

RESOLUTION 09-01-2007

DIGEST

Judicial Ethics: Ex Parte Communications

Amends Code of Judicial Ethics Canon 3(B) to require courts to disclose written *ex parte* communications by providing all interested parties with copies of correspondence.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of the California Bar Association recommends that the Judicial Council amend the Code of Judicial Ethics, Canon 3B, to read as follows:

- 1 Canon 3(B)
- 2 (1) A judge shall hear and decide all matters assigned to the judge except those in
- 3 which he or she is disqualified.
- 4 (2) A judge shall be faithful to the law* regardless of partisan interests, public
- 5 clamor, or fear of criticism, and shall maintain professional competence in the law.*
- 6 (3) A judge shall require* order and decorum in proceedings before the judge.
- 7 (4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses,
- 8 lawyers, and others with whom the judge deals in an official capacity, and shall require*
- 9 similar conduct of lawyers and of all court staff and personnel* under the judge's direction
- 10 and control.
- 11 (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not,
- 12 in the performance of judicial duties, engage in speech, gestures, or other conduct that would
- 13 reasonably be perceived as (1) bias or prejudice, including but not limited to bias or
- 14 prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation,
- 15 or socioeconomic status, or (2) sexual harassment.
- 16 (6) A judge shall require* lawyers in proceedings before the judge to refrain from
- 17 manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national
- 18 origin, disability, age, sexual orientation, or socioeconomic status against parties, witnesses,
- 19 counsel, or others. This Canon does not preclude legitimate advocacy when race, sex,
- 20 religion, national origin, disability, age, sexual orientation, socioeconomic status or other
- 21 similar factors are issues in the proceeding.
- 22 (7) A judge shall accord to every person who has a legal interest in a proceeding, or
- 23 that person's lawyer, full right to be heard according to law.* A judge shall not initiate,
- 24 permit, or consider *ex parte* communications, or consider other communications made to the
- 25 judge outside the presence of the parties concerning a pending or impending proceeding,
- 26 except as follows:
- 27 (a) A judge may obtain the advice of a disinterested expert on the law* applicable to
- 28 a proceeding before the judge if the judge gives notice to the parties of the person consulted
- 29 and the substance of the advice, and affords the parties reasonable opportunity to respond.
- 30 (b) A judge may consult with court personnel* whose function is to aid the judge in
- 31 carrying out the judge's adjudicative responsibilities or with other judges.
- 32 (c) A judge may, with the consent of the parties, confer separately with the parties
- 33 and their lawyers in an effort to mediate or settle matters pending before the judge.

34 (d) A judge may initiate ex parte communications, where circumstances require, for
35 scheduling, administrative purposes, or emergencies that do not deal with substantive
36 matters provided:

37 (i) the judge reasonably believes that no party will gain a procedural or tactical
38 advantage as a result of the ex parte communication, and

39 (ii) the judge makes provision promptly to notify all other parties of the substance of
40 the ex parte communication and allows an opportunity to respond.

41 (e) A judge may initiate or consider any written ex parte communication when
42 expressly authorized by law* to do so, or when counsel has complied with Rule 5-300(B)(4)
43 of the California Rules of Professional Conduct. The court's communication shall be sent to
44 all interested parties or their counsel.

45 (8) A judge shall dispose of all judicial matters fairly, promptly, and efficiently.

46 (9) A judge shall not make any public comment about a pending or impending
47 proceeding in any court, and shall not make any nonpublic comment that might substantially
48 interfere with a fair trial or hearing. The judge shall require* similar abstention on the part of
49 court personnel* subject to the judge's direction and control. This Canon does not prohibit
50 judges from making statements in the course of their official duties or from explaining for
51 public information the procedures of the court, and does not apply to proceedings in which
52 the judge is a litigant in a personal capacity. Other than cases in which the judge has
53 personally participated, this Canon does not prohibit judges from discussing in legal
54 education programs and materials, cases and issues pending in appellate courts. This
55 educational exemption does not apply to cases over which the judge has presided or to
56 comments or discussions that might interfere with a fair hearing of the case.

57 (10) A judge shall not commend or criticize jurors for their verdict other than in a
58 court order or opinion in a proceeding, but may express appreciation to jurors for their
59 service to the judicial system and the community.

60 (11) A judge shall not disclose or use, for any purpose unrelated to judicial duties,
61 nonpublic information* acquired in a judicial capacity.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

Existing Law: Permits ex parte contact with a judicial officer when explicitly authorized by the law.

This Resolution: Would clarify when ex parte contact is permitted and resolve a conflict between the Code of Judicial Ethics and the Rules of Professional Conduct.

The Problem: There is an apparent conflict between Canon 3B(7)(e) of the Code of Judicial Ethics and Rule 5-300(B)(4) of the Rules of Professional Conduct regarding whether a court can properly respond to an ex parte communication that complies with Rule 5-300(B)(4).

In his book, entitled California Judicial Conduct Handbook, David M. Rothman identifies the “apparent” conflict in the law. On the one hand, Rule 5-300(B)(4) allows counsel to

communicate to a judge ex parte if it is done in writing, “with a copy furnished to such other counsel.” On the other hand, judges generally are not allowed to initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding with few exceptions. According to Rothman, this “apparent conflict” between the Canon and the Rule “was not clarified by the recent revision of the Code of Judicial Ethics.” (California Judicial Conduct Handbook, at p. 128.)

One of the exceptions set forth in subsection (e) provides that: “A judge may initiate any ex parte communications when expressly authorized by law* to do so.” The asterisk following the word “law” means the term is defined in the Terminology section of the Ethics Code. This definition states as follows: “Law denotes court rules as well as statutes, constitutional provisions, and decisional law.” It is arguable that the Rule falls within the Ethics Code’s definition of “law, ” especially since it was approved by the California Supreme Court and is binding on all members of the Bar pursuant to Business & Professions Code section 6000, *et seq.* (Rules of Professional Conduct, Rule 1-100.) Accordingly, Canon 3B(7) could be construed in light of subsection (e) to allow ex parte communications where the requirements of the Rule are met, *i.e.*, where counsel sent copies of the letter to the other side and an opportunity to be heard was provided.

There is a problem with this interpretation, specifically with the requirement that the law relied upon *expressly* authorizes the ex parte communication. The legal meaning of the term “express,” per Black’s Law Dictionary, appears to be no different than the word’s plain, ordinary meaning. “Express” means “[c]lear; definite; explicit ... [or] [d]irectly and distinctly stated.” (Black’s Law Dictionary at 580 (6th ed. 1990)). The question is does Rule 5-300(B)(4) explicitly allow judges to receive ex parte letters if the other side is sent a copy? The answer appears to be no. This is because Rule 5-300(B)(4) merely allows counsel to submit an ex parte communication to the court; it does not expressly or directly state that the court can respond to the communication. Technically, the requirement of subsection (e) is not met by Rule 5-300(B)(4).

IMPACT STATEMENT

This proposed resolution would not affect any other law, statute or rule.

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