EX PARTE COMMUNICATIONS
Quick Tips

Introduction: Three-Step Analysis

Issues around ex parte communications are a big source of judicial questions, complaints, and disciplinary penalties. Each time the issue arises, go through a three-step analysis:

1. Is the communication ex parte?

"Ex parte" refers to case-related communication from or to the judge without all parties, or their lawyers, present. For example:

- The defense attorney in a case before you mentions in the elevator that he'll put on his expert witness tomorrow.
- You read a news account of the case.
- Your court reporter tells you the defendant is a big liar.
- You receive an unsolicited email from one party, sent only to you, about a substantive matter in the case before you.

2. Is it improper?

All ex parte communications are improper unless a specific exception applies. (See below)

3. If the communication is improper, what's the remedy?

Unless the information is so damaging it causes you to be biased, the remedy is to a) disclose the information to all sides and b) ask the person initiating the communication to avoid doing so in the future. Consider recusing yourself if you feel you cannot ignore what you've been told.

Before remedy there is prevention. Know the rule and its exceptions, and avoid situations where inadvertent ex parte communications are likely to occur.

The Rule

The ex parte rules are based on **Canon 3B(7)** and its subsections.

> **Canon 3B(7)** A judge shall not initiate, permit, or consider ex parte communications, that is, any communications made to or from the judge outside the presence of the parties concerning a pending or impending proceeding . . .

The Exceptions

1. A judge may consult with a) court personnel who aid the judge in adjudicative responsibilities, or b) other judges. If you consult with another judge, do not abdicate your own decisionmaking responsibility, and do not consult with one who has been disqualified on the same case. **Canon 3B(7)(b)**

3. A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters. **Canon 3B(7)(c)**

4. A judge may initiate ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided the

judge a) reasonably believes no party will gain a procedural or tactical advantage as a result of the ex parte communication, and b) promptly notifies all other parties of the substance of the ex parte communication and allows an opportunity to respond. **Canon 3B(7)(b)**

5. A judge may engage in factual research. Though ex parte, this is expressly permitted by law. Note: Consulting with just one side's expert outside of open court is impermissible ex parte communication. **Canon 3B(7)**

Conclusion

The issue of ex parte communication goes directly to the fairness of the proceedings and the concern that the judge is hearing something that will impair the integrity of the decision. It has to do with both justice and the perception that justice has been done.

When in doubt, do not engage in discussions about a particular case unless both sides are present.