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EX PARTE COMMUNICATION WITH A JUDGE REGARDING A SCHEDULING OR ADMINISTRATIVE MATTER

Adopted: October 24, 1997

Opinion rules that a lawyer may engage in an ex parte communication with a judge regarding a scheduling or administrative matter only if necessitated by the administration of justice or exigent circumstances and diligent efforts to notify opposing counsel have failed.

Editor's Note: Opinion was originally published as RPC 255. Before adoption, it was revised to reference the appropriate sections of the Revised Rules of Professional Conduct under which it was finally decided.

Inquiry #1:

Attorney A represents Defendant X who is charged with driving while impaired. The case is scheduled for trial in district court the following day. Criminal district court is in session daily, and a motion to continue could be heard in open court. Attorney A, outside the course of official proceedings, contacts the local district court judge to request a continuance of the trial of Defendant X. Attorney A does not discuss the merits of the case with the local judge. Is a communication with the local district court judge to request a continuance, made without the prosecutor's knowledge or presence, an ethical violation?

Opinion #1:

Yes, unless the ex parte communication is necessitated by the administration of justice or exigent circumstances and diligent efforts to contact the opposing lawyer (in this case, the prosecutor) have failed.

Rule 3.5(a) of the Revised Rules of Professional Conduct prohibits communications with the judge except in the following situations: (1) in the course of official proceedings; (2) in writing, if the lawyer promptly delivers a copy of the writing to opposing counsel; (3) orally, upon adequate notice to the opposing counsel; or (4) as otherwise authorized by law. If an ex parte oral communication with a judge may influence the outcome of a case, the lawyer should avoid the communication unless the opposing party receives adequate notice or the communication is allowed by law. See RPC 237 (citing statutes permitting ex parte communications in certain emergencies). Nevertheless, the administration of justice or exigent circumstances may necessitate an ex parte oral communication with a judge to resolve a scheduling or administrative matter. If so, the lawyer may engage in the ex parte communication with the judge only after a diligent effort has been made to notify the opposing lawyer.

Inquiry #2:

A retired judge from outside the district is scheduled to preside over the next day's session of district court. Attorney A is seeking the continuance from the local district court judge because he wants to avoid the trial of Defendant X's case by the visiting judge. Does this affect the opinion set forth above?

Opinion #2:

No.

Inquiry #3:

Defendant Z is charged with driving while impaired. He is the grandson of a retired deputy sheriff who has been very active in local politics for many years. The deputy sheriff supported and campaigned for at least two of the three local district court judges. At least two of the judges have visited in the retired deputy's home.

One of the three judges voluntarily recused himself from the trial of Defendant Z. The day before the case was scheduled for trial, the prosecutor separately approached each of the other two judges. Without the knowledge of Defendant Z's lawyer, the prosecutor informed each judge of Defendant Z's relationship to the retired deputy sheriff and inquired whether the judge would hear the case. Each judge indicated that he would recuse himself from the case. As a consequence, the trial was postponed in order that it might be heard by a judge from another county. Is a communication with a local judge to inquire as to whether the judge will recuse himself from a particular case, made without the opposing lawyer's knowledge or presence, an ethical violation?

Opinion #3:

Yes. See opinion #1 above.

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April 17, 1998