Arizona Supreme Court
Judicial Ethics Advisory Committee

ADVISORY OPINION 02-03
(August 8, 2002)

Communications Between Court and Counsel

Issues

1. Do telephonic discussions between a judge and counsel for both parties to resolve disclosure and discovery disputes, without formal papers being filed, constitute prohibited *ex parte* communications?

   Answer: No.

2. Do letters addressed to the court, with copies to opposing counsel, constitute prohibited *ex parte* communications:

   Answer: No.

3. Do letters addressed to opposing counsel, with copies to the court, constitute prohibited *ex parte* communications?

   Answer: No.

Facts

During the course of a medical malpractice case, counsel and the court conducted several discussions of disclosure and discovery disputes telephonically, with a court reporter present, and without formal papers having been filed. As the trial date approached, counsel wrote letters concerning various other matters, some of which were addressed to the court, with copies to opposing counsel. Others were addressed to opposing counsel with copies to the court, and at least two letters were addressed to a lawyer representing a non-party witness, with copies to the court and opposing counsel. The letters were received and opened by the court's judicial assistant, who put them together for the judge to read before a trial management conference.

Among other things, the letters were accusatory with respect to opposing counsel's conduct of the litigation. They dealt with claims of admissibility in evidence of affidavits, alleged unfair impositions on witnesses subpoenaed for the first day of trial, and other matters, some of which pertained to the contest between the parties, and some related only to scheduling. Although the letters contained statements relevant to possible rulings on evidentiary and procedural matters, nothing in the letters dealt directly with deciding the entire case on the merits.

Discussion

By its very nature, the advisory committee exists to give advice and counsel to judges and judicial employees about prospective conduct which, if permissible, could occur in the future. The committee generally tries to avoid giving advice on past conduct which, if impermissible, would arguably have to be reported to the Commission on Judicial Conduct. In some instances, however, it is helpful to the judiciary as a whole to consider ethical issues that may arise after a judge has had time to reflect on what transpired in a case and whether his or her conduct measured up to proper standards. This opinion arises out of just such a case.

The committee believes that no *ex parte* communications occurred in the situation presented here. Canon 3B(7) of the Code of Judicial Conduct provides, in relevant part, that ". . . A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . . ." As we have noted before, "'[e]x parte' refers to actions taken 'at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested.'" Ariz. Op. 01-01 (Issue 1), quoting *Black's Law Dictionary* 597 (7th ed. 1999). If all the parties in a case are made aware of a communication with the court and are given an opportunity to be heard on an issue, then the communication is not an *ex parte* communication. Even when an *ex parte* communication has occurred, there are five exceptions to the general rule that either exempt the court from the strict application of the rule or permit the court to notify the parties and thereby correct the problem. In this instance, however, none of the exceptions were directly applicable to the facts or issues presented.

In the first instance involving telephonic discussions between counsel and the judge to resolve disclosure and discovery disputes, with a court reporter present and without formal papers being filed, there was no *ex parte* communication since all counsel were directly involved. This is not an uncommon situation, and it often occurs without a court reporter being present to record the telephonic proceedings. It is not unusual for discovery disputes to develop during the course of a deposition, where it is sometimes necessary and appropriate for counsel to contact the judge by telephone in order to resolve the dispute without formal papers being filed. This does not constitute an *ex parte* communication prohibited by Canon 3B(7) and should not be discouraged when it is necessary to communicate with the judge in this manner to promptly and efficiently move the case forward.

As to the other two issues presented, again, there technically were no *ex parte* communications since all counsel were copied with the letters, whether they were written directly to the judge or to other counsel with copies to the judge. However, even though there was no violation of Canon 3B(7) that would serve to disqualify the judge, these types of letter communications should be discouraged. They apparently were not for the purpose of obtaining any immediate relief necessitated by disclosure or discovery issues but were, rather, related to matters that should have been addressed by formal motions rather than by letters.

The key element in all of these issues is that the judge never communicated with only one attorney. Rather, all contacts, whether by telephone or letter, were shared with or participated in by all counsel and the judge. Under these circumstances, no violation of Canon 3B(7) occurred.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canon 3B(7) (1993).

Other References

Arizona Judicial Ethics Advisory Committee, Opinion 01-01 (Oct. 13, 2001).