REPORT OF INDEPENDENT REVIEWERS

In response to allegations that a former judicial officer in the Third Judicial District of Iowa in an ex parte manner requested, accepted and improperly used proposed rulings during his tenure, State Court Administrator Todd Nuccio on March 28, 2018 appointed the undersigned to conduct an independent review, pursuant to his authority under Iowa Code §§ 602.1204(2), 602.1209(1) and 602.1209(7). The following report is submitted in response to that directive from the State Court Administrator.

I. General Charge and Scope of Review

The undersigned were directed to "conduct an independent review into the allegations that a former judicial officer in the Third Judicial District of Iowa, in an ex parte manner, requested and accepted proposed orders, including but not limited to proposed findings of fact and conclusions of law, from counsel in pending cases without opposing counsel's knowledge and improperly used those proposed orders as final orders of the court in those cases."

The allegations at issue focus on the actions of now retired District Judge Edward A. Jacobson. The independent reviewers were not charged to determine if Judge Jacobson violated any laws or court rules but were specifically charged with conducting a review and analysis of the processes followed by Judge Jacobson related to submission or use of proposed orders within the framework of such laws and court rules, and to document any questionable and/or improper practices found. Further, they were directed to pursue and document any other evidence of limited or system-wide practices that are incongruent with the proper preparation of court orders.

II. Conduct of Review and Investigation

In performing the review and investigation as directed, the following actions were taken:

A. The depositions of Elizabeth Rosenbaum and Edward Jacobson, taken November 15, 2017 in Plymouth County Case Number CDCD030591, Presuhn v. Presuhn, were reviewed.

B. Questionnaires were prepared and distributed to all current District 3 district judges, district associate judges, senior judges, magistrates, court administrators, clerks of court, court reporters and judicial assistants, approximately 140 people in total. The questionnaires distributed are attached to this report as Appendix B. The responses to those questionnaires were then reviewed.

C. The available archived emails of Edward Jacobson during his tenure as a judge, totaling approximately 9,500, were reviewed. Due to the archiving practices for Lotus Notes (the email system utilized by the Iowa judicial branch) the emails reviewed do not constitute all the emails sent and received by Judge Jacobson during his tenure.

D. Interviews. The following persons were interviewed by the independent reviewers:

1. Duane Hoffmeyer, Chief Judge of District 3;
2. Pam Calhoun, current Court Administrator of District 3;
3. Leesa McNeil, former Court Administrator of District 3;

4. Maria Schultz, former court reporter for Judge Jacobson;

5. Denise Derby, former court reporter for Judge Jacobson;

6. Rosanne Lienhard Plante, attorney in District 3.

7. Edward Jacobson, in the presence of his attorneys Michael Carroll, Dan Connell and Thad Cosgrove.

E. Individual case records were reviewed where those cases related to specific emails identified as problematic during the investigation and review. Those problematic emails are specified below and specified in Appendix C.

F. Research and review of the applicable case law, the Code of Judicial Conduct and the Code of Professional Responsibility.

III. Legal and Ethical Parameters

The Iowa Supreme Court addressed the questions concerning the wholesale adoption of proposed rulings submitted by litigants, and the ex parte solicitation of such proposed rulings, many years ago in *Kroblin v. RDR Motels, Inc.*, 347 N.W.2d 430, 434-35 (Iowa 1984):

> We first address the questions of whether and under what circumstances a trial court may properly request the assistance of counsel in drafting rulings, orders, judgments and decrees, then the question of whether in this case the buyer is entitled to a new trial because the court adopted orders proposed by the sellers' counsel.
>
> Many courts have recognized as a common practice the post-trial submission by counsel of proposed findings, conclusions, orders and decrees. (citations omitted). Trial counsel's thorough preparation and articulation of suggested findings of fact and conclusions of law, accompanied by references to particular testimony and exhibits, can be of great assistance to the trial court, especially in highly technical or complicated cases. (citations omitted). Many courts have sharply criticized the practice, however, suggesting that if the trial court adopts verbatim the findings prepared by winning counsel it may appear that the court has abdicated its role of fact-finder as well as decision-maker. (citations

omitted). The United States Supreme Court itself criticized findings of fact which had been submitted by counsel and adopted verbatim by the trial court. The Court held that the findings were formally the court's and would stand if supported by evidence, but it clearly stated its preference for those "drawn with the insight of a disinterested mind" which thereby "reveal the discerning line for decision of the basic issue in the case." (citations omitted). "All courts agree that finding the facts is an important part of the judicial function and that the judge cannot surrender this function. (citation omitted).

Detailed written decisions are often required by court rule, particularly when a judge tries an issue of fact without a jury. (citations omitted). The purpose of such rules is threefold: (1) the quality of the judge's decision-making process is enhanced by requiring simultaneous articulation of the judge's underlying reasoning; (2) the parties receive assurance that their contentions have been fully and fairly considered; and (3) appellate courts can readily ascertain the specific factual and legal bases for the court's decision. (citations omitted). These purposes may not adequately be served to the extent that the trial court delegates to counsel its own responsibility to scrutinize the record, select apt principles of law, and fully articulate the bases for a sound, fair decision.

We believe the better practice is that spelled out in *Bradley v. Maryland Casualty Co.:*

> We venture to suggest that if, because of prevailing custom, or pressure of work, or a case's technical nature, or for other reasons, counsel must be asked to assist in the preparation of findings and conclusions, it is better practice to make this request at or soon after the submission of the case and prior to decision and to make it of both sides. 5 Moore's Federal Practice (2d ed. 1966), par. 52.06[3], p. 2665. Then the court may pick and choose and temper and select those portions which better fit its own concept of the case.

(citation omitted). We further emphasize that in fairness all parties should be given the same opportunity to submit proposed findings and to comment on findings proposed by others. The Iowa Code of Judicial Conduct provides in relevant part:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding.

Although the Iowa Code of Judicial Conduct has been amended and modified over the years since 1984, the principles governing ex parte communication for the solicitation of proposed rulings, and the adoption verbatim of proposed rulings submitted by litigants, have not changed. *See Nevadacare, Inc. v. Department of Human Services,* 783 N.W.2d 459 (Iowa 2010); *Rubes v. Mega Life and Health Insurance, Inc.,* 642 N.W.2d 263 (Iowa 2002); *Production Credit Association v. Shirley,* 485 N.W.2d 469 (Iowa 1992); *Richter v. State of Iowa*, 899 N.W.2d 739 (Iowa App. 2017); *Carter v. Rumple,* 695 N.W.2d 334 (Iowa App. 2004); *In re Marriage of Siglin,* 555 N.W.2d 846 (Iowa App. 1996).

The current provisions of the Iowa Code of Judicial Conduct relevant to the instant review and investigation are Rules 51:2.2 (Impartiality and Fairness), 51.2.6 (Ensuring the Right to Be Heard) and 51.2.9 *(Ex Parte* Communication). In summary, these present rules provide the same guidance and restrictions as set forth in *Kroblin, supra,* more than 30 years ago.

A more comprehensive discussion of the legal and ethical parameters may be found in the legal memorandum sent by Chief Judge Arthur E. Gamble to the judges of District 5 on April 12, 2018 following entry of the Supervisory Order of the Iowa Supreme Court on March 27, 2018, attached hereto as Appendix D. The legal memorandum sent by Judge Gamble is attached to this report as Appendix E.

IV. Results of Jacobson Investigation

As stated above, one of the materials reviewed during the investigation was the deposition of Edward Jacobson taken November 25, 2017 in *Presuhn v. Presuhn*, Plymouth County Case Number CDCD030591. The deposition was taken in connection with the petition to vacate decree filed by petitioner Troy Presuhn on June 19, 2017; the decree was originally entered June 27, 2016 by Judge Jacobson.

During the course of the deposition, Jacobson was asked by respondent's attorney if at the end of the trial he had reached certain decisions about what the judge thought should be in the decree, and whether he had in some manner relayed those decisions to respondent's then attorney for the purpose of drafting a decree. Dep. pp. 4-5. Jacobson testified that he had reviewed the pretrial stipulation, exhibits and everything and had concluded that he agreed with respondent's position on every contested issue. He stated that he then contacted respondent's attorney, either by phone or email, and left a message that he desired respondent's attorney to draft a proposed decree in line with respondent's pretrial requests and then email it to him. Dep. pp. 5-6.

Jacobson further testified that respondent's attorney did then email a proposed decree to him, which he reviewed. He believed the attorney might have left "a couple of blanks" due to being unsure of exactly what the judge wanted. Jacobson concluded that he had forwarded the decree to

his court reporter, who filed the decree after making any changes requested by the judge. Dep. p. 6.[1]

Later in his deposition, Jacobson testified that approximately 75% of the time, he dictated his rulings which were then typed by his court reporter. Of the remaining 25%, he stated that he would personally type rulings if they were very short. Dep. pp. 8-9. The following colloquy then occurred between Jacobson and petitioner's attorney:

> Q: How many times have you directed one of the counsels to write the final ruling after a contested trial?
>
> A: I don't know. A couple hundred maybe.
>
> Q: Do you typically do this via a phone call, an email or a letter? How do you direct one of the counsels to write the rulings after a contested trial?
>
> A. Any of the above.
>
> Q: And do you make sure both counsel are usually present on those communications, or are you only contacting one of them?
>
> A. Well, if there is anything still to be heard, or evidence is still to be contested, then everything goes to both counsel. If I made a

[1] Jacobson's testimony in his deposition is not consistent with his emails of June 27, 2016 to his court reporter and reply to respondent's attorney. In the latter email, he states "Fixed one typo and filed."

decision, and all I want is somebody to put it on paper, I don't have any problem telling one counsel to do it without telling the other counsel I told them to do it.

Q: And is there any reason when—on the cases after a contested trial why you would choose to do that versus giving dictation and having a court reporter write up the ruling that you had determined?

A. As I said, I was—I really, really tried to never have anything go over the 60-day rule when I was on the bench, and if I was under time constraints, that's usually when it happened.

Dep. pp. 9-10. Jacobson also testified in deposition that he estimated he had tried approximately 2,000 divorce cases during his 16-year career. Dep. p. 4.

During his interview with the independent reviewers, Jacobson clarified the testimony he gave during the deposition referenced above and gave insight into his decision-making processes. He stated that the number of approximately 200 cases given in his deposition testimony referred to all cases where he had solicited proposed rulings from attorneys, **not** the number of cases in which he had ex parte solicited proposed findings of fact and conclusions of law from one attorney, and then adopted the proposed ruling as his own. He stated that there were only a handful of cases in the latter category, and that the few times he ex parte solicited and then used proposed rulings were times when he was under time pressure to

file a ruling before the 60-day rule would apply.

Although Jacobson was unaware of any legal authority supporting the ex parte solicitation of proposed findings and conclusions, later adopted by the judge, he stated that such was a common practice in both South Dakota, where he practiced before moving to Iowa, and in Iowa both when he was a practicing attorney and judge. He stated that both based upon his own personal knowledge and statements to him by attorneys practicing in District 3, he believes such practice is utilized by all judges in the district, in many instances more than he did. He asserted that he utilized the practice only after he had decided a case, and that no party gained any procedural or substantive advantage by authoring the resulting ruling without the knowledge of the opposing party and/or lawyer. If he did not like a particular item in the ruling sent to him by the attorney, he edited the ruling himself and never asked the attorney to re-submit the proposed ruling with changes.

Jacobson stressed that he never believed he was doing anything improper. He stated that his professional reputation, both as an attorney and judge, has been of paramount importance to him, and he would never do anything to jeopardize that reputation. It was extremely important to him that he file his rulings on time, within the 60-day window provided by Iowa Court Rule 22.10. He stated he only called upon a lawyer to write a ruling for him when he felt extreme time pressure.

The review of Jacobson's emails available disclosed 13 rulings by him which fell within the scope of the review and investigation directive. The majority of the 13 rulings were in family law cases, but there were other civil cases involved as well. The summary of those 13 cases is attached to this report as Appendix C.

As stated above, one of the persons interviewed was attorney Rosanne Lienhard Plante, who has made public a complaint that she believed the ruling in one of her cases had been ghostwritten by the other attorney in the case. The case in question is Woodbury County Case Number DRCV169658, Savary v. Murdach, tried in January 2017. Ms. Lienhard Plante stated that her belief and complaint was based upon the contents of the ruling itself and not upon any extrinsic evidence. The interviewers have been unable to find any emails which would support the complaint. Additionally, Jacobson's court reporter at the time specifically remembers typing the ruling from the judge's dictation. The interviewers concluded that the ruling in Savary v. Murdach was not ghostwritten.

V. Systems Review

Included in the charge from the State Court Administrator was a directive to pursue and document any other evidence of limited or system-wide practices that are incongruent with the proper preparation of court orders. Further the review was to assess and determine:

1. If informal communication between judicial officers and attorneys can impact the improper use of proposed orders;

2. Under what circumstances and frequency clerk of court personnel affix the electronic signature of a judicial officer to a court order;
3. How well the Judicial Branch's e-filing system (EDMS) is configured to capture and track the iterations of proposed orders.

The systems review was conducted by reviewing the content of the questionnaires returned by District 3 personnel, as well as the interviews identified above. The following conclusions are drawn from the review.

A. There is no evidence that any judicial officer in District 3 other than Edward Jacobson solicited proposed rulings from litigants in an ex parte manner, or that they adopted proposed rulings in an inappropriate manner, other than the assertions of Jacobson during his interview. Many of the judges in District 3 stated that they virtually never solicited proposed findings of fact and conclusions of law from the litigants following trial. Those that did solicit proposed rulings either did so in open court, or by communication with both sides, and only in complicated cases where the ability to cut and paste from the parties' proposed rulings expedited the process of entering a final ruling.[2] One judge stated that he/she never solicited proposed rulings because of

[2] Judges are required to file a monthly report by Iowa Rule of Judicial Administration 22.10. That report must list any case which has been under advisement for 60 days or longer. A case is deemed submitted even though briefs or transcripts have been ordered but have not yet been filed. Rule 22.10(2). Thus if a judge requests proposed findings and conclusions from the parties, the time waiting for them will count against the 60-day period.

his/her pride in writing ability, and his/her desire to produce a ruling wholly his/her own.

B. EDMS is designed to facilitate the presentation of proposed orders but does not preserve all proposed orders indefinitely. Attorneys and parties routinely submit proposed orders to the courts for a variety of reasons. Iowa Court Rule 16.409 governs the presentation of proposed orders to the Court.[3] The rule provides that a proposed order may be electronically presented with a motion or without a motion. The order must be submitted in an editable format capable of being read by Microsoft Word, and in specified fonts. Whenever a document is submitted or presented all registered filers in the case receive an electronic notice of the submission or presentation. Iowa Rule 16.201(11). Proposed orders submitted in this fashion are not retained by EDMS past one year due to storage restrictions.

Attorneys and litigants often present proposed orders in connection with uncontested matters or to schedule hearings. They are also used by litigants in the courtroom when matters have been resolved, and especially in criminal matters after pretrial conferences, pleas and sentencings. In these situations, the attorneys and/or litigants usually prepare the order, review it together and then present it to the Court electronically for signature and filing. The proper use of proposed

[3] Iowa Rule 16.201(25) defines a "proposed document" as a document electronically presented to the court for review or other court action. A proposed document, other than a proposed exhibit, is not filed until the Court takes action on it.

orders to the Court is vital to the efficient operation of the courts and does not involve ex parte communication between the courts and litigants.

A second common method for the use of proposed findings and conclusions is the filing of the document with EDMS not as a proposed order but as a document akin to a brief, written closing argument or statement of proposed relief. The last document is commonly required in family law trials to assist the trial court in determining not only what the issues are for trial, but in identifying exactly what the parties are requesting the trial court to do in its ruling. In this instance, the document is submitted electronically and not just presented as a proposed order. In such event the proposed findings and conclusions become a permanent docket entry in PDF format, are not editable and are electronically served on all registered filers in the case.[4] Thus it is easy to determine to what extent the trial court adopted the positions of each party. There is nothing improper about either the presentation or submission of proposed findings and conclusions in these circumstances.

C. Informal (unreported) communication between judicial officers and attorneys/litigants, whether by email, telephone or in person, is

[4] When proposed findings and conclusions are submitted electronically, as opposed to being presented, the trial judge may well request that an editable version in Word format be emailed to the judge and opposing counsel so that the judge can cut and paste while making a final ruling. Again, such requests are not made *ex parte*, and both sides receive a copy of the other's proposed findings and conclusions.

unlikely to impact the improper use of proposed orders so long as the informal communication is not ex parte. However, ex parte communications are a problem not just because they contravene the rules of professional conduct for both judges and attorneys.

Jacobson asserted during his interview that no party obtained a procedural or substantive advantage by being given the opportunity to draft the final ruling after an ex parte communication from the trial judge, since he had already decided the case before the communication occurred. However, as the discussion of legal principles above makes clear, if a judicial officer solicits a proposed ruling and adopts it verbatim, the judge gives the appearance of having abdicated his or her responsibility to make an independent judgment of the case. The appellate courts have indicated time and again that in such circumstance they are less likely to give weight to the findings of fact of the trial court. If the proposed ruling was ex parte, then not only was one party denied the opportunity to be heard, but the appellate courts have no reason to scrutinize the findings and conclusions of the trial court more carefully. Finally, both ex parte communications and the use of ghostwritten decisions cause a lack of trust and confidence in the judiciary by the public.

D. Non-judicial officers in District 3, including court administrators, court reporters, clerks of court and judicial assistants have been given some signature authority of judges, but only in limited circumstances

controlled by the individual judge. Court administrators, clerks of court and judicial assistants are given signature authority only for scheduling matters or for routine orders such as trial scheduling orders. Court reporters have additionally been given signature authority to file rulings in contested matters where the final ruling has been approved by the judge, and the judge has directed the court reporter to then file the ruling.

VI. Summary, Conclusions and Recommendations

A. Although the vast majority of Judge Jacobson's cases were resolved in an appropriate manner, he improperly used proposed orders from a litigant as the final order of the court, without opposing counsel's knowledge, on at least 13 occasions.[5]

B. There is insufficient evidence to conclude that any other judicial officer or court administrator, clerk of court, court reporter or judicial assistant in District 3 has engaged in any practice incongruent with the proper preparation and filing of court orders.

C. All Iowa judicial officers and attorneys would benefit from a continuing legal education session reiterating the lessons of *Kroblin* and its progeny, as well as the specifics of the Code of Judicial Conduct and Code of Professional Responsibility. These lessons and specifics

[5] In Case #2 of Appendix C the attorney did not present a proposed written order per se to Jacobson, but they did have an ex parte communication concerning the content of a ruling on temporary matters with the attorney offering to prepare a proposed order if the judge would tell her what he wanted in said order.

should also be stressed to new judges during the judicial orientation process.

D. Best practices would mandate that if a judicial officer wishes to obtain proposed findings of fact and conclusions of law from the parties that the request be made at the close of trial or very soon thereafter and that the request be documented as made to both sides. Further the submission by the attorney should be made as a filing to EDMS, not as a proposed order. In that way the proposed ruling submitted by the attorney will be a docket entry in PDF format, a notice of the filing will be sent to all parties in the case and the proposed ruling is preserved as a docket entry within EDMS. The judicial officer should be free to request an additional copy be presented to him or her by both sides in Word format so that it can be edited easily and utilized appropriately in the preparation of the judge's ruling.

Respectfully submitted,

David K. Boyd
State Court Administrator (Ret.)

Hon. Robert A. Hutchison
Senior Judge

June 1, 2018

APPENDIX A

STATE COURT ADMINISTRATION
Iowa Judicial Branch Building
1111 East Court Avenue
Des Moines, IA 50319

TODD NUCCIO
State Court Administrator

ADMINISTRATIVE DIRECTIVE 2018 - 5

APPOINTMENT OF INDEPENDENT REVIEWERS TO CONDUCT A SYSTEMS ANALYSIS OF PROPOSED ORDERS BY A JUDICIAL OFFICER IN THE THIRD JUDICIAL DISTRICT

Pursuant to my authority under Iowa Code sections 602.1204.(2) and 602.1209(1) and (7), I hereby appoint the Honorable Robert Hutchison and David K. Boyd as independent reviewers, and authorize, direct and instruct them as follows:

1) GENERAL CHARGE: Conduct an independent review into the allegations that a former judicial officer in the Third Judicial District of Iowa (D3), in an ex parte manner, requested and accepted proposed orders, including but not limited to proposed findings of fact and conclusions of law, from counsel in pending cases without opposing counsel's knowledge and improperly used those proposed orders as final orders of the court in those cases.

2) SCOPE OF REVIEW: The purposes of the review is not to determine if the former judicial officer is culpable or has violated any laws or rules; that task is within the jurisdiction of other entities. Instead, the independent reviewers are charged with conducting a review and analysis of the processes followed by Judge Edward A. Jacobson related to submission or use of proposed orders and to document any questionable and/or improper practices found. In the course of interviewing other judicial officers, counsel and clerks of the district court in District 3, you should pursue and document any other evidence of limited or system-wide practices that are incongruent with the proper preparation of court orders.

3) AUTHORITY AND INSTRUCTIONS: In performing this review and analysis, the independent reviewers are authorized and instructed to do the following:

- review the external emails received by Judge Edward A. Jacobson to determine the nature and extent of possible ghostwriting incidents and ex parte communications;

- request and review the emails sent to external sources by Judge Edward A. Jacobson should the review of external emails received by him indicate the need for a gathering and examination of further evidence;
- contact and, if he is agreeable, interview Judge Edward A. Jacobsen to determine how he requested, received and processed proposed orders;
- interview current and former court personnel in District 3 to determine how proposed orders are requested, received, and processed and to what extent ex parte communications are involved;
- assess if informal communication between judicial officers and attorneys can impact the improper use of proposed orders;
- determine under what circumstances and frequency clerks affix the electronic signature of a judicial official to a court order;
- evaluate how well the Judicial Branch's e-Filing system is configured to capture and track the iterations of proposed orders;
- conduct other inquiries related to this topic as the independent reviewers deem appropriate to the fulfillment of these instructions;
- produce a final written report of findings of fact and proposed recommendations to the State Court Administrator by June 2, 2018.

3-28-18

Date

Todd Nuccio
State Court Administrator

APPENDIX B

QUESTIONNAIRES

JUDGES QUESTIONNAIRE

1. Please describe when, if at all, you request or require that attorneys or litigants submit proposed orders or rulings to you. In your description, please include:
    a. Whether the submissions are pretrial, post-trial or both;
    b. Whether the submissions are procedural (such as setting hearings) or substantive in nature;
    c. The method you require for such submissions (whether through EDMS, by email, by regular mail, some other method or a combination of methods);
    d. The method by which you communicate the requirement for a proposed order or ruling;
    e. If the submission is not through EDMS, do you require that a copy be provided to all counsel and parties of record;
    f. Whether your request for a proposed order or ruling to one party or attorney is itself communicated to all counsel and parties of record;
2. Please describe under what circumstances, and within what restrictions, if any, you grant signature authority within EDMS to:
    a. Court reporters;
    b. Clerks of court;
    c. Judicial assistants.

COURT ADMINISTRATORS QUESTIONNAIRE

1. Under what circumstances and instructions, if any, are you given signature authority for a judicial officer?
2. Under what circumstances, if any, have you been directed by a judicial officer to contact an attorney or litigant to obtain a proposed order or ruling?
3. If you have been directed to make such a contact to an attorney or litigant to obtain a proposed order or ruling, what instructions were given to you by the judicial officer, including:
    a. The content of the proposed order or ruling;
    b. Whether to notify any other person of the request for the proposed order or ruling;

COURT REPORTERS QUESTIONNAIRE

1. Under what circumstances are proposed orders and rulings given to you, including:
    a. Whether the proposed orders and rulings are presented to you via dictation, handwriting, Word format or otherwise;
    b. Whether the presentation is made through EDMS or through some other method;
2. What are your responsibilities once a proposed order or ruling is given to you?
3. Under what circumstances and instructions are you given signature authority for a judicial officer?
4. Under what circumstances, if any, have you been directed by a judicial officer to contact an attorney or litigant to obtain a proposed order or ruling?
5. If you have been directed to make such a contact to an attorney or litigant to obtain a proposed order or ruling, what instructions were given to you by the judicial officer, including:
    a. The content of the proposed order or ruling;
    b. Whether to notify any other person of the request for the proposed order or ruling;

CLERKS QUESTIONNAIRE

1. Under what circumstances and instructions, if any, are you given signature authority for a judicial officer?
2. Under what circumstances, if any, have you been directed by a judicial officer to contact an attorney or litigant to obtain a proposed order or ruling?
3. If you have been directed to make such a contact to an attorney or litigant to obtain a proposed order or ruling, what instructions were given to you by the judicial officer, including:
    a. The content of the proposed order or ruling;
    b. Whether to notify any other person of the request for the proposed order or ruling;

JUDICIAL ASSISTANTS QUESTIONNAIRE

1. Under what circumstances are proposed orders and rulings given to you, including:
    a. Whether the proposed orders and rulings are presented to you via dictation, handwriting, Word format or otherwise;
    b. Whether the presentation is made through EDMS or through some other method;
2. What are your responsibilities once a proposed order or ruling is given to you?
3. Under what circumstances and instructions are you given signature authority for a judicial officer?
4. Under what circumstances, if any, have you been directed by a judicial officer to contact an attorney or litigant to obtain a proposed order or ruling?
5. If you have been directed to make such a contact to an attorney or litigant to obtain a proposed order or ruling, what instructions were given to you by the judicial officer, including:
    a. The content of the proposed order or ruling;
    b. Whether to notify any other person of the request for the proposed order or ruling;

APPENDIX C

1. Crawford County LACV035650, Lally v. Lally

   Email May 25, 2011 from plaintiff's attorney to EJ (Edward Jacobson) with attached proposed ruling from contested trial held March 23, 2011; no copy to opposing counsel. EJ replies by email on same date "I have made some small changes and signed the judgment." Again no copy to opposing counsel. Judgment entered May 26, 2011.

2. Crawford County DRCV037754, Haberl v. Kolthoff

   Emails from petitioner's attorney to EJ January 16 and January 17, 2014, following contested hearing on temporary matters. Emails not copied to pro se respondent. Discussion regarding content on temporary matters order and offer by petitioner's attorney to prepare proposed order if EJ will tell her what he wants in the order.

3. Monona County DRCV028590, Pruett v. Victor

   Email received by EJ from attorney March 18, 2014 with attached proposed temporary matters order, "as requested" by EJ. No copy to opposing counsel. Order adopted verbatim except EJ filled in the blanks for the amount of child support.

4. Woodbury County DRCV153117, Logsdon v. Lapora

   Email April 2, 2015 from EJ to attorney: "I am still awaiting a proposed decree" in Logsden v. Lapora. Attorney provided proposed findings and conclusions on April 7 by email to judge. No copy to pro se respondent. Note that the April 7, 2015 email does not appear in the Lotus Notes archives, but was one retained by the court reporter.

5. Woodbury County DRCV160233, Buenrostro v. Buenrostro

   Email received by EJ from attorney December 9, 2015 and reply by EJ same date. Attorney attached proposed order following contested hearing on temporary matters. No

copies provided to opposing counsel by attorney or EJ. Proposed order adopted verbatim.

6. Woodbury County CDCD124365, Bird v. Bird

   Email June 27, 2016 from EJ to court reporter. Attaches "requested ruling" sent by email from one attorney to EJ. No copies to opposing counsel. The email from the attorney to EJ cannot be found in his received emails. EJ adopted the proposed ruling verbatim, including typos (see p. 12 of ruling).

7. Plymouth County CDCD030591, Presuhn v. Presuhn

   June 27, 2016 EJ forwards to his court reporter proposed findings sent by email to the judge by one of the attorneys. The attorney indicates in the email that they are being sent to the judge per his request; the attorney's email is not in the judge's inbox but is found in the email from the judge to the court reporter. The email from the attorney is not copied to opposing counsel. The judge replies to the attorney: "fixed one typo and filed."

8. Woodbury County CDCD124640, Briese v. Briese

   Email June 29, 2016 from attorney to EJ with requested ruling and decree. No copy to opposing party, who was pro se. Email captioned "Discard 1st one I had 2 mistakes." Decree entered same date after EJ instructs court reporter to file decree (email 6/29/16 from EJ to reporter); adopted proposed ruling and decree verbatim. Contested trial.

9. Crawford County CDCD003170, Petersen v. Petersen

   Email received by EJ on January 4, 2017 from one of attorneys with proposed order for contested contempt proceeding. No copy to defendant, who was pro se at trial. Proposed order was adopted verbatim, including typos.

10. Crawford County EQCV039182, United Bank of Iowa v. Krajicek Pallett, et. al.

In January 2017 a proposed ruling is sent to EJ by email from one attorney in the case. No copies are shown to opposing counsel. On January 25, 2017 EJ forwards to his court reporter by email the proposed ruling from the attorney. However, no email from the attorney to the judge, with the attached ruling, can be located. The final ruling of the Court is verbatim the proposed ruling from the attorney. The activity follows an inquiry from the Clerk of Court to the judge on January 12, 2017 inquiring if the judge will be ruling on the pending matter.

11. Woodbury County LACV166053, Margellus v. Markou

Email February 23, 2017 from plaintiff's attorney to EJ, stating "Attached as requested" are proposed findings, etc. No copy to defendant, who was pro se at trial. The proposed ruling was adopted verbatim, including typos.

12. Woodbury County PCCV172415, Lang v. State of Iowa

Email received by EJ from Assistant Woodbury County Attorney July 11, 2017 enclosing proposed judgment "as you requested." The email was copied to the judge's court reporter, but not to opposing counsel. The judgment dismissed the post-conviction relief case and imposed sanctions on the petitioner. Proposed ruling was adopted verbatim.

13. Woodbury County CDCD123178, Krastel v. Krastel

Emails sent from petitioner's attorney to EJ on October 4 and 24, 2016; no content to second email other than attached proposed ruling. Respondent was pro se at trial; was not copied on email from attorney to EJ. Proposed ruling was not adopted verbatim, but almost entirely.

APPENDIX D

STATE COURT ADMINISTRATION
Iowa Judicial Branch Building
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Des Moines, IA 50319

TODD NUCCIO
State Court Administrator

ADMINISTRATIVE DIRECTIVE 2018 - 5

APPOINTMENT OF INDEPENDENT REVIEWERS TO CONDUCT A SYSTEMS ANALYSIS OF PROPOSED ORDERS BY A JUDICIAL OFFICER IN THE THIRD JUDICIAL DISTRICT

Pursuant to my authority under Iowa Code sections 602.1204(2) and 602.1209(1) and (7), I hereby appoint the Honorable Robert Hutchison and David K. Boyd as independent reviewers, and authorize, direct and instruct them as follows:

1) GENERAL CHARGE: Conduct an independent review into the allegations that a former judicial officer in the Third Judicial District of Iowa (D3), in an ex parte manner, requested and accepted proposed orders, including but not limited to proposed findings of fact and conclusions of law, from counsel in pending cases without opposing counsel's knowledge and improperly used those proposed orders as final orders of the court in those cases.

2) SCOPE OF REVIEW: The purposes of the review is not to determine if the former judicial officer is culpable or has violated any laws or rules; that task is within the jurisdiction of other entities. Instead, the independent reviewers are charged with conducting a review and analysis of the processes followed by Judge Edward A. Jacobson related to submission or use of proposed orders and to document any questionable and/or improper practices found. In the course of interviewing other judicial officers, counsel and clerks of the district court in District 3, you should pursue and document any other evidence of limited or system-wide practices that are incongruent with the proper preparation of court orders.

3) AUTHORITY AND INSTRUCTIONS: In performing this review and analysis, the independent reviewers are authorized and instructed to do the following:

- review the external emails received by Judge Edward A. Jacobson to determine the nature and extent of possible ghostwriting incidents and ex parte communications;
- request and review the emails sent to external sources by Judge Edward A. Jacobson should the review of external emails received by him indicate the need for a gathering and examination of further evidence;
- contact and, if he is agreeable, interview Judge Edward A. Jacobsen to determine how he requested, received and processed proposed orders;

APPENDIX E

MEMORANDUM

To: Judges and Magistrates of the Fifth Judicial District

From: Arthur E. Gamble, Chief Judge

Date: April 12, 2018

Subject: Iowa Supreme Court Supervisory Order In the Matter of the Prohibition against Ex Parte Communication.

I. Ex Parte Communication.

The March 27, 2018 Iowa Supreme Court Supervisory Order In the Matter of the Prohibition Against Ex Parte Communication addresses the prohibited practice of a judge's *ex parte* request to an attorney to prepare a proposed decree or ruling without including all opposing counsel or parties in the communication. *Kroblin v. RDR Motels, Inc.*, 347 N.W.2d 430 (Iowa 1984). By reference to *NevadaCare, Inc. v. Department of Human Services*, 783 N.W.2d 459, 465-66 (Iowa 2010), the Court also encourages district courts not to adopt verbatim the proposed findings of fact and conclusions of law prepared by counsel. *Id.* at 466. This applies even when proposed findings and conclusion have been solicited from all parties not *ex parte*. *Id.* at 465.

The Supervisory Order states:

> Accordingly, no judge or magistrate shall communicate with an attorney about preparing a proposed order or decree without including all other attorneys or self-represented litigants in the case in the communication. Iowa Code of Judicial Conduct rule 51:2.9.

This broadly worded admonition extends to proposed orders as well proposed findings and conclusions following the trial of a contested case. However, the focus of the Supervisory Order is on *ex parte* communications after the trial of a contested matter.

Rule 51:2.9 of the Iowa Code of Judicial Conduct prohibits *ex parte* communication. Rule 51:2.9(A) provides:

> (A) 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 or their lawyers, concerning a pending matter or impending matter, except as follows: …

Rule 51:2.9(A) covers the practice prohibited by the Supervisory Order where a judge communicates with an attorney *ex parte* about preparing a proposed order or decree. See *Iowa Supreme Court Attorney Disciplinary Bd. v. Johnson,* 792 N.W.2d 674, 679-80 (Iowa 2010) ("Johnson also committed a serious ethical violation when he handwrote a sentence that had not been agreed to by opposing counsel or the opposing party into an order and presented it *ex parte* to the court."). The Court should not consider a post-trial order submitted by counsel *ex parte* even if it is unsolicited by the judge. See *Iowa Supreme Court Bd. Of Professional Ethics and Conduct v. Winkle*, 599 N.W.2d 456, 457 n.1 (Iowa 2002).

Rule 52:2.9 prohibits a judge from permitting a lawyer or party to communicate with the judge *ex parte* concerning a proposed order or decree unless an exception applies.

A. Exceptions.

1. Non-substantive matters.

Rule 51:2.9 includes certain exceptions that may be applicable to proposed orders or decrees. Rule 51:2.9(A)(1) provides:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) The judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
(b) The judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond. (Emphasis added).

Comment [8] to Rule 51:2.9 provides:

> [8] Parties frequently present ex parte requests to a judge for routine scheduling matters. Iowa Rule of Civil Procedure 1.453 requires the clerk to provide notice of all orders entered by the court. A notice of orders entered in routine scheduling matters provided by the clerk satisfies the judge's obligation under paragraph (A)(1)(b).

Thus, a judge or staff on behalf of the judge may communicate *ex parte* with a lawyer or party to coordinate the scheduling of a trial or hearing. The entry of a routine scheduling order with notice provided by the clerk or EDMS satisfies the judge's obligation.

The *ex parte* communication must not address substantive matters. See *Johnson v. Nickerson*, 2007 WL 6513967, at *4 (Iowa App. 2017) (Court took a dim view of *ex parte* communication between a judge and defense counsel but held defendant was not prejudiced because the discussion was limited to matters of courtroom security and did not address the merits of the case.); *Milas v. Society Insurance*, 2017 WL 651397, at *4 (Iowa App. 2017) (Brief *ex parte* discussion during trial wherein counsel informed the court that counsel wanted to make a record did not violate Rule 51:2.9 where the court immediately notified opposing counsel and provided an opportunity to respond).

If the proposed order addresses substantive matters, the judge shall give the opposing party an opportunity to respond. *Id.; See Iowa Supreme Court Bd. of Professional Ethics and*

Conduct v. Rauch, 650 N.W.2d 574, 577–79 (Iowa 2002) (Attorney misrepresented facts to a judge in the process of obtaining an *ex parte* order of continuance affecting the merits of the pending case.). See Iowa. R. Civ. P. 1.910(2) ("No case assigned for trial shall be continued *ex parte*.")

2. Authorized by Law.

Rule 51:2.9(5) provides another exception:

> (5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

The Code of Judicial Conduct provides that the term "law" referred to in Rule 51:2.9(5) "encompasses court rules as well as statutes, constitutional provisions, and decisional law."

a) Defaults.

Iowa Rule of Civil Procedure 1.973 provides:

> Judgment upon a default shall be rendered as follows:
>
> 1.973(1) Where the claim is for a sum certain, or which by computation, can be made certain, the clerk, upon request, shall make such computation as may be necessary, and upon affidavit that the amount is due shall enter judgment for that amount, and costs against the party in default.
>
> 1.973(2) In all cases the court on motion of the prevailing party, shall order the judgment to which the prevailing party is entitled, provided notice and opportunity to respond have been given to any party who has appeared, and the clerk shall enter the judgment so ordered. If no judge is holding court in the county, such order may be made by a judge anywhere in the judicial district as provided in rule 1.453. The court may, and on demand of any party not in default shall, either hear any evidence or accounting required to warrant the judgment or refer it to a master; or submit it to a jury if proper demand has been made therefor under rule 1.902. (Emphasis added).

Iowa Rule of Civil Procedure 1.442(1) provides:

> *When service is required.* Unless the court otherwise orders, everything required to be filed by the rules in this chapter; every order required by its terms to be served; every pleading subsequent to the original petition; every paper relating to discovery; every written motion including one which may be one which may be

> heard ex parte; and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties. No service need be made on any party against whom a default has been entered except that pleadings asserting new or additional claims for relief against the party shall be served upon the party in the manner provided for service of original notice in rule 1.305 … (Emphasis added).

Rules 16.201(23), 16.316, and 16.409, cited in the Supervisory Order, govern submission and service of proposed orders. Rule 16.409 allows proposed orders to be submitted electronically (and states a proposed order must be in Word format so it can be edited by the court). Rule 16.409 provides that all "registered filers" will receive copies through the EDMS system of documents and proposed documents. Rule 16.316 states, "A certificate of service must be filed for all documents EDMS does not serve. These include documents that must be served on parties who are nonregistered filers, documents that must be served on persons or entities seeking to intervene in a confidential case, documents that persons or entities file pursuant to rule 16.319(2) [nonparty filers], and discovery materials." Presumably, the Rule 16.316 does not require notice to parties in default who are not entitled to notice under the above-cited Rules of Civil Procedure.

Thus, under Rule 1.973(2), the court may enter a default judgment, and only "a party who has appeared" is entitled to notice and opportunity to respond to the motion. Under Rule 1.442(1), when a default has been entered, the party in default is not entitled to notice of a proposed order.

The supervisory order states a judge may not communicate with an attorney about preparing a proposed order or decree without including all other attorneys or self-represented litigants in the case in the communication. When read in conjunction with the rules for entry of default judgments, it appears parties who have been properly served but have not appeared in

the case are not entitled to notice of the proposed order or decree. Similarly, if a party is declared in default, the party is not entitled to service of a proposed judgment.

It is also important to note that a default judgment may award any relief consistent with the petition; however it cannot exceed what is demanded. Iowa R. Civ. P. 1.976. If a petition requests a certain dollar figure, the default judgment cannot exceed that amount. If a custody petition requests joint legal custody, the default decree should not award sole legal custody. If it is unclear what is demanded in the petition, a hearing can be scheduled to prove up damages/requests for relief.

Therefore, a judge is authorized by law to communicate with attorneys concerning default judgments. The judge may enter proposed orders after entry of default in mortgage foreclosure proceedings, debt collection proceedings, dissolution of marriage actions, paternity actions, child custody proceedings, child support matters and any number of routine matters where this is a common practice.

A separate issue presented by the supervisory order is the Supreme Court's caution against wholesale verbatim adoption of the proposal order. *NevadaCare*, 783 N.W.2d at 466. The judge must make sure the proposed order, judgment or decree is consistent with the judge's independent determination of the facts, the law, and the application of law to the facts. As the Iowa Court of Appeals observed in *In re Marriage of Siglin*, 555 N.W.2d 846, 849 (Iowa App. 1996):

> Consequently, the practice of requesting counsel to prepare proposed findings and conclusions must not be employed solely as a means of delegating judicial work or abandoning the decision-making function. To the contrary, it should be done as a cooperative means of assisting the court in preparing a fair and prompt decision. Trial judges can show their responsible use of this practice by refraining from wholesale, or near wholesale, adoption of a proposed decision. Instead, the proposed decision should

be a guide, with selected portions incorporated into the independent thoughts of the trial judge.

Proposed orders submitted upon default often do not recite the level of detailed findings of fact and conclusions of law that are required after the trial of a contested case. Nevertheless, a judge should carefully review proposed orders in order to exercise the court's independent decision-making function and edit proposed orders as necessary to reflect the judge's own ruling and order. *NevadaCare*, 783 N.W.2d at 466.

II. Permitted Practices.

The Supervisory Order expressly "does not change permitted practices, but ensures that the rules and principles regarding ex parte communication are followed." The order states, "The practice of attorney's as officers of the Court, providing proposed findings of fact and conclusion of law can greatly assist judges in the preparation of orders, particularly in complex or technical cases. Yet, knowledge of and notice to all parties or attorneys is the touchstone that permits the practice to occur."

A. Proposed Findings of Fact and Conclusions of Law Not *Ex Parte*.

The situation giving rise to the supervisory order was a judge's *ex parte* request of one attorney for a proposed ruling following a contested trial to the exclusion of opposing counsel. That is improper. A judge must provide knowledge and notice to all parties to a trial by including them in the communication soliciting or receiving the proposed document.

However, permitted practices exist.

1. Request of All Parties.

At the conclusion of a contested hearing or bench trial, the judge may solicit proposed findings and conclusions from all parties who are not in default, with copies to the other parties.

The judge should make a record of this request. *Kroblin,* 347 N.W.2d at 435-36 ("We further emphasize that in fairness all parties should be given the same opportunity to submit proposed findings and to comment on findings proposed by others.")

2. Bench Ruling.

A judge may dictate findings of fact and conclusions of law into the record and direct one of the attorneys to prepare a proposed order consistent with the judge's bench ruling. Again, this should be on the record in the presence of all parties, and a copy of the proposed order should be filed with EDMS so it is available to all registered filers or served upon nonregistered filers. See *Ramirez v. State*, 2005 WL 973610, at *1 n.1 (Iowa App 2005)("Here, the district court exercised its independent judgment by apprising the parties of its ruling before requesting one party to memorialize it."). Again, the Court should only adopt the proposed order after careful review if it is consistent with the Court's own decision**.** See *NevadaCare*, 783 N.W.2d at 466.

3. Knowledge and Notice.

The Supervisory Order recognizes these permitted practices but cautions, "Yet, knowledge of and notice to all parties or attorneys is the touchstone that permits the practice to occur." In the paper world, this notice and knowledge was typically acknowledged when the opposing party or attorney signed off on the proposed order "approved as to form" before it was submitted to the judge. Typically, the judge would direct this to occur when the order was dictated. In the world of electronic filing, the court may require the non-preparing party to file a document certifying that the proposed order conforms to the court's dictated order but that the party does not agree to the substance of the proposed order for purposes of appeal. In the alternative, the court may allow the party preparing the proposed order to certify that he or she

has submitted the proposed order to the opposing counsel or party and that party approves the proposed order as to form but not substance. Either way, the court must be assured that notice and knowledge has occurred before the proposed order is executed. *Kroblin*, 347 N.W.2d at 435 *citing Chicopee Manufacturing Corp. v Kendall Co.*, 288 F.2d 719, 724-25 (4th Cir.) *cert. denied*, 368 U.S. 825, 82 S.Ct. 44, 7 L.Ed.2d 29 (1961) (counsel's preparation of opinion, without notice to opposing party, may amount to denial of due process).

B. Proposed Orders Through EDMS.

EDMS is a transparent system that provides notice and knowledge to all parties. Counsel should submit it as a proposed document under EDMS or serve it on all parties as provided by Iowa Rule Civ. P. 1.442. The Supervisory Order cites the applicable chapter 16 rules for notice in the EDMS system. "See Iowa R. Elec. P. 16.201(23) (describing EDMS process for notice to parties upon electronic filing of documents or proposed); id. r. 16.316 (providing for filing a certificate of service on all documents EDMS does not serve on parties who are nonregistered filers); id. r. 16.409 (permitting proposed orders to be filed electronically)."

Rule 16.201(23) provides in part:

> …When a document or proposed document is electronically filed or presented to the Court, EDMS will post a notice of electronic filing or presentation to the EDMS account of all parties who are registered filers in the case. Such parties may view and download the document or proposed document by logging on to these account.

When a proposed order comes into the judge's queue, it is not *ex parte* because all registered filers have notice of it and may object to it or propose an alternative order. If there are nonregistered filers, the party submitting the proposed order must serve it and include a certificate of service. Iowa Court Rule 16.319(2). The judge must check to see that the required certificate of service is included in the proposed order. If these procedures are not followed, the

proposed order would be considered *ex parte*. See *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Lesyshen*, 585 N.W.2d 281, 287 (Iowa 1998).

A proposed order submitted in EDMS with a motion goes through clerk's review and is then directed to the judge's queue. A proposed order submitted without a motion does not go through clerk's review. It is routed by the system directly to the judge's queue. A proposed order is not docketed whether it is submitted alone or with a motion. The proposed order comes in Word format. The judge can substitute another order for the proposed order, edit it, or execute it without changes. EDMS does not track changes a judge's changes to proposed orders.

A registered filer's eflex notification of the submission of a proposed order remains accessible for 180 days. A party aggrieved by the court's execution of a proposed order can download the proposed order from EDMS and attach it to any challenge of the court's action on the order. After the expiration of the 180 days, JBIT can retrieve a proposed order from clerk's review for up to 12 months from submission. After that, JBIT will not be able retrieve the proposed order.

The judge should make sure the proposed order reflects the court's independent judgment before entering it. It should be edited as necessary. See *NevadaCare*, 783 N.W.2d at 466. But if the proposed order is consistent with the judge's thinking, the judge is permitted to enter it.

C. Entry of Proposed Order upon Failure to Appear After Notice.

Sometimes a matter will come before the Court for hearing or bench trial and a party may fail to appear. If a party fails to appear for trial after notice, they are in default under Rule 1.971(3). The discussion above concerning defaults would apply.

The situation where a party fails to appear for an interlocutory hearing requires further analysis. Comment [2] to Rule 51:2.9 provides, "Whenever the presence of a party or notice to a party is required by this rule, 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." If required notice to the party who failed to appear for hearing has been given, communication with the appearing parties is not *ex parte* and does not violate the Rule 51:2.9.

When a party fails to appear at hearing after notice, the judge may dictate a bench ruling into the record and direct the attorney for the appearing party to submit a proposed order consistent with the judge's ruling or the judge may consider a proposed order offered by the a party who appeared. For example, a defendant to a mortgage foreclosure who filed an answer and request for delay of sale fails to appear at a hearing on the plaintiff's motion for summary judgment. Plaintiff's counsel appears. If appropriate, the Court may sustain the motion at the hearing and consider a proposed decree submitted by plaintiff's counsel or direct plaintiff's counsel to prepare one. Again, the party submitting the proposed order should do so through EDMS and include a certificate of service as provided by Iowa R. Elec. P. 16.316 to nonregistered filers. The relief requested in the proposed decree should be consistent with the relief requested in the petition.

III. *Ex Parte* Temporary Injunctions.

"Concern has been raised regarding the issuance of temporary injunctions without hearing or notice to the adverse party, and the subsequent difficulty in scheduling a hearing to dissolve, vacate or modify the injunction." Official Comments to the 2001 Amendment to Iowa R. Civ. P. 1.507. Under certain circumstances, a court may enter a temporary injunction pending

notice and hearing. *Opat v. Ludeking*, 666 N.W.2d 597, 607 (Iowa 2003). The judge should exercise extreme caution in granting an *ex parte* temporary injunction or executing proposed orders granting such extraordinary relief. "[R]ule 1.1507 sets out the procedure to use when a party seeks a temporary injunction without notice to the adverse party." *Id*.

Rule 1.1507 provides:

> Before granting a temporary injunction, the court may require reasonable notice of the time and place of hearing therefor to be given the party to be enjoined. When the applicant is requesting that a temporary injunction be issued without notice, applicant's attorney must certify to the court in writing either the efforts which have been made to give notice to the adverse party or that party's attorney or the reason supporting the claim that notice should not be required. Such notice and hearing must be had for a temporary injunction or stay of agency action pursuant to Iowa Code section 17A.19(5), to stop the general and ordinary business of a corporation, or action of an agency of the state of Iowa, or the operations of a railway or of a municipal corporation, or the erection of a building or other work, or the board of supervisors of a county, or to restrain a nuisance. (Emphasis added).

An *ex parte* temporary injunction can present an ethical dilemma for a judge. A judge considering an *ex parte* request for temporary injunction should remember that Comment [1] to Iowa Code of Judicial Conduct Rule 51:2.9 provides, "To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge. *See, e.g.,* Iowa R. Civ. P. 1.1507." If notice is not going to be provided to the adverse party, the judge must be careful to request the certification required by Rule 1.1507. A temporary injunction granted without the required certification is not void but it is voidable. *Opat*, 666 N.W.2d at 607.