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COMMUNICATIONS WITH JUDICIAL OFFICIALS

Adopted: July 16, 2021

Opinion discusses the permissibility of various types of communications between lawyers and judges.

In connection with the adoption by the Council of the opinion below on July 16, 2021, the following prior ethics opinions were withdrawn: RPC 237, 97 FEO 3, 97 FEO 5, 98 FEO 12, 98 FEO 13, 2001 FEO 15, 2003 FEO 17.

The Ethics Committee has issued a number of opinions interpreting and applying the Rules of Professional Conduct to various lawyer-judge communications. *See* RPC 237, 97 FEO 3, 97 FEO 5, 98 FEO 12, 98 FEO 13, 2001 FEO 15, 2003 FEO 17. However, these opinions—spanning 30 years—were based upon different iterations of the Rules of Professional Conduct. This opinion addresses and clarifies a lawyer's responsibilities under the current Rules of Professional Conduct in communicating with a member of the judiciary while acting in a representative capacity. As a result, upon adoption of the present opinion, the State Bar Council withdrew the aforementioned opinions.

This opinion addresses a lawyer's professional responsibility in communicating with a member of the judiciary during the course of litigation where the opposing party is represented by counsel. While this scenario is common, it is very possible that a lawyer may need to communicate with a member of the judiciary during the course of litigation where the opposing party is self-represented. A lawyer's professional responsibility to avoid improper communications with the tribunal applies equally to situations where the opposing party is represented and where the opposing party is pro se. To preserve the integrity of and instill confidence in the justice system, a lawyer should take great care to ensure his or her conduct in communicating with a tribunal is compatible with the Rules of Professional Conduct, particularly when dealing with an unrepresented party.

Lawyers communicate with judges on a daily basis. Communicating with members of the judiciary is required for the effective representation of clients and the administration of justice. Lawyers' communications with judges generally fall into one of three categories: 1) clearly permissible communications, e.g., formal pleadings and arguments during public proceedings and other communications authorized by law or court order; 2) clearly prohibited communications, e.g., spontaneous, in-person ex parte communications about the merits of a case; and 3) informal communications (e.g., email communications about scheduling dilemmas). This opinion primarily addresses informal communications.

Communication between lawyers and the courts by way of formal filings are the backbone of an effective justice system. The submission to a tribunal of formal written communications, such as pleadings and motions, pursuant to the tribunal's rules of procedure does not create the appearance of granting undue advantage to one party. Presuming the filings comply with the Rules of Civil Procedure, the local rules, and any other requirements imposed by law or court order, such communication is entirely permitted under the Rules of Professional Conduct.

The Rules of Professional Conduct impose some limits on lawyers' communications with judges. These limits are designed to ensure fair and equal access to the presiding tribunal by the parties and their representative counsel. To this end, Rule 3.5(a)(3) prohibits a lawyer from communicating ex parte with a judge or other official unless authorized to do so by law or court order. Rule 3.5(d) defines "ex parte communication" as "a communication on behalf of a party to a matter pending before a tribunal that occurs in the absence of an opposing party, without notice to that party, and outside the record."

The following are some common scenarios involving informal communications with judges.

Inquiry #1:

Lawyer A represents Wife in a domestic case against Husband, who is represented by Lawyer B. Lawyer A's young child is sick, requiring Lawyer A to stay home to care for his child for the rest of the week. Lawyer A is scheduled to appear in court for a hearing in Wife and Husband's domestic case tomorrow but can no longer attend the hearing due to childcare issues. May Lawyer A inform the court of his inability to attend court and informally request that the hearing be continued by email or text message to the judge presiding in the domestic case, without copying Lawyer B?

Opinion #1:

No. The definition of ex parte communications encompasses all communications concerning a matter that is pending before a tribunal, including scheduling issues. Rule 3.5(d). The Rules of Professional Conduct do not exempt scheduling matters from the prohibition on ex parte communications. Accordingly, although ex parte communications concerning scheduling matters are often limited and innocent in nature, they are prohibited unless authorized by law or court order. In this instance, Lawyer A's communication is sent a) on behalf of himself and his client, b) concerning a matter pending before the tribunal (the domestic proceeding), c) outside of the record, d) without notice to the opposing counsel, and e) in the absence of opposing counsel. Accordingly, Lawyer A's communication is an ex parte communication with the court, and thus prohibited unless authorized by law or court order. *See* Rules 3.5(a)(3) and (d).

Inquiry #2:

Same scenario as Inquiry #1. Does Lawyer A cure the ex parte nature of his communication by sending an email or text message to all judges in his district concerning his inability to attend court that week and requesting all hearings for which he is responsible during the week be continued, without copying Lawyer B or any other opposing counsel or party?

Opinion #2:

No. If Lawyer A has a matter pending and the communication is sent to the judge presiding in that matter, amongst other judges, the communication remains ex parte and is prohibited. *See* Opinion #2. If Lawyer A has multiple cases pending, the single, generic communication described in this inquiry may constitute multiple instances of prohibited ex parte communication.

Inquiry #3:

Same scenario as Inquiry #1. May Lawyer A inform the court of his inability to attend the day's hearing and informally request that the hearing be continued via email or text message to the presiding judge, with Lawyer B copied on the email or text message?

Opinion #3:

Yes, provided the communication is not prohibited by law, local rules, or the presiding judge, and does not address the merits of the underlying case (see Opinion #4, below). Pursuant to Rule 3.5(d), a communication by a lawyer to a judge is a prohibited ex parte communication if made "in the absence of an opposing party" (or in the absence of opposing counsel). A communication to a judge that is simultaneously provided to the opposing party/counsel is not made "in the absence of an opposing party" and therefore is not an "ex parte communication" as defined in Rule 3.5. This is true of both hard copy communications and electronic communications, including text messaging and emails.

Lawyers are encouraged to remember that simultaneous provision of a communication does not necessarily result in simultaneous receipt of that communication. When possible and appropriate, a lawyer should provide reasonable advance notice to opposing counsel of the need and intention to communicate with the presiding judge about the subject of the communication.

However, even a communication that is not a prohibited ex parte communication may nevertheless be prohibited by law or court order, including local rules or administrative orders entered by the tribunal. A presiding judge or the rules of a tribunal may also provide guidance and/or instruction to lawyers concerning such communications, as the Rules of Professional Conduct are not meant to disable or abridge "the inherent powers of the court to deal with its attorneys." N.C. Gen. Stat. § 84-36. Lawyers are advised to review all relevant laws and court orders, including local rules, prior to engaging in such communication.

Inquiry #4:

Same scenario as Inquiry #2. May Lawyer A communicate his inability to attend the hearing and informally request a continuance via email or text message to the presiding judge, with Lawyer B copied on the email or text message, if the email or text message contains additional argument from Lawyer A on the matter to be heard by the court in the upcoming proceeding?

Opinion #4:

No. Even though such a communication may not be a prohibited ex parte communication, it is still improper. Unsolicited communications addressing the merits of the underlying matter made outside the ordinary or approved course of communication with the court are prejudicial to the administration of justice in violation of Rule 8.4(d). As noted above, the purpose of the prohibition on ex parte communications is to ensure fair and equal access to the presiding tribunal by parties and their counsel. Allowing one party unfettered access to make off-the-record arguments to the presiding judge via electronic communication undermines the principle of fair and equal access to the presiding judge. *See* Rule 3.5 cmt. [8] ("All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party."). It is also antithetical to the notion that cases are tried in a public forum rather than in private discussions behind closed doors. Providing notice and copying the opposing party/counsel on such a communication does not remedy these problems. Unless the communication is authorized by law or court order, or unless the communication is solicited by the presiding judge, informal communications that address the merits of the case are improper and constitute misconduct under Rule 8.4(d).

Inquiry #5:

Judge has instructed Lawyers A and B to send trial briefs concerning a pending motion to the judge via email, with a copy to opposing counsel. May Lawyers A and B submit substantive argument on the merits of a pending matter via email as the court has requested?

Opinion #5:

Yes. If the presiding judge has instructed counsel to communicate directly with the court, the communication is not a prohibited ex parte communication under Rule 3.5 and is not prejudicial to the administration of justice under Rule 8.4(d) even if the requested communication will be on the merits of a pending matter. This conclusion applies to any appropriate request from a judge to all counsel for communication, including trial briefs and proposed orders. Again, the Rules of Professional Conduct are not meant to disable or abridge "the inherent powers of the court to deal with its attorneys." N.C. Gen. Stat. § 84-36. The presiding judge has the authority to determine how counsel are to communicate with the court; except as prohibited by law or court rule, such communications are within the discretion and preference of the tribunal and the presiding official.