

SDCBA Legal Ethics Opinion 2013-2

(Adopted by the San Diego County Bar Legal Ethics Committee April 16, 2013.)

I. BACKGROUND

Attorney A has a pending civil matter before Judge B. Attorney A and Judge B are also both past board members of a legal group comprised of lawyers and judges that periodically presents MCLE programs and hosts bench/bar mixers.

One week before a hearing on a summary judgment motion that Attorney A has brought before Judge B, Attorney A sends an article to Judge B describing recent developments related to the leading sports team in Judge B's boyhood hometown. Attorney A is aware of Judge B's interest in the team since he has seen team memorabilia in Judge B's chambers. Attorney A and Judge B also have talked about the team at functions of the legal group to which both belong. Attorney A contacted the executive director of the legal group and obtained Judge B's home mailing address. Attorney A sent the article to the Judge at that address with a handwritten note that read:

“Good to see you at our last meeting. I know I'll be seeing you next week, but in the meantime I thought you would find the enclosed of interest. I hope your team wins this weekend so that you'll be in a receptive frame of mind when you consider my arguments. All the best.”

California Rule of Professional Conduct 5-300(B) prohibits an attorney from directly or indirectly communicating with a judge “upon the merits of a contested matter pending before the judge” except: (a) in open court; (b) with the consent of other counsel; (c) in the presence of other counsel; (d) in writing with a copy furnished to other counsel; or (e) in ex parte matters.

II. QUESTION PRESENTED

Did Attorney A offend RPC 5-300(B) in sending the article to Judge B with the handwritten note?

III. AUTHORITIES ADDRESSED

California Rules of Professional Conduct 1-100(A), 5-300(B); ABA Model Rule 3.5(b); *Heavy v. State Bar* (1976) 17 Cal.3d 553; *Matthew Zaheri Corp. v. New Motor Vehicle Board* (1997) 55 Cal.App.4th 1305; *People v. Laue* (1982) 130 Cal.App.3d 1055; *In re Jonathan S.* (1979) 88 Cal.App.3d 468; *Kaufman v. American Family Mutual Ins. Co.* (D.Colo. 2008) 2008 WL 4980360; *Carter v. Payer* (Ohio App. 1994) 1994 WL 620497; *Enos v. DeHart (In re Metropolitan Metals)* (M.D.Pa. 1996) 206 B.R. 89; San Diego County Bar Association Op. 2012-2; Arizona State Bar Op. 90-20; D.C. Bar Op. 5 (1975)

IV. DISCUSSION

The California Rules of Professional Conduct, the State Bar Act, and the opinions of California courts interpreting that authority are binding on California lawyers. An attorney may be disciplined for the willful violation of those ethical rules. (Cal. Rule of Prof. Conduct 1-100(A).) “Misconduct of counsel need not be intentional, i.e., an act performed with the knowledge that it is wrongful, prohibited by the law of legal ethics. However, the term ‘misconduct’ suggests that the conduct must at least be negligent in light of some legal duty of care.” (*Matthew Zaheri Corp. v. New Motor Vehicle Board* (1997) 55 Cal.App.4th 1305, 1318, note 10, internal citation omitted.)

Although not binding, attorneys are advised to consult the opinions of ethics committees in California for guidance on standards of professionalism. The ethics opinions of other jurisdictions also may be consulted. (Cal. Rule of Prof. Conduct 1-100(A).) “Thus, especially where there is no conflict with the public policy of California, the ABA Model Rules serve as a collateral source for guidance on proper professional guidance in California” and California courts will apply them. (*Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1210, internal marks and citation omitted; *Legacy Villas at La Quinta Homeowners Assoc. v. Centex Homes* (C.D.Cal. 2012) 2012 WL 1536036 at *7.)

California Rule of Professional Conduct 5-300 prohibits ex parte communication with a judge in a pending matter on the merits of the dispute except in certain specified instances. ABA Model Rule 3.5(b) prohibits a lawyer from communicating with a judge during a proceeding “unless authorized to do so by law or court order.” It also bears noting that, while beyond the scope of this opinion and the Bar, Canon 3(B)(7) of the California Code of Judicial Ethics states in pertinent part: “A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, full right to be heard according to law. 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 concerning a pending or impending proceeding. . . .”

California Rule of Professional Conduct 5-300 as written would appear not to make a lawyer subject to discipline for ex parte communication with a judge in a pending matter as long as the communication did not relate to the merits of the pending matter. ABA Model Rule 3.5 would appear to prohibit any such ex parte communication, whether on the merits or otherwise, while a matter is pending regardless of whether the communication relates to the merits of the matter under consideration or not. The distinction in the way in which the ban on ex parte contact with a judge is framed may make no practical difference.

In *Heavy v. State Bar* (1976) 17 Cal.3d 553, the California Supreme Court considered the appropriate degree of discipline for plaintiff’s counsel in a wrongful death action who wrote no fewer than four letters to a judge, copies of which the lawyer did not send to opposing counsel. The judge had issued an order vacating a dismissal for the attorney’s failure to respond to a single interrogatory propounded by defendants, even

after being ordered to do so by the judge, with the condition that the lawyer personally pay \$600 in attorney's fees and costs to the defendants. (That is almost \$2500 in 2013 dollars. See Consumer Price Index calculator at <http://www.minneapolisfed.org/>.) The letters were increasingly belligerent. The final such letter began "Your Majesty" and included the following passage: "I have explained to you in careful detail that this penalty involves taking food from the mouths of my little children. I am unable to comply with your edict. Your intransigence in this matter strongly suggests the valor common to draft dodgers." (*Heavy v. State Bar, supra*, 17 Cal.3d at 557.) In contesting discipline for writing these letters, the lawyer contended that the communications did not concern the merits of the dispute and, since the suit had been dismissed by the court, there was no longer a pending matter.

The California Supreme Court disagreed. At the time the letters were written, the issues in the pending case concerned not only the liability of the defendants for the wrongful death of the husband of the attorney's client, but also the validity of the dismissal ordered for failure of counsel to respond to defendants' interrogatory. Therefore, the letters seeking unconditional reinstatement of the action "clearly concerned the merits of the action" and violated the rule prohibiting such ex parte contact. (*Heavy v. State Bar, supra*, 17 Cal.3d at 559.) The Court found equally important that the lawyer's letters had offended the spirit of the rule. The rule prohibiting such ex parte contact "is, in essence, a rule of fairness meant to insure that all interested sides will be heard on an issue. When [the lawyer] wrote his first letter to the judge, he knew or should have known that the defendants and their counsel would be interested in any request to vacate a dismissal and an order requiring payment to them of \$600." (*Ibid.*) Any doubt in the lawyer's mind about his ethical duties should have been removed when the judge wrote back to him to tell the lawyer that the judge was sending a copy of the letter to opposing counsel. The lawyer was warned again when he sent the second letter. Sending two additional letters to the judge after two warnings demonstrated "a brazen disregard of his professional duties." (*Id.* at 560.)

The California Court of Appeal later has warned: "Unless expressly authorized by law, ex parte contacts between the court and counsel are always ill-advised and violate the State Bar Rules of Professional Conduct when such contacts deal with the merits of a pending, contested matter. (Citation to predecessor to Rule 5-300.) Moreover, unauthorized ex parte contacts of whatever nature erode public confidence in the administration of justice, the very cement by which the system holds together." *In re Jonathan S.* (1979) 88 Cal.App.3d 468.

In *Matthew Zaheri Corp. v. New Motor Vehicle Board, supra*, the California Court of Appeal, citing *Heavy*, explained that a communication "upon the merits of a contested matter" for purposes of the rule "extends to communication of information in which counsel knows or should know the opponents would be interested. Construed in aid of its purpose, we conclude the standard generally bars any ex parte communication by counsel to the decision-maker of information relevant to issues in the adjudication. (*Id.* at 1317, internal citation to *Heavy* omitted. But see *People v. Laue* (1982) 130 Cal.App.3d 1055, no violation or rule against ex parte communication where defense

counsel made ex parte oral communication to judge to initiate recall of defendant's sentence pursuant to Penal Code section 1170. At the time of defense counsel's request, there was nothing pending before the court.)

How closely the communication relates to a pending matter or not may be significant in determining whether the rule against ex parte communication has been violated. The State Bar of Arizona, for example, has opined that a lawyer may communicate with a judge about a law-related program at a time the lawyer, or a member of the lawyer's firm, has matters pending before the judge. Arizona has adopted Model Rule 3.5, which, as pointed out above, is not on its face limited to communications related to the pending matter. The Arizona panel nonetheless concluded that "it is clear that the only ex parte communications forbidden by [Ethics Rule] 3.5 are those concerning the pending or impending proceedings before the court. Communications with a judicial officer on matters *wholly unrelated* to litigation matters pending before the court are not ex parte communications. If they were, judges would, as a practical matter, be precluded from conversing with any lawyers, either socially or through professional associations or bar committees." (Arizona State Bar Ethics Op. 90-20, emphasis added.)

The Arizona ethics opinion implies that an attorney's ex parte communication with a judge about a law-related program on which they are collaborating may offend the rule against unauthorized ex parte contact if the communication relates to an issue the lawyer, or a member of his law firm, has before the judge in a pending matter. (Cf. D.C. Ethics Opinion No. 5 (1975), concluding that rule against ex parte contact with a judge about pending matter is not offended when lawyer publishes legal journal article discussing issue under review in case he is handling before a federal court of appeal if the lawyer provides opposing counsel with a copy of the article. Other jurisdictions governed substantially by the Model Rules similarly have interpreted this provision. (See *Enos v. DeHart (In re Metropolitan Metals)* (M.D.Pa. 1996) 206 B.R. 89 (ex parte rule not violated by contact with judge about testimony as a witness in a case judge handled as trustee before being named to the bench. Attorney followed up on his ex parte communication with a written letter to the judge on which counsel for all parties were copied; *Carter v. Payer* (Ohio App. 1994) 1994 WL 620497 (forwarding judge a copy of complaint lawyer had filed with the State Bar about opposing counsel's conduct apparently in the pending matter did not offend the rule against ex parte communication since the complaint did not concern the merits of the case).)

California Rule of Professional Conduct 5-300 prohibits communication with a judge upon the merits of a contested matter pending before the judge as well as communication with the judge's "law clerks, research attorneys, or other court personnel who participate in the decision-making process." (Cal. Rule of Prof. Conduct 5-300(C).) In *Kaufman v. American Family Mutual Ins. Co.* (D.Colo. 2008) 2008 WL 4980360, the district judge admonished defense counsel for a brief ex parte communication with a magistrate judge's law clerk that may have concerned preserving the court's jurisdiction, following dismissal of plaintiff's lawsuit, over sanctions imposed against plaintiff's counsel. Defense counsel was ordered to pay the attorney's fees that plaintiff incurred to bring a motion to prohibit further ex parte contact by defense counsel.

In light of the rule announced in *Heavy* as it was applied in *Matthew Zaheri Corp.*, the handwritten note to the judge in the hypothetical scenario violated Rule of Professional Conduct 5-300(B). The two references to the upcoming hearing in the note, particularly the reference to the attorney's "very sympathetic client" are enough to turn the otherwise permissible, if ill-advised, ex parte transmission of an unrelated article about sports into a prohibited ex parte communication upon the merits of the pending motion. The precise contours of the kinds of "information in which counsel knows or should know the opponents would be interested" are unclear. An explicit reference in such a communication to a pending matter, however, will virtually always meet that test.

It is no response for the attorney to assert that the note was sent to the judge as a friendly gesture, emphasizing that it was sent to the judge's home as evidence of the informal, unofficial nature of the communication. Depending on the circumstances, a communication from an attorney sent to the home address of a judge before whom he has a pending matter may be stronger evidence of guilt than innocence. In any event, a benign motive will not excuse an ex parte communication explicitly referring to a pending matter, even if a more sinister motive may cause an ex parte communication to a judge or judicial staff member participating in the decision-making process that more obscurely relates or refers to the issues in a pending matter to violate the rule nonetheless. (Cf. San Diego County Bar Association Ethics Opinion 2012-2, concluding that an ex parte social media friend request to a represented party without more offends the rule against ex parte communication by an attorney with a represented party about the subject of the representation where the motive for the request was to gain access to shielded information that may be useful to the attorney in the representation.)

V. CONCLUSION

An attorney should tread carefully in engaging in ex parte communication of any kind with a judge before whom the attorney has a matter pending. Such contact is ill-advised in any context. Any reference in such a communication to the pending matter, or any demonstrable motive to influence the pending matter, may offend the letter and the spirit of the rule addressing such ex parte contact.