By Martin Cole

Lawyers Dealing With Judges

The judicial election season is now officially upon us. It appears that, despite another two years of concern about the potential for contested judicial elections being heavily funded by out-of-state entities with agendas, the campaign scene will be relatively quiet against incumbents. A few open-seat elections will be interesting, but as best I can judge (pun intended!) at this point, only a very few races appear to include party-political candidates. The potential for such judicial election problems certainly remains an issue, and a realistic issue for the future; but at least for one more election cycle we will again watch other states' nasty campaigns instead of our own … and that is just fine.

Many lawyers desire to become judges. A judgeship is still a position of public importance, prestige and honor—and financial sacrifice for many private practitioners. Until they become judges, however, lawyers must deal with judges from the perspective of a practicing attorney. In that role, how lawyers are permitted to deal with a judge is governed by several Minnesota Rules of Professional Conduct (MRPC).

Ex Parte Contacts

Perhaps the rule most directly on point is Rule 3.5(g), MRPC, which states that "[i] n an adversary proceeding a lawyer shall not communicate or cause another to communicate as to the merits of the case with the judge … ." This is of course formal codification of the basic tenet that a lawyer may not communicate ex parte with a judge as to the merits of a matter. So does that mean that a lawyer may never communicate with a judge? Of course not. The rule itself sets out a list of exceptions to the basic premise where a judicial contact is permitted: in the course of official proceedings, in writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to a pro se adverse party, orally upon adequate notice to opposing counsel or to the pro se adverse party, or if otherwise authorized by law. "In the course of official proceedings" obviously allows an attorney to appear and argue the merits to a judge in a proper ex parte hearing, for example.[1]

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Issues involved in communicating with a judge pursuant to Rule 3.5(g) usually revolve around the terms "the merits of the case" or "promptly" deliver a copy to opposing counsel. Many lawyers seem to assume the "the merits" and procedural issues are mutually exclusive categories—that is, if an ex parte contact to a judge, or perhaps to the judge's law clerk or assistant, is about what the lawyer believes to be a procedural matter such as scheduling a motion hearing date, then the prohibition against ex parte contacts does not apply. This is not always true. For example, a request that a judge recuse herself or that opposing counsel be disqualified due to a conflict of interest may not technically be on the merits of a case, but authorities agree that such requests affect the merits of a case or may create an advantage for one party, and thus should be made by motion with proper notice to the other side, and not be allowed ex parte.

As to promptly notifying the other side of a written or oral communication with a judge, generally simultaneous notice has been sufficient, but be careful what that means in today's instant communication world. Is "cc'ing" opposing counsel via regular mail while faxing or emailing the document to the court adequate?[2] Or, as one lawyer did, is leaving a voice mail message on opposing counsel's work phone at 11:00 p.m. on a Sunday either prompt or adequate notice of a hearing set up for Monday at 8:30 a.m.? Such attempts at manipulation are not proper, even though as may be gleaned from the above, it may require an egregious, improper contact to warrant disciplinary involvement. No instances of an attorney being publicly disciplined solely for a violation of Rule 3.5(g) exist.[3]

Of course judges have a corresponding duty to not engage in improper ex parte contacts[4] and ought therefore to "cut off" any attempt by a party's counsel to do so. Rule 8.4(f), MRPC, also prohibits attorneys from assisting or contributing to a judge's violation of the CJC, which can create a "double whammy" situation for an attorney if the judge were to initiate an ex parte contact.

> **"A lawyer who knows that a judge has committed a violation of the applicable Code of Judicial Conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority."**

Other Rules

There are other rules in the MRPC that impact a lawyer's dealings with the judiciary. For example, Rule 8.2(a) prohibits an attorney from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge … or of a candidate for election" to a judicial position. The standard is an objective one, and a few attorneys have been severely disciplined by the state supreme court for violations of this rule.[5] While the 1st Amendment protects many statements about judges, there are disciplinary limits.

A lawyer's obligation to report misconduct under Rule 8.3, MRPC, applies to judges as well as to other attorneys: In Minnesota, that will be the Board on Judicial Standards. Here too, note that judges have a corresponding duty to report lawyer misconduct.[6]

One perhaps minor aspect of a lawyer's dealings with a judge can arise

in the hiring of a judicial law clerk by a law firm or agency. Rule 1.12, MRPC, provides that a judicial law clerk may negotiate for employment with a party or lawyer who is appearing before the clerk's judge, even if the clerk is personally involved in the matter, as long as the clerk informs her judge of the negotiation. Once hired, the clerk may not, however, represent a party in a matter in which the clerk participated personally and substantially while a clerk; and the entire firm may be disqualified unless the clerk is timely and appropriately screened.

Finally, coming back to judicial elections, Rule 8.2(b) requires that, "A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct." Thus, attorneys running for judicial office need to be familiar with those campaign restrictions that remain in force, even after recent federal court decisions have eliminated some such restrictions.[7] So, those wishing to become judges this year should be aware of the current campaign rules; the rest of us must still always follow those rules regulating our dealings with judges. ▲

Notes

[1] *See also*, Rule 3.3(d), MRPC, which requires a lawyer in an ex parte proceeding to inform the tribunal of all material facts known to the lawyer, whether or not those facts are adverse. Also note that a properly noticed motion or other proceeding to which the adverse party fails to show is not considered ex parte a lawyer certainly may argue the merits to the judge in such a situation.

[2] Electronic filing, as is required in federal district court in Minnesota, helps eliminate this scenario.

[3] In combination with other violations, however, attorneys have been publicly disciplined. *See, e.g., In re Jensen*, 468 N.W.2d 541 (Minn. 1999).

[4] Rule 2.9, Minnesota Code of Judicial Conduct (MCJC).

[5] *In re Graham*, 453 N.W.2d 313 (Minn. 1990); In re Nathan, 671 N.W.2d 578 (Minn. 2003); In re Nett, 839 N.W.2d 716 (Minn. 2013).

[6] Rule 2.15(B), MCJC.

[7] *See, Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *Wersal v. Sexton*, 674 F.3d 1010 (8th Cir., 2012), *cert. denied* 133 S.Ct. 209 (2012).

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