

~~Current Version of Canon~~ **PROPOSED REVISIONS TO CANON 3.B(8).**¹

~~Of the Code of Judicial Conduct~~

Revisions to Subsection (8):

(8) A judge shall² 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. A judge shall not initiate, permit, or consider ~~ex parte communications or other~~ communications made to the judge outside the presence of ~~the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee~~ all parties concerning the merits of a pending or impending judicial proceeding. This prohibition applies to any communication perceived by the judge to be an attempt to influence the judge³ in a pending or impending judicial proceeding.⁴ A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

- (a) communications concerning uncontested administrative or uncontested procedural matters;
- (b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

¹ The subcommittee was asked to suggest revisions to address communications to courts transmitted by e-mail and social media. This draft reflects the subcommittee's current thinking, but the subcommittee expects to continue working on the proposal based on input received from the full Advisory Committee.[⊥]

² The subcommittee raises the question whether to modernize the language and use "must" or "should" instead of "shall."[⊥]

³ The subcommittee questions whether the standard used should be subjective (as in the proposed text), objective (e.g., "appears to be intended to influence the judge"), or more restrictively subjective (e.g., "whether the judge believes there is any possibility that the communication could influence her").[⊥]

⁴ This sentence is intended to broaden the Canon to include e-mails and social media.

- (c) obtaining 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;
- (d) consulting with other judges or with court personnel;
- (e) considering ~~an ex parte~~ communication expressly authorized by law.⁵

Proposed new Section (8A):

(8A) If a judge receives a communication that is prohibited by Canon 3.B.(8), the judge or the clerk of the court shall:⁶

- (a) reduce the communication to writing, if not already in written form;⁷
- (b) preserve the writing among the documents in the proceeding to which the communication is related, or in a general file in the court's records;
- (c) send a copy of the writing to all parties to the proceeding;
- (d) notify the sender (if known) of the communication that:
 - 1. the communication as made is prohibited by Canon 3.B.(8) of the Code of Judicial Conduct;
 - 2. the communication will be sent to all parties to the proceeding; and

⁵ Issue raised by the Subcommittee: whether to add an exception for hearings when a party, after notice and opportunity to be heard, does not appear at the hearing.¹

⁶ See note 2.¹

⁷ **Proposed Comment:** The reduction to writing need not be a verbatim recitation of the communication. A summary that captures the general nature of the comment is adequate. If known, the writing should identify the author, date, and time of the communication. If multiple communications are received of a similar nature, a single written summary is adequate if it summarizes the communications, estimates the number of communications and, if practicable, makes the individual communications available for inspection by the parties.

3. other communications by the sender may be considered by the court if the sender complies with the rules of procedure and Canons of Judicial Conduct; and
(e) take such other action as the court deems appropriate.⁸

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⁸ Examples of actions the court might consider: (1) request the parties to respond, (2) address the communication by court order, or (3) inform the sender that the court is prohibited by the rule of law from considering the communication.

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Description	#15408239v2<HNB> - Canon 3 (8)
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Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

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