

I Feel Like We're **MISSING SOMETHING**

Attorneys Kelsey and David represent opposing parties in a litigation matter. After a contested hearing on a pretrial motion involving multiple issues, the judge takes the matter under advisement without ruling on any of the issues and asks both counsel to submit proposed orders.

Two weeks later, Kelsey gets a phone call from the judge, who tells her that the court is ruling mostly in her favor but ruling against her on two issues. Accordingly, the judge asks Kelsey to change two provisions in her proposed order—both of which are unfavorable to her client—and resubmit the order. Kelsey listens, takes notes, and does not advocate for her position.

Before making the requested edits and submitting the revised order to the court, Kelsey calls David to let him know about the phone call. When Kelsey tells him she had a conversation with the judge about the case without David participating, David becomes irate and accuses Kelsey of violating the ethics rule prohibiting lawyers from engaging in *ex parte* communications. When Kelsey points out that the judge called her, not the other way around, David replies “that doesn’t matter!” before angrily hanging up the phone.

Kelsey makes the revisions that the judge requested and makes no other changes. She then files the revised order, copying David on the filing. The judge signs the revised order that Kelsey submitted.

Who violated their ethical obligations regarding *ex parte* communications?

- A. Kelsey.
- B. The judge.
- C. Both.
- D. Neither.



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The Texas Center for Legal Ethics was created by three former chief justices of the Supreme Court of Texas to educate lawyers about ethics and professionalism. Lawyers can access the Texas Disciplinary Rules of Professional Conduct, the Texas Lawyer’s Creed, and a variety of other online ethics resources by computer or smart device at legalethictexas.com.

DISCLAIMER

The information contained in Ethics Question of the Month is intended to illustrate an ethics issue of general interest in the Texas legal community; it is not intended to provide ethics advice that applies regardless of particular facts. For specific legal ethics advice, readers are urged to consult the Texas Disciplinary Rules of Professional Conduct (including the official comments) and other authorities and/or a qualified legal ethics adviser.



ANSWER: The *ex parte* rule governing attorneys is Rule 3.05(b) of the Texas Disciplinary Rules of Professional Conduct. It says, “A lawyer shall not . . . communicate . . . *ex parte* with a tribunal for the purpose of influencing that entity or a person concerning a pending matter.” While Kelsey did have an *ex parte* conversation with a tribunal about a pending matter, the question here is whether she was trying to influence the judge.

Although Kelsey did not initiate the call, the rule does not differentiate based on who placed the call. It merely says that a lawyer “shall not communicate *ex parte* with a tribunal.” However, she did not ask the judge to take any action, but instead listened passively while the judge dictated his changes to the proposed order. Thus, there is no evidence that Kelsey communicated with the judge “for the purpose of influencing” the judge, which is required to violate Rule 3.05(b).

However, prudent attorneys are advised to avoid any *ex parte* communication with a judge about a pending matter to avoid having to defend one’s purpose in the communication to a grievance committee or jury. When receiving a phone call from a judge, an attorney should ask the judge to conference in opposing counsel to protect both the attorneys and the judge from the appearance of an improper *ex parte* communication.

As for the judge, Canon 3.B(8) of the Texas Code of Judicial Conduct provides that “A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties . . . concerning the merits of a pending or impending judicial proceeding.” The judge here clearly initiated and permitted an *ex parte* communication outside the presence of all counsel. Because the judge discussed the substantive aspects of the order in the phone call with Kelsey, the conversation did concern the merits of a pending judicial proceeding. Therefore, the judge violated Canon 3.B(8). The best answer is B. For more analysis, go to legalethictexas.com/ethics-question-of-the-month.