

RPC 237 - WITHDRAWN

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EX PARTE COMMUNICATIONS WITH JUDGE

Adopted: October 18, 1996

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.

Editor's Note: On July 16, 2021, the State Bar Council withdrew this opinion upon its adoption of 2019 FEO 4 (<https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2019-formal-ethics-opinion-4/>).

Inquiry #1:

Attorney A represented Wife in negotiations on a separation agreement from Husband. Husband was represented by a lawyer in Attorney B's law firm. A separation agreement, giving Wife custody of the minor child of the marriage, was executed and incorporated by reference in the divorce decree. The case was heard by Judge J.

Several years later, Attorney B filed a motion on behalf of Husband for a change of custody. Attorney B would like to contact Judge J in chambers to ask Judge J to sign an ex parte order changing the custody of the child to Husband. Without sending Attorney A a copy of the motion or notifying Attorney A of his intentions, may Attorney B communicate with Judge J outside the course of the official proceedings for the purpose of asking Judge J to sign the ex parte order?

Opinion #1:

No. Rule 7.10(b) prohibits a lawyer representing a client in an adversary proceeding from communicating as to the merits of the cause with a judge before whom the proceeding is pending if the communications will occur outside official proceedings. Rule 7.10(b)(3) does permit oral communications with a judge provided the opposing party is given adequate notice. Although Rule 7.10(b)(4) also permits ex parte communications with a judge about the merits of a cause if authorized by law, such communications must be specifically authorized by statute, court rule, or other law. See, e.g., G.S. §50B-2(c) (authorizing ex parte orders in domestic violence actions); G.S. §50-13.5(d)(3) (authorizing ex parte custody orders when a child is exposed to substantial risk of injury, abuse or abduction); and Rule 65 of the Rules of Civil Procedure (ex parte temporary restraining orders permitted).

Inquiry #2:

Does Attorney B have a duty to give Attorney A notice of oral or written communications with Judge J outside the course of official proceedings if Attorney A is the attorney of record?

Opinion #2:

Yes. See opinion #1. If the communications are in writing, Attorney B must promptly deliver a copy of the written communication to Attorney A. Rule 7.10(b)(2).

Inquiry #3:

If Attorney B asks the judge in chambers to issue a show cause order directing Husband to appear and show cause at some later date, may Attorney B communicate with Judge J, outside the course of official proceedings in the cause, without notifying Attorney A?

Opinion #3:

No, if Attorney B will communicate with Judge J as to the merits of the cause. However, if Attorney B submits only the written pleadings necessary for the issuance of a show cause order and does not communicate with the judge as to the merits of the cause, he may communicate with the judge in this manner provided he promptly delivers a copy of the pleadings and order to Attorney A. See Rule 7.10(b)(2).

Inquiry #4:

Does a lawyer have a duty to examine the court record to determine whether there is an attorney of record for the opposing party before seeking an order from a judge outside the course of official proceedings?

Opinion #4:

A lawyer should make reasonable inquiry, including an examination of the court record, to determine if there is an attorney for the opposing party. Although there may be no attorney of record, Rule 7.10(b) requires notification to an unrepresented opposing party prior to communicating orally with the judge as to the merits of the cause.