

NC Rules of Professional Conduct

Rule 1.0 Terminology

- (n) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. The term encompasses any proceeding conducted in the course of a trial or litigation, or conducted pursuant to the tribunal’s rules of civil or criminal procedure or other relevant rules of the tribunal, such as a deposition, arbitration, or mediation. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, may render a binding legal judgment directly affecting a party’s interests in a particular matter.
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Rule 3.3 Candor Toward the Tribunal

[...]

- (d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.
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Rule 3.5 Impartiality and Decorum of the Tribunal

- (a) A lawyer representing a party in a matter pending before a tribunal shall not:

[...]

- (3) unless authorized to do so by law or court order, communicate *ex parte* with the judge or other official regarding a matter pending before the judge or official;
- (d) For purposes of this rule:
 - (1) *Ex parte* communication means a communication on behalf of a party to a matter pending before a tribunal that occurs in the absence of an opposing party, without notice to that party, and outside the record.

- (2) A matter is “pending” before a particular tribunal when that tribunal has been selected to determine the matter or when it is reasonably foreseeable that the tribunal will be so selected.

Comment

[2] To safeguard the impartiality that is essential to the judicial process, jurors and members of the jury venire should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with members of the jury venire prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with a juror or a member of the jury venire about the case.

[8] All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if unrepresented. Ordinarily, an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel or, if there is none, to the opposing party. A lawyer should not condone or lend himself or herself to private importunities by another with a judge or hearing officer on behalf of the lawyer or the client.

Ethics Opinion Notes

RPC 237 - Withdrawn. Opinion rules that a lawyer may not communicate with the judge before whom a proceeding is pending to request an ex parte order unless opposing counsel is given adequate notice or unless authorized by law.

97 Formal Ethics Opinion 3 - Withdrawn. Opinion rules that a lawyer may engage in an ex parte communication with a judge regarding a scheduling or administrative matter only if necessitated by the administration of justice or exigent circumstances and diligent efforts to notify opposing counsel have failed.

97 Formal Ethics Opinion 5 - Withdrawn. Opinion rules that a lawyer must give the opposing counsel a copy of a proposed order simultaneously with the lawyer’s submission of the proposed order to a judge in an ex parte communication.

98 Formal Ethics Opinion 12 - Withdrawn. Opinion sets forth the disclosures a lawyer must make to the judge prior to engaging in an ex parte communication.

98 Formal Ethics Opinion 13 - Withdrawn. Opinion restricts informal written communications with a judge or judicial official relative to a pending matter.

2001 Formal Ethics Opinion 15 - Withdrawn. Opinion rules that a lawyer may not communicate ex parte with a judge in reliance upon the communication being “permitted by law” unless there is a statute or case law specifically and clearly authorizing such communications or proper notice is given to the adverse party or counsel.

2019 Formal Ethics Opinion 4. Opinion discusses the permissibility of various types of communications between lawyers and judges.

Misconduct

It is professional misconduct for a lawyer to:

- (d) engage in conduct that is prejudicial to the administration of justice;

Comment

[4] A showing of actual prejudice to the administration of justice is not required to establish a violation of paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. For example, in *State Bar v. DuMont*, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified on other grounds, 304 N.C. 627, 286 S.E.2d 89 (1982), the defendant was disciplined for advising a witness to give false testimony in a deposition even though the witness corrected his statement prior to trial. Conduct warranting the imposition of professional discipline under paragraph (d) is characterized by the element of intent or some other aggravating circumstance. The phrase “conduct prejudicial to the administration of justice” in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings. In *State Bar v. Jerry Wilson*, 82 DHC 1, for example, a lawyer was disciplined for conduct prejudicial to the administration of justice after forging another individual’s name to a guarantee agreement, inducing his wife to notarize the forged agreement, and using the agreement to obtain funds.

Ethics Opinion Notes

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