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Helping Lawyers Help Kids

IN PRACTICE

Ex Parte Communications between Children and Judges in Dependency Proceedings

by Jessica R. Kendall

Involving children in their dependency court hearings empowers them and helps them come to terms with decisions made about their lives. It lets them influence a situation that will chart their future and that often feels outside their control.¹

What happens, however, when a child wishes to share his or her views with the judge but does not want to be in court? For example, the child may not want to face an abuser or share a placement preference in a parent's presence. Can the child still share her opinions and desires with the judge? In these cases, the child, child's attorney, and the court must consider other options that could enable the child to participate in the process, including whether the child can legally and ethically meet with the judge privately.²

This article addresses ex parte communications by children and youth with the court by reviewing governing rules and laws. Through three case examples, the article provides tips for judges and attorneys, even in jurisdictions that lack case law or court rules on point.

State Laws and Rules Regarding Ex Parte Communication

Many states lack statutory language that dictates how or whether courts can have ex parte communications

with lawyers or parties in dependency cases. More guidance exists in the context of family law/custody cases. However, many state dependency cases and court rules have addressed the issue.³ A review of numerous state approaches shows that jurisdictions fall into one of two categories:

1. There is no statute, rule, or case on point. Whether ex parte communication is allowed is dictated by practice, which may vary from judge to judge or county to county.⁴
2. There is an applicable court rule or case dictating how or whether ex parte communication can occur.⁵

Whether driven by rule or practice, states that allow ex parte communication generally:

- allow any party, lawyer or the judge to request an ex parte meeting;⁶
- may require the court to make findings that the ex parte communication is warranted under a balancing of interests or that it is necessary to promote a flow of

critical information and/or to prevent the child from suffering emotional harm;⁷

- require that attorneys for all parties be present during the meeting;⁸
- allow the court to exclude parents from the meeting;⁹
- require the meeting be recorded and that a written record be made available to all parties;¹⁰
- may require a list of questions or topics be made available to the parties before the meeting.¹¹

Even if a state's dependency law or rules are silent on whether or how the judge may have ex parte

(Continued on page 103)

What's Inside:

- 98 CASE LAW UPDATE
- 107 ABA POLICY
ABA Affirms Right to Legal Representation for Children and Parents in Child Maltreatment Cases and Adopts Other Policies
- 108 RESEARCH IN BRIEF
- 111 BAR INNOVATIONS
Change is Local: State and Local Bar Projects Help Kids

(Continued from page 97)

contact with a child, state family law may offer guidance. Ex parte communications between judges and children in family law cases is common and many states have case law or rules on point. These cases may guide ex parte communications in dependency cases, where no other law exists.

Like existing dependency cases and rules, family law cases balance parents' due process rights with the desire to protect children from potential harm.¹² Many states allow judges in family law proceedings to meet children in-chambers and most require that conversations be recorded; several allow the parents' counsel to be present.¹³ Based on this jurisprudence and existing law in other states' dependency cases, courts in states with no law directly on point should consider:

- telling the child the parents will be notified of his request to meet with the judge;
- notifying the parties of the request and obtaining their positions;
- assessing whether the parties will consent to the private meeting;
- if not all parties consent, encouraging them to discuss the issue outside court to seek a joint resolution. Consider whether mediation or another form of alternative dispute resolution may be appropriate in this instance;
- maintaining a written record of the in-chambers meeting that is then made available to all parties;
- providing the parties, in advance, a written list of questions or topics to be discussed;
- assessing whether ethics rules would allow an in-chambers meeting on the record with counsel present; and
- allowing the child to have a support person (which may be counsel) present during the meeting.

Can a Child Directly Communicate with a Judge?

Case 1:

Keisha is 12 and has been in foster care for 11 months. She has appeared at some court proceedings to date, but has not spoken much. Her attorney has contacted the judge's chambers, stating that before the permanency hearing Keisha wants to speak directly with the judge, but doesn't want to do so during the court hearing. She requests that she be allowed to speak to the judge privately. Keisha's mother's attorney objects, stating that if the court is to consider Keisha's position, then his client has the right to know what is said and to cross examine the child.

- What are some key issues to consider and what rules, cases, or practices guide the analysis of those questions?
- What should the judge, do?
- What should Keisha's lawyer do?

Judge's Tips:

Consult the state judicial code of ethics. Although state codes of judicial conduct vary slightly, most are based on the ABA Model Code of Judicial Conduct, which is the basis for discussion here. Rule 2.9 governs ex-parte communications and states:¹⁴

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 or their lawyers, concerning a pending or impending matter.

However, several exceptions to this Rule allow ex parte communication, including:¹⁵

1. When circumstances require ex parte communication for *scheduling, administrative, or emergency purposes*, which does not address substantive matters.
2. The judge may obtain the *written advice of a disinterested expert on*

the law applicable to the proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted, the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice needed.

3. A judge may *consult with court staff and court officials* whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record.
4. A judge may, with the *consent of the parties*, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.
5. A judge may initiate, permit, or consider any ex parte communication when *expressly authorized by law* to do so.

Under the Model Code, the judge can only meet with Keisha if the other parties agree or if the judge is authorized *by law* to speak with her privately. Since the mother's attorney has already objected to the private meeting, it is unlikely that all parties will consent. So, the next question becomes whether state or local law or rule will allow this kind of contact.

The commentary to Rule 2.9(A) sheds light on what the Model Code envisioned as the proper uses for this exception. The commentary notes:¹⁶

A judge may initiate, permit or consider ex parte communications expressly authorized by law, such as when serving on *therapeutic or problem solving courts, mental health courts, or drug courts*. In this capacity, judges may assume a more interactive role with parties, treatment

providers, probation officers, social workers and others.

While the 2007 revisions to the ABA Model Code of Judicial Conduct generally tightened the restrictions on ex parte communication, this new commentary language indicates an intent to loosen restrictions in particular cases. Although dependency cases are not mentioned in the commentary, various aspects of dependency court practice and court proceeding is consistent with the “therapeutic” or “problem solving” approaches of the referenced courts. As such, the spirit of this language suggests that dependency cases may be an area where ex parte communications would be favored. As noted above, state interpretations of this Rule and the extent to which they allow ex parte communication in dependency proceedings vary and continue to be a developing area.

In considering whether to allow an ex parte conversation with the child, the court may want to consider and balance several factors, including the:

- judicial interest in and need for full and complete information;
- child’s privacy interests, state of mind and welfare; and
- procedural stage the case is at (whether pre or post TPR, etc.);
- due process rights of all parties.

If the court is inclined to allow an ex parte communication, consider the following best practices (as noted above):

- Seek the consent of all parties.
- Keep a written record of the conversation and make that record available to all parties.
- Allow attorneys to be present, even if parties (parents) are excluded.
- Clarify on the record the impact of any information provided by the child on judicial determinations later made by the court.

- Provide the parties with a list of questions and/or topics to discuss with the child in-chambers.

Lawyer’s Tips:

Notify other counsel of Keisha’s request. When Keisha’s lawyer learns that she wants a private meeting with the judge, she should discuss with her client why and counsel her on the possible pros and cons of such an encounter, such as:

Pros

- may increase the child’s comfort in sharing sensitive information;
- may allow the child to speak more freely without other parties and family members present;
- may be a less formal environment than the courtroom; and
- may allow the judge to consider information she would not have had otherwise.

Cons

- may later have to share the same information in court, or have the judge share it;
- may prevent other parties, including the child’s social worker and parents from gaining important information about the child;
- judge may not consider what the child says when she decides issues in the case or do as the child wishes; and
- child may not be able to have a support person or her lawyer present during the meeting.

The lawyer should also discuss with Keisha possible alternatives to an ex parte conversation with the court, including preparing a written submission for the court.

If Keisha still requests the private meeting, the lawyer should check court rules, case law, statutes and the ethics codes for both lawyers and judges to see how ex parte communications are handled. To ensure the meeting is not challenged later, Keisha’s lawyer should notify other counsel of Keisha’s request

and ask for their consent. If some parties are unwilling to consent, ask if they would consider:

- Allowing the meeting to go forward, but having the conversation reported and/or recorded (if the child client is informed and gives consent). This would allow all parties an opportunity to learn of, or actually hear, what was said and rebut statements they disagree with in future court proceedings.
- Having the meeting with only the attorneys present during the conversation. If the parties agree, Keisha’s attorney should also ensure that the parties are clear about who can question the child during the meeting and, if the meeting is limited to the judge, whether counsel can submit questions for the judge to ask.

If the parties agree to the private meeting, the judge would then be able to consider this information as he would any other information or evidence shared at a court proceeding. Limiting how the court uses information gained during the ex parte communication may not be possible unless mutually agreed to by the court and parties before the meeting or shortly thereafter. The tips noted above, however, can help ensure any ex parte meeting the court is inclined to allow is conducted in the best manner possible.

Can a Lawyer Accompany a Child In-Chambers?

Case 2:

Upon thinking about her upcoming meeting with the judge, Keisha asks her lawyer to join her. She is nervous about meeting with the judge alone and would like to have someone she knows with her.

- Can the lawyer attend if no other counsel are going to be present?

Lawyer's Tips:

Check state rules of professional conduct for attorneys, as well as court rules and case law.

They may limit the lawyer's ability to have ex parte communication with the court and may, therefore, prohibit the lawyer from being present during the meeting without other counsel present. Although some states may vary, many follow the ABA Model Rules of Professional Conduct addressing ex parte communication with the court. Rule 3.5(b) states that a lawyer: "shall not . . . communicate ex parte with [a judge] during the proceedings unless authorized to do so by law or court order."¹⁷

Like the judicial code, the Model Rules for attorneys allow ex parte communication, if expressly authorized by law. They also allow for ex parte communication when the court orders it. This may be more likely to occur in problem-solving courts or dependency court where evidentiary rules are often relaxed at many stages of the case and courts are encouraged to work closely with parties to resolve problems. This may also be feasible in "benchmark hearings," which focus on youth aging out of foster care and promote stronger direct communication between the youth and judges as well as other parties.

Otherwise, if the relevant court rules or case law are silent, the state professional rules of conduct may, like the Model Rules, prevent Keisha's lawyer from participating in the private meeting with the judge. In the face of silence, Keisha's lawyer may want to raise with the court Keisha's desire for the lawyer to be present and seek court authorization to participate.

Can a Judge Communicate with a Child in an Emergency?

Case 3:

The judge receives a call late Saturday afternoon from Keisha. In her message she informs the judge

that she has run away from her foster home after an altercation with her foster parent. The judge is in chambers that day preparing for Monday hearings. In her message, Keisha says she has nowhere to go and doesn't have her social worker's or attorney's contact information. She has taken the subway downtown, but is now lost and not sure where she is. Upon hearing the message, the judge is able to determine where she is.

- Can the judge call Keisha back to help her find her way?
- Can the judge e-mail or call the social worker or Keisha's attorney?
- Can the judge contact the foster parent and find out whether Keisha can or should return home?

Judge's Tips:

Call Keisha and give her directions. It is probably permissible for the judge to return Keisha's call to provide her directions so that she is not lost. The first exception under Rule 2.9 allows the judge to have ex parte communication with parties for "emergency purposes" as long as the conversation does not address substantive issues relating to the case. Simply telling Keisha how to get to the subway or elsewhere does not relate to a substantive matter of the case and can be considered an emergency given the time of day, Keisha's inability to reach someone else, and her unfamiliarity with her surroundings.

Alert the social worker and/or attorney of Keisha's message. Similarly, under the same exception, the judge may contact Keisha's social worker or attorney to tell them about Keisha's call and provide information about her location.

Do not conduct your own investigation. The judge cannot, however, contact the foster parent and find out why Keisha may have

run away. Doing so would violate Model Judicial Code Rule 2.9(C):¹⁸

A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

The comments to the Rule further suggest that the prohibition on the judge conducting an independent investigation extends to doing online searches or using an "electronic" medium.¹⁹

Conclusion

Whether children in dependency cases can meet with judges privately depends largely on local practice, court rules, statutes and case law. Attorneys and judges faced with this situation must also review their ethics codes to assess whether and under what circumstances these meetings are allowed. Although states' rules, cases, and laws vary widely, those jurisdictions that allow ex parte communications between the judge and child also build in safeguards to protect the parents' rights, such as requiring all counsel to be present and/or recording all private meetings between judges and children. Over time, judges and advocates may wish to consider seeking further guidance—via rule or case law—in this important and developing area.

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Endnotes

¹ To access other articles or tools regarding youth participation in court proceedings, visit the ABA Bar-Youth Empowerment Project Web site at: www.abanet.org/child/empowerment/youthincourt.shtml.

² Another option to consider so that the child can participate is to have her write a letter to the judge.

³ *Cf.*, Athens v. Athens, 165 P.3d 1048 (Haw. Ct. App. 2007) (unpublished opinion) (the court concluded, in a family law proceeding, that decisions made by the judge based on ex parte communication with the child had to be reversed where the purpose for the off-the-record meeting was ambiguous, the judge considered the child a witness and met with her out of the presence of parties or counsel).

⁴ *See, e.g.*, Ohio – In re T.V., 2005 WL 1983962 (Ohio Ct. App.) (discussing practice of judges interviewing children in chambers without reference to a state law or rule); Virginia – E-Mail Correspondence in response to NACC list serv request (Apr. 15, 2010, 11:11 EDT) (on file with ABA) (explaining that Virginia has no specific statutes on point, but rather the decision is left to each individual judge’s discretion); Nevada – E-Mail Correspondence in response to NACC list serv request (Apr. 15, 2010, 13:52 EDT) (on file with ABA) (explaining that Nevada has no statute or rule on point, but that trial courts in one region of the state have agreed on some basic rules regarding ex parte communications).

⁵ *See, e.g.*, California – Cal. Welf. & Inst. Code §350; Florida – Fla. R. Juv. P. 8.255(d)(2); New Jersey – N.J. Rules of Ct., Rule 5:12-4.

⁶ *See, e.g.*, Fla. R. Juv. P. 8.255(d)(2)(B) (“The motion may be filed by any party or the trial court on its own motion.”).

⁷ *See, e.g.*, In re Maria P., 904 A.2d 432 (Md. 2006) (finding that the court must make specific factual findings about the propriety of the parent’s exclusion); In re Adoption of Roni, 775 N.E.2d 419 (Mass. Ct. App. 2002) holding that judges can only depart from traditional in-court methods for taking a child’s testimony if the child will suffer trauma from testifying).

⁸ *See, e.g.*, Cal. R. of Ct., Rule 5.534(c) (“[A] child may testify in chambers and outside the presence of the child’s parent or guardian if the parent or guardian is represented by counsel who is present . . .”).

⁹ *See, e.g.*, Cal. Welf. & Inst. Code § 350 (“The testimony of a minor may be taken in chambers and outside the presence of the minor’s parent or parents . . .”); G.C. v. Dep’t of Children & Families, 791 So. 2d 17, 21-22 (Fla. Dist. Ct.

App. 2001) (holding that a child could testify outside the presence of her parents in a dependency hearing).

¹⁰ *See, e.g.*, Cal. Welf. & Inst. Code §350 (“After testimony in chambers [by the child], the parent or parents of the minor may elect to have the court reporter read back the testimony or have the testimony summarized by counsel for the parent or parents.”).

¹¹ *See, e.g.*, Matter of Kim K., 570 N.Y.S.2d 423 (Fam. Ct. 1991).

¹² Atkinson, Jeff. “Interview of the Child by the Judge.” In *Modern Child Custody Practice*, 2009, § 12-33.

¹³ *Ibid.*

¹⁴ ABA Model Code of Judicial Conduct, Rule 2.9(A) Ex Parte Communication (2007). <www.abanet.org/judicialethics/

(*In re Mason, cont’d from p. 99*)

opportunity to participate during the year-long reunification review period and the court did not have full information when making its decisions during these hearings. Thus, under state statute, the court could not grant the state’s motion to terminate the father’s parental rights.

The second issue the supreme court addressed was whether the father was permitted to participate in the service plan, as provided in MCL 712A. The service plan in the court file was not signed by the father and there was no indication that the father ever received a copy. The agency social worker did not provide proof he ever spoke to the father or the jail staff about services for the father.

The father never knew of the service plan or had an opportunity to meet the requirements before the court terminated his parental rights based on his failure to comply. Due to the agency’s and court’s failures, the father would have been entitled to more time to complete the services upon his release from jail. Both the trial and appellate courts ignored this.

Finally, the supreme court addressed whether terminating the father’s parental rights under MCL 712A.19b(30)(h) was appropriate. It was questionable whether the children would “be deprived of a normal home for a period

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¹⁵ *Ibid.*

¹⁶ ABA Model Code of Judicial Conduct, Rule 2.9(A), Comment 4 Ex Parte Communication (2007). <www.abanet.org/judicialethics/ABA_MCJC_approved.pdf>

¹⁷ ABA Model Rule of Professional Conduct 3.5(b) (2009). <www.abanet.org/cpr/mrpc/mrpc_toc.html>

¹⁸ ABA Model Code of Judicial Conduct, Rule 2.9(C) Ex Parte Communication (2007) <www.abanet.org/judicialethics/ABA_MCJC_approved.pdf>.

¹⁹ ABA Model Code of Judicial Conduct, Rule 2.9, Comment 6 Ex Parte Communication (2007) <www.abanet.org/judicialethics/ABA_MCJC_approved.pdf>.

exceeding two years” given that termination was not sought until December 2008 and, at that time, the father’s expected release date was July 2009. There was no basis to find “the parent has not provided for the child’s proper care and custody.” The parent is not required to be the person caring for the child. The children were with the father’s relatives for most of the case while the father was in jail.

The supreme court questioned whether the facts showed there was “no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child’s age.” Instead, it appeared the father would be able to care for his children in the near future based on his progress and expected release date. Even if he personally could not take care of his children, his relatives could.

The trial court also requested termination based on his criminal behavior and the chance that he would harm the children if they were returned to his care. There was no past or present evidence to support this contention.

In sum, due to the father’s inability to meaningfully participate in the proceedings, the trial court lacked significant information in making its decision and the agency did not meet its burden to provide sufficient evidence to terminate the father’s parental rights.