



**CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS**

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CJEO Formal Opinion No. 2014-004

[Issued January 16, 2014]

**JUDICIAL SCREENING OF EX PARTE APPLICATIONS FOR NON-
DOMESTIC-VIOLENCE EMERGENCY FAMILY LAW ORDERS**

I. Issue Presented

The Committee on Judicial Ethics Opinions (CJEO) has been asked to provide an opinion on the following question:

A local rule authorizes judicial officers to review all requests for non-domestic-violence emergency orders in family law matters, in order to determine the necessity for an emergency hearing, even where the request is made without prior notice to the other party or without a request for waiver of notice and a signed explanation of why notice should not be given. Does this local rule facilitate the violation of the Code of Judicial Ethics?

II. Summary of Conclusions

A local rule setting up a procedure by which a judicial officer screens all requests for emergency non-domestic-violence family law orders without regard to whether notice

has been given to the other party or whether a request has been made for waiver of notice and a signed explanation has been provided showing why such notice should not be required is not authorized by the rules of court governing family law emergency orders and therefore contravenes the prohibition against considering ex parte communications in canon 3B(7) of the Code of Judicial Ethics. Therefore, a local rule that purports to authorize such screening facilitates the violation of canon 3B(7) of the Code of Judicial Ethics.

III. Relevant Facts

A local rule¹ provides that when a party in a family law proceeding seeks to have a request for an order (i.e., a motion or request for order) considered for emergency hearing, the clerk is to forward the request to a judicial officer for review. During that review, the judicial officer screens the papers to determine whether they set forth facts showing the necessity for an emergency hearing.² If the judicial officer determines that good cause for an emergency hearing exists, a date and time for the emergency hearing is set, and the party seeking relief is required to give notice of the emergency hearing to the other party.³ Under the local rule, no notice to the other party of the application for an

¹ For purposes of this opinion, the local rule is described by its operative and relevant features. Providing the text of the local rule would identify a party whose inquiry or conduct the committee is required to maintain as confidential. (Cal. Rules of Court, rule 9.80(h).)

² Specifically, the judicial officer is to determine whether an emergency hearing is necessary (1) to avoid immediate danger or irreparable harm to a party or to the children involved in the matter, (2) to help prevent the immediate loss or damage to property subject to disposition in the case, or (3) to make orders concerning any of the matters set forth in rule 5.170 of the California Rules of Court (see *post*, footnote 8 and accompanying text).

³ The local rule does not specify the procedure that follows a determination that good cause for an emergency hearing does *not* exist, except to say that the request for order must be filed in any event.

emergency hearing is required before the judicial officer screens the application to determine if good cause for an emergency hearing exists, nor does the moving party have to request a waiver of notice and show why notice should not be given before that screening. Instead, as a matter of course, the screening of the application to determine if good cause for an emergency hearing exists occurs without prior notice to the other party.

IV. Authorities

A. Applicable Canons⁴

Canon 3B(7): “A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, full right to be heard according to law. . . . A judge shall not initiate, permit, or consider ex parte communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding, and shall make reasonable efforts to avoid such communications, except as follows:

“[¶] . . . [¶]

“(b) A judge may initiate, permit, or consider ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided:

“(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

“(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

“(c) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so or when authorized to do so by stipulation of the parties.

“(d) If a judge receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.”

⁴ All further references to canons are to the California Code of Judicial Ethics unless otherwise indicated.

B. Other Authorities

California Rules of Court, rules 3.1200 et seq., 5.151-5.170, 9.80

Abramson, *The Judicial Ethics Of Ex Parte And Other Communications* (Winter 2000) 37 Hous. L.Rev. 1343, 1354, 1370

V. Discussion

A. Rules of Court Governing Emergency Orders⁵

In family law cases, applications for emergency orders -- also known as ex parte applications -- are governed by rules 5.151 and 5.165 through 5.170 of the California Rules of Court, which are known as the emergency orders rules.⁶ (Cal. Rules of Court, rule 5.151(a).) “The purpose of a request for emergency orders is to address matters that cannot be heard on the court’s regular hearing calendar.” (*Id.*, rule 5.151(b).) More specifically, “[t]he process is used to request that the court:

“(1) Make orders to help prevent an immediate danger or irreparable harm to a party or to the children involved in the matter;

“(2) Make orders to help prevent immediate loss or damage to property subject to disposition in the case; or

“(3) Make orders about procedural matters, including the following:

“(A) Setting a date for a hearing on the matter that is sooner than that of a regular hearing (granting an order shortening time for hearing);

“(B) Shortening or extending the time required for the moving party to serve the other party with the notice of the hearing and supporting papers (grant an order shortening time for service); and

“(C) Continuing a hearing or trial.” (*Ibid.*)

⁵ This opinion addresses only those matters that fall under the rules of court governing family law emergency orders.

⁶ These rules generally do *not* apply to ex parte applications for domestic-violence restraining orders under the Domestic Violence Prevention Act. (See Cal. Rules of Court, rule 5.151(a).)

The declarations in support of a request for emergency orders “must contain facts within the personal knowledge of the declarant that demonstrate why the matter is appropriately handled as an emergency hearing, as opposed to being on the court’s regular hearing calendar.” (Cal. Rules of Court, rule 5.151(d)(2).) Additional requirements apply to requests for emergency orders relating to child custody and visitation. (*Id.*, rule 5.151(d)(5).) In either case, however, the evidence submitted in support of a request for emergency orders must demonstrate that the issuance of an emergency order is necessary to achieve the purposes of the rule.

When a request for emergency orders is made, “notice to the other party is shorter than in other proceedings.” (Cal. Rules of Court, rule 5.151(b).) Generally, “[a] party seeking emergency orders under this chapter must give notice to all parties or their attorneys so that it is received no later than 10:00 a.m. on the court day before the matter is to be considered by the court.” (*Id.*, rule 5.165(b).) “Notice of appearance at a hearing to request emergency orders may be given by telephone, in writing, or by voicemail message.” (*Id.*, rule 5.165(a).) When notice of an emergency hearing has been given, the moving party must include with the request for emergency orders a written declaration based on personal knowledge regarding the details of the notice given.⁷ (*Id.*, rule 5.151(c)(4); see *id.*, rule 5.151(e)(2)(A).) If notice of the emergency hearing was given later than 10:00 a.m. the court day before the hearing, that declaration must also include a request that “the court approve the shortened notice” and must provide facts showing “exceptional circumstances that justify the shorter notice.” (*Id.*, rule 5.165(b)(1).)

Notice to the other party of the request for emergency orders can be “waived under exceptional and other circumstances as provided in the [emergency orders] rules.” (Cal. Rules of Court, rule 5.151(b).) Like shortened notice, waiver of notice requires court approval. To ask the court to waive notice of the request for emergency orders, “the

⁷ Specifically, the declaration must describe “[t]he notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected and that, within the applicable time under rule 5.165, the applicant informed the opposing party where and when the application would be made[.]” (Cal. Rules of Court, rule 5.151(e)(2)(A).)

party [seeking the waiver] must file a written declaration signed under penalty of perjury that includes facts showing good cause not to give the notice.” (*Id.*, rule 5.165(b)(2).) Situations in which the court may find good cause not to give notice of the emergency hearing include the following:

“(A) Giving notice would frustrate the purpose of the order;

“(B) Giving notice would result in immediate and irreparable harm to the applicant or the children who may be affected by the order sought;

“(C) Giving notice would result in immediate and irreparable damage to or loss of property subject to disposition in the case;

“(D) The parties agreed in advance that notice will not be necessary with respect to the matter that is the subject of the request for emergency orders[.]” (*Ibid.*)

If the party seeking the emergency hearing tried to give notice of the hearing but could not, the declaration regarding notice must state that “the applicant in good faith attempted to inform the opposing party but was unable to do so” and must “specify[] the efforts made to inform the opposing party.” (Cal. Rules of Court, rule 5.151(e)(2)(B).) In such a case, the court may waive notice for good cause if it finds that “[t]he party made reasonable and good faith efforts to give notice to the other party, and further efforts to give notice would probably be futile or unduly burdensome.” (*Id.*, rule 5.165(b)(2)(E).)

The emergency orders rules also specify certain situations in which a party may always request an order without notice to the other party.⁸ (See Cal. Rules of Court, rule 5.170.)

From the foregoing, it is apparent that California law permits a party in a family law proceeding to seek emergency orders from the court without notice to the opposing

⁸ Those situations are as follows: “[a]pplications to restore a former name after judgment”; “[s]tipulations by the parties”; “[a]n order or judgment after a default court hearing”; “[a]n earnings assignment order based on an existing support order”; “[a]n order for service of summons by publication or posting”; “[a]n order or judgment that the other party or opposing counsel approved or agreed not to oppose”; and an “[a]pplication for an order waiving filing fees.” (Cal. Rules of Court, rule 5.170.)

party only under very limited circumstances. Additionally, before a court may consider a request for emergency orders without notice, the applicant must ask for waiver of notice and “make an affirmative factual showing of irreparable harm, immediate danger, or [an]other statutory basis for granting relief without notice.” (Cal. Rules of Court, rule 5.151(d)(2); see *id.*, rule 5.165(b)(2).) Absent the requisite showing, notice is required.

With that in mind, we turn to the ethical rules regarding ex parte communications between the parties and the court.

B. Ethical Rules

Canon 3B(7) codifies the judge’s ethical obligation to protect the right of every party to due process of law. The first sentence of canon 3B(7) states: “A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, full right to be heard according to law.” Ex parte communications, defined as “any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding,” inherently infringe on that right. (*ibid.*) It is understood, of course, that ex parte communications are sometimes necessary to prevent immediate danger or irreparable harm. Those circumstances are narrowly defined, however, to ensure the critical right of every party to be heard.

Because of the important role judges play in protecting the right of every party to be heard, with certain exceptions (discussed below), canon 3B(7) prohibits judges from initiating, permitting, or considering ex parte communications and also requires judges to make reasonable efforts to avoid ex parte communications. In effect, the canon generally precludes a judge from engaging in a communication about a “pending or impending proceeding” with a party to that proceeding when the other party is not present and has not received notice of the communication. (*Ibid.*, see Abramson, *The Judicial Ethics Of Ex Parte And Other Communications* (Winter 2000) 37 Hous. L.Rev. 1343, 1354 (Abramson) [“An otherwise proper communication becomes a prohibited ex parte communication when matters relevant to a proceeding circulate among or are discussed

with fewer than all the parties who are legally entitled to be present or notified of the communication”].)

Exceptions to the prohibitions against ex parte communications are recognized in the following situations:

(1) “where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters”;⁹

(2) “when expressly authorized by law to do so or when authorized to do so by stipulation of the parties.” (Canon 3B(7)(b) & (c).)¹⁰

We now apply these emergency order rules of court and ethical rules to the present facts.

C. Application to the Facts and the Local Rule

Specifically, the question before us is this: If a local rule sets up a procedure by which judges review all requests for non-domestic-violence emergency orders in family law matters in order to determine whether the moving papers show the necessity for an emergency hearing, and that review occurs without notice to the other party or without a request for waiver of notice with a signed explanation of why notice should not be given, does the rule facilitate or permit ex parte communications in violation of the Code of Judicial Ethics? In the committee’s opinion, the answer to that question is yes.

⁹ The application of this exception is subject to the following conditions: “(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication; and [(¶)] (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.” (Canon 3B(7)(b).)

¹⁰ The exception for ex parte communications “expressly authorized by law” permits judges to hear the many ex parte applications that come before them seeking emergency relief, such as ex parte applications brought pursuant to California Rules of Court 3.1200 et seq., which apply in civil cases generally, and those brought pursuant to California Rules of Court, rule 5.151, et seq., which apply in family law cases.

The first step in the analysis is to determine whether a judge’s review of the application papers under the procedure specified in the local rules involves an *ex parte* communication. It clearly does, because the rule allows a party in a family law matter to present a request for emergency orders to the court for review without first notifying the other side that the request will be presented to the court. It does not matter, for purposes of determining whether an *ex parte* communication has occurred, that the request is to be reviewed at this stage only to determine whether good cause exists to set an emergency hearing. What matters is that one party is communicating to the judge concerning a pending proceeding without notice to the other party. Such a communication is, by definition, an *ex parte* communication.

Given that an *ex parte* communication is involved, the next step in the analysis is to determine whether that communication implicates the prohibitions in the canons.¹¹ It does. It is true that a judge in this situation does not violate the prohibition against *initiating* *ex parte* communications, because the communication -- i.e., the request for emergency orders -- is initiated by the moving party, not the judge. Nonetheless, the canons also prohibit *permitting* and *considering* *ex parte* communications, and both of these prohibitions are implicated by the procedure established by the local rule. A rule authorizing a judge to review a request for emergency orders for the purpose of determining whether it demonstrates good cause for an emergency hearing is one that *permits* a judge to *consider* an *ex parte* communication.

The final step in the analysis is to determine whether the procedure authorized by the local rule falls within any of the exceptions found in the canons. It does not. Under the first exception, a judge may permit or consider an *ex parte* communication “where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters,” provided certain conditions (set out above) are met. (Canon 3B(7)(b).) This exception is a narrow one. The phrase, “where circumstances require,” “strongly suggests that this exception must be considered on a case-by-case

¹¹ At this point, we do not consider whether the communication falls within one of the exceptions provided for in the canons. That analysis follows below.

basis, without establishing a comprehensive exception to the general rule.” (Abramson, *supra*, 37 Hous. L. Rev., at p. 1370.) Here, however, the local rule establishes a procedure to be followed in *every* family law case in which a party seeks non-domestic-violence emergency orders. In each and every such case, the judge reviews the request without prior notice to the other side, and without regard to whether there is any showing that good cause existed not to give such notice. Circumstances do not “require” this sort of blanket screening in every family law case. Further, non-domestic-violence emergency orders are an “emergency” by definition, so the application papers required for requesting such orders deal with substantive matters. Accordingly, this exception does not apply.

Under the second exception, a judge may permit or consider an *ex parte* communication “when expressly authorized by law to do so or when authorized to do so by stipulation of the parties.” (Canon 3B(7)(c).) Just like the first one, this exception does not apply. As for “stipulation of the parties,” nothing in the local rule predicates the judge’s review of a request for emergency orders on whether the parties have stipulated to such review; the review occurs without notice and without any prior stipulation to the lack of notice. As for what is “expressly authorized by law,” nothing in the local rule predicates the judge’s review on whether notice has been given or a request for waiver of notice has been made.

Under the family law rules permitting *ex parte* applications, “[a] party seeking emergency orders . . . must give notice to all parties or their attorneys so that it is received no later than 10:00 a.m. on the court day before the matter is to be considered by the court.” (Cal. Rules of Court, rule 5.165(b).) Nothing in the rules excludes from this concept of consideration a judge’s determination of whether an emergency hearing should be held on the request for emergency orders. In making that determination, the judge must review the moving papers to see if they “demonstrate why the matter is appropriately handled as an emergency hearing, as opposed to being heard on the court’s regular hearing calendar.” (*Id.*, rule 5.151(d)(2).) Thus, in conducting the review provided for by the local rule, the judge “considers” the matter presented by the request

for emergency orders, even if the court does not ultimately resolve the request on its merits at that time.

The emergency orders rules do, however, allow a judge to consider requests to waive notice of the ex parte application. (Cal. Rules of Court, rule 5.165(b)(2).) To make such a request, “the party must file a declaration signed under penalty of perjury that includes facts showing good cause not to give the notice.” (*Ibid.*) The rule provides that a judge may waive notice for “good cause,” which may include that notice would result in harm to the applicant, children, or property at subject in the case. (*Ibid.*)

Thus, a judge is authorized by this rule to consider application papers that have not been served on the other side and necessarily contain ex parte communications when two requirements have been met: (1) a party requests that notice not be given, and (2) a declaration or other signed explanation is provided to support this request. In practical terms, determining which ex parte applications meet these two requirements is an administrative task that must precede judicial consideration of whether the application papers include facts showing good cause not to give notice. Once an ex parte application for an emergency order has been filed that asks for waiver of notice and provides a signed explanation of why notice should not be given, the application papers may be taken to the judge to determine the sufficiency of the explanation and whether notice may be waived.¹²

The local rule here includes none of these requirements for judicial review of ex parte applications. Instead, *all* applications are taken to the judge for review without regard to notice or requests for waiver of notice. This screening process allows the judge to consider application papers containing ex parte communications that are not authorized by law, and, by doing so, violates canon 3B(7)(c).

¹² The committee is aware of forms used by some courts that allow self-represented and represented parties to request waiver of notice by checking a box, filling in an explanation, and signing on a signature line that includes a penalty of perjury affirmation. Such forms allow easy identification of the applications that may be taken to the judge for a determination of whether the applicant’s papers, including those that accompany the form, meet the requirements of the rule and show good cause for waiver on notice.

VI. Conclusion

Under the emergency orders rules, “[c]ourts may require all parties to appear at a hearing before ruling on a request for emergency orders. Courts may also make emergency orders based on the documents submitted without requiring the parties to appear at a hearing.” (California Rules of Court, rule 5.169.) A local rule setting up a procedure by which a judicial officer reviews all requests for non-domestic-violence emergency orders for the purpose of determining whether an emergency hearing should be held without the moving party first providing notice to the other side or requesting waiver of notice and showing good cause for such waiver is not expressly authorized by law. Such a local rule, in the committee’s opinion, would facilitate a violation of the prohibitions in the Code of Judicial Ethics against permitting and considering ex parte communications.



This opinion is advisory only (Cal. Rules of Court, rules 9.80(a), (e); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc. (CJEO) rules 1(a), (b)). It is based on facts and issues, or topics of interest, presented to the California Supreme Court Committee on Judicial Ethics Opinions in a request for an opinion (Cal. Rules of Court, rule 9.80(i)(3); CJEO rules 2(f), 6(c)), or on subjects deemed appropriate by the committee (Cal. Rules of Court, rule 9.80(i)(1); CJEO rule 6(a)).