 5B(2) of the CJC, provided such service does not interfere with the performance of the judge's judicial duties nor reflect adversely upon your impartiality.

Disqualification

If members, volunteers or employees, of the organization ever appear before the judge as a witness or advocate, the judge's disqualification would be required. Should this become anything more than an isolated occurrence, then the judge should terminate the association with the organization.

Grants for Agencies

Judges may provide a letter of recommendation to be included with a grant application to a public or private fund-granting agency. The letter may not specifically request funding, and is restricted to the legal, economic, educational, or governmental system or the administration of justice.

Fundraising

Judges may not:

- solicit memberships
- solicit monetary donations
- solicit gifts in kind
- solicit volunteering of time or service
- require donations in sentences, to avoid contempt, or to get a cell phone returned