

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 95-14
(June 21, 1995)

**Ex Parte Communications with Special Masters
And Court-appointed Attorneys**

Issues

1. May a judge engage in communications with a special master outside the presence of the parties or their attorneys without violating the prohibition against *ex parte* communications?

Answer: Yes.

2. May a judge engage in communication, outside the presence of the parties, with an attorney appointed for the children in a domestic relations case, without violating the prohibition against *ex parte* communications?

Answer: No.

Discussion

Issue 1

Attempts at improper *ex parte* communications are perhaps the chief threat to the integrity of our state court system. When successful, they are the bane of all who look to the court system for fairness. It is important, therefore, to distinguish between permissible and impermissible *ex parte* communication.

Canon 3B(7) says 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." There are five exceptions to this general rule. Exception C states: "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."

A master falls within this exception. Rule 53 of the Arizona Rules of Civil Procedure provides that judges may appoint masters under an order of reference to conduct hearings and submit a variety of findings. The master is an arm of the court and it is not only allowable, but necessary, for the judge to communicate with the master regarding where and when the master's work is to be done, the scope and procedures to be employed, the comprehensiveness of the findings, etc. Since the judge serves to hear objections to the master's report, he or she should not attempt to influence the master's specific findings.

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Issue 2

Ex parte communications with an attorney for a child in a domestic relations custody dispute presents a different situation. A.R.S. § 25-321 gives the court the authority to appoint an attorney for a child in a contested custody matter, and many commentators and child advocates have championed doing such. Upon receiving the appointment, attorneys become actively involved in the proceedings. In cases that proceed to hearings, the appointed attorney has the same opportunity to call and cross-examine witnesses and to argue for a particular outcome that the lawyers for the parents have. As between the parents, the child's attorney is not necessarily a neutral observer. The attorney will often take a position partial to custody by one or the other parent. If information or argument is offered to the judge that needs explanation or amplification, the parents' attorneys should be given the opportunity. Because of the attorney's active and often partial role, there can be no *ex parte* communication between attorney and judge.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canon 3B(7) (1993).

Other References

Arizona Revised Statutes, § 25-321.

Arizona Rules of Civil Procedure, Rule 53.