

## MEMORANDUM

TO: Final Decision-Makers

FROM: Terry L Thurbon, Chief Administrative Law Judge  
Office of Administrative Hearings

RE: Managing *Ex Parte* Contacts in Pending Cases

DATE: January 26, 2007

The purpose of this memorandum is to provide information to help you manage *ex parte* contacts concerning administrative cases for which you are final decisionmaker. An *ex parte* contact is a written or oral communication from one party to the decisionmaker outside the presence of and without notice to the other party or parties to the case.<sup>1</sup> The Executive Branch Ethics Act forbids executive branch employees from contacting you, directly or indirectly, for the purpose of influencing the outcome of a case pending before you.<sup>2</sup> A similar prohibition applies to legislators and legislative employees.<sup>3</sup> Private parties and their attorneys are not subject to those statutory prohibitions, but it is equally inappropriate for them to attempt to influence the neutral decisionmaker regarding the outcome of a pending case outside the presence of the other parties.

Improper *ex parte* contacts do occur. Private parties may find it difficult to discipline themselves not to discuss a particular case when talking to an agency head or other final decisionmaker about policy issues or proposed regulations. The same is true for legislators and legislative staff, who may initiate discussions about cases that generated constituent complaints or provided the impetus for proposed legislation, without being fully aware that they are attempting to discuss still-pending cases with a decisionmaker who ultimately has to rule on the case as a neutral. Managing interactions with the public and legislative employees to minimize the risk of improper *ex parte* contacts can be challenging.

The challenge may be even greater for the head of an executive branch department, such as a Commissioner, when it comes to contacts with executive branch employees. Policymaking and supervisory functions bring a department head into close contact with subordinates whose decisions are the subject of administrative adjudications destined for final decision at the department-head level. The dispute that gives rise to an administrative case may identify policy or good-government-practices issues that the department needs to evaluate for implications beyond the specific case. The department head may want to be involved in that evaluation, along with department employees and assistant attorneys general who are also acting as advocates in the pending cases. The department head may be accustomed to consulting particular assistant attorneys general on certain subjects and might engage the attorney in a discussion about legal

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<sup>1</sup> 2 AAC 64.990(13) (defining “improper *ex parte* communication” as “an oral or written communication between a decision-maker, whether intermediate or final, and a party to an administrative hearing, a witness in a proceeding, or a person trying to influence the decision-maker that occurs outside of the presence of the other parties and without notice and an opportunity to participate being given to the other parties”).

<sup>2</sup> See AS 39.52.120(e).

<sup>3</sup> AS 24.60.030(i).

issues, without realizing that the attorney is an advocate in a pending administrative case raising the same legal issues.

When I conduct training for adjudicatory boards and commissions, and other administrative adjudicators, under my AS 44.64.020(6) duty, I recommend “ADR” as a memory device to guide decisionmakers in managing the inevitable *ex parte* contacts. In this context, ADR stands for

- Avoid
- Disclose
- Recuse

The best course is to **avoid** *ex parte* contact altogether, rather than risk having a seemingly innocent contact turn improper. To do this, the decisionmaker must be mindful of his or her own role in the case and the role of the other person to the communication. You are always free to discuss a case with the administrative law judge (ALJ) who is hearing it on your behalf. The ALJ is, in effect, your eyes and ears, as well as your legal advisor, for the specific case.<sup>4</sup> You can minimize the risk of improper *ex parte* contacts growing out of routine case status or process questions from parties or legislative staff by referring callers with such questions to my office. We prevent *ex parte* contacts with the ALJ by having someone who is not hearing the case answer such questions or, if appropriate, schedule an on-the-record status conference in which all the parties can participate.

Sometimes you may be unable to avoid an *ex parte* contact. For instance, you may receive correspondence about a case but not recognize it as such until you have read it, or a party may engage you in a conversation in which it does not become apparent that the subject concerns a case until you have already heard the party’s side of the story. When that happens, the best course is to immediately **disclose** the *ex parte* contact. The disclosure must be made on the record, and must provide the other parties with notice of both the fact and the content of the communication that has taken place. My office will assist you in making the necessary disclosure to the parties and affording the other parties an opportunity to respond.

If the other parties do not object and you believe you can still be impartial, you need not **recuse** yourself from the case. If the nature of the improper *ex parte* contact is such that you cannot remain impartial, you must recuse yourself. If another party does object, or if the nature of the contact is such that your continuing with the case might create an appearance of impropriety, you will need to consider whether to recuse yourself and delegate decisionmaking authority to someone else.<sup>5</sup> Recusal is not automatic simply because an *ex parte* contact has occurred, even if the other parties object to the decisionmaker continuing with the case. An

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<sup>4</sup> Our ALJs do not provide legal advice to agencies outside the context of specific cases. The attorney general is the legal advisor to executive branch agencies. If a circumstance arises in which the final decisionmaker does not want to consult the ALJ about the case-specific issues, but nevertheless wants legal assistance when carrying out the final decisionmaker role, the attorney general may be able to assign an assistant attorney general *who has not been involved in the case* to assist the final decisionmaker. **Under no circumstances, however, would it be appropriate for the final decisionmaker to seek or accept legal advice concerning a case from an attorney who represented the agency party in the case.**

<sup>5</sup> You may be able to delegate final decisionmaking authority to the ALJ hearing the case on your behalf. AS 44.64.030(c) states, in part: “To the extent otherwise permitted by law, the agency may delegate to the administrative law judge assigned to conduct the hearing on behalf of the agency the authority to make a final agency decision in the matter.”

adjudicator's duty to hear a case when that can be done fairly is just as strong as the duty to recuse when grounds for disqualification exist.<sup>6</sup> My office can assist you in your consideration of whether to recuse yourself. If you do recuse yourself from a case, we will provide the necessary notice to the parties.

Experience shows that most improper *ex parte* contacts can be managed to neutralize the fact or appearance of impropriety, first by avoiding such contacts and, failing that, by disclosing them. If you have any questions about this memorandum, I would be happy to discuss it with you.

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<sup>6</sup> See *Amidon v. State*, 604 P.2d 575, 577 (Alaska 1979) (stating that "a judge has as great an obligation not to disqualify himself, when there is no occasion to do so, as he has to do so in the presence of valid reasons").