

**Nebraska Ethics Advisory Opinion for Lawyers  
No. 08-02**

AN UNSOLICITED LETTER SENT TO A JUDGE WHICH DISCUSSES  
SUBSTANTIVE ISSUES OF A CASE DOES NOT CONSTITUTE AN  
IMPROPER EX PARTE COMMUNICATION IF THE LETTER IS  
SIMULTANEOUSLY SENT TO OPPOSING COUNSEL.

**QUESTION PRESENTED**

Does an unsolicited letter sent to a judge which discusses substantive issues  
of a case constitute an improper ex parte communication if the letter is  
simultaneously sent to opposing counsel?

**FACTS**

An attorney sent a letter written to a judge following trial on the substantive  
issues of a case that was copied and sent simultaneously to the opposing party.  
The letter was not requested by the court and the attorney did not receive  
permission to send the letter beforehand.

**APPLICABLE RULES OF PROFESSIONAL CONDUCT**

**RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL**

(a) A lawyer shall not:

- (1) seek to influence the 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;

**DISTRICT 2, RULE 2-4 Correspondence with the Court**

All correspondence to the court regarding pending litigation shall refer to the subject case by case title, number and county, and a copy of such correspondence shall be mailed to opposing counsel. If the correspondence entails the transmittal

of pleadings or journal entries, orders or decrees, preaddressed stamped envelopes required for those purposes shall be enclosed therewith.

## DISCUSSION

Nebraska Rule 3.5(2) is not applicable to the question presented. The letter in question is not an “ex parte communication” because the opposing side was not excluded from the exchange. Because the opposing attorney was given a copy of the letter, that attorney is on notice of the arguments made and has an opportunity to refute them.

An ex parte communication is defined as, “A communication between counsel and the court when opposing counsel is not present.” Black’s Law Dictionary (8th ed. 2004). Further, Black’s 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 only.” *Id.* Black’s definition continues, “A judicial proceeding, order, injunction, etc., is said to be *ex parte* when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.” *Id.* (Emphasis in original).

Accordingly, the crucial aspect of determining whether a communication is ex parte is if the adverse party was given notice of the communication or had an opportunity to respond. The Nebraska Supreme Court has stated, “An ex parte communication occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party.” *In re Interest of Chad S.*, 263 Neb. 184, 187, 639 N.W.2d 84, 87 (2002); *State v. Ryan*, 257 Neb. 635, 648, 601 N.W.2d 473, 484 (1999); *State v. Lotter*, 255 Neb. 456, 473, 586 N.W.2d 591, 609-10 (1998). In the situation presented, the adverse party would have had notice because they were also sent a copy of the letter, therefore the communication would not be construed as an ex parte communication.

There are a number of listings under “ex parte communication” and “ex parte communications” in *Words and Phrases* that speak to this issue. *Words and Phrases* 15B at 65-66 (2004). In each of those instances, the factor that determined whether a communication was ex parte was whether the opposing counsel or party was included in some way in the communication. Although none of those cases describe an identical fact pattern to the case at hand, their holdings do support the proposition that the scenario in the case at hand was not an ex parte communication. For example:

- *US v. Changeo*, 1 F.3d 837 (9th Cir. 1993): A meeting between a district judge and lone dissenting juror was not an “ex parte communication” because defense counsel was present.

- *US v. Forbes*, 150 F.Supp.2d 672 (D.NJ 2001): An “ex parte communication” is a communication which takes place between one party and the court in a matter, without the presence of opposing party or parties, with or without notice to such other party or parties.
- *Matter of Endicott*, 157 BR 255 (W.D.Va. 1993): A written communication between trustee and bankruptcy judge, when the trustee submitted a proposed confirmation order to the judge without sending copies to the creditor’s counsel, was not an improper “ex parte communication” when the preparation of confirmation order was a mere administrative act consisting of the trustee’s completion of blank lines on a form on the basis of rulings the bankruptcy judge had already made in the presence of all objecting parties.
- *Guilbert v. Regents of University of California*, 93 Cal.App.3d 233 (1979): Where, after a university president wrote a letter to a disciplinary committee in which he observed that a two-week suspension without pay imposed on a university employee seemed excessive, a disciplinary decision was not changed on basis of any extrinsic evidence or information, but the penalty was merely mitigated in accordance with the opinion expressed by the university president in the letter, the letter did not constitute “ex parte communication” such as prohibited by law.
- *Brooks v. US*, 683 A.2d 1369 (DC 1995): A trial court’s in camera review of police documents which defendant sought in post-trial discovery motion with knowledge of both defendant and prosecution was not an “ex parte communication.”
- *Harris v. US*, 738 A.2d 269 (DC 1999): “Ex parte communications” that a judge may not initiate or consider involve fewer than all parties who are legally entitled to be present during the discussion of any matter and are prohibited in order to ensure that every person who is legally interested in a proceeding is given the full right to be heard according to law.
- *Spigener v. Wallis*, 80 S.W.3d 174 (Tex.App.—Waco 2002): “Ex parte communications,” in which members of the judiciary are prohibited from engaging, are those that involve fewer than all of the parties who are legally entitled to be present during discussion of any matter; they are barred in order to ensure that every person who is legally interested in a proceeding is given full right to be heard according to the law.

In each of the preceding definitions, “ex parte communications” are defined as not including the opposing side. In the case at hand, because the opposing attorney was also sent the letter that went to the judge, this scenario is, by definition, not an ex parte communication. Therefore, there was no violation of Nebraska Rule of Professional Responsibility 3.5.

The request to this Committee raises the case of *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988) as a concern. In *Barker*, the judge in a murder trial pursued a meeting with the victim's family without the presence of either the prosecutor or the defense attorney. 227 Neb. at 843, 420 N.W.2d at 696. Because it was an improper ex parte communication, the court held that the judge should have recused himself from sentencing the defendant. *Id.* at 854, 420 N.W.2d at 702. First, the court in *Barker* stated: “An ex parte communication...is a material error only if the adverse party is prejudiced by an inability to rebut the facts communicated and if improper influence on the decision maker appears with reasonable certainty to have resulted.” *Id.* at 846, 420 N.W.2d at 698 (quoting *State ex rel. Irby v. Israel*, 100 Wis.2d at 425, 302 N.W.2d at 525). Next, the court in *Barker* held that “a judge who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding, must recuse himself or herself from the proceedings when a litigant requests such recusal.” The question presented in connection with this request does not apply to either of these precedents. First, opposing counsel was not prejudiced by an inability to rebut the facts presented in the letter to the judge because opposing counsel was given a copy of the letter and, upon receiving the letter, was able to respond with his/her own arguments on the merits. Second, the judge in the case at hand did not initiate or invite the letter from the attorney in question, so the judge in the inquiry is not obligated to recuse him/herself.

Moreover, the attorney’s actions you described in your inquiry follow District 2 Rule 2-4. The opposing attorney was sent a copy of the correspondence in question. Thus, there is no violation of Rule 2.4.

## CONCLUSION

Based on the various definitions of “ex parte communication” as set out above, the question presented does not present a violation of the Nebraska Rules of Professional Conduct. An ex parte communication requires that the opposing side be precluded from the communication in question. Because the opposing attorney had the opportunity to respond to the arguments on the merits contained in the letter and the judge did not initiate the communication, there is no prejudice against the opposing counsel.