Resisting *Ex Parte* Temptation

Cynthia Gray

The Model Code of Judicial Conduct provides: "A judge shall not initiate, permit, or consider *ex parte* communications . . . concerning a pending or impending matter."[1] Despite the Latin term, the prohibition is pretty straightforward, based in a common-sense understanding of fair play that gives all litigants the same opportunities to persuade the decision maker, with no private earwigging. The concept is so fundamental that a judge's impartiality may be questioned, and their decision may be reversed, based on *ex parte* communications.

The simplicity of the rule notwithstanding, judges violate it and are sanctioned for those communications every year. Moreover, while the prototype for an *ex parte* communication may be someone accosting a judge at a gas station or in the courthouse—and those scenarios do happen[2]—in numerous cases, it is the judge who starts the conversation.[3]

Those judges may be forgetting the breadth of the proscription on *ex parte* communications, which reflects the significance of the principles involved. For example, the rule does not include the term "merits" and forbids judges from initiating and permitting *ex parte* communications, not just considering them. Thus, the prohibition is not limited to conversations about the substance of a case and includes seemingly innocuous exchanges that judges may feel will not affect their decisions. The ban continues even after a case is no longer pending before a judge "through any appellate process until final disposition."[4] As a corollary to the *ex parte* rule, judges cannot independently investigate the facts in a case, including on-line and through social media.[5]

Further, a judge's motivation for having a tête-à-tête about a case is irrelevant. All *ex parte* communications are proscribed even if the judge does not intend to be unfair or is not acting out of bias but is just trying to facilitate proceedings, for example.

In a West Virginia case,[6] the judge called the president of a corporate party to explain the case's background and status and to encourage him to attend the next hearing because the corporation's attorney was inexperienced. However, the president interpreted the call as an attempt by the judge to get the corporation to change its litigation strategy.

In the discipline proceeding, the judge argued that it is a common practice for judges to contact parties to speed things along. Rejecting that excuse, the Supreme Court of Appeals warned that,

Footnotes

1. Model Code of Jud. Conduct r. 2.9(A) (Am. Bar Ass'n 2007).
2. In the Matter of James P. Curran, State Comm'n on Jud. Conduct (Nov. 14, 2017), https://tinyurl.com/3zhe9xsr (after arraigning a defendant and entering an order of protection, a judge was approached by a man at a gas station and received an anonymous voicemail message alleging that the defendant had violated the order of protection; the judge did not disclose the communications and relied on the information in the proceedings); Public Admonition of Huizenga, Ind. Comm'n on Jud. Qualifications (June 22, 2009) https://tinyurl.com/2337wpu2 (a judge assumed the role of the prosecutor to negotiate a resolution in a case after a defendant approached the judge in his office about tickets she had received).
3. *See, e.g.*, *In re* Cummings, 292 P.3d 187 (Alaska 2013) (while alone in the courtroom with an assistant district attorney and a clerk, a judge advised the attorney to read the court of appeals' memorandum opinions issued that day "because they involved matters [he] was currently litigating"); Public Admonishment of Caskey, Cal. Comm'n on Jud. Performance (July 6, 1998), https://tinyurl.com/2py77xw4 (a judge sent an *ex parte* email to an attorney appearing in a juvenile dependency case before him soliciting advice on how to handle the matter); Inquiry Concerning Mills, Ca. Comm'n on Jud. Performance (August 28, 2018), https://tinyurl.com/379y9xak (as the jury in a driving-under-the-influence case was deliberating, a judge said to the deputy district attorney, "Do you want to know what I would have done?" and talked to him *ex parte* about an argument countering a defense theory); *In re* Filip, 923 N.W.2d 282 (Mich. 2019) (a judge sent *ex parte* emails to prosecutors citing cases relevant to issues in two cases over which he was presiding); Commission on Judicial Performance v. Bozeman, 302 So.3d 1217 (Miss. 2020) (in a civil case, a judge called another judge about the testimony given at an initial hearing and called a friend who was a mechanic to ask about the parties' arguments); In the Matter of Reagan, Neb. Comm'n on Jud. Qualifications (June 2, 2003), https://tinyurl.com/ pxhrhjcf (after the court of appeals reversed an order entered by a judge denying a defendant's request for post-conviction relief, the judge telephoned the assistant attorney general assigned to the case to express his concern about the decision and sent a letter to the assistant attorney general, without copying the defendant's counsel, elaborating on his concerns); Disciplinary Counsel v. Stuard, 901 N.E.2d 788 (Ohio 2009) (in *ex parte* communications, a judge gave his notes to the prosecution with instructions to draft the sentencing order in a capital murder case); Public Admonition of Zander and Order of Additional Education, Tex. State Comm'n on Jud. Conduct (August 12, 2021), https://tinyurl.com/45zt3d4b (after learning that the county attorney wanted to dismiss a traffic matter, a judge called the law enforcement officer who issued the citation and asked if he wanted the case dismissed; when the office said that he did not, the judge directed his clerk to tell the county attorney, "The Judge just thought you would want to defend the officer."); Judicial Inquiry and Review Commission v. Shull, 651 S.E.2d 648 (Va. 2007) (during a recess in a hearing regarding a protective order, a judge placed an *ex parte* call to the hospital where the petitioner alleged she had been treated); *In re* Starcher, 456 S.E.2d 202 (West Virginia 1995) (a judge called an assistant prosecuting attorney to advise them to have some supporters present in the courtroom during closing argument in an ongoing sexual assault trial, to use the term "serial rapist" frequently, and to be more emotional before the jury).
4. Model Code of Jud. Conduct, terminology, pending (Am. Bar Ass'n 2007).
5. Model Code of Jud. Conduct r. 2.9(C) cmt. 6 (Am. Bar Ass'n 2007).
6. *In re* Kaufman, 416 S.E.2d 480 (W. Va. 1992).

regardless how well-intentioned a judge may be, the "one-sided nature of *ex parte* communications raises questions about motivations and impartiality that can never be resolved to everyone's satisfaction," as evidenced in that case.[7]

Further, the code's general-appearance-of-impropriety standard[8] means that a one-on-one chat that looks like an *ex parte* communication is inappropriate even if there is in fact no actual conversation about a case. A discipline decision from California illustrates what the appearance of *ex parte* communications can look like.[9] A judge admitted that he often visited with two attorneys in his chambers on days when they were appearing before him, but he denied that they discussed cases pending before him, and the California Supreme Court agreed that had not been proven. Nevertheless, the Court concluded that the judge's practice created the appearance of *ex parte* communications, still violating the code of judicial conduct.[10]

EXCEPTIONS DO NOT SWALLOW THE RULE

Some violations probably can be traced to judges mistakenly exaggerating the exceptions to the rule, which are narrow, limited to specific circumstances, and often temporary.

For example, there is an exception that allows a judge to obtain the advice of an expert—but only in writing, only an expert in the law, only if the judge gives the parties prior notice of the expert and the subject of the advice, and only if the judge provides "a reasonable opportunity to object and respond to the notice and to the advice received."[11] A judge may consult *ex parte* with other judges and with court staff and officials who help the judge with adjudicative duties, but only if the judge avoids "receiving factual information that is not part of the record" and avoids "abrogate[ing] the responsibility" to make their own decision.[12] There is an exception for separate settlement conferences but only "with the consent of the parties."[13]

Ex parte communications "authorized by law" are permitted by the rule,[14] but "law" does not include custom, and the authorization must be express and the law strictly followed to prevent abuse. For example, an Indiana court rule allows a judge to grant an emergency *ex parte* request for a temporary restraining order without notice to the other party but only if the petitioner shows that waiting to hear from the other party will result in immediate and irreparable harm, certifies in writing that they tried to give notice, and explains why notice should not be required. If the judge grants *ex parte* relief without "meticulous attention" to those requirements, the judge violates the code and can be disciplined for that failure.[15]

The exception most susceptible to an inappropriately broad interpretation may be the one "for scheduling, administrative, or emergency purposes."[16] After only a quick read or based on memory, a judge may not recall that the exception has many prerequisites and applies only if circumstances necessitate that other parties be left out, only if the communication is not about substantive matters, only if "the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage," and only until the judge promptly notifies the excluded parties of the substance of the exchange and gives them an opportunity to respond.

A federal judicial discipline decision rejected a judge's reliance on the administrative exception to excuse his frequent *ex parte* contacts with the U.S. Attorney's Office in his district about criminal matters.[17] Having worked in that office for 24 years, the judge was friendly with many people there and communicated with them about warrant requests, draft plea agreements, jury instructions, docketing issues, and scheduling matters without including defense counsel. He also criticized individual Assistant U.S. Attorneys *ex parte*. For example, in an email to a paralegal in the office, the judge complained that one of the prosecutors in the case on trial before him was "entirely inexperienced" and was repeating "the bull***t" from the defendant's testimony and turning a "slam-dunk" case into a "60-40" one for the defendant.[18] After a misunderstanding in a pretrial conference in a second case, he reassured an Assistant U.S. Attorney in an *ex parte* email: "You're doing fine. Let's get this thing done." The judge also occasionally communicated *ex parte* with the office after the case was no longer before him, for example, congratulating federal prosecutors when they prevailed on appeal in cases over which he had presided.

Most of the communications were by email, but some were in person or over the phone. In the discipline proceeding, the special investigative committee appointed by the chief judge noted that there was no evidence that the *ex parte* communications affected any of the judge's rulings, benefited any party, or, with a few exceptions, were on the merits of the cases.

The judge "admitted that some of his communications were flatly inappropriate and others were unwise." However, he initially argued that the exchanges about scheduling and other minor or ministerial matters were not "objectionable," were allowed "'for the efficient operation of the court,'" and were part of the courthouse "culture."

7. *Id.* at 485. The Court publicly admonished the judge.
8. Model Code of Jud. Conduct Canon 1 (Am. Bar Ass'n 2007).
9. Kennick v. Commission on Judicial Performance, 787 P.2d 591 (Cal. 1990).
10. *Id.* at 609–10. The Court removed the judge for this and other misconduct.
11. Model Code of Jud. Conduct r. 2.9(A)(2) (Am. Bar Ass'n 2007).
12. Model Code of Jud. Conduct r. 2.9(A)(3) (Am. Bar Ass'n 2007).
13. Model Code of Jud. Conduct r. 2.9(A)(4) (Am. Bar Ass'n 2007).
14. Model Code of Jud. Conduct r. 2.9(A)(5) (Am. Bar Ass'n 2007).
15. Indiana Advisory Opinion 2001-1, Ind. Comm'n on Jud. Qualifications, https://tinyurl.com/yert5hnd (last visited Oct. 20, 2021). *See*, e.g., *In re* Jacobi, 715 N.E.2d 873 (Ind. 1999) (judge was suspended for three days without pay for granting an *ex parte* temporary restraining order in a dispute between several municipalities about a board appointment even though the petitioner had not filed the required certifications); Public Admonition of Johnston, Ind. Comm'n on Jud. Qualifications (July 5, 2012) https://tinyurl.com/ rnvxbrxa (judge was publicly admonished for granting an *ex parte* motion for change of custody filed by maternal grandparents without ensuring that the father had been given notice or that there was an emergency).
16. Model Code of Jud. Conduct r. 2.9(A)(1) (Am. Bar Ass'n 2007).
17. *In re* Bruce, U.S. Ct. of Appeals for the 7th Cir.: Special Comm. (May 14, 2019) https://tinyurl.com/c9tkd43m.
18. The defense motion for a new trial based on the judge's *ex parte* communications in that case was granted. United States v. Nixon, 480 F. Supp. 3d 859 (C.D. Ill. 2020).

Noting that the code allows *ex parte* communications for scheduling "when circumstances require it," the special committee emphasized that, "'when circumstances require it' is key. As Judge Bruce now concedes, the majority of his *ex parte* communications did not 'require' the exclusion of defense counsel; they were often a matter of simple convenience, happenstance, and habit." Noting that the judge had not explained why he could not have included defense counsel in his "routine scheduling and ministerial discussions" with the prosecution, the committee stated that the communications violated the code even if the practice was attributable to courthouse culture.[19]

The discipline cases illustrate how easy it is for a judge to slip into *ex parte* communications. Judges must remain mindful that every communication about a case that does not include all interested parties or their attorneys is presumptively prohibited and that assumption can only be rebutted by careful analysis.

Since October 1990, Cynthia Gray has been director of the Center for Judicial Ethics, a national clearinghouse for information about judicial ethics and discipline that is part of the National Center for State Courts. She summarizes recent cases and advisory opinions, answers requests for information about judicial conduct, writes a weekly blog (at www.ncscjudicialethicsblog.org), writes and edits the Judicial Conduct Reporter*, and organizes the biennial National College on Judicial Conduct and Ethics. She has made numerous presentations at judicial-education programs and written numerous articles and publications on judicial-ethics topics. A 1980 graduate of the Northwestern University School of Law, Gray clerked for Judge Hubert L. Will of the United States District Court of the Northern District of Illinois for two years and was a litigation attorney in two private law firms for eight years.*

19. Based on the special committee report, the Judicial Council publicly admonished the judge and ordered that no matters involving the U.S. Attorney's Office be assigned to him for several months, that he watch a training video, and that he read excerpts of the Code of Conduct for U.S. Judges.

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