

Can You Hear Me Now?

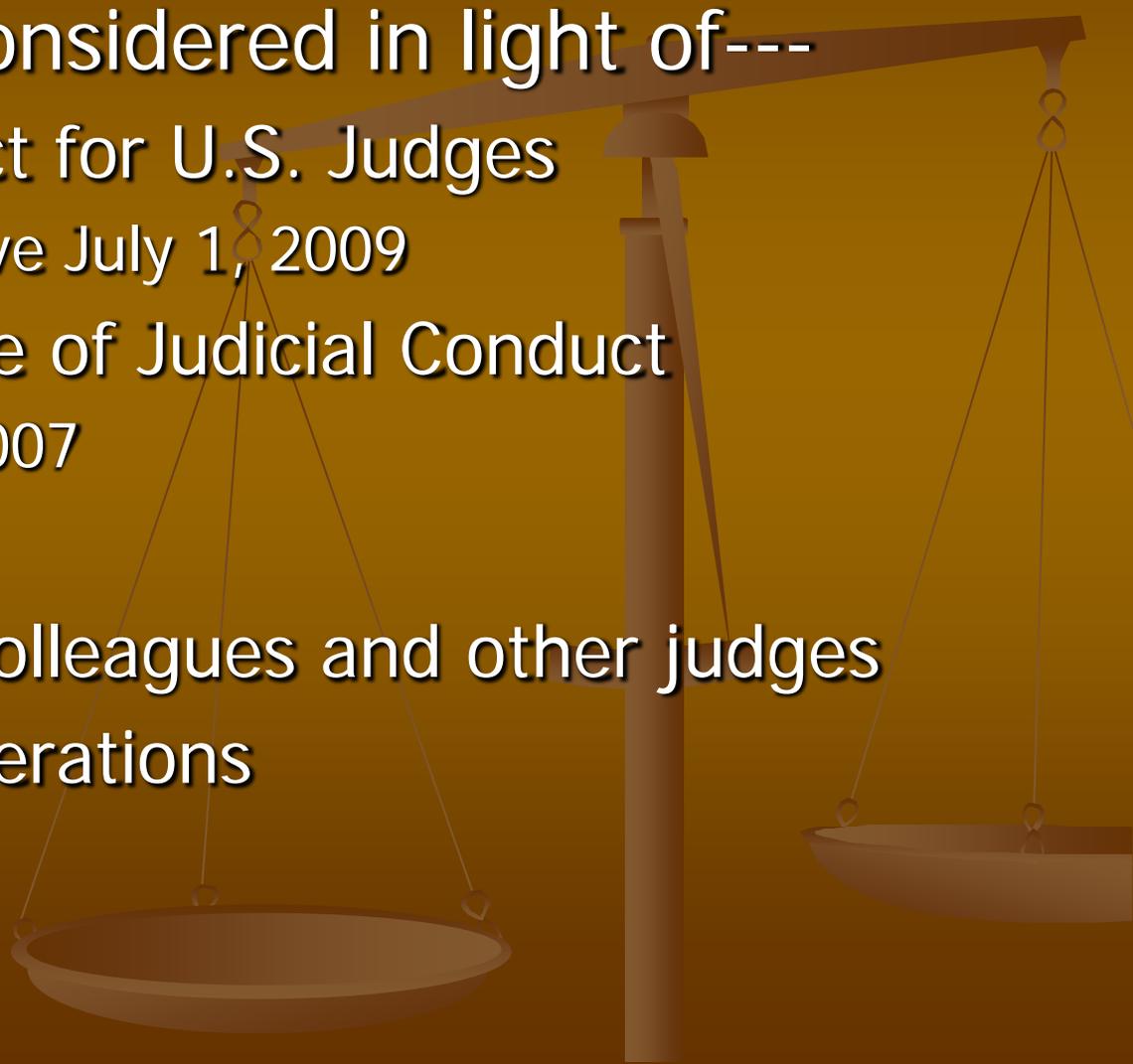
Ethical Issues Relating to *Ex Parte* Judicial Communications

U.S. Magistrate Judge Celeste F. Bremer
U.S. Magistrate Judge Karen K. Klein
Ninth Circuit Judicial Conference
July 20, 2009



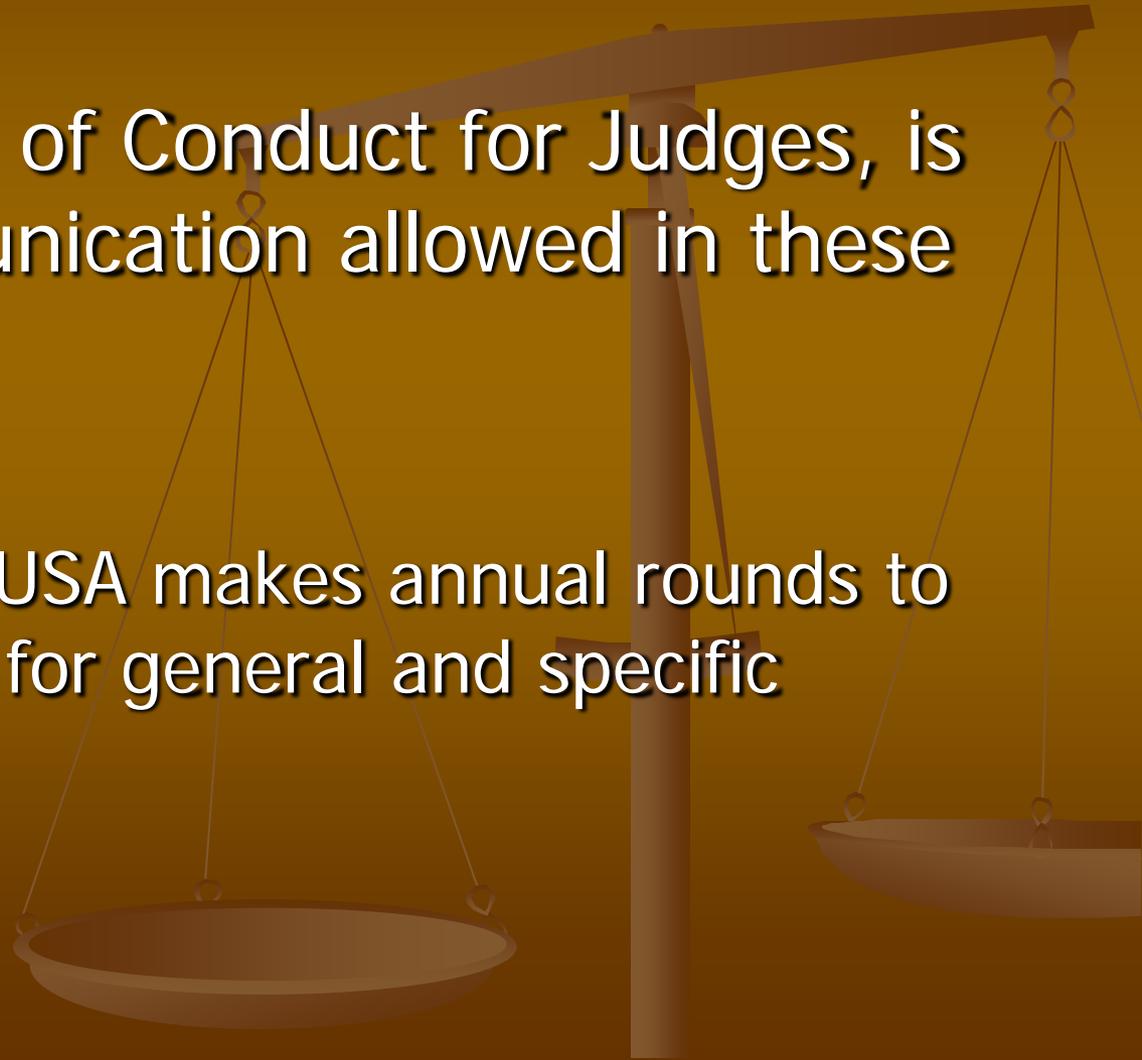
Format of Program

- Hypotheticals considered in light of---
 - Code of Conduct for U.S. Judges
 - Revised effective July 1, 2009
 - ABA Model Code of Judicial Conduct
 - Last revision 2007
 - Case law
 - Experience of colleagues and other judges
 - Practical considerations



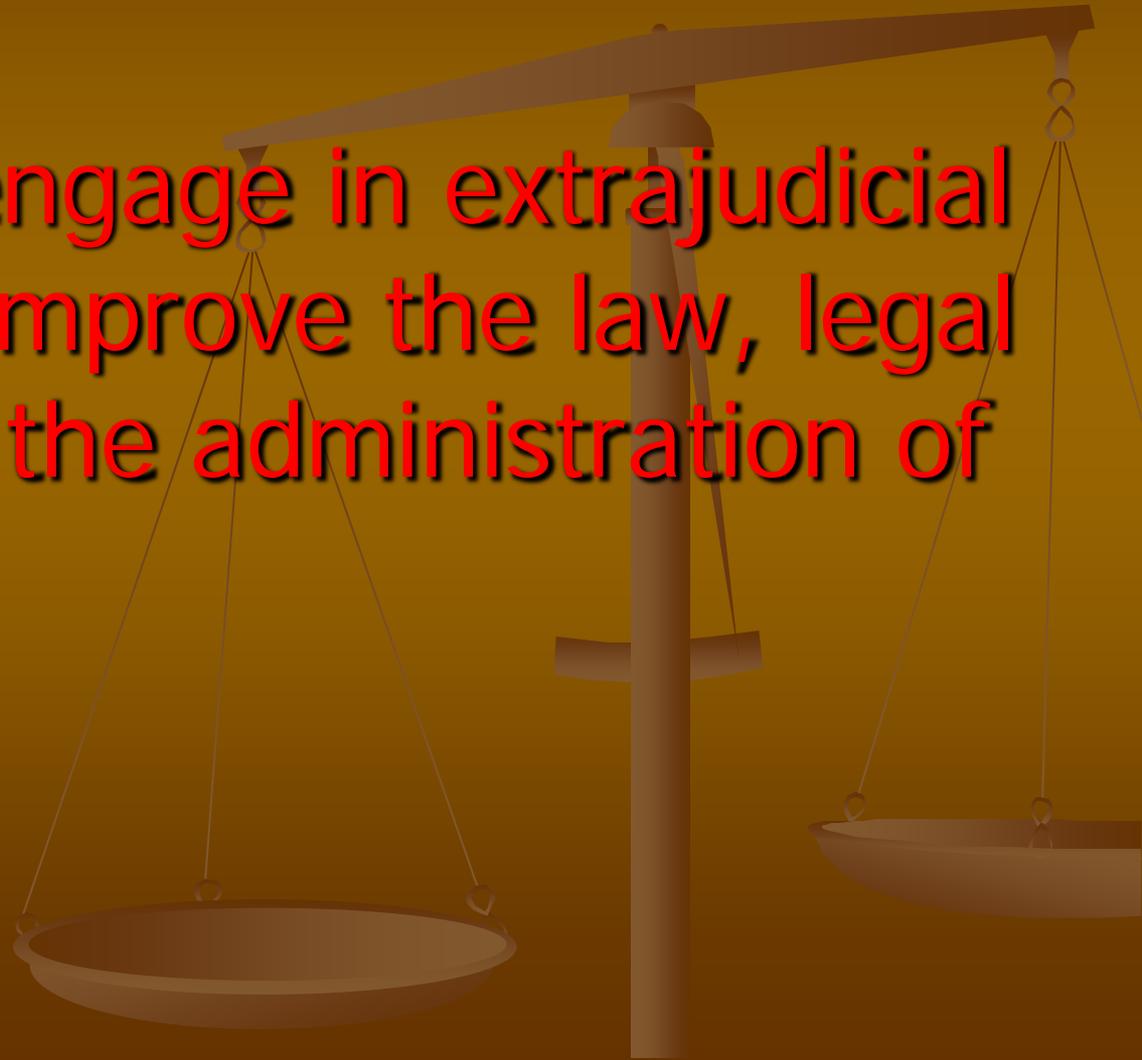
Hypothetical # 1(A): U.S. Attorney Contacts

- Under the Code of Conduct for Judges, is *ex parte* communication allowed in these situations?
 - A. Civil Chief AUSA makes annual rounds to ask each judge for general and specific feedback.



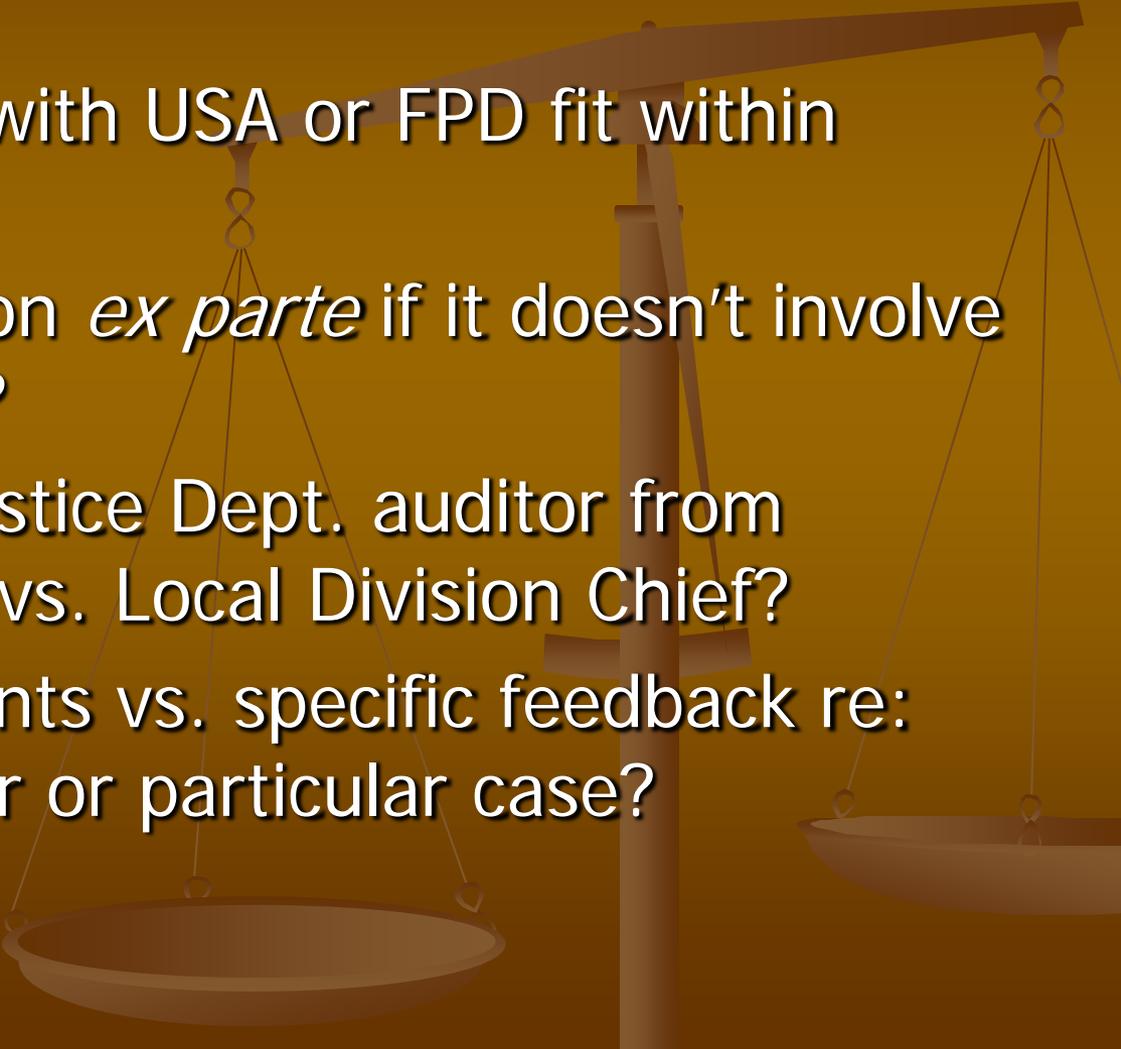
Canon 4, Code of Conduct for U.S. Judges:

- Judge may engage in extrajudicial activities to improve the law, legal system, and the administration of justice.



Hypothetical No. 1(A)

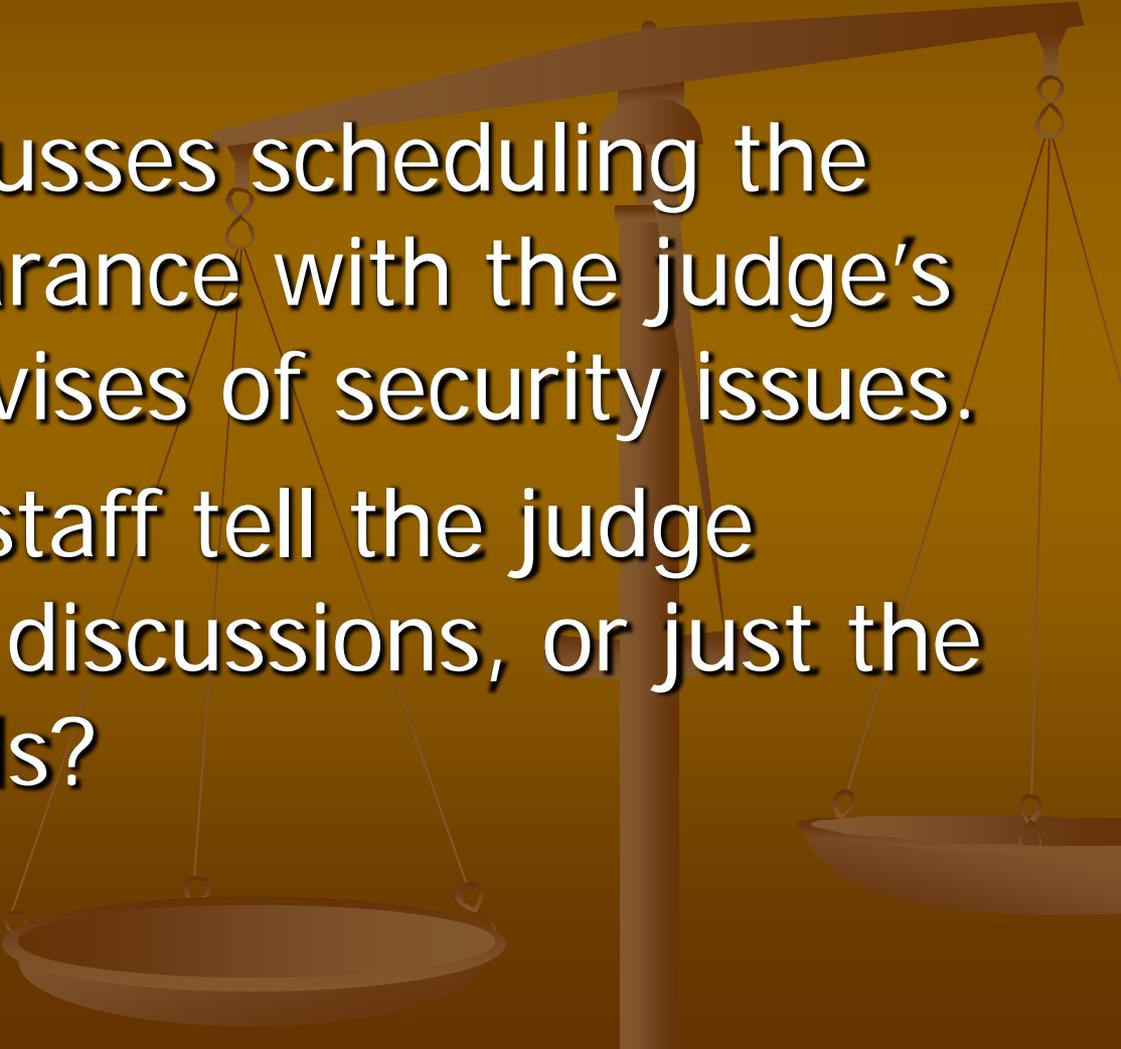
U. S. Attorney Contacts

- Do discussions with USA or FPD fit within Canon 4?
 - Is communication *ex parte* if it doesn't involve a pending case?
 - Meeting with Justice Dept. auditor from another district vs. Local Division Chief?
 - General comments vs. specific feedback re: particular lawyer or particular case?
- 

Hypothetical # 1(B): U.S. Attorney Contacts

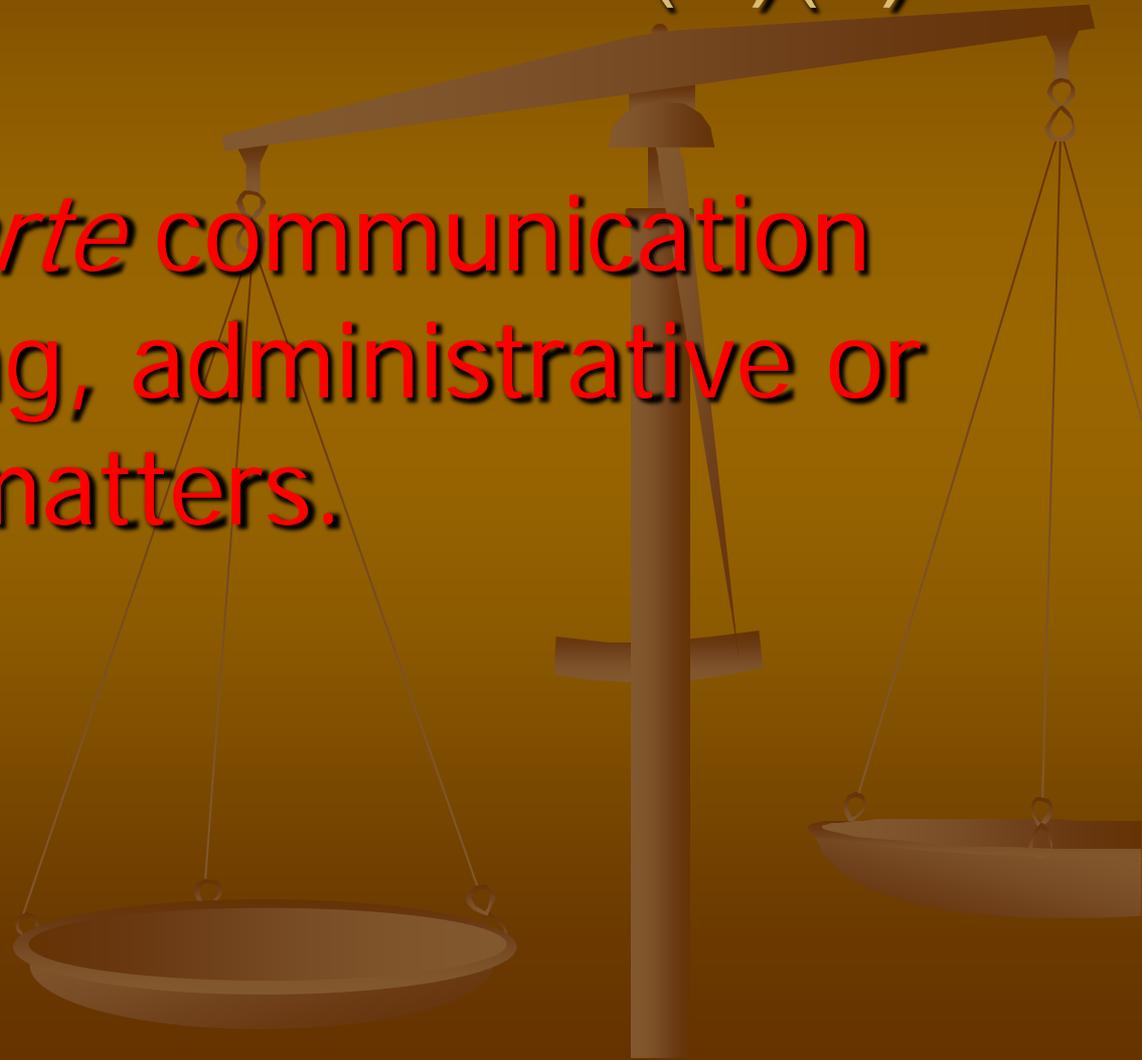
B. AUSA discusses scheduling the Initial Appearance with the judge's staff and advises of security issues.

Should staff tell the judge about these discussions, or just the U.S. Marshals?

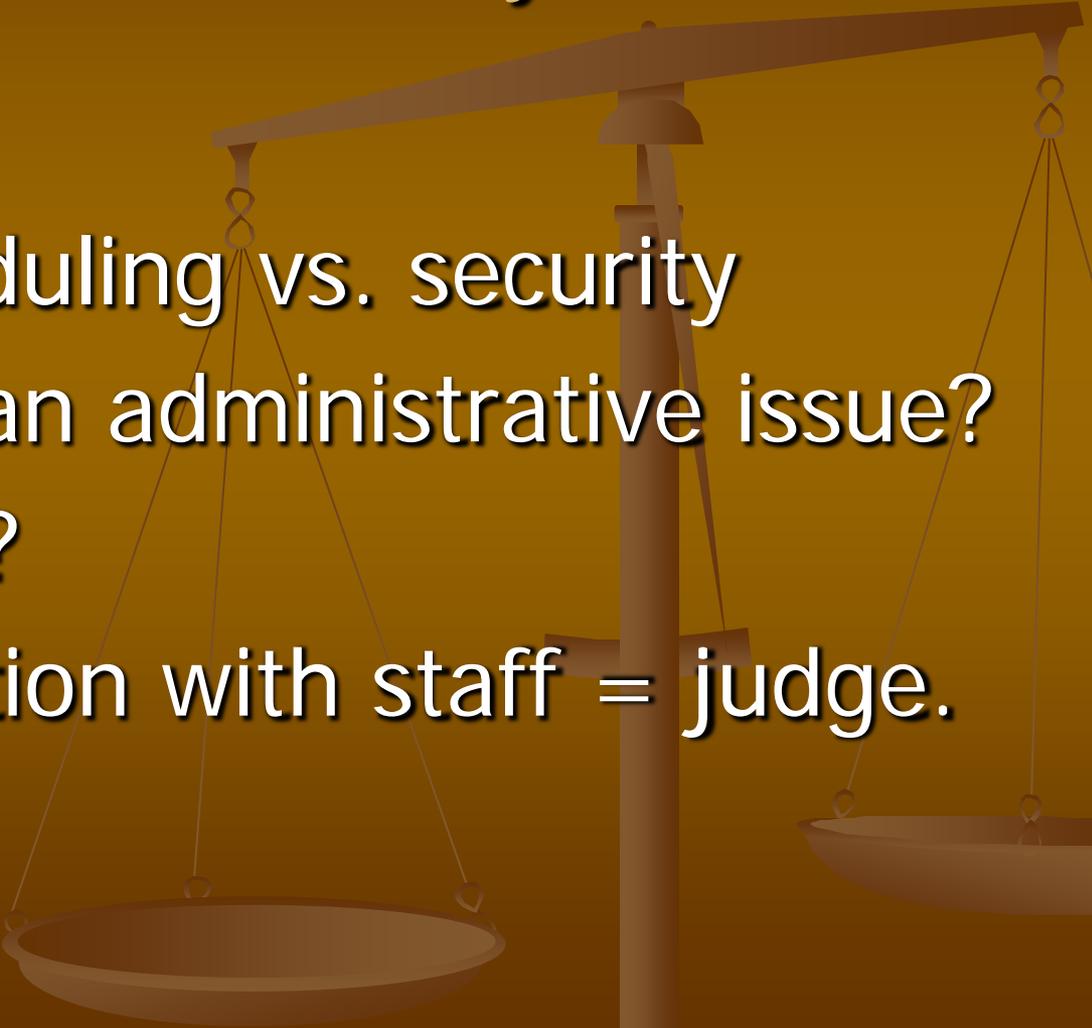


Canon 3A(4)(b), Code of Conduct and ABA Model Rule 2.9(A)(1)

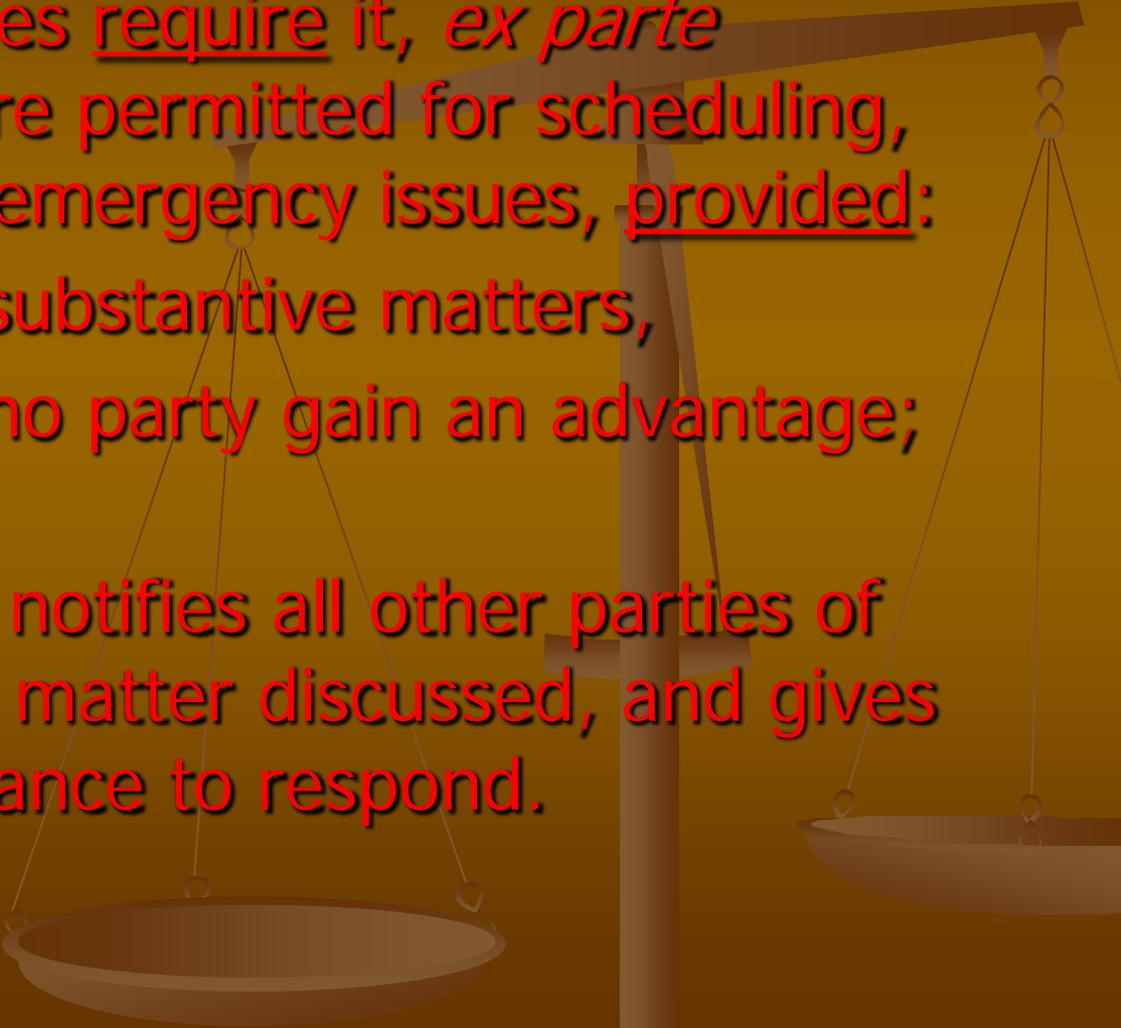
- **Allows *ex parte* communication for scheduling, administrative or emergency matters.**



Hypothetical 1(B): Discussion of Security Issues

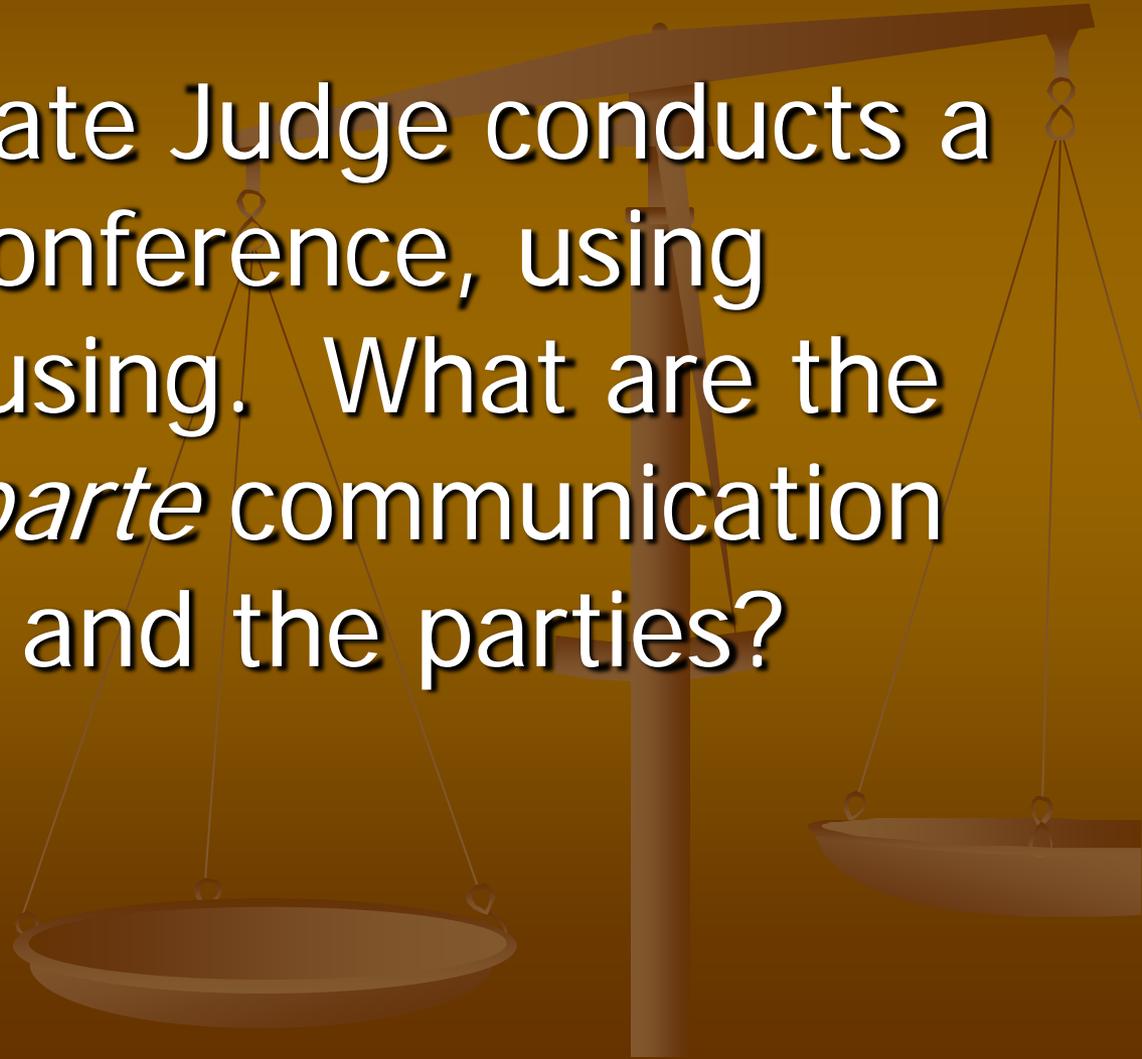
- Topic: Scheduling vs. security
 - Is security an administrative issue?
 - Emergency?
 - Communication with staff = judge.
- 

The Rest of Canon 3A(4) and ABA Model Rule 2.9(A)(1)

- When circumstances require it, *ex parte* communications are permitted for scheduling, administrative, or emergency issues, provided:
 - Do not discuss substantive matters,
 - Judge believes no party gain an advantage; and
 - Judge promptly notifies all other parties of any substantive matter discussed, and gives the parties a chance to respond.
- 

Hypothetical # 2: Settlement

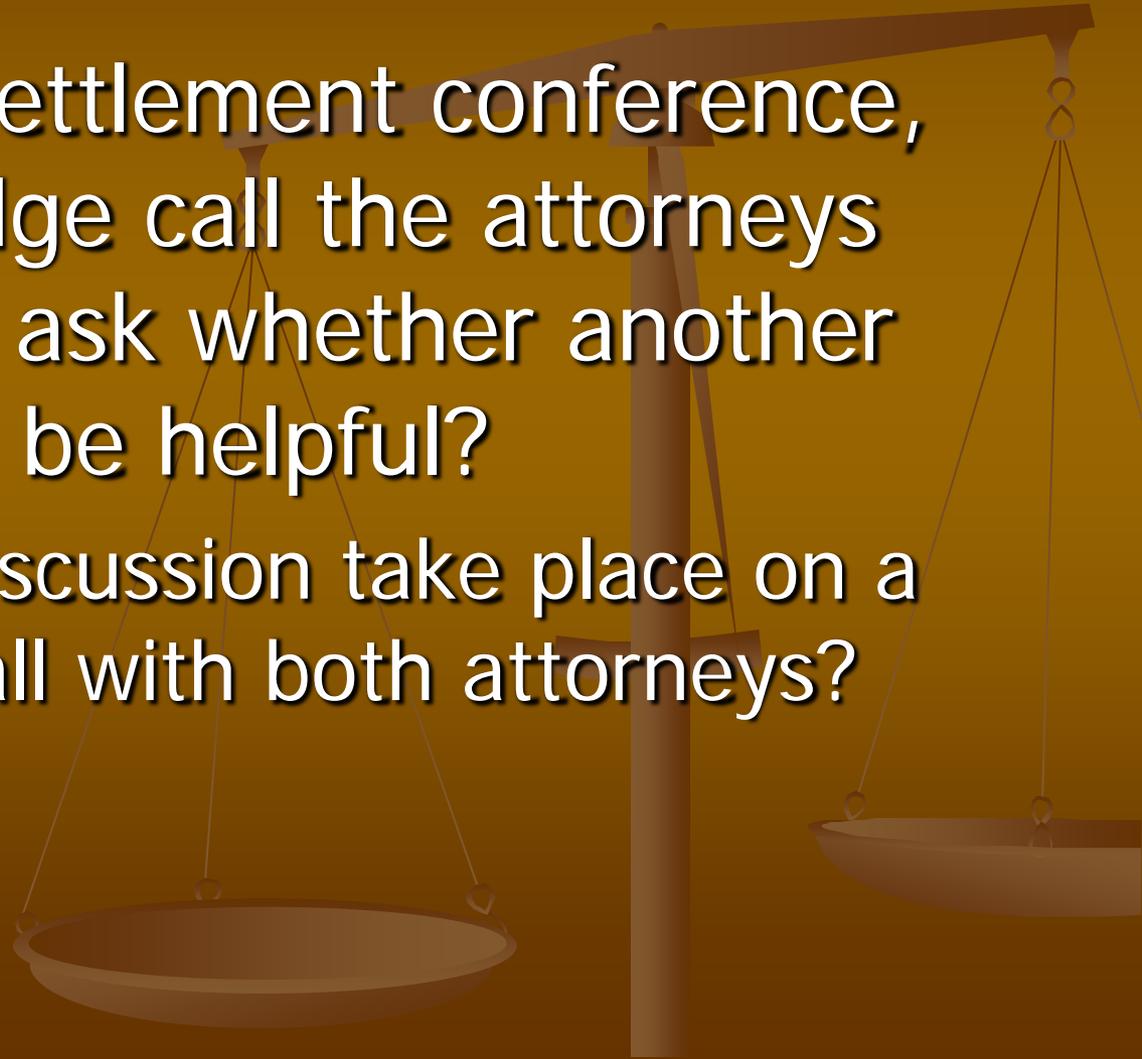
- The Magistrate Judge conducts a settlement conference, using private caucusing. What are the limits of *ex parte* communication with counsel and the parties?



Hypothetical #2(A)

Settlement

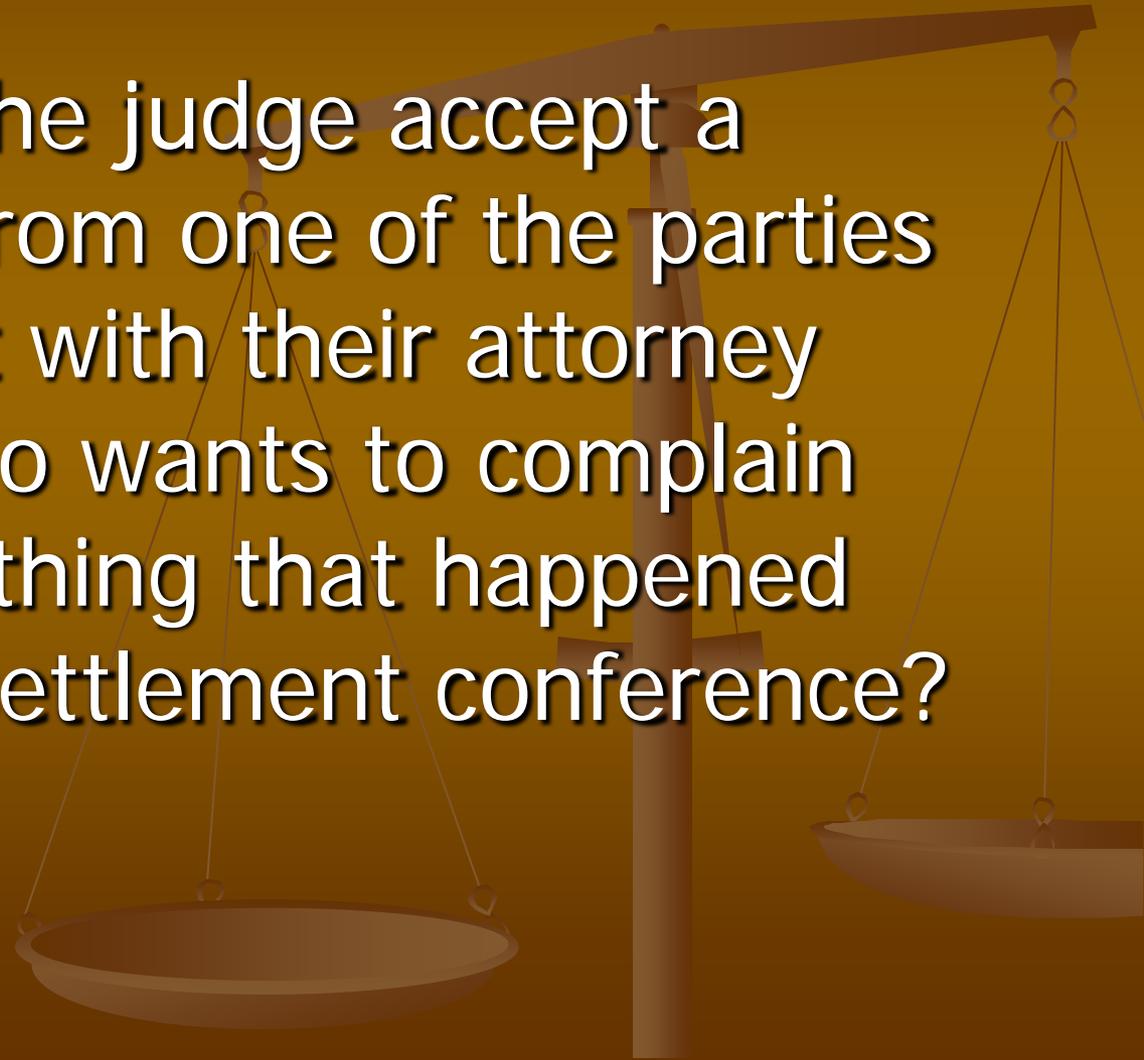
- A. After the settlement conference, should the judge call the attorneys individually to ask whether another session would be helpful?
 - Should this discussion take place on a conference call with both attorneys?



Hypothetical # 2(B)

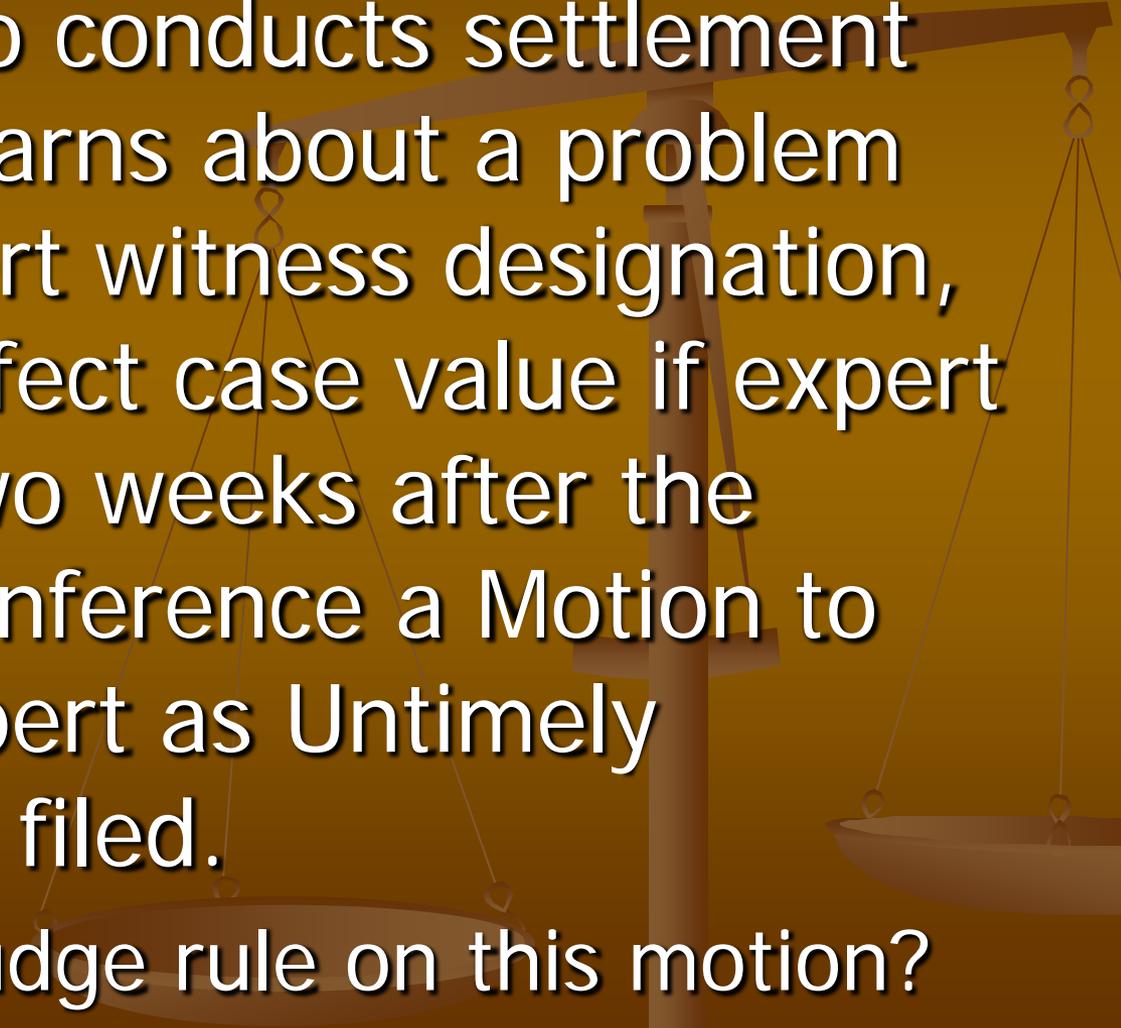
Settlement

- B. Should the judge accept a phone call from one of the parties directly (not with their attorney present) who wants to complain about something that happened during the settlement conference?

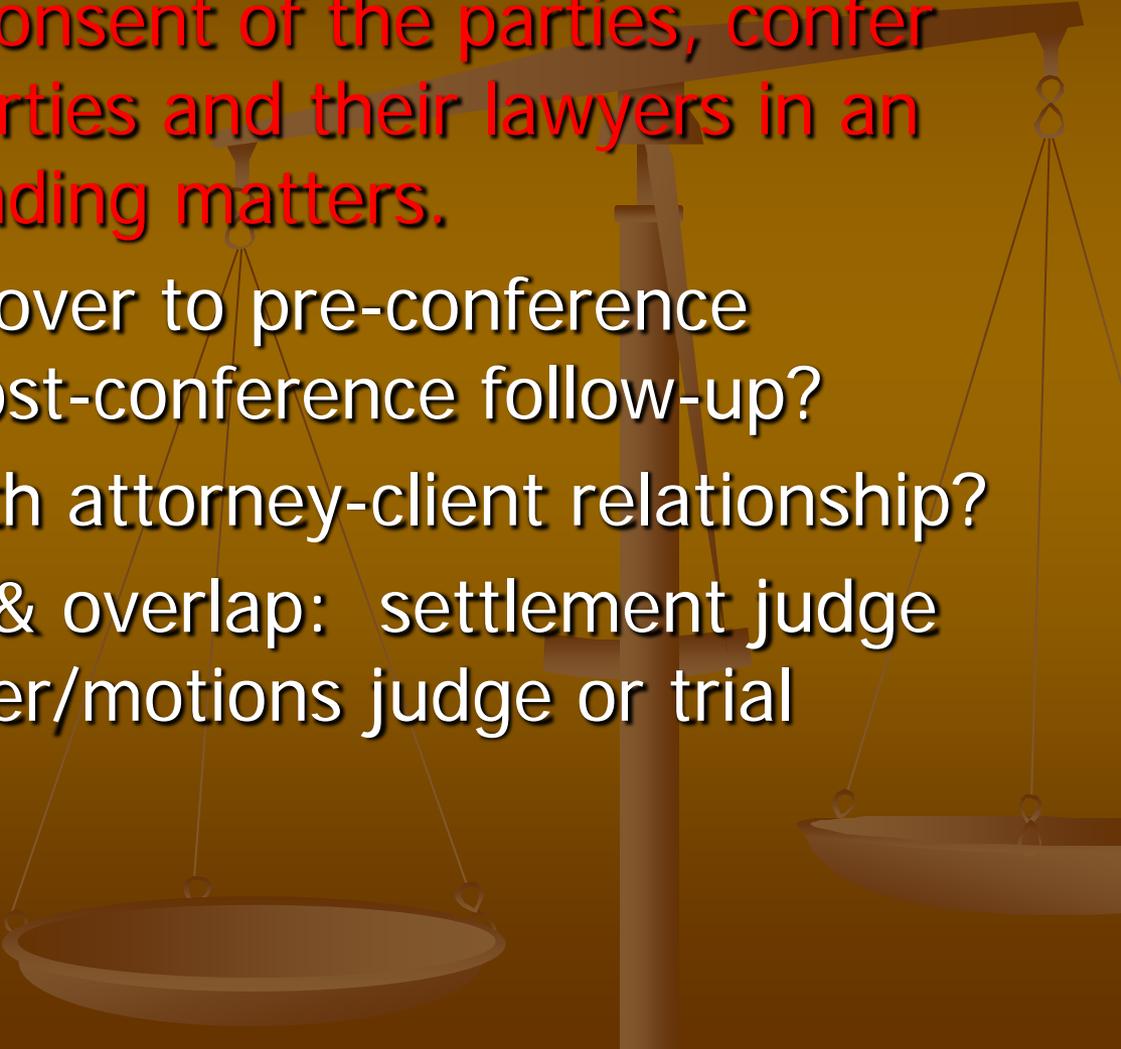


Hypothetical 2(C)

Settlement

- C. Judge who conducts settlement conference learns about a problem with the expert witness designation, which may affect case value if expert excluded. Two weeks after the settlement conference a Motion to Strike the Expert as Untimely Designated is filed.
 - Should the judge rule on this motion?
- 

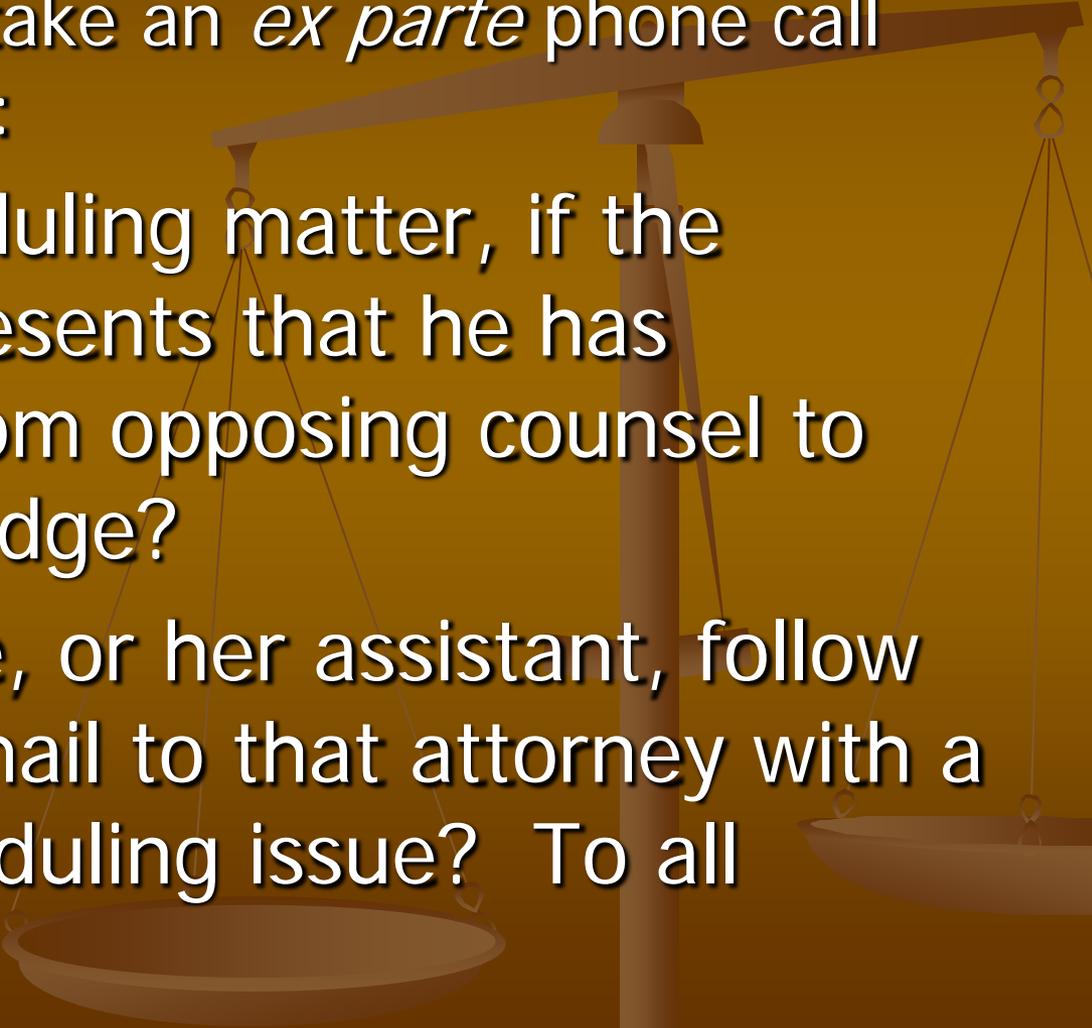
Canon 3A(4)(d) and ABA Model Rule 2.9(A)(4)

- Judge may, with consent of the parties, confer separately with parties and their lawyers in an effort to settle pending matters.
 - Does this carry over to pre-conference planning and post-conference follow-up?
 - Interference with attorney-client relationship?
 - Role ambiguity & overlap: settlement judge vs. case manager/motions judge or trial judge.
- 

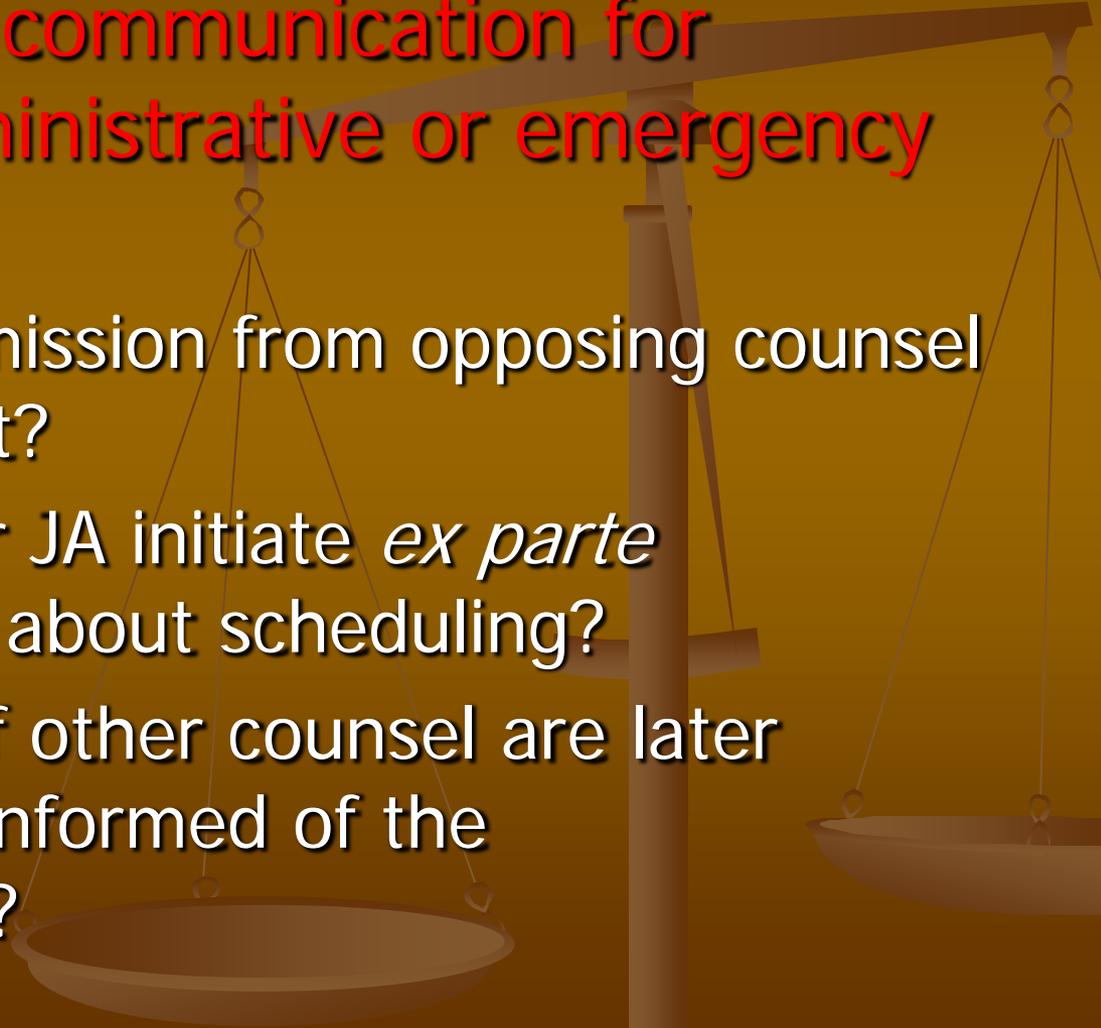
Code of Conduct Committee Advisory Opinion 95:

- Rule 16 does not prevent settlement judge from presiding at trial.
 - Case-by-case analysis, depending on jury/non-jury, involvement of litigants in settlement discussions, parties' consent to dual role of judge, etc.
 - Generally greater ethical concern in non-jury case than in jury case.
- 

Hypothetical #3: More Scheduling Issues

- Should the judge take an *ex parte* phone call from one attorney:
 - About a scheduling matter, if the attorney represents that he has permission from opposing counsel to contact the judge?
 - Can the judge, or her assistant, follow up with an email to that attorney with a different scheduling issue? To all counsel?
- 

Canon 3A(4)(b) and ABA Model Rule 2.9(A)(1)

- Allows *ex parte* communication for scheduling, administrative or emergency matters.
 - Need prior permission from opposing counsel for such contact?
 - Should judge or JA initiate *ex parte* communication about scheduling?
 - *Ex parte*, now if other counsel are later (when? how?) informed of the communication?
- 

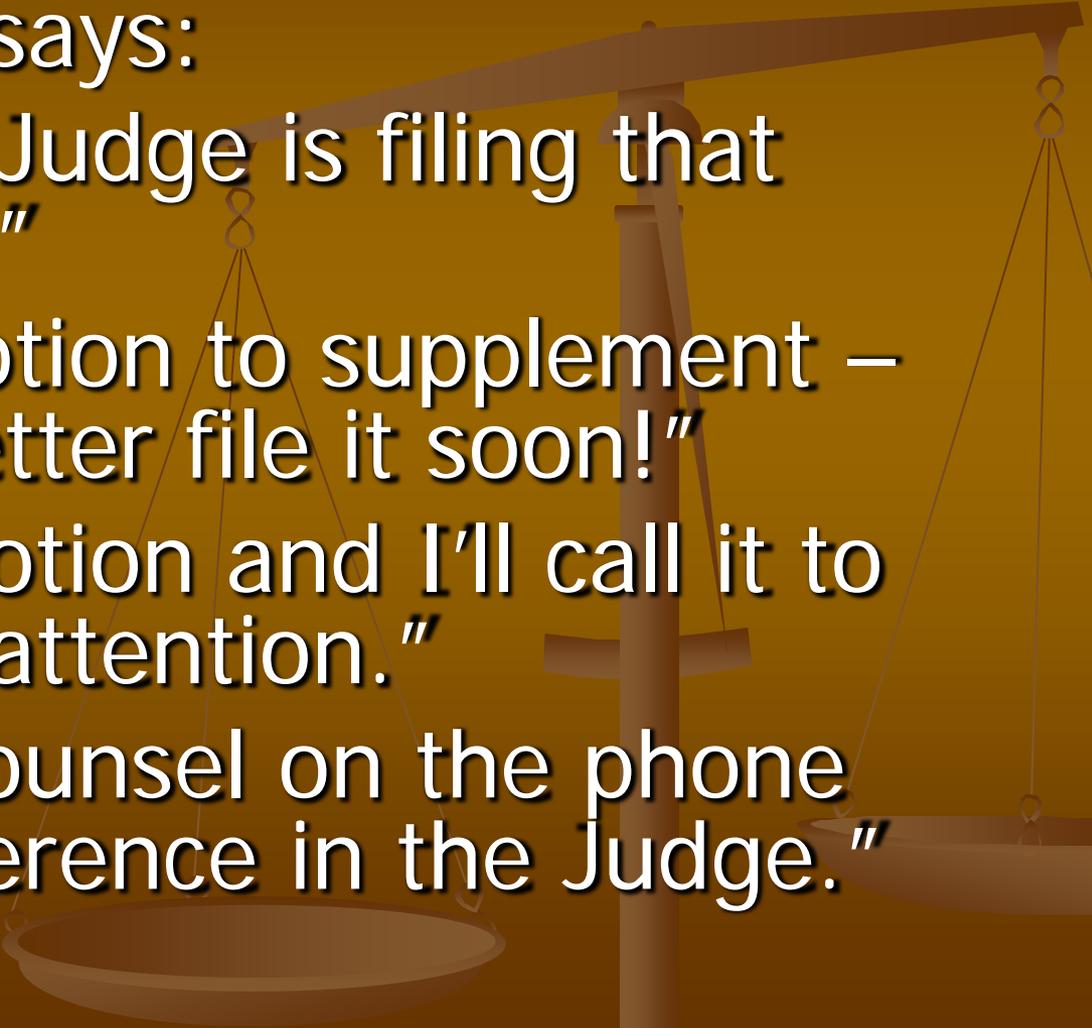
Hypothetical #4:

Motion Practice/Contact with Staff

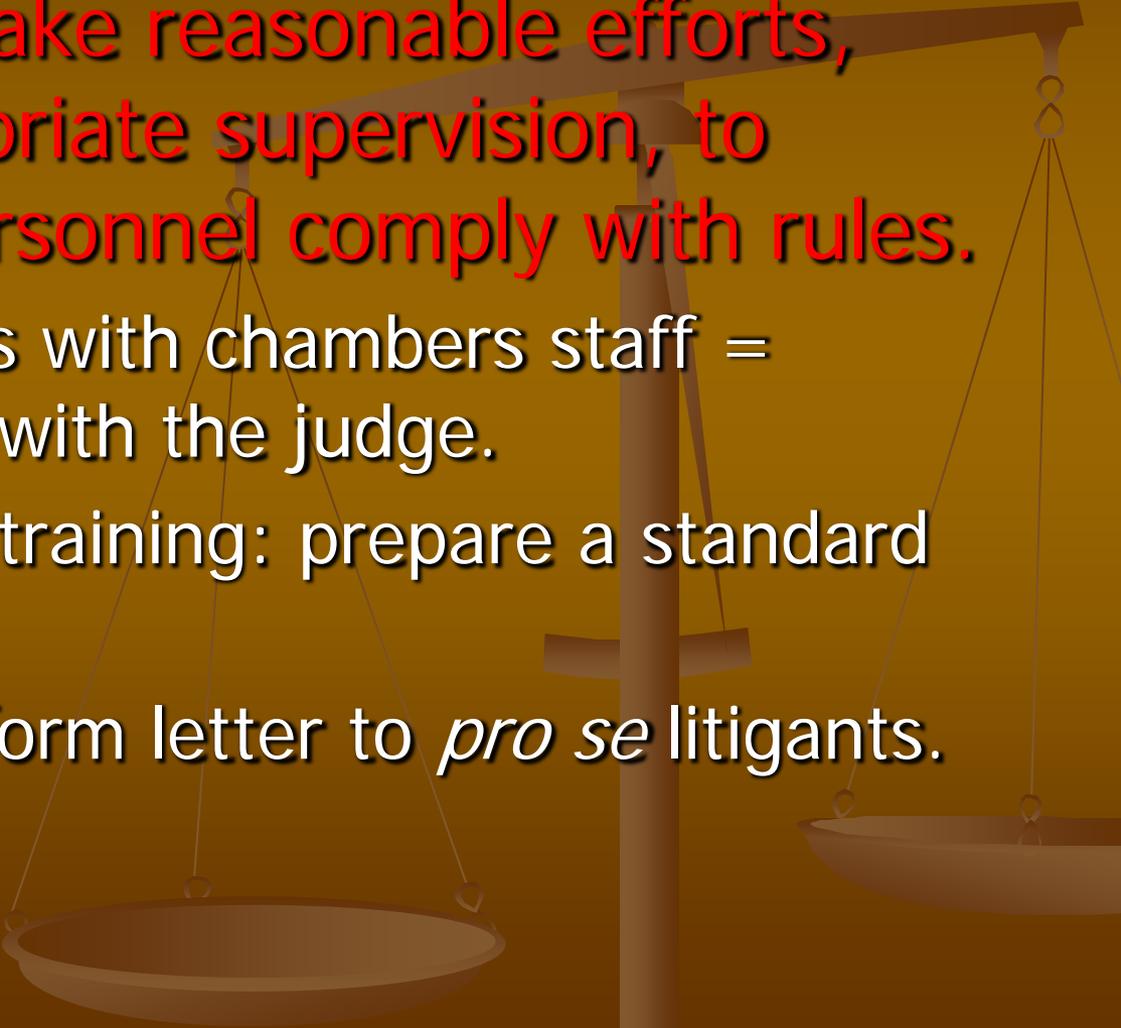
- Attorney calls chambers *ex parte*; talks to a law clerk to find out if there is still time to supplement a pending motion.
- Attorney asks: "Is it worth filing a supplement, or is the Order going to be filed shortly?"
 - What should the law clerk say?

Hypothetical #4 (con't)

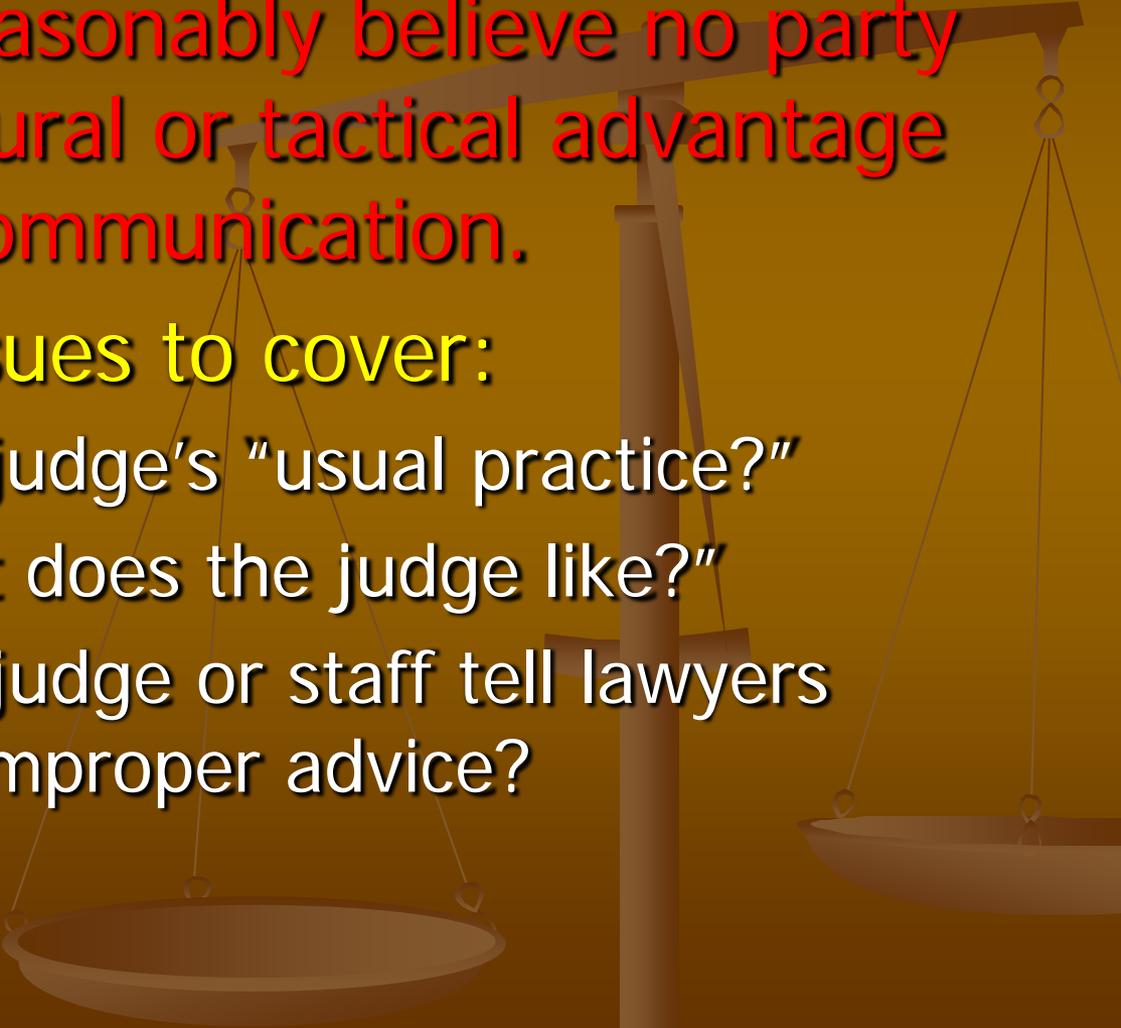
Contact with Staff

- The law clerk says:
 - a. "Yes, the Judge is filing that order today."
 - b. "File a motion to supplement – but you'd better file it soon!"
 - c. "File a motion and I'll call it to the Judge's attention."
 - d. "Get all counsel on the phone and I'll conference in the Judge."
- 

Comment to Canon 3A(4) and ABA Model Rule 2.9(D)

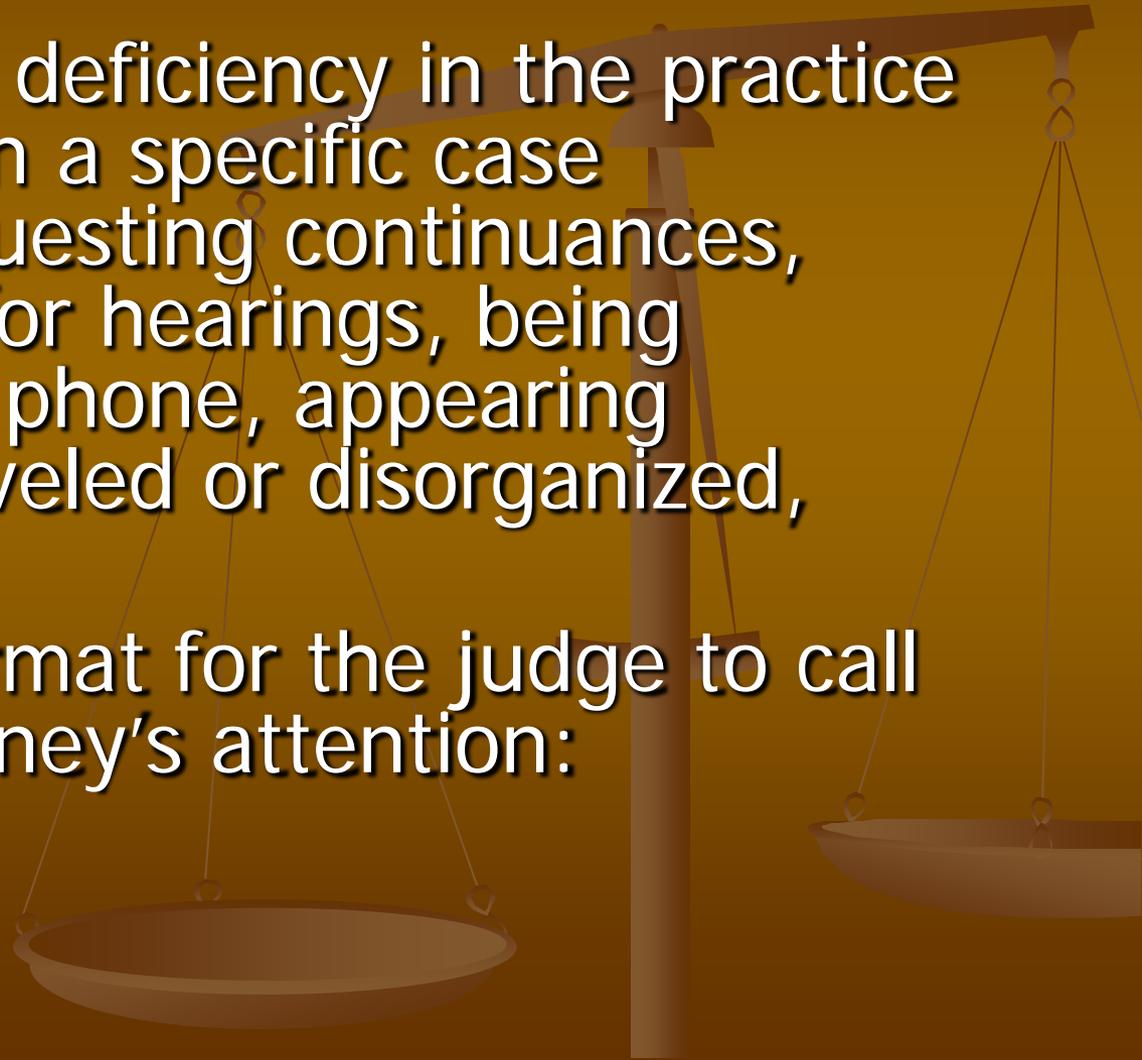
- Judge should make reasonable efforts, including appropriate supervision, to ensure court personnel comply with rules.
 - Communications with chambers staff = communication with the judge.
 - Chambers staff training: prepare a standard response.
 - See Judge Mix form letter to *pro se* litigants.
- 

Canon 3A(4)(b) and ABA Model Rule 2.9(A)(1)

- Judge should reasonably believe no party will gain procedural or tactical advantage from *ex parte* communication.
 - Staff training issues to cover:
 - Answers about judge's "usual practice?"
 - Advising: "What does the judge like?"
 - How much can judge or staff tell lawyers without giving improper advice?
- 

Hypothetical #5: Concerns about Attorney Performance

- Judge notices a deficiency in the practice of an attorney in a specific case (chronically requesting continuances, appearing late for hearings, being unreachable by phone, appearing atypically disheveled or disorganized, etc.).
- What is best format for the judge to call this to the attorney's attention:



Hypothetical #5:

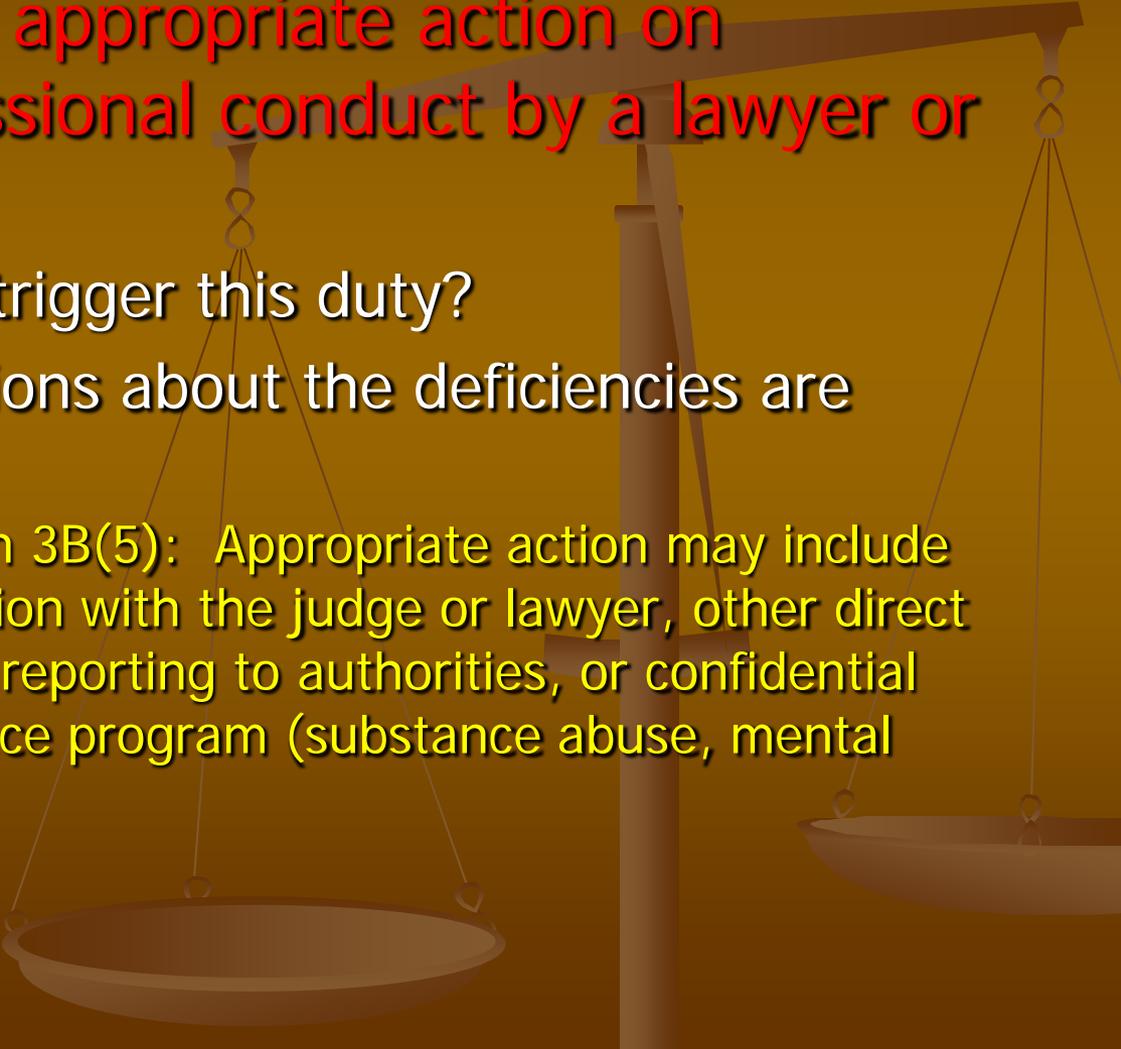
Concerns about Attorney Performance

- The judge should talk to the attorney:
 - a. Privately, in chambers
 - i. With a law clerk as a witness
 - ii. With the attorney's partner as a witness
 - iii. With the attorney's client
 - iv. Alone
 - b. In open court
 - c. In an order filed in the case pending before the judge
 - d. In a written complaint to the State Grievance Commission

Hypothetical #6: Attorney Deficiency--AUSA

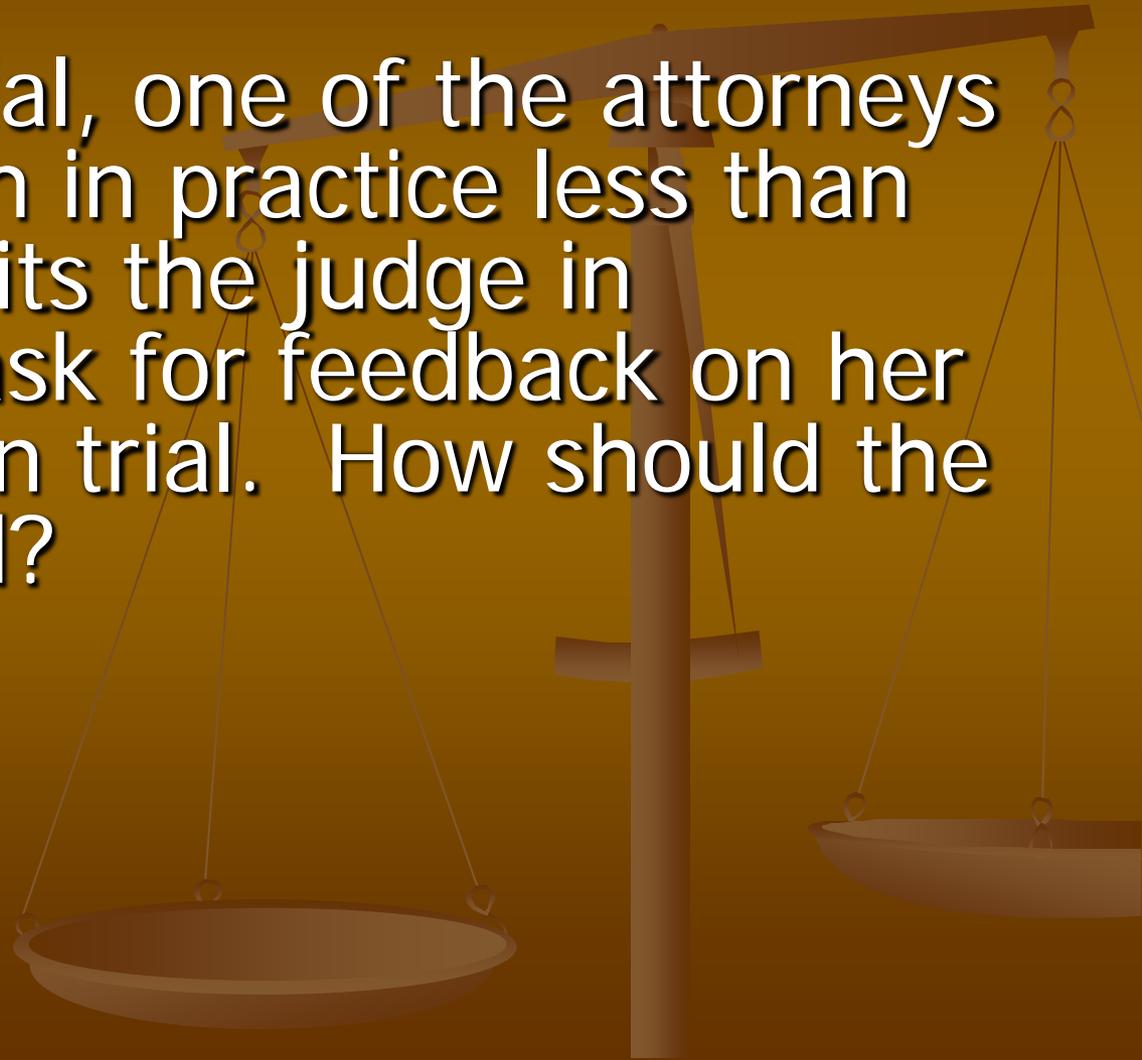
- Judge notices a deficiency in the practice of an AUSA whom the judge doesn't know well.
- Judge has a good working relationship with both the USA and the Chief of the Division to which the AUSA in question is assigned. Should judge make an *ex parte* call to the USA, or Chief of the Division, instead of talking directly to the attorney involved?

Canon 3B(5), Code of Conduct

- Judge should take appropriate action on unethical/unprofessional conduct by a lawyer or other judge.
 - What deficiencies trigger this duty?
 - What communications about the deficiencies are appropriate?
 - Comment to Canon 3B(5): Appropriate action may include direct communication with the judge or lawyer, other direct action if available, reporting to authorities, or confidential referral to assistance program (substance abuse, mental health).
- 

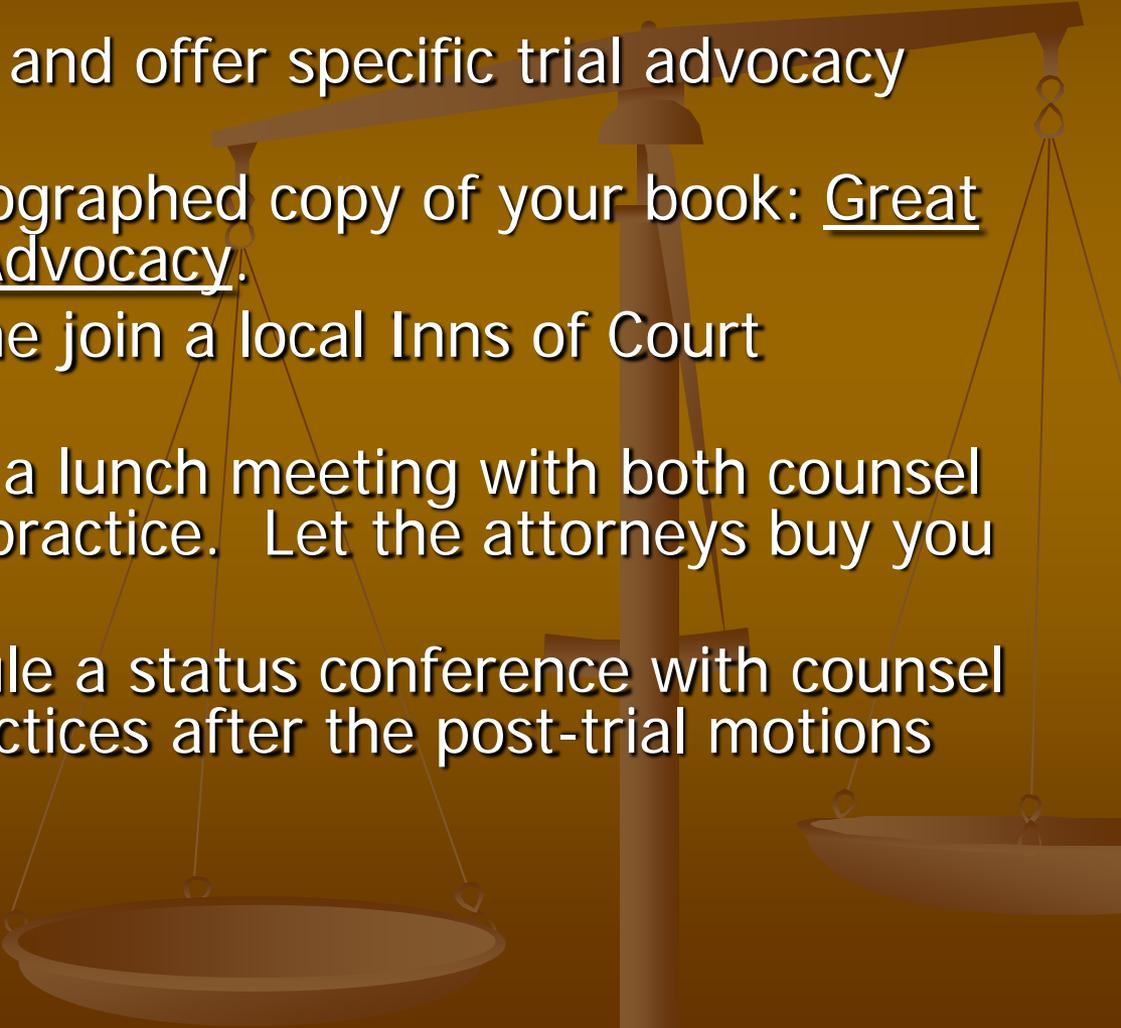
Hypothetical #7: Post-trial feedback

- After a jury trial, one of the attorneys (who has been in practice less than two years) visits the judge in chambers to ask for feedback on her performance in trial. How should the judge respond?



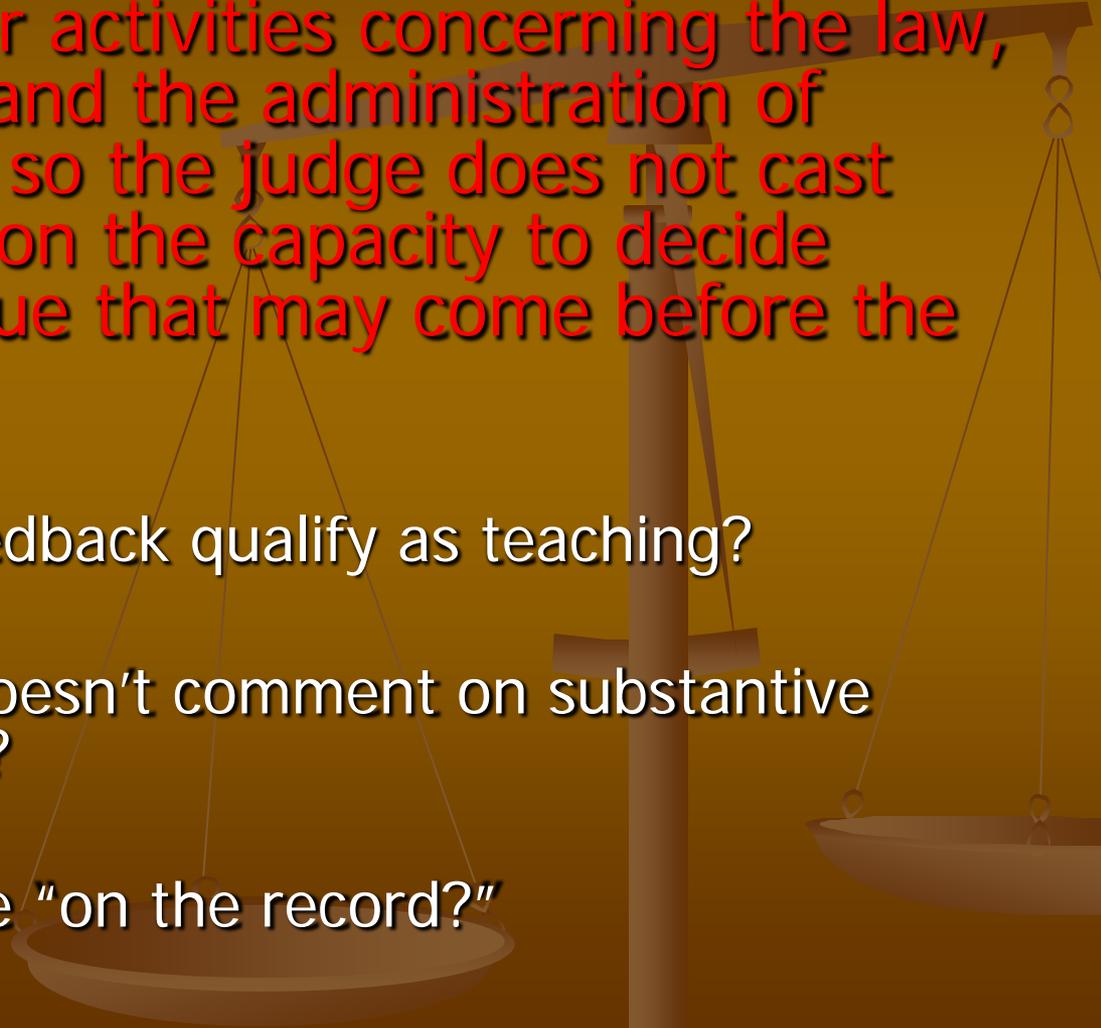
Hypothetical #7: Post-trial feedback

The judge should respond to the request:

- a. Offer to mentor and offer specific trial advocacy pointers.
 - b. Sell her an autographed copy of your book: Great Moments in Trial Advocacy.
 - c. Suggest that she join a local Inns of Court pupillage group.
 - d. Offer to set up a lunch meeting with both counsel to talk about trial practice. Let the attorneys buy you lunch.
 - e. Offer to schedule a status conference with counsel to discuss trial practices after the post-trial motions are ruled upon.
- 

Canon 4A(1)

Judge's Role as Educator

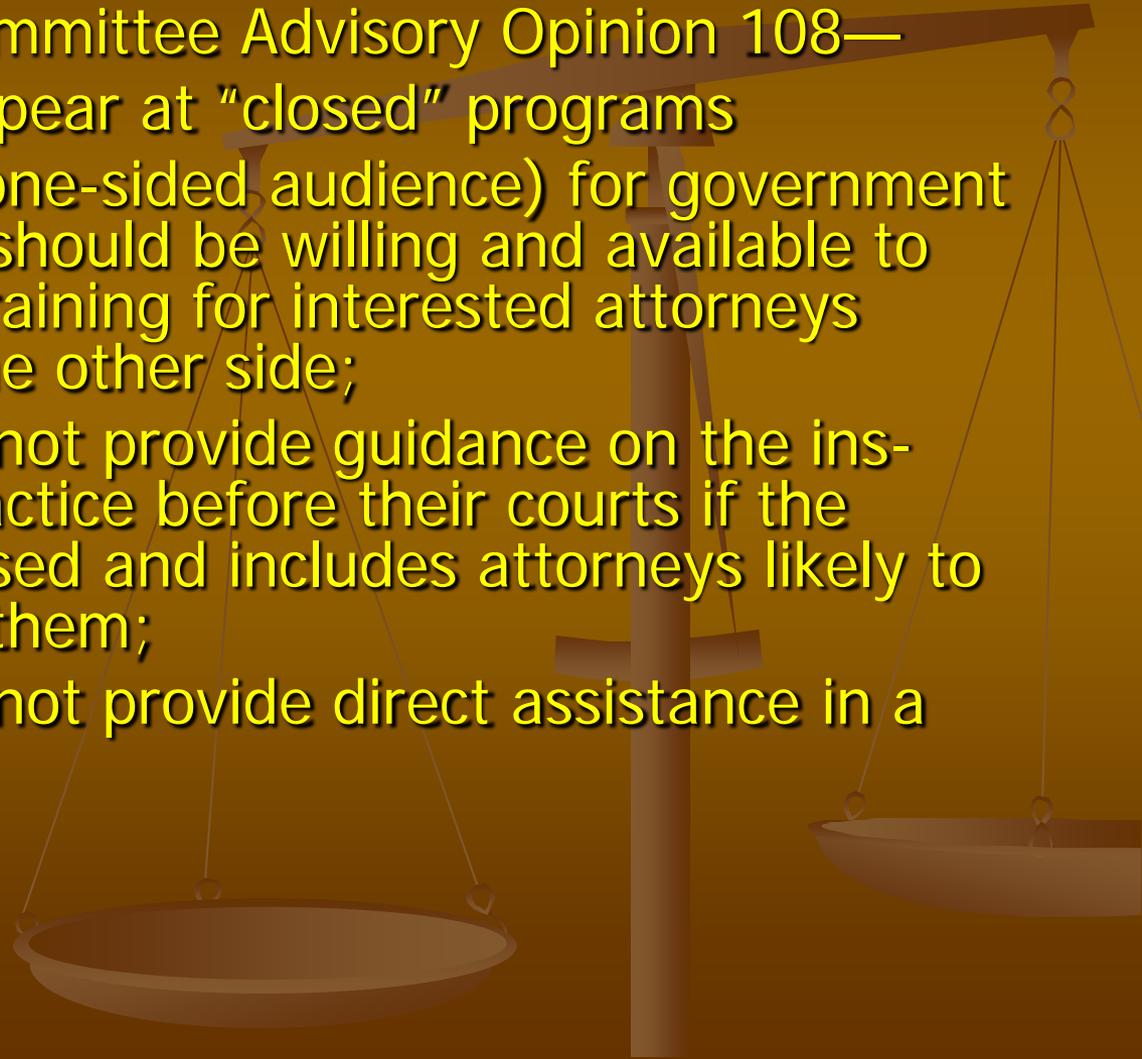
- A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice, if in doing so the judge does not cast reasonable doubt on the capacity to decide impartially any issue that may come before the judge.
 - Does post-trial feedback qualify as teaching?
 - Is it OK if judge doesn't comment on substantive issues in the case?
 - Should meeting be "on the record?"
- 

Canon 4A(1)

Judge's Role as Educator

Code of Conduct Committee Advisory Opinion 108—

- Judges may appear at “closed” programs (open only to a one-sided audience) for government attorneys, but should be willing and available to participate in training for interested attorneys representing the other side;
- Judges should not provide guidance on the ins-and-outs of practice before their courts if the audience is closed and includes attorneys likely to appear before them;
- Judges should not provide direct assistance in a given case.



Canon 4A(1)

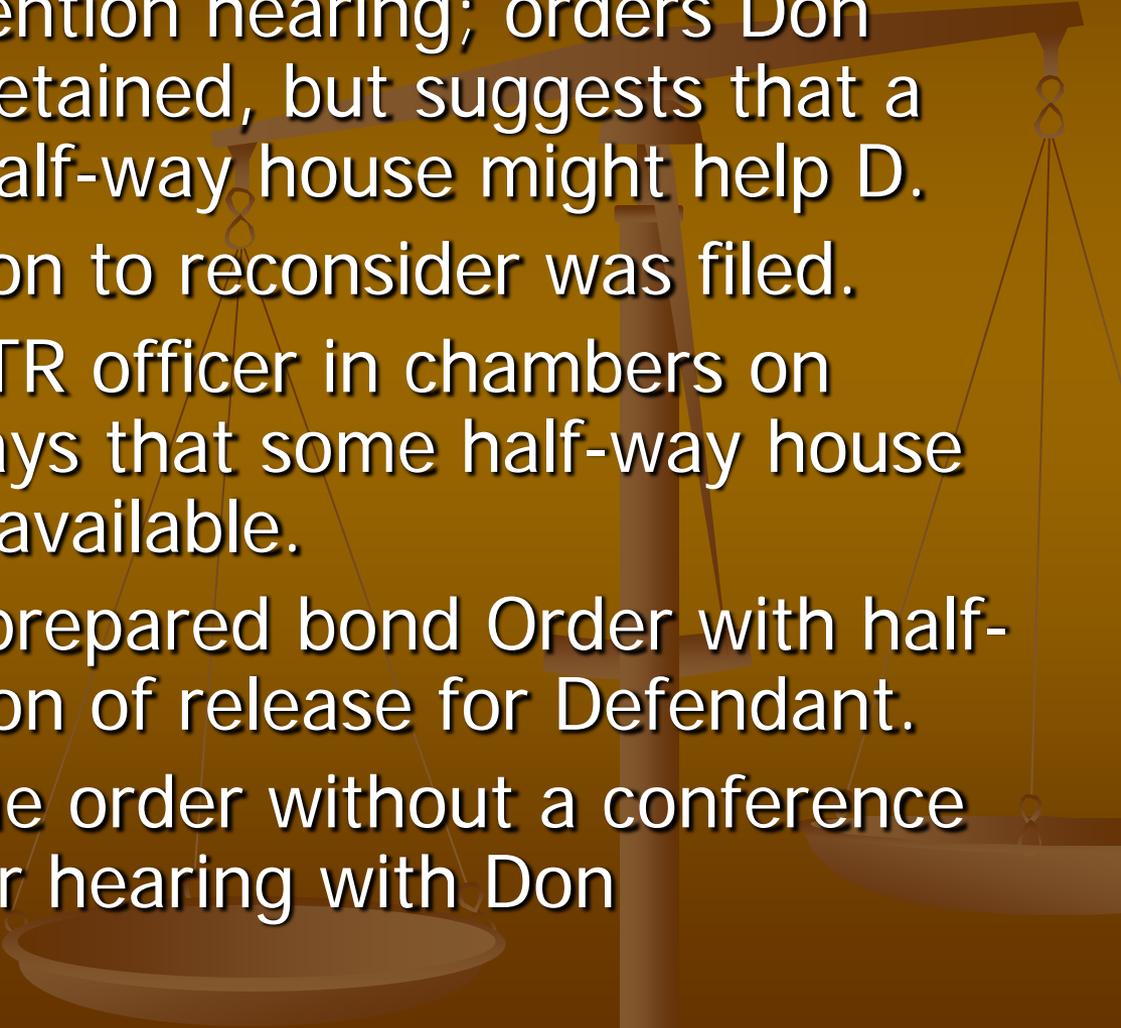
Judge's Role as Educator

Code of Conduct Committee Advisory
Opinion 105—

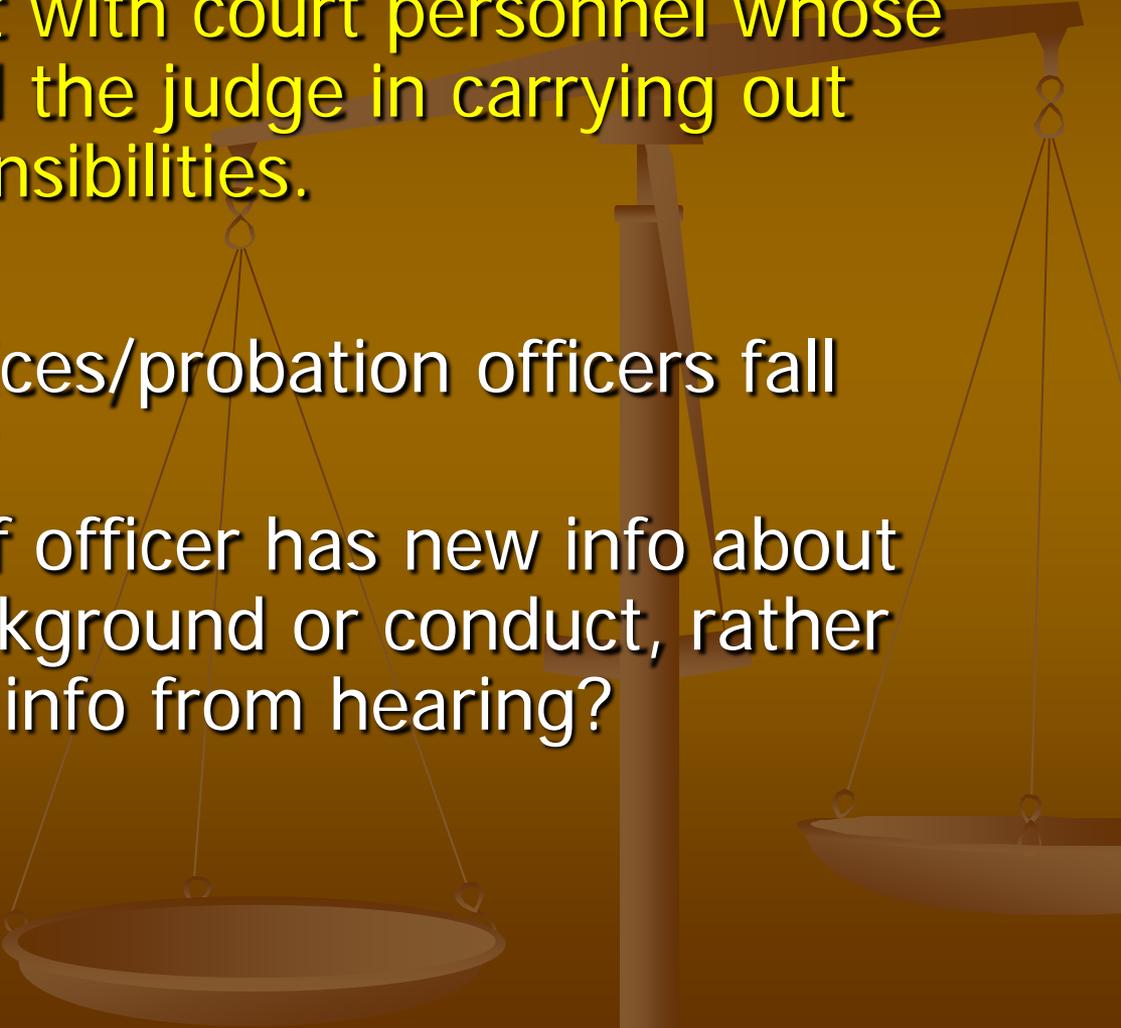
- Judges should not participate in law firm or legal department training.



Hypothetical #8: Contact with Pretrial Services/Probation Officer

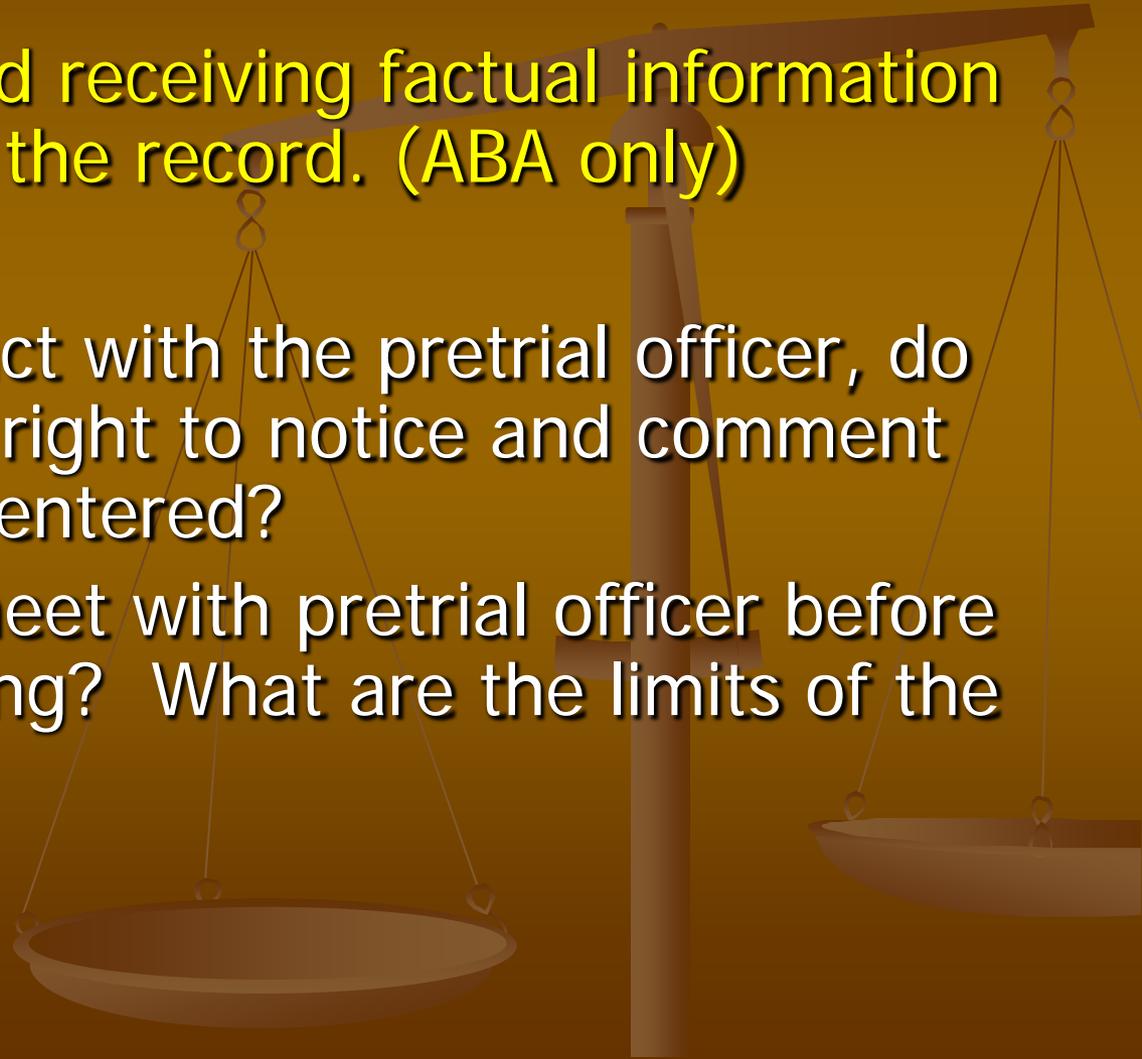
- Judge holds a detention hearing; orders Don Defendant to be detained, but suggests that a term in the local half-way house might help D.
 - No appeal or motion to reconsider was filed.
 - One week later, PTR officer in chambers on another matter; says that some half-way house beds just became available.
 - PTR officer has a prepared bond Order with half-way house condition of release for Defendant.
 - Should you sign the order without a conference call with counsel or hearing with Don Defendant?
- 

Comment to Canon 3A(4) and ABA Model Rule 2.9(A)(3)

- Judge may consult with court personnel whose function it is to aid the judge in carrying out adjudicative responsibilities.
 - Do pretrial services/probation officers fall within this rule?
 - Does it matter if officer has new info about defendant's background or conduct, rather than update on info from hearing?
- 

Comment to Canon 3A(4) and ABA Model Rule 2.9(A)(3)

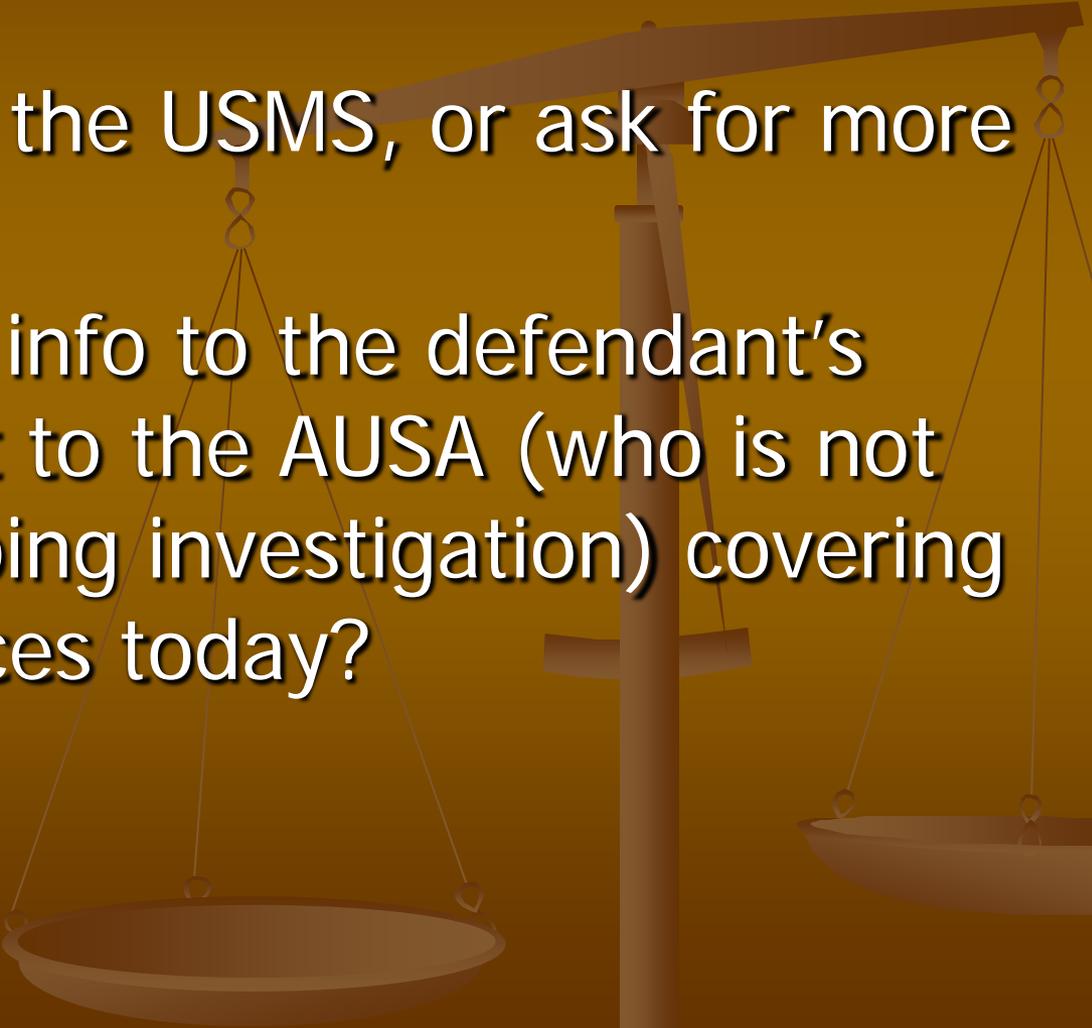
- Judge should avoid receiving factual information that is not part of the record. (ABA only)
 - Following contact with the pretrial officer, do counsel have a right to notice and comment before order is entered?
 - Should judge meet with pretrial officer before detention hearing? What are the limits of the discussion?



Hypothetical #9: Security Issues

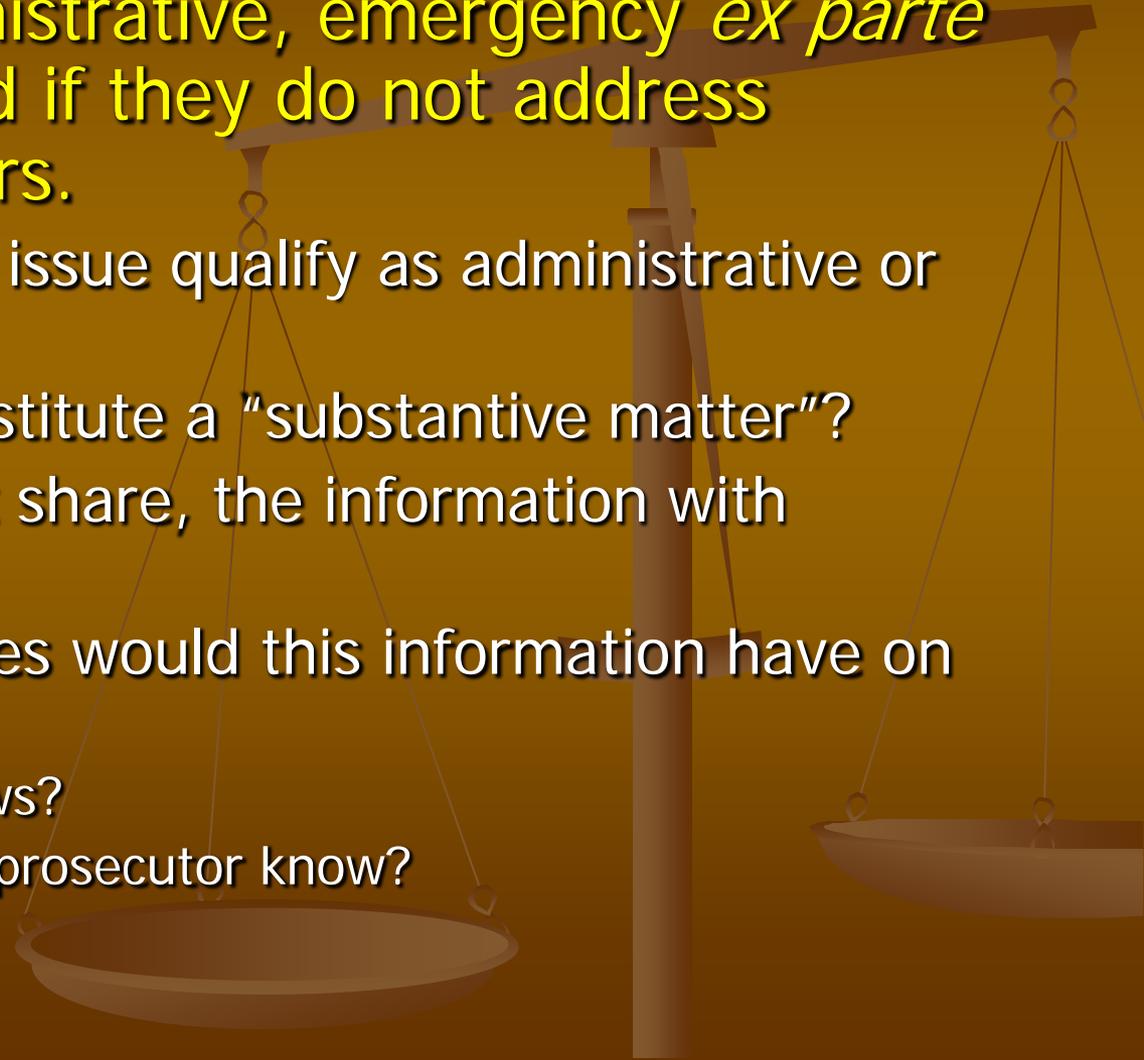
- Before criminal court starts, a deputy marshal stops by chambers. He says there are security issues relating to one of the defendants appearing today, but that he can't provide more information without jeopardizing an ongoing investigation. The DUSM asks for permission to use extra security measures in the courtroom.

Hypothetical #9: Security Issues

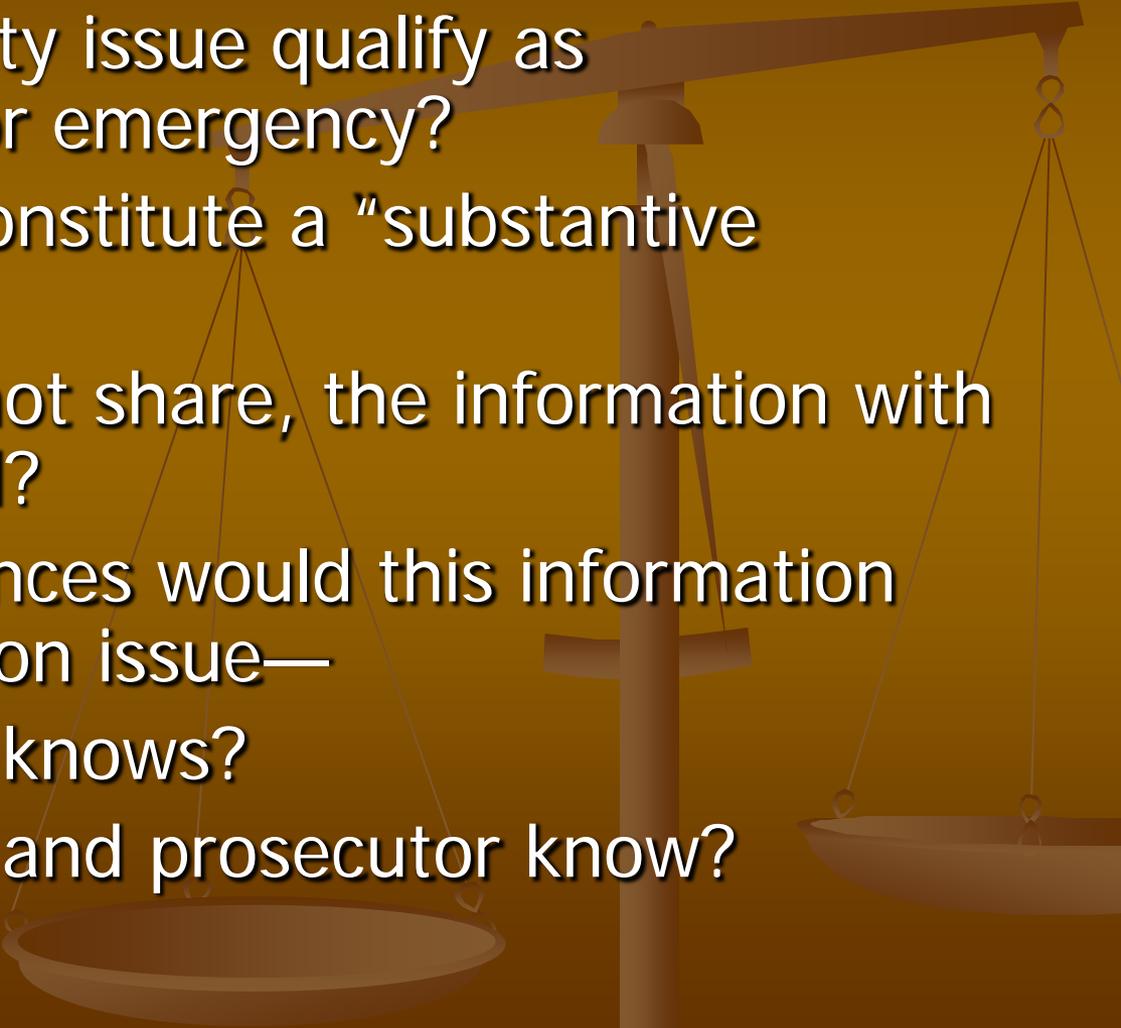
- Do you defer to the USMS, or ask for more information?
 - Do you disclose info to the defendant's attorney, or just to the AUSA (who is not part of the ongoing investigation) covering initial appearances today?
- 

Canon 3A(4)(b) and ABA Model Rule 2.9(A)(1)

- Scheduling, administrative, emergency *ex parte* contacts permitted if they do not address substantive matters.
 - Does this security issue qualify as administrative or emergency?
 - Does security constitute a “substantive matter”?
 - Why share, or not share, the information with defense counsel?
 - What consequences would this information have on detention issue—
 - If only judge knows?
 - If only judge and prosecutor know?

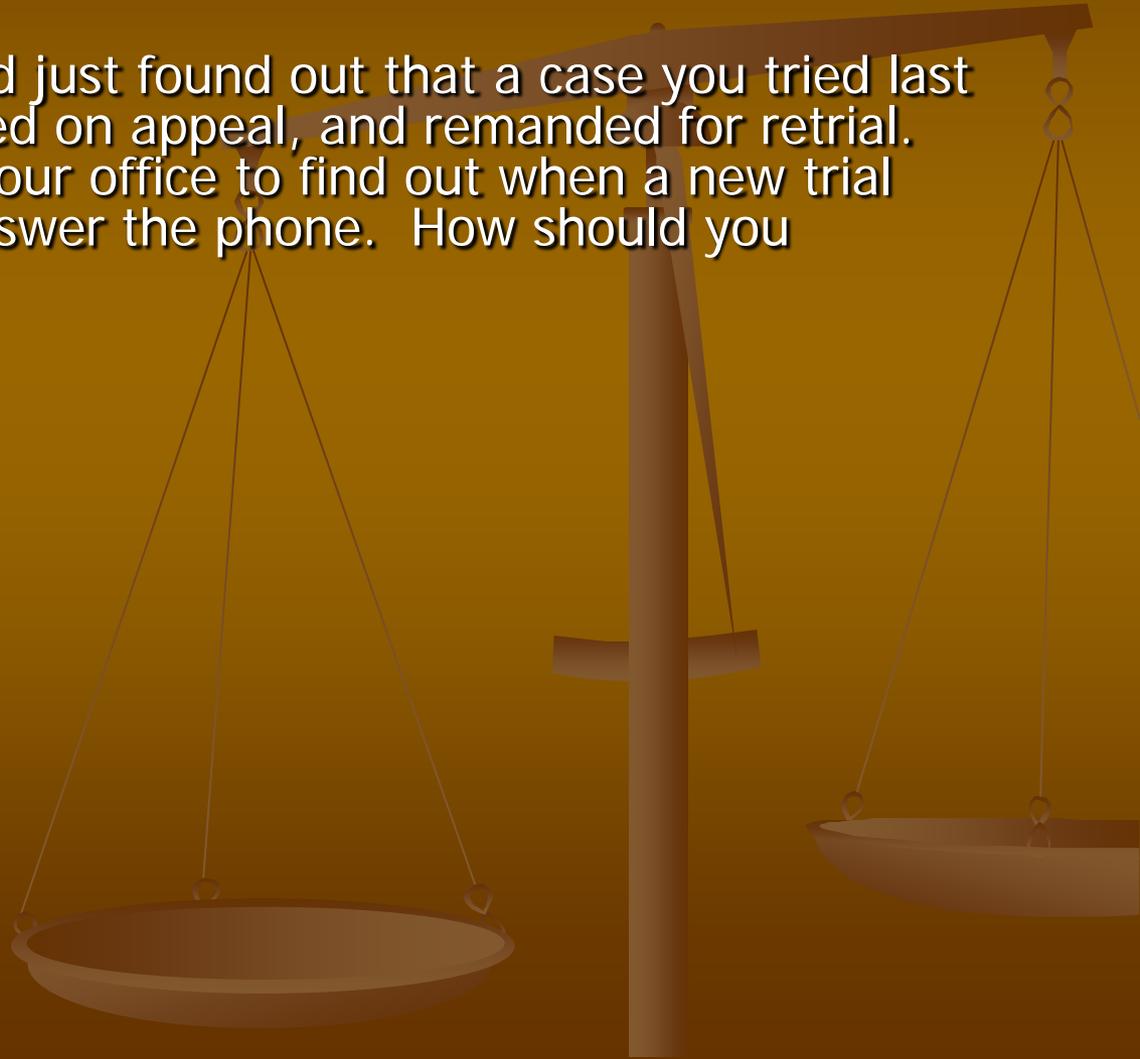


Hypothetical #9 (con't): Security Issues

- Does this security issue qualify as administrative or emergency?
 - Does security constitute a "substantive matter"?
 - Why share, or not share, the information with defense counsel?
 - What consequences would this information have on detention issue—
 - If only judge knows?
 - If only judge and prosecutor know?
- 

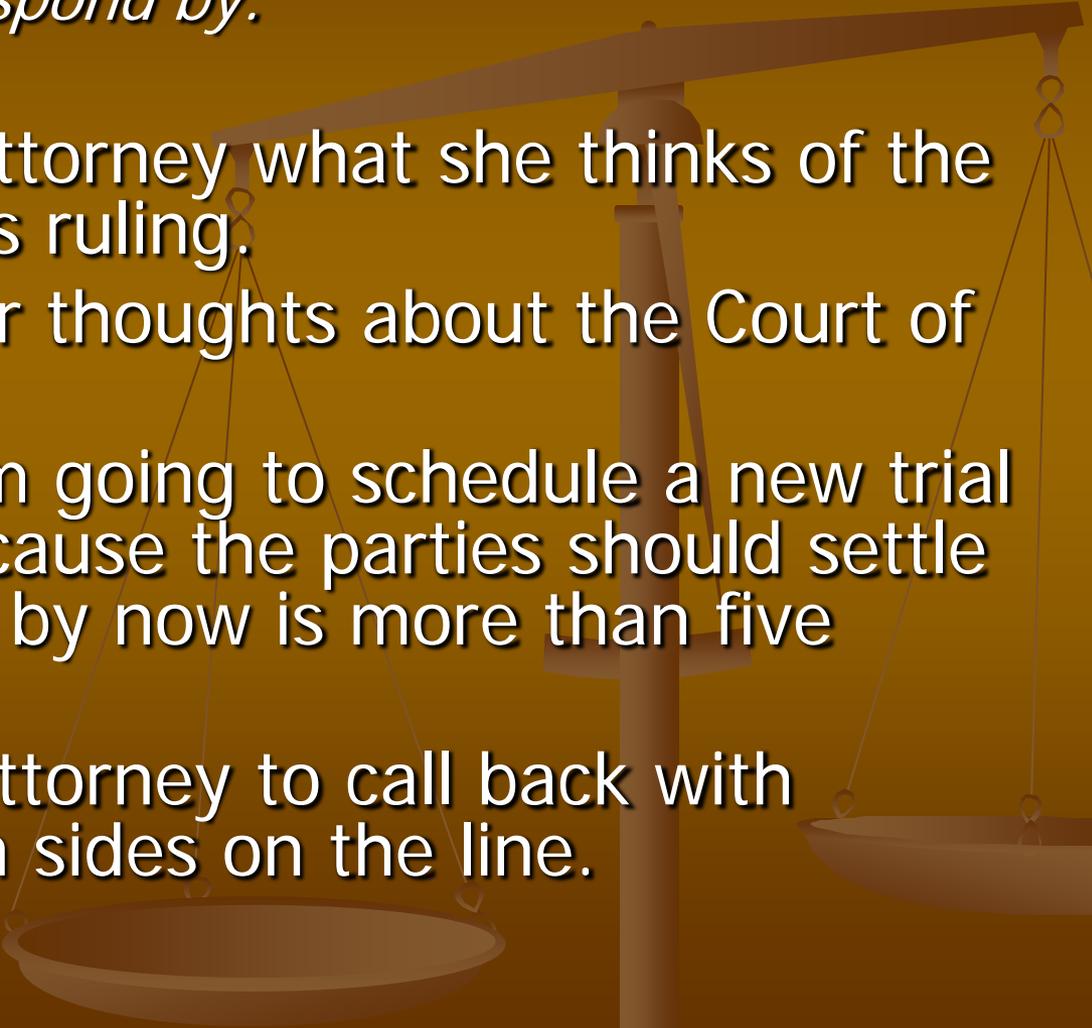
Hypothetical #10: Reversal on Appeal

- 10. You are the judge and just found out that a case you tried last year has just been reversed on appeal, and remanded for retrial. Counsel for a party calls your office to find out when a new trial date might be set; you answer the phone. How should you respond?

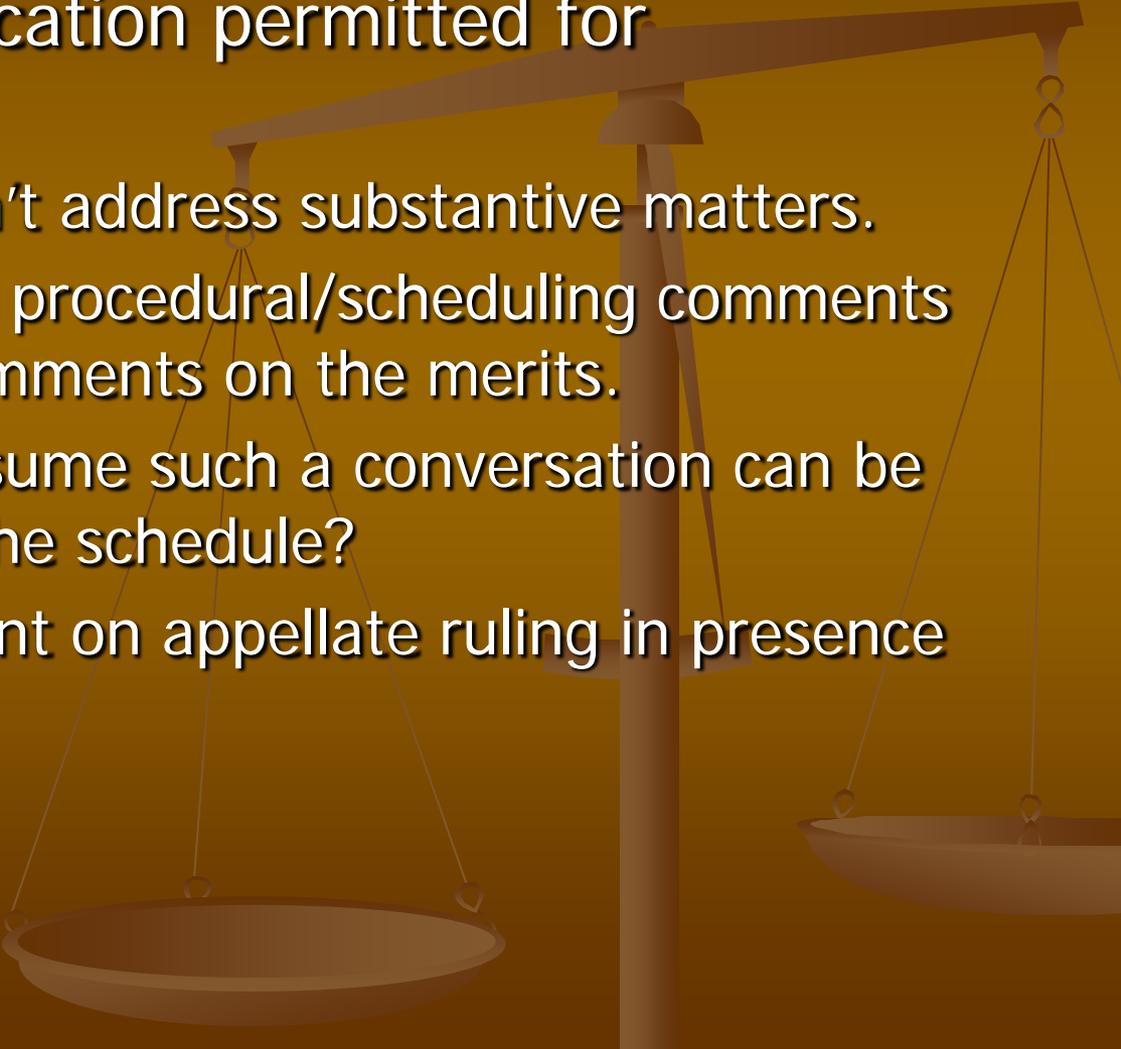


Hypothetical #10 (con't): Reversal on Appeal

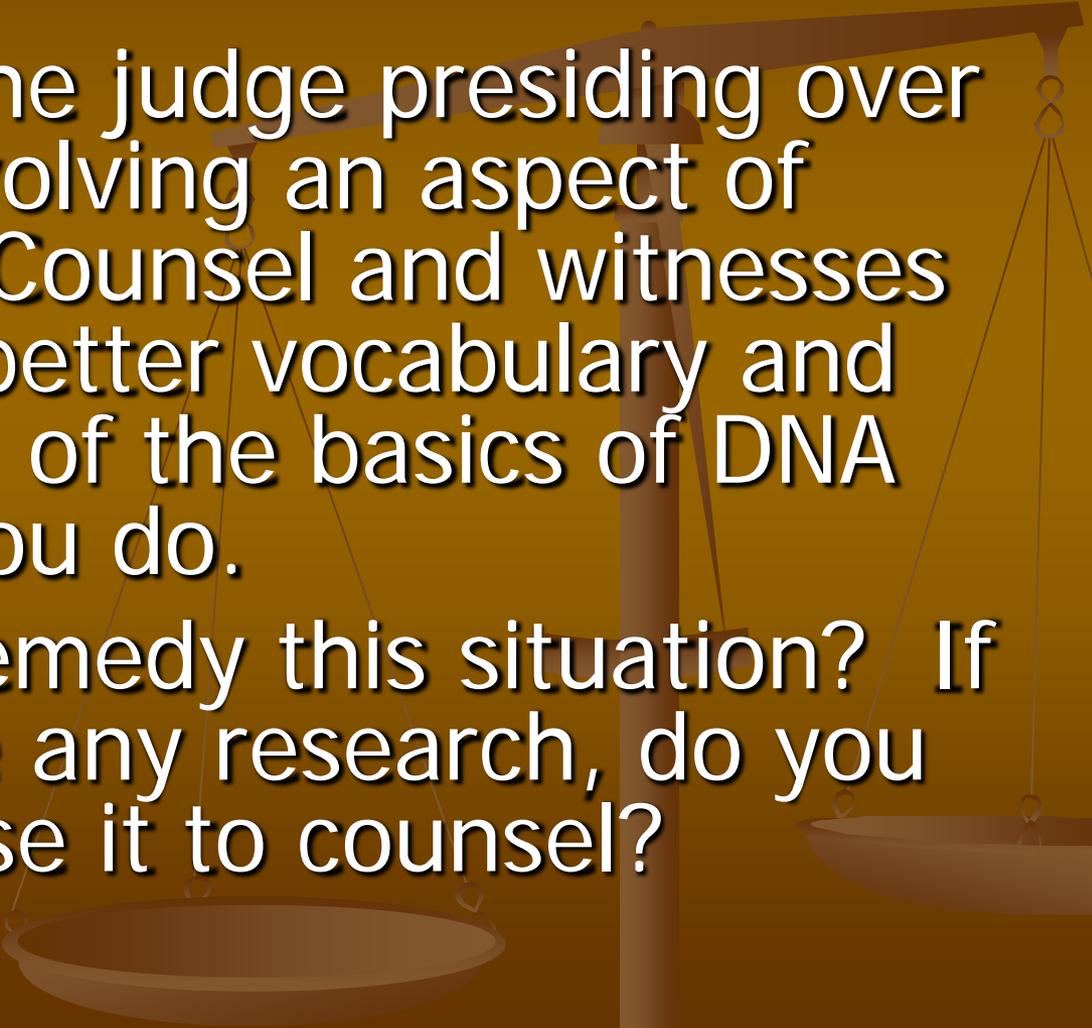
The judge should respond by:

- a. Asking the attorney what she thinks of the Court of Appeals ruling.
 - b. Offering your thoughts about the Court of Appeals ruling.
 - c. Saying: "I am going to schedule a new trial immediately because the parties should settle the case, which by now is more than five years old."
 - d. Telling the attorney to call back with counsel for both sides on the line.
- 

Canon 3A(4)(b) and ABA Model Rule 2.9(A)(1)

- *Ex parte* communication permitted for scheduling—
 - as long as it doesn't address substantive matters.
 - Problem: Blending procedural/scheduling comments with "editorial" comments on the merits.
 - Is it realistic to assume such a conversation can be limited strictly to the schedule?
 - May judge comment on appellate ruling in presence of both lawyers?
- 

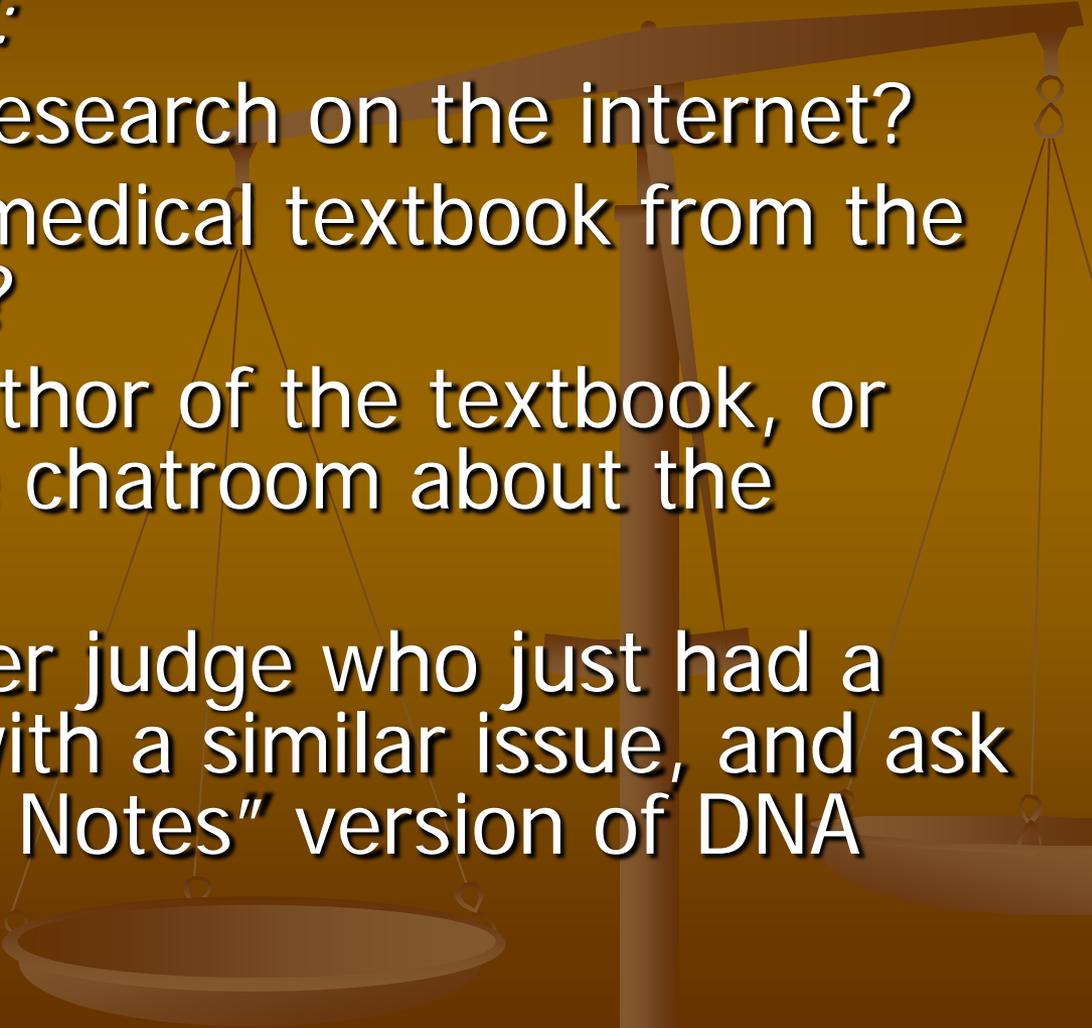
Hypothetical #11: Extracurricular Information

- 11. You are the judge presiding over a civil case involving an aspect of DNA testing. Counsel and witnesses have a much better vocabulary and understanding of the basics of DNA testing than you do.
 - How do you remedy this situation? If you undertake any research, do you have to disclose it to counsel?
- 

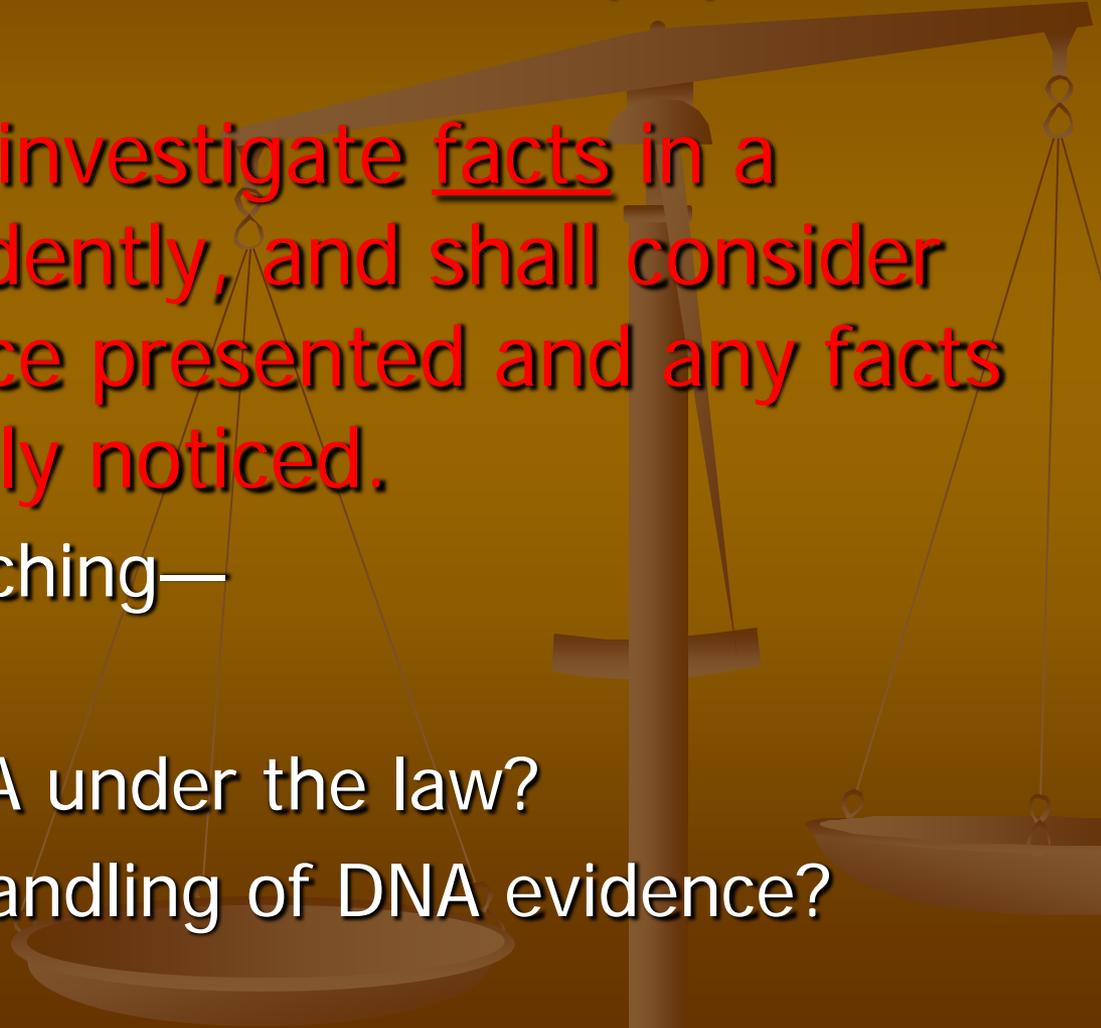
Hypothetical #11:

Extracurricular Information

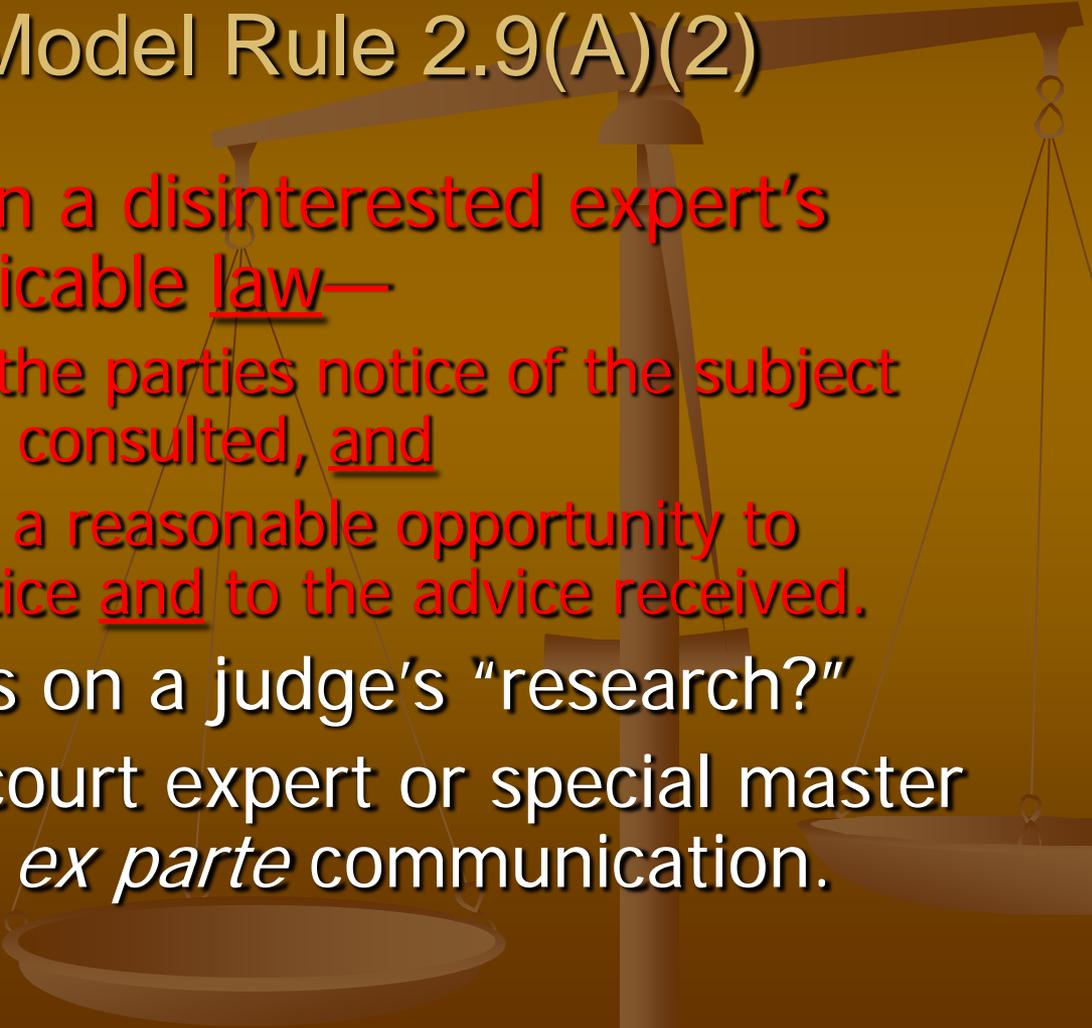
The judge should:

- a. Do some research on the internet?
 - b. Borrow a medical textbook from the Circuit library?
 - c. Call the author of the textbook, or join a website chatroom about the issue?
 - d. Call another judge who just had a trial dealing with a similar issue, and ask for the "Cliff's Notes" version of DNA testing?
- 

Hypothetical #11: Extracurricular Information ABA Model Rule 2.9(C)

- Judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts properly judicially noticed.
 - Is judge researching—
 - facts?
 - status of DNA under the law?
 - procedural handling of DNA evidence?
- 

Hypothetical #11: Extracurricular Information Canon 3A(4)(c) and ABA Model Rule 2.9(A)(2)

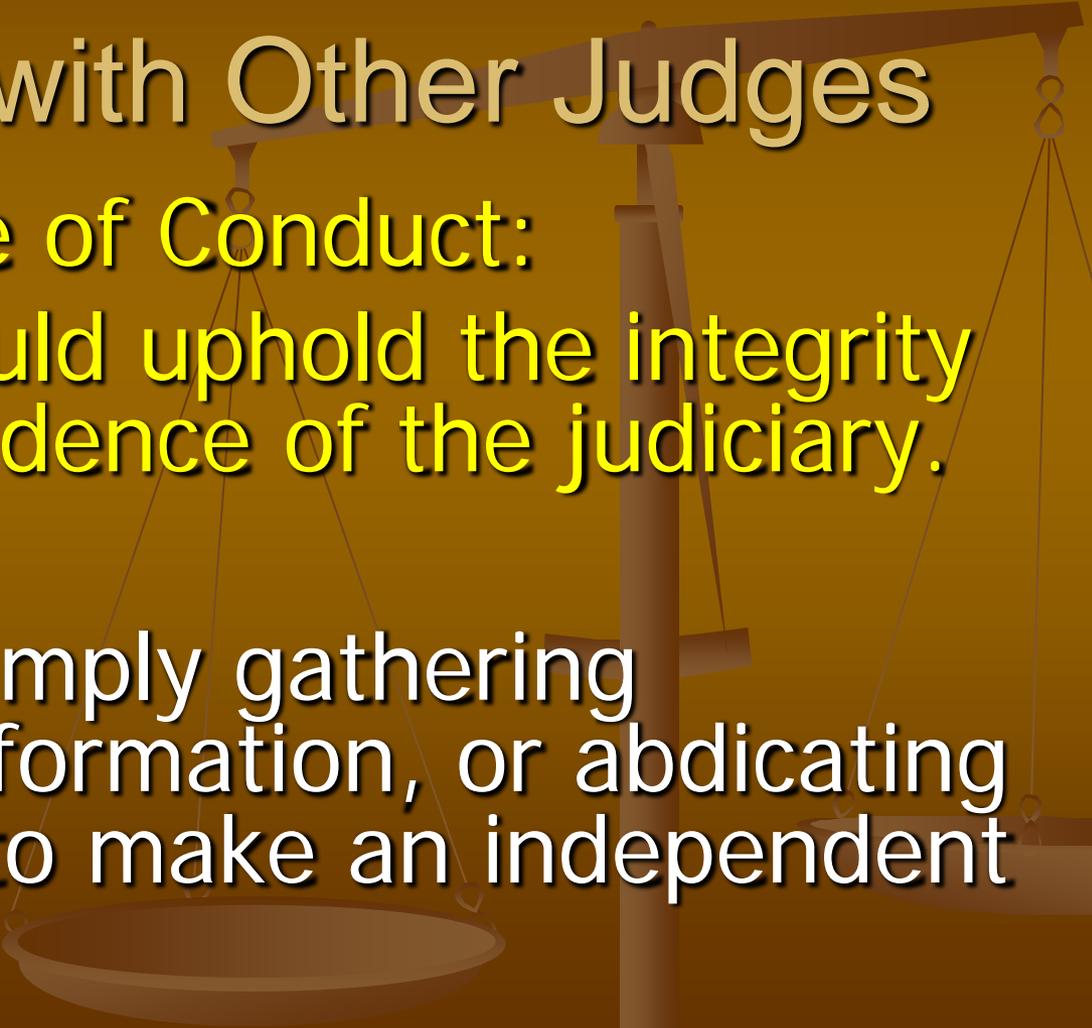


- A judge may obtain a disinterested expert's advice on the applicable law—
 - If the judge gives the parties notice of the subject matter and person consulted, and
 - affords the parties a reasonable opportunity to respond to the notice and to the advice received.
- What are the limits on a judge's "research?"
- Order appointing court expert or special master should provide for *ex parte* communication.

Hypothetical #11: Extracurricular Information Conferring with Other Judges

- Comment, Canon 3A(4) and ABA Model Rule 2.9(A)(3):
 - A judge may confer with other judges in carrying out adjudicative responsibilities.
 - Additional ABA provisos—
 - The judge must make reasonable efforts to avoid receiving factual information not part of the record, and
 - may not abrogate responsibility to decide the matter.

Hypothetical #11: Extracurricular Information Conferring with Other Judges



- Canon 1, Code of Conduct:
 - A judge should uphold the integrity and independence of the judiciary.
- Is the judge simply gathering experiential information, or abdicating responsibility to make an independent decision ?

