

MEMORANDUM

TO: Texas Supreme Court Advisory Committee

FROM: Subcommittee on Ex Parte and Non-Litigant Communications¹

DATE: June 6, 2016

Attached is a revised proposed rule for consideration at the June 10 meeting. It is the product of extensive discussion by the subcommittee, including consideration of input from the full committee at two prior meetings. The footnotes to the rule reflect the subcommittee's consideration of specific points made at prior TSCAC meetings, but are by no means exhaustive of the points considered by the subcommittee.

Also attached for background are:

- 1) Chief Justice Hecht's initial referral letter, dated August 4, 2015;
- 2) Canon 3 of the Texas Code of Judicial Conduct;²
- 3) Opinion No. 154 from the State Bar Committee on Judicial Ethics;
- 4) ABA Model Code of Judicial Conduct – 2.9; and
- 5) Code of Conduct for United States Judges – Canon 3(A)(4).

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¹ The proposed rule addresses non-litigant communications, which are distinct from ex parte communications (i.e., communications between parties or party-representatives and the court).

² The initial proposal by the subcommittee was in the form of a revised Canon 3.B (8), but, in response to early feedback from the full committee, the current proposal is in the form of a proposed rule of administration.

PROPOSED RULE OF JUDICIAL ADMINISTRATION 17

If a judge receives¹ a written communication² from a non-party³ regarding the merits of a pending case, the clerk of the court or the judge:

- (a) must retain a copy of the communication and send a copy to all parties;⁴ and
- (b) may take other action the court deems appropriate.

Proposed Official Comment⁵

This rule encompasses all forms of written communications, including electronic communications. This rule applies only to communications directed to a judge and does not apply to (1) communications directed to a broad audience such as newspaper editorials, billboards, and non-specific posts on social media, or (2) properly served amicus curiae filings. In subsection (b), for example, the court could notify the sender that the court has received the communication and has provided it to the parties in the case.

¹ The subcommittee considered whether more than receipt should be required to trigger application of the rule, and concluded that receipt should be the trigger in order to satisfy transparency considerations.

² The subcommittee considered the question whether the rule should extend to oral communications, and concluded that the narrower focus addresses the question posed by the Court and is most workable.

³ The subcommittee considered the question whether the rule should extend to party communications, and concluded that party communications are best addressed by the judicial conduct code and differing factors require different rules.

⁴ The subcommittee considered the issues of cost and burdensomeness as to subsection (a), and concluded that the requirements stated in the proposed rule should be manageable.

⁵ The comment has been streamlined to reflect comments made at the last full committee meeting. In addition, proposed text for a response to the sender has been provided, and the comment clarifies that it does not apply to amicus curiae filings.

Note to the Committee:

The Subcommittee decided not to include a reference in the rule to Section 36.04 of the Texas Penal Code, but thought that the full Committee should be aware of the code provision:

(a) A person commits an offense if he privately addresses a representation, entreaty, argument, or other communication to any public servant who exercises or will exercise official discretion in an adjudicatory proceeding with an intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law.

(b) For purposes of this section, "adjudicatory proceeding" means any proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.

(c) An offense under this section is a Class A misdemeanor.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.



The Supreme Court of Texas

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August 4, 2015

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters.

Parental Notification Rules and Forms. HB 3994, passed by the 84th Legislature, makes substantive amendments to Chapter 33 of the Family Code, which governs parental notice of an abortion for an unemancipated minor. In 1999, with the help of the Advisory Committee, the Court promulgated rules to govern proceedings to obtain a court order and forms for use in these proceedings. The rules and forms must be updated to reflect the recent statutory amendments. The Committee should also consider whether parental-notification proceedings should be subject to or exempt from the electronic-filing mandate for civil cases. Because HB 3994 takes effect on January 1, 2016, the Court must have the Committee's recommendations by October 16, 2015.

Three-Judge District Court. SB 455, passed by the 84th Legislature, adds to the Government Code Chapter 22A, which authorizes the Attorney General to request the convention of a special three-judge district court in school-finance and redistricting cases. Section 22A.004(b) authorizes the Court to adopt rules for the operation of a three-judge district court convened under Chapter 22A and for proceedings of the court.

* **Ex Parte Communications.** The Internet and social media have made it easy for any person to direct a communication, or instigate mass communications, to a judge about a pending case. Canon 3(B)(8) of the Code of Judicial Conduct prohibits a judge from "initiat[ing], permit[ting], or consider[ing] *ex parte* communications," but it does not give specific guidance on the ethical duty of a judge who receives an improper communication or a mass of improper communications about a case. The Court *

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requests the Advisory Committee's recommendations on whether and how the Code should be amended to specifically address the duty of a judge who receives improper communications about a case, including communications sent by e-mail or through social media.

ADR and Constitutional County Court Judges. The Court has received the attached letter from the Hon. Tom Pollard, county judge of Kerr County. Judge Pollard points out that under Canons 4(F)-(G) and 6(B)(3) of the Code of Judicial Conduct, a constitutional county court judge is permitted to maintain a private law practice but is prohibited from acting as an arbitrator or mediator for compensation. Judge Pollard asks the Court to revise the Code to permit a constitutional county court judge to serve as an arbitrator or mediator for compensation in a case that is not pending before the judge. The Court requests the Advisory Committee's recommendations on whether and how the Code should be amended to permit a constitutional county court judge to serve as a private arbitrator or mediator.

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

A handwritten signature in black ink, appearing to read "Nathan L. Hecht", with a long horizontal flourish extending to the right.

Nathan L. Hecht
Chief Justice

Attachment

Canon 3: Performing the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

- (1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.
- (2) A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.
- (3) A judge shall require order and decorum in proceedings before the judge.
- (4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.
- (5) A judge shall perform judicial duties without bias or prejudice.
- (6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.
- (7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.
- (8) A judge shall 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 concerning the merits of a pending or impending judicial proceeding. 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;

- (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.
- (9) A judge should dispose of all judicial matters promptly, efficiently and fairly.
- (10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.
- (11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

C. Administrative Responsibilities.

- (1) A judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.
- (2) A judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.
- (3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.
- (4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.
- (5) A judge shall not fail to comply with Rule 12 of the Rules of Judicial Administration, knowing that the failure to comply is in violation of the rule.

D. Disciplinary Responsibilities.

(1) A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.

(2) A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.

Canon 4: Conducting the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Obligations

A. Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or
- (2) interfere with the proper performance of judicial duties.

B. Activities to Improve the Law. A judge may:

- (1) speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code; and,
- (2) serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He or she may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system and the administration of justice.

C. Civic or Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the profit of its members, subject to the following limitations:

- (1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly or frequently engaged in adversary proceedings in any court.
- (2) A judge shall not solicit funds for any educational, religious, charitable, fraternal or civic organization, but may be listed as an officer, director, delegate, or trustee of such an organization, and may be a speaker or a guest of honor at an organization's fund raising events.

EX PARTE COMMUNICATIONS FROM LITIGANTS
Opinion No. 154 (1993)
State Bar of Texas, Judicial Section, Committee on Judicial Ethics

QUESTION: What is a judge's ethical obligation upon receiving from a litigant a letter which attempts to communicate privately to the judge information concerning a case that is or has been pending?

ANSWER: Canon 3A(5)* provides that a judge shall not permit or consider improper ex parte or other private communication concerning the merits of a pending or impending judicial proceeding. (Canon 10** provides that the word "shall" when used in the Code means compulsion.) Judges may comply with Canon 3A(5)* by doing the following: 1) Preserve the original letter by delivering it to the court clerk to be file marked and kept in the clerk's file. 2) Send a copy of the letter to all opposing counsel and pro se litigants. 3) Read the letter to determine if it is proper or improper; if improper, the judge should send a letter to the communicant, with a copy of the judge's letter to all opposing counsel and pro se litigants, stating that the letter was an improper ex parte communication, that such communication should cease, that the judge will take no action whatsoever in response to the letter, and that a copy of the letter has been sent to all opposing counsel and pro se litigants.

Canon 3A(4)* provides that a judge shall accord to every person who is legally interested in a proceeding the right to be heard according to law. Consideration of an ex parte communication would be inconsistent with Canon 3A(4),* because it would not accord to other parties fair notice of the content of the communication, and it would not accord to other parties an opportunity to respond. Canon 3*** provides that the judicial duties of a judge take precedence over all the judge's other activities. A judge's consideration of a controversy that is not brought before the court in the manner provided by law would be inconsistent with the judicial duty to determine "cases" and "controversies" (Art. 3, Constitution of the United States). A judge has no authority or jurisdiction to consider, or to take any action concerning, out-of-court controversies. A judge's consideration of a controversy that is not properly before the court could give the appearance of inappropriate action under color of judicial authority, which would tend to diminish public confidence in the independence and impartiality of the judiciary, rather than promote it as Canon 1 and Canon 2 require a judge to do.

Finally, a judge should try to minimize the number of cases in which the judge is disqualified. If a judge permits a communication to the judge concerning any matter that may be the subject of a judicial proceeding, that could necessitate disqualification or recusal.

* Now see Canon 3B(8). ** Now see Canon 8B(1). *** Now see Canon 3A.

ABA Model Code of Judicial Conduct- 2.9

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

Code of Conduct for United States Judges- Canon 3(A)(4)

(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.