

IN THE SUPREME COURT OF THE STATE OF ALASKA
ORDER NO. 1724

Amending the Commentary
to Code of Judicial Conduct
Canon 3.B.(7) concerning
representation hearings.

IT IS ORDERED:

The Commentary to Code of Judicial Conduct Canon 3.B.(7) is amended to read as follows:

**Canon 3. A Judge Shall Perform the Duties of Judicial
Office Impartially and Diligently.**

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B. Adjudicative Responsibilities.

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(7) A judge shall accord to every person 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 concerning a pending or impending proceeding except as allowed by this Section. A judge shall make reasonable efforts to see that law clerks and other court staff carrying out similar functions under the judge's supervision do not violate the provisions of this Section.

(a) A judge may initiate or consider an ex parte communication when expressly authorized by law* to do so.

(b) When circumstances require, a judge may engage in ex parte communications for scheduling or other administrative purposes, provided that:

(i) the communications do not deal with substantive matters or the merits of the issues litigated,

(ii) the judge reasonably believes no party will gain a procedural or tactical advantage because the communication is ex parte, and

(iii) the judge takes reasonable steps to notify all other parties promptly of the substance of the ex parte communication and, when practicable, allows them an opportunity to respond. This subsection does not apply to ex parte communications by law clerks or other court staff concerning scheduling or administrative matters.

(c) If all the parties have agreed to this procedure beforehand, either in writing or on the record, a judge may engage in ex parte communication on specified administrative topics with one or more parties.

(d) A judge may consult other judges and law clerks or other court staff whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

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

Commentary.—*The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.*

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is

unrepresented the party, who is to be present or to whom notice is to be given.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

The first sentence of Section 3B(7) (“A judge shall accord to every person the right to be heard according to law.”) is not intended to expand or alter the law of standing (a person’s right to bring an action), nor is it intended to expand or alter the procedural rules governing the scope and manner of a person’s right to be heard in a case.

Judges should endeavor to create some form of record of ex parte communications whenever possible, even when the communications are authorized under this Section.

Section 3B(7)(a) permits an ex parte communication when it is expressly authorized by law, including communications that may reveal privileged information. For example, a judge may engage in an ex parte communication when the judge must question a criminal defendant about the defendant’s request for appointment of a different attorney, and the judge determines that privileged information will be revealed.

Under Section 3B(7)(b), a judge may engage in ex parte communications for “scheduling or other administrative purposes.” For example, a judge may make or receive an ex parte communication when the sole purpose of the communication is to provide courtesy notification to the parties or to the court of a delay or change in scheduling. Another example of an ex parte communication contemplated by this Section is when a defense attorney notifies the judge that the defendant cannot be located, that the scheduled trial should be called off, and that the defense concedes that a bench warrant should be issued for the defendant’s arrest.

Section 3B(7)(b) requires a judge to take reasonable steps to promptly notify all parties of any ex parte communication. The continuing development of communications technology will affect what steps are “reasonable.” Telephone communication is now virtually ubiquitous and telefax communication is widespread. In the near future, it may be common to notify lawyers through computer mail or computer bulletin boards. A judge should consider these alternatives when deciding the most expeditious means of communication reasonably available to the court and the parties.

A judge’s secretary or law clerk may also engage in ex parte communications to discuss scheduling or other administrative matters. Such communications are permitted as long as the requirements of Sections 3(B)(7)(b)(i) and (ii) are satisfied, that is, as long as the communications do not deal with the substance or merits of the litigation and no party gains an advantage as a result of the ex parte contact. When the communication is with a staff member rather than a judge, Section 3B(7)(b)(iii) does not

apply. Thus, if an attorney asks about the status of a pending motion, the judge's secretary may provide this information without notifying the other parties of the communication or including them in a conference call.

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DATED: March 4, 2010

EFFECTIVE DATE: October 15, 2010

/s/
Chief Justice Carpeneti

/s/
Justice Fabe

/s/
Justice Winfree

/s/
Justice Christen

/s/
Justice Stowers