Resisting Ex Parte Temptation

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The Model Code of Judicial Conduct provides: “A judge shall not initiate, permit, or consider ex parte communications. . . concerning a pending or impending matter.” 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 earwiggling. 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—in numerous cases, it is the judge who starts the conversation.

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.” As a corollary to the ex parte rule, judges cannot independently investigate the facts in a case, including on-line and through social media.

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, 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,
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. Further, the code’s general-appearance-of-impropriety standard 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. 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.

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.” 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.” There is an exception for separate settlement conferences but only “with the consent of the parties.”

Ex parte communications “authorized by law” are permitted by the rule, 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.

The exception most susceptible to an inappropriately broad interpretation may be the one “for scheduling, administrative, or emergency purposes.” 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. 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. 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.”

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7. Id. at 485. The Court publicly admonished the judge.
10. Id. at 609–10. The Court removed the judge for this and other misconduct.
15. Indiana Advisory Opinion 2001-1, Ind. Comm’n on Jud. Qualifications, https://tinyurl.com/yert3nd (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/rmxhbrxa (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).
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.

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.