Email and Ex Parte Communications
By Joel R. Brandes and Chris McDonough

The covid 19 pandemic has taught us many lessons. Closing New York Courts to the public and conducting court appearances and trials virtually using Microsoft Teams, and telephone conferencing has become an acceptable method of conducting business. As many judges and court personnel have accepted these and other alternative methods of communication, we likely will continue to see increased reliance on email for communication with the courts. The informality and relative 'looseness' of email communication has the potential for creating ethical problems.

The Rules of Professional Conduct ("RPC") prohibit ex parte communications with a Court on the merits of the matter in an adversarial proceeding. RPC 3.5 (a)(2) provides that in an adversarial proceeding a lawyer may not "communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except: (i) in the course of official proceedings in the matter; (ii) in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer; (iii) orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or (iv) as otherwise authorized by law, or by Part 100 of the Rules of the Chief Administrator of the Courts."

The Rules of Judicial Conduct (22 NYCRR Part 100) have a correlative provision. Rule 100.3(B)(6) provides, in part that "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 or impending proceeding" (subject to five specific exceptions). (22 NYCRR § 100.3(B)(6))

A violation of RPC 3.5 has serious legal and disciplinary implications.

If a party or his counsel has improper ex parte communications with a judge, any resulting order made by that judge in violation of this rule will be reversed. In *Coleman v Coleman,* (61 AD2d 757, 402 NYS2d 6 (1st Dept.,1978)) the Appellate Division reversed a temporary support order because it was made by the court after it received an improper ex parte communication from the plaintiff, in violation of former EC 7-35 and DR 7-110 (B). (Now RPC 3.5. See also Meislahn v McCall, 246 AD2d 957, 695 NYS2d 754 (3d Dept.,1999) [ex parte communication with hearing officer in violation of Administrative Procedure Act created appearance of impropriety and bias]; Signet Const. Corp v Golden, 99 AD2d 431, 470 NYS2d 396 (1st Dept.,1984); Bernstein v Taj Group of Hotels, 235 AD2d 370, 653 NYS2d 18 (1st Dept.,1997).)

In *Matter of Weinstein,* (4 A.D.3d 29, 772 N.Y.S.2d 275 (1 Dept. 2004) the attorney made statements to a referee in a kinship proceeding, without notice to opposing counsel, resulting in a violation of DR 7–110(B)(3) (communicating as to the merits of a cause with an official before whom the proceeding is pending without notice

to opposing counsel). The Court found that respondent "flagrantly" violated the rule by making statements to the Referee concerning the substance of a prior guardianship proceeding.

In *Matter of Steinberg*, (167 A.D.3d 206, 90 N.Y.S.3d 39 (1st Dept., 2018) the respondent-attorney was suspended for professional misconduct in violation of RPC 3.5(a)(2) (ex parte communication with a judge as to the merits of the matter being litigated), 8.4(d) (conduct prejudicial to the administration of justice), and 8.4(h) (other conduct adversely reflecting on fitness as a lawyer). Two of the four charges pertained to a four-page ex parte email respondent sent to the Court in response to its order and decision imposing contempt fines against respondent's client, who had failed to abide by a court order directing the defendant to return the plaintiff's vehicle to him. In the email respondent stated, inter alia, "I would respectfully suggest that the only proper course should be for you to recuse yourself."

In *Matter of Kingsley, (*14 A.D.3d 20, 784 N.Y.S.2d 441 (4th Dept, 2004) the respondent was suspended for, inter alia, engaging in an ex parte communication with the Support Magistrate assigned to hear his client's matter.

*Matter of Winiarsky (*104 A.D.3d 1, 957 N.Y.S.2d 102 (1st Dept.,2012) involved a proceeding that had been assigned to a court attorney to act as a special referee. While the proceeding was pending, the court attorney received an ex parte email from the respondent which read, in pertinent part: "[o]ur firm is currently seeking to hire a mid-level associate with about 4–6 years of experience in litigation. Would you know of anyone, whether it is an individual working in Supreme Court or in Housing Court, who may be interested? ... Of course, if you may have any interest, I would be keenly interested in discussing such a position with you as I have greatly admired both your grasp of the law and the manner in which you have handled the issues presented to you." The respondent was served with seven charges, six of which were dismissed. The remaining charge related to his ex parte communication of a job opportunity to the court attorney. The court held that his conduct constituted a violation of DR 1–102(A)(7) and he was disciplined with a public censure based on that charge.

The restriction on ex parte communications is broad in scope. A lawyer may not communicate with a judge regarding the merits of the case in any manner. This includes communication with his court attorney or law secretary.

The New York State Bar Association Professional Ethics Committee has opined that unless expressly permitted by the court upon application on notice to all parties or authorized by law, it is improper to submit a brief or other communication to the court without *promptly* delivering a copy to opposing counsel. (NYSBA Opinion #325 – 01/24/1974 (51-73) Construing former EC 7-35; DR 7-110(B) Judicial Code: Canon 3(A)(4))

Ex parte communications present a danger to lawyers who fail to heed the restriction on them, yet there are circumstances in which a lawyer may have ex parte communications with a fact-finder in an adversarial proceeding.

A judge may confer separately with the parties and their lawyers on agreed-upon matters with the consent of the parties.(22 NYCRR § 100.3(B)(6)(d))

Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are also authorized.(Rule 3.5 (a)(2)). The judge must reasonably believe that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, must make provisions for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allow them an opportunity to respond. (id) If one side communicates with the judge in writing the lawyer must "promptly" deliver a copy of the writing to counsel for other parties. If he communicates orally, he must do so upon adequate notice to counsel for the other parties. (id).

The City Bar Association Committee on Professional and Judicial Ethics has explained the meaning of the term "promptly" in addressing the question of whether it is proper for an attorney to deliver a letter containing argument to the court by hand with the notation "CC (opposing counsel)", and then serve opposing counsel by regular mail. (NYC Eth. Op. 1987-6 (N.Y.C. Assn. B. Comm. Prof. Jud. Eth.), 1987 WL 346196). The Committee rightly decided that it is improper for an attorney to delay an adversary's knowledge of communications to a tribunal by this hand/mail method, particularly when the tribunal may be misled by the absence of notation on the letter as to the method of delivery to opposing counsel. If a letter is delivered to a tribunal by hand, it should be delivered to opposing counsel by hand as well, or by a method of delivery such as simultaneous electronic transmission or express courier that ensures truly prompt receipt by the adversary. In addition, the date sent and method of delivery to opposing counsel should always be disclosed in any communication to a tribunal. The Committee found the submission of ex parte briefs to be improper because of "the danger that a first impression conveyed in an ex parte submission, however unfair or erroneous, may be decisive...." Delivering a letter argument to a tribunal by hand while delaying its delivery to an adversary by sending it by mail could accomplish the same result. Because of the misleading failure to identify the method of delivery to opposing counsel, the tribunal may erroneously conclude that the writer's adversary has simultaneous notice of the argument in the letter and has chosen to make no response, causing the judge unknowingly to violate the Code of Judicial Conduct by considering what is in effect an ex parte communication, or otherwise creating the possibility of unfair influence by the "first impression" conveyed by the letter writer.

Finally, a judge may initiate or consider any ex parte communications when authorized by law to do so. (22 NYCRR § 100.3 (B)(6)(e)). Numerous sections of the Civil Practice Law and Rules, authorize ex parte motions. The court may grant an order

“upon motion without notice” (For example, see CPLR 308(5); "ex-parte" (For example, see CPLR 3215(d)); "without notice” (For example, see CPLR 308), "on its own initiative" (For example, see CPLR 3103(a)); "upon its own motion”(For example, see CPLR 902); and "with or without notice" (For example, see CPLR 3106(b)). We caution counsel that these provisions do not authorize ex parte *oral* communications with the court.

Tensions between competing ethical obligations can arise when counsel has to make a motion to be relieved since revealing the reason counsel seeks to be relieved could prejudice the client. This can be easily dealt with in the affidavit accompanying the order to show cause by asking the court to provide in the order to show cause that the affidavit in support of the motion need not be served on opposing counsel or that the paragraph in the supporting affidavit explaining the reasons counsel seeks to be relieved be redacted.

The purpose behind prohibiting ex parte communications is to ensure that the litigants in a proceeding have a neutral forum and an impartial judge. The rules of professional conduct prohibiting ex parte communications appear to be simple. However, the nuances that we have discussed in this article need to be understood, to avoid running afoul of the Rules.

The now common use of email with court staff and judges compounds the danger of ex parte communication. Emails are generally less formal, and usually less thought through than a well composed letter which allows more time to consider what you wrote before sending it. Similarly, when standing before a judge lawyers choose their words more carefully than when firing off an email.

Email makes it easier to violate Rule 3.5, and lawyers must ensure that every email is in compliance before hitting the send key.

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