# PSST. HEY JUDGE...

By Suzanne Lever *(This article appeared in Journal 17,2 (/media/121093/journal-17-2.pdf), June 2012)*

I often get inquiries from lawyers asking whether a particular communication with a judge—usually made by opposing counsel—is an improper ex parte communication. After I gently remind the inquiring lawyer that my role is to advise lawyers as to their *own prospective conduct*, I direct them to Rule 3.5(a)(3) and accompanying Ethics Opinions Notes.[1] Because I receive so many calls on this particular rule, it seemed that an article discussing the rule was warranted.

Rule 3.5(a)(3) provides that a lawyer shall not communicate ex parte with a judge except: in the course of official proceedings; in writing, if a copy of the writing is furnished simultaneously to the opposing party; orally, upon adequate notice to opposing party; or as otherwise permitted by law.

A particular *ex parte* communication may be considered permissible or impermissible under Rule 3.5(a)(3) based on its CONTENT.

Unlike the prohibition on ex parte communications "as to the merits of a matter" in a prior version of the *ex parte* rule (Rule 7.10(b) of the superseded (1985) Rules of Professional Conduct), Rule 3.5(a) seems to prohibit all *ex parte* communications with a judge. Comment [8] to Rule 3.5 narrows the prohibition to communications with a judge *relative to a pending matter*"in circumstances which might have the effect or give the appearance of granting undue advantage to one party."

For example, a lawyer may not communicate *ex parte* with a judge concerning opposing counsel's alleged improper behavior. Although the opposing lawyer's behavior does not go to the merits of the case, his behavior is "relative to the matter." As stated in 98 FEO 13, one party may not gain an unfair advantage by using an ex parte communication to "cast opposing counsel in a bad light."

98 FEO 13 restricts *informal written communications* with a judge or judicial official relative to a pending matter, even if a copy of the writing is furnished simultaneously to the opposing party. The opinion provides that informal written communications with a judge or other judicial official should be limited to the following: (1) written communications—such as a proposed order or legal memorandum—prepared pursuant to the court's instructions; (2) written communications relative to emergencies, changed circumstances, or scheduling matters that may affect the procedural status of a case; (3) written communications sent to the tribunal with the consent of the opposing lawyer; or (4) any other communication permitted by law or the rules or written procedures of the particular tribunal.

Sometimes a lawyer may engage in an *ex parte* communication with a judge regarding a scheduling or administrative issue, even though these issues are also "relative to the matter." 97 FEO 3 provides that a lawyer may engage in an *ex parte* communication with a judge regarding scheduling or administrative matters *if* necessitated by the administration of justice or exigent circumstances *and* diligent efforts to notify opposing counsel have failed.

A particular *ex parte* communication may be considered permissible or impermissible under Rule 3.5(a)(3) based on its CONTEXT.

When an *ex parte* communication is specifically authorized by law, Rule 3.5(a)(3)(D) permits a lawyer to communicate with a judge without notifying the opposing party or lawyer. For this exception to apply, there must be "a statute or case law specifically and clearly authorizing such communication. Such authorization may not be inferred by the absence in the statute or case law of a specific statement requiring notice to the adverse party or counsel prior to the *ex parte*communication." 2001 FEO 15. "Customary procedures" do not equal "authorized by law."

Although customary, the North Carolina Administrative Office of the Courts recently opined that a post-judgment motion seeking an order in aid of execution cannot be heard or issued *ex parte*. Because there is no statutory authority for hearing these motions ex parte, it would be a violation of Rule 3.5 for a lawyer to submit such an *ex parte* motion to the court.

The failure to follow local court rules, or other applicable Rules of Professional Conduct, may make an *ex parte* communication unethical. If there is a statute authorizing communication with a judge to obtain an *ex parte* order, and there is also a local court rule requiring the lawyer to notify opposing counsel before communicating with a judge *ex parte*, a lawyer may not communicate with the judge without notifying the opposing lawyer. Rule 3.4(c) states that a lawyer shall not "knowingly disobey...an obligation under the rules of a tribunal, except a lawyer acting in good faith may take appropriate steps to test the validity of such an obligation." If a lawyer believes in good faith that notifying the opposing lawyer or the opposing party prior to communicating with a judge will result in the harm that the statute which authorizes the *ex parte*communication seeks to avoid (e.g. abduction of a child), the lawyer may test the validity of the rule by disclosing to the judge at the beginning of the *ex parte* communication that the opposing lawyer (or the opposing party if unrepresented) was not notified as required by the local court rule and the reason therefore. The court may then determine whether to proceed without notifying the opposing lawyer (or the opposing party).

98 FEO 12 sets forth disclosures a lawyer must make to the judge *prior* to engaging in an *ex parte* communication so that the judge may determine whether he will hear the matter *ex parte*. In addition, Rule 3.3(d) provides that during the *ex parte* proceeding "a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." The fact that the opposing party is represented by counsel is a material fact that must be disclosed to the court. In addition, if the lawyer did not notify the opposing lawyer prior to the *ex parte* communication with the tribunal, this fact must also be disclosed.

And remember, judges also have a rule prohibiting *ex parte* communications. *See* N.C. Code of Judicial Conduct Canon 3A(4). (Except as authorized by law, judge should neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding.) The North Carolina Judicial Standards Commission reprimanded a judge for "friending" a lawyer involved in a hearing before him and using an online social network to discuss the case with the lawyer. *See* N.C. Judicial Standards Comm., Inquiry No. 08-234 (April 1, 2009). The commission found that the *ex parte* communications indicated a disregard of the principles of judicial conduct and constituted conduct prejudicial to the administration of justice.
In conclusion, don't call me to complain about your fellow lawyers and don't call the judge either.

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## Endnote

1. If a lawyer's inquiry involves the conduct of another lawyer, the lawyer must put the inquiry in a letter to the State Bar and a copy of the letter must be mailed to the lawyer whose conduct is in issue.