

Avoiding Improper Ex Parte Communications

DISCIPLINARY COMMISSION

OPINION #2-24

Question

How can an attorney avoid improper *ex parte* communications while protecting client interests?

Short Answer

Indiana Trial Rule 5 and Indiana Professional Conduct Rule 3.5(b) require that all pleadings and orders be served on opposing parties, except in rare instances when matters are permitted by law to be heard *ex parte*.¹ Indiana Code of Judicial Conduct Rule 2.9 prohibits judicial officers from engaging in *ex parte* communication on pending or impending matters with limited exceptions. These limited exceptions include an exception for scheduling, administrative, or emergency purposes that do not address substantive matters and do not create a procedural, substantive, or tactical advantage for any party due to the communication. In addition, the judicial officer is required to promptly notify all parties to the matter of these *ex parte* communications and give them an opportunity to respond.

Parties are sometimes tempted to engage in *ex parte* communications with a judicial officer in family law matters via emergency petition when perceived time-sensitive issues arise regarding custody and visitation. To avoid an ethical violation, an attorney acting on a client's behalf in these circumstances may only request *ex parte* relief by strictly adhering to the mandates of Trial Rule 65(B).² To comply with Trial Rule 65(B), the following conditions must exist and be included in the pleading:

- 1) Specific facts shown by affidavit (or by verified complaint if not an existing matter) that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party can be heard on the motion;

¹ This opinion does not directly apply to proceedings that may involve custody issues, but which properly are *ex parte*, such as protective order cases, or other matters that operate pursuant to their own statutory provisions, such as juvenile detention or CHINS placement proceedings. Generally, it does apply to any petition for a temporary restraining order under Trial Rule 65(B), regardless of whether custody issues are involved. See *Matter of Jacobi*, 715 N.E.2d 873 (Ind. 1999).

² If the emergency circumstance relates to the safety of the party or the child, the party may petition for an *ex parte* protection order pursuant to I.C. 34-26-5-9.

- 2) A certification from the attorney to the court of what efforts, if any, have been made to give notice and/or specific reasons for why notice to the opposing party should not be required.

A practitioner who files an *ex parte* pleading asking for relief without a hearing and which does not include the above two items likely violates Rule 3.5(b). Likewise, any judge granting such relief without a hearing likely violates Judicial Conduct Rule 2.9.

Recommended Rules for Review

[Indiana Rules of Professional Conduct](#): 3.5(a), 3.5(b), 8.4(d), 8.4(f)

[Indiana Rules of Trial Procedure](#): 5, 65(B)

[Indiana Code of Judicial Conduct](#): 1.2, 2.2, 2.6, 2.9

Summary

The following general rules should be considered:

- 1) To the extent reasonably possible, all parties or their attorneys shall be included in communications with a judge. Indiana Professional Conduct Rule [3.5\(b\)](#). Indiana Code of Judicial Conduct Rule [2.9](#).
- 2) Any communication with a judicial officer addressing a substantive matter on a pending or impending matter that is made outside the presence of or without notice to the adverse party, unless authorized by law or court order, is an improper *ex parte* communication. Indiana Professional Conduct Rule [3.5\(b\)](#)
- 3) A misunderstood exception to the rules against *ex parte* communication with a judicial officer is the scheduling exception. Rule 2.9(A)(1) of the Indiana Code of Judicial Conduct permits parties to communicate with judicial officers for scheduling, administrative, or emergency purposes when required by the circumstances. However, the judicial officer must reasonably believe that no party will gain a procedural, substantive, or tactical advantage as a result of the communication. In addition, the judicial officer must promptly notify all other parties of such *ex parte* communication and give all other parties an opportunity to be heard. Indiana Code of Judicial Conduct Rule 2.9. Indiana Professional Conduct Rule 3.5(b).
- 4) An attorney who engages in an impermissible *ex parte* communication with a judicial officer not only violates Rule 3.5(b), but the attorney may also have engaged in conduct prejudicial to the administration of justice in violation of Indiana Rule of Professional Conduct 8.4(d) if significant harm is caused by the *ex parte* communication. Indiana Professional Conduct Rules [3.5\(b\)](#), [8.4\(d\)](#).
- 5) The general rule is that an attorney must provide notice to all other parties. This general rule applies to circumstances when filing emergency petitions on behalf of a parent or

guardian. Indiana Trial Rule 65(B) provides a limited exception to this notice requirement and allows a party to seek emergency *ex parte* relief for exigent circumstances. Trial Rule 65(B) requires the applicant seeking *ex parte* relief to show specific facts of the likelihood of immediate and irreparable injury to the applicant. Also, the applicant must certify to the court in writing of the applicant's efforts to notify other parties, if any, and reasons for supporting why notice should not be required. Indiana Professional Conduct Rule [3.5\(b\)](#). Indiana Rule of Trial Procedure [65\(B\)](#).

Ethical Minefields and Application of the Rules

Ethical Minefield #1 – Modification of Existing Custody Order

Hypothetical #1: Mother and Father have a custody agreement stipulating that Father has visitation with the Child every other weekend beginning on Fridays and that Father will ensure that Child is delivered to Child's football practice on Fridays in the fall. Last Friday, Child missed football practice because Father did not take Child. Mother informs her counsel, Attorney A, that she would like to have Father's visitation changed from beginning after school on Friday to beginning at 9:00 a.m. on Saturday mornings. Mother and Father have a contentious relationship, and Mother would like to modify the existing custody order without first notifying Father. Attorney A is seeking advice as to whether a Verified Petition to Modify Custody can ethically be filed without notifying Father.

While navigating the contentious interpersonal relationships of a client can be difficult, especially when a child is involved, Attorney A must provide notice and an opportunity to be heard to Father. In this instance, a child missing a football practice does not constitute an exigent circumstance warranting emergency relief.³ If Attorney A files a Verified Petition to Modify Custody without providing notice to Father, Attorney A will be in violation of Professional Conduct Rule [3.5\(b\)](#). Mother's desired change to the custody agreement is an issue for a non-emergency modification order and hearing.

³ For examples of other circumstances that would not be considered emergencies for purposes of *ex parte* petitions for custody modifications, please review [Indiana Judicial Ethics Advisory Opinion #1-01](#).

If the facts are changed to Mother has serious, articulable concerns about the Child's safety while in the Father's home, Attorney A may petition for a temporary restraining order under Indiana Trial Rule [65\(B\)](#). Under Trial Rule [65\(B\)](#), Attorney A may avoid providing notice of the order to Father without being in violation of Professional Conduct Rule [3.5\(b\)](#) if Attorney A provides specific facts of an emergency and a certification, in writing, of the reasons supporting the claim that notice to Father should not be required. To succeed on such a petition, Attorney A must establish not only the potential for irreparable harm but the likelihood that such harm will occur before Father, the adverse party, can be heard. A good rule of thumb is that if a party is seeking to change the timing of the visitation only (as opposed to ceasing visitation altogether), an emergency does not exist that justifies a party seeking *ex parte* relief under Trial Rule 65(B).

Ethical Minefield #2 – Last-Minute Change to Visitation Schedule

Hypothetical #2 – Mother, Father, and Stepmother have a custody agreement stipulating that Father and Stepmother will have the Children during every other break from school. This year, Father and Stepmother have visitation with Children during spring break. Without consulting Father or Mother, Stepmother booked a non-refundable trip to Disney World set to start two days before the spring break visitation is scheduled to begin. Father asks his Attorney to file a last-minute motion adjusting the start time of visitation. Attorney B files the motion but does not provide notice to Mother to avoid resistance to the client's request. Attorney B also does not certify the Attorney's efforts to provide notice or the reasons supporting a claim that notice should not be required.

By failing to provide notice of the motion to Mother, Attorney B has engaged in improper *ex parte* communications with the presiding judge in violation of Professional Conduct Rule [3.5\(b\)](#). Attorney B also has not acted in accordance with the requirements of Trial Rule [65\(B\)](#) by failing to specify the immediate and irreparable injury or to certify to the court, in writing, the claim that notice should not be required and the reasons supporting the claim. Had Attorney B followed Trial Rule [65\(B\)](#), Attorney B's *ex parte* communication would still have violated Professional Conduct Rule [3.5\(b\)](#) because the client seeking *ex parte* relief cannot show that she would suffer immediate and irreparable injury under Trial Rule 65(B).

Attorney B should advise the client that *ex parte* requests and orders affecting custodial rights are only granted in extraordinary circumstances and depend upon a showing of that irreparable

injury, loss, or damage will occur if immediate relief is not granted.⁴ Although Attorney's clients would surely be upset about the monetary loss associated with a late start to vacation plans, non-refundable deposits and poor planning by Stepmother are not exigent circumstances resulting in irreparable harm for purposes of Trial Rule [65\(B\)](#).

Ethical Minefield #3 – Emergency Motion to Suspend Visitation

Hypothetical #3 – Mother is the custodial guardian for a Child she shares with Father. Mother and Father have a custody agreement permitting Father to have visitation with Child one weekend per month. Father recently entered a new relationship and has expressed a desire for his new Partner to meet Child. Mother approaches her attorney (Attorney A) about suspending Father's visitations with Child. Attorney A files an emergency motion to suspend visitation, without providing notice to Father. The judge issues an order suspending Father's visitation immediately without a hearing. Father is not aware of the suspension of his rights until he arrives for his monthly visitation and is denied visitation by Mother.

The scenario above implicates not only Professional Conduct Rule [3.5\(b\)](#) and Trial Rule [65\(B\)](#), but also Judicial Conduct Rule [2.9](#). Mother's desire to avoid Child having contact with Father's new partner is not an exigent circumstance resulting in irreparable harm to Mother or Child; therefore, Attorney A engaged in an improper *ex parte* communication with the presiding judge by filing the emergency motion without proper notice to the adverse party.

The judge in this scenario erred in ruling on the motion to suspend visitation, as notice was not provided to Father and no certification was provided to support why notice to Father should not have been required. Judicial Conduct Rule [2.6](#) provides that a judge "shall accord every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard."⁵ By accepting the emergency motion and issuing the order suspending Father's visitation, the judge not only engaged in improper *ex parte* communications in violation of Judicial Conduct Rule [2.9](#), but the judge also encroached upon Father's substantive right to be heard.⁶

As in Hypothetical #1, if Mother has good reason to believe Father's new partner would be a danger to Child, Attorney A can file for an emergency temporary restraining order enjoining

⁴ See also [Indiana Judicial Ethics Advisory Opinion #1-15](#).

⁵ See also [Comment 1 to Judicial Conduct Rule 2.6](#), which explicitly states that the substantive rights of litigants can only be protected if procedures protecting the right to be heard are observed.

⁶ See [Indiana Judicial Ethics Advisory Opinion #1-01](#) for analysis of the steps that should be taken by a judge when considering whether to affect custodial rights *ex parte*.

Father from bringing the Partner with him to monthly visitations and allege the required elements of Trial Rule 65(B). Attorney A may also file a modification order and request a hearing to evaluate the custody agreement, with proper notice provided to all parties.

Ethical Minefield #4 – Altering an Existing Order of Protection

Hypothetical #4: Attorney B has been retained to represent Wife in divorce proceedings against Husband, against whom Wife has an order of protection. Husband's attorney obtained an order permitting Husband to enter a shared marital property to remove Husband's personal effects before a sale of the property. Wife now wishes to alter the existing order of protection to prevent Husband from accessing the property. Attorney B then approaches the presiding judge at a local community event and has an off-the-record conversation about Wife's desire to alter the existing protection order. The following day, Attorney B files an emergency motion to alter the order of protection to prevent Husband from entering the property, without providing notice to Husband or Husband's attorney. The judge grants the motion later that same day, without a hearing.

In the scenario above, Attorney B engaged in improper *ex parte* communications in violation of Professional Conduct Rule [3.5\(b\)](#) by having an off-the-record conversation with the presiding judge and by filing the emergency motion regarding a substantive matter without providing proper notice to Husband. Additionally, by approaching the judge and having an off-the-record conversation about Wife's interest in altering the existing protection order, Attorney B improperly sought to influence the judge in violation of Professional Conduct Rule [3.5\(a\)](#) and committed conduct prejudicial to the administration of justice in violation of Professional Conduct Rule [8.4\(d\)](#).

Wife's desire to ban Husband from their shared marital property would not be an exigent circumstance for purposes of Trial Rule [65\(B\)](#) unless Attorney B would be able to provide evidence to the court that Husband would likely cause irreparable loss or damage if immediate relief was not granted. If Attorney B had not approached the judge privately regarding the matter and, instead, had filed a certification with the court of the claim that notice to Husband should not be required and the reasons supporting the claim, Attorney B's filing would be a permissible *ex parte* communication if Attorney B is able to specify facts of immediate and irreparable harm. However, without such a certification, Attorney B's actions were not in accordance with Trial Rule [65\(B\)](#).

The judge in this scenario issued an order that was based on improper *ex parte* communications in violation of Judicial Conduct Rules 1.2, 2.2, 2.6, and [2.9](#).

Ethical Minefield #5 – Inherently Unfair Fee Agreements

Hypothetical #5: Attorney A was retained to represent the maternal Grandparents of a Child in a custody proceeding after the death of the Child's Mother. Under the existing order, Mother had sole physical and legal custody of Child with Father having long distance visitations rights. The Grandparents seek to obtain custody of Child and take Child with them to their native France. Attorney A files on behalf of the Grandparents a guardianship petition requesting emergency custody of Child because Child's Mother died, Father has only been a part-time care giver, and Grandparents want to return to France. Attorney A does not serve the petition on Child's Father, who lives out of state, nor does Attorney A certify any attempts made to serve Father or the reasons why notice should not be required. A hearing on Attorney A's petition is held shortly after the filing of the petition, again with no notice to Father, and Grandparents are subsequently granted custody of Child. Grandparents then return to France with Child. Father does not discover that Grandparents were granted custody until the Child is out of the country; Father then immediately files a motion to correct error.

Attorney A engaged in improper *ex parte* communication with the presiding judge under Professional Conduct Rule [3.5\(b\)](#) by filing the emergency guardianship petition requesting a change in custody without providing proper notice to Father or the proper certification for why notice should not be required under Trial Rule [65\(B\)](#). Without exigent circumstances or risk of irreparable harm, Grandparents' custodial interests do not outweigh Father's substantive right to be heard regarding custody.

The presiding judge in this scenario erred in holding a hearing and ruling on Attorney A's petition outside of Father's presence when Trial Rule [65\(B\)](#) was not followed and there was no alleged risk of irreparable harm to the Child. When considering whether to affect custodial rights, a judge should be cautious to preserve the rights of the opposing party. To safeguard these rights, a judge should scrutinize the merits of the petition to ensure compliance with Trial Rule 65(B) before granting an emergency *ex parte* motion or petition, regardless of whether the

filing is brought as an emergency petition for guardianship or an emergency motion to modify custody, or some other emergency pleading to alter an existing custody order.⁷

Ethical Minefield #6 – Charging for Preparation of a Response to Grievance

Hypothetical #6 – Attorney B, who represents Mother, has a pending child support matter before Judge A in which Father is proceeding pro se. Attorney B and Judge A have minimal professional contacts and do not socialize with each other. They both have children who participated in a state “We the People” civics competition, and Attorney B took pictures during the awards ceremony. Prior to a hearing in the child support matter, Attorney B asks Judge A if the judge would like to see the pictures, and Judge A and Attorney B go into chambers to review the pictures. Judge A and Attorney B come out of chambers and enter the courtroom together. Father is concerned that Judge A and Attorney B were discussing the child support motion in chambers without him.

In the above scenario, Attorney B (and Judge A) have not engaged in an improper *ex parte* communication that would violate Professional Conduct Rule 3.5 or Judicial Conduct Rule 2.9. Nonetheless, attorneys and judges must be mindful about the appearance cast when an attorney meets with a judge in the judge’s chambers immediately prior to a hearing when other parties are not present. Outside observers may believe that the attorney has special influence over the judge or that substantive matters about the case were discussed. To avoid the filing of grievances against them, attorneys and judges should avoid this behavior.

Conclusion

The general rule is that attorneys and judges should avoid communicating about pending or impending matters outside the presence of all other parties or their lawyers. The prohibition against an attorney’s *ex parte* communication with a judicial officer stems from the need to protect the due process rights of all parties to a case. These due process rights mean that judicial officers should make sure that all parties to a case have notice of any communication with the judge and an opportunity to be heard on each issue presented to the judicial officer.

As such, attorneys should avoid engaging in *ex parte* communications with a court. Even when an attorney believes a communication is only administrative and believes there is no risk of receiving a substantive, procedural, or tactical advantage over the other parties, the best

⁷ See [Indiana Judicial Ethics Advisory Opinions #1-01 and #1-15](#).

practice is for an attorney to notify all parties of any communication with a judge because a judge still needs to notify all parties of these administrative communications and allow all other parties to be heard on these administrative matters.

In short, attorneys should not communicate with a judicial officer about a case without notice to the other parties unless there is a true emergency. To preserve the substantive and procedural rights of parties to be heard, the filing of emergency *ex parte* petitions should be limited to the most extraordinary of circumstances for which irreparable injury, loss, or damage would occur without immediate relief. Instead, efforts should be directed at communication among parties and if impossible, among their lawyers, to sort out issues that do not amount to these rare exigent circumstances.

This nonbinding advisory opinion is issued by the Indiana Supreme Court Disciplinary Commission in response to a prospective or hypothetical question regarding the application of the ethics rules applicable to Indiana judges and lawyers. The Indiana Supreme Court Disciplinary Commission is solely responsible for the content of this advisory opinion, and the advice contained in this opinion is not attributable to the Indiana Supreme Court.