

Children's Law Center of Indiana



Ex Parte Communications

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What is an ex parte communication and why is it harmful?

An ex parte communication is a one-sided communication with the judge. Black's Law Dictionary defines ex parte as "on one side only; by or for one party; done for in behalf of or on the application of, one party." Because ex parte communications strike at the fundamental fairness of the American legal system, judges and lawyers are forbidden by the Indiana Rules of court from engaging in ex parte communications. American law provides due process for participants in the legal system. Due process includes the right to notice of the complaint or criminal charge, the right to be notified of and to be present at a hearing, and the right to confront and cross-examine witnesses. Due process also allows a person the opportunity to present his own evidence and witnesses in support of his view of the events.

If the Guardian ad Litem (GAL) is not a legal party to the case, how can any communication with the judge be an ex parte communication?

In dissolution, guardianship, adoption, and other non-CHINS proceedings the GAL may not be considered by the Court to be a formal party to the case. Nevertheless, it is still unfair for the GAL to communicate one on one with the judge. Judges are not permitted to conduct their own investigation of a case and may not initiate contact with an expert outside the presence of the parties in an attempt to settle a matter. See Garrard v. Stone, 624 N.E.2d 68, 70 (Ind. Ct. App. 1993). If the judge talks to a person, even a non-party, outside the presence of the parties to the case, this creates an appearance of impropriety. Id. The impropriety cannot be cured by the outside person's testimony in court. The appearance of impropriety undermines public confidence in the judicial system. The judge shall perform the duties of judicial office impartially, competently, and diligently. See Ind. Judicial Cannon 2. In Garrard v. Stone, the judge's conversation with a custody evaluator outside the presence of the parties resulted in the decision of the Court of Appeals to send the case back to the trial court for a new trial before a different judge. A judge's out of court conversation with a GAL on any type of legal proceeding would likely have the same result.

How can ex parte communications harm the judge?

If the judge conducts an ex parte communication, he may be found to have violated the Indiana Code of Judicial Conduct, which specifically prohibits ex parte communications. Judicial Canon 2, Rule 2.9 states that a “judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers.” Judges who have violated this Canon can be disciplined by the Indiana Supreme Court. The judge can be publicly reprimanded. See In Re Morton, 770 N.E.2d 827 (Ind. 2002); In Re Bean, 529 N.E.2d 836 (Ind. 1988). The judge can be removed from office, suspended from the practice of law, or disbarred. See In Re Lewis, 535 N.E.2d 127 (Ind. 1989). Ex parte communications may also result in a lack of public confidence in the particular judge, which can cause the judge to lose a bid for re-election. Generally, a judge must disqualify himself when there exists a reasonable question regarding his impartiality. See Tyson v. State, 622 N.E.2d 457, 459 (Ind. 1993).

How can engaging in ex parte communication with the judge harm a lawyer for your GAL program?

A lawyer who seeks to influence a judge by means prohibited by law or who communicates ex parte with a judge during a proceeding has violated Ind. Professional Conduct Rule 3.5. The lawyer may be disciplined by the Indiana Supreme Court. Sanctions can include a public reprimand. See In Re Saint, 785 N.E.2d 1101 (Ind. 2003) (lawyer violated Prof. Cond. R. 3.5 by communicating ex parte with judge concerning substantive content of Ind. Trial Rule 60(B) motion in dissolution case) and In Re Marek, 609 N.E.2d 419 (Ind. 1993) (lawyer violated Prof. Cond. R. 3.5 by attaching handwritten note from herself to the judge along with her proposed findings of fact in a dissolution case without serving opposing lawyer with a copy of the note or making opposing lawyer aware of the existence of the note). See also In Re Cotton, 939 N.E.2d 619 (Ind. 2010) (lawyer for wife engaged in improper ex parte communication with judge concerning order for protection in dissolution case without contacting husband’s lawyer which resulted in property loss to husband). Other sanctions which can be imposed by the Supreme Court include suspension from the practice of law for a period of time or disbarment. Your program’s lawyer could also lose his reputation in the local bar which reflects negatively on your program.

How can ex parte communications harm the child for whom you are advocating?

Ex parte communications can cause the judge to recuse himself or to be removed from the case. This could cause a new trial, the need to have witnesses and evidence presented for a second time, and subsequent delays in deciding the child’s placement, adoption, custody or other important issues. See Garrard v. Stone, 624 N.E.2d 68, 70 (Ind. Ct. App. 2003) where the guardianship had to be retried before a new judge.

Are there any circumstances when ex parte communications are acceptable?

A judge is allowed by Judicial Canon 2 Rule 2.9 to have ex parte communications for scheduling, administrative purpose or emergencies which do not address substantive matters. This exception is

allowed if the judge has a reasonable belief that no party will gain procedural, substantive, or tactical advantages as a result of the ex parte communication. The judge must promptly notify the parties of the substance of the ex parte communication and give them an opportunity to respond. See Mahrtdt v. State, 629 N.E.2d 244, 248 (Ind. Ct. App. 1994). Examples of administrative matters could include: “When can you assign this case to a volunteer?” “Can your volunteer attend a hearing next Monday?”; “Can you attend a hearing on Friday to gather information for assigning this case?”

What can you do to minimize the effect of an inadvertent ex parte communication?

You should immediately contact all parties and tell them about the communication. A letter or note sent by facsimile proves the date and time that this contact was attempted. An email message could also be used. Follow-up by telephone to be sure the information was received by all parties. The In Re Morton opinion, 770 N.E.2d 827, 832 (Ind. Ct. App. 2002) states that the Judicial Qualifications Commission complaint against the judge might have been avoided by prompt disclosure of the ex parte communication and criminal referral to the Indiana State Police which the judge made as a result of the communication.

You may also make a copy of this document and give it to the judge in the county where your program represents children to help him focus on the problems associate with ex parte communication.