



# Ohio Board of Professional Conduct

## OPINION 2022-12

Issued December 9, 2022

### Prosecutor Preparation of Judgment Entry

**SYLLABUS:** A prosecutor may prepare a judgment entry at the direction of a judge. A prosecutor should not engage in subsequent communications with a court about changes or edits to a judgment entry that concern substantive matters or issues on the merits unless opposing counsel is included in the communications.

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# Ohio Board of Professional Conduct

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**APPLICABLE RULES:** Prof.Cond.R. 3.5, 8.4(d), Jud.Cond.R. 2.9, 2.12

#### QUESTIONS PRESENTED:

- 1) Whether a prosecuting attorney may prepare a judgment entry at the request of a judge.
- 2) Whether a prosecutor and/or his or her staff may engage in subsequent communications with a judge and/or his or her staff to prepare the entry without communication with or the input of opposing counsel.

#### OPINION:

The preparation of judgment entries by counsel at the direction of a judge is permissible under court rule. Supreme Court Sup. R. 7 states that the judgment entry required in Civ. R. 58 and Crim. R. 32 may be prepared and presented to the court by counsel. In criminal cases, after announcing its decision, some courts routinely request the prosecutor to prepare the judgment entry. *See* Adv. Op. 1999-08 (defense counsel has a duty to notify court of clerical error in judgment entry prepared by prosecutor.)

*Ex Parte Communications*

Ex parte communications by and between counsel and a judge about substantive matters or issues on the merits is prohibited by rules of conduct. *See* Prof.Cond.R. 3.5(a)(3) (ex parte communication prohibited with judicial officer on merits of the case); Jud.Cond.R. 2.9(A) (a judge shall not initiate, receive, or permit ex parte communications.) However, Jud.Cond.R. 2.9(A)(1) permits ex parte communications by a court “for scheduling, administrative, or emergency purposes that do not address substantive matters or issues on the merits” when the judge reasonably believes no party will gain an advantage as a result. Consequently, after a decision, decree, or verdict, a judge’s direction to counsel for one party to prepare a judgment entry, as contemplated by Sup.R. 7, is a permissible communication regarding an administrative matter in a case. However, opposing counsel should be made aware of the request and, in complying with a judge’s direction, counsel must avoid violating the prohibition against improper ex parte communications.

The Supreme Court’s decision in *Disciplinary Counsel v. Stuard*, 121 Ohio St.3d 29, 2009-Ohio-261, provides an example of an improper ex parte communication between the court and counsel in the preparation of a sentencing opinion. Between the penalty-phase hearing and the sentencing hearing, the judge asked the prosecutor to prepare the opinion required by statute when sentencing the defendant to death. The prosecutor drafted and submitted the opinion at the judge’s direction based on notes the judge gave to the prosecutor. On multiple occasions, the court directed the prosecutor to make subsequent and substantive changes and edits to the sentencing opinion. At no time was defense counsel made aware that the court had assigned the drafting of the opinion to the prosecutor or consulted during the exchange of the opinion between the court and the prosecutor. Defense counsel subsequently challenged the process as an impermissible collaboration between the court and the prosecutor and an improper ex parte communication. In the disciplinary matter, the Supreme Court found that both the judge and prosecutor had engaged in ex parte communications in violation of the former Code of Professional Responsibility and the Code of Judicial Conduct, and both were disciplined for the violations. On appeal of the criminal conviction, the Supreme Court observed that the ex parte communications between the judge and prosecution in preparing the sentencing opinion was “wholly inconsistent” with the ethical rules. *State*

*v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665 ¶ 161. On remand, the judge was ordered to prepare a new sentencing opinion.

The potential for improper *ex parte* communications exists in the preparation of a judgment when a court requests a prosecutor to make substantive edits or changes to an entry that the prosecutor was initially and properly tasked with preparing. If a prosecutor is directed to prepare an entry by a court and subsequent edits or changes are requested of the prosecutor by the court that involve substantive matters or issues on the merits, the Board recommends that the prosecutor decline to make the revisions, based on his or her ethical obligations under Prof.Cond.R. 3.5, unless opposing counsel is included in the communications.

#### *Conduct prejudicial to the administration of justice*

A prosecutor's regular engagement in improper *ex parte* communications with a court to prepare and complete a judgment entry may also implicate the prohibition against engaging in conduct prejudicial to the administration of justice. Prof.Cond.R. 8.4(d); *Disciplinary Counsel v. Stuard*, *supra*, at ¶10. The finalizing of a judgment entry at the court's direction by making edits or changes to the document concerning substantive matters without including opposing counsel in the process, may interfere with due process and damage the public's perception of the justice system as a whole.

#### *Ex parte communications with court staff*

The above analysis does not change if the direction to a prosecutor to make subsequent changes or edits to a judgment entry is received from court staff rather than the judge. A lawyer communicating with court staff about substantive matters or issues on the merits pending before the court is viewed as an improper *ex parte* communication. *See Disciplinary Counsel v. Thomas*, 2020-Ohio-5582 (lawyer disciplined for sending substantive letter regarding facts in a pending matter to court's staff attorney.) Moreover, court staff subject to a judge's direction or control cannot act in a manner contrary to a judge's obligations under the Code of Judicial Conduct, including the prohibition against *ex parte* communications. Jud.Cond.R. 2.12(A). *See also, In re Disqualification of Spitler*, 142 Ohio St.3d 76, 2014-Ohio-5875 (allegation of impropriety and *ex parte* communications when judge's staff directed counsel for one party to prepare an entry.)

The Board concludes that a prosecutor is not ethically prohibited from preparing a judgment entry at the direction of a court. The directive should be placed on the record in the presence of opposing counsel, and revisions to the entry concerning substantive matters or issues on the merits as directed by the court should be made only when counsel for both parties are included in the process. The prosecutor must address with both the court and defense counsel any questions or concerns about the manner or method in which the entry is to be prepared.