JUDICIAL EX PARTE COMMUNICATION LAWS AND POLICIES

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Abstract

Rules regarding ex parte communication in the United States serve to maintain the actual and perceived integrity and impartiality of the judiciary as well as encourage a fair judicial system. While there are several ex parte interactions that are clearly inappropriate, social situations and emerging technologies can present uncertainties.

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Introduction

The United States Court of Appeals for the Fourth Circuit recently heard a challenge to President Trump's executive order limiting travel from several countries.[1] Although judges' emails are not publicly available, prior to argument, an advocacy group sent thousands of emails en masse to each judge urging the court to lift the injunction and reinstate the executive order.[2] The court's IT team worked to create a block that would filter out any partisan messages about the case, but not before numerous emails inundated the judges. Consistent with Canon 3(A)(4) of the Code of Conduct, the Fourth Circuit Clerk of Court sent a notice to all parties alerting them to the emails.[3]

Although perhaps the situation I described above is a bit anomalous, it does appear that the number of ex parte contacts with judges is going up, particularly with the increased reliance on social media. The purpose of this paper is to explore how judges might ethically approach ambiguous situations involving ex parte communications, and in particular (1) the circumstances under which such communications are permissible, (2)

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[1] *Int'l Refugee Assistance Project v. Trump,* 857 F.3d 554 (4th Cir. 2017).

[2] Cogan Schneier, *Group Floods Fourth Circuit Judges with Pro Travel Ban Emails*, The Nat'l L.J., April 5, 2017, http://www.nationallawjournal.com/id=1202783073119/Group-Floods-Fourth-Circuit-Judges-With-Pro-Travel-Ban-Emails?slreturn=20170606084859.

[3] *Int'l Refugee Assistance Project v. Trump* (No. 17-1351), ECF No. 84.

the novel perils of social media and other emerging technologies, and (3) how to deal with inadvertent ex parte contact. Part I provides a brief background on the regulation of ex parte communications in the United States. Part II describes certain situations in which ex parte communications are permissible and the extent to which they are circumscribed. Part III considers some of the ways in which ex parte communications have been dealt with. I begin by describing several scenarios to help frame the discussion.

- An attorney involved in arguing a case I had just heard approached my law clerk after argument and offered her a folder of his research. She did not accept the folder, and reported the incident to me. I told our clerk of court, who wrote the parties to describe the contact without identifying the attorney.
- Because my resident chambers are not in the same city as the courthouse, I and many of my colleagues stay in a hotel when we go to court. Many attorneys who argue before our court stay in the same hotel. As I was riding in the elevator one morning, I heard the three lawyers on the same elevator discussing the questions they might receive from the panel in a case on which I was to sit that day. At the start of court I stated what had happened and asked if any of the parties might have a concern about the matter.
- While the travel ban case was being considered by the district court, a law professor whom I know very well sent me a draft of a law review article he was writing that was critical of the ban. I sent it on to our clerk of court and

let the professor know that the matter was very likely to come before us on appeal.

- Prior to a sentencing hearing in a particularly brutal kidnapping and assault case, the sentencing judge received petitions and letters from members of the public asking for a severe sentence, as did an editorial in a local newspaper. The judge imposed a sentence in excess of that requested by the government. In explaining his decision, he acknowledged the many communications he received, but stated on the record that his decision was based solely on the facts of record.
- What should a judge do if he receives a LinkedIn invitation from an attorney who occasionally appears before him?

These are the types of issues that I ask you to keep in mind throughout the discussion below.

Ex parte communication is generally thought of as "communication between counsel and the court when opposing counsel is not present."[4] Ex parte contact, however, includes any communication with a judge regarding a pending or impending matter in the absence of both parties. Thus, interaction between a judge and special interest groups, victims, families of defendants, and other members of the public without the presence of

[4] Black's Law Dictionary 840 (8th ed. 2004).

all parties to litigation constitutes ex parte communication. Contact can range from formal letters and meetings to informal phone calls, encounters, and electronic media.

While technology has increased the court system's efficiency and public accessibility, the judiciary is increasingly vulnerable to inappropriate exchanges with the public as well as counsel and parties. There are, of course, examples of clearly inappropriate behavior, such as a judge calling the prosecutor in an ongoing criminal trial to give advice on the prosecution's closing arguments.[5] But gray areas also abound that subject a judge to inadvertent or unwitting communication without an adverse party present.

In the United States, the American Bar Association, the Judicial Conference of the United States Committee on Codes of Conduct, and each state bar association, file advisory ethical opinions to address some of these nebulous ethical areas. These opinions are not a complete defense if a judge is charged with violating ex parte communication ethics rules, but they do help members of the judiciary navigate the often murky waters of ex parte interactions. Carefully monitoring ex parte communication promotes public confidence in court proceedings and preserves the integrity and impartiality of the judiciary.

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[5] *See In re Starcher*, 457 S.E.2d 147 (W. Va. 1995).

I. Background on Ex Parte Communications

The American Bar Association ("ABA"), a voluntary professional organization, has been providing model ethics rules for judges for almost a century,[6] presently through the Code of Judicial Conduct ("Model Code"). A majority of states and the federal courts have adopted the Model Code's rules regarding ex parte communication in full or written their own rules that are substantively similar to the Model Code. The Model Code provides that, barring limited exceptions, "a judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside

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[6] In 1924, the ABA adopted a Canon of Judicial Ethics, which discouraged judges from conducting "private interviews, arguments, or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where the provision is made by law for ex parte application." CANONS OF JUD. ETHICS (AM. BAR ASS'N 1924), https://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/1924_canons_jud_ethicspdf.authcheckdam.pdf; *see also* Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, Hous. L. Rev. 1343, 1347 (2001). The canon did not allow for any exceptions unless "made by law," a rigidity that caused many judges to ignore it. *See* Jay C. Carlisle, *Ex Parte Communication by the Judiciary*, N.Y. St. B.J. 12, 14 (Nov. 1986). The ABA responded in 1972 by creating a more flexible standard in the Model Code of Judicial Conduct. MODEL CODE OF JUD. CONDUCT (AM. BAR ASS'N 1972). Model Code Canon 3(A)(4) discouraged judges from "initiat[ing] or consider[ing] ex parte or other communications concerning a pending or impending proceedings." *Id.* Canon 3(A)(4) (1972). Canon 3(A)(4) listed two exceptions: (1) as allowed by law and (2) to receive advice from a "disinterested expert on the law applicable to a proceeding before him." *Id.* The ABA further revised the Model Code in 1990 to make the prohibition on ex parte communication mandatory and disallowing judges from not only initiating or considering ex parte communications but also from permitting them. MODEL CODE OF JUD. CONDUCT Canon 3(B)(7) (AM. BAR ASS'N 1990).

the presence of the parties or their lawyers, concerning a pending or impending matter."[7] This "proscription . . . includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding."[8]

In 1973, the Judicial Conference, which makes national policy for the federal courts, adopted the Code of Conduct for United States Judges ("Code of Conduct") as binding on all federal judges except Supreme Court Justices. The Code of Conduct adopted the Model Code Canon 3(A)(4) in whole.[9] The current version of the Code of Conduct tracks the Model Code almost verbatim, though with one notable difference: it is not mandatory.[10]

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[7] MODEL CODE OF JUD. CONDUCT Canon 2.9 (AM. BAR ASS'N 2011) (hereinafter, Model Code).

[8] *Id.* cmt. 3.

[9] H.R. Doc. No. 93-103, at 9–10 (1973).

[10] Code of Conduct for United States Judges, http://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf.

II. Types of Ex Parte Communication

The Model Code bars a judge from initiating, considering, or permitting ex parte communication. These prohibitions relate to both how the communication came to happen and what the judge does with the information.

The legal community as a whole benefits when judges remain active in the bar's activities. Particularly given that most judges worked as lawyers before coming onto the bench, judges will interact with lawyers on a regular basis--both in their professional roles through bar associations and other attorney organizations and in their personal capacities. These relationships can become potential ethics violations when lawyers are assigned to judges with which they have a relationship.

Most judges concerned with avoiding improper ex parte contact will easily be able to prevent the clear-cut violations. For example, a judge should not give media interviews or public remarks about a pending case.[11] With many interactions, however, it is not as apparent whether contact is improper. Many ambiguous circumstances fall into one of three broad categories: (1) permitted ex parte communication; (2) inadvertent ex parte communication; and (3) social media contact. Each is discussed below.

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[11] *See United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

Permitted Communication

Read literally, the Model Code is unworkable. Practical considerations require judges to speak to court staff, law clerks, and sometimes the parties without both parties present. Cognizant of these practicalities, the Model Code permits ex parte communications in five circumstances: (1) for scheduling, administrative, or emergency purposes; (2) to receive written advice from a disinterested expert; (3) to consult with court staff, court officials, and other judges; (4) with the consent of the parties the judge may speak separately with the parties in an effort to reach a settlement; (5) when expressly authorized by law.[12]

1. Scheduling, Administrative, or Emergency Purposes

If the "circumstances require," a judge can communicate ex parte for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided the judge does not believe any party will gain an advantage by the communication and the judge promptly notifies other parties of the substance of the communication, giving them a change to respond.[13] Although authorized by the Model Code, such ex parte communication should still be used as a last resort. For example, a

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[12] MODEL CODE Canon 2.9.

[13] *Id.*(A)(1).

lawyer may have two different matters scheduled simultaneously and is unable to reach opposing counsel. Such circumstances may require the attorney to request an ex parte continuance from one of the judges.[14]

Though a judge may also engage in ex parte communication in the case of an "emergency," the Model Code leaves emergency undefined. Most bodies to have considered the issue take a strict interpretation of emergency. In *Shaw v. Shaw*, a judge granted a wife's emergency motion for custody of her child and to allow her to temporarily relocate out of state away from her husband.[15] The wife stated she needed to leave immediately to start at a new, better paying job in Louisiana. A Florida appellate court rejected that argument and found that the trial judge erred in considering the ex parte communication. The court reasoned that "the facts do not indicate that a true emergency or extraordinary circumstances existed to justify a lack of prior notice to the husband. . . . There is no allegation that the husband threatened harm to the minor child."[16]

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[14] *See* N.C. Bar Ass'n, Formal Op. 12-2 (1998), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-12/?opinionSearchTerm=ex%20parte.

[15] 696 So.2d 391 (Fla. Ct. App. 1997).

[16] *Id.* at 392.

2. Receive Advice from a Disinterested Law Expert

The Model Code also provides a narrow exception for a judge to obtain the written advice from a disinterested legal expert on an issue of law 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."[17] The Model Code added this exception in 1972 over objections that it would be more appropriate for views to be expressed in the form of amicus briefs.[18] The expert must not have an interest in the parties or the outcome of a case. Notably, a judge can only ask the expert what the law is.[19] He may not go further to ask how the expert would apply the law in a certain case.

Consider also the following hypothetical scenario. Jack Smith, a law professor, frequently publishes articles about the telecommunications sector. Jack is a former law clerk to an appellate judge, Judge Baker, with whom he remains friendly. Jack's latest article discusses a recent district court case involving a phone company. The article expresses Jack's view that the district court "got it wrong" and provides proscriptive

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[17] MODEL CODE Canon 2.9(A)(2).

[18] *See* Abramson, *supra* note 6, at 1374.

[19] *Id.* at 1373.

advice so that the appeals court will "get it right." Once it is published, Jack sends an email to Judge Baker, attaching the article and a note saying, "I hope your summer is going well. Here's some light beach reading!" Unbeknown to Jack, Judge Baker is later assigned to the panel on the case on appeal.

It is not readily apparent what steps Judge Baker must take to avoid violating any ethics rules regarding ex parte communication. Jack does not appear before Judge Baker and the case was not on Judge Baker's docket when he received the article. The Model Code anticipates some of this type of exchange between judges and legal academics. 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, the subject matter of the advice, and "affords the parties a reasonable opportunity to object and respond to the notice and to the advice received."[20] In the given hypothetical, it is unclear whether Jack is "disinterested" and Judge Baker clearly could not have given advance notice because he did not know he was going to receive the article. The best course of action is likely for Judge Baker to disclose the article and note to the parties, allowing them the opportunity to respond.

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[20] Model Code Canon 2.9(A)(2).

3. Consult with Court Staff and Other Judges

Practically, judges would be unable to do their jobs without being able to speak to court personnel and other judges. Some examples are obvious--judges frequently discuss the merits of their cases and applicable law with their law clerks outside of the presence of any party. Other court staff are privy to nonpublic letters and memoranda about a case. In the Fourth Circuit, the Office of Staff Counsel employs staff attorneys who prepare memoranda in cases decided without oral argument. These attorneys do not work for any particular judge but are employees of the court as a whole.

Judges may also discuss pending cases with other judges of the same level and jurisdiction so long as each judge reaches her own conclusions about the case.[21] Our court has discussed internally whether to hear a case en banc, whether to calendar a case for oral argument, and whether to hold a case in abeyance pending resolution of another matter. The Model Code does, however, limit the exception to judges whose courts are on the same level. For example, a federal trial judge should not discuss a legal matter with a state trial judge unless a statute authorizes the communication. Similarly, federal trial and appellate judges should not confer about pending or impending legal matters unless such communication is placed on the record.

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[21] *See, e.g.*, *Gaston v. Hunter*, 588 P.2d 326, 352 (Ariz. Ct. App. 1978) (finding no error when a judge informed the parties that he used other judges as "sounding boards").

4. Communication to Foster Settlement

The Model Code also permits judges, with the consent of the parties, to speak individually with the parties to encourage settlement or mediation. Of course a judge may not advise a party as to their chances in a pending case so that the party can decide if they want to settle.[22] If attempts at settlement fail, the judge should keep any ex parte information learned during negotiation confidential and she should not consider the information in resolving the case.[23]

5. Ex Parte Communication Allowed by Law

The Model Code has always provided an exception for ex parte communication authorized by law. The Federal Rules of Civil Procedure, which govern all federal civil proceedings in United States district courts, allow judges to entertain ex parte requests for situations such as temporary restraining orders, applications for search warrants and wiretaps, requests for in camera review of documents, and default judgments where a party fails to appear despite notice. States also have similar rules that allow judges to rule on motions for relief in the absence of one or more party.[24]

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[22] *See Matter of J.B.K.*, 931 S.W.2d 581 (Tx. Ct. App. 1996).

[23] *See In re Complaint of Judicial Misconduct*, 647 F.3d 1181, 1182 (9th Cir. 2011).

[24] *See e.g.*, Alex Rothrock, *Ex Parte Communications with a Tribunal: From Both Sides*, Colo. Lawyer 55, 57 (Apr. 2000) (collecting state legal opinions).

Inadvertent Communication

Prohibitions against ex parte communication do not turn on intent. Judges may not "initiate" or "permit" ex parte communication. In other words, it does not matter whether the judge initiates communication or is an accidental recipient of it.

Courthouses are filled with not only judges but lawyers, plaintiffs, press, victims, defendants, interested members of the public, families, and other types of advocates. Many state and local courtrooms do not have the resources to cordon judges away from the rest of the public. As a result, a judge might accidentally overhear the private conversations of one party in a case. Although the judge did not intend to hear the conversation improper ex parte communication nonetheless occurred. In such situations, the judge should announce to the speaking party that she is a judge in the pending matter and then promptly inform both parties on the record that ex parte communication occurred. The judge must then exercise caution not to "consider" the ex parte communication.

Social Media

As modes and methods of communication increase, judges must take care not to violate ethics rules by communicating in the absence of adverse parties. Although a judge "seldom h[as] an affirmative duty to disclose" social media connections with lawyers or other appearing before the judge, "current and frequent communication" with

someone may require disclosure.[25] Judges should "also take care to avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending or impending matters before the judge."[26] As such, judges should not "friend" lawyers, jurors, litigants or others who may appear before the judge or have an interest in a matter before a judge. However, the social media format appears to matter just as much as the amount of contact. In 2010, the California Judges Association's Judicial Ethics Committee released its opinion regarding online social networking. The opinion recognized that while there is no ethical rule prohibiting judges from interaction with lawyers who appear before them, judges should take care to ensure that there is no actual or apparent impropriety in the communication.[27]

For example, the opinion advised that it would be improper for a judge to connect with a lawyer who occasionally appears before the judge on a social networking site where the judge posts personal updates about her extrajudicial activities and thoughts. Because the judge uses the website mainly for personal updates, "[a] person aware of the facts could reasonable conclude that the attorney is in a special position to influence the

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[25] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 3 (2013), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf.

[26] *Id.* at 2.

[27] Ca. Judges Ass'n Jud. Ethics Comm., Op. No. 66 6 (2010), http://www.caljudges.org/docs/Ethics%20Opinions/Op%2066%20Final.pdf.

judge."[28] Similarly, in North Carolina, a state court judge was publicly reprimanded for "friending" the attorney for the defendant in a child custody and support case and posting comments about the pending matter on his Facebook page.[29] A judge who uses social networking to update participants about his activities with a local bar association, however, would not face the same appearance of impropriety by sending requests to connect with lawyers who may appear before the judge.[30] In contrast to Facebook "friending," the North Carolina State Bar Association permits judges to send and accept invitations to attorney professional profiles on LinkedIn.[31]

Judges should also not communicate with anyone about a case using social media. A Texas defendant unsuccessfully appealed the district court's denial of his motion for a new trial after the defendant learned of communication between the father of the defendant's girlfriend and the assigned judge, who were friends on Facebook.[32] The

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[28] *Id.* at 9.

[29] N.C. Jud. Standards Comm'n, Public Reprimand, B. Carlton Terry, Jr., Inquiry No. 08-234, http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf.

[30] Ca. Judges Ass'n Jud. Ethics Comm., Op. No. 66, at 9.

[31] N.C. Bar Ass'n, Formal Op. 8 (2015), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-8/?opinionSearchTerm=ex%20parte.

[32] *Youkers v. State*, 400 S.W.3d 200, 203 (Tex. App. 2013).

girlfriend's father sent the judge a message asking for leniency for the defendant. The judge immediately responded that such communication is a violation of the state code and threatened to unfriend the father if he sent any further communication about the case. The judge also placed a copy of the messages in the record, disclosed the incident to both parties' lawyers, and contacted the judicial conduct commission. Although the state appellate court found that being Facebook friends, alone, was not enough to violate the code, the inappropriate contact here could have been completely avoided had the judge immediately unfriended all persons with an interest in the case's outcome. The California opinion advises judges to immediately cease and disclose online contact once an attorney has matters pending before the court.[33] Given the potential for in appropriate communication, other jurisdictions have instituted a per se ban on judge-attorney social-media connections.[34]

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[33] *I* Ca. Judges Ass'n Jud. Ethics Comm., Op. No. 66 6, at 10–11.

[34] *See* Fla. Jud. Ethics Advisory Comm., Op. No. 2012-12 (May 9, 2012); Okla. Jud. Ethics Advisory Panel, Op. No. 2011-3 (July 6, 2011).

III. Disclosing Ex Parte Communication

Regardless of how a judge comes to hear ex parte information, she may not consider it. In *Sloan v. United States*, a juror came into a trial judge's chambers post-verdict.[35] The juror then engaged in a discussion with the judge's law clerk during which the juror told the law clerk that the jury acquitted the defendant on two of three counts because it misunderstood the court's instructions.[36] At sentencing, the judge disclosed the conversation to both counsel and on appeal the defendant asserted that the ex parte communication violated ethics rules and due process. Although the appellate court noted that the trial judge should have notified counsel more promptly, it held that the judge did not consider the ex parte communication based in part on the trial judge's repeated statements on the record that he would not consider the contact during his sentencing deliberations. The court determined that "indirect and accidental receipt of non-prejudicial *ex parte* information may be satisfactorily addressed by notification to counsel of the communication."[37]

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[35] 527 A.2d 1277, 1286 (D.C. 1987).

[36] *Id.*

[37] *Id.* at 1287.

Similarly, the Supreme Court of Georgia upheld a custody order a judge entered after receiving numerous letters and telephone calls on behalf of both parties. The Court rejected appellant's argument that the trial judge erred in considering the communications because the trial judge "candidly pointed out that it had received the communications and the [appellant] did not object at that time."[38] Further, the trial judge "clearly specified the evidence that it relied upon (apart from the communications)."[39]

When it is clear that a judge's decision is based on inappropriate ex parte communications, the decision must be vacated. In *State v. Rice*, the Supreme Court of Vermont vacated a defendant's sentence that was enhanced after the judge admitted into evidence twenty-two petitions signed by over 500 people calling for an increased sentence.[40] Therefore, even when a judge acquires improper information inadvertently, there remains the potential for ethics violations if the judge considers the ex parte communication.

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[38] *Ivey v. Ivey*, 455 S.E.2d 258, 260 (Ga. 1994).

[39] *Id*.

[40] 483 A.2d 248, 251 (Vt. 1984).

Conclusion

Judges are in the best position to avoid violating prohibitions on initiating ex parte communications. Some of these points are clear. Communication that does not fall into an exception should be avoided. Judges should refrain from calling, emailing, or speaking to the public about pending matters outside of the courtroom and should not initiate contact with anyone regarding a pending matter unless allowed by an exception. When faced with a potential ex parte communication, a judge should take care not to initiate contact, promptly disclose any contact with all parties, and fully explain the reasons for any decision on the record. Technology and social media present new problems[41] but evolving standards regarding ex parte communication and electronic media reflect the same basic principles that have guided ex parte communication

[41] In a 2012 survey of state and local judges, more than 46% of judges reported using social media and 86% of those judges have a Facebook profile. 2012 Conference of Court Public Information Officers New Media Survey 5 http://ccpio.org/wp-content/uploads/2012/08/CCOIO-2012-New-Media-ReportFINAL.pdf. In 2013, the ABA released its formal opinion guidance for judge's use of social media. The ABA concluded that judge's may use social media but must take particular care to "comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 1 (2013), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf.

guidelines for the last century: (1) avoid the appearance of impropriety and (2) disclose any potential or actual ex parte communication to give both parties the opportunity to respond.