

Limitations on Ex Parte Communications in New England

Compilation of New England State Statutes, Regulations and Codes

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CONNECTICUT
EX PARTE
MATERIALS

§ 4-181. Contested cases. Communications by or to hearing officers and members of an agency.

Connecticut Statutes

Title 4. MANAGEMENT OF STATE AGENCIES

Chapter 54. UNIFORM ADMINISTRATIVE PROCEDURE ACT

Current through 2017 Special Sessions

§ 4-181. Contested cases. Communications by or to hearing officers and members of an agency

- (a) Unless required for the disposition of ex parte matters authorized by law, no hearing officer or member of an agency who, in a contested case, is to render a final decision or to make a proposed final decision shall communicate, directly or indirectly, in connection with any issue of fact, with any person or party, or, in connection with any issue of law, with any party or the party's representative, without notice and opportunity for all parties to participate.
- (b) Notwithstanding the provisions of subsection (a) of this section, a member of a multimember agency may communicate with other members of the agency regarding a matter pending before the agency, and members of the agency or a hearing officer may receive the aid and advice of members, employees, or agents of the agency if those members, employees, or agents have not received communications prohibited by subsection (a) of this section.
- (c) Unless required for the disposition of ex parte matters authorized by law, no party or intervenor in a contested case, no other agency, and no person who has a direct or indirect interest in the outcome of the case, shall communicate, directly or indirectly, in connection with any issue in that case, with a hearing officer or any member of the agency, or with any employee or agent of the agency assigned to assist the hearing officer or members of the agency in such case, without notice and opportunity for all parties to participate in the communication.
- (d) The provisions of this section apply from the date the matter pending before the agency becomes a contested case to and including the effective date of the final decision. Except as may be otherwise provided by regulation, each contested case shall be deemed to have commenced on the date designated by the agency for that case, but in no event later than the date of hearing.

Cite as Conn. Gen. Stat. § 4-181

Source:

1971, P.A. 854, S. 16; P.A. 88-317, S. 19, 107; P.A. 89-174, S. 3, 7.

Note: P.A. 88-317 designated former section as Subsec. (a) and amended Subsec. (a) to apply restriction on communications to a "hearing officer or member of any agency" instead of to "members or employees of an agency", to insert "final", to substitute "proposed final decision" for "findings of fact and conclusions of law in a contested case", and to make technical changes, deleted provision authorizing agency members to communicate with each other and to have the aid and advice of personal assistants and substituted new Subsec. (b) re communications among

members of multimember agency and receipt of aid and advice by members of an agency or a hearing officer and added new Subsec. (c) re communications involving parties, intervenors, other agencies and persons having an interest in the outcome and new Subsec. (d) re period when section applicable, effective July 1, 1989, and applicable to all agency proceedings commencing on or after that date; P.A. 89-174 deleted provision in Subsec. (b) which had required agency to disclose in case record identity of employees or agents communicating with an agency member or a hearing officer.

Case Notes:

Cited. 168 C. 435; 171 C. 691; 172 C. 263; 173 C. 462; 183 C. 128; 186 C. 153; 191 C. 173. Once violation of statute proved by party seeking relief, burden shifts to agency to prove no prejudice resulted from prohibited ex parte communication; waiver of claim to disqualification discussed. 202 C. 453. Where record shows prima facie violation of section, burden shifted to agency to prove no resulting prejudice. 207 C. 296. Cited. 212 C. 471; 215 C. 49; 226 C. 105; 239 C. 32.

Cited. 1 CA 1. To be entitled to relief, plaintiff must show prejudice to his rights resulting from an ex parte communication in violation of statute. 4 CA 143. Cited. 9 CA 622; 27 CA 495; judgment reversed, see 225 C. 499; 36 CA 587; 37 CA 777; 43 CA 512; 44 CA 622. Investigator's report cannot be construed as ex parte communication where other party has notice of report and opportunity to participate in presentation of allegations to the fact finder. 47 CA 325. Plaintiff was deprived of due process of law when commissioner engaged in ex parte communications with plaintiff's former attorney and issued unilateral order awarding attorney's fees without providing plaintiff with notice or opportunity to present evidence. *Id.*, 391.

Subsec. (b):

Cited. 37 CA 653; judgment reversed, see 238 C. 361. It was not improper for zoning commission to consider memorandum after close of public hearing because it was sent from one commission member to another concerning commission's deliberations and contained a summary of the member's opinion. 112 CA 484.

Connecticut Public Utilities Regulatory Authority

Sec. 16-1-28. Ex parte communication

Unless required for the disposition of ex parte matters authorized by law, neither the commissioners nor any member of the Authority staff designated as a presiding officer shall communicate directly or indirectly with any person or party concerning any issue of fact or law involved in any contested case that has been commenced under these rules, except upon notice and opportunity for all parties to participate. The Authority staff member designated as presiding officer and the commissioners may severally communicate with each other ex parte and may have the aid and advice of such members of the Authority staff as are designated to assist them in such contested case. This rule shall not be construed to preclude such necessary routine communications as are necessary to permit the Authority staff to investigate facts and to audit the applicable records of any party in a contested case at any time before, during and after the hearing thereof. (Effective December 21, 1971; Amended February 5, 2016)

Connecticut Rules of Professional Conduct

Rule 3.5. Impartiality and Decorum (Amended June 26, 2006, to take effect Jan. 1, 2007.)

A lawyer shall not:

- (1) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (2) Communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (3) Communicate with a juror or prospective juror after discharge of the jury if:
 - (a) the communication is prohibited by law or court order;
 - (b) the juror has made known to the lawyer a desire not to communicate; or
 - (c) the communication involves misrepresentation, coercion, duress or harassment; or
- (4) Engage in conduct intended to disrupt a tribunal or ancillary proceedings such as depositions and mediations. (P.B. 1978-1997, Rule 3.5.) (Amended June 26, 2006, to take effect Jan. 1, 2007)

COMMENTARY: Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions. During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order. A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication. The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Connecticut Code of Judicial Conduct

Rule 2.9 Ex Parte Communications

(a) 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 or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(A) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(B) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and gives the parties an opportunity to respond.

(2) 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 and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and to respond to the notice and to the written advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record and does not abrogate the responsibility personally to decide the matter.

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

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

(b) If a judge inadvertently receives an unauthorized ex parte communication bearing on the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(c) A judge serving as a fact finder shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(d) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control. (Effective Jan. 1, 2011.)

COMMENT:

(1) To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

(2) Whenever the presence of a party or notice to a party is required by this Rule, 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.

(3) The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

(4) A judge may initiate, permit, or consider ex parte communications expressly authorized by law.

(5) A judge may consult with other judges on pending matters but must avoid ex parte discussions of a case with judges who are disqualified from hearing the matter and with judges who have appellate jurisdiction over the matter.

(6) The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic. Nothing in this Rule is intended to relieve a judge of the independent duty to investigate allegations of juror misconduct. See *State v. Santiago*, 245 Conn. 301, 715 A.2d 1 (1998).

(7) A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of subsection (a) (2).

MAINE
EX PARTE
MATERIALS

Maine Revised Statutes

Title 5: ADMINISTRATIVE PROCEDURES AND SERVICES

Part 18: ADMINISTRATIVE PROCEDURES

Chapter 375: MAINE ADMINISTRATIVE PROCEDURE ACT

Subchapter 4: ADJUDICATORY PROCEEDINGS

§9055. Ex parte communications; separation of functions

1. Communication prohibited. In any adjudicatory proceeding, no agency members authorized to take final action or presiding officers designated by the agency to make findings of fact and conclusions of law may communicate directly or indirectly in connection with any issue of fact, law or procedure, with any party or other persons legally interested in the outcome of the proceeding, except upon notice and opportunity for all parties to participate.

[1985, c. 506, Pt. A, §5 (AMD) .]

2. Communication permitted. This section shall not prohibit any agency member or other presiding officer described in subsection 1 from:

A. Communicating in any respect with other members of the agency or other presiding officers; or
[1977, c. 551, §3 (NEW).]

B. Having the aid or advice of those members of his own agency staff, counsel or consultants retained by the agency who have not participated and will not participate in the adjudicatory proceeding in an advocate capacity. [1979, c. 425, §11 (AMD).]

[1979, c. 425, §11 (AMD) .]

SECTION HISTORY

1977, c. 551, §3 (NEW). 1979, c. 425, §11 (AMD). 1985, c. 506, §A5 (AMD).

The Revisor's Office cannot provide legal advice or interpretation of Maine law to the public.

If you need legal advice, please consult a qualified attorney.

[Office of the Revisor of Statutes \(mailto:webmaster_ros@legislature.maine.gov\)](mailto:webmaster_ros@legislature.maine.gov) • 7 State House Station • State House Room 108 • Augusta, Maine 04333-0007

Maine Public Utilities Commission

Chapter 110 (Rules of Practice and Procedure)

Section 8 (Adjudicatory Proceedings: General Provisions)

G. Ex Parte Communications

1. Ex Parte Communications Prohibited

- a. Throughout any adjudicatory proceeding:
 - i. no commissioner, presiding officer, or other advisory staff member in a proceeding shall communicate, directly or indirectly with any party, including a proposed intervenor, or any other person legally interested in the outcome of the proceeding; and
 - ii. no party, including a proposed intervenor or person legally interested in the outcome of a proceeding shall communicate, directly or indirectly, with any commissioner, presiding officer, or other advisory staff member in connection with any potential decision in the case or any issue of fact, law or procedure, except upon notice and opportunity for all parties to participate as provided in these rules or pursuant to order of the presiding officer.
- b. Any Commissioner, presiding officer, other advisory staff member, party or representative of a party making or receiving an ex parte communication prohibited by this section shall, within 48 hours after first having reason to believe the communication was prohibited, disclose the substance of such communication to all parties to the proceeding.

Report

2. Prohibited Communications after Issuance of Presiding Officer's

- a. In an adjudicatory proceeding, after the issuance of the presiding officer's report or proposed findings, no person shall make any direct or indirect communication to any commissioner, presiding officer, or other advisory staff member in connection with any potential or proposed decision in the proceeding or any issue of fact, law or procedure, except for the filing by a party of a response or exceptions to the report or proposed findings as permitted by section 752(b), or except as permitted by order or prior approval of the Commission or presiding officer, or except as by motion

pursuant to section 1004. In the event any of the above receive such a communication it should be disclosed as required in Section F(A)(2) above.

- b. In the event that the Commission receives a communication that violates the prohibition contained in subsection (a), the communication shall be disclosed as required in (G)(1)(b) above.
- c. No party in a proceeding shall request, encourage, suggest, or provide any assistance to any other person to make a communication that would violate subsection (a) of this section.

3. **Communications Permitted**

This section shall not prohibit:

- a. Any commissioner or presiding officer from communicating in any respect with commissioners or presiding officers; or
- b. Any commissioner or presiding officer from having the aid or advice of those members of the Commission staff, counsel or consultants retained by the Commission who have not participated and will not participate in the Commission proceeding in an advocate capacity; or
- c. Inquiry by a party, a commissioner, a presiding officer, or other advisory staff member concerning the status of any event contained in the procedural schedule, any filing, or any order.
- d. Individual communications between any party and members of the Commission's advocacy staff or between any party and any staff members in a non-adjudicatory proceeding.

4. **Proposed Findings or Decisions**

No party or representative of any party shall prepare and forward proposed or draft findings or final decisions of any matter pending before the Commission to any Commissioner, presiding officer or advisory staff member unless such party or representative has been requested to do so by the Commissioner or presiding officer. Any party making a procedural motion to the Commission or presiding officer may append a proposed procedural order to the motion.

Maine Rules of Professional Conduct

3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other tribunal official by means prohibited by law; nor shall a lawyer, directly or indirectly give or lend anything of value to a judge, tribunal official, or employee of a tribunal unless the personal or family relationship between the lawyer and the judge, tribunal official, or employee is such that gifts are customarily given and exchanged;

(b) communicate ex parte with such a person, directly or indirectly, during the proceeding, concerning such proceeding, unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;*

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal; or

(e) fail to reveal promptly to the court knowledge of improper conduct by a juror, prospective juror, or member of the jury pool, or by another toward a juror or member of the jury pool or a member of a juror's or jury pool member's family.

Paragraph 3.5(a) does not preclude contributions to election campaigns of public officers.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order. In particular, in the absence of opposing counsel, a lawyer shall not directly or indirectly communicate with or argue before a judge or tribunal upon the merits of a contested matter pending before such judge or tribunal, except in open court; nor shall the lawyer, without furnishing opposing counsel with a copy thereof, address a written communication to a judge or tribunal concerning the merits of a contested matter pending before such judge or tribunal. Subparagraph (b) does not preclude communications permitted by rule of court. For purposes of subparagraph (b), the term "opposing counsel" includes a party who has no counsel.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order (as it is with federal jurors in Maine) but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication. At no time shall a lawyer connected with a trial of a

case, communicate extra judicially, directly or indirectly, with a juror or anyone the lawyer knows to be a member of the pool from which the jury will be selected, or with any member of such person's family.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

REPORTER'S NOTES:

Model Rule 3.5 (2002) is generally in accord with existing Maine law, but is somewhat less specific than the analogous Maine Bar Rules. The corresponding Maine Bar Rules are M. Bar R. 3.7(e)(2)(vi), 3.7(h)(1) and 3.7(h)(2). Because the Task Force thought it was a good idea to offer more explicit guidance on the issue of a lawyer's obligation to be impartial and his or her responsibility to exercise decorum in the context of appearing before a tribunal, it recommended adoption of Model Rule 3.5 (2002) and its corresponding Comments, as revised to reflect existing Maine law and practice.

The Task Force wanted to draw attention to a clear distinction between state and federal law with respect to the issue of communication with a juror or prospective juror, following such juror's discharge from the jury. While post-discharge communication is allowed under state law, it is prohibited in Maine under federal law.

FOOTNOTE

* There is a distinction with respect to communication with a juror or prospective juror, after discharge of the jury panel, under state and federal law in Maine.

Maine Code of Judicial Conduct

Rule 2.9 Ex Parte Communications

A. 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 or their lawyers concerning a pending or impending matter except as follows:

1. Where circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes that does not address substantive matters is permitted, provided:

a. The judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

b. The judge makes provision promptly to notify all other parties of the substance of the ex parte communication and gives the parties an opportunity to respond.

2. A judge may obtain the written advice of a disinterested expert on the law applicable to a specific proceeding before the judge if the judge (a) gives notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and (b) affords the parties a reasonable opportunity to object and respond to the notice and the advice requested.

3. A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record and does not abrogate the responsibility personally to decide the matter.

4. A judge may, with the consent of the parties, confer separately with the parties with or without their lawyers present, or separately with their lawyers alone.

5. A judge may initiate or consider any ex parte communications when expressly authorized by law, court rule, or administrative order to do so, such as when serving in judicially assisted settlement conferences or on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, counsel, treatment providers, probation officers, social workers, and others.

B. If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

C. Except when receiving case-related information about events in or around the courthouse that is relevant to assuring a fair trial and protecting the integrity of the judicial process, a judge shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be judicially noticed.

D. A judge shall make reasonable efforts, including by providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

MASSACHUSETTS
EX PARTE
MATERIALS

Massachusetts Department of Public Utilities

220 CMR 1.00: Procedural Rules

1.02: General Provisions

* * * *

(9) *Ex Parte* Communications in Adjudicatory Proceedings.

(a) From the initial filing in an adjudicatory proceeding until the rendering of a final decision, a Commissioner, presiding officer, or staff member of the Department may not communicate with a party or interested person about any substantive issue of fact, law, or policy except upon reasonable notice and opportunity for all parties to participate.

(b) Communications not prohibited by 220 CMR 1.02(9)(a) include:

1. Communications concerning scheduling, administrative, and other procedural matters; and
2. Communications between a party and assigned settlement intervention staff for the purpose of producing a settlement, or communications between a party and staff assigned to conduct alternative dispute resolution or mediation proceedings.

(c) If a person makes or attempts to make an *ex parte* communication prohibited by 220 CMR 1.02(9)(a), the Commissioner, presiding officer, or staff member shall advise the person that the communication is prohibited and shall immediately terminate the prohibited communication.

(d) If a Commissioner, presiding officer, or staff member violates the *ex parte* rule, he or she shall, no later than two business days after determining that the communication was prohibited, serve on each party and place in the docket file the following:

1. A written statement including the substance and circumstances surrounding the communication; the identity of each person who participated in the communication; the time, date, and duration of the communication; and whether, in his or her opinion, the receipt of the *ex parte* communication disqualifies him or her from further participation in the adjudicatory proceeding; and
2. Any written or electronic documentation of the communication.

The above documents to be placed in the docket file shall not be made a part of the evidentiary record.

(e) The Department may, upon the motion of any party or on its own motion, accept or require the submission of additional evidence of the substance of a communication prohibited by 220 CMR 1.02(9)(a).

(f) Upon receipt of a communication made or caused to be made by a party in violation of 220 CMR 1.02(9)(a), the Department may, to the extent consistent with the interests of justice, require the party to show cause why his or her claim or interest in the

adjudicatory proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(g) Where a party has violated 220 CMR 1.02(9)(a), the Department or presiding officer may take such action as is deemed appropriate within the circumstances.

Massachusetts Rules of Professional Conduct

Rule 3.5 Impartiality and Decorum of the Tribunal. (December 1, 2017)

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer, either directly or through communications with the judge or otherwise, a desire not to communicate with the lawyer; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
 - (4) the communication is initiated by the lawyer without the notice required by law; or
- (d) engage in conduct intended to disrupt a tribunal. Adopted March 26, 2015, effective July 1, 2015.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in S.J.C. Rule 3:09, the Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. Subject to the notice requirements discussed below, the lawyer may do so unless the communication is prohibited by law or a court order. For example, in most cases common-law principles bar inquiry into the contents of jury deliberations and the thought processes of jurors, but not into extraneous influences. The lawyer must respect the desire of the juror not to talk with the lawyer. Where a juror makes known to the judge a desire not to communicate with the lawyer, and the judge so informs the lawyer, the lawyer may not initiate contact with that juror, directly or indirectly. The lawyer may not engage in improper conduct during the communication.

[3A] If the lawyer wishes to initiate the communication with a juror or prospective juror after discharge of the jury, the lawyer must send notice of the lawyer's intent to initiate such contact to counsel for the opposing party or parties (or directly to the opposing party or parties, if not represented by counsel) five business days before contacting any juror. The notice must include a description of the proposed manner of contact and the substance of any proposed inquiry to the jurors, and, where applicable, a copy of any letter or other form of written communication the lawyer intends to send. The preferred method of initiating contact with a juror is by written letter, and the letter must include a statement that the juror may decline any contact with the lawyer or terminate contact once initiated. If the lawyer seeks to initiate contact through an oral

conversation (whether in person, by telephone, or otherwise), the lawyer is nonetheless required to provide opposing counsel or opposing parties with prior notice of the substance of the intended communication five business days before the contact is initiated. See *Commonwealth v. Moore*, 474 Mass. 541, 551-52 (2016).

[3B] If the juror initiates the communication with the lawyer and seeks to communicate about permissible subjects, such as the existence of extraneous influences on the jury deliberation process or the lawyer's performance during the trial, the lawyer is permitted to communicate with that juror after discharge of the jury without following these notice requirements.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(p).

Massachusetts Code of Judicial Conduct

Rule 2.9 Ex Parte Communications

(A) 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 or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may engage in ex parte communications in specialty courts, as authorized by law.

(3) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, subject to the following:

(a) a judge shall take all reasonable steps to avoid receiving from court personnel or other judges factual information concerning a case that is not part of the case record. If court personnel or another judge nevertheless brings information about a matter that is outside of the record to the judge's attention, the judge may not base a decision on it without giving the parties notice of that information and an opportunity to respond. Consultation is permitted between a judge, clerk-magistrate, or other appropriate court personnel and a judge taking over the same case or session in which the case is pending with regard to information learned from prior proceedings in the case that may assist in maintaining continuity in handling the case;

(b) when a judge consults with a probation officer, housing specialist, or comparable court employee about a pending or impending matter, the consultation shall take place in the presence of the parties who have availed themselves of the opportunity to appear and respond, except as provided in Rule 2.9(A)(2);

(c) a judge shall not consult with an appellate judge, or a judge in a different Trial Court Department, about a matter that the judge being consulted might review on appeal; and

(d) no judge shall consult with another judge about a pending matter before one of them when the judge initiating the consultation knows the other judge has a financial, personal or other interest that would preclude the other judge from hearing the case, and no judge shall engage in such a consultation when the judge knows he or she has such an interest.

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

(5) A judge may initiate, permit, or consider any ex parte communication when authorized by law to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication.

(C) A judge shall consider only the evidence presented and any adjudicative facts that may properly be judicially noticed, and shall not undertake any independent investigation of the facts in a matter.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court personnel.

NEW HAMPSHIRE
EX PARTE
MATERIALS

NEW HAMPSHIRE STATUTES RELATED TO EX PARTE COMMUNICATIONS

The Public Utilities Commission

363:12 Ethical Conduct Required. –

In addition to any other type of behavior or activity of a commissioner that is proscribed by RSA 363, a commissioner shall conduct himself and his affairs in accordance with a code of ethics that shall include, but not be limited to, the following elements:

- I. Avoidance of impropriety and the appearance of impropriety in all his activities;
- II. Performance of his duties impartially and diligently;
- III. Avoidance of all ex parte communications concerning a case pending before the commission;
- IV. Abstention from public comment about a matter pending before the commission and require similar abstention on the part of commission personnel;
- V. Require staff and personnel, subject to commission direction, to observe the standards of fidelity and diligence that apply to the commissioners;
- VI. Initiate appropriate disciplinary measures against commission personnel for unprofessional conduct;
- VII. Disqualify himself from proceedings in which his impartiality might be reasonably questioned;
- VIII. Inform himself about his personal and fiduciary interests and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children;
- IX. Regulate his extracurricular activities to minimize the risk of conflict with his official duties;
- X. Refrain from solicitation of funds for any political purpose although a commissioner may be listed as an officer, director, trustee of such organizations; and
- XI. Refrain from financial or business dealings which would tend to reflect adversely on his impartiality, although he may hold investments which do not come under the purview of his regulatory responsibilities, such as a family business.

Source. 1911, 164:2. 1913, 145:3. PL 237:11. 1935, 115:1. RL 286:11. 1951, 203:10 par. 11. RSA 363:12. 1979, 494:3, eff. Aug. 1, 1979.

Participation of Staff in Adjudicative Proceedings

Section 363:30

363:30 Definitions. –

In this subdivision:

- I. "Adjudicative proceeding" means the procedure to be followed in contested cases before the commission, as set forth in RSA 541-A:31 through RSA 541-A:35.
- II. "Advise" means to discuss, converse or communicate regarding testimony, written comments, discovery, motions, stipulations, evidence, memoranda of law, briefs, findings, conclusions,

decisions or orders in an adjudicative proceeding other than as a participant in the course of public proceedings.

III. "Decisional employee" means any commissioner, presiding officer or staff member in an adjudicative proceeding who is specifically assigned to render a decision or make findings of fact and conclusions of law or to assist or advise the commission or presiding officer with respect to issues of law, fact or procedure, in accordance with this subdivision.

IV. "Nonadjudicative proceeding" means any proceeding which is not adjudicative or which precedes the commencement of an adjudicative proceeding.

V. "Party" means an applicant, respondent, petitioner, participant, defendant, complainant, or intervenor in an adjudicative proceeding, and any agent or other person acting on behalf of the above.

VI. "Presiding officer" means the person designated by the commission to preside over a commission proceeding, as described in RSA 363:17. The presiding officer may be a member of the commission or any qualified member of its staff.

VII. "Staff" means the employees of the commission and any consultants and other contractors retained by the commission for the purpose of assisting the commission and its employees in providing advice or information, or for the purpose of supplementing the work of the commission and its employees.

VIII. "Staff advocate" means any staff member who is specifically assigned to advocate as a party with respect to issues arising in an adjudicative proceeding, whether by written or oral testimony, comments or otherwise, in accordance with this subdivision.

Source. 1994, 414:1, eff. Aug. 10, 1994.

Section 363:31

363:31 Exclusions. –

I. The provisions of this subdivision shall not apply to any communication:

- (a) Which is specifically authorized by law; or
- (b) Which is one to which all parties agree in writing or which may be made on the record without regard to the applicable provisions of this subdivision in the case of an adjudicative proceeding.

II. For the purposes of this subdivision, "ex parte communication" shall not include a communication with respect to an adjudicative proceeding if such communication:

- (a) Is a status report or request for a status report;
- (b) Relates to an uncontested matter of procedure; or
- (c) Is made in the course of another proceeding of the commission to which it primarily relates, and is on the public record.

Source. 1994, 414:1, eff. Aug. 10, 1994.

Section 363:32

363:32 Designation of Employees. –

I. Whenever the commission conducts an adjudicative proceeding in accordance with the provisions of RSA 541-A:31 through RSA 541-A:35, the commission shall designate one or

more members of its staff as a staff advocate, as defined in RSA 363:30, VIII, if requested by a party with full rights of participation in the proceeding, or upon its own initiative, when the commission determines that such members of its staff may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding.

II. Whenever the commission conducts an adjudicative proceeding in accordance with the provisions of RSA 541-A:31 through RSA 541-A:35, the commission may designate one or more members of its staff as a staff advocate, as defined in RSA 363:30, VIII, if requested by a party with full rights of participation in the proceeding, or upon its own initiative, at any time for good reason, including that: the proceeding is particularly controversial and significant in consequence; the proceeding is so contentious as to create a reasonable concern about staff's role; or it appears reasonable that such designations may increase the likelihood of a stipulated agreement by the parties.

III. Whenever the commission conducts an adjudicative proceeding in accordance with the provisions of RSA 541-A:31 through RSA 541-A:35, the commission may designate one or more members of its staff as a decisional employee, as defined in RSA 363:30, III, when the commission determines that such designation will contribute to the prompt and orderly conduct of the proceeding or is otherwise in the public interest.

IV. Unless the commission provides otherwise, any such designations shall only be applicable to a specified adjudicative proceeding. The commission shall make a list of all current designations available to the public.

Source. 1994, 414:1, eff. Aug. 10, 1994. 2010, 167:1, eff. Aug. 16, 2010.

Section 363:33

363:33 Phased or Segmented Proceedings. – If a proceeding is phased or segmented so that one or more parts of the proceeding are nonadjudicative and one or more parts are adjudicative, the commission may by order provide that each phase or segment shall constitute a separate proceeding for purposes of the application of this subdivision.

Source. 1994, 414:1, eff. Aug. 10, 1994.

Section 363:34

363:34 Ex Parte Communications in Adjudicative Proceedings. – Unless required for the disposition of ex parte matters authorized by law, in an adjudicative proceeding, decisional employees shall not communicate with any person or party, directly or indirectly, in connection with any issue in that proceeding, except upon notice and opportunity for all parties to participate. This notice requirement shall not apply to communications between or among commissioners, decisional employees, and personal assistants, including legal counsel, who have not been assigned as staff advocates in the adjudicative proceeding in question.

Source. 1994, 414:1, eff. Aug. 10, 1994.

Section 363:35

363:35 Separation of Function. – No employee designated as a staff advocate in an adjudicative proceeding may advise the commission, its presiding officer, individual commissioners, or any decisional employee designated as such in the same proceeding, with respect to matters at issue in the contested case.

Source. 1994, 414:1, eff. Aug. 10, 1994.

Section 363:36

363:36 Assessment of Costs. – The commission may recover additional costs which it incurs in the performance of its duties resulting from the designation of employees as staff advocates or decisional employees in the manner provided in RSA 363:27, I; RSA 365:37; or RSA 365:38.

Source. 1994, 414:1, eff. Aug. 10, 1994.

[Professional Conduct Rules Table of Contents](#)

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

ADVOCATE

Rule 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
- (d) engage in conduct intended to disrupt a tribunal.

2004 ABA Model Rule Comment

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

NEW HAMPSHIRE CODE OF JUDICIAL CONDUCT

Rule 2.9 *Ex Parte Communications*

(A) 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 or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) 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 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.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

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

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

Comment

[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[2] Whenever the presence of a party or notice to a party is required by this Rule, 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.

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[4] A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2).

RHODE ISLAND
EX PARTE
MATERIALS

TITLE 42

State Affairs and Government

CHAPTER 42-35

Administrative Procedures

SECTION 42-35-13

§ 42-35-13. Ex parte consultations.

Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render an order or to make findings of fact and conclusions of law in a contested case shall not, directly or indirectly, in connection with any issue of fact, communicate with any person or party, nor, in connection with any issue of law, with any party or his or her representative, except upon notice and opportunity for all parties to participate; but any agency member:

- (1) May communicate with other members of the agency, and
- (2) May have the aid and advice of one or more personal assistants.

History of Section.

(G.L. 1956, § 42-35-13; P.L. 1962, ch. 112, § 1; P.L. 1986, ch. 281, § 9.)

Rhode Island Public Utilities Commission

Rules of Practice and Procedure

Section 1.2 (The Commission)

(h) Ex Parte Communications.

(1) Except as permitted below, no person who is a party to or a participant in any proceeding pending before the Commission, or the person's counsel, employee, agent, or any other individual acting on the person's behalf, shall communicate ex parte with any Commissioner about or in any way related to the proceeding, and no Commissioner shall request or entertain any such ex parte communications.

(2) The prohibitions contained above do not apply to a communication from a party or participant or counsel, agent or other individual acting on the person's behalf, if the communication relates solely to general matters of procedure or scheduling and is directed to the Clerk or the Commission Counsel.

Rhode Island Rules of Professional Conduct

Rule 3.5. Impartiality and decorum of the tribunal. A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
- (d) engage in conduct intended to disrupt a tribunal. (As adopted by the court on February 16, 2007, eff. April 15, 2007.)

COMMENTARY

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

Rhode Island Code of Judicial Conduct

Rule 2.9 Ex Parte Communications

(A) A judge* shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the 18 parties or their lawyers, concerning a pending* or impending matter,* except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) in the absence of an agreement by the parties, the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to be heard.

(2) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

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

(4) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so.

(5) When administering a specialized problem-solving calendar established by statute or administrative order, a judge may initiate, receive, permit, or consider ex parte communications with treatment providers, probation officers, social workers, and others, where appropriate.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

COMMENT

[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[2] Whenever the presence of a party or notice to a party is required by this Rule, 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.

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[4] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.

[5] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

[6] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code.

VERMONT
EX PARTE
MATERIALS

§ 813. Ex parte consultations.

Vermont Statutes

Title 3. EXECUTIVE

Part 1. GENERALLY

Chapter 25. ADMINISTRATIVE PROCEDURE

Current through 2018 Legislative Session

§ 813. Ex parte consultations

Unless required for the disposition of ex parte matters authorized by law, members or employees of any agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his or her representative, except upon notice and opportunity for all parties to participate. An agency member:

- (1) May communicate with other members or employees of the agency; and
- (2) May have the aid and advice of one or more personal assistants.

Cite as 3 V.S.A. § 813

History. 1967, No. 360 (Adj. Sess.), § 13, eff. July 1, 1969.

Vermont Public Utilities Commission

Proposed Rule 2.200 (3-23-2018)

2.200 Procedures Generally Applicable

2.201 Practice Before the Commission

(E) Ex parte communications.

- (1) Prohibited communications. Unless required for the disposition of ex parte matters authorized by law, upon the filing in a contested case of a complaint, petition, application or other filing which the Commission has treated as the same, no member, employee, or agent of the Commission may communicate, directly or indirectly, in connection with any issue of fact, with any party or any ~~interested~~ person, or, in connection with any issue of law, with any party or any employee, agent, or representative of any party, except with the consent of all parties or upon notice and opportunity for all parties to participate
- ~~(2)~~ A member, employee, or agent of the Commission may communicate with a person or party about matters in a contested case that do not involve issues of fact or law, including but not limited to, scheduling and administrative issues.
- (3) Participation in decision. Unless required for disposition of ex parte matters authorized by law, any member, employee or agent of the Commission who has, in connection with a pending, contested case, except with the consent of all parties or upon notice and opportunity for all parties to participate, communicated in connection with any issue of fact with any party or interested person or, in connection with any issue of law, with any party or any employee, agent or representative of any party, shall not participate or advise in the decision, recommended decision or Commission review except as a witness or as counsel in public proceedings.
- ~~(34)~~ Improper communications by parties. Any person or party who, directly or through an employee, agent or representative, communicates or attempts to communicate with any member, employee or agent of the Commission on any subject so as to cause, or with the intent to cause, the disqualification of such member, employee or agent from participating in any manner in any proceeding, may be disqualified from subsequent participation in the proceeding, may be dismissed as a party to the proceeding, may be held in contempt of the Commission and/or may be deemed to have waived any objection to the subsequent decision by the Commission

with respect to any matter which is the subject of such communication.

(45) Exception. Notwithstanding any provision of subparagraph (1) or (23), above, members, employees, and agents of the Commission may communicate with other members, employees, or agents, provided that none of the latter has engaged in communications prohibited by (A1) above.

~~(6) An employee or agent of the Commission may, with the consent of the parties, confer separately with a party or their representative in an effort to mediate or settle matters pending before the Commission. Pursuant to (1), above, such employee or agent of the Commission may not participate in rendering a decision in such matters.~~

Vermont Rules for Professional Responsibility

Rule 3.3. CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] This rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of “tribunal.” It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate’s duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the

lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the comment to that rule. See also the comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows

the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this rule or as otherwise required or permitted by Rule 1.6.

Vermont Code of Judicial Conduct

Vt. A.O. 10 Canon 3 (2012)

A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

B. ADJUDICATIVE RESPONSIBILITIES.

* * * *

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.* 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 except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

- (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
- (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law* applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) 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. (e) A judge may initiate or consider any ex parte communications when expressly authorized by law* to do so.

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E. DISQUALIFICATION.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

- (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of disputed evidentiary facts concerning the proceeding, or is to serve as factfinder in a case in which the judge has conferred ex parte with the parties in an unsuccessful effort to mediate or settle the matter pursuant to Section 3B(7)(d);