

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 12th day of December, 2018.

It is ordered that Section III of the Rules for Integration of the Virginia State Bar, Part Six of the Rules of Court, be amended, to become effective immediately.

Amend Section III, Canon 3, to read as follows:

**SECTION III. CANONS OF JUDICIAL CONDUCT
FOR THE COMMONWEALTH OF VIRGINIA**

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Canon 3. A Judge Shall Perform The Duties Of Judicial Office Impartially And Diligently.

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B. Adjudicative Responsibilities. —

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(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) The judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) The judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may 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.

(c) A judge may consult with law clerks whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

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Comment on subdivision B(7). — The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge. A judge should always be cautious with regard to the possibility of prejudice or the appearance of such when communicating with a probation officer or a similarly situated person without the involvement of all parties.

Defendants convicted of criminal or traffic offenses often have all or part of their sentences suspended upon conditions that include probation. If a defendant is alleged to have violated the terms of his suspended sentence or probation, the Commonwealth's Attorney or probation officer may file a request or motion seeking the issuance of a *capias*, show cause order, or other process against the defendant, and a hearing to revoke the defendant's probation and suspended sentence. For purposes of this Canon, the filing shall not be deemed to be a prohibited ex parte communication with the court. It is not a violation of Canon 3B(7) for a judge to consider what has been filed in order to decide whether to issue process against the defendant, notwithstanding

the fact that notice of the motion or request has not been provided to the defendant. The defendant must be given the opportunity to respond to the allegations at a hearing on the merits. If process is issued, it is recommended that copies of the documents requesting the issuance of process should be attached. This Commentary is limited to the interpretation and application of Canon 3B(7), and is not intended to be in derogation of statutory or Constitutional requirements governing the revocation of a defendant's probation or suspended sentence.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer or if the party is unrepresented, the party who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus curiae*.

Certain *ex parte* communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage *ex parte* communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all *ex parte* communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

A judge may consult with the Legal Research Assistance Project of the Supreme Court of Virginia for aid in carrying out the judge's adjudicative responsibilities.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

Judges have historically played an important role in providing instruction, advice and mentoring to lawyers as they begin and continue to develop their practice skills. Judges should insure that the instruction and advice they provide will not result in unfair advantage to the recipient or prejudice to other parties in a pending proceeding.

A Copy,

Teste:

A handwritten signature in cursive script that reads "Pat L. Hamington".

Clerk