

Ex Parte Communications

Hypotheticals

1. 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 how the AUSAs are performing, and to ask for suggestions to improve practices or procedures, including feedback about specific AUSAs.
 - b. After an arrest, an AUSA accompanies the agent to present the Criminal Complaint to the Magistrate Judge. After the Complaint is signed, the AUSA discusses scheduling the Initial Appearance with the judge's staff and advises of security issues relating to the defendants. Should staff tell the judge about these discussions, or just the U.S. Marshals?
2. The Magistrate Judge conducts a settlement conference, using private caucusing. What are the limits of *ex parte* communication with counsel and the parties?
 - a. Should the judge call the attorneys individually the day after the conference to ask whether another session would be helpful? Should this discussion take place on a conference call with both attorneys?
 - 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?
 - c. Should the judge who conducted the settlement conference, and learned about a problem with the expert witness designation, then rule on a Motion to Strike the Expert as Untimely Designated, when the motion is filed two weeks after the settlement conference?

3. 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 counsel with a different scheduling issue?

4. Attorney calls chambers *ex parte* and talks to a law clerk, inquiring whether there is still time to file a supplement to a pending motion. The attorney asks the law clerk, "Is it worth filing a supplement, or is the order going to be filed shortly?" What should the law clerk say?

- 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."

5. Assume that the 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.). Should the judge call this to the attorney's attention under the following circumstances:

- 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

6. Assume the judge notices a deficiency in the practice of an AUSA the judge doesn't know well. However, the 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 the judge make an *ex parte* call to the USA, or Chief of the Division, instead of talking directly to the attorney involved?

7. 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. Should the judge respond as follows?

- a. Welcome the chance to mentor a new member of the Bar, and offer specific trial advocacy pointers.
- b. Offer to sell her an autographed copy of the judge's book: Great Moments in Trial Advocacy.
- c. Suggest that she join a local Inns of Court pupilage group.
- d. Say that the judge will only meet with both counsel at the same time, but offer to set up a lunch meeting to talk about trial practice. Let the attorneys buy you lunch.
- e. Say that the judge will only meet with both counsel at the same time, and schedule a status conference to discuss trial practices after the post-trial motions are ruled upon.

8. You are the judge who held a detention hearing. You ordered Don Defendant to be detained, but at the detention hearing, you suggest that a term in the local half-way house might be appropriate. No appeal or motion to reconsider was filed. One week later, a Pretrial Services officer stops by on another matter, and says that some half-way house beds just became available. The officer asks whether you want to send Don Defendant to the half-way house now; he has a prepared bond order stating this as a condition. Should you sign the order without a conference call with counsel?

9. You are the judge handling criminal duty. The deputy marshal in charge of prisoner transport stops by chambers to say there are security issues relating to one of the defendants scheduled for initial appearances, but that he can't provide more information without jeopardizing an ongoing investigation. The DUSM asks for permission to keep leg irons and a belly chain on the Defendant, to move him separately from the other defendants, and to bring the explosives detection dog through the courtroom before court starts. Do you defer to the USMS, or ask for more information? If you get more information, do you disclose it to the defendant's attorney, or just to the AUSA (who is not part of the ongoing investigation) covering initial appearances today?

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. Should you:

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

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? Are you allowed to:

- 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?

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