

## Judicial Inquiry Commission

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This is in response to your request for an advisory opinion from the Judicial Inquiry Commission. Your question concerns the circumstances under which a judge is required to disclose to the parties and their attorneys the nature and content of an “ex parte conversation.”

I

The reported synopsis to Advisory Opinion 93-503 states:

“A judge is not necessarily disqualified from presiding over a divorce case in one county because the judge acquired information about a related (involving one of the same adult parties) juvenile case from another county in an ex parte conversation the judge had with the juvenile court judge or from an order issued in the Mobile case. The judge is disqualified if the judge obtained information of a disputed evidentiary fact from the conversation or order and that information will influence the judge’s opinion of the substantive merits of the case in his county.

“Where a judge has an ex parte conversation with another judge concerning a pending case, the judge should, on the judge’s own motion and on the record, candidly disclose to the parties and their attorneys the nature and content of the ex parte conversation.”

The second paragraph of the synopsis is hereby withdrawn. Advisory Opinion 93-503 does not address that principle and does not contain that or similar language. The inclusion of this paragraph in the synopsis was error. The correct synopsis of Advisory Opinion 93-503 is as follows:

“A judge is not necessarily disqualified from presiding over a divorce case in one county because the judge acquired information about a related (involving one of the same adult parties) juvenile case from another county in an ex parte conversation the judge had with the juvenile court judge or from an order issued in the Mobile case. The judge is disqualified if the judge obtained information of a disputed evidentiary fact from the conversation or order and that information will influence the judge’s opinion of the substantive merits of the case in his county.

II

The question remains of when and under what circumstances should a judge report an ex parte communication with another judge to the parties and their attorneys.

“Ex parte communications are those that involve fewer than all of the parties who are legally entitled to be present during the discussion of any matter. They are barred in order to ensure that ‘every person who is legally interested in a proceeding [is given the] full right to be heard according to law.’” J. Shaman, S. Lubet, J. Alfani, Judicial Conduct and Ethics, 149 (Michie 1990). Quoted in Advisory Opinion 92-456.

Canon 3A(4), Alabama Canons of Judicial Ethics provides in relevant part:

“A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to the law, and, except as authorized by law, neither initiate nor consider ex parte communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested and impartial expert on the law applicable to a proceeding before him; provided however, a judge should use discretion in such cases and, if the judge considers that justice would require it, should give notice to the parties of the person consulted and the substance of the advice, and afford the parties reasonable opportunity to respond.”

The Alabama Supreme Court has held that “Canon 3A(4) generally prohibits ex parte contacts, but provides an exception for impartial experts on questions of applicable law.” Hunt v. State, [Ms. 92-1300, December 13, 1993] \_\_\_ So.2d \_\_\_ (Ala.Cr.App. 1993), affirmed, [Ms. 1930501, April 22, 1994] \_\_\_ So.2d \_\_\_ (Ala. 1994). The term “disinterested expert” has been defined as “one who ‘has no connection with any party or any participant in [the] lawsuit.’” Hunt v. State, [Ms. 92-1300, December 13, 1993] \_\_\_ So.2d at \_\_\_ (Ala.Cr.App. 1993) quoting Judicial Conduct and Ethics § 6.07 at 37 (Supp. 1993).

We note that under Canon 3A(4), a judge, after consulting an “expert,” does not necessarily have to “give notice to the parties of the person consulted and the substance of the advice, and afford the parties reasonable opportunity to respond.”<sup>1</sup> Notice and opportunity to respond are required only when “the judge considers that justice would require it.”

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<sup>1</sup> Compare Canon 3A(4), Model Code of Judicial Conduct (1972) which requires disclosure: “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.”

A judge's communication with another judge constitutes an exception to the prohibition on ex parte communications.

"A judge may consult ex parte with other judges. Commentary to Canon 3A(4), 1972 Model Code. However, the judge who is consulted probably would be disqualified if the case were to come before him or her in the future. 1972 Reporter's Notes at 53.

J. Shaman and Cynthia Gray, Judicial Conduct & Ethics Curriculum at p. 4 of "Ex parte Communications" (American Judicature Society 1993).

Furthermore, ex parte communications between judges and court personnel may not violate the prohibition against ex parte communications.

"Ex parte communications between judges and court personnel do not violate Canon 3A(4). Commentary to Canon 3A(4), 1972 Model Code. 'Court personnel' means court staff and officials 'whose function is to aid the judge in carrying out his adjudicative responsibilities' (Commentary to Canon 3A(4), 1972 Model Code) and who are subject to the judge's 'direction and control.' Canon 3B(2). '[L]awyers in a proceeding before a judge, are not 'court personnel' (Commentary to Canon 3A(6), 1972 Model Code), even if the lawyer is, for example, a prosecutor regularly assigned to the judge's courtroom. . . .

"Probation officers present a problem under the court personnel exception to the ex parte communications rule. When probation officers prepare a pre-sentence report, they are acting as an arm of the court, and some ex parte communications, such as simple factual inquiries regarding a probationer's status, are permitted. California Advisory Opinion 37 (1987). However, other communications may be contrary to statutes requiring probation officers' pre-sentence reports and recommendations to be in writing. Communications from probation officers may also raise constitutional issues of due process and the right to confrontation 'to the extent that they are intended to influence the exercise of judicial discretion in the absence of notice and an opportunity to be heard. . . .' Id. Therefore, judges must 'undertake a careful evaluation of the purpose of the communication, and the nature of the information likely to be imparted by the probation officer, before the judge participates in such a communication.' Id."

Judicial Conduct & Ethics Curriculum at p. 5 of "Ex parte Communications."

However, judges do not have a license "to ignore entirely the restriction on ex parte communication. Neither all court personnel, nor every communication, can be construed as 'aiding the judge in carrying out his adjudicative responsibilities.'" Judicial Conduct and Ethics § 6.06 at 158.

Communications by a judge with another judge which display a tendency to influence or impede the judge's decision violate the prohibition against ex parte communications. *Id.* A judge may not directly or indirectly investigate the facts of a case outside the record and use the results of that investigation in determining the facts of the case. Price Brothers Company v. Philadelphia Gear Corporation, 649 F.2d 416 (6th Cir.), cert. denied, 454 U.S. 1099 (1981) (trial judge directed law clerk to observe operation of machine in controversy).

“It is imperative that a finder of fact avoid off-the-record contacts that might bias its judgment or otherwise impair its ability to fairly and objectively weigh the evidence properly submitted at trial. A judge presiding at a bench trial may not directly or indirectly, through his law clerk or by any other means, conduct an investigation outside the record and use the results of that investigation in determining the facts of a case.”

Price Brothers, 649 F.2d at 419.

Furthermore, in discussing a pending case with another judge, the trial judge must ever be aware of the judge's ethical obligation to avoid even the appearance of impropriety. See Kennick v. Commission on Judicial Performance, 787 P.2d 591 (Cal. 1990) (judge created appearance of impropriety by allowing attorneys to visit socially in chambers ex parte on days when they were appearing before the judge).

Therefore, it is the opinion of this Commission that when a trial judge has a communication with another judge (or any other person) outside the presence of the attorneys involved in the case and thereby obtains factual information which will either bias the trial judge's judgment or otherwise impair the trial judge's ability to fairly and objectively weigh the evidence properly submitted, the trial judge should voluntarily report the substance and contents of that communication to the attorneys and the parties in the case.

This advisory opinion has been considered by and is the opinion of the entire Commission.

Respectfully,