Maintaining Judicial Professionalism: Reflections from the Bar

Panelist Materials

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It is human nature to want to talk about whatever it is you are working on, whether that is in your professional life or your personal life. Judges and attorneys are not immune from the desire to talk to others about what is going on in their lives. But as Judges and attorneys, we not only must follow respective ethical rules, we should also strive to not undermine the fairness of the legal system we are a part of.

The Supreme Court of Florida has said, "Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant . . . . The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal." Rose v. State, 601 So.2d 1181 (Florida Supreme Court 1992). Very recently, our own Supreme Court said, "engaging in or allowing ex parte communications presents to the public an image of a judge who covertly interacts with a party in order to unfairly advance that party's interests and jeopardizes the appearance of the independence, integrity, and impartiality of the judiciary." Inquiry Concerning Judge Peterson, S22Z0180 (decided June 25, 2024).

Judges had careers before moving to the bench. Inherently, judges will often have litigators (meaning attorneys that are actually in court often) practicing before them that the judge knew well prior to taking the bench. This may include colleagues, coworkers, mentors, mentees, law firm partners, and friends. Putting on the robe does not mean that the judge can never speak to those attorneys again. It just means that judges and attorneys must be diligent in ensuring that conversations do not cross the line into improper ex parte communications.

Some examples are obvious. If a judge learns that a prosecutor plans on pursuing misdemeanor charges instead of felony charges, that judge should not call the prosecutor and urge the prosecutor to seek a felony indictment. Ryan v. Commission on Judicial Performance, 45 Cal.3d 518 (1988). An ex parte meeting between a judge and defense attorney where the judges discussed defense procedural advantages without the prosecutor being present was clearly improper. In re Mosley, 102 P.3d 555 (Nevada 2004). These examples will likely not raise any questions as to where the line that should not be crossed is drawn.

Other examples may cause judges and attorneys to reasonably question where the line is. An Alaska judge was disciplined for telling a prosecutor, without the defense attorney present, that he should read new appellate opinions because the opinions involved legal issues before the court that the prosecutor was handling. In re Cummings, 292 P.3d 187 (2013). There, the Judge testified that he merely encouraged attorneys in his courtroom to read new appellate opinions. That Supreme Court did not just focus on whether this communication prejudiced the defendant, but also whether the communication could have the "appearance of aiding the prosecution."

For prosecutors, public defenders, and others who are in court all the time, often without all parties present, there are conversations with judges that often take place, this includes scheduling and logistics. These may be about things happening in the courtroom. All parties must be mindful that it is not just what the substance and intent of the conversation is, but what the appearance may be. *Cf* In re Mosley, 102 P.3d 555, 562 (Nev. 2004)(The Supreme Court of Nevada reversed a finding of the Nevada Commission on Judicial discipline based on the judge's ex parte communications in making an own recognizance bail determination and said "because of the custom and practice in Clark County, however flawed, with the acquiescence of the district attorneys, we reverse the Commission's finding."). *Compare* Rose v. State, 601 So. 2d 1181 (Fla. 1992)(The Florida Supreme Court ordered an evidentiary hearing on a judge's actions and said: "The judicial practice of requesting one party to a prepare a proposed order for consideration is a practice born of the limitations of time. Normally, any such request is made in the presence of both parties or by a written communication to both parties. We are not unmindful that in the past, on some occasions, judges, on an ex parte basis, called only one party to direct that party to prepare an order for the judge's signature. The judiciary, however, has come to realize that such a practice is fraught with danger and gives the appearance of impropriety.")(cleaned up).

So how do judges and attorneys best avoid situations where there is no intent to have an improper ex parte discussion? First, being mindful of not just the substance of any conversations, but also how others may perceive those conversations. The best route is to include all parties. In the Cummings case above, the judge could have emailed both attorneys to inform them that there might be new appellate opinions that are relevant to an issue and ask both sides to provide a letter brief regarding those new opinions.

We can also all better educate ourselves about these concerns. The Annotated Model Code of Judicial Conduct[1] has almost 30 pages of case cites on this issue. Those exist because there have been prior instances of judges having improper ex parte discussions. Learn from others past mistakes and strive to not repeat them.

[1] https://www.americanbar.org/products/inv/book/263035570/