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(Revised 1998)

**EX-PARTE COMMUNICATIONS – PROBATION OFFICER**

**AUTHORITY:** Canons 2, 2B(2), 3B(7) and 3B(7)(a) and 3B(7)(b), Welfare & Institutions Code Section 270, Penal Code Sections 1202, 1203, 1205, 1208

I. Background

Although a probation officer may function to aid the judge in carrying out adjudicative responsibilities, some ex-parte communications with a probation officer are violative of statute, or may be inappropriate to the circumstances.

II. Questions

A judge has asked if it is appropriate for the judge to meet with a probation officer prior to a restitution hearing in order to review documents and determine an amount for restitution to be imposed as a condition of probation.

III. Answer

A factual recital or accounting of the value of property for which restitution is due is a matter more appropriately presented in an adversary proceeding than in an ex parte communication.

IV. Discussion

Canon 3B(7) provides in pertinent part:

...A judge shall not initiate, permit, or consider ex parte communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:

...

(b) A judge may consult with court personnel whose function it is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

Welfare and Institutions Code Section 270 and Penal Code Section 1203.6 provide that probation officers are to be appointed and removed by the court and that all deputy or assistant probation officers derive their authority from these judicially designated department heads. While probation officers perform a large number of mandated functions, primary among which is insuring probationers comply with the conditions of probation (See, e.g., Pen Code, §§ 1202.8, 1203, 1203.1 subd. (b), 1203.5, 1205 and 1208), they also directly assist judges in carrying out their adjudicative responsibilities through preparation of presentence and ongoing investigations, reports and recommendations (See, e.g., Pen. Code §§ 1203, subds. (b) and (c), 1203.10, and 1203.12). In carrying out these latter functions, and particularly in light of the fact that their authority and status are within the purview of the court, it would appear that

probation officers do in fact act as “court personnel whose function is to aid the judge in carrying out adjudicative responsibilities” within the meaning of Canon 3B(7)(b).

The foregoing is not, however, dispositive of the present inquiry. Communications between probation officers and judges take many forms, ranging from brief telephone calls to lengthy detailed reports, the contents of which are specifically mandated by statute. Certain types of communications between probation officers and judges can never occur *ex parte* without violating the law and thus being *per se* unethical under Canon 2, which provides that “[a] judge shall respect and comply with the law<sup>1</sup> and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” (See, e.g., Pen. Code, § 1203, subd. (b), [which requires that presentence reports and recommendations be in writing and be submitted to the court, counsel and defendant at least nine days prior to hearing].) Other communications, while not contrary to any statute, may, to the extent that they are intended to influence the exercise of judicial discretion in the absence of notice and opportunity to be heard, raise constitutional issues of due process and the right of confrontation. Still others, such as simple factual inquiries regarding a probationer’s status, may present no apparent statutory or constitutional problem.

The judge must, therefore, undertake a careful evaluation of the purpose of the communication and the nature of information likely to be imparted by the probation officer before the judge participates in such a communication. A factual recital or accounting of the value of property for which restitution is due is a matter more appropriately presented in an adversary proceeding than in an *ex parte* communication.

Canon 3B(7)(a) does allow the judge to “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.” The computation of restitution is not advice on the law. A judge’s *ex parte* communication with a probation officer is inappropriate in the circumstances presented.

This opinion is advisory only. The Committee acts on specific questions submitted, and its opinion is based on facts as set forth in the questions submitted.

COMMITTEE ON JUDICIAL ETHICS  
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<sup>1</sup> Law denotes rules as well as statutes, constitutional provisions, and decisional law. See Canons 1 (Commentary), 2A, 2C (Commentary), 3A, 3B(2), 3B(7), 3E, 4B (Commentary), 4C, 4D(6)(a)-(b), 4F, 4H, and 5D.