

1 **RULE 2.9 *Ex Parte* Contacts and Communications with Others**

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

6
7 (1) When circumstances require it, an *ex parte communication* for scheduling,
8 administrative, or emergency purposes, that does not address substantive matters or
9 issues on the merits, is permitted, provided ~~both of the following apply:~~ ~~(a) The the judge~~
10 reasonably believes that no party will gain a procedural, substantive, or tactical advantage
11 as a result of the *ex parte* communication;

12
13 ~~(b) The judge makes provision promptly to notify all other parties of the~~
14 ~~substance of the *ex parte* communication, and gives the parties an opportunity to~~
15 ~~respond.~~

16
17 (2) A judge may obtain the ~~written~~ advice of a disinterested expert on the *law*
18 applicable to a proceeding before the judge, if the judge gives ~~advance~~ notice to the
19 parties of the person ~~to be~~ consulted and the subject-matter of the advice ~~to be~~ solicited,
20 and affords the parties a reasonable opportunity to object ~~and or~~ respond to ~~the notice and~~
21 ~~to the advice received;~~ ;

22
23 (3) A judge may consult with court staff and court officials whose functions are to aid
24 the judge in carrying out the judge’s adjudicative responsibilities, or with other judges,
25 provided the judge makes reasonable efforts to avoid receiving factual information that is
26 not part of the record and does not abrogate the responsibility personally to decide the
27 matter; ;

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

31
32 (5) A judge may initiate, receive, permit, or consider ~~any~~ an *ex parte communication*
33 when expressly authorized by *law* to do so;

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35 (6) A judge may initiate, receive, permit, or consider an *ex parte communication*
36 when presiding over a *specialized docket*, provided the judge reasonably believes that no
37 party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte*
38 *communication*.

39
40 (B) If a judge ~~inadvertently~~ receives an unauthorized *ex parte communication* bearing
41 upon the substance of a matter, the judge shall make provision promptly to notify the parties of
42 the substance of the communication and provide the parties with an opportunity to respond.

43
44 (C) A judge shall not investigate facts in a matter independently, and shall consider
45 only the evidence presented and any facts that may properly be judicially noticed.

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

52 [1] To the extent reasonably possible, all parties or their lawyers shall be included in
53 communications with a judge.
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55 [2] Whenever the presence of a party or notice to a party is required by this rule, it is
56 the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom
57 notice is to be given.
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59 [3] The proscription against communications concerning a proceeding includes
60 communications with lawyers, law teachers, and other persons who are not participants in the
61 proceeding, except to the limited extent permitted by this rule.
62

63 [4] A judge may initiate, receive, permit, or consider *ex parte* communications
64 expressly authorized by law, such as when ~~servicing on therapeutic or problem-solving courts,~~
65 ~~mental health courts, or drug courts:~~ (1) an indigent defendant demonstrates a particularized
66 need to retain an expert witness and has not determined whether the expert will testify at trial; (2)
67 the judge obtains information that may result in a confidential referral of counsel to a lawyers
68 assistance program [see Rule 2.14], or (3) in order to comply with Crim. R. 46(C) provided the
69 prosecutor and accused, or accused's attorney, are apprised of the information prior to any
70 decision that is made as a result of the information gathered by the judge or member of the
71 judge's staff.
72

73 [4A] A judge may initiate, receive, permit, or consider *ex parte* communications when
74 administering a specialized docket established under the authority of the Rules of
75 Superintendence or other law. In this capacity, judges may assume a more interactive role with
76 parties, treatment providers, probation officers, social workers, and others.
77

78 [5] A judge may consult with other judges on pending matters, but must avoid *ex*
79 *parte* discussions of a case with judges who have previously been disqualified from hearing the
80 matter and with judges who have appellate jurisdiction over the matter.
81

82 [6] The prohibition against a judge investigating the facts in a matter extends to
83 information available in all mediums, including electronic.
84

85 [7] A judge may consult ethics advisory committees, outside counsel, or legal experts
86 concerning the judge's compliance with this code. Such consultations are not subject to the
87 restrictions of division (A)(2).
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92 **Comparison to Ohio Code of Judicial Conduct**

93
94 Rule 2.9(A) is substantially comparable to Ohio Canon 3(B)(7).

95
96 Rule 2.9(A)(1) is substantially the same as Ohio Canon 3(B)(7)(a).

97
98 Rule 2.9(A)(2) is comparable to Ohio Canon 3(B)(7)(b).

99
100 Rule 2.9(A)(3) expands upon former Ohio Canon 3(B)(7)(c) by describing conduct a
101 judge should attempt to avoid when consulting with court staff and officials and other judges.

102
103 Rule 2.9(A)(4), dealing with the judge’s settlement authority, has no comparable
104 provision in the Ohio Code.

105
106 Rule 2.9(A)(5) is comparable to Ohio Canon 3(B)(7)(d).

107
108 Rule 2.9(A)(6), addressing the conduct of a judge who presides over a specialized docket,
109 has no comparable provision in the Ohio Code.

110
111 Rules 2.9(B), (C), and (D) have no comparable provisions in the Ohio Code.

112
113 **Comparison with ABA Model Code of Judicial Conduct**

114
115 The title to Rule 2.9 is modified to more accurately reflect the content of the rule.

116
117 Rule 2.9(A) is modified to add a prohibition against the receipt of an *ex parte*
118 communication, a concept contained in Ohio Canon 3(B)(7). Deleted from division (A) is a
119 reference to a judge’s consideration of other communications outside the presence of the parties
120 or their lawyers concerning a pending or impending matter. This phrase is incorporated in the
121 definition of “*ex parte* communication” found in the Terminology section of the Code.

122
123 Rule 2.9(A)(1) is modified to retain the provisions of Ohio Canon 3(B)(7)(a). Further,
124 Model Rule 2.9(A)(1)(b) is deleted because if a judge complies with provisions of the modified
125 rule, notice to the other parties is unnecessary.

126
127 Rule 2.9(A)(2) retains the concept of after-the-fact notification to the parties when the
128 judge obtains advice from a legal expert, as compared to the before-the-fact notice requirements
129 contained in the Model Rules. The advance notice requirements contained in Model Rule
130 2.9(A)(2) would be unworkable in many situations.

131
132 Rule 2.9(A)(6) is added due the increasing prevalence of specialized dockets in Ohio and
133 the necessity to make provision for the manner in which communications with parties and others
134 must occur to facilitate the proper administration of a specialized docket.

135
136 Comment [4] is divided into [4] and [4A] to treat two separate and distinct matters.
137 Comment [4] deals with *ex parte* communications authorized by law and addresses the

138 requirements in *State v. Mason* (1998), 82 Ohio St.3d 144 and *State v. Smith* (1991), 61 Ohio
139 St.3d 284, as well as the well-recognized confidentiality in Ohio for referrals to a lawyer
140 assistance program. Comment [4A] deals with *ex parte* communications that are necessary for
141 proper administration of a specialized docket.