

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE AMENDMENT OF)
CANON 3(B) (7) OF THE CODE OF) RULE 11-05
JUDICIAL CONDUCT, SDCL CH. 16-2,)
APPX., RELATING TO EX PARTE)
COMMUNICATIONS AND PROBLEM-)
SOLVING COURTS.)

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A hearing was held on February 16, 2011, at Pierre, South Dakota, relating to the amendment of Canon 3(B) (7) of the Code of Judicial Conduct, SDCL Ch. 16-2, Appx., relating to ex parte communications and problem-solving courts and the Court having considered the proposed amendment and being fully advised in the premises, now, therefore, it is

ORDERED that Canon 3(B) (7) of the Code of Judicial Conduct, SDCL Ch. 16-2, Appx., be and it is hereby amended to read in its entirety as follows:

Canon 3(B) (7) of the Code of Judicial Conduct, SDCL Ch. 16-2, Appx., Concerning Ex Parte Communications and Problem-solving Courts.

CANON 3

B. Adjudicative Responsibilities.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to Law.* 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 except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; 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.

(b) A judge may obtain the advice of a disinterested expert on the law* applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) 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.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law* to do so or when serving on problem-solving courts, treatment courts or drug courts.

B(7) COMMENTARY

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

Canon 3(B)(7)(e) recognizes a judge may initiate, permit, or consider ex parte communications in certain circumstances; such as when serving on problem-solving courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers and others as part of the problem-solving court team.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

IT IS FURTHER ORDERED that the rule shall become effective
July 1, 2011.

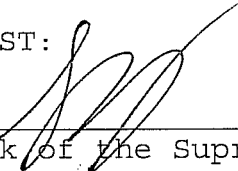
DATED at Pierre, South Dakota, this 2nd day of March,
2011.

BY THE COURT:



David Gilbertson, Chief Justice

ATTEST:



Clerk of the Supreme Court
(SEAL)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

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Clerk