



U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Suite 3266
Washington, DC 20530
(202) 514-3365

September 16, 2025

By Email

Nikhel Sus
CREW



Re: OPR FOIA No. F22-00034 Second Interim Response (2nd non-referral)

Dear Mr. Sus:

This letter is in response to your January 30, 2022 Freedom of Information Act (FOIA)/Privacy Act (PA) request to the Department of Justice (DOJ) Office of Professional Responsibility (OPR) seeking the following records from January 1, 2010, to the date we began to process your request:

1. All complaints or other submissions to DOJ's Office of Professional Responsibility ("OPR") regarding possible professional misconduct by any federal court of appeals judge, district court judge, magistrate judge, or bankruptcy judge.
2. All referrals made by OPR to any judicial disciplinary authority, state bar, or any other external entity regarding possible professional misconduct by any federal court of appeals judge, district court judge, magistrate judge, or bankruptcy judge.
3. All OPR reports, conclusions, or findings relating to items 1 or 2 above.

OPR received your request on January 20, 2022, and has assigned to it tracking number **F22-00034**. Please refer to this number in any correspondence pertaining to this matter.*

For this second interim response to your request for records related to non-referrals of judicial misconduct, OPR processed a total of 745 pages responsive to your request. Enclosed please find 72 pages responsive to your request. Of the 72 pages, 70 pages (Bates-numbered F22-00034 00873 to 00942) are appropriate for release without excisions and two pages (Bates-numbered F22-00034 00943 to 00944) are appropriate for release with excisions made pursuant to Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6) and (b)(7)(C). Exemption 6 pertains to information the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties. Exemption 7(C) pertains to information compiled for law enforcement purposes which could reasonably be expected to

* For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

constitute an unwarranted invasion of the personal privacy of third parties. Please be advised that we have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions. Twenty pages were deemed to be duplicates of pages processed for this interim response.

OPR determined that 20 pages (Bates-numbered F22-00034 00945 to 00965) contained information of interest to the Executive Office for U.S. Attorneys (EOUSA); three pages (Bates-numbered F22-00034 00966 to 00968) contained information of interest to the Office of the Inspector General (the OIG); and eight pages (Bates-numbered F22-00034 00969 to 00976) contained information of interest to EOUSA and to the Office of Information Policy (OIP - for the Office of the Deputy Attorney General (ODAG)). We will send these pages for consult to EOUSA, the OIG and OIP pursuant to 28 C.F.R. § 16.4(d). Upon receipt of the consultation responses, OPR will finalize and provide these pages, as appropriate, to you.

Because one page of responsive records originated with the Criminal Division (CRM) (Bates-numbered F22-00034 00977), OPR will refer this page to CRM for processing and direct response to you.

Because two page of responsive records originated with the OIG (Bates-numbered F22-00034 00978 to 00979), OPR will refer these pages to the OIG for processing and direct response to you.

Because 598 pages of responsive records originated with the EOUSA (Bates-numbered F22-00034 00980 to 01576), OPR will refer these pages to EOUSA for processing and direct response to you.

Twenty-one pages (Bates-numbered F22-0034 01577 to 01597) were withheld in full pursuant to Exemptions 5, 6 and 7(C) of the FOIA, 5 U.S.C. § 522(b)(5), (b)(6) and (b)(7)(C). Exemption 5 pertains to certain inter- and intra-agency communications protected by the deliberative process privilege. Exemption 6 pertains to information the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties. Exemption 7(C) pertains to information compiled for law enforcement purposes which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties. Please be advised that we have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.

Although I am aware that your request is the subject of ongoing litigation and that appeals are not ordinarily acted on in such situations, I am required by statute and regulation to inform you of your right to file an administrative appeal with the Office of Information Policy.

Sincerely,
Carmen Smith Carter
Carmen Smith Carter
Assistant Counsel for the
Freedom of Information and Privacy Acts

Attachment: F22-00034 Processed and Produced Page Counts Chart

cc: Taylor Pitz
Trial Attorney
Federal Programs Branch
Civil Division

Attachment F22-00034 Processed and Produced Page Counts Chart						
Interim/ Monthly Interim	Bates Nos.	No. of Pages Processed	Blank, Duplicate, Non- responsive Pages	Produced to Sus=S Consult=C Referral=R Withheld in Full=WIF	No. of Pages Produced	Pages Produced and Processed
Prioritized, Referred Judges						
FEB 2023	1-66	66	62	S=4	66	66 [†]
MAR 2023	67-283	217	0	S=1 R=137 (EOUSA) R=73(FBI) WIF=6	217	217
3 rd Interim (Jan 29, 2024)	284-491	614	406	C=1 (EOUSA, CRM, FBI) R=182 (EOUSA) R=11 (CRM) R=14 (FBI)	208	614
4 th Interim (Sept. 23, 2024)	492-626	561	426	S=84 C=15 (CRM) C=17 (CRM,PRAO) WIF=19	135	561
5 th Interim	627-788	168	6	S=11 C=11 (EOUSA) C=2 (CRM) R=111 (EOUSA) W=27	162	168
Non-Referred Judges						
1 st Interim	789-872	86	2	C=11 (EOUSA, OIG) R=64 (OIG) W=9	84	86
2 nd Interim	873-1597	745	20	S=72 C=31(EOUSA, the OIG, OIP) R=1 (CRM) R=2 (OIG) R=598 (EOUSA) W=21	725	745
				Total Produced	1,597	
				Total Produced and Processed		2,457

[†] For the February 2023 interim response, 62 of the 66 pages produced were discovered to be nonresponsive post-production, but are counted here as part of the total number of pages actually produced (and processed).

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Jim Dey: Judge won't play word games with feds in Schock case

Tue, 10/24/2017 - 6:00am | Jim Dey ([/author/jim-dey](#))

For the second time in recent weeks, U.S. Judge Colin Bruce has applied the lash to federal prosecutors who are handling the corruption prosecution of former U.S. Rep. Aaron Schock, R-Peoria.

Bruce on Monday summarily denied a motion by prosecutors that asked him to reconsider his earlier order directing the government to search its records and detail "any further misrepresentations or misleading statements" in addition to those already disclosed to the court.

Displaying a lack of patience, Bruce said the "government's filings speak for themselves" and that "any additional claims or arguments have not been and will not be considered." He said he presumes there are "no further inaccurate claims contained in (government) filings."

"For this reason, the court believes that engaging the government in a discussion of semantics would not be productive. The court sees no reason to reconsider the wording of its previous order," Bruce said.

F22-00034 - 00873

In dry legalese, Bruce expressed his disgust for government filings in response to a defense motion to dismiss charges against Schock on the basis of government misconduct during grand jury proceedings.

The defense is asking for the dismissal because government lawyers allegedly violated Schock's right to remain silent by stating — repeatedly — that Schock was asked, but declined, to testify before the grand jury.

Bruce said "the court finds its analysis of the issue similar to" that of Schock's lawyers. In making that statement, he embraced Schock's position that "the government's pathetic claim ... is a further error compounding its prior false and misleading representations to the court."

"In essence, the government has doubled down on its initial misleading representation. ... The position is also consistent with the government's continuing practice to simply deny misconduct when faced with facts that show its occurrence," said George Terwilliger, a Schock lawyer based in Washington.

Schock, a 36-year-old Peoria resident, is charged with a variety of offenses in connection with his alleged mishandling of tax dollars and campaign contributions. He has denied the allegations, charging that prosecutors engaged in questionable tactics in order to put together a criminal indictment.

One of them relates to the grand-jury proceedings, where prosecutors initially denied any improprieties, then appeared to acknowledge they did occur and, finally, last week, withdrew the admissions and suggested Bruce had misunderstood what the government intended to say.

"The government acknowledges that it is solely responsible for causing this conflation or misunderstanding of issues," acting U.S. Attorney Patrick Hansen stated in an Oct. 17 motion asking the court to withdraw its order that the government search its records for "further misrepresentations and misleading statements."

In response to Schock's complaint about how the probe was conducted, the prosecution has contended that the former House member is engaged "in an increasingly aggressive search for some government misconduct" to avoid a trial.

But prosecutors stubbed their toes in response to a Schock allegation about an abuse of the grand-jury process, a claim that relies on an affidavit by a former grand juror that "the prosecutor told the grand jury that Aaron Schock and his attorney were requested to appear and that no one had shown up."

It was on that basis that the defense sought grand-jury transcripts. But Bruce denied that motion after Assistant U.S. Attorney Tim Bass said the allegation was false and the alleged event "never happened."

After Schock's lawyers continued to press the matter, asking for a hearing on the issue, Hansen submitted a 33-page motion denying any impropriety but acknowledging that "on 11 occasions, seven times before the first grand jury and four times before the second grand jury — government counsel commented on or addressed Mr. Schock's testifying or decision not to testify before the grand jury, typically in response to inquiries by one or more grand jurors."

It was that admission that prompted Bruce to order the government to search its records and report any further improprieties. He stated that Bass' statement was "misleading, if not simply false" and that the government has "now changed its position" that the allegation is false.

Rather than perform the search the judge ordered, the government responded with last week's motion that essentially argued that its previous motion didn't mean to concede what Bruce thought it did.

Specifically, the government said Bass was correct when he said the disputed statements never occurred because government representatives never made the literal statement that "the prosecutor told the grand jury that Aaron Schock and his attorney were requested to appear and no one had shown up," and that its responses were made in good faith and with no intent to skirt the rules.

Schock's lawyers were withering in the denunciation of the prosecution's reliance on the literacy of the disputed statement, calling it a "self-serving and belated claim to be merely correcting a misunderstanding."

Not only was the government's reliance on a literal interpretation dubious, they said, but it's also at odds with the facts.

Terwilliger cited four statements prosecutors made to the grand jury that fit neatly within the substance of the Schock claim.

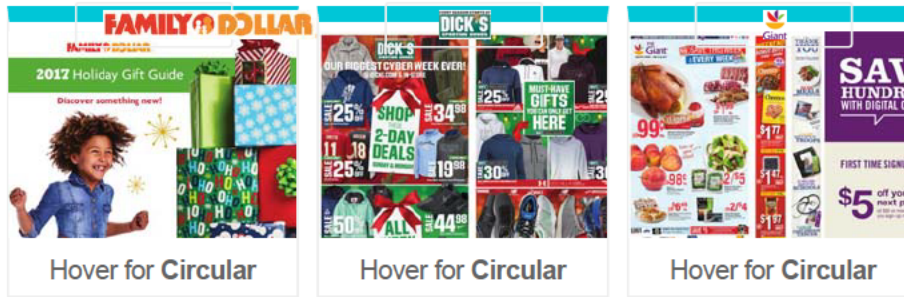
One prosecutor statement from Oct. 4, 2016, reads, "We have invited Aaron Schock to come in on more than one occasion, and we'll continue to extend that invitation. He has respectfully declined."

Citing that statement, among others, Terwilliger told Bruce, "The government's response to the court's order reveals a troubling standard for truthfulness."

Jim Dey, a News-Gazette staff member, can be reached by email at jdey@news-gazette.com (mailto:jdey@news-gazette.com) or by phone at 217-351-5369.



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Jim Dey: Charge of government misconduct goes beyond sex issue

Sun, 08/13/2017 - 6:00am | Jim Dey ([/author/jim-dey](#))

A motion to dismiss the corruption case against him filed by former U.S. Rep. Aaron Schock drew considerable media attention because of allegations that investigators demonstrated prejudice against him through repeated inquiries about his sexuality.

Schock said authorities made a series of unsuccessful efforts to find "evidence" that he is a homosexual, something he has long denied.

Drawing less attention in the 83-page motion were other allegations that Schock made about prosecutorial misconduct that he said reflected the government's desire to first target him for indictment and worry about the details later.

George Terwilliger, a former high ranking official in the U.S. Justice Department, wrote that "no topic has been off limits."

Over a 20-month investigation and "through the use of two federal grand juries, the (U.S. Attorney's Office). ... investigated Mr. Schock's personal, political and professional life, from business activities he conducted as a teenager through his present, post-congressional employment," the defense motion states.

The 36-year-old Schock, a one-time up-and-coming member of the U.S. House of Representatives, was indicted in November 2016, on a variety of charges related to the alleged misuse of more than \$100,000 in both public and campaign funds. He's tentatively scheduled to go to trial in January at the U.S. Courthouse in Urbana, although the trial already has been delayed once and may be again.

A Peoria resident, Schock announced his resignation from the U.S. House of Representatives in March 2015, just five months after his election to a third term. His resignation followed a news story that drew national news attention by reporting that Schock had redecorated his office in a theme from "Downton Abbey," a PBS drama about Great Britain in the early 1900s. He's denied that, too.

The "Downton Abbey" episode was quickly followed by multiple news stories, the original source of which has never been disclosed, from various outlets that raised questions about Schock's mileage reimbursements and business practices. They suggested Schock enriched himself by submitting reimbursement requests for miles he had never driven.

The indictment picks up on that theme, charging that Schock defrauded the government and his campaign committees on mileage issues and other personal purchases. One charge alleged that he bought sports tickets with campaign funds, re-sold them and kept the proceeds.

Schock has acknowledged that he and his staff mishandled some financial issues but denies any intent to improperly enrich himself. He charges that authorities repeatedly impugned his character to witnesses and before the grand jury in a way to create the impression that Schock "was a bad guy who needed to be 'got.'"

He charges that authorities "abused and intimidated witnesses, particularly those providing exculpatory evidence," "misrepresented facts and law in a manner that falsely impugned" Schock's "conduct and character," "failed to disclose or omitted exculpatory or impeachment evidence," and harassed Schock "through continued investigation post-indictment. ...of Mr. Schock's current employer and business partners."

While continuing to reside in Peoria, Schock now is involved that real-estate ventures that require considerable travel, including regular trips to China. The motion charges that the cumulative effect of the alleged prosecutorial misconduct created an "irreversible embedded false impression about Mr. Schock's conduct and character in the minds of key witnesses" in a way that "prejudices any future testimony at trial."

The motion also alleges that the grand jury's exposure to a stream of negative, false and misleading statements about Schock affected their personal attitudes. The motion includes an exchange between a grand juror and a IRS agent that it contends demonstrates that claim.

A grand juror expressed concern the body might not have sufficient evidence to return an indictment and wondered if there was another means of dealing with Schock.

"So if — you know, like Al Capone, if we don't get him, then

the IRS can take him down?" the grand juror asked.

"Yes," replied IRS Agent James Peacock.

The motion seeks a dismissal of the indictment or, alternatively, a prohibition against two key government witnesses from testifying. They are Karen Haney, the political director of a Schock campaign committee, and Sarah Rogers, an employee in Schock's Washington office who handled mileage reimbursement issues.

U.S. Judge Colin Bruce is presiding over the case. Before being appointed to the bench, he was a longtime federal prosecutor in the same office as Tim Bass, the assistant U.S. Attorney that Schock's lawyers allege engaged in inappropriate conduct that poisoned the prosecution case.

Bass, who is based in Springfield, has a reputation as an aggressive prosecutor. He has handled a wide variety of criminal and corruption cases, including a wide-ranging conspiracy involving the theft of public funds from recipients of state grants.

The defense acknowledged its dismissal request is an "extraordinary remedy" but asserted "this is an extraordinary case."

Bass "did not discover a crime and attempt to determine who committed it. He picked Aaron Schock and set out to pin an offense on him," the motion states.

The lengthy indictment outlines a wide variety of financial transactions in which the government charges that Schock took financial advantage of taxpayers and campaign donors.

Some of those transactions involved the use of campaign funds to finance entertainment at fund-raising events. Politicians routinely purchase sports tickets for fund-raising events.

For example, in 2014, U.S. Sen. Richard Durbin's campaign committee bought over \$100,000 in National Hockey League tickets for fundraisers.

A dispute about Schock's purchase of ski-lift tickets for a fundraiser resulted in a lengthy exchange between Bass and campaign director Haney:

"...Mr. Bass asked how a payment for ski lift tickets would not be personal. Ms. Haney responded that it would not be personal if it was connected to a fund-raiser. Even though Ms. Haney was legally correct that lift tickets purchased in connection with a fund-raiser held at a ski resort are perfectly permissible, Mr. Bass falsely implied that it was illegal," the defense motion states, noting that Bass stated before the grand jury that Haney's testimony was motivated by "loyalty" to Schock.

Although there is no mention of ski-lift tickets in the indictment, one charge against Schock stems from a \$5,621 payment to him in connection with his sale of his personal vehicle and his campaign committee's purchase of another vehicle from a Peoria dealership run by a Schock friend. The indictment alleges Schock gained the \$5,621 by "caus(ing) the campaign to pay off the loan."

But dealership owner Jeff Green testified that the payment was the result of an error made in the dealership's business office.

"When the prosecutor asked finance manager Dave Angevine before the grand jury, why he kept 'talking about what could have, should have or might have happened,' Mr. Angevine responded: 'Part of it is I feel bad because I know I added the payoff,'" the motion states. "Despite all this, the government persists in charging Mr. Schock with causing this transaction" even though there is no evidence "Mr. Schock had ever realized that a mistake had been made."

Terwilliger speculated the "government's newfound theory was that Mr. Schock never told anyone it had been a mistake."

The indictment is chock full of detailed allegations that raise questions about Schock's approach to spending public and campaign funds. At the same time, the defense motion offers a highly detailed response that alleges authorities either misunderstood or misrepresented details of those transactions in a manner that put them in a criminal light.

Of course, a regular tool in the defense lawyer's tool box is to impugn investigative methods as a means of challenging damning evidence. That's what the Schock defense is doing here, and the length and breadth of the defense motion reveals it has a lot to work with.

Jim Dey, a member of The News-Gazette staff, can be reached by email at jdey@news-gazette.com (mailto:jdey@news-gazette.com) or by phone at 217-351-5369.

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Rep. Aaron Schock was indicted on 24 felony counts last November stemming from an FBI investigation into his use of his House office expense allowance and campaign funds for personal gain. | Chip Somodevilla/Getty Images

Judge complains prosecution 'misled' him in Aaron Schock case

Court orders review of government filings for 'false or misleading claims' in ex-congressman's criminal procedure.

By **JOSH GERSTEIN** | 10/03/2017 07:07 PM EDT | Updated 10/03/2017 10:10 PM EDT

The federal judge overseeing the criminal case against former Rep. Aaron Schock leveled an unusual public complaint Tuesday that he was misled by a prosecutor on the case.

Judge Colin Bruce, of the U.S. District Court for the Central District of Illinois, also ordered the prosecution to conduct a review of all its court filings in the matter for potential inaccuracies.

Bruce concluded that the lead prosecutor on the case, Assistant U.S. Attorney Timothy Bass, gave inaccurate information to the court when he appeared to deny that prosecutors told grand jurors that Schock, a former Illinois Republican congressman, had been subpoenaed to the grand jury but declined to appear.

The acting U.S. attorney for the Central District of Illinois, Patrick Hansen, disclosed in a court filing last month that prosecutors discussed Schock's possible testimony or decision not to testify on a total of 11 occasions with two grand juries. Hansen defended the prosecution's actions as proper and said most of the episodes came in response to queries from grand jurors who seemed eager to hear from Schock.

In a three-page order Tuesday, Bruce indicated he was troubled by what he viewed as a "changed ... position" by the government on what grand jurors were — and were not — told.

"The recent revelation puts this court in a somewhat difficult position as it is now aware that it was misled by the Government," wrote Bruce, an appointee of President Barack Obama and a veteran of the same U.S. Attorney's Office. "Unfortunately, this court relied upon, and even quoted, the Government's inaccurate statement, which it now knows to be false, in a previous order. While the court's reliance on that statement was not dispositive of any issue, the court must ensure that it does not rely on any inaccurate information in any future orders."

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Bruce gave the prosecution two weeks to examine all filings in the case.

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“To ensure the accuracy of the record, as well as the integrity of this court, the Government is ordered to review all claims and statements made in its current filings to ensure there are no more false or misleading claims,” he wrote.

The judge also seemed to be trying to flag the situation to Justice Department officials in Washington by speculating openly about whether those officials were aware of statements prosecutors made to the grand jury about whether Schock would or wouldn’t testify.

“The Government has claimed numerous times ... that the Department of Justice authorized the charges in this case,” Bruce wrote in a footnote. “The court wonders if such authorization was made with full knowledge of the occurrences before the Grand Jury as set forth by the Government in its recent filing.”

Bruce specifically ordered that the new report be filed by Hansen, the top official in the office and a career prosecutor who took over after the previous U.S. attorney, an appointee of President Barack Obama, retired last year.

A spokeswoman for the U.S. Attorney’s Office declined to comment.

Defense attorneys have complained that the discussion with grand jurors about Schock’s testifying impinged on his Fifth Amendment right to remain silent. Schock’s lawyers have also made other allegations about prosecutorial misconduct, including examining Schock’s sexuality. The prosecution has denied any interest in that subject.

An attorney for Schock, George Terwilliger, had little to say about the judge’s latest ruling. “The order speaks for itself,” he said.

Sebelius believed Menendez wanted her to 'take some action'

By **MATT FRIEDMAN**

Schock was indicted on 24 felony counts last November stemming from an FBI investigation into his use of his House office expense allowance and campaign funds for personal gain. The indictment alleges Schock illegally pocketed tens of thousands of dollars in improper

mileage reimbursements, camera equipment, and proceeds from selling tickets to the World Series and Super Bowl.

The former congressman has pleaded not guilty. His lawyers have attributed some of the transactions that the government portrays as theft or fraud as nothing more than sloppy bookkeeping.

Schock's trial is set to begin in January.

CORRECTION: An earlier version of this story misidentified the president who appointed Bruce.

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Citation:

Leslie W. Abramson, The Judicial Ethics of Ex Parte and other Communications, 37 Hous. L. Rev. 1343 (2000)

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HOUSTON LAW REVIEW

ARTICLE

THE JUDICIAL ETHICS OF EX PARTE AND OTHER COMMUNICATIONS

*Leslie W. Abramson**

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* Professor of Law, Louis D. Brandeis School of Law.

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The recent impeachment of the New Hampshire Supreme Court's chief justice for unethical communications has brought new awareness to this area of judicial ethics. The New Hampshire House of Representatives accused Chief Justice David Brock of calling a trial judge to remind the latter that a state legislator in a pending lawsuit before the judge could assist in gaining pay raises for the justices.¹ The articles of impeachment also accused the chief justice of both asking a fellow justice about the appointment of an appeals panel in the latter's divorce case and subsequently discussing the appointed panel with him.²

Traditionally, lawyers and even most judges erroneously believe that, without exception or qualification, judges risk severe disciplinary sanctions by engaging in *any* ex parte communications with lawyers and their clients in the absence of representation by all parties to a case.³ Similarly, it is assumed that lawyers can never "ex parte" the judge about the merits of a case.⁴ Most judges and practitioners also believe that the field of

1. *New Hampshire Chief Justice Impeached*, HOUS. CHRON., July 13, 2000, at 15A.

2. *Id.* (stating that the articles of impeachment also accused Brock of lying under oath during the investigation and improperly allowing justices to comment on cases they had been disqualified from hearing due to conflicts of interest). After a three-week trial in the state Senate, Brock was acquitted on all four articles of impeachment. *Chief Justice Wins Acquittal in N.H. Senate*, HOUS. CHRON., Oct. 11, 2000, at 9A (noting that no single article of impeachment garnered more than eight votes—fifteen were needed to convict on any particular article—and that "most state senators either said what Brock did was not serious enough for impeachment or the evidence was not persuasive").

3. See, e.g., C.T. Harhut, *Ex Parte Communication Initiated by a Presiding Judge*, 68 TEMP. L. REV. 673, 694 (1995) ("Judges are not certain if the Canons of Judicial Conduct allow ex parte communication with anyone.").

4. See John M. Greacen, "No Legal Advice from Court Personnel" What Does That

ex parte communications is unchanging. Just the opposite is true. In the past decade, the American Bar Association's Model Code of Judicial Conduct significantly changed and expanded the scope of permissible ex parte communications.⁵ By contrast, the ethics rules for lawyers, as reflected since the ABA's 1983 Model Rules of Professional Conduct, have substantially narrowed the range of permissible ex parte communications for lawyers.⁶

Judicial and disciplinary sanctions for ethical violations attributable to impermissible communications may vary with the circumstances, as well as whether the ethical violation was isolated or part of a pattern of misconduct.⁷ From state to state, regardless of the applicable judicial ethics standard, judicial participation in prohibited ex parte communications generally occurs not as corrupt conduct by unscrupulous judges but instead results from

simple laxity or ignorance, such as the casual conversation that strays into the merits, the quick phone call to check a procedural point, or perhaps the judge independently getting his or her doctor's opinion on the medical evidence presented in a case before the court. These innocent, or at least unknowing, *ex parte* communications present serious dangers to the lawyers and judges engaging in them, since a pure conscience is no defense.⁸

Mean?, JUDGES' J., Winter 1995, at 10, 14 (citing the "basic principle that counsel may not communicate with the judge *ex parte*").

5. Refer to notes 20-23 *infra* and accompanying text (discussing the relaxation of certain rules in the 1990 version of the ABA's Model Code of Judicial Conduct).

6. Refer to notes 175-78 *infra* and accompanying text (comparing the Rules of Professional Conduct to the less restrictive 1969 ABA Code of Professional Responsibility).

7. See George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 ST. JOHN'S L. REV. 291, 324-28 & n.129 (1998) (collecting cases).

8. *The Dangers of Ex Parte Communications*, 74 JUDICATURE 288, 288 (1991) [hereinafter *Ex Parte Communications*]. For an example of a seemingly innocent ex parte communication, see *In re Fuchsberg*, 426 N.Y.S.2d 639, 646-47 (Ct. Jud. 1978).

Respondent [Judge Fuchsberg] consulted with law professors with regard to at least 12 different cases pending before the Court of Appeals. In certain of the instances the consultation amounted to a telephone conversation with a professor in which new developments in the relevant area of law were discussed. In other instances respondent sent the briefs in the case to the professor and asked him to prepare and submit a memorandum containing the latest authorities. In three instances, respondent sought and obtained from law professors draft opinions. Substantial portions of the language of the opinions eventually published by respondent in these cases were taken from the draft opinions which had been submitted by the law professors. Finally, in at least one, and possibly two, cases, respondent forwarded an unpublished draft opinion of another Judge on the Court of Appeals to a law professor with whom he was

While apparently innocent communications with a judge may threaten the judge's independence unwittingly, they may also create a perception that the judge favors one party in the absence of the adversary process.⁹ Without both sides present to balance the presentation of information, a judge may have a misleading impression of the factual context underlying a proceeding.¹⁰ Worse, the judge may have an inaccurate or incomplete version of the facts.¹¹ These negative effects of ex parte communications on the judicial process have generated concern and reaction from the organized bar for the past seventy-five years.¹²

Part One of this Article examines the Model Code of Judicial Conduct standards relating to ex parte communications, the accompanying Code commentaries, and the purpose for the ethical requirement. Part Two looks at which communications are prohibited, such as independent investigations by judges, and also discusses the meaning of the term "on the merits." Part Three of the Article examines ex parte communications that are actually permitted: requests for help from disinterested experts, communications with other judges and with court personnel, contacts to resolve a case through mediation or settlement, judicial requests for findings of fact and conclusions of law, and ex parte contacts that are authorized by law. Part Four discusses and compares the ethical standards imposed upon lawyers regarding ex parte communications, and raises questions about the consistency between the judicial and lawyers' ethical codes. This Part includes proposals for improving the ABA Code of

consulting without notifying the Judge in question.

....

There is no evidence, however, that such violations were willful. Respondent has testified he was unaware of the Canon's existence, as have the law professors with whom he consulted. We note, in this connection, that the Canon was adopted relatively recently.

Id. (emphasis added).

Not only should judges refuse to participate in ex parte communications; they also cannot fail to report and disclose such communications. See, e.g., *In re Boyd*, 308 So. 2d 13, 20, 22 (Fla. 1975) (holding that failure by a state supreme court justice to disclose an ex parte communication about a pending case was improper, and that on a multijudge court the proper course is for the judge to bring the communications to the attention of the judge's colleagues).

9. Refer to notes 34-35 *infra* and accompanying text (discussing the harm caused by the mere appearance of impropriety on the part of the judiciary—an appearance that is often concomitant with ex parte communications).

10. Ex Parte Communications, *supra* note 8, at 288 (citing this as one of the "evils" of ex parte communications).

11. *Id.*

12. Refer to Part I.A *infra* (discussing the development of the American Bar Association's Canons of Judicial Ethics since their adoption in 1924).

Judicial Conduct to assist judges, lawyers, and lay members of judicial conduct organizations in evaluating judicial disqualification or discipline.

I. CODE OF JUDICIAL CONDUCT STANDARDS

A. *The Judicial Codes' Standards*

Ethical concerns about judicial *ex parte* communications have a long history in American jurisprudence. In 1924, the House of Delegates of the American Bar Association adopted thirty-four Canons of Judicial Ethics, which were subsequently adopted in some form by a majority of the states for most of the next half century.¹³ Canon 17 included the following standard:

A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.

....

... Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel.¹⁴

In 1972, an ABA Special Committee on Standards of Judicial Conduct, chaired by California Chief Justice Roger Traynor, completed three years of work and persuaded the ABA House of Delegates to adopt higher and more explicit standards of judicial

13. See Harhut, *supra* note 3, at 674–75 (noting that “[m]ost states and the federal courts . . . adopted some version” of the ABA’s model rules for judicial conduct).

14. ABA CANONS OF JUDICIAL ETHICS Canon 17 (1924). The ABA’s Committee on Judicial Ethics was chaired by Chief Justice William Howard Taft, and developed the Canons of Judicial Ethics, which were adopted at the 1924 ABA annual meeting. See *Forty-Seventh Annual Meeting Maintains Association’s High Standard*, 10 A.B.A. J. 555, 555 (1924) (calling the Association’s adoption of the Canons “the outstanding feature of the meeting”).

New Hampshire and Massachusetts use language almost identical to the 1924 Canon’s, although these states have adopted other parts of the 1972 or 1990 Codes. MASS. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* 2 Nat’l Rep. Legal Ethics (Univ. Pub. Am.) (2000); N.H. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* 3 Nat’l Rep. Legal Ethics (Univ. Pub. Am.) (2000). Louisiana’s language is similar to Canon 17, except that its provisions are mandatory and refer to both “private or *ex parte* interviews” and to “judicial action in any case, either civil or criminal.” LA. CODE OF JUDICIAL CONDUCT Canon 3(A)(6), *reprinted in* LA. R. CT. (West 2000). Rhode Island’s Canon 17-like standard ends after the phrase “judicial action” and then adds that “ordinarily all communications of counsel to the judge should be made known to opposing counsel.” R.I. CODE OF JUDICIAL CONDUCT Canon 3(B)(8)(f), *reprinted in* R.I. CT. R. ANN. (Michie 1998).

conduct.¹⁵ Under the general Canon 3 language that “a judge should perform the duties of his office impartially and diligently,” Canon 3(A)(4) of the 1972 Code stated, in part:

[E]xcept as authorized by law, [a judge should] neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.¹⁶

15. See Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 712 n.32 (1997) (noting that nearly every state has adopted Codes of Judicial Conduct modeled closely after the 1972 ABA Code).

16. MODEL CODE OF JUDICIAL CONDUCT Canon 3(A)(4) (1972). The 1972 language remains applicable verbatim or in substantially identical form in the following twelve states: Alabama, Colorado, Delaware, Idaho, Iowa, Maryland, Mississippi, New Jersey, New York, North Carolina, Pennsylvania, and Washington. See ALA. CANONS OF JUDICIAL ETHICS Canon 3(A)(4), reprinted in ALA. CODE ANN. (Michie Cum. Supp. 1999) (adding a recommendation that the judge exercise discretion in consulting the disinterested expert and limiting the requirement of providing notice and an opportunity to respond to those situations in which “the judge considers that justice would require it”); COLO. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), reprinted in COLO. REV. STAT. ANN. (2000); DEL. JUDGES’ CODE OF JUDICIAL CONDUCT Canon 3(A)(4), reprinted in DEL. R. ANN. (1998) (adding “[a] judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters”); IDAHO CODE OF JUDICIAL CONDUCT Canon 3(A)(4), reprinted in 2 Nat’l Rep. Legal Ethics (Univ. Pub. Am.) (2000) (substituting “except as administrative responsibilities dictate” for “except as authorized by law” and limiting the provision that permits a judge to obtain advice from a disinterested party by rephrasing it as “[j]udges shall not solicit the advice of any person, except from court or judicial personnel regarding proceedings before them unless the judge gives notice to the parties and affords them opportunity to respond”); IOWA CODE OF JUDICIAL CONDUCT Canon 3(A)(4), reprinted in IOWA R. CT. (West 2001); MD. CODE OF JUDICIAL CONDUCT Canon 3(A)(5), reprinted in MD. CODE ANN. (Michie 1998); MISS. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), <http://www.judperf.state.ms.us/conduct.htm> (last visited Jan. 20, 2001); N.J. CODE OF JUDICIAL CONDUCT Canon 3(A)(6), reprinted in 3 Nat’l Rep. Legal Ethics (Univ. Pub. Am.) (2000) (expanding the provisions that allow a judge to obtain advice from a disinterested party by permitting the judge to consult not only an expert on “the law applicable to” a proceeding, but also an expert on “the subject matter” of a proceeding; the effect of this is that a New Jersey judge with, say, a medical malpractice case before him could consult a physician, rather than being restricted to consulting only an expert on malpractice law); N.Y. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), reprinted in N.Y. JUD. LAW ANN. (McKinney 1992); N.C. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), reprinted in N.C. GEN. STAT. ANN. (Supp. 1999) (freeing the judge from the requirement of giving interested parties either notice of the *ex parte* consultation or an opportunity to respond); PA. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), reprinted in PA. R. CT. (West 2000) (stating, in full, “A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, must not consider *ex parte* communications concerning a pending proceeding.”); WASH. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), reprinted in WASH. CT. R. (West 2000) (limiting the form of permissible *ex parte* communication to “amicus curiae only”).

The 1972 Code clearly prohibits all types of ex parte and other communications, except for the two following exceptions to the general rule: (1) communications authorized by court rules, statutes and common law decisions; and (2) advice from a “disinterested expert” on the law applicable to a current matter, if the judge both notifies the parties about the consulted person and the substance of his or her advice and gives the parties a reasonable opportunity to react to the advice.

The ABA provided three sentences of commentary for Canon 3(A)(4), regarding with whom a judge may consult:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite him to file a brief *amicus curiae*.

MODEL CODE OF JUDICIAL CONDUCT Canon 3(A)(4) cmt. (1972).

Half of the states that adopted Canon 3(A)(4) also incorporated the ABA commentary in some form. *See* COLO. CODE OF JUDICIAL CONDUCT Canon 3(A)(4) cmt., *reprinted in* COLO. REV. STAT. ANN. (2000) (employing the ABA’s three sentences of commentary); DEL. JUDGES’ CODE OF JUDICIAL CONDUCT Canon 3(A)(4) cmt., *reprinted in* DEL. R. ANN. (1998) (clarifying the ABA’s three sentences of commentary further by (1) stating that a judge may consult with lawyers or unrepresented parties on purely procedural matters that do not affect the merits of a proceeding, (2) urging judges to fully disclose ex parte communications, and (3) recommending that the judge ensure that clerks and staff personnel comply with the provisions of the Canon); MD. CODE OF JUDICIAL CONDUCT Canon 3(A)(5) cmt., *reprinted in* MD. CODE ANN. (Michie 1998) (same); N.J. CODE OF JUDICIAL CONDUCT Canon 3(A)(6) cmt., *reprinted in* 3 Nat’l Rep. Legal Ethics (Univ. Pub. Am.) (2000) (same); N.Y. CODE OF JUDICIAL CONDUCT Canon 3(A)(4) cmt., *reprinted in* N.Y. JUD. LAW ANN. (McKinney 1992) (same); WASH. CODE OF JUDICIAL CONDUCT Canon 3(A)(4) cmt., *reprinted in* WASH. CT. R. (West 2000) (same).

Alabama, Iowa, Idaho, Mississippi, North Carolina, and Pennsylvania did not adopt any of the commentary. *See* ALA. CANONS OF JUDICIAL ETHICS Canon 3(A)(4), *reprinted in* ALA. CODE ANN. (Michie 1999) (adopting portions of the ABA commentary for other sections of the state’s Canons of Judicial Ethics, but adopting none for Canon 3(A)(4)); IDAHO CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* 2 Nat’l Rep. Legal Ethics (Univ. Pub. Am.) (2000) (adopting none of the ABA commentary for any Canon within the Code); IOWA CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* IOWA R. CT. (West 2001) (same); MISS. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), <http://www.judperf.state.ms.us/conduct.htm> (last visited Jan. 20, 2001) (same); N.C. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* N.C. GEN. STAT. ANN. (Supp. 1999) (same); PA. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* PA. R. CT. (West 2000) (adopting portions of the ABA commentary for other sections of the state’s Canons of Judicial Ethics, but adopting none for Canon 3(A)(4)).

The CODE OF CONDUCT FOR UNITED STATES JUDGES, as adopted by the Judicial Conference of the United States in 1992, includes a provision substantially similar to the 1972 Code’s Canon 3(A)(4). *See* 150 F.R.D. 307, 310–11 (1992).

The ABA House of Delegates adopted a revised Model Code of Judicial Conduct in 1990.¹⁷ In pertinent part, the ethical standard in Canon 3(B)(7) became mandatory.¹⁸

17. MODEL CODE OF JUDICIAL CONDUCT (1990) (replacing the word "should" in Canons 1, 2, 3, and 5, and the word "may," in Canon 4, with the word "shall").

18. Of the forty-nine states that have adopted some form of the ABA Canons or Code, most, including Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming, use the term "shall" to describe a judge's ethical duty. See ALASKA CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* ALASKA CT. R. (West 2001); ARIZ. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* ARIZ. R. CT. (West 2000); ARK. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* ARK. CODE ANN. (Michie 2000); CAL. CODE OF JUDICIAL ETHICS Canon 3(B)(7), *reprinted in* CAL. CODE ANN. (West 1996); CONN. CODE OF JUDICIAL CONDUCT Canon 3(a)(4), *reprinted in* CONN. R. CT. (West 1998); FLA. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* FLA. R. CT. (West 2000); GA. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* 1 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) (2000); HAW. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* HAW. REV. STAT. ANN. (Michie 1999); IDAHO CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* 2 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) (2000) (employing the word "should" to describe both a judge's obligation to provide all parties an opportunity to be heard, and the duty not to initiate ex parte communications, but then stating that a judge "shall not" solicit advice from any person other than court personnel without giving interested parties an opportunity to respond); ILL. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* ILL. COMP. STAT. ANN. (Michie 1998); IND. CODE OF JUDICIAL CONDUCT Canon 3(B)(8), *reprinted in* IND. CODE ANN. (Michie 2000); KAN. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), http://www.kscourts.org/ctruls/jud_can3.htm (last visited Jan. 20, 2001); KY. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), http://www.aoc.state.ky.us/supreme/supreme/amended_orders98.htm (last visited Jan. 20, 2001); LA. CODE OF JUDICIAL CONDUCT Canon 3(A)(6), *reprinted in* LA. R. CT. (West 2000) (employing "shall" throughout to describe a judge's obligations, but stating that a judge "may" obtain ex parte advice from a disinterested legal expert if the judge provides the parties notice and opportunity to respond); ME. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* ME. R. CT. (West 2000); MICH. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* MICH. R. CT. (West 2000); MINN. CODE OF JUDICIAL CONDUCT Canon 3(A)(7), *reprinted in* MINN. R. CT. (West 2000); MO. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* MO. CT. R. (West 2000); NEB. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), http://court.nol.org/rules/Judcom_30.htm (last visited Jan. 20, 2001); NEV. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* NEV. REV. STAT. (Michie 1999); N.M. CODE OF JUDICIAL CONDUCT Canon 21-300(B)(7), *reprinted in* N.M. R. ANN. (Michie 2000); N.D. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* N.D. CT. R. ANN. (Lexis 2000-2001); OHIO CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* OHIO REV. CODE ANN. (Anderson Supp. 1997); OR. CODE OF JUDICIAL CONDUCT JR 2-102, [http://www.ojd.state.or.us/sca/webrules.nsf/d92724f3314408d788256802006cbee3/c30306d120fc0618882568c100788eb9/\\$file/E3j99012.pdf](http://www.ojd.state.or.us/sca/webrules.nsf/d92724f3314408d788256802006cbee3/c30306d120fc0618882568c100788eb9/$file/E3j99012.pdf) (last visited Jan. 20, 2001); R.I. CODE OF JUDICIAL CONDUCT Canon 3(B)(8), *reprinted in* R.I. CT. R. ANN. (Michie 1998); S.D. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* S.D. CODIFIED LAWS (Michie 1995); TENN. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* TENN. CODE ANN. (1998-1999); TEX. CODE OF JUD. CONDUCT, Canon 3(B)(8), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 1997); UTAH CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* UTAH CT. R. ANN. (Lexis 2000); VT. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* VT. STAT. ANN. (1999); VA. CANONS OF JUDICIAL CONDUCT Canon 3(B)(7), http://www.courts.state.va.us/text/jirc/canons_112398.html (last visited Jan. 20, 2001); W. VA. CODE OF JUDICIAL CONDUCT ANN. Canon 3(B)(7), *reprinted in* W. VA. CODE ANN. (Michie 1999); WYO. CODE OF JUDICIAL CONDUCT ANN. Canon 3(B)(7), *reprinted in*

A judge shall not 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 except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

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

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

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

WYO. CT. R. ANN. (1998).

The following states use the term "should": Alabama, Colorado, Delaware, Iowa, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, South Carolina and Washington. ALA. CANONS OF JUDICIAL ETHICS Canon 3(A)(4), *reprinted in* ALA. CODE ANN. (Michie 1999); COLO. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* COLO. REV. STAT. ANN. (2000); DEL. JUDGES' CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* DEL. R. ANN. (1998); IOWA CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* IOWA R. CT. (West 2001); MD. CODE OF JUDICIAL CONDUCT Canon 3(A)(5), *reprinted in* MD. CODE ANN. (Michie 1998); MASS. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* 2 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) (2000); MISS. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), <http://www.judperf.state.ms.us/conduct.htm> (last visited Jan. 20, 2001); N.H. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* 3 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) (2000); N.J. CODE OF JUDICIAL CONDUCT Canon 3(A)(6), *reprinted in* 3 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) (2000); N.Y. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* N.Y. JUD. LAW ANN. (McKinney 1992); N.C. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* N.C. GEN. STAT. ANN. (Supp. 1999); OKLA. CODE OF JUDICIAL CONDUCT Canon 3(B)(6) (1997), *reprinted in* OKLA. CT. R. & PROC. (West 2000); PA. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* PA. R. CT. (West 2000) ("A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, must not consider *ex parte* communications concerning a pending proceeding."); S.C. CODE OF JUDICIAL CONDUCT ANN. Canon 3(A)(4), *reprinted in* S.C. CODE ANN. (West Supp. 1999); WASH. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* WASH. CT. R. (West 2000).

Wisconsin uses the term "may" to describe the proscription. *See* WIS. SUP. CT. R. 60.04(1)(g).

(d) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.¹⁹

19. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (1990) (footnotes omitted). Thirty-four states have adopted the 1990 Code verbatim or in substantially identical language: Alaska, Arkansas, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maine, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. See ALASKA CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* ALASKA CT. R. (West 2001); ARK. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* ARK. CODE ANN. (Michie 2000); ARIZ. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* ARIZ. R. CT. (West 2000); CAL. CODE OF JUDICIAL ETHICS Canon 3(B)(7), *reprinted in* CAL. CODE ANN. (West 1996); CONN. CODE OF JUDICIAL CONDUCT Canon 3(a)(4), *reprinted in* CONN. R. CT. (West 1998); FLA. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* FLA. R. CT. (West 2000); GA. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* 1 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) (2000); HAW. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* HAW. REV. STAT. ANN. (Lexis 1999); ILL. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* ILL. COMP. STAT. ANN. (Michie 1998); IND. CODE OF JUDICIAL CONDUCT Canon 3(B)(8), *reprinted in* IND. CODE ANN. (Michie 2000); KAN. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), http://www.kscourts.org/ctruls/jud_can3.htm (last visited Jan. 20, 2001); KY. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), http://www.aoc.state.ky.us/supreme/supreme/amended_orders98.htm (last visited Jan. 20, 2001); ME. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* ME. R. CT. (West 2000); MICH. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* MICH. R. CT. (West 2000); MINN. CODE OF JUDICIAL CONDUCT Canon 3(A)(7), *reprinted in* MINN. R. CT. (West 2000); MO. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* MO. CT. R. (West 2000); NEB. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), http://court.nol.org/rules/Judcom_30.htm (last visited Jan. 20, 2001); NEV. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* NEV. REV. STAT. (Michie 1999); N.M. CODE OF JUDICIAL CONDUCT Canon 21-300(B)(7), *reprinted in* N.M. R. ANN. (Michie 2000); N.D. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* N.D. CT. R. ANN. (Lexis 2000-2001); OHIO CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* OHIO REV. CODE ANN. (Anderson Supp. 1997); OKLA. CODE OF JUDICIAL CONDUCT Canon 3(B)(6), *reprinted in* OKLA. CT. R. & PROC. (West 2000); OR. CODE OF JUDICIAL CONDUCT JR 2-102, [http://www.ojd.state.or.us/sca/webrules.nsf/d92724f3314408d788256802006cbee3c30306d120fc0618882568c100788eb9/\\$file/E3j99012.pdf](http://www.ojd.state.or.us/sca/webrules.nsf/d92724f3314408d788256802006cbee3c30306d120fc0618882568c100788eb9/$file/E3j99012.pdf) (last visited Jan. 20, 2001); R.I. CODE OF JUDICIAL CONDUCT Canon 3(B)(8), *reprinted in* R.I. CT. R. ANN. (Michie 1998); S.C. CODE OF JUDICIAL CONDUCT ANN. Canon 3(A)(4), *reprinted in* S.C. CODE ANN. (West Supp. 1999); S.D. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* S.D. CODIFIED LAWS (Michie 1995); TENN. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* TENN. CODE ANN. (1998-1999); TEX. CODE OF JUD. CONDUCT, Canon 3(B)(8), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 1997); UTAH CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* UTAH CT. R. ANN. (Lexis 2000); VT. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* VT. STAT. ANN. (1999); VA. CANONS OF JUDICIAL CONDUCT Canon 3(B)(7), http://www.courts.state.va.us/text/jirc/canons_112398.html (last visited Jan. 20, 2001); W. VA. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* W. VA. CODE ANN. (Michie 1999); WIS. SUP. CT. R. 60.04(1)(g); WYO. CODE OF JUDICIAL CONDUCT ANN. Canon 3(B)(7), *reprinted in* WYO. CT. R. ANN. (1998).

The 1990 ABA Code has eleven sentences of commentary and most states have adopted most or all of it. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt. (1990).

The commentary is intended to provide guidance to interpretation of the Canons, rather than a statement of additional rules. MODEL CODE OF JUDICIAL CONDUCT pmbl. (1990). The following nine states, however, have adopted none of the commentary: Louisiana, Maine, Michigan, Ohio, Oklahoma, Oregon, Texas, Utah, and Vermont. See

The 1990 Code more clearly expresses the nature and scope of prohibited²⁰ and permitted ex parte communications in "a more nuanced approach"²¹ than its predecessors. Besides precluding judicial initiation or consideration of ex parte communications, judges cannot "permit" them either.²² Proscribed communications include any communications to the judge "outside the presence of the parties" as well as conversations or statements with or from

LA. CODE OF JUDICIAL CONDUCT Canon 3(A)(6), *reprinted in* LA. R. CT. (West 2000); ME. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* ME. R. CT. (West 2000); MICH. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* MICH. R. CT. (West 2000); OHIO CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* OHIO REV. CODE ANN. (Anderson Supp. 1997); OKLA. CODE OF JUDICIAL CONDUCT Canon 3(B)(6), *reprinted in* OKLA. CT. R. & PROC. (West 2000); OR. CODE OF JUDICIAL CONDUCT JR. 2-102, [http://www.ojd.state.or.us/sca/webrules.nsf/d92724f3314408d788256802006cbee3/c30306d120f0618882568c100788eb9/\\$file/E3j99012.pdf](http://www.ojd.state.or.us/sca/webrules.nsf/d92724f3314408d788256802006cbee3/c30306d120f0618882568c100788eb9/$file/E3j99012.pdf) (last visited Jan. 20, 2001); TEX. CODE OF JUD. CONDUCT, Canon 3(B)(8), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 1997); UTAH CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* UTAH CT. R. ANN. (Lexis 2000); VT. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* VT. STAT. ANN. (1999).

20. Although most courts have construed the use of the term "should" in the 1972 Code to signify a mandatory duty, an ethical obligation under Canon 3(B)(7) became explicitly mandatory in the 1990 Code by substitution of the word "shall" for "should." As the preamble to the 1990 Code attempts to explain:

When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.

MODEL CODE OF JUDICIAL CONDUCT pmbl. (1990).

21. *Ex Parte Communications*, *supra* note 8, at 288.

22. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (1990). In *Subway Restaurants, Inc. v. Kessler*, 970 P.2d 526 (Kan. 1998), for example, despite the judge's reporting of an ex parte conversation, the court deemed "inappropriate" the judge's listening to an attorney's questions as she was preparing an opinion sanctioning another attorney, *id.* at 536. See also *In re Ragatz*, 429 N.W.2d 488, 490-91 (Wis. 1988) (suspending an attorney for responding to ex parte communications initiated by the judge because the attorney failed "to either refrain from participating in... [ex parte] communications or provide a copy of his response to opposing counsel").

Other cases treat the consequences of an ex parte communication differently depending on who initiated the contact. See, e.g., *O'Connor v. Leapley*, 488 N.W.2d 421, 423 (S.D. 1992) (stating that when "ex parte communication is not invited or initiated by the judge, reversible error occurs only if the adverse party is prejudiced... and if improper influence appears with reasonable certainty").

Of the states adopting the 1990 Code's language, Georgia, Oklahoma, and Utah delete the term "permit" in their respective versions of Canon 3(B)(7). See GA. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* 1 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) (2000); OKLA. CODE OF JUDICIAL CONDUCT Canon 3(B)(6), *reprinted in* OKLA. CT. R. & PROC. (West 2000); UTAH CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* UTAH CT. R. ANN. (Lexis 2000). Indeed, Utah's Code states that a judge "shall discourage" ex parte or other communications. UTAH CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* UTAH CT. R. ANN. (Lexis 2000). Kentucky's Code requires that a judge not encourage ex parte communications with parties. KY. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), http://www.aoc.state.ky.us/supreme/supreme/amended_orders98.htm (last visited Jan. 20, 2001).

fewer than all parties. While the 1990 Code restates the 1972 principles and exceptions, it significantly expands the number of acceptable *ex parte* communications that were otherwise prohibited by the 1972 language by adding the following exceptions: (1) scheduling, administrative purposes, and emergencies under certain conditions; (2) consultation²³ with court personnel and other judges; and (3) separately meeting with parties and counsel in mediation and settlement conferences with the parties' consent. Explicit recognition of these exceptions enhances the Code's value for judges' daily use.

B. What Is an Ex Parte Communication?

Judicial attempts to define *ex parte* communications refer to law dictionary definitions as well as common sense or logical descriptions. A judicial proceeding or order is *ex parte* "when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested."²⁴ As a rule of fairness, it includes any communication of information that a judge or attorney knows or should know would be of interest to adversary counsel. An otherwise proper communication becomes a prohibited *ex parte* communication when matters relevant to a proceeding circulate among or are discussed with fewer than all the parties who are legally entitled to be present or notified of the communication and entitled to have an opportunity to respond, impeach, contradict or explain.²⁵ Cited examples of *ex parte* communications occur when a party's motion or correspondence submitted to a court is not served on all other parties²⁶ or when a judge obtains information about a case without making it available to all the parties.²⁷

23. Alaska's Commentary defines "consult" as "engag[ing] in discussions regarding the substance or merits of the case." ALASKA CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., reprinted in ALASKA CT. R. (West 2001).

24. BLACK'S LAW DICTIONARY 597 (7th ed. 1999). This definition was used for guidance in *Harris v. United States*, 738 A.2d 269, 277 n.13 (D.C. 1999); *Cagle v. Davis*, 513 S.E.2d 16, 21 (Ga. Ct. App. 1999); and *Dutton v. Dutton*, 713 N.E.2d 14, 17 (Ohio Ct. App. 1998).

25. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) & cmt. (1990). As indicated, broader definitions of banned communications under the ABA Code include judicial receipt of communications about a pending or impending proceeding from someone *other* than the interested parties. See *id.*

26. See *Durrough v. State*, 620 S.W.2d 134, 144 (Tex. Crim. App. 1981) (en banc) (holding that a proceeding was not *ex parte* because "the appellant was served with a copy of the State's motion").

27. See *In re J.A.*, 601 A.2d 69, 74-75 & n.4 (D.C. 1991) (holding that because the trial judge made a case file available to all parties, it became part of the record and was therefore not an improper *ex parte* contact). In *Merle v. United States*, however, the

C. *The Purpose of the Prohibition*

The 1990 Code rules ban ex parte communications or other communications occurring “outside the presence of the parties.”²⁸ Absent an exception, the clear implication is that the parties in a legal matter should attend all judicial proceedings during which the judge will hear or receive information about the case. The commentary urges that all parties or their lawyers be included in communications with the judge to the extent reasonably possible,²⁹ but then notes that it is a party’s lawyer who must be present or receive notice when required under the Code.³⁰

The proscription against ex parte and other improper communications is to “accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.”³¹ Generally, no party or viewpoint should have an advantage in the presentation of information or the decision-making of a judge without notice to all interested parties. When ex parte communications are used, excluded parties lose the opportunity to rebut unfavorable³² or incorrect³³ information.

defendant claimed that his ex parte letters to the trial judge could not be used to evaluate his competency because his counsel had never reviewed the letters. 683 A.2d 755, 761 (D.C. 1996). The *Merle* court held that a litigant’s communication with the presiding judge could not be deemed an ex parte communication as to the litigant. *Id.*

28. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (1990).

29. See *id.* cmt. (“In general, . . . a judge must discourage ex parte communication.”). Of the states adopting the 1990 Commentary, only Alaska, California, and Hawaii have deleted this provision. See ALASKA CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., reprinted in ALASKA CT. R. (West 2001); CAL. CODE OF JUDICIAL ETHICS Canon 3(B)(7) cmt., reprinted in CAL. CODE ANN. (West 1996); HAW. CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., reprinted in HAW. REV. STAT. ANN. (Michie 1999).

Virginia’s Commentary states that a judge should be “cautious with regard to the possibility of prejudice or the appearance of such when communicating with a probation officer or a similarly situated person without the involvement of all parties.” VA. CANONS OF JUDICIAL CONDUCT Canon 3(B)(7), http://www.courts.state.va.us/text/jirc/canons_112398.html (last visited Jan. 20, 2001).

30. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt. (1990). Of the states that have adopted the 1990 Commentary, only California omits this provision. See CAL. CODE OF JUDICIAL ETHICS Canon 3(B)(7) cmt., reprinted in CAL. CODE ANN. (West 1996).

31. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (1990).

32. See, e.g., *In re Ross*, 667 N.E.2d 1012, 1016 (Ohio Ct. App. 1995) (vacating the adjudication of juvenile delinquency because an ex parte hearing “tainted” the proceedings and gave the state an unfair advantage).

33. See, e.g., *State v. Taylor*, Nos. CA97-10-110, CA97-10-111, 1998 WL 761673, at *8–9 (Ohio Ct. App. Nov. 2, 1998) (finding that the trial court’s statements on the record clearly indicated that it had relied upon incorrect information obtained through an ex parte communication in determining a criminal sentence).

The ABA prohibits ex parte communications in criminal cases as follows:

Although the sentencing court may appropriately take into consideration the defendant’s admission of guilt or assistance given the prosecution in some

Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by un rebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.³⁴

Even if a judge has correctly decided a case, judicial exposure to ex parte communications creates the appearance of impropriety, which undermines public confidence in the judicial system.³⁵

circumstances, it is inappropriate for the court to take the initiative in seeking to obtain such a confession or to induce cooperation with the prosecution. Similarly, although it is desirable that the sentencing court request the parties and the probation officer to provide it with additional information where the sentencing record appears incomplete or potentially inaccurate, the court should not undertake its own investigation absent extraordinary circumstances or otherwise consider allegations of misconduct by the defendant not present in the sentencing record.

ABA, III THE ABA STANDARDS FOR CRIMINAL JUSTICE 495-96 (2d ed. 1980).

34. *Rose v. State*, 601 So. 2d 1181, 1183 (Fla. 1992) (stating that the judicial practice of contacting only one party to prepare an order for a judge to sign gives the appearance of impropriety), *aff'd in part, rev'd in part*, 675 So. 2d 567 (Fla. 1996).

The Supreme Court of Florida recognized the prohibition against ex parte communications in small counties. *In re Miller*, 644 So. 2d 75, 78 (Fla. 1994). The Florida Supreme Court stated:

In small counties, it has been a time-honored tradition for residents to look to a county judge for advice and counsel in many areas, including legal matters. The judicial canon that makes ex parte communications improper does not distinguish between sparsely populated and metropolitan areas. As our state and its jurisprudence have progressed, the practice of turning to a county judge for legal advice is no longer permitted. Although [the judge] was not formally charged with engaging in ex parte communications, this opinion should stand as a statement that such conduct will not be tolerated.

Id.

35. Public confidence in the judiciary presupposes the sustenance of a free civic state. Cf. Leslie J. Walker, *Notes to THE DISCOURSES OF NICCOLÒ MACHIAVELLI* 124-31 (Leslie J. Walker trans., Yale Univ. Press 1950).

II. PROHIBITED COMMUNICATIONS

A. *Ex Parte* and "Other" Communications

The 1972 Code prohibits judicial initiation or consideration of "*ex parte* or other communications concerning a pending or impending proceeding," except as authorized by law.³⁶ The standard relating to *ex parte* communications is understandable, but the rule's reference to "other communications" is confusing and the reference to permissible *ex parte* contacts when "authorized by law" is overly burdensome. First, how can judges be precluded from initiating or considering *any* other information about their cases? Surely the Code does not mean what it says—judges *must* consider and sometimes initiate communications in order to clarify, expedite, and resolve their cases. Coupled with the 1972 Commentary, the best that may be said about the reference to "other communications" in the 1972 Code is that the phrase glibly distinguishes contacts with "lawyers, law teachers, and other persons who are not participants in the proceeding" from the Code's authority to seek advice from a disinterested law expert.³⁷ Second, the rule's reference to initiation or consideration of other communications "authorized by law" places a burden on a judge to know or inquire about which communications are authorized by rule, statute, or judicial decision.

The 1990 Code disallows two types of communications: (1) initiation, permission, or consideration of *ex parte* communications; and (2) consideration of "other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding."³⁸ Under the second category, a judge may properly consider any communication that is not *ex parte*, as long as it occurs in the presence of the parties.³⁹ As written (and punctuated), the 1990 Code is still not as clear as it should be (or probably was meant to be). The first category

36. MODEL CODE OF JUDICIAL CONDUCT Canon 3(A)(4) (1972).

37. The extensive Reporter's Notes to the 1972 Code offer no direct explanation for inclusion of the term "other communications." See generally E. WAYNE THODE, ABA & AM. BAR FOUND., REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT (1973).

38. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (1990). The Reporter's Notes for the 1990 Code state: "A rule was added prohibiting a judge from considering other communications made to the judge outside the presence of the parties, not just communications technically termed '*ex parte*,' when such other communications are not otherwise authorized." LISA L. MILORD, CTR. FOR PROF'L RESPONSIBILITY, ABA, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 20 (1992).

39. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (1990). Wisconsin omits the phrase "made to the judge outside the presence of the parties" in its Code. See WIS. SUP. CT. R. 60.04(g).

prohibits initiating, permitting or considering all ex parte communications, without reference to context, for example, about a pending or impending proceeding. Currently, only consideration of "other communications" is prohibited, with regard to pending or impending proceedings. By placing a comma after the word "parties," the Code language would clarify that *both* initiation, permission, or consideration of ex parte communications *and* consideration of other communications made to the judge outside the presence of the parties are prohibited "concerning a pending or impending proceeding."⁴⁰ An even more streamlined and clarified amended Code would state: "A judge shall not initiate, permit, or consider any communication made to the judge outside the presence of the parties about a pending or impending proceeding, except that:" The current Code reference to "ex parte communications" assumes that all judicial and lay persons thoroughly understand the meaning of this term of art. As long as the Code distinguishes the contexts in which judges cannot deal with ex parte communications and other communications, the Code will lack precision and its application will be unnecessarily troublesome. To the extent the general ethical proposal requires qualification, the stated exceptions and commentary suffice.

Having identified shortcomings with the ethical Codes used in most states, why does the Code address "other communications" at all? Why is it not sufficient for the Codes to treat only ex parte communications?⁴¹ The Code exceptions to the general rule permit ex parte communications for scheduling and emergencies and for those expressly authorized by law. The other

40. Another matter for potential Code clarification is the identity of the persons with whom judicial initiation, consideration or permission of ex parte communications must not occur. Only Texas explicitly lists the persons with whom the judge cannot have such contact: "a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee." TEX. CODE OF JUD. CONDUCT, Canon 3(B)(8), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 1997).

41. The Codes of Alabama, Idaho, Kentucky, Louisiana, and Wisconsin do not refer to "other" communications. See ALA. CANONS OF JUDICIAL ETHICS Canon 3(A)(4), *reprinted in* ALA. CODE ANN. (Michie Cum. Supp. 1999); IDAHO CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* 2 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) (2000); KY. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), http://www.aoc.state.ky.us/supreme/supreme/amended_orders98.htm (last visited Jan. 20, 2001); LA. CODE OF JUDICIAL CONDUCT Canon 3(A)(6), *reprinted in* LA. R. CT. (West 2000); WIS. SUP. CT. R. 60.04(g). The Codes of Ohio and Oregon refer to "communications" in the general standard and then refer to ex parte communications when describing exceptions. See OHIO CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* OHIO REV. CODE ANN. (Anderson Supp. 1997); OR. CODE OF JUDICIAL CONDUCT JR 2-102, <http://www.ojd.state.or.us/sca/webrules.ns/d92724f3314408d788256802006cbee3/c30306d120fc0618882568c100788eb9/file/E3j99012.pdf> (last visited Jan. 20, 2001).

exceptions neither mention *ex parte* communications nor use the term “other communications” or “communications,” although those provisions involve communications with disinterested experts, court personnel, and with the parties for settlement or mediation purposes. At a minimum, prohibited “other communications” must necessarily include the exceptions that do not relate to *ex parte* situations and which do not conform to the Code language. For example, it would be unethical for a judge to consider advice from a disinterested expert on the applicable law without notifying the parties or giving them a chance to respond.

Judicial decisions, as well as a flexible reading of the Codes, limit the prohibited *ex parte* and other communications under the Codes to pending or impending⁴² proceedings. The rule easily applies to cases and matters on a judge’s docket that are incomplete, that is, when all issues have not been resolved by a judgment. What are “impending” proceedings? Improper communications with a judge appear to be subject to the rule if it is clear that the judge has information relating to a particular fact situation that is likely to be filed in the foreseeable future, presumably in that jurisdiction. Regardless of whether the judge anticipates the imminent filing of a lawsuit, once the case is filed the judge who has engaged in or been a participant in an *ex parte* communication should recuse himself without waiting for one of the parties to move for disqualification.⁴³ At the other end of the “proceedings” spectrum: Is the ethical rule applicable to information received after a judge’s decision or after termination of the case? The content of a conversation between the judge and a third party may reveal that the conversation did not occur until after the judge made the decision and therefore was not prohibited, that is, it may show the judge’s thoughts about the expected consequences of the decision or indicate the judge’s difficulty in reaching that ruling.⁴⁴ Likewise, after the conclusion

42. Pennsylvania’s Code deletes the term “impending” from its prohibition on *ex parte* communications. PA. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* PA. R. CT. (West 2000).

43. *See, e.g., Stivers v. Knox County Dep’t of Pub. Welfare*, 482 N.E.2d 748, 749 (Ind. Ct. App. 1985) (holding that recusal of a juvenile court judge was justified under the Code despite statutory authorization for the judge to participate in a group discussion about facts that led to the filing of a petition for termination of parental rights).

Professor Kaufman has raised the issue of whether judges should participate in law school moot court cases dealing with issues pending in their courts or making their way towards their court. Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 WASH. L. REV. 851, 858–59 (1989). Even if the judge does not announce a decision on the merits, is the judge nevertheless receiving communications about a pending or impending proceeding by considering the briefs and arguments in a moot court case? *See id.*

44. *See, e.g., McAdams v. McAdams*, 530 N.W.2d 647, 651 (N.D. 1995) (determining

of proceedings, the rule no longer applies. For example, in *Hovelson v. U.S. Swim & Fitness, Inc.*,⁴⁵ the judge heard counsel's ex parte motion to amend the judgment to include the defendant's other names.⁴⁶ Because the motion was made following judgment with no appeal pending, the judge did not violate the Code by considering the motion ex parte.⁴⁷

B. Initiating, Permitting, or Considering Ex Parte or Other Communications

The general ethical standard bans a judge from initiating, permitting, or considering ex parte communications and from considering other communications.⁴⁸ Judicial initiation of ex parte communications necessarily suggests that the judge has taken a proactive approach toward procuring information, and neither telling the parties about the judge's intent to have an ex parte contact nor obtaining their consent⁴⁹ cures the error. Whether the initiation occurs through an independent investigation⁵⁰ or by talking to fewer than all the parties to a

that the judge's telephone conversation with a custody investigator did not influence the judge's decision because the judge had already reached a decision).

45. 450 N.W.2d 137 (Minn. Ct. App. 1990).

46. *Id.* at 139.

47. *Id.* at 143. The prohibition is also inapplicable to communications about future issues. In *Sloan v. United States*, during a post-verdict discussion, a juror told the judge's law clerk that the jury had acquitted the defendant on some of the charges because it had misunderstood the court's instructions. 527 A.2d 1277, 1286-87 (D.C. 1987). Besides deferring to the trial judge's statement that he did not consider the juror's communication when he later sentenced the defendant, the appellate court noted that the trial judge's consideration of the information was "strictly limited to future application" and that future use of the remarks did not constitute consideration of an ex parte communication about a "pending" proceeding. *Id.* at 1287.

48. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (1990).

49. See *McElhanon v. Hing*, 728 P.2d 273, 279 (Ariz. 1986) (en banc) (holding that although the trial judge's ex parte hearing violated a rule prohibiting a judge from initiating or considering ex parte communications regarding a pending case, the ex parte conference did not actually prejudice the defendant). Obtaining consent from some of the parties for an ex parte contact is itself a form of initiation that violates the Code. See *id.*

California's commentary, however, permits judicial initiation or consideration of an ex parte communication whenever the parties so stipulate. See CAL. CODE OF JUDICIAL ETHICS Canon 3(B)(7) cmt., reprinted in CAL. CODE ANN. (West 1996). Alaska has a narrower provision requiring the parties to consent prior to ex parte communications about "specified administrative topics with one or more parties." ALASKA CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(c), reprinted in ALASKA CT. R. (West 2001).

50. See, e.g., *State v. Emanuel*, 768 P.2d 196, 197, 201 (Ariz. Ct. App. 1989) (vacating a sentence for theft conviction and remanding the case for resentencing before another judge after the trial judge conducted an ex parte inquiry into rumors of prior work-related thefts by the defendant, even though the trial judge noted on record at sentencing that the sentence was not based on what he had learned from the defendant's prior attorney employer); *State v. Romano*, 662 P.2d 406, 407 (Wash. Ct. App. 1983) (finding reversible error after a trial judge contacted two of his friends to verify the

proceeding,⁵¹ an ethical violation occurs when a party has no opportunity to respond to the information received by the judge. That the judge would choose to inquire or converse about a pending matter and thereby commit a rule violation becomes all the more unfortunate in light of the alternatives that exist for gathering the same information, such as using a questionnaire, requesting clarification or a detailed explanation, or conducting a hearing.⁵² Because a judge may also violate Canon 3(B)(7) by *permitting* an ex parte communication, he or she can avoid a rule violation by refusing or indicating an unwillingness to engage in improper conversations, and by appointing someone else to screen written and electronic communications directed toward the judge.

Judges also cannot “consider” improper communications. Judicial consideration of information contained in those communications necessarily raises concerns about the process by which the judge decides pending matters. For example, when a judge customarily reads pre-sentence reports prior to any determination of guilt,⁵³ without any legal authority to do so, the judge not only violates the rule but also raises a concern about a pro-prosecution appearance because various issues require resolution during trial.

Even if the judge has considered information contained in the communication, the nature and dissemination of a specific communication are relevant to whether a judge has breached the ethical ban. For instance, when a judge speaks to a probation officer to assist in determining a defendant’s sentence, the judge has breached the ethical rule by considering such communications, unless the information the judge sought was already known either to the judge through other reports or to the defendant through access to those reports.⁵⁴ Or, if a judge

defendant’s statements about the defendant’s income).

51. See, e.g., *McElhanon*, 728 P.2d at 278.

52. See, e.g., *Foster v. United States*, 615 A.2d 213, 218–19 n.14 (D.C. 1992) (emphasizing the trial judge’s duty to avoid any off-the-record contacts that might be construed as ex parte communications). By contrast, no rule infraction occurs when someone other than the judge seeks the contact. See, e.g., *Sloan*, 527 A.2d at 1287 (asserting that no violation or appearance of impropriety occurred when a juror initiated a discussion with the judge’s law clerk followed by the judge’s informing each party’s counsel of the communication); *Matheney v. State*, 688 N.E.2d 883, 896 (Ind. 1997) (finding no ex parte violation when a witness merely shared with the judge the nature of statements the judge himself had made).

53. See *State ex rel. Bryan v. McDonald*, 662 S.W.2d 5, 7 (Tex. Crim. App. 1983) (en banc) (holding that there was no statutory authority for an investigation of pre-sentence reports prior to a determination of guilt).

54. See *Foster*, 615 A.2d at 217 (finding no violation of the Code’s “consider” prohibition when the judge sought information already known to him and accessible to

considers information from an ex parte communication, no violation will be found when any other evidence in the record supports judicial findings traceable to the prohibited communication.⁵⁵

When a judge disclaims any role that a proscribed communication played in the decision-making process, an appellate court is likely to defer to that declaration and find no ethical violation for having considered an ex parte or other communication.⁵⁶ Conversely, judicial acknowledgment of participation in a prohibited conversation, unaccompanied by assurance that the information learned would not be considered, is likely to lead a reviewing court to conclude either that the judge was unaware of his ethical obligation not to consider the information or that it would create an appearance of impropriety.⁵⁷

C. *Prohibited Communications—Matters of Substance or On the Merits*

When the judge communicates privately, either with a witness,⁵⁸ with counsel for only one of the parties,⁵⁹ or otherwise

the defendant).

55. *Id.*

56. See, e.g., *Sloan*, 527 A.2d at 1287 (finding believable the trial judge's statement that he would not consider the improper contact); *B.G. Equip. Co. v. Am. Ins. Co.*, 402 N.Y.S.2d 479, 480–81 (N.Y. App. Div. 1978) (deferring to the trial court's unequivocal statement that there was no consideration of ex parte submission of trial memorandum).

57. See, e.g., *Belton v. United States*, 581 A.2d 1205, 1213–14 (D.C. 1990) (reasoning that, without a judicial disclaimer, the manner by which the judge obtained information created concern about whether the judge relied upon the information).

58. See, e.g., *Goebel v. Benton*, 830 P.2d 995, 999–1000 (Colo. 1992) (en banc) (disqualifying a judge following his discussion with a dismissed party's executive director and counsel to discuss an issue of "critical importance" to the judge's ultimate ruling in case); *Teeft v. Luna Cheese Corp. of Fla.*, 577 So. 2d 1004, 1004–05 (Fla. Dist. Ct. App. 1991) (ordering a new trial after discovering that the judge copied from a witness's files documents that supported the defendant's liability); *In re Ross*, 667 N.E.2d 1012, 1016 (Ohio Ct. App. 1995) (vacating a delinquency adjudication in view of the fact that the victim's mother had met with the judge to object to his findings); *In re Hancock*, 483 S.E.2d 756, 756–57 (S.C. 1997) (affirming a judge's public reprimand where the judge had an ex parte conversation with an arresting officer to discuss helping the judge in his friend's traffic case).

59. See, e.g., *Strothers v. Strothers*, 567 N.E.2d 222, 224–25 (Mass. App. Ct. 1991) (finding reversible error when a judge discussed with counsel the amount of child support the party could afford and determining that a judge must treat a pro se party the same as a judge would treat a party's attorney); *In re Buford*, 577 S.W.2d 809, 847 (Mo. 1979) (en banc) (suspending a judge for dismissing cases following private arguments that were held without notice to opposing counsel); *In re Edens*, 226 S.E.2d 5, 8 (N.C. 1976) (censuring a judge for entering an order without providing notice to opposing counsel); *In re Williams*, 657 N.E.2d 1352, 1353 (Ohio 1993) (disqualifying a judge after he contacted the law director of the defendant-city); *Jones v. State*, 668 P.2d 1170, 1171–72 (Okla. Crim. App. 1983) (declaring reversible error after a trial judge sent letters to a prosecutor

discusses the facts of the case without all counsel being present,⁶⁰ a Code violation occurs regardless of who initiated the discussion. However, one of the 1990 Code provisions exempts *ex parte* communications for scheduling, administrative purposes, or emergencies that do not pertain to “substantive matters” or “issues on the merits.”⁶¹ The negative implication of the exception is that the general prohibition forbids *ex parte* communications about either the substance of the claim or the merits of an issue. What is the purpose of including both phrases in the rule? The disjunction of substantive matters and issues on the merits suggests that the forbidden communications may extend both to matters of substance, that is, the ultimate merits of the case, as well as to the merits of non-substantive issues that arise during the proceedings.⁶² The definition of an *ex parte* communication supports this interpretation, for it includes any communication of information in which adversary counsel would be interested.⁶³ Because procedural rulings can end a case prior to its disposition on the merits, counsel is likely to be as concerned about procedural issues as he or she is to be about the substance of the contested claims. Therefore, the Code bans *ex parte* communications concerning the merits of both the substantive claims and any procedural issues raised during the proceedings.⁶⁴

suggesting trial strategies); *State v. Cash*, 867 S.W.2d 741, 749 (Tenn. Crim. App. 1993) (ordering recusal after a judge met with a prosecutor to discuss a factual issue that was the subject of remand), *aff’d in part*, No. 03C01-9607-CC-00271, 1997 WL 634531 (Tenn. Crim. App. Oct 16, 1997).

60. See, e.g., *Merle v. United States*, 683 A.2d 755, 761 (D.C. 1996) (finding that letters written by a party to the judge did not constitute *ex parte* communication); *In re Lewis*, 535 N.E.2d 127, 128–29 (Ind. 1989) (disciplining a judge with suspension for discussing the merits of several cases with a friend and the friend’s relatives); *Stivers v. Knox County Dep’t of Pub. Welfare*, 482 N.E.2d 748, 751 (Ind. Ct. App. 1985) (ordering recusal after a judge discussed an impending case with members of a child protection team); *Maneikis v. State*, 411 N.E.2d 669, 669 (Ind. Ct. App. 1980) (holding that a party who conducted *ex parte* communication with a judge cannot later complain about the conversation); *State v. Romano*, 662 P.2d 406, 407 (Wash. Ct. App. 1983) (finding reversible error for a judge to contact friends to inquire about a defendant’s statements of income).

61. Of the states adopting the 1990 Code, only California excludes the phrase “or issues on the merits” from its Code. MODEL CODE OF JUDICIAL CONDUCT 3(B)(7)(a) (1990); CAL. CODE OF JUDICIAL ETHICS Canon 3(B)(7)(d), *reprinted in* CAL. CODE ANN. (West 1996).

62. See, e.g., *In re Smith*, 670 P.2d 1018, 1020–21 (Or. 1983) (in banc) (deciding that *ex parte* contact did not affect a legal right or duty and that “[t]he merits of a proceeding have to do with the legal rights and duties of the parties as they are disclosed by the pleadings and evidence”).

63. See, e.g., *Mathew Zaheri Corp. v. New Motor Vehicle Bd.*, 64 Cal. Rptr. 2d 705, 712 (Cal. Ct. App. 1997) (stating the basic standard for improper *ex parte* communication and concluding that this standard generally prohibits any *ex parte* communication between counsel and the trier of fact).

64. See *id.* (applying Canon 3(B)(7) to communications to the judge about

By contrast, communications about "purely" procedural⁶⁵ matters are not ethical violations, for example, when counsel advises the judge that she will not file a reply to the plaintiff's response to her summary judgment motion, or when the judge permits counsel to place an objection on the record. Even then, it may be difficult for the judge and counsel to maintain separation between substance and procedure as the duration of a communication grows.

One of the more prejudicial forms of communications occurs when the judge confers privately with a criminal accused's co-defendant. In *Bell v. State*,⁶⁶ the defendant was charged with drug trafficking and conspiracy to traffic in marijuana.⁶⁷ Before trial, defense counsel learned from the sheriff that the trial judge had visited the co-conspirator in jail and provided him with legal research, without telling either side's counsel about the meeting.⁶⁸ A short time later, the State agreed to grant the co-conspirator use immunity in return for his testimony against the defendant, and the judge disqualified himself from the co-conspirator's companion case.⁶⁹ When the defendant moved to disqualify the judge from his case, the judge made no effort to explain the reason for the secret meeting or to reassure the defendant that the meeting did not affect him.⁷⁰ The judge denied

information "relevant to issues in the adjudication"; *Foster v. United States*, 615 A.2d 213, 216-18 (D.C. 1992) (including sentencing within the merits of a proceeding). Cf. *Leisure v. Leisure*, 589 N.E.2d 1163, 1168-69 (Ind. Ct. App. 1992) (finding that no actual bias resulted from the ex parte communication because the content of the communication "went to an incidental issue" and was not related to appellate issues); *Jake C. Byers, Inc. v. J.B.C. Invs.*, 834 S.W.2d 806, 820-21 (Mo. Ct. App. 1992) (determining that a judge's asking counsel for suggested findings of fact and conclusions of law after entering judgment "is simply a procedural matter, not a decision on the merits").

65. See, e.g., DEL. JUDGES' CODE OF JUDICIAL CONDUCT Canon 3(A)(4) cmt., reprinted in DEL. R. ANN. (1998) (citing scheduling as an example of a "purely procedural" matter).

66. 655 N.E.2d 129 (Ind. Ct. App. 1995).

67. *Id.* at 130-31. See also *State v. Perkins*, 686 P.2d 1248, 1257 (Ariz. 1984) (en banc) (determining that no prejudice was shown to justify the reversal of convictions when the judge told all counsel about letters concerning the co-defendant and distributed copies); *In re W.T.L.*, 656 A.2d 1123, 1129-30 (D.C. 1995).

Complaining witnesses, crime victims, and prosecutors may also be prejudiced by judicial disposition of charges without any opportunity to object or offer proof. See, e.g., *In re Clayton*, 504 So. 2d 394, 394-95 (Fla. 1987) (reprimanding a judge for conducting ex parte proceedings to dispose of cases); *In re Edens*, 226 S.E.2d 5, 10 (N.C. 1976) (censuring a judge for accepting a guilty plea without the presence of the prosecutor); *In re Eplin*, 416 S.E.2d 248, 251-52 (W. Va. 1992) (recommending suspension of a judge for unilaterally disposing of case as a favor to a politician).

68. *Bell*, 655 N.E.2d at 131.

69. *Id.*

70. *Id.* at 132.

the motion to recuse, and the defendant was convicted.⁷¹ The appellate court reversed the convictions and granted the defendant a new trial as a result of the undisclosed meeting and advice, as well as the appearance of impropriety.⁷² A year later, the trial judge was suspended for his willful misconduct that was prejudicial to the administration of justice.⁷³

Private meetings with victims or their families prior to sentencing in criminal cases also violate the ban against ex parte communications on the merits.⁷⁴ Those meetings often present the most compelling reason for the general rule: The accused should have an opportunity to confront any allegations against him and to deny or explain them with his own arguments and proof.⁷⁵ A judge's consideration of information acquired through ex parte contacts without notification to the accused or a chance to respond violates both the Code and the due process right to a fair hearing.⁷⁶

Well-intentioned friends and citizens occasionally correspond with the judge in order to express their opinions about issues related to a case with the hope that the communication will thereby influence the judge's decision. While it is not improper for a judge to receive petitions or letters about a pending matter, the ethical standard is violated when the judge initiates, permits, or considers such communications. Appellate opinions express concern when a judge fails to disclose to all parties and their counsel the receipt or the contents of letters or petitions. For instance, in *State v. Scales*, the judge received a petition signed by 2000 people from the victim's hometown, seeking the maximum penalty for murder.⁷⁷ While rejecting the goal of the petition, the appellate court mentioned its effect on the sentence

71. *Id.*

72. *Id.*

73. *In re Sanders*, 674 N.E.2d 165, 167 (Ind. 1996).

74. *See, e.g., State v. Scales*, 933 P.2d 737, 738, 743 (Kan. 1997) (deciding that a private presentencing meeting between the judge and the victim's family violated the ban against ex parte communications); *State v. Valencia*, 602 P.2d 807, 808–09 (Ariz. 1979) (en banc) (setting aside a sentence after the trial judge held a private in-chambers conversation with the victim's brother).

75. *See Scales*, 933 P.2d at 741.

76. *See, e.g., In re Peck*, 867 P.2d 853, 855–56 (Ariz. 1994) (en banc) (removing a judge from office for meeting with the defendant's family and calling the police to advocate that the defendant was a victim of mistaken identity); *Valencia*, 602 P.2d at 808–09 (remanding the cause and setting aside the sentence after the trial judge held an ex parte conversation with the victim's brother); *Teeft v. Luna Cheese Corp.* of Fla., 577 So. 2d 1004, 1005 (Fla. Dist. Ct. App. 1991) (finding reversible error in the case of a secret meeting between a trial judge and a witness); *Scales*, 933 P.2d at 741 (finding reversible error and remanding for resentencing before a different judge).

77. 933 P.2d at 739.

imposed.⁷⁸ It is important for judges to establish procedures to avoid intentional or accidental ethical violations and to be cautious by acknowledging receipt of such communications,⁷⁹ turning them over to counsel for the parties, and disclaiming any consideration of them.⁸⁰

Finally, when a jury is troubled by issues, it may seek the judge's assistance to clarify evidence or the judge's instructions. Without the presence of the parties and counsel, such judicial meetings with the jury constitute ex parte communications about substantive matters. Indeed, the judge should not communicate with jurors until the case is completed. For example, in *Harris v. United States*,⁸¹ the judge invited jurors to speak about their questions or concerns about the trial process following the return of the verdict but before the judge sentenced the defendant.⁸² During the meeting with jurors, the judge learned that the verdict was a compromise.⁸³ At sentencing, the judge disclosed the jurors' comments but disclaimed any effect of the jury conversations on the sentence he would impose.⁸⁴ The appellate court held that the ethical violation was harmless and affirmed the convictions and sentences.⁸⁵

D. Independent Investigations

Banned ex parte communications include independent judicial investigations and the acquisition of information from "lawyers, law teachers, and other persons who are not

78. *Id.* at 740.

79. *See, e.g., Ivey v. Ivey*, 445 S.E.2d 258, 260 (Ga. 1994) (noting the judge's acknowledged receipt of calls and letters from the parties' relatives and friends but finding no indication that the judge considered them).

80. Communications from a party that are read by the judge constitute ex parte communications, even when the party cannot benefit from any ethical violation by the judge. *See, e.g., Maneikis v. State*, 411 N.E.2d 669, 670 (Ind. Ct. App. 1980) (holding that a party who initiates ex parte communication with a judge cannot later complain about the conversation).

81. 738 A.2d 269 (D.C. 1999).

82. *Id.* at 276. Similarly, in *Sloan v. United States*, a juror told the judge's law clerk in a post-verdict discussion that the jury had acquitted on some charges because it misunderstood court's instructions. 527 A.2d 1277, 1287 (D.C. 1987). The *Sloan* court noted that the judge's consideration of the information was "strictly limited to future application" and thus was not a consideration of an ex parte communication concerning the "pending" proceeding. *Id.*

83. *Harris*, 738 A.2d at 278.

84. *Id.* at 277.

85. *Id.* at 280-81. To avoid the problem of a judge's prematurely hearing about the jury's views, the ABA Standards recommend that such discussions occur after the completion of the jurors' service and then only on the record in open court with all counsel present. ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY 227 (Standard 15-4.3, Judicial communication with jurors) (3d ed. 1996).

participants in the proceeding, except to the limited extent permitted.”⁸⁶ In many cases, discrepancies in the evidence probably tempt judges to conduct some “research” to resolve variations in the proof. While it is true that such contacts may assist judges in deciding issues and cases, American jurisprudence relies on the adversary process to resolve factual disputes. As Chief Justice Benjamin Cardozo stated:

The function of the judges “is to determine controversies . . .” They are not adjuncts or advisers, much less investigating instrumentalities

. . . The judge is [not] a prosecutor. . . . He is [not] to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one. . . . [H]is conclusion is [not] to be announced upon a case developed by himself.⁸⁷

A judge who initiates a probe and considers its results gains information unavailable to the parties who cannot test its validity or credibility. Moreover, the ban on *ex parte* investigations reinforces the commentary’s principle that the judge “must consider only the evidence presented.”⁸⁸ Appellate courts frown on judicial investigations, not only because they present an appearance of partiality,⁸⁹ but also because they may

86. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt. (1990). Of the states adopting the 1990 commentary, only Alaska omits the sentence prohibiting independent investigations. See ALASKA CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., *reprinted in* ALASKA CT. R. (West 2001).

Indiana adds a sentence permitting a judge to consult with the Indiana Judicial Center or to participate in continuing legal education programs. IND. CODE OF JUDICIAL CONDUCT Canon 3(B)(8) cmt., *reprinted in* IND. CODE ANN. (Michie 2000). Illinois does not include the “except to the limited extent permitted” phrase, thereby banning the ability of a judge to consult such persons. ILL. CODE OF JUDICIAL CONDUCT Canon 3(A)(4) cmt., *reprinted in* ILL. COMP. STAT. ANN. (Michie 1998).

Arizona, California, and North Dakota qualify the commentary language, banning independent investigations *unless* they are authorized by law. ARIZ. CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., *reprinted in* ARIZ. R. CT. (West 2000); CAL. CODE OF JUDICIAL ETHICS Canon 3(B)(7) cmt., *reprinted in* CAL. CODE ANN. (West 1996); N.D. CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., *reprinted in* N.D. CT. R. ANN. (Lexis 2000–2001).

87. *In re Richardson*, 160 N.E. 655, 658 (N.Y. 1928).

88. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt. (1990).

89. A court may find an ethical violation relating to an *ex parte* communication even though it finds the judge did not initiate or consider such a communication. See, e.g., *Belton v. United States*, 581 A.2d 1205, 1215 (D.C. 1990). In *Belton*, the judge was visiting an apartment complex when several residents started discussing the neighborhood drug problems. *Id.* at 1213. When they mentioned the name of a defendant in the judge’s court, the judge told them he could not discuss a pending case. *Id.* at 1211. . At the sentencing hearing, the defendant received no assurance from the judge that he had disregarded the communication in his sentencing deliberations. *Id.* at 1214. After his sentencing hearing, the defendant moved for the judge’s recusal, questioning the judge’s references at the hearing to the conversations at the apartment complex. *Id.* at 1211. Although the

provide the judge with personal knowledge of disputed facts, which is a specific ground for judicial disqualification.⁹⁰

Investigations take various forms, including contacts with witnesses and others to verify information,⁹¹ consulting documents in other cases,⁹² and traveling to various sites. For example, in *Abington Ltd. Partnership v. Heublein*,⁹³ an easement case, the trial judge made an ex parte visit to the property that was the subject of dispute and engaged in conversation with a resident.⁹⁴ Despite the fact that the visit was an improper independent investigation of the facts under the Code, counsel never attempted to show either that the judge's observations differed from earlier visits with counsel present or that the judge relied on his independently acquired knowledge in deciding the

reviewing court stated that the judge neither initiated nor considered the ex parte communication, it reversed for the appearance of impropriety and remanded the case for resentencing. *Id.* at 1215.

90. See, e.g., *id.* at 1214–15; *In re Garrard*, 624 N.E.2d 68, 70 (Ind. Ct. App. 1993) (requiring reversal of a guardianship proceeding after finding that a judge's initiation of ex parte communication with an expert witness created the appearance of impropriety); *State v. Cash*, 867 S.W.2d 741, 749 (Tenn. Crim. App. 1993) (concluding that a trial judge should recuse himself from criminal prosecution proceedings when the judge independently investigated the defendant's prior criminal record), *aff'd in part*, No. 03C01-9607-CC-00271, 1997 WL 634531 (Tenn. Crim. App. Oct. 16, 1997).

See also MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(a) (1990) (footnote omitted) ("A judge shall disqualify himself or herself in a proceeding in which . . . the judge has . . . personal knowledge of disputed evidentiary facts concerning the proceeding . . .").

91. See, e.g., *In re Anderson*, 814 P.2d 773, 776–77 (Ariz. 1991) (en banc) (censuring the judge for repeated use of a bench-side telephone for ex parte contacts to assist in resolving cases); *State v. Emanuel*, 768 P.2d 196, 198 (Ariz. Ct. App. 1989) (vacating the sentence and remanding the case for resentencing before another judge where the trial judge had called several attorneys for whom the defendant had worked to determine why he had left their employ); *Horton v. Ferrell*, 981 S.W.2d 88, 89 (Ark. 1998) (finding that it was reversible error for a court to accept a report based upon the master's ex parte investigation); *Davis v. United States*, 567 A.2d 36, 38 (D.C. 1989) (declaring reversible error in an auto theft case in which a law clerk discovered, after the trial judge asked the clerk to investigate the defendant's background, that the defendant was using an alias); *Teetf v. Luna Cheese Corp. of Fla.*, 577 So. 2d 1004, 1004 (Fla. Dist. Ct. App. 1991); *Garrard*, 624 N.E.2d at 69 (concluding there was reversible error when a judge made a telephone call to an expert who had filed a written report); *Sherman v. State*, 905 P.2d 355, 377 (Wash. 1995) (en banc) (finding reversible error when the judge directed a judicial extern to inquire about the process used to monitor recovering physicians).

92. See, e.g., *Cash*, 867 S.W.2d at 749 (disqualifying a judge from taking part in further proceedings where the judge had independently investigated the defendant's prior record). See also *In re J.A.*, 601 A.2d 69 (D.C. 1991), a neglect case in which the judge read the court file from the mother's divorce proceeding, *id.* at 74–75. Because the mother first raised the issue of ex parte contacts on appeal, the court used the plain error standard and found no plain error. *Id.* at 75.

93. 717 A.2d 1232 (Conn. 1998).

94. *Id.* at 1235.

case. Therefore, the reviewing court found no violation of the ex parte provision of the Code.⁹⁵

III. PERMISSIBLE COMMUNICATIONS

A. *Ex Parte Communications for Scheduling, Administrative Purposes, or Emergencies*

The 1990 Code explicitly recognizes several exceptions to the general ban on ex parte communications. "Where circumstances require," ex parte communications are allowed to facilitate scheduling⁹⁶ and other administrative purposes⁹⁷ and to accommodate "emergencies that do not deal with substantive matters or issues on the merits,"⁹⁸ provided that the following conditions are satisfied: (1) "the judge reasonably believes that no

95. *Id.* at 1234. The court did, however, remand the case for new trial due to an appearance of partiality under the Code. *Id.* at 1238. See also *Tyson v. State*, 622 N.E.2d 457, 459 (Ind. 1993) (finding that an appellate judge's spouse's conversation with appellate counsel did not violate the Code's proscription against ex parte communications but did create the appearance of partiality, requiring the judge's recusal).

96. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(a) (1990). See also *Hall v. Hall*, 482 A.2d 974, 976-77 (Pa. Super. Ct. 1984) (affirming the denial of a recusal motion where the judge called an attorney to describe when a hearing would occur because this communication was "not the type . . . contemplated" in Canon 3(A)(4) of the Pennsylvania Code). Compare *In re Johnson*, 658 N.E.2d 589, 590 (Ind. 1995), in which a judge held defense counsel in contempt after the judge changed the date of a hearing to conform to an agreement of counsel, but then, after prosecutor's ex parte call, changed it back to a date on which the defense counsel could not attend. The judge was reprimanded after conceding that he violated Indiana's Canon 3(A)(4). *Id.*

As examples of "scheduling," Alaska's commentary lists notice to counsel about a delay or change of court dates and notice from counsel that a criminal defendant cannot be located. ALASKA CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., reprinted in ALASKA CT. R. (West 2001).

97. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(a) (1990). See also, e.g., *Mahrdt v. State*, 629 N.E.2d 244, 248-49 (Ind. Ct. App. 1994) (affirming the denial of a recusal motion because the judge's call to the sheriff's office to schedule a time for inspection of a blood alcohol machine was administrative and therefore proper).

98. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(a) (1990). Alaska deletes the reference to "emergencies." ALASKA CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(b), reprinted in ALASKA CT. R. (West 2001). Idaho's Code states that a judge should not initiate ex parte communications "except as administrative responsibilities dictate." IDAHO CODE OF JUDICIAL CONDUCT Canon 3(A)(4), reprinted in 2 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) (2000).

Kentucky adds the fixing of bail to the list of permissible ex parte communications. KY. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), http://www.aoc.state.ky.us/supreme/supreme/amended_orders98.htm (last visited Jan. 20, 2001). Michigan deletes the phrase "where circumstances require." MICH. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), reprinted in MICH. R. CT. (West 2000). Texas permits communications about uncontested administrative or uncontested procedural matters. TEX. CODE OF JUD. CONDUCT, Canon 3(B)(8)(a), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 1997).

party will gain a procedural or tactical advantage,"⁹⁹ and (2) the judge provides prompt notice¹⁰⁰ about the substance of the communication to all other parties, who must be given a chance to respond.¹⁰¹ The phrase "where circumstances require" strongly suggests that this exception must be considered on a case-by-case basis, without establishing a comprehensive exception to the general rule.

Not all ex parte communications for scheduling, administrative purposes or emergencies dealing with substantive matters or issues on the merits are authorized; such communications are legitimate only "where circumstances require."¹⁰² First, to establish the applicability of this exception, it is necessary to show that certain facts or conditions demand an ex parte communication.¹⁰³ Circumstances would appear to call for ex parte communications more frequently in emergency

99. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(a)(i) (1990). *See also, e.g.*, *Kail v. State*, 14 S.W.3d 878, 881-82 (Ark. 2000) (holding that a communication between a case coordinator and the victim's wife regarding a visit to the crime scene provided no party a tactical advantage); *Garage Doors of Indianapolis, Inc. v. Morton*, 682 N.E.2d 1296, 1301 n.5 (Ind. Ct. App. 1997) (declining to infer that the opposing party gained an advantage from ex parte contact merely because he filed his answer and counterclaim immediately after the communication).

100. *See, e.g.*, *Mathew Zaheri Corp. v. New Motor Vehicle Bd.*, 64 Cal. Rptr. 2d 705, 712 (Cal. Ct. App. 1997) (holding that an administrative law judge's failure to disclose the substance of an ex parte communication constituted misconduct); *Cagle v. Davis*, 513 S.E.2d 16, 20-21 (Ga. Ct. App. 1999) (finding no improper communication where counsel was notified about an ex parte conversation between the judge's law clerk and opposing counsel); *James v. State*, 716 N.E.2d 935, 941 (Ind. 1999) (finding no error in the denial of a recusal motion where the judge relied in good faith on the prosecutor to call the defense counsel about the content of an ex parte communication).

101. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(a)(ii) (1990). Louisiana, Ohio and Oklahoma omit this provision. *See* LA. CODE OF JUDICIAL CONDUCT Canon 3(A)(6), *reprinted in* LA. R. CT. (West 2000); OHIO CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(a), *reprinted in* OHIO REV. CODE ANN. (Anderson Supp. 1997); OKLA. CODE OF JUDICIAL CONDUCT Canon 3(B)(6)(a), *reprinted in* OKLA. CT. R. & PROC. (West 2000).

New Mexico substitutes the phrase "if it might reasonably be perceived that the party contacting the judge may have gained a tactical advantage" for "and allows an opportunity to respond." N.M. CODE OF JUDICIAL CONDUCT Canon 21-300(B)(7)(a)(ii), *reprinted in* N.M. R. ANN. (Michie 2000). Oregon's Code permits the judge to delegate the notice function. OR. CODE OF JUDICIAL CONDUCT JR 2-102, [http://www.ojd.state.or.us/sca/webrules.nsf/d92724f3314408d788256802006cbee3/c30306d120fc0618882568c100788eb9/\\$file/E3j99012.pdf](http://www.ojd.state.or.us/sca/webrules.nsf/d92724f3314408d788256802006cbee3/c30306d120fc0618882568c100788eb9/$file/E3j99012.pdf) (last visited Jan. 20, 2001). *See also id.* JR 2-102(D) (describing the content of the disclosure).

102. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(a) (1990).

103. Virginia's commentary cautions judges against giving an unfair advantage to new lawyers or causing prejudice to others when judges exercise their historical role in instructing, advising and mentoring new lawyers. VA. CANONS OF JUDICIAL CONDUCT Canon 3(B)(7), http://www.courts.state.va.us/text/jirc/canons_112398.html (last visited Jan. 20, 2001). *See also* *United States v. Marks*, 949 S.W.2d 320, 329 (Tex. 1997) (Gonzalez, J., concurring and dissenting) (arguing that the burden should be placed on the ex parte communicant to establish that the circumstances warrant an ex parte communication).

contexts than for scheduling or administrative purposes, because in the former there is no opportunity to gather counsel together even telephonically before the court must take action. Second, even "where circumstances require," this exception does not apply to all communications that are the subject of the general ban; it applies only to ex parte communications, not to "other communications" described in the general rule.¹⁰⁴ Finally, such an ex parte communication is permissible under the Code only if the judge reasonably believes that no party will gain an advantage from it and the judge promptly notifies any parties about the substance of the communication and the opportunity to respond.¹⁰⁵

Most litigation arising under this exception relates to emergency situations dealing with public safety concerns. The exception seems particularly appropriate if immediate disclosure of the communication would endanger the safety of either a participant in the communication or a third party.¹⁰⁶ The rule indicates that after the perceived danger abates, the communication is to be disclosed to all parties.¹⁰⁷ In *In re Varain*,¹⁰⁸ the judge had learned that an arrestee was accused of sexual activity with a minor and had been arrested at 3:00 a.m. by a sheriff's deputy who was friendly with the minor's parent.¹⁰⁹ The judge had an ex parte conversation with the defendant at the county jail that was limited to an inquiry about his personal safety.¹¹⁰ The Nevada Supreme Court reversed the recommendation of the judicial discipline commission and found that the jailhouse conversation was an emergency as described in Canon 3(B)(7).¹¹¹ An amended Code provision for this exception would state:

104. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(a) (1990).

105. *Id.* Canon 3(B)(7)(a)(i)-(ii) (1990). Alaska's commentary excuses the prompt notification requirement when lawyers have contacted court staff about scheduling or administrative matters, such as a contact about the status of a pending motion. ALASKA CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., reprinted in ALASKA CT. R. (West 2001). The Alaska Code also states that a judge must take reasonable steps to promptly notify counsel, and that advances in "communications technology will affect what steps are 'reasonable.'" *Id.*

106. See, e.g., *Mathew Zaheri Corp. v. New Motor Vehicle Bd.*, 64 Cal. Rptr. 2d 705, 712 (Cal. Ct. App. 1997) (stating that a judge may receive, without violating the rule against ex parte communications, information from counsel who believes that an opposing party is carrying a weapon).

107. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(a) (1990).

108. 969 P.2d 305 (Nev. 1998).

109. *Id.* at 307.

110. *Id.*

111. *Id.* at 310-11. Another "emergency" circumstance relates to the orderly progress of litigation, as when a police officer at a retrial intends to testify about a confession given

(a) Where circumstances require, communications are authorized for either scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits, provided [1990 Code's proviso language remains same].

The primary change for this exception is to eliminate the special status for the term of art "ex parte communication." The result for judges would simplify the meaning of Code language to guide their judicial conduct.

B. Communication with a Disinterested Law Expert

Another exception to the ethical ban on improper communications permits a judge to contact a legal expert about the law pertinent to a case before the judge. Specifically, the Codes allow a judge to obtain the advice of a disinterested law expert about a pending case if the judge informs the parties about the person consulted and the substance of the advice, and also gives the parties a reasonable opportunity to respond.¹¹²

by the defendant, even though the officer did not recall the confession at defendant's first trial. *See, e.g., James v. State*, 716 N.E.2d 935, 941 (Ind. 1999) (finding that such a situation justified an ex parte communication to the judge about the fact of the expected testimony only, as well as prompt notice to defense counsel). *See also United States v. Marks*, 949 S.W.2d 320, 327-28 (Tex. 1997) (Gonzalez, J., concurring and dissenting) (arguing that the judge's ex parte hearing with the government was improper where the government intervened and sought to show that the defendant's deposition should not be taken because it would interfere with simultaneous grand jury proceedings).

112. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(b) (1990); MODEL CODE OF JUDICIAL CONDUCT Canon 3(A)(4) (1972). Of the states using the 1972 Code, Pennsylvania does not provide for obtaining advice. PA. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* PA. R. CT. (West 2000). Idaho specifically forbids soliciting the advice of anyone other than court or judicial personnel, unless there is notice and an opportunity to respond. IDAHO CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* 2 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) (2000). Alabama permits a judge to obtain the advice but states that a judge should use discretion in such cases. ALA. CANONS OF JUDICIAL ETHICS Canon 3(A)(4), *reprinted in* ALA. CODE ANN. (Michie Cum. Supp. 1999). If the judge seeks such advice, the Code provides notice and an opportunity to respond only if the judge determines that justice requires it. *Id.* North Carolina omits the notice provision. N.C. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* N.C. GEN. STAT. ANN. (1999).

Of the states using the 1990 Code, Alaska, Illinois, and Oregon omit the provision. ALASKA CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* ALASKA CT. R. (West 2001); ILL. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* ILL. COMP. STAT. ANN. (Michie 1998); OR. CODE OF JUDICIAL CONDUCT JR 2-102, [http://www.ojd.state.or.us/sca/webrules.nsf/d92724f3314408d788256802006cbee3/c30306d120fc0618882568c100788eb9/\\$file/E3j99012.pdf](http://www.ojd.state.or.us/sca/webrules.nsf/d92724f3314408d788256802006cbee3/c30306d120fc0618882568c100788eb9/$file/E3j99012.pdf) (last visited Jan. 20, 2001). Indeed, Alaska's commentary makes the point that an Alaska judge cannot seek ex parte advice from a disinterested expert. ALASKA CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., *reprinted in* ALASKA CT. R. (West 2001).

Arizona does not provide for notice or an opportunity to respond. ARIZ. CODE OF JUDICIAL CONDUCT 3(B)(7), *reprinted in* ARIZ. R. CT. (West 2000).

Kentucky requires no notice to the parties, meaning that the parties lose the

What is the justification for this long-standing exception? Like attorneys, judges may be more conversant with the law in some areas than others. Although the attorneys before the court have an ethical obligation to disclose the controlling precedents to the judge, even if they are adverse,¹¹³ a judge may believe that counsel have not accurately expressed or understood the law on a particular issue. Thus, the judge may turn to a disinterested expert on the law to determine the applicable law.

A careful reading of this Code exception reveals both clear and implicit principles. Currently, the advice obtained from the expert does not have to be written, and the expert must be disinterested in the parties or the outcome of the proceeding. The exception for judicial consultation with a disinterested expert applies only to experts solicited by the judge, not by any of the parties.¹¹⁴ Similarly, judicial disclosure to the parties about discussions with the expert “must follow the consultation and not precede the consultation.”¹¹⁵ The notice provisions imply that a judge should not seek advice if the judge does not want to identify the expert or the expert’s advice. Most important, the nature of the advice sought must be confined to “the law applicable to a proceeding.”¹¹⁶ The judge may ask, “What is the applicable law on issue X?” If the judge asks the expert how to apply the law to a set of facts, however, or to identify the legal issue under those facts, the judge is seeking advice beyond the scope of the exception and is engaged in a prohibited communication.¹¹⁷

Consultation with a “disinterested expert” may not be as valuable as it appears. With law teachers, for example, expertise about an issue may be more illusory than real. Frequently, the expert offers the advice in a casual manner lacking the

opportunity to cross-examine the expert in order to bring out the expert’s biases or prejudices. KY. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), http://www.aoc.state.ky.us/supreme/supreme/amended_orders98.htm (last visited Jan. 20, 2001).

113. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (1998).

114. See, e.g., *Stevens v. Lake*, 615 So. 2d 1177, 1185 (Miss. 1993) (finding error where a trial judge disallowed testimony from plaintiff’s two lawyer-experts on the grounds that their testimony would constitute ex parte communication); *In re Garrard*, 624 N.E.2d 68, 69–70 (Ind. Ct. App. 1993) (reversing and remanding for new trial where the trial judge erroneously initiated conversation with a party’s expert).

115. *Time Warner Entm’t Co. v. Baker*, 647 So. 2d 1070, 1072 (Fla. Dist. Ct. App. 1994) (explaining that this requirement flows from the Florida Code’s mandate that the judge tell the parties the identity of the expert and the substance of the communication).

116. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(b) (1990) (footnote omitted).

117. Kentucky’s Code attempts to clarify the purpose of the consultation when it states that the advice may be sought “[a]s a part of legal research.” KY. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), http://www.aoc.state.ky.us/supreme/supreme/amended_orders98.htm (last visited Jan. 20, 2001).

seriousness of the judge who must decide the case. Finally, the advice sought from an alleged "disinterested" expert may instead be from someone who has a specific partisan interest in the issue or the outcome of the case.¹¹⁸

[I]t cannot be assumed that legal and other experts will give only objective advice. They may have developed philosophical loyalties which affect the advice that they give; as practicing attorneys they may have cases involving the same problems on which they are rendering advice; as consultants they may owe allegiance to business or other interests that could benefit from acceptance by courts of their viewpoints. Unless the parties are given the opportunity to respond to the expert and the substance of his advice, his prejudices and preconceptions may go unchallenged.¹¹⁹

The commentary for both the 1972 and 1990 Codes offers an alternative to the permitted communication. An appropriate and often more desirable method for a judge to obtain advice from a disinterested legal expert is to "invite" the person to file an *amicus curiae* brief with the court.¹²⁰ The *amicus* brief approach may produce more considered advice from the expert and can lead to better court decisions without being perceived as an encroachment on the adversary system.¹²¹ An amended Code exception for seeking advice from others should state:

(b) If a judge affords the parties reasonable opportunity to respond, a judge may seek and obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge by

118. See, e.g., Kaufman, *supra* note 43, at 856 (stating that advice from disinterested experts "may well be affected by quite specific interest in ways that will not be known to an inquiring judge"); Arno H. Denecke, *The Judiciary Needs Your Help, Teachers*, 22 J. LEGAL EDUC. 197, 203 (1970) ("Ex parte conversations or correspondence with experts, law teachers or otherwise, is unfair and can be misleading. The facts given may be incomplete or inaccurate, the problem can be incorrectly stated or other matters can be incorrectly stated.").

119. *In re Fuchsberg*, 426 N.Y.S.2d 639, 648 (Ct. Jud. 1978).

120. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt. (1990); MODEL CODE OF JUDICIAL CONDUCT Canon 3(A)(4) cmt. (1972).

Washington's Code provides that a judge may only obtain advice from a disinterested expert by *amicus curiae*, and then only if the parties have a reasonable opportunity to respond. WASH. CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* WASH. CT. R. (West 2000).

Of the states using the 1990 Commentary, only Alaska excludes this provision. See ALASKA CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., *reprinted in* ALASKA CT. R. (West 2001).

121. See THODE, *supra* note 37, at 53. However, *amicus* briefs often take too much time to be of much use. *Id.* at 54.

- (i) Notifying the parties in writing both about the person who was consulted and the substance of the advice, or
- (ii) Inviting the person to file a brief *amicus curiae*.

Under the first option, a reasonable application of the amended standard would require the judge to transmit a copy of all written communications from the expert. Regardless of whether written communications were received from the person, the judge should also forward in writing the substance of any oral conversations with the person. The second option elevates current commentary language into the black-letter standard, and brings the process of solicited information into public view.

C. Disclosure about Communications

Each of the preceding exceptions to the general prohibition on ex parte communications includes a provision requiring notice to the parties about the substance of the communication.¹²² Notice for scheduling and similar purposes must be prompt because the judge must give the parties an opportunity to respond. For the notice attendant to obtaining advice on the law, no reference is made to the timeliness of the notice, but the judge must give any party who did not already know about the communication a reasonable opportunity to respond. Failure to disclose a conversation and its contents creates the appearance of impropriety.¹²³ When there is disagreement about whether the

122. MODEL CODE OF JUDICIAL CONDUCT Canons 3(B)(7)(a)(ii), (b) & cmt. (1990). New Mexico requires disclosure only "if it might reasonably be perceived that the party contacting the judge may have gained a tactical advantage." N.M. CODE OF JUDICIAL CONDUCT Canon 21-300(B)(7) cmt., *reprinted in* N.M. R. ANN. (Michie 2000). Delaware's commentary appears to require full disclosure of any ex parte communication "as soon as practicable." DEL. JUDGES' CODE OF JUDICIAL CONDUCT Canon 3(A)(4) cmt., *reprinted in* DEL. R. ANN. (1998).

Of the states adopting the 1990 Commentary, Alaska and California omit this ABA Commentary provision. *See* ALASKA CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., *reprinted in* ALASKA CT. R. (West 2001); CAL. CODE OF JUDICIAL ETHICS Canon 3(B)(7) cmt., *reprinted in* CAL. CODE ANN. (West 1996). *See also* San Carlos Apache Tribe v. Bolton, 977 P.2d 790, 795 (Ariz. 1999) (en banc) (recommending that, "whenever practicable, the judge should err in favor of giving notice" even when a specific Canon does not expressly include a notice requirement).

123. *E.g.*, Bell v. State, 655 N.E.2d 129, 132 (Ind. Ct. App. 1995) (holding that "the trial judge created an appearance of impropriety" by "failing to fully disclose the extent of his [ex parte] conversation"); Niblock v. State, 711 P.2d 771, 772-73 (Kan. Ct. App. 1985) (deferring to the state's supreme court to determine an ethical violation where the trial judge responded to a letter from state corrections officials and then presided over a hearing presenting the same issue without revealing the letter to the parties or counsel).

judge provided adequate notice, a reviewing court can look to the record and perhaps the testimony of the participants.¹²⁴

Judicial decisions about notice are more flexible than indicated by the Code language. For example, a judge may cure insufficient notice to the parties by satisfying the remainder of the rule—explaining the substance of the communication and allowing the parties to respond.¹²⁵ Alternatively, delegation by the judge of the notice to counsel for the opposing party may suffice if the judge and the parties discuss the matter together soon after the communication.¹²⁶ For otherwise improper communications, notice to all parties may mitigate or eliminate the ethical violation. When a judge accidentally engages in such a communication, notice to the parties of the communication itself or a description of the content preserves rather than destroys the judge's impartiality.¹²⁷ By contrast, a trial judge's failure to disclose participation in a banned communication or to reveal its contents will likely result in the conclusion that the judge engaged in an ethical violation.¹²⁸ For example, in *Mathew Zaheri Corp. v. New Motor Vehicle Board*,¹²⁹ an attorney contacted an administrative law judge to complain that the opposing party had attempted to intimidate witnesses.¹³⁰ The reviewing court

124. See, e.g., *Cagle v. Davis*, 513 S.E.2d 16, 21 (Ga. Ct. App. 1999) (affirming the judgment of the trial court where both the record and counsel's testimony demonstrated adequate notice of the ex parte communications).

Similarly, Alaska suggests that a judge should "create some form of record" about any aspect of an ex parte communication. ALASKA CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., reprinted in ALASKA CT. R. (West 2001).

125. E.g., *Kail v. State*, 14 S.W.3d 878, 881–82 (Ark. 2000) (finding that the trial court was not prejudiced against the appellant where the trial judge satisfied the remainder of the rule after failing to promptly notify the parties of an ex parte communication).

126. E.g., *James v. State*, 716 N.E.2d 935, 941 (Ind. 1999) (finding no error where the judge relied on the prosecutor's good faith that the prosecutor would contact defense counsel about the communication).

127. E.g., *A.H. v. P.B.*, 2 P.3d 627, 628–29 (Alaska 2000) (finding that the judge acted appropriately in forwarding ex parte communications received from one pro se party to another pro se party); *State v. Perkins*, 686 P.2d 1248, 1257 (Ariz. 1984) (en banc) (finding no prejudice where the judge told all counsel about letters from a codefendant regarding the defendant's anticipated perjury); *Sloan v. United States*, 527 A.2d 1277, 1287–88 (D.C. 1987) (deciding that the trial court "satisfactorily addressed" the accidental receipt of an ex parte communication by notifying counsel).

128. See, e.g., *State v. Rich*, 907 P.2d 1382, 1383–84 (Ariz. 1995) (en banc) (placing the burden on the appellee to prove that there was no reversible error where the judge failed to disclose an improper ex parte communication with the jury); *In re Wheatley*, 697 N.E.2d 938, 941 (Ill. App. Ct. 1998) (vacating and remanding where the trial judge created the appearance of impropriety by failing to disclose the receipt of an improper ex parte communication).

129. 64 Cal. Rptr. 2d 705 (Cal. Ct. App. 1997).

130. *Id.* at 708.

found judicial misconduct due to the judge's failure to disclose the information so the opposing party could respond.¹³¹

D. Communication with Other Judges or with Court Personnel

Another exception to the general ban on communications permits a judge to consult with other judges and with those court personnel who assist the judge in discharging his or her adjudicative responsibilities.¹³² Although the Code allows consultation with other judges, the commentary language qualifies the permission by stating that any communications between trial and appellate judges should be placed in the record *if* such communications are permitted.¹³³ Thus, reference to a jurisdiction's court decisions and rules may be necessary to determine whether this type of inter-judge contact is proper.

The case law supports consultation between judges whose courts are on the same level, as long as the presiding judge does not rely solely upon the conversation with his colleague in

131. *Id.* at 712–13 (finding misconduct but affirming because the misconduct did not prejudice appellant's cause).

132. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(c) (1990). Louisiana deletes this provision. LA. CODE OF JUDICIAL CONDUCT Canon 3(A)(6), *reprinted in* LA. R. CT. (West 2000). Virginia substitutes the term "law clerks" for "court personnel." VA. CANONS OF JUDICIAL CONDUCT Canon 3(B)(7), http://www.courts.state.va.us/text/jirc/canons_112398.html (last visited Jan. 20, 2001). Maine adds the phrase "or persons appointed by the court." ME. CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* ME. R. CT. (West 2000). Utah adds the phrase "provided that the judge does not abrogate the responsibility to personally decide the case pending before the court." UTAH CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* UTAH CT. R. ANN. (Lexis 2000).

The 1990 Code effectively codified language from the 1972 Code Commentary, which stated: "The proscription against communications concerning a proceeding . . . does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities." MODEL CODE OF JUDICIAL CONDUCT Canon 3(A)(4) cmt. (1972). *See also* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1346 (1975) ("The 'court personnel' referred to in the . . . [1972] Commentary refers only to immediate employees of the court whose function it is to aid the judge in carrying out his adjudicative responsibilities, and over whose activities the judge exercises supervision.").

133. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt. (1990). Of the states adopting the 1990 commentary, California, Illinois, Indiana, and Missouri delete this provision. CAL. CODE OF JUDICIAL ETHICS Canon 3(B)(7) cmt., *reprinted in* CAL. CODE ANN. (West 1996); ILL. CODE OF JUDICIAL CONDUCT ANN. Canon 3(A)(4) cmt., *reprinted in* ILL. COMP. STAT. ANN. (Michie 1998); IND. CODE OF JUDICIAL CONDUCT ANN. Canon 3(B)(8) cmt., *reprinted in* IND. CODE. ANN. (Michie 2000); MO. CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., *reprinted in* MO. CT. R. (West 2000). Utah has elevated the Commentary language into its black-letter Code. UTAH CODE OF JUDICIAL CONDUCT Canon 3(B)(7), *reprinted in* UTAH CT. R. ANN. (Lexis 2000). *See In re Larsen*, 616 A.2d 529, 559 (Pa. 1992) (noting that Canon 3(A)(4) applies to the judge who presides over a case, while Canon 2 applies to a judge who contacts the presiding judge); Harhut, *supra* note 3, at 681.

reaching a decision.¹³⁴ The persons involved should also be judges for the same jurisdiction.¹³⁵ For example, a federal trial judge should not communicate with a state trial judge about a pending case unless the contact is "authorized by law," such as the procedure for certification of legal questions when a federal judge needs more information about a matter of state law. Another implication of the exception is that both participants in the conversation should be judges at that time. If the contacted judge was a judge at one time but not at the time of the communication, however, the contact may still be proper if the judge is treated as a "disinterested expert on the law" under Canon 3(B)(7)(b).¹³⁶ A final implication of the exception is that the current trial judge should not have contact with a judge who once presided in the case but who has since been disqualified or otherwise removed from the case.¹³⁷

134. See, e.g., *People v. Farmer*, 765 P.2d 940, 963 (Cal. 1989) (in bank) (explaining that "collegial interchanges on abstract legal matters are not improper," but the "court must reach its own conclusions and shoulder full responsibility for them"); *Andrews v. State*, 505 N.E.2d 815, 826-27 (Ind. Ct. App. 1987) (holding as harmless error a Canon 3(A)(4) violation where a judge stated on the record that he had discussed the admissibility of evidence with other judges but that the final decision on the issue was his own); *Executive Mgmt., Ltd. v. Titor Title Ins. Co.*, 963 P.2d 465, 479 (Nev. 1998) (concluding that the trial judge did not rely upon his conversation with a fellow judge). See also *Gaston v. Hunter*, 588 P.2d 326, 352 (Ariz. Ct. App. 1978) (finding no error when a judge informed the parties that he had used other judges as "sounding boards"). Cf. *In re Markey*, 696 N.E.2d 523, 530 (Mass. 1998) (suspending a judge for three months for conduct that included initiating ex parte communication with another judge, intending to influence the latter judge's decision regarding an abuse prevention order).

135. Oregon explicitly allows contact between judges "of the same level." OR. CODE OF JUDICIAL CONDUCT JR 2-102, [http://www.ojd.state.or.us/sca/webrules.nsf/d92724f3314408d788256802006cbee3/c30306d120fc0618882568c100788eb9/\\$file/E3j99012.pdf](http://www.ojd.state.or.us/sca/webrules.nsf/d92724f3314408d788256802006cbee3/c30306d120fc0618882568c100788eb9/$file/E3j99012.pdf) (last visited Jan. 20, 2001).

What is the same jurisdiction? Professor Kaufman raises the issue of whether all appellate judges are members of the same court or whether only appellate judges assigned to a particular district are members of the same court. Kaufman, *supra* note 43, at 858. He "would draw the line where the demands of cooperation and collegiality seem the greatest, namely geographically." *Id.*

136. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(b) (1990). See also *Trs. of Cent. States Southeast & Southwest Areas, Pension Fund v. Indico Corp.*, 401 So. 2d 904, 907 (Fla. Dist. Ct. App. 1981) (finding that a former judge who was a current member of a law firm representing one of the parties in the proceeding was not a disinterested expert); *Executive Mgmt.*, 963 P.2d at 479 (holding that a judge did not violate the ethical rules when he consulted with a former judge who at the time of contact had become a prosecutor).

137. Compare *Smith v. State*, 535 N.E.2d 1155, 1157 (Ind. 1989) (holding that a regular judge is not an "interested" party when his testimony is used by a special judge to refute the need for another change of judge), with *Gubler v. Comm'n on Judicial Performance*, 688 P.2d 551, 567 (Cal. 1984) (in bank) (concluding that there is no limitation on communication among judges of the same court as long as none of the communicating judges have already been disqualified from the proceeding in question).

Alaska's commentary states that a successor judge to a disqualified judge cannot speak to the predecessor judge "about the merits of any pending issues, the merits

Judicial communications with court personnel¹³⁸ are necessary for the judge to carry out the adjudicatory role. Without the assistance of court clerks and support staff, a judge's job could become overwhelming. Even though the Code exception extends only to court personnel who assist in the judge's adjudicatory function, it is still necessary to define the scope of the term "court personnel." Does it include only the personnel whom the judge supervises—employees who work directly with the judge—or does it refer to all of the people with whom the judge is expected to interact as the judge makes decisions? The Code commentary may offer a clue when it states that "[a] judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that [Canon] 3B(7) is not violated through law clerks or other personnel on the *judge's staff*."¹³⁹ Unless the particular judge's staff extends beyond those who work in close physical proximity to the judge, the better approach is that "court personnel" function as an arm of the court, as opposed to public officials who are part of a non-judicial branch agency or office.¹⁴⁰

of any previously decided issues, or the substance of any proceedings already held in the case." ALASKA CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(d) cmt., *reprinted in* ALASKA CT. R. (West 2001). That is, only administrative matters such as court dates can be the subject of discussion. *Id.*

138. Without offering much assistance to anyone, the Terminology Section of the 1990 Code defines "court personnel" as not including "the lawyers in a proceeding before a judge." MODEL CODE OF JUDICIAL CONDUCT terminology (1990).

139. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt. (1990) (emphasis added). This provision is deleted from the Commentary in Alaska. ALASKA CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., *reprinted in* ALASKA CT. R. (West 2001).

California's commentary permits "court staff" to communicate scheduling information or similar administrative functions. CAL. CODE OF JUDICIAL ETHICS Canon 3(B)(7) cmt., *reprinted in* CAL. CODE ANN. (West 1996). *See also* Greacen, *supra* note 4, at 14–15.

[] Court staff should be mindful of the basic principle that counsel may not communicate with the judge *ex parte*. Court staff should not let themselves be used to circumvent that principle, or fail to respect it, in acting on matters delegated to them for decision. This principle requires a little explanation. Today many courts delegate significant decision-making authority to clerk's offices, especially on procedural matters, and cost and fee awards. The clerk's office staff need to remember to follow traditional principles of avoiding *ex parte* contacts in the way in which they exercise such decision-making discretion—assuring themselves that they have heard from both sides before deciding an issue, and avoiding even the appearance of giving one party an "inside track" in the process. Deputy clerks also need to avoid becoming messengers to the judge of communications that would be improper for the judge to receive directly.

Id.

140. *See, e.g.,* State v. Mayer, 834 P.2d 165, 166 (Ariz. Ct. App. 1992) (finding that because a probation officer is an officer of the court, a judge does not commit an ethical violation when he conducts a private discussion with a probation officer regarding a presentence report); Foster v. United States, 615 A.2d 213, 218 (D.C. 1992) (explaining

An amended version of this exception should state:

(c) A judge may consult with

(i) Law clerks and other court personnel on the judge's staff whose function is to aid the judge in carrying out the judge's adjudicative responsibilities, or

(ii) Other judges in the same jurisdiction and on the same court level. A copy of any written communication or the substance of any oral communication between judges in different jurisdictions or on different court levels must be provided to all parties to the proceedings that were the subject of the communication.

The amended exception incorporates 1990 commentary language to clarify the persons on a judge's staff and to require disclosure of certain types of inter-judge communication.

E. Communication to Promote Mediation or Settlement

Judges with heavy caseloads are always interested in promoting the prompt disposition of their cases. Despite the general proscription against ex parte contacts, the 1990 Code commentary permits a judge, with the parties' consent, to meet separately with the parties and their counsel to try to mediate or settle the matter pending before the judge.¹⁴¹ Although this

that while probation officers are the arm of the court, the parole board is an independent entity whose members are appointed by the executive branch and subject to confirmation by the legislative branch). Therefore, conversations between a judge and a parole board member violated Canon 3(A)(4). *Id.*

Communications that satisfy this exception may implicate other concerns. For example, probation officers who conduct criminal presentence investigations for judges gather confidential information from the defendant, evaluate it along with other data about the defendant, and report in writing to the judge with copies available to the defendant and counsel. *See, e.g.,* *People v. Smith*, 378 N.W.2d 384, 397-98 (Mich. 1985). Because counsel's task at sentencing includes questioning information in the report believed to be unreliable, "communications between probation officers and judges, whether in written or oral form, threaten the ability of counsel to effectively challenge unreliable information and hence threaten a defendant's right to counsel." *Id.* at 398. The *Smith* court held that all information used to sentence a defendant must be included in the written presentence report, and that resentencing is necessary when the judge obtains information about the defendant from the probation officer that is not included in the written report. *Id.* at 399. Compare *Mayer*, 834 P.2d, in which the court stated that a judge was not required to recuse himself when he conferred in private with the probation officer about a presentence report prepared at the judge's direction, *id.* at 166.

141. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt. (1990). Of the states that have adopted the 1990 Code, Arkansas, Louisiana, Ohio, Oklahoma, and Oregon delete this exception. *See* ARK. CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., *reprinted in* ARK. CODE ANN. (Michie 2000); LA. CODE OF JUDICIAL CONDUCT Canon 3(A)(6), *reprinted in* LA. R. CT. (West 2000); OHIO CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., *reprinted in* OHIO REV. CODE ANN. (Anderson Supp. 1997); OKLA. CODE OF JUDICIAL CONDUCT Canon 3(B)(6), *reprinted in* OKLA. CT. R. & PROC. (West 2000); OR. CODE OF JUDICIAL CONDUCT JR 2-102, <http://www.ojd.state.or.us/sca/webrules.nsf/d92724f>

standard suggests that counsel for the parties should be included in settlement discussions, judicial decisions have allowed the judge to engage in negotiations with a person believed by the judge to be the party or its authorized representative without the presence of counsel.¹⁴² *Dutton v. Dutton*¹⁴³ tested the bounds of this flexibility.¹⁴⁴ The trial judge met the parties as they returned to the courthouse from lunch, took them to his chambers without the presence of either counsel, and conducted settlement negotiations for over three hours.¹⁴⁵ The appellate court observed that it would have been more appropriate for counsel to have been present, but ruled that no ex parte communication had taken place and found no judicial duress in the process that produced a settlement.¹⁴⁶

A slightly amended version of this exception would state:

(d) A judge may, with the prior consent of all the parties and their lawyers, confer separately with the parties and/or their lawyers in an effort to mediate or settle matters pending before the judge.

The amended standard adopts Tennessee's recognition that the consent must precede any conferring, and all parties must consent.¹⁴⁷ It further notes that if the parties *and* lawyers consent, only the parties may be part of a judicial attempt to mediate or settle a case. Ordinarily, it is unlikely that the

3314408d788256802006cbee3/c30306d120fc0618882568c100788eb9/\$file/E3j99012.pdf (last visited Jan. 20, 2001). Hawaii relocated this exception to its commentary. HAW. CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., *reprinted in* HAW. REV. STAT. ANN. (Michie 1999). Delaware adds this exception to its version of the Code. DEL. JUDGES' CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* DEL. R. ANN. (1998).

New Mexico adds the sentence: "Ordinarily the judge will meet jointly with the parties." N.M. CODE OF JUDICIAL CONDUCT Canon 21-300(B)(7)(d), *reprinted in* N.M. R. ANN. (Michie 2000). Tennessee refers to the importance of the judge's obtaining "the prior consent of the parties." TENN. CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(d), *reprinted in* TENN. CODE ANN. (1998-1999) (emphasis added). Virginia and Wisconsin delete the phrase "mediate or"; their Codes therefore apply the exception only to settlement discussions. *See* VA. CANONS OF JUDICIAL CONDUCT Canon 3(B)(7), http://www.courts.state.va.us/text/jirc/canons_112398.html (last visited Jan. 20, 2001); WIS. SUP. CT. R. 60.04(1)(g)(4).

142. *See, e.g., In re Christiansen*, 723 N.E.2d 1100, 1101 (Ohio 1999). In contrast, *In re Williams*, 657 N.E.2d 1352 (Ohio 1993), ordered recusal after finding no clear indication about the role of the person with whom the judge was negotiating, *id.* at 1353.

143. 713 N.E.2d 14 (Ohio Ct. App. 1998).

144. *Id.* at 15. *See also* Bland v. Graves, 650 N.E.2d 117, 126 (Ohio Ct. App. 1994) (finding that it is "not an abuse of discretion for a trial judge to suggest a procedure or provide a process which facilitates settlement of all or part of the litigation").

145. *Dutton*, 713 N.E.2d at 15.

146. *Id.* at 17.

147. *See* TENN. CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(d), *reprinted in* TENN. CODE ANN. (1998-1999).

lawyers will consent to the presence of only the parties, but at least the exception leaves open the possibility as a permitted alternative form of contact.

F. Requests for Findings of Fact and Conclusions of Law

At or near the conclusion of a matter, a judge may seek the prevailing party's assistance in specifying the language for a ruling on a motion or the merits of the case. The 1990 Code commentary permits a judge to "request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions."¹⁴⁸ The implication of this language is that a judge can ask counsel,¹⁴⁹ possibly in an ex parte conversation,¹⁵⁰ to submit "findings and conclusions," as long as someone simultaneously or soon thereafter tells opposing counsel about the judge's request. A judge commits an ethical violation if that communication with counsel refers either to the merits of the case¹⁵¹ or instructions about the form and content of the proposed findings and conclusions.¹⁵² Counsel presenting the findings and

148. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt. (1990). Of the states adopting the 1990 commentary, California, Hawaii, and Indiana omit this provision, and New Mexico deletes the reference to the parties' opportunity to respond. CAL. CODE OF JUDICIAL ETHICS Canon 3(B)(7) cmt., *reprinted in* CAL. CODE ANN. (West 1996); HAW. CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., *reprinted in* HAW. REV. STAT. ANN. (Michie 1999); IND. CODE OF JUDICIAL CONDUCT Canon 3(B)(8) cmt., *reprinted in* IND. CODE. ANN. (Michie 2000); N.M. CODE OF JUDICIAL CONDUCT Canon 21-300(B)(7) cmt., *reprinted in* N.M. R. ANN. (Michie 2000).

Without the commentary statement, court rules may still authorize preparation of proposed orders. *See, e.g., Aztec Minerals Corp. v. State*, 987 P.2d 895, 899 (Colo. Ct. App. 1999) (noting that the Colorado court rules permit the court to direct counsel to prepare a proposed order).

149. Because the commentary standard does not apply unless a judge requests a party to submit proposed findings and conclusions, the ethical proscription would not apply when counsel for a party sends the proposed findings to the judge without prompting. If it is widely known that the judge expects findings after entry of judgment, however, the judge may violate Canon 3(B)(7) by "permitting" unethical communications. *See, e.g., Jake C. Byers, Inc. v. J.B.C. Invs.*, 834 S.W.2d 806, 821 (Mo. Ct. App. 1992) (finding no ethical violation where the plaintiff's counsel mailed a letter to the judge containing suggested findings of fact and conclusions of law because the judge had already entered the judgment and that such an ex parte communication "is simply a procedural matter, not a decision on the merits").

150. *See Williams v. Farmers Ins. Group, Inc.*, 720 P.2d 598, 600 (Colo. Ct. App. 1985) (stating that a judge may properly request findings and conclusions as long as the request is not made ex parte), *aff'd*, 805 P.2d 419 (Colo. 1991).

151. *See, e.g., Aztec*, 987 P.2d at 900 (finding no ethical violation because the conversation in question did not touch on the merits of the case); *Jake C. Byers, Inc.*, 834 S.W.2d at 821 (noting that a judge's request for suggested findings and conclusions is not a decision on the merits and thus does not constitute an ethical violation).

152. *See Williams*, 720 P.2d at 600-01 (holding that the proper remedy for an ex

conclusions to the court should serve the papers on opposing counsel pursuant to court rules,¹⁵³ and opposing counsel can then react by objecting, proposing alternatives, acquiescing, or using a similar alternative. If counsel accompanies the proposed findings and conclusions with assertions, arguments or requests on behalf of a client about the merits of the case, judicial consideration of these matters violates the Code and does not comply with the Code's administrative or emergency exceptions.

G. *Ex parte Communications Authorized by Law*

The 1972 Code expressly recognizes that a judge can initiate or "consider *ex parte* or other communications" about a proceeding if "authorized by law."¹⁵⁴ The 1990 Code allows a judge to initiate or consider only *ex parte* communications that are "expressly authorized by law."¹⁵⁵ Without legal authority or an explicit exemption for an *ex parte* communication, a judge must resist litigants' attempts to circumvent the ethical norm. For example, defendants in criminal cases often seek *ex parte* hearings on their requests for expert assistance for strategic reasons, even though such hearings are unauthorized by law.¹⁵⁶

parte communication in which the court instructed the plaintiff's counsel about how to prepare the order was to vacate the order); *Bird Lakes Dev. Corp. v. Meruelo*, 582 So. 2d 119, 120 n.1 (Fla. Dist. Ct. App. 1991) (reprimanding a trial judge for an *ex parte* telephone call in which he gave oral instructions "to appellant's counsel as to what the order should contain"); *Burgess v. Stern*, 428 S.E.2d 880, 882-84 (S.C. 1993) (finding no ethical violation where a judge conferred with counsel about the order because the evidence supported the revised order).

153. See, e.g., *Ex parte Masonite Corp.*, 681 So. 2d 1068, 1070 (Ala. 1996) (finding no ethical violation even though the opposing party did not receive the order before the judge signed it because the judge subsequently held a hearing on the matter in which opposing counsel was given the opportunity to object to the order); *Aztec*, 987 P.2d at 899 (noting that because counsel served a copy of the proposed order on opposing counsel, there was no appearance of bias or prejudice); *Bird Lakes*, 582 So. 2d at 120 n.1 (invalidating an order, in part, because counsel did not serve a copy of the proposed order on the opposing party).

154. MODEL CODE OF JUDICIAL CONDUCT Canon 3(A)(4) (1972). Of the states retaining the 1972 language, Idaho substitutes the phrase "except as administrative responsibilities dictate" for "except as authorized by law." IDAHO CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* 2 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) (2000).

155. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(d) (1990). Louisiana deletes this provision. See LA. CODE OF JUDICIAL CONDUCT Canon 3(A)(6), *reprinted in* LA. R. CT. (West 2000). Ohio substitutes "as authorized by law" for "when expressly authorized by law to do so." OHIO CODE OF JUDICIAL CONDUCT Canon 3(A)(4), *reprinted in* OHIO REV. CODE ANN. (Anderson Supp. 1997). Wisconsin adds the verbs "permit" and "engage" to "initiate" and "consider." WIS. SUP. CT. R. 60.04(1)(g).

South Carolina's commentary lists statutory examples of *ex parte* communications that are authorized by law. S.C. CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt., *reprinted in* S.C. CODE ANN. (West Supp. 1999).

156. See, e.g., *State v. Apelt*, 861 P.2d 634, 650 (Ariz. 1993) (en banc) (concluding that "there is no authority for granting an indigent defendant an *ex parte* hearing

While prosecutors can find expert assistance without obtaining judicial permission, defendants naturally wish to avoid divulging their trial strategy until court rules or decisions require. Still, courts unanimously reject efforts to compel courts to hold such hearings in the absence of all parties.¹⁵⁷

The scope of an "authorized by law" exception includes constitutional, statutory, and state and local rule provisions, as well as court orders or judicial decisions expressly permitting communications in the absence of any or all counsel.¹⁵⁸ In criminal cases, *ex parte* communications are authorized by law for such matters as when a prosecutor asks a judge to issue warrants for arrests, searches, or the seizure of property for forfeiture based upon affidavits submitted to the judge.¹⁵⁹

In civil cases, authorized *ex parte* contacts often are either part of a jurisdiction's procedural rules or involve a specific subject area.¹⁶⁰ In either case, they concern judicial entry of an order without prior notice of the motion or application for the order to each person who either may be adversely affected by the order and/or to each person who wishes to appear in opposition to the entry of such an order.¹⁶¹ Typical procedural practices authorizing *ex parte* orders include motions to vacate default judgments, applications for issuance of temporary restraining

regarding his or her need for expert assistance"); *Newhart v. State*, 669 N.E.2d 953, 955 (Ind. 1996) (rejecting the defendant's demand for an *ex parte* hearing on his request for expert assistance and noting that the ethical rules "counsel against such *ex parte* communications"); *State v. Goulet*, 593 N.W.2d 345, 347-49 (N.D. 1999) (rejecting an *ex parte* request for funds to depose an out-of-state witness).

157. See, e.g., *Apelt*, 861 P.2d at 650; *Newhart*, 669 N.E.2d at 955; *Goulet*, 593 N.W.2d at 347-49.

158. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. (1998); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995).

159. See, e.g., KAN. STAT. ANN. § 60-4107(a) (1994) (authorizing, in limited circumstances, asset seizure and forfeiture to be conducted between the prosecutor and the judge *ex parte*); LA. CHILDREN'S CODE ANN. art. 613(B) (West 1995) (providing statutory authorization for a judge to grant an order on an *ex parte* application in child abuse neglect cases for entry into a place where the child may be found); MASS. R. PROB. CAUSE DETERMS. (d), reprinted in MASS. R. CT. (West 2000) (providing that a court may make an *ex parte* probable cause determination in warrantless arrest cases); VA. CODE ANN. § 19.2-54 (Michie 1975) (allowing an affidavit for issuance of a search warrant to be temporarily sealed for good cause shown in *ex parte* hearing). See also *Drake v. State*, 555 N.E.2d 1278, 1281 (Ind. 1990) (stating that probable cause hearings for the issuance of search warrants are permissible *ex parte* proceedings). Cf. *State ex rel. Bryan v. McDonald*, 662 S.W.2d 5, 7 (Tex. Crim. App. 1983) (en banc) (finding that there was no statutory authority allowing the lower court to view a pre-sentence investigation report prior to the determination of guilt).

160. See, e.g., N.M. R. ANN. 10-301(A) (Michie 2000) (permitting the issuance of *ex parte* orders in child custody cases).

161. See, e.g., *id.*

orders,¹⁶² motions for injunctive relief, motions to set aside judgments for clerical errors and other reasons,¹⁶³ and in camera consideration of affidavits in various instances.¹⁶⁴ Ex parte contacts also may be authorized to enable the judge to acquire information about technical issues in certain types of cases,¹⁶⁵ or to facilitate communications between judges in different states.¹⁶⁶

An amended exception would state:

(e) A judge may initiate, permit, or consider any communications expressly authorized by law.

The new language results in an exception that is more consistent with the standards that precede it in this Code section. For example, the current exception omits the verb “permit,” which was added to the general 1990 standard.¹⁶⁷ Again, the reference to “ex parte communications” is replaced with an approach that should be less subject to nitpicking, that is, whether a legally authorized exception addresses “communications” instead of “ex parte communications.”

IV. COMPARING LAWYERS’ ETHICAL STANDARDS

A. *The Ethical Standards*

The ABA’s 1969 Code of Professional Responsibility (CPR) for lawyers deals with the issue of ex parte communications by lawyers with judges.¹⁶⁸ The CPR’s general rule seems to ban a lawyer’s ex parte communication with a judge in pending, adversary proceedings.¹⁶⁹ Such contacts are permissible, however, in four circumstances: during official proceedings, in writing if

162. See, e.g., WIS. STAT. ANN. § 813.025(2) (West 1994) (authorizing the issuance of a restraining order effective for no more than five days unless extended after an adversary hearing).

163. See, e.g., *In re Wilson*, 461 N.W.2d 105, 109 (N.D. 1990) (conceding that the ex parte communication between counsel and the judge and the ex parte order clarifying the judgment and an addendum to the judgment was apropos to correct a clerical mistake under N.D. R. CIV. P. 60(a), although requiring notice and hearing would have been the more appropriate action).

164. See, e.g., TEX. R. CIV. P. 166b(4) (Vernon 1984, repealed 1999) (authorizing in camera inspections of documents to determine claims of privilege).

165. See, e.g., ARIZ. REV. STAT. ANN. § 45-256(A) (West 1994) (granting the court the authority to request technical assistance from the director of the state department of water resources).

166. See, e.g., *In re Simons*, 693 N.E.2d 1111, 1117 (Ohio Ct. App. 1997) (concluding that the Uniform Child Custody Jurisdiction Act encourages communications between courts of different states).

167. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (1990).

168. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-110(b) (1981).

169. *Id.*

the lawyer promptly delivers a copy to the opposition, orally with sufficient notice to the opposition, and as otherwise authorized by law.¹⁷⁰

Disciplinary Rule 7-110(B) of the CPR prohibits communications by a lawyer or someone at the lawyer's direction with a judge about the merits of a case.¹⁷¹ The purpose of the disciplinary rule "is to prevent the effect, or even the appearance, of granting undue advantage to one party to the litigation."¹⁷² As

170. *Id.* Hawaii applies the basic standard plus the first three exceptions. HAW. RULES OF PROF'L CONDUCT ANN. R. 3.5(d)(1)-(3) (Michie 1999). Maine substitutes the term "open court" for the first exception, deletes the exception for oral communications, and confines the last exception to "communications permitted by rule of court." ME. CODE OF PROF'L RESPONSIBILITY R. 3.7(h)(2) (West 2000).

Texas phrases the last exception as "except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure." TEX. DISCIPLINARY R. PROF'L CONDUCT 3.05(b), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

171. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-110(b) (1981). The 1969 general standard remains applicable in Georgia, Hawaii, Iowa, Nebraska, New York, Oregon, and Tennessee. GA. CODE OF PROF'L RESPONSIBILITY DR 7-110(B), *reprinted in* GA. R. CT. ANN. (Michie 2000); HAW. RULES OF PROF'L CONDUCT R. 3.5(d), *reprinted in* HAW. REV. STAT. ANN. (Michie 1999); IOWA CODE OF PROF'L RESPONSIBILITY DR 7-110(B), *reprinted in* IOWA CODE ANN. (West 1996); NEB. CODE OF PROF'L RESPONSIBILITY DR 7-110(B), *reprinted in* NEB. CT. R. & PROC. (West 1999); N.Y. CODE OF PROF'L RESPONSIBILITY DR 7-110(B), *reprinted in* N.Y. JUD. LAW ANN. (McKinney 1992); OR. CODE OF PROF'L RESPONSIBILITY DR 7-110(B), *reprinted in* OR. R. CT. (West 2000); TENN. SUP. CT. R. 8, DR 7-110(B), *reprinted in* TENN. CODE ANN. (2000). Although the following states subsequently ratified the ABA's 1983 Model Rules of Professional Conduct, they nevertheless retained the essential language of the 1969 CPR norm: Florida, Kansas, Minnesota, North Carolina, Oklahoma, Texas, Utah, and Virginia. FLA. RULES OF PROF'L CONDUCT R. 4-3.5(b), *reprinted in* FLA. STAT. ANN. (West 2000); KAN. RULES OF PROF'L CONDUCT R. 3.5(c)(4), *reprinted in* 2 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) (2000); MINN. RULES OF PROF'L CONDUCT R. 3.5(b), *reprinted in* MINN. STAT. ANN. (West 2000); N.C. REV. RULES OF PROF'L CONDUCT R. 3.5(a)(3), *reprinted in* N.C. GEN. STAT. ANN. (1999); OKLA. RULES OF PROF'L CONDUCT R. 3.5(b), *reprinted in* OKLA. STAT. ANN. tit. 5 (West 1996); TEX. DISCIPLINARY R. PROF'L CONDUCT 3.05(b), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9); UTAH RULES OF PROF'L CONDUCT R. 3.5(c), *reprinted in* UTAH CT. R. ANN. (Michie 2000); VA. CODE OF PROF'L RESPONSIBILITY R. 3.5(e), *reprinted in* VA. R. ANN. (Lexis 2000).

Disciplinary Rule 7-110 was accompanied in the CPR by the aspirational Ethical Consideration 7-35, which states in pertinent part:

All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before . . . a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel. . . . Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel. . . . A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

172. *In re Thompson*, 940 P.2d 512, 515 (Or. 1997).

with the Codes of Judicial Conduct, the concerns about *ex parte* contacts by lawyers relate to the judge's being improperly influenced and inaccurately informed.¹⁷³ Application of the general rule only to adversary proceedings appears unnecessarily narrow¹⁷⁴ in light of the scope of the exceptions that include both official proceedings (which may include both adversary and *ex parte* proceedings) and other circumstances permitted by law (including rule and statutory provisions for *ex parte* matters such as applications for injunctions or search warrants).¹⁷⁵

The ABA replaced the CPR in 1983 with a set of ethical standards known as the Rules of Professional Conduct (RPC), which have been adopted completely or in part by more than four-fifths of the states. Unfortunately, the RPC approach to a lawyer's communications with a judge took a step backward from the CPR. Rule 3.5(b) of the RPC states that "[a] lawyer shall not . . . communicate *ex parte* with [a judge or other official] except as permitted by law."¹⁷⁶ Not only does RPC 3.5 narrow the type of contact (from communications to *ex parte* communications), it also excludes any reference to the context in which a communication (for example, an adversary proceeding, a pending case) might occur or any of the other exceptions from the CPR.¹⁷⁷ Three RPC states retain the CPR phrase "on the merits of the cause,"¹⁷⁸ so that it is clear that a lawyer can communicate *ex*

173. See, e.g., Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Lesyshen, 585 N.W.2d 281, 288 (Iowa 1998) (suspending the license of lawyer who obtained a change of custody order *ex parte* without disclosing salient information to the trial judge); Ky. Bar Ass'n v. Davis, 847 S.W.2d 57, 58 (Ky. 1993) (suspending a lawyer for "seeking to gain unfair advantage for her client and herself by engaging in *ex parte* communication"); Herring v. Retail Credit Co., 224 S.E.2d 663, 666 (S.C. 1976) (criticizing the use of *ex parte* orders as depriving the appellate court of an adequate record, and denying those affected by the orders an opportunity to be heard).

174. Perhaps for this reason, North Carolina and Texas delete the phrase "adversary proceedings" from their standards. See N.C. REV. RULES OF PROF'L CONDUCT ANN. R. 3.5(a)(3) (1999); TEX. DISCIPLINARY R. PROF'L CONDUCT 3.05(b), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

Maine and California refer to "the merits of a contested matter." ME. CODE OF PROF'L RESPONSIBILITY R. 3.7(h)(2) (West 2000); CAL. RULES OF PROF'L CONDUCT R. 5-300(B) (Foundation Press 2000).

175. Refer to notes 158-63 *supra* and accompanying text.

176. MODEL RULES OF PROF'L CONDUCT R. 3.5(b) (1998). California may have the most confusing provision, which directs a lawyer not to communicate with a judge on the merits of a case, except in *ex parte* matters. CAL. RULES OF PROF'L CONDUCT R. 5-300(B) (Foundation Press 2000). The provision probably should be interpreted so that the reference to *ex parte* matters is to those matters recognized by law as properly brought or conducted, without the presence of all counsel. California also recognizes exceptions when all counsel consent or when all other counsel in the matter are present. *Id.*

177. MODEL RULES OF PROF'L CONDUCT R. 3.5(b) (1998).

178. ARK. CT. R. 3.5(b); KY. SUP. CT. R. 3.5(b); S.D. RULES OF PROF'L CONDUCT R. 3.5(b), reprinted in S.D. CODIFIED LAWS (Michie 1995).

parte with a judge as long as the communication is unrelated to the merits of the case.¹⁷⁹

Reading the lawyers' ethical rules and the Codes of Judicial Conduct raises a question about their interrelationship. Does the lawyers' CPR or RPC allow ex parte communications by lawyers in fewer, more, identical, or merely different situations than do the ABA Codes of Judicial Conduct? In a particular ex parte conversation between a judge and a lawyer, may the judge be acting ethically when the lawyer is not? In addition to three explicit exceptions, the CPR allows communications about the merits of a case "[a]s otherwise authorized by law."¹⁸⁰ The RPC ban communications with a judge "except as permitted by law."¹⁸¹ Recall that both modern versions of the Code of Judicial Conduct permit a judge to initiate or consider ex parte communications as "authorized by law."¹⁸²

Does the reference to "law" in the judge's ethical code include acceptable communications described in the lawyers' code, and conversely? The answer may exist in the scope of the meaning of the term "law," that is, whether the CPR, RPC, and/or the Codes of Judicial Conduct have the force of law.¹⁸³ Several states have attempted to clarify the possible ethical imbalance in the CPR¹⁸⁴

179. Michigan bans ex parte communications with a judge "concerning a pending matter," a narrower ban than is found in the Codes of Judicial Conduct that deal with both pending and impending matters. MICH. RULES OF PROF'L CONDUCT R. 3.5(b) (West 2000). North Dakota's ethical code for lawyers parallels part of the Code of Judicial Conduct by prohibiting all attempts to influence a judge, "including ex parte communications concerning a pending or impending proceeding." N.D. RULES OF PROF'L CONDUCT ANN. R. 3.5(a), reprinted in N.D. CT. R. ANN. (Michie 2000-2001).

Wisconsin's ethical code for lawyers likewise parallels part of the Code of Judicial Conduct by allowing ex parte communications "for scheduling purposes if permitted by the court," with prompt notification to the opposition. WIS. SUP. CT. R. 20:3.5(b).

180. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-110(b)(4) (1981).

181. MODEL RULES OF PROF'L CONDUCT R. 3.5(b) (1998).

182. MODEL CODE OF JUDICIAL CONDUCT Canon 3(A)(4) (1972); MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(d) (1990).

183. "[T]he courts . . . as external governors of the profession, must give ethics rules the force of law in disciplinary proceedings. Likewise, courts must decide whether and to what extent ethics rules have authoritative force in other contexts." Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 298 (1992). See also Gary A. Munneke & Anthony E. Davis, Esq., *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?*, 22 J. LEGAL PROF. 33, 61 n.136 (1998) ("[W]hatever force of law attaches to the ethical codes is derived from their adoption as standards of professional conduct in a particular jurisdiction."); Geoffrey C. Hazard, Jr., *State Supreme Court Regulatory Authority Over the Legal Profession*, 72 NOTRE DAME L. REV. 1177, 1179 (1997) ("The Code and the Model Rules of Professional Conduct were adopted and have the force of law by action of the highest courts of the states.").

184. By the time the American Bar Association adopted the Model Rules of Professional Conduct in 1983, Disciplinary Rule 7-110(b)(4) of the CPR had been amended

and RPC provisions by adding to the exceptions for permissible ex parte communications an explicit reference to the Code of Judicial Conduct or court rules¹⁸⁵—the permissible exceptions for a lawyer to participate in an ex parte communication encompass the situations described in the Code of Judicial Conduct. Because most states either do not recognize a problem or have lacked the foresight to deal with the issue, it becomes important to examine whether the courts assign the ethical codes any legal significance.

State court decisions have split on whether the CPR or the RPC have the force and effect of law. If the CPR or RPC have the force of law,¹⁸⁶ the Code of Judicial Conduct reference to

to state that exceptions to prohibited communications included those "authorized by law, or by [Canon 3(a)(4) of the 1972 version of] the Code of Judicial Conduct." MODEL CODE OF PROF'L RESPONSIBILITY DR 7-110(b)(4) (1981).

185. See, e.g., KAN. RULES OF PROF'L CONDUCT R. 3.5(c)(4), *reprinted in* 2 Nat'l Rep. Legal Ethics (Univ. Pub. Am.) (2000) (authorizing communications "by law or court rule"); ME. RULES OF PROF'L CONDUCT R. 3.7(h)(2) (West 2000) (acknowledging that the rule "does not preclude communications permitted by rule of court"); NEB. CODE OF PROF'L RESPONSIBILITY DR 7-110(B)(4) (West 1999) (providing for exceptions "by Canon 3B(7) of the Code of Judicial Conduct"); N.Y. CODE OF PROF'L RESPONSIBILITY ANN. DR 7-110(B)(4), *reprinted in* N.Y. JUD. LAW ANN. (McKinney 1992) (excepting those communications "authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct"); OR. CODE OF PROF'L RESPONSIBILITY DR 7-110(B)(4) (West 1999) (allowing communications "authorized by law or by Judicial Rule 2 of the Code of Judicial Conduct"); TENN. CT. R. ANN. DR 7-110(B)(4) (2000) (providing an exception for communications authorized "by Section A(4) under Canon 3 of the Code of Judicial Conduct"); VT. RULES OF PROF'L CONDUCT R. 3.5(b)(1), *reprinted in* VT. STAT. ANN. (1999) (granting an exception for communications permitted by "the Code of Judicial Conduct").

In addition, the commentary to RPC Rule 3.5 states that other forms of influence upon a tribunal "are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar." MODEL RULES OF PROF'L CONDUCT R. 3.5 cmt. (1998).

186. The following decisions explicitly recognize that the CPR or the RPC has the force of law or should be treated like statutes. *Cambron v. Canal Ins. Co.*, 269 S.E.2d 426, 430 (Ga. 1980) (asserting that the Georgia Code of Professional Responsibility has the effect of law); *In re Vrdolyak*, 560 N.E.2d 840, 845 (Ill. 1990) (stating that the Illinois Code of Professional Responsibility "operates with the force of law"); *State v. Alvey*, 524 P.2d 747, 751 (Kan. 1974) (holding that the Kansas Code of Professional Responsibility has "the force and effect of a statute"); *In re Wallace*, 574 So. 2d 348, 350-51 (La. 1991) (affirming that the Louisiana Code of Professional Responsibility has the "force and effect of substantive law"); *Post v. Bregman*, 707 A.2d 806, 816 (Md. 1998) (holding that the Maryland Rules of Professional Conduct have "the force of law"); *Krischbaum v. Dillon*, 567 N.E.2d 1291, 1300 (Ohio 1991) (affirming that the Ohio Code of Professional Responsibility "has the force of law"); *State ex rel. Bryant v. Ellis*, 724 P.2d 811, 812 (Or. 1986) (holding that the Code of Professional Responsibility has the force of law in Oregon); *Berberian v. New England Tel. & Tel. Co.*, 330 A.2d 813, 815 (R.I. 1975) (stating that the Rhode Island Code of Professional Responsibility has "the force and effect of law"); *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397, 399 (Tex. 1988) (asserting that the Texas Disciplinary Rules of Professional Responsibility "should be treated like statutes"); *Manchin v. Browning*, 296 S.E.2d 909, 920 (W. Va. 1982) (holding that officers of the court of West Virginia are bound by the Code of Professional Responsibility, which has the "force and effect of law").

acceptable judicial ex parte communications that are "authorized by law" would make anything permitted by the CPR or RPC tolerable for judges because the CPR or RPC constitute a source of lawful ex parte situations. The result may be a broader category of situations in which judges could engage in ex parte communications. Conversely, if the CPR or RPC lack the force of law,¹⁸⁷ the Code of Judicial Conduct allusion to ex parte communications that are authorized by law would not include anything allowed under the CPR or RPC (unless those provisions were duplicated in statutes or decisional law). In this instance, whatever additions the CPR or RPC might pose would be ineffective in expanding the list of circumstances in which judges could initiate or consider ex parte communications.

Fewer judicial decisions have addressed whether the Code of Judicial Conduct has the "force of law." If the Code has the force of law,¹⁸⁸ the scope of permitted instances for lawyers to engage in ex parte communications would widen because the Code of Judicial Conduct would provide additional examples of acceptable ex parte communications for lawyers. On the other hand, when the Code lacks the force of law,¹⁸⁹ the CPR or RPC reference to situations authorized or permitted by law does not allow the Code to constitute a source of added, acceptable ex parte communications.

B. Case Law

The general rule in CPR Disciplinary Rule 7-110(b) provides that a lawyer in a pending, adversary proceeding must not

187. The following decisions explicitly assert that the CPR or the RPC do not have the force of law or are not regarded as positive law by statute or rule. *Gaylard v. Homemakers of Montgomery, Inc.*, 675 So. 2d 363, 367 (Ala. 1996); *Doan v. Comm'n on Judicial Performance*, 902 P.2d 272, 279 (Cal. 1995); *Pichon v. Benjamin*, 702 P.2d 890, 892 (Idaho Ct. App. 1985); *In re Dineen*, 380 A.2d 603, 604 (Me. 1977); *In re Weinstock*, 351 N.E.2d 647, 649 (N.Y. 1976); *Commonwealth v. Chmiel*, 738 A.2d 406, 415 (Pa. 1999).

188. *E.g., In re Sheffield*, 465 So. 2d 350, 355 (Ala. 1984) (holding that the Alabama Canons of Judicial Ethics "are not merely guidelines for proper judicial conduct" and that they "have the force and effect of law" in finding that an Alabama judge failed to act impartially when he improperly initiated contempt proceedings); *La. State Bar Ass'n v. Harrington*, 585 So. 2d 514, 522 (La. 1990) (affirming that the Louisiana Rules of Professional Conduct and the Code of Judicial Conduct have "the force and effect of substantive law" in finding that an attorney violated the Rules by improperly sending a threatening letter to an adversary party in an attempt to gain an advantage in a proceeding). *See also Stivers v. Knox County Dep't of Pub. Welfare*, 482 N.E.2d 748, 751 (Ind. Ct. App. 1985) (holding that the Code of Judicial Conduct ban on ex parte communications prevails over a statute requiring a judge to serve on a child protection team where the judge would discuss the merits of individual juvenile cases).

189. *E.g., Councill v. Stafford*, 626 N.E.2d 577, 579 (Ind. Ct. App. 1993); *Reilly v. S.E. Pa. Transp. Auth.*, 489 A.2d 1291, 1298 (Pa. 1985); *Aguilar v. Anderson*, 855 S.W.2d 799, 811 (Tex. App.—El Paso 1993, writ denied).

communicate about the merits of a claim with a judge or other official.¹⁹⁰ The case law construing the lawyers' standard appears more definitive than comparable decisions interpreting the Codes of Judicial Conduct. First, a proceeding is "pending" from the filing of the claim until the rendition of a final judgment, meaning that lawyers cannot engage in ex parte contacts with a judge as long as a timely motion for reconsideration of a judicial decision has not been entered.¹⁹¹ Once the time for appeal has run, a lawyer may communicate with the judge about the merits.¹⁹²

Second, the phrase "on the merits" refers to the content of a lawyer's communication rather than a phase of the proceedings.¹⁹³ In *In re Schenck*, a lawyer (who ironically had become a judge by the time of the disciplinary proceeding) was reprimanded for sending a letter to a judge urging that his case be resolved and that further delay was merely an effort to force a settlement.¹⁹⁴ The court rejected the lawyer's claim that such a letter was not on the merits, noting that "[a] communication may concern procedure as well as substantive law and still be on the merits."¹⁹⁵ Nevertheless, most cases of ex parte contact about scheduling and accelerating the disposition of issues are "purely" procedural and therefore not "on the merits."¹⁹⁶

An ex parte contact by a lawyer is characterized as being "on the merits" when it is made with the intent to affect the outcome

190. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-110(b) (1981).

191. *E.g.*, *In re Thompson*, 940 P.2d 512, 514 n.1 (Or. 1997). In *Thompson*, a lawyer who was unhappy with an appellate decision berated one of the appellate judges in public. *Id.* at 513. The case was still pending because the appellate decision was subject to modification by the court. *Id.* at 515-16. That the appellate court took no further action in the case was irrelevant, because the communication was considered on the merits at the time it was made, regardless of how it was perceived by the judge. *Id.* at 516.

192. *See, e.g.*, *id.* at 515-16.

193. *E.g.*, *In re Burrows*, 629 P.2d 820, 826 (Or. 1981) (in banc). The "communication may concern procedure as well as substantive law and still be on the merits of the cause." *In re Schenck*, 879 P.2d 863, 867 (Or. 1994). *See also* *Eisner v. Eisner*, 513 So. 2d 673, 674 (Fla. Dist. Ct. App. 1987) (reversing judgment because FLA. BAR RULES OF PROF'L CONDUCT R. 4-3.5(b) indicates that counsel's ex parte letter to the judge stating relief requested and restating arguments from the hearing constitutes a prohibited ex parte communication); *In re Jensen*, 468 N.W.2d 541, 545 (Minn. 1991) (approving a public reprimand for an attorney, in part for sending ex parte communications to appellate judges seeking relief from and challenging their orders).

194. 879 P.2d at 867.

195. *Id.*

196. *See, e.g.*, *People v. Conte*, 304 N.W.2d 485, 488 (Mich. Ct. App. 1981) (stating that a telephone communication by the prosecutor with the appellate judge about accelerating the disposition of interlocutory issues "in no way involved the merits of the cause"), *aff'd*, 365 N.W.2d 648 (Mich. 1984); *J & H Gibbar Constr. Co. v. Adams*, 750 S.W.2d 580, 584 (Mo. Ct. App. 1988) (holding that an informal communication about available hearing and trial dates is "purely procedural").

of a proceeding and it actually or potentially affects a legal right or duty of a party.¹⁹⁷ The scope of “on the merits” must include both actual and potential effect, for otherwise the existence of a violation “would depend entirely on how the judge or the official to whom the *ex parte* communication was made responded to the communication. However, nothing in DR 7-110(B) suggests that a lawyer must be *successful* in improperly influencing a judge’s or an official’s decision for an *ex parte* contact to be improper.”¹⁹⁸

Third, one of the recognized DR 7-110(B) exceptions allows *ex parte* communications “[i]n the course of official proceedings in the cause.”¹⁹⁹ An “official proceeding” may be characterized either as any part of a case initiated by the judge assigned to the case, or as those parts of a case in which opposing counsel is present.²⁰⁰ The court in *In re Evans* criticized the former definition, preferring the latter meaning, because “it would be absurd to permit such communications whenever a judge was willing to hear them and thus to authorize ‘officially’ their utterance.”²⁰¹

The rule exception that is common to RPC Rule 3.5 and CPR DR 7-110 allows lawyers to engage in *ex parte* communications when permitted or otherwise authorized by law.²⁰² The cases are clear that for this exception to apply, there must be written, rather than merely customary, procedures providing for *ex parte* communications, and that the particular procedures for *ex parte* activity must be followed.²⁰³ For example, a lawyer’s failure to

197. *E.g.*, *Thompson*, 940 P.2d at 515.

198. *Id.* The *ex parte* communication itself is the violation, regardless of whether in “hindsight” it appears to have been favorable to the offending lawyer’s opponent. *E.g.*, *Burrows*, 629 P.2d at 826.

In *In re Smith*, 670 P.2d 1018 (Or. 1983) (in banc), the court held that when counsel for one of the parties added a paragraph to an order to show cause without disclosing it to the judge or to the opponent, the paragraph in the *ex parte* communication did not concern the merits of the case because the language of the paragraph did not affect a legal right or duty of either party, *id.* at 1021.

199. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-110(b)(1) (1981).

200. *E.g.*, *In re Evans*, 782 P.2d 315, 322 (Ariz. 1989) (en banc) (holding that a meeting between an attorney, the client, and a judge was an “official proceeding” on the merits and that opposing counsel should have been present).

201. *Id.*

202. Compare MODEL RULES OF PROF’L CONDUCT R. 3.5 (1998) with MODEL CODE OF PROF’L RESPONSIBILITY DR 7-110 (1981). As with the judicial ethics standards, these proper *ex parte* communications are limited to extraordinary emergency situations like writs of attachment, garnishment, sequestration, and equitable relief. *See, e.g.*, *In re Anonymous*, 729 N.E.2d 566, 568 (Ind. 2000) (holding that equitable relief, such as a temporary restraining order, may be granted *ex parte*); TEX. R. CIV. P. 592 (stating that a writ of attachment may be issued *ex parte*); TEX. R. CIV. P. 658 (noting that a writ of garnishment may be issued *ex parte*); TEX. R. CIV. P. 696 (stating that a writ of sequestration may be issued *ex parte*).

203. *E.g.*, *Anonymous*, 729 N.E.2d at 568 (holding that failure to follow proper procedures in seeking to obtain emergency judicial relief is an impermissible *ex parte*

follow the applicable rules regarding efforts to notify all parties about seeking a temporary restraining order renders the proceeding an unethical ex parte communication.²⁰⁴

The case law relating to both the CPR and the RPC rejects excuses and justifications for ethical ex parte communication violations.²⁰⁵ A lawyer's belief that he or she is acting in good faith on the client's behalf does not excuse an ethical violation; "ethical standards must not be compromised under the guise of protecting the interests of clients."²⁰⁶ In *Iowa Supreme Court Board of Professional Ethics & Conduct v. Ackerman*,²⁰⁷ the lawyer blamed his participation in an ex parte communication on a "breakdown" in communication with his support staff.²⁰⁸ In increasing the recommended discipline for this and other ethical violations, the court suspended the lawyer's license, stating that he "cannot be rescued from the violation by an isolating wall of sloppiness and confusion."²⁰⁹

V. CONCLUSION

The ABA's Codes of Judicial Conduct describe the circumstances in which a judge can and cannot engage in ex parte and other communications without the presence of all

communication by an attorney).

204. *E.g.*, *id.* at 568-69 (privately reprimanding a lawyer for failure to follow procedures for obtaining temporary restraining order). By comparison, a lawyer's good faith (but erroneous) interpretation of the law that an ex parte communication was "authorized by law" can result in no imposition of discipline and a conclusion that the ex parte communication was constructively "authorized by law." *E.g.*, *In re Gillis*, 686 P.2d 358, 362 (Or. 1984) (en banc).

A surprising type of ex parte communication "authorized by law" was at issue in *Hill v. Squibb & Sons, E.R.*, 592 P.2d 1383 (Mont. 1979). A local court rule authorized the filing of trial briefs to be used solely for the benefit of the trial court without disclosure to opposing counsel. *Id.* at 1387. The Montana Supreme Court recognized that such a rule may "theoretically" conflict "with the spirit of openness and cooperation" in the modern civil procedure rules, but grudgingly justified the rule as "authorized by law." *Id. Contra* R.I. CODE OF JUDICIAL CONDUCT Canon 3(B)(8) cmt., reprinted in R.I. CT. R. ANN. (Michie 1998) (providing that a judge should not accept any trial briefs unless the briefs have been exchanged with adversary parties or "unless all parties agree otherwise in advance of the submission of the briefs"); WIS. SUP. CT. R. 60.04(g) cmt. ("A judge should not accept trial briefs that are not exchanged with adversary parties unless all parties agree otherwise in advance of submission of the briefs.").

205. *See, e.g.*, *Fitzhugh v. Comm. on Prof'l Conduct*, 823 S.W.2d 896, 899 (Ark. 1992).

206. *Id. See also Anonymous*, 729 N.E.2d at 569 (holding that a lawyer's good faith belief of acting to protect a client does not justify dispensing with mandatory ex parte procedures); *In re Marek*, 609 N.E.2d 419, 420 (Ind. 1993) (holding that ex parte communications constitute "unethical conduct, whatever the motive").

207. 611 N.W.2d 473 (Iowa 2000) (en banc) (per curiam).

208. *Id.* at 474.

209. *Id.* at 474-75.

parties and counsel.²¹⁰ This Article has noted how the rules for judges and lawyers have evolved and how the courts have applied the ethical principles. It has also identified shortcomings in the rules, and offered specific ideas for improving the Codes or comparable state codes by modifying current ethical norms.²¹¹ While the judicial and disciplinary decisions show that no set of rules can anticipate every context in which communications issues may arise, continuing oversight by organizations responsible for Code standards can produce useful proposals for modification. Periodic review promotes public confidence in the judicial system's ability and willingness to regulate itself.

210. Refer to Part II and Part III *supra*.

211. Refer to Parts III.A, III.B, III.D, and III.E *supra*.

From: [Gonzalez, Gregory \(OPR\)](#)
To: [Hardy, Lyn \(OPR\)](#)
Subject: RE: OPR No. 201800286 Judge Bruce Collins, C.D. Ill.
Date: Monday, March 4, 2019 8:13:18 AM

Thanks. At least, we need to know if the court made any findings concerning the conduct of the DOJ employees that we are looking at relative to the ex parte email issue.

Greg Gonzalez
Counsel
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Ave. NW,
Washington, D.C. 20530

(b) (6)

202-514-5050 fax

From: Hardy, Lyn (OPR) (b) (6)
Sent: Friday, March 01, 2019 9:29 AM
To: Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: OPR No. 201800286 Judge Bruce Collins, C.D. Ill.

No, we may never hear. I'll let you know if I do.

From: Gonzalez, Gregory (OPR) (b) (6)
Sent: Thursday, February 28, 2019 3:55 PM
To: Hardy, Lyn (OPR) (b) (6)
Subject: RE: OPR No. 201800286 Judge Bruce Collins, C.D. Ill.

Any word on a decision re: Bruce or a report?

Greg Gonzalez
Counsel
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Ave. NW,
Washington, D.C. 20530

(b) (6)

202-514-5050 fax

From: Hardy, Lyn (OPR) (b) (6)
Sent: Tuesday, February 05, 2019 5:16 PM
To: Gonzalez, Gregory (OPR) (b) (6)

Cc: Fenn, Stephen (OPR) (b) (6)

Subject: FW: OPR No. 201800286 Judge Bruce Collins, C.D. Ill.

Greg, another correction that Brooker gave me (that I forgot to include in the email below) is that he is not handling anything concerning the (b) (6), (b) (7)(C) case, just (b) (6), (b) (7)(C) and the committee investigation. Lyn.

Duplicate of BN 00969

