



Advisory Committee on the Code of Judicial Conduct

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February 26, 2021

RE: AO 21-03

Dear ~

You have requested an opinion from the Advisory Committee on the Code of Judicial Conduct concerning the applicability of the Code of Judicial Conduct to interactions between a judge and a mediator when the judge has referred the case to alternate dispute resolution. Specifically, you have asked the following questions:

- (1) whether, prior to mediation and outside of the presence of the parties, the judge may discuss the judge's concerns about the case and understanding of the parties' relative bargaining positions in order to inform the mediator about the case;
- (2) whether, after mediation, the mediator may inform the judge of the outcome of the mediation;
- (3) whether, if the mediation is successful, the mediator may inform the court about the terms of the settlement agreement;
- (4) whether, when the judge has ordered the mediation, the mediator is an arm of the court; and
- (5) if improper communications have taken place between the mediator and the judge, what remedial actions, if any, should be taken.

The issues you raise involve both ethical issues addressed in the Code of Judicial Conduct and procedural issues established by statute.

(1) Discussions with mediator prior to mediation

Generally, the Code prohibits a judge from engaging in ex parte communications. "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside of the presence of the parties or their lawyers, concerning a pending or impending matter" Rule 21-209(A) NMRA. Although a judge may, with the consent of the parties, "confer separately with the parties and their lawyers" in efforts to settle cases, this exception to the prohibition of Rule 21-209(A)(4) does not give the judge the ability to separately

confer with an assigned mediator regarding the substance of a case. Nor, as we later discuss, does the Committee believe that an assigned mediator is a member of “court staff” or a “court official[] whose functions are to aid the judge in carrying out the judge’s adjudicative responsibilities.” See Rule 21-209(A)(3) (excepting from the prohibition against ex parte communications “court staff and court officials whose functions are to aid the court in carrying out the judge’s adjudicative responsibilities”).

Although a judge may believe that a mediator may be able to better mediate a case if the judge provided input regarding the judge’s substantive concerns prior to mediation, by the nature of such concerns, one party may receive an advantage and another may be prejudiced by such a discussion. The discussion would be an improper ex parte communication unless the judge included the parties in the communication.

(2), (3) Informing judge of outcome of mediation and/or terms of settlement

The Mediation Procedures Act, NMSA 1978, Section 44-7B-1 through -6 (2007) (MPA) addresses mediation proceedings. As defined by the MPA, “mediation communication” is “a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes or considering, conducting, participating in, initiating, continuing or reconvening a mediation or retaining a mediator.” § 44-7B-2(B).

Under the MPA, mediation communications, which include the agreement reached by the parties, are confidential except as specifically provided. Under the exceptions, an agreement is not confidential when “evidenced by a record signed by the mediation parties” except when the parties designate parts to be confidential, or as otherwise provided by law or by the parties. § 44-7B-5(A) (1), (2), (6), (D)(4).

The Committee believes that the mediator may communicate to the judge whether the mediation has been successful, but may not, except as may be agreed by the parties or as allowed by the MPA, disclose the terms of the settlement.

(4) Role of mediator

The MPA defines “mediation” as “a process in which a mediator (1) facilitates communication and negotiation between mediation parties to assist them in reaching an agreement regarding their dispute; or (2) promotes reconciliation, settlement or understanding between and among parties.” § 44-7B-2(A). In practice, mediators can be individuals in private practice or employees of a mediation program, including those created or administered by a court. § 44-7B-2(D), (E).

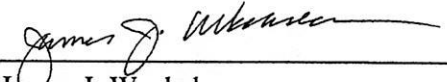
As we have discussed, Rule 21-209(A)(3) allows a judge to “consult with court staff and court officials whose functions are to aid the judge in carrying out the judge’s adjudicative responsibilities, . . .” The Committee, however, considers the mediation process to be separate from the adjudicative process. Indeed, the court will generally stay the adjudicative process while a case is in mediation. Mediators do not provide information to the judge for the judge to use in making adjudicative decisions. The Committee does not believe that Rule 21-209(A)(3) permits ex parte communications with the judge.

Nor does the Committee believe that a mediator becomes an “arm of the court” so as to permit ex parte communications with the judge. Generally a court employee or official may be considered an “arm of the court.” *See* Black’s Law Dictionary, 1834 (11th ed. 2019) (defining “arm of the court” as “[a]n officer of the court who performs tasks or duties related to the court’s functions). However, in the context of ex parte communications, this definition must be read in connection with Rule 21-209(A)(3), which specifically limits ex parte communications with a court official to those assisting the judge in the judge’s adjudicative responsibilities.

By way of example, probation officers who gather information and prepare a presentence report do so for the judge and have been held to be “arms of the court” permitting ex parte communications with the judge. *U.S. v Johnson*, 935 F.2d 47, 49-50 (4th Cir. 1991); *U.S. v. Farmer*, 2016 WL 7387161 (N.D. Ohio). Mediators, in contrast, act independently of the judge. Their involvement with the parties is for the purpose of mediation rather than to enable the judge to make an adjudicative decision.

(5) Remedial action

If a judge becomes aware of an ex parte communication concerning mediation, the judge should disclose the substance of the communication to the parties and provide them an opportunity to respond. *Cf.* Rule 21-209(A)(1) (allowing a judge to engage in ex parte communications for scheduling, administrative, or emergency purposes provided “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”). Depending on the nature of the communication, the judge may be disqualified from further proceedings in the case. *See* Rule 21-211(A) NMRA (“A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned. . . .”).


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