

27 NCAC 02 RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

- (a) A lawyer representing a party in a matter pending before a tribunal shall not:
- (1) seek to influence a judge, juror, member of the jury venire, or other official by means prohibited by law;
 - (2) communicate ex parte with a juror or member of the jury venire except as permitted by law;
 - (3) unless authorized to do so by law or court order, communicate ex parte with the judge or other official regarding a matter pending before the judge or official;
 - (4) engage in conduct intended to disrupt a tribunal, including:
 - (A) failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of the intent not to comply;
 - (B) engaging in undignified or discourteous conduct that is degrading to a tribunal; or
 - (C) intentionally or habitually violating any established rule of procedure or evidence; or
 - (5) communicate with a juror or prospective juror after discharge of the jury if:
 - (A) the communication is prohibited by law or court order;
 - (B) the juror has made known to the lawyer a desire not to communicate; or
 - (C) the communication involves misrepresentation, coercion, duress or harassment.
- (b) All restrictions imposed by this rule also apply to communications with, or investigations of, family members of a juror or of a member of the jury venire.
- (c) A lawyer shall reveal promptly to the court improper conduct by a juror or a member of the jury venire, and improper conduct by another person toward a juror, a member of the jury venire, or the family members of a juror or a member of the jury venire.
- (d) For purposes of this rule:
- (1) Ex parte communication means a communication on behalf of a party to a matter pending before a tribunal that occurs in the absence of an opposing party, without notice to that party, and outside the record.
 - (2) A matter is "pending" before a particular tribunal when that tribunal has been selected to determine the matter or when it is reasonably foreseeable that the tribunal will be so selected.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the North Carolina Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of provisions. This rule also prohibits gifts of substantial value to judges or other officials of a tribunal and stating or implying an ability to influence improperly a public official.

[2] To safeguard the impartiality that is essential to the judicial process, jurors and members of the jury venire should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with members of the jury venire prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with a juror or a member of the jury venire about the case.

[3] After the jury has been discharged, a lawyer may communicate with a juror unless the communication is prohibited by law or court order. The lawyer must refrain from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases, and must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] Vexatious or harassing investigations of jurors or members of the jury venire seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on the lawyer's behalf who conducts an investigation of jurors or members of the jury venire should act with circumspection and restraint.

[5] Communications with, or investigations of, members of the families of jurors or the families of members of the jury venire by a lawyer or by anyone on the lawyer's behalf are subject to the restrictions imposed upon the lawyer with respect to the lawyer's communications with, or investigations of, jurors or members of the jury venire.

[6] Because of the duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a juror, a prospective juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

[7] The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, shall not give or lend anything of value to a judge, a hearing officer, or an official or employee of a tribunal under circumstances which might give the appearance that the gift or loan is made to influence official action.

[8] All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if unrepresented. Ordinarily, an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel or, if there is none, to the opposing party. A lawyer should not condone or lend himself or herself to private importunities by another with a judge or hearing officer on behalf of the lawyer or the client.

[9] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[10] As professionals, lawyers are expected to avoid disruptive, undignified, discourteous, and abusive behavior. Therefore, the prohibition against conduct intended to disrupt a tribunal applies to conduct that does not serve a legitimate goal of advocacy or a requirement of a procedural rule and includes angry outbursts, insults, slurs, personal attacks, and unfounded personal accusations as well as to threats, bullying, and other attempts to intimidate or humiliate judges, opposing counsel, litigants, witnesses, or court personnel. Zealous advocacy does not rely upon such tactics and is never a justification for such conduct. This conduct is prohibited both in open court and in ancillary proceedings conducted pursuant to the authority of the tribunal (e.g., depositions). See comment [11], Rule 1.0(n). Similarly, insults, slurs, threats, personal attacks, and groundless personal accusations made in documents filed with the tribunal are also prohibited by this Rule. "Conduct of this type breeds disrespect for the courts and for the legal profession. Dignity, decorum, and respect are essential ingredients in the proper conduct of a courtroom, and therefore in the proper administration of justice." *Atty. Grievance Comm'n v. Alison*, 565 A.2d 660, 666 (Md. 1989). See also Rule 4.4(a)(prohibiting conduct that serves no substantial purpose other than to embarrass, delay, or burden a third person) and Rule 8.4(d)(prohibiting conduct prejudicial to the administration of justice).

[11] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition or mediation. See Rule 1.0(n).

History Note: Authority G.S. 84-23;
Adopted by the Supreme Court: July 24, 1997;
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