

Turning due process on its head: ethical limitations on *ex parte* practice

The genius of our adversarial system is that it uses the checks and balances of opposing advocacy as a corrective measure in the truth-seeking process. Simply put, without the active presence of an opposing voice, a result is liable to be profoundly flawed. This is not just a trifling part of the design of our system of justice. Due process considerations demand it. The exigencies of a situation may require quick judicial action without the other side present, but we should understand these cases to be exceptional.

It's Greek (er, Latin) to me

Lawyers have come to call one-sided proceedings “*ex parte*” proceedings. I suppose the term is workable enough, but for my dime, it somewhat obscures the serious compromises *ex parte* proceedings work on the fair administration of justice compared to the greater trustworthiness of fully adversarial proceedings. Plus, the terminology invites lay observers to conclude that one-sided proceedings are part of a bag of secret tricks open only to lawyers. Not being native Latin speakers, maybe we should agree to call these proceedings what they are: *one-sided*.

No authority, no *ex parte*

The Rules of Professional Conduct treat one-sided communications in two ways. First, in Rule 3.5(b), one-sided proceedings are prohibited entirely unless there is explicit, independent legal authorization for them. In other words, a one-sided communication is never justified just because it is not prohibited. That rule states: “A lawyer shall not communicate

ex parte with [a judge, juror, prospective juror or other official] during a proceeding unless authorized to do so by law or court order.”

Enhanced candor

Second, Rule 3.3(d) imposes on advocates an enhanced duty of candor to tribunals during the course of an otherwise proper *ex parte* proceeding. That rule states: “In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.” This is a counter-intuitive, hence challenging, role for the advocate who will normally rely upon the opposing party to ferret out and present adverse facts.

Taken together, these two rules establish an ethical standard for one-sided communications by prohibiting them entirely unless there is explicit legal authority for them and, even when authorized, requiring lawyers to give a full presentation of the relevant facts, favorable or adverse, so the tribunal is able to render an informed decision. This is, in fact, an ethical standard that incorporates fundamental due process principles imposing upon tribunals a duty, absent exceptional circumstances, to not take adverse action against a party without fair notice and an opportunity to be heard.

When there is legal authority for a one-sided communication or proceeding, lawyers must rigorously comply with the terms and conditions of that authorization. There are some practice areas, domestic relations is one of them, where a culture seems to have developed within segments of the bar that views one-sided proceedings as something routine, not extraordinary. This view dishonors the most

basic values of the adversarial system.

Procedural and substantive rigor

Most one-sided proceedings involve seeking temporary restraining order relief in the absence of actual notice to the opposing party. Indiana Trial Rule 65 is the legal authority governing these proceedings, but it requires compliance with specific preconditions, both substantive and procedural, before a judicial officer may entertain and grant a request for relief without notice. Procedurally, T.R. 65(B)(2) requires that a court may not entertain granting *ex parte* relief unless, “the applicant’s attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.” See *In re Anonymous*, 729 N.E.2d 566 (Ind. 2000).

Substantively, T.R. 65(B)(1) allows the issuance of a temporary restraining order without notice, “only if it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition.” T.R. 65(B) goes on to impose very specific requirements on the content and duration of a TRO without notice.

The applicant’s attorney must make a personal certification to the court in compliance with T.R. 65(B)(2). Unless the attorney is actually a witness in the case (thereby raising other ethical concerns, see Rule of Professional Conduct 3.7) the applicant’s attorney will not have sufficient knowledge to verify the facts necessary to support the substantive requirements of T.R. 65(B)(1). This will typically occur by way of the client’s affidavit

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or verification, perhaps supplemented by the affidavits of others. Although the rule doesn't specifically require it, cautious practice would be for the attorney's T.R. 65(B)(2) certification to be explicitly labeled as such and submitted as a separate filing from the verified application filed on behalf of the client.

It is unfortunate that T. R. 65 lists the procedural requirements of T.R. 65(B)(2) after the substantive standard of T.R. 65(B)(1), inasmuch as the logical order of things is the reverse. If applicant's counsel cannot or does not make the certification required by T.R. 65(B)(2), the tribunal should give no consideration to the merits of the application.

Counsel's T.R. 65(B)(2) certification is important. It communicates to the tribunal one of two

things. First, counsel has tried to give notice by the following designated methods, but has not succeeded. The need for immediate relief is compelling enough that the court should entertain it even though the other side has not received notice. The second alternative is that counsel has intentionally foregone trying to give notice to the other side because to do so would risk incurring the very harm that counsel seeks court intervention to prevent. The need for immediate relief is sufficiently compelling that the court should entertain it even though there has been no effort to provide notice. An example of the latter situation is where the mere act of notice might prompt a parent with physical possession of a child to flee the jurisdiction.

T.R. 65(E) does not trump T.R. 65(B)

A source of some confusion is T.R. 65(E). It has been argued by some that T.R. 65(E) is an independent grant of authority, in certain domestic relations cases, for a court to grant an *ex parte* TRO without insisting on compliance with the procedural requirements of T.R. 65(B). This view misinterprets T.R. 65(E). The interplay between T.R. 65(E) and T.R. 65(B)(2) was discussed at some length in *Matter of Anonymous*, 786 N.E.2d 1185 (Ind. 2003). "Trial Rule 65(E) exists for the purpose of setting forth an alternative to the T.R. 65(B)(1) showing regarding 'injury, loss, or damage,' but it does not replace or modify in any way the T.R. 65(B)(2) showing regarding notice.

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... Thus compliance with T.R. 65(B)(2) is required in all situations in which temporary restraining orders are sought, including domestic relations cases.”

Id. at 1188-89.

The same may be said with respect to statutory injunction proceedings. Even if a statute purports to authorize temporary restraining orders without notice, the procedural protections in T.R. 65(B) must be satisfied because that rule applies by its terms to the issuance of all TROs.

Stop, look and listen

On both lawyer and judicial discipline fronts, the Indiana Supreme Court has been active for several years meting out discipline in cases of unauthorized, one-sided contact between lawyers and judges. In this regard, Indiana has been more active than most other jurisdictions. It likely reflects the Court’s interest in reviving respect for the fundamental notion that one-sided proceedings are extraordinary and must be used sparingly and cautiously. This is not to say that relief without notice should not be available in appropriate cases. In fact, the preconditions for obtaining proper one-sided relief are not onerous – all the more reason to wonder why some lawyers regularly disregard them. Still, it is important that advocates, in seeking *ex parte* relief, think carefully about the appropriateness of resorting to that exceptional measure, and upon going forward, carefully attend to applicable procedural and substantive requirements. ☞