

**Rule 2.09**  
**Ex Parte Communications**  
**Benjamin Au**  
**March 23, 2004**

Mr. Au provides for the Commission's consideration information about Fed. R. Civ. P. 52 (b)(2)(B), as revised and effective December 1, 2003, which requires at the time of a special master's appointment, a designation of circumstances in which the special master may communicate ex parte with the court or a party. Mr. Au reports that ex parte communications involving both substantive and administrative matters occur frequently between a special master and raise ethical concerns because they may undermine the appearance of objectivity and fairness.

In view of practical considerations, Rule 53 does not bar ex parte communication, but leaves such communications within the discretion of the court, and Mr. Au believes this nuance is muted in proposed Rule 2.09. He urges the Commission to ensure that the Model Code reflect the balance of Rule 53 between the general impropriety of ex parte communication and the context-specific situations that necessitate ex parte communication between judges and special masters.

Mr. Au suggests that the Model Code indicate that although ex parte communication is the exception rather than the rule, there may be circumstances beyond incidental communications where ex parte communications are appropriate and do not raise the appearance of impropriety. In his view, language that imposes an outright ban on a judge's ex parte communications would be too restrictive considering the intentional permissiveness of Rule 53.