

**EX PARTE COMMUNICATIONS:
A CLICK FROM CALAMITY**

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EX PARTE COMMUNICATIONS: Calamity with a Click

By Gary Bellair

A. Introduction.

Clicks of an icon or two gave rise to calamity evinced by the bold-faced headline running across the top fold of the 23 June 2014 edition of the Austin American-Statesman: “**Ruling on finance case judge pending.**”¹ The underlying article gave a report of the arguments made during a hearing on the State’s motion to recuse Judge John Dietz from hearing further matters in long-running litigation concerning school financing.

The State based its motion on emails Dietz exchanged with school-district attorneys. Among the emails at issue was one written by Dietz, who acknowledged “walking a line between coaching and encouraging” as he refined his opinion in the school finance controversy.² The State cited emails as proof that Dietz and school-district attorneys improperly “collaborated on substantive legal issues in private, outside of [open] court, and without including the attorney-general’s office.”³ The State characterized such collaboration as an “abdication of judicial authority” that gives rise to questions about the judge’s impartiality.⁴

The principal advocate for the school districts disagreed with the State’s assessment of the need to recuse Dietz.⁵ He argued that the emails evidenced the

State’s active participation in the case.⁶ Part of that participation included a private-communications agreement made at the time that the judge properly requested the prevailing parties’ to prepare fact findings and legal conclusions.⁷ Arguing in favor of judicial efficiency, attorneys for the school districts also noted that the State, who had ample opportunities to make its objection to the exchange of emails, waited several months before doing so.⁸ The State retorted that judicial efficiency should not override judicial fairness.⁹

B. The propriety of *ex parte* communications.

At the heart of the recusal controversy are questions concerning the propriety of *ex parte* communications between a judge and attorneys for only one of the parties. An *ex parte* communication in which a judge asks the prevailing party to prepare fact findings and legal conclusions is generally recognized as permissible.¹⁰ But permissibility has its bounds.¹¹

1. *The nature of impermissible communications.*

Texas, like Colorado, has bounds of permissibility.¹² The bounds exist to guard against any inherent appearance of impropriety.¹³ Beyond guarding against im-

⁶*Id.*

⁷*Id.*

⁸*Id.*

⁹Reeves, *supra* note 2.

¹⁰*Cf. Randolph v. Texaco Exp. & Prod., Inc.*, 319 S.W.3d 831, 836 (Tex. App.—El Paso 2010, pet. denied) (dictum opining that a request for a response to a request for fact findings and legal conclusions is not an [impermissible] *ex parte* communication about the merits).

¹¹*Cf. Williams v. Farmers Ins. Group, Inc.*, 720 P.2d 598, 600-01 (Colo. App. 1985) (opining requests for the preparation of findings and conclusions must not include instructions).

¹²*See Barnes v. Whittington*, 751 S.W.2d 493, 495 n.1 (Tex. 1988) (noting that Texas rules and case law discourage impermissible *ex parte* communications).

¹³*See Tamminen v. State*, 644 S.W.2d 209, 218 (Tex. App.—San Antonio 1982) (opining that judges and prosecutors scrupulously avoid situations where their fairness and integrity could appear to be compromised), *aff’d*, 653 S.W.2d 799 (Tex. Crim. App. 1983).

¹Chuck Lindell, *Ruling on finance case judge pending*, AUSTIN AMERICAN-STATESMAN, B1, June 20, 2014.

²Kimberly Reeves, *In recusal hearing, State and plaintiffs tussle over Dietz’ action in school finance case*, KRONBERG’S QUORUMREPORT, available at http://www.quorumreport.com/Quorum_Report_Daily_Buzz_2014/in_recusal_hearing_state_and_plaintiffs_tussle_over_buzziid22156.html (last visited June 29, 2014).

³Lindell, *supra* note 1.

⁴Terrence Stutz, *State seeks to oust judge in Texas school finance case*, DALLASNEWS (June 20, 2014), available at <http://www.dallasnews.com/news/education/headlines/20140620-state-seeks-to-oust-judge-in-texas-school-finance-case.ece> (last visited on June 29, 2014).

⁵*Id.*

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proper appearances, prohibitions exist to ensure that legally interested parties have an equal right to be heard.¹⁴

The bounds preclude *ex parte* communications that involve less than “all of the parties who are legally entitled to be present during the discussion of any matter.”¹⁵ Examples include:

- a litigant’s request for an *in camera* consideration of summary-judgment affidavit;¹⁶
- conversations between the bench and witnesses in a pending case;¹⁷
- attempts by attorneys who quiz court personnel about the “chances” of favorable dispositions,¹⁸ and
- conversations resulting in, *inter alia*, waivers of class-attendance requirements for DWI defendants, sentence reductions, and “time-served” credits in excess of the time actually served.¹⁹

2. Prohibitions on *ex parte* communications.

The adversarial system rests on a fundamental tenet: justice prevails most often when skilled adversaries

¹⁴*Abdygapparova v. State*, 243 S.W.3d 191, 207 (Tex. App.—San Antonio 2007, pet. ref’d).

¹⁵*In re S.A.G.*, 403 S.W.3d 907, 914 (Tex. App.—Texarkana 2013, no pet.) (quoting *In re Thoma*, 873 S.W.2d 477, 496 (Tex. Rev. Trib.1994)).

¹⁶*See Abdelnour v. Mid National Holdings, Inc.*, 190 S.W.3d 237, 241 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *accord Tamminen*, 644 S.W.2d at 217, *aff’d in part and rev’d in part*, 653 S.W.2d 799 (Tex. Crim. App. 1983) (reversing and remanding the sentencing portion of a trial tainted by the due-process violation attributable to misconduct that occurred when the prosecution gave “confidential information” (*viz*, a pamphlet which characterized Bandidos in an unfavorable light) to the court during a case involving a heinous aggravated gang rape by members of the Bandido Motorcycle Gang).

¹⁷*See Erskine v. Baker*, 22 S.W.3d 537 (Tex. App.—El Paso 2000, pet. denied).

¹⁸*See In re J.B.K.*, 931 S.W.2d 581, 583 (Tex. App.—El Paso 1996, orig. proceeding).

¹⁹*See In re Thoma*, 873 S.W.2d at 506.

present competing cases to impartial tribunals.²⁰ To safeguard that tenet, there are rules and statutes that prohibit some *ex parte* communications. Most noteworthy are provisions of the Texas Disciplinary Rules of Professional Conduct and the Texas Code of Judicial Conduct; however, some statutes and constitutional guarantees are sources of guidance for the bench and bar.

a. Texas Disciplinary R. of Prof’l Conduct.

Rule 3.05 of the Texas Disciplinary Rules of Professional Conduct provides guidance to attorneys desiring to engage in *ex parte* communications with tribunals.²¹ Rule 3.05 provides:

A lawyer shall not:

- (a) seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure;
- (b) except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate *ex parte* with a tribunal for the purpose of influencing that entity or person concerning a pending matter other than:
 - (1) in the course of official proceedings in the cause;
 - (2) in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented by a lawyer;
 - (3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
- (c) For purposes of this rule:
 - (1) “Matter” has the meanings ascribed by it in Rule 1.10(f) of these Rules;

²⁰*See generally In re S.A.G.*, 403 S.W.3d at 914 (noting “[o]ur adversarial system of justice, grounded in the principle of an impartial judiciary, becomes compromised when one-sided, closed-door, in-chambers discussions with trial judges are encouraged.”).

²¹Rule 3.05 governs communications with traditional courts as well as communications with administrative agencies acting in a judicial capacity. *See* Tex. Comm. on Prof’l Ethics, Op. 604 (cautioning that attorneys should avoid *ex parte* communications with members of state agencies when the agency is acting in its judicial capacity).

(2) A matter is “pending” before a particular tribunal either when that entity has been selected to determine the matter or when it is reasonably foreseeable that that entity will be so selected.²²

Rule 3.05 thus permits *ex parte* written communications if there is a prompt delivery of copies to the opposing party.²³ The rule also allows *ex parte* oral communications upon adequate notice to the other party.²⁴ But the rule prohibits attorneys from engaging in *ex parte* communications with a tribunal, other than as permitted by law, “for the purpose of influencing that entity or person concerning a pending matter”²⁵

b. Rules governing judicial conduct.

“[M]embers of the judiciary are significant public figures . . . [who] serve as the collective guidon of the banner representing fairness and impartiality in our state.”²⁶ Provisions intended to nurture fair and impartial service are part of a rule that delineates adjudicative responsibilities.²⁷ The most pertinent of the provision states:

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 other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge’s

direction and control. This subsection does not prohibit:

- (a) communications concerning uncontested administrative or uncontested procedural matters;
- (b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;
- (c) obtaining 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;
- (d) consulting with other judges or with court personnel;
- (e) considering an *ex parte* communication expressly authorized by law.²⁸

c. Constitutional and statutory guides.

Courts routinely refer to the rules of disciplinary and judicial conduct when evaluating the propriety of *ex parte* communications.²⁹ But those rules are not the sole bases for evaluating the propriety of such communications. For example, article 36.27 of the Texas Code of Criminal Procedure governs how jurors communicate with the bench during criminal proceedings.³⁰

Evaluations of *ex parte* communications may also implicate constitutional protections because such communications may deprive (1) criminal defendants of the constitutionally guaranteed right to a fair trial,³¹ and (2) parties, whether civil or criminal, of due process.³²

²²Tex. Disciplinary R. Prof’l Conduct 3.05, *reprinted in* TEX. GOV’T CODE, tit. 2, subtit. G, app. A.

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶*In re Barr*, 13 S.W.3d 525, 532 (Tex. Rev. Trib. 1998, no appeal).

²⁷*See* Tex. Code Jud. Conduct, Canon 3(B)(8), *reprinted in* TEX. GOV’T CODE, tit. 2, subtit. G, app. B.

²⁸*Id.*

²⁹*See* Chad Baruch & Hon Tracy E. Christopher, *Ex Parte Commc’ns*, State Bar of Tex. Prof. Dev. Program, State Bar College Summer School 11 (2010).

³⁰*See* TEX. CODE CRIM. PROC. art. 36.27.

³¹*See* U.S. CONST. amend VI; TEX. CONST. art. 1, § 10.

³²*See* U.S. CONST. amend XIV; TEX. CONST. art. 1, § 19.

The opinion in *Abdygapparova* illustrates an application of the protection afforded under the due-process clause. The due-process issue arose when the trial judge provided the prosecutor with guidance concerning the presentation of the State’s case.³³ The appellate court subsequently provided the bench and the bar with guidance concerning the propriety of the notes with the judge and the prosecutor exchanged by holding that the communications evinced bias on the part of the trial judge, whose conduct deprived Abdygapparova of his right to a fair trial before an impartial tribunal.³⁴

C. The Technical Evolution.

Smartphones empower users with access to computing power equal to that available to those responsible for running an Apollo space mission.³⁵ That power enables attorneys to search for information about potential clients, parties, fact and expert witnesses, judges, veniremen, and jurors. But the bounds of the rules governing impermissible *ex parte* communications require the judicious rather than injudicious uses of the technology.

1. *The tech and rule-savvy judge.*

Facebook communications gave rise to the appellate issues raised in *Youkers v. State*.³⁶ The issues arose within the context of a proceeding brought to revoke Youkers’ community supervision. Youkers was on parole for a prior felony when the state indicted him for assaulting his girlfriend.³⁷ Pursuant to a plea agreement’s terms, the court sentenced Youkers and placed him on community supervision.³⁸ The State moved to revoke Youkers’ supervision.³⁹ Youkers pleaded true to

revocation allegations and requested a reinstatement of his community supervision.⁴⁰

The court denied the reinstatement request and imposed an eight-year sentence.⁴¹ Youkers subsequently filed a motion for new trial which raised a question concerning the judge.⁴² Youkers’ proffered Facebook communications between “friends” as evidence of the judge’s bias.⁴³

Those communications began when the father of Youkers’ girlfriend sent a message seeking leniency for Youkers.⁴⁴ The judge’s online response advised the father that the communication was a violation of rules precluding *ex parte* communications; he ceased reading the message once he realized the message was improper; and cautioned that he would “unfriend” the father if he received further communications about the case or any other pending legal matter.⁴⁵ The judge’s online response also advised that he was placing a copy of the communications in the court’s file, disclosing the incident to the lawyers, and contacting the judicial conduct commission to determine if further steps were required.⁴⁶ At the hearing on the new-trial motion, the judge testified that “these were the only Facebook communications he had with the father and he had not read any of the father's Facebook posts.”⁴⁷

Youkers appealed the denial of the new-trial motion on the grounds that “the judge’s Facebook relationship with the father created actual and apparent absence of impartiality.”⁴⁸ But the court’s review of the appellate record failed to provide any supporting context because (1) the “friend” designation, standing alone, provided no insight into the nature of the relationship; and (2) the

³³*Abdygapparova*, 243 S.W.3d at 207-08.

³⁴*Abdygapparova*, 243 S.W.3d at 209.

³⁵See Drew Olanoff, *Funfact: One Google search uses the computing power of the entire Apollo space mission*, <http://thenextweb.com/google/2012/08/28/funfact-one-google-search-uses-computing-power-entire-apollo-space-mission/> (last visited on June 19, 2014).

³⁶*Youkers v.State*, 400 S.W.3d 200, 203 (Tex. App.–Dallas 2013, pet. ref’d).

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.* at 204.

⁴³*Id.* at 204.

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*Id.* at 203.

⁴⁷*Id.*

⁴⁸*Id.*

judge acted in full compliance with the Texas Committee on Judicial Ethics' recommended procedure concerning the treatment of *ex parte* communications.⁴⁹ Accordingly, the court concluded that "the trial judge did not abuse his discretion in denying Youkers's motion for new trial based on his Facebook-based claims of bias."⁵⁰

Youkers thus evinces a rule-savvy judge's proper disposition of issues concerning *ex parte* communications occurring in modern-technological venue.

2. *Mistrials: a peril of ex parte communications.*

The consequences of impermissible *ex parte* communications involving the use of evolving technologies range from unsettling to harmless. The unsettling consequences include mistrials and varying sanctions for violations of the rules governing impermissible *ex parte* communications; whereas, the opposite end of the spectrum concerns improper communications that the law deems to be harmless under the appellate standards of review.

Evincing the possibility of a new trial on account of an improper *ex parte* communication is the opinion handed down by the Tennessee Supreme Court in *State v. Smith*.⁵¹ The *Smith* decision concerned the propriety of the actions taken by the trial court after a state's witness disclosed that a juror, in violation of an explicit jury instruction, sent the witness a Facebook message that applauded her testimony. The judge informed the attorneys of the communications but conducted no investigation into the juror's ability to continue deliberating with the rest of the jury. On appeal, the supreme court noted that the witness' disclosure required the court to do "more than simply inform the parties about the [disclosure] and then await the jury's verdict." Instead, the court needed "to immediately conduct a hearing ... to obtain all the relevant facts surrounding the

⁴⁹*Id.* at 206-07 (citing Comm. on Jud. Ethics, State Bar of Tex., Op. 154 (1993), which provides that a judge who receives an *ex parte* communication from litigant may comply with canon 3B(8) by placing the communication in clerk's file; providing the communication to all parties; determining if the communication is proper; and, if it is not, advising the communicant that all *ex parte* communications must cease).

⁵⁰*Id.* at 207.

⁵¹*State v. Smith*, 418 S.W.3d 38 (Tenn. 2013).

extra-judicial communication between [the witness and the juror], as well as communications between the juror and other members of the jury."⁵²

The court's failure to conduct such a hearing led to the supreme court's decision to remand the case with instructions "to conduct a hearing to determine whether [the juror]'s Facebook communication with [the state's witness] disqualified him from continuing to serve on [the] jury."⁵³ Instructions further mandated a new trial for the accused "[i]f, for any reason, the trial court is unable to conduct a full and fair hearing" concerning the juror's improper extra-judicial communications.⁵⁴

Smith is no aberration.⁵⁵ Widespread examples of laxity arising from the misuse of technology gave rise to the coining of a descriptive phrase: "Google mistrials."⁵⁶

Somewhat illustrative of a Texas court's declaration of a "Google mistrial" is the new-trial order that gave rise to *In re Health Care Unlimited, Inc.* Underlying the trial court's declaration were allegations that the presiding juror engaged in juror misconduct by having cell-phone conversations with an employee of the defendant during breaks while the jury deliberated.⁵⁷

At the hearing on the motion, which the court treated as a motion for new trial, the juror and employee admitted having telephone conversations during the jury's

⁵²*Id.* at 48.

⁵³*Id.* at 49.

⁵⁴*Id.*

⁵⁵*See, e.g., Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189, 202-02 (Mo. Ct. App. 2012) (finding the possibility of anti-corporate bias justified the removal of a juror whose blog allegedly contained material relating to "corporate criminals, credit rating agencies, economic warfare, and socialism" although the juror disclosed no bias when asked a voir-dire question requiring a disclosure of possible bias against corporations); *State v. Abdi*, 45 A.3d 29 (Vt. 2012) (holding that harm ensued from a juror's use of the internet to acquire extraneous information concerning the Somali culture).

⁵⁶Paula Hannaford-Agor, *Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards*, 24 THE COURT MANAGER 42, 42 (Summer 2009).

⁵⁷*In re Health Care Unlimited, Inc.*, 429 S.W.3d 600, 601 (Tex. 2014).

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deliberations.⁵⁸ But each explained that the conversations “only involved preparations for ... an upcoming church retreat.”⁵⁹ The juror additionally denied seeing the employee at the trial, although the court noted that the employee “sat behind and conferred with [the defendant]’s counsel during the evidentiary part of the trial ‘in the full view of the jury.’”⁶⁰ Evidence further established the employee was a school-board member of the district that employed the juror and her husband.⁶¹

In light of an indisputable violation of admonitory instructions and the totality of the circumstances, the court’s order concluded that “the integrity of the verdict rendered in this cause has been compromised and in the interest of justice, a new trial should be granted.”⁶² The propriety of the new-trial order was at issue in *In re Health Care Unlimited*. After scrutinizing the order, which included neither findings nor conclusions concerning either the materiality of the communications or the ensuing harm, the supreme court concluded that the trial court abused its discretion by rendering an order that skirted the injury element of Texas Rule of Civil Procedure 327.⁶³ Accordingly, the court conditionally granted relief requiring the trial court to vacate its new-trial order and render judgment on the verdict.⁶⁴

3. *Disciplinary proceedings: another peril.*

Cell-phone users exchanged nearly eight trillion text messages during 2012.⁶⁵ Most of the messages were arguably conducive to laxity that, according to commentators, cause calamities which ensue from impermissible

ex parte communications.⁶⁶ Typifying such laxity are the text messages that gave rise to a Polk County scandal.

a. The report of *ex parte* communications.

Then assistant district attorney and judicial candidate Kaycee Lynn Jones (Jones) happened to be a spectator during the 258th District Court’s trial of *State v. Reeves* when she received the first of a series of text messages that became the topic of newspaper reports.⁶⁷ In part, the message series reportedly read:

KAYCEE!!

Yes?

Baby pooped on defendant
That pissed him off
He just testified baby
pooped on him
If he threw dog off bed be-
cause dog peed on bed, what
would he do if baby pooped
on him??????

Good point

Tell Beverly

Ok⁶⁸

Jones contemporaneously wrote a note to the lead prosecutor. According to the criminal investigator who passed Jones’ note to the prosecutor, the note said: “judge says, baby pooped on defendant – if he threw a dog off the bed because dog peed on bed what would he do if baby pooped on him?”⁶⁹ The investigator subsequently filed a complaint concerning the propriety of the

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰*Id.* at 601-02.

⁶¹*Id.* at 601.

⁶²*Id.* at 602.

⁶³*Id.* at 603-04.

⁶⁴*Id.* at 604.

⁶⁵See Portio Researcher, *Mobile Messaging Markets 2014: Facebook, WhatsApp, SMS, and OTT – the State of Play*, 16 (Mar. 12, 2014), <http://www.portioresearch.com/en/major-reports/current-portfolio/mobile-messaging-markets-state-of-play-2014.aspx> (last visited June 13, 2014).

⁶⁶See Baruch & Christopher, *Ex Parte Commc’ns* at 11-1.

⁶⁷Jones now is the presiding judge of the 411th District Court, Polk County, Texas. See http://www.courts.state.tx.us/pubs/JudicialDirectory/District_Judges_by_District2014.pdf.

⁶⁸Vanesa Brashier, *State leader calling for 258th District Judge Coker’s impeachment*, THE KINGWOOD OBSERVER (July 19, 2013), http://www.yourhoustonnews.com/kingwood/news/state-leader-calling-for-th-district-judge-coker-s-impeachment/article_001b0782-a12f-54a4-8b1a-235193f77e7e.html?mode=story.

⁶⁹Livingston, *Judge Coker Facing Allegations of Ethics Violation in Court Room*, POLK COUNTY TODAY, (Jan. 23, 2013), http://www.polkcountytoday.com/coker_012413.html.

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message.⁷⁰ The complaint characterized the actions of the judge, Elizabeth Coker (Coker), as unethical.⁷¹

b. The ensuing calamities.

Unfavorable press reports of the text-messaging incident gave rise to investigations by the Texas Commission on Judicial Conduct⁷² (Commission) and the Office of the Chief Disciplinary Counsel of the State Bar of Texas (Disciplinary Counsel).⁷³

1) A fall from grace.

The Commission initiated an investigation concerning the conduct of Coker. During the pendency of the investigation, a state representative filed a bill calling for the impeachment of Coker.⁷⁴ The bill called for Coker's impeachment because she "demonstrated conduct unbecoming of a judge" by injecting herself into the trial in violation of the Texas Code of Judicial Conduct.⁷⁵

The call for Coker's impeachment stalled; however, the Commission continued its investigation. The investigation, which initially concerned the allegations arising

from the *ex parte* text-message communications exchanged while Coker presided over the trial of *State v. Reeves*, uncovered information giving rise to other allegations concerning Coker's use of Jones.⁷⁶ The Commission also investigated claims concerning *ex parte* communications with jurors "deliberating in one or more criminal trials."⁷⁷ Notably, the investigation gave rise to the concerns about the truthfulness of Coker, who was less than candid about discussions that she had with a witness who testified before the Commission.⁷⁸

The proceedings before the Judicial Conduct Commission reached a zenith on October 21, 2013, when the Commission and Coker finalized an agreement concerning her voluntary resignation.⁷⁹ The agreement, which included neither findings by the commission nor admissions of wrongdoing by Coker, required that she tender her resignation.⁸⁰ Additionally, the agreement permanently barred Coker from holding judicial office and performing judicial functions in the State.⁸¹

2) A public reprimand.

The first news reports of the texting incident indicated that Jones promised to fully cooperate with any inquiry.⁸² Jones made good on her promise by sending a letter to the Disciplinary Counsel for the State Bar of Texas letters in which Jones admitted her part in the texting exchange.⁸³ Jones additionally expressed her remorse: "I deeply regret that I acted in this manner." Jones further averred that she "now fully appreciate[s]

⁷⁰*See id.*

⁷¹*See id.*

⁷²The constitution empowers the Judicial Conduct Commission with the authority to perform three fundamental tasks: (1) investigate, and if necessary, pursue formal or informal charges; (2) make findings of fact after conducting an adjudicative hearing; and (3) recommend or order a final disposition of the charges. *See generally* TEX. CONST. art. V, § 1–a. The investigations of the Judicial Conduct Commission may result in: (1) a dismissal of the complaint; (2) a public or private order of additional education in combination with a public or private sanction; (3) a public or private admonition, warning or reprimand; (4) the acceptance of a voluntary agreement to resign from judicial office in lieu of disciplinary action, or (5) formal proceedings for the removal or the involuntary retirement of the judge from the bench. TEX. CONST. art. V, § 1–a(8).

⁷³The Chief Disciplinary Counsel represents the Commission for Lawyer Discipline, the State Bar of Texas committee entrusted with the responsibility for handling attorney discipline. TEX. GOV'T CODE § 81.075(a); *see also In re Allison*, 288 S.W.3d 413, 415 (Tex. 2009).

⁷⁴Brashier, *supra* note 67.

⁷⁵*Id.*

⁷⁶*In re Coker*, CJC Cause 13-0376-DI, Voluntary Agreement to Resign from Judicial Office in Lieu of Disciplinary Action (Tex. Comm'n Jud. Conduct 2013).

⁷⁷*See id.* at *1.

⁷⁸*See id.* at *2.

⁷⁹*See id.*

⁸⁰*See id.* at 2-3.

⁸¹*See id.* at 2.

⁸²Cindy Horswell, *Judge accused of texting prosecutor to aid case*, HOUSTON CHRONICLE (Jan. 17, 2013), available at <http://www.houstonchronicle.com/news/houston-texas/houston/article/Judge-accused-of-texting-prosecutor-to-aid-case-4204137.php> (last visited Oct. 22, 2013).

⁸³Brasier, *supra* note 67.

the importance of the impartiality of a judge in a trial”⁸⁴

By agreement, Jones and the Disciplinary Counsel subsequently resolved the disciplinary proceeding pending against her. The agreed judgment rendered by the Evidentiary Panel of the State Bar District 3-2 Grievance Committee (the “Panel”) provided for a monetary sanction in the amount of \$650 and a Public Reprimand in accordance with the Texas Rules of Disciplinary Procedure. The evidentiary panel imposed the sanction after concluding that Jones committed the following violations of Texas Disciplinary Rules of Professional Conduct:

3.05(b) [A lawyer shall not: except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate ex parte with a tribunal for the purpose of influencing that entity or person concerning a pending matter other than: (1) in the course of official proceedings in the cause; (2) in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented by a lawyer; (3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer]; and **8.04(a)(6)** [A lawyer shall not: knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law].⁸⁵

3) Public Opinion: The continuing fallout.

The press and bloggers provide additional forums for evaluating the propriety of impermissible *ex parte* communications. To date, reports concerning the dispositions by the Commission and the Panel are still less than favorable. One commentator expresses dismay in the Commission’s decision to allow Coker to resign

⁸⁴*Id.*

⁸⁵*Commission for Lawyer Discipline v. Jones*, State Bar Dist. 3-2 Grievance Comm. Cause 201300648, Agreed Judgment of Public Reprimand (Evid. Panel May 5, 2014).

under circumstances which allowed her to deny any wrongdoing and immediately, albeit unsuccessfully, run for District Attorney.⁸⁶ Referencing the comments of criminal-justice experts who suggest Jones should have received a heftier reprimand, the commentator also bemoans the “slap on the wrist” that the Panel gave Jones.⁸⁷ Giving credence to concerns that the actions of the Commission and the Panel are insufficient to deter similar misconduct are news reports of the sanctions that officials in Florida imposed against former judge Ana Gardiner and former prosecutor Howard Scheinberg.⁸⁸

Scheinberg was the lead prosecutor in *State v. Loureiro*, a first-degree capital murder case tried before former judge Ana Gardiner.⁸⁹ The jury returned a verdict which found the defendant guilty of first-degree murder, and subsequently recommended the death penalty.⁹⁰ Former judge Gardiner imposed the death penalty; however, the Broward State Attorney’s office agreed to a new trial after learning that Gardiner and Scheinberg engaged in substantial personal communications during the course of the trial.⁹¹

The communications led proceedings which the Supreme Court of Florida culminated by suspending Scheinberg from the practice of law in Florida for a two-year period;⁹² and disbaring Gardiner, who previously resigned as circuit judge.⁹³

⁸⁶*Sophie, TX: Prosecutor-Turned-Judge Gets Lightest Possible Punishment for Brazen Misconduct*, THE OPEN FILE (June 2, 2014), available at <http://www.prosecutorialaccountability.com/tx-prosecutor-turned-judge-gets-lightest-possible-punishment-for-brazen-misconduct/>.

⁸⁷*Id.*

⁸⁸Admin, *Lesson for Prosecutors: Stop Texting Your Judge*, THE OPEN FILE (June 17, 2014), available at <http://www.prosecutorialaccountability.com/lesson-for-prosecutors-stop-texting-your-judge/>.

⁸⁹*The Florida Bar v. Scheinberg*, 129 So. 3d 315, 316 (Fla. 2013).

⁹⁰*Id.* at 316.

⁹¹*Id.* at 316-17.

⁹²*Id.* at 320.

⁹³*The Florida Bar v. Gardiner*, SC11-2311, 2014 WL 2516419, **2-5 (Fla. 2014).

The circumstances giving rise to the text-messaging incidents *Reeves* and *Loureiro* are indisputably an affront to an adversarial system of justice based on the principle of an impartial judiciary.⁹⁴ But, despite the similarities, the circumstances giving rise to the respective incidents are not identical.

Dissimilarities such as a conviction that necessitated a new trial for Loureiro and an acquittal for Reeves perhaps justify the differences in the sanctions that the governing bodies meted out. But public opinion, like that of the legislator who called for the impeachment of Coker, may, and perhaps should, be an important factor in safeguarding the Rule of Law. Opinions, like that of the above-referenced commentator, similarly worthy of consideration when circumstances suggest that prosecutors and judges might need some back-to-basics ethics training about the dangers of impermissible *ex parte* communications.

D. Epilog

Coker presumably practices law in the communities surrounding Livingston, TX. Judge Jones is the presiding judge of the 411th Judicial District Court. Judge David Peeples overruled the Attorney General's attempt to oust Judge Dietz, who presumably is about to finish editing the findings of fact and conclusions of law necessary to justify his decision in the school-finance litigation.⁹⁵ And the author hopefully enlightened his readers about the dangers of *ex parte* communications that are inconsistent with the foundational principles of our Rule of Law.

⁹⁴*In re S.A.G.*, 403 S.W.3d at 914.

⁹⁵Terrence Stutz, *Texas' bid to remove judge in school finance case fails*, DALLASNEWS (June 23, 2014), available at <http://www.dallasnews.com/news/state/headlines/20140623-texas-bid-to-remove-judge-in-school-finance-case-fails.ece> (last visited July 11, 2014).