***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

**Memorandum**

To: CAFL Appellate Panel Support Unit

From: [Law Student Intern]

Re: Ex Parte Communications as Grounds for Reversal **[NB: This memo should be read in concert with an Intern Memo on the same subject from 2011]**

Date: June 17, 2014

**I. QUESTIONS PRESENTED**

A. When do a judge’s ex parte communications with a lawyer, witness, party to the trial, or individual otherwise involved in the case, such as a social worker or probation officer, warrant reversal of the judge's decision?

B. When must an objection to a judge’s ex parte communications with a lawyer, witness, party to the trial, or individual otherwise involved in the case, such as a caseworker or probation officer, be raised to avoid waiver of the objection?

**II. BRIEF ANSWERS**

A. Ex parte communications with a lawyer, witness, party to the trial, or individual otherwise involved in the case warrant reversal of the judge’s decision only if each of the following is true: (1) the communications involved a discussion of the merits of the case; (2) the communications influenced the judge's ultimate decision; and (3) the communications occurred without a party’s knowledge or participation. In exceptional circumstances, the mere appearance of partiality arising from an ex parte communication may be sufficient to warrant reversal. However, in a majority of previous cases, Massachusetts courts have been reluctant to reverse on the grounds of facially ambiguous ex parte communications.

B. Any objection to a judge’s ex parte communications with a lawyer, witness, party to the trial, or individual otherwise involved in the case must be raised in a timely manner upon learning of the communications; otherwise, the objection is waived.

**III. DISCUSSION**

Generally, judges are not permitted to engage in private communications that will influence their actions unless all parties are present. S.J.C. Rule 3:09, Canon 3 (A) (4), as appearing in 382 Mass. 809 (1991).

**A**. **Ex Parte Communications as Grounds for Reversal**

An appellate court will reverse a judgment based on improper ex parte communications only if the communications: (1) involved a discussion of the merits of the case; (2) influenced the judge’s ultimate decision; and (3) occurred without a party’s knowledge or consent. See Harris v. Board of Trustees of State Colleges, 405 Mass. 515 (1989); Duro v. Duro, 392 Mass. 574 (1984); Guardianship of Simon (No. 2), 83 Mass. App. Ct. 1123 (2013) (Mass. App. Ct. Rule 1:28); Strothers v. Strothers, 30 Mass. App. Ct. 188 (1991).

**1. Communication Involving the Merits of the Case**

An ex parte communication may not be grounds for reversal if it did not involve the merits of the case. See Demoulas v. Demoulas, 428 Mass. 543 (1998) (declining to reverse in part because there was no evidence about what plaintiff's counsel and judge discussed in ex parte communication); Simon, 83 Mass. App. Ct. 1123 (affirming; ex parte communication only involved a logistical question about the trial transcript); Logtenberg v. White, 65 Mass. App. Ct. 1102 (2005) (Mass. App. Ct. Rule 1:28). But if the communication involved an important aspect of the case, the judgment may be reversed. See Strothers, 30 Mass. App. Ct. at 191-92 (reversing, where judge discussed disputed trust fund for children with father's counsel and child's guardian ad litem and used this information to determine the amount of child support father could afford).

**2. Communication Influenced the Judge's Ultimate Decision**

An ex parte communication may not be grounds for reversal if the communication did not influence the judge's ultimate decision or prejudice a party. See Harris, 405 Mass. at 527 (affirming; there was no evidence that the judge received “information concerning undisclosed facts” which could have unfairly swayed his decision); Perez v. Boston Housing Auth., 379 Mass. 703, 741 (1980) (declining to reverse despite acknowledgment of problematic ex parte communications between judge and BHA members because, in part, the communications were “unthinking rather than venal” and did not affect “the substance of the proceedings one way or another”); Meier v. Fink, 61 Mass. App. Ct. 1120 (2004) (Mass. App. Ct. Rule 1:28) (declining to reverse because mother did not point to anything in findings that indicated she was prejudiced by the communication between judge and father). However, if the record reveals that the communication influenced the judge’s ultimate decision, the judgment may be reversed. Duro, 392 Mass. at 581 (reversing where judge’s permanent custody award to father were likely influenced by judge’s ex parte communication with probation officer); Strothers, 30 Mass. App. Ct. at 191-92 (reversed; judge relied on ex parte communication to determine amount of child support awarded based on ex parte recommendation by father’s counsel).

**3. Communication Occurred Without Appellant's Knowledge or Consent**

An ex parte communication may not be grounds for reversal if the communication occurred with the adverse party’s knowledge or consent. See Meier, 61 Mass. App. Ct. 1120 (declining to reverse because mother was aware of the scheduled meeting between judge and father before its occurrence but did not object to it). But if the communication occurred without the adverse party’s knowledge or consent, the judgment may be reversed. See Duro, 392 Mass. at 581 (reversing where mother was unaware of judge’s out-of-court communication with probation officer).

**4. Communication Raised the Appearance of Partiality**

An ex parte communication may be grounds for reversal if the communication raises an appearance of partiality. Guardianship of Garrard, 624 N.E.2d 68, 69-70 (Ind. Ct. App. 2008) (reversing on basis of appearance of partiality where judge had telephone conversation with family therapist even though the contents of the conversation were unknown, and there was no evidence of prejudice resulting from the communication)..

**B. Timeliness of the Objection to Ex Parte Communication**

Any objection to a judge’s ex parte communication with a lawyer, witness, party to the trial, or individual otherwise involved in the case must be raised by the objecting party in a timely manner upon learning of the communication, or the objection will be waived. See Demoulas, 428 Mass. at 547-48 (holding that issue of ex parte communication not preserved because it was untimely; issue raised almost two years after the objecting party became aware of the communication). If a party does not learn about the ex parte communication until after completion of the trial, he may file a motion for relief from judgment, but such a motion will only succeed if the moving party makes “a strong showing that nothing could have been done at an earlier time.” Id. at 548.

**IV. CONCLUSION**

Certain ex parte communications between a judge and a lawyer, witness, party to the trial, or individual otherwise involved in the case, such as a social worker or probation officer, are grounds for reversal. But ex parte communications are not grounds for reversal if the ex parte communication did not concern the merits of the case, did not influence the judge’s ultimate decision, or occurred with the aggrieved party’s knowledge or consent. An otherwise valid objection is waived if it is not filed in a timely manner after the aggrieved party first learns about the ex parte communication.