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Ethical Responsibilities and Opinions

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

No. 1987-6

COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

November 9, 1987

ACTION: Formal Opinion

OPINION:

An attorney has inquired as to whether it is proper to send by hand to a tribunal in a contested matter a letter containing arguments, which shows a "cc" notation to opposing counsel (and no further notation or proof of service), but then to send the document to opposing counsel by mail.

For the reasons set forth below, the Committee is of the opinion that it is not proper for an attorney to delay an adversary's knowledge of communications to a tribunal by this hand/mail method, particularly when the tribunal may be misled by the absence of notation as to the method of delivery to opposing counsel. If a letter is delivered to a tribunal by hand, it should be delivered to opposing counsel by hand as well, or by a method of delivery such as simultaneous electronic transmission or express courier that ensures truly prompt receipt by the adversary. In addition, the date sent and method of delivery to opposing counsel should always be disclosed in any communication to a tribunal.

For purposes of this inquiry, the Committee assumes that such letter communications and delivery methods are not contrary to the local rules of the tribunal or to an individual judge's rules of practice. Whether such communications are proper under those rules is a question beyond this Committee's jurisdiction, and counsel are well advised to consult the applicable rules prior to engaging in communications of this type.

The principal problem presented by the inquirer's suggested conduct is that it may lead a tribunal to consider, unwittingly, what may amount to an improper communication. Canon 3(A)(4) of the Code of Judicial Conduct requires a judge to accord all parties a full right to be heard and directs that a judge

"neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding." To protect against this, concomitant ethical obligations are imposed upon attorneys. DR 7-110(B)(2) provides that: "In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except [i]n writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer." The corresponding ethical consideration is set forth in EC 7-35 which provides, in pertinent part:

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 he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer.

This Committee and others have consistently criticized and held improper ex parte submissions to tribunals. See, e.g., N.Y. City 887 (1975); N.Y. State 420 (1975); N.Y. State 325 (1974). While the letter inquired of is not, in the strict sense, an ex parte communication, it nonetheless is capable of leading to the same evils. In N.Y. City 887, we found the submission of ex parte briefs to be improper because of "the danger that a first impression conveyed in an ex parte submission, however unfair or erroneous, may be decisive. . . ." Here, delivering a letter argument to a tribunal by hand while delaying its delivery to an adversary by sending it by mail could accomplish the same result. Because of the misleading failure to identify the method of delivery to opposing counsel, the tribunal may well conclude that the writer's adversary has simultaneous notice of the argument in the letter and has chosen to make no response, causing the judge unknowingly to violate Canon 3(A)(4) of the Code of Judicial Conduct by considering what is in effect an ex parte communication or otherwise creating the possibility of unfair influence by the "first impression" conveyed by the letter writer, contrary to N.Y. City 887.

As noted above, DR 7-110(B)(2) prohibits an attorney from communicating in writing with a tribunal concerning a pending matter unless a copy of the writing is promptly delivered to opposing counsel. "Promptly" has been defined as meaning "at once, without a moment's delay," Oxford English Dictionary (1985); and "at the same point of time, immediately, without delay" or "simultaneously." *Wolff v. Dicker*, 152 Misc. 615, 617-18 (N.Y.C. Mun. Ct. 1934). The method suggested by the inquiry, which is designed to and does produce a substantial delay between receipt by the tribunal and receipt by opposing counsel, * therefore does not meet the requirement of prompt delivery set forth in DR 7-110(B)(2) and "might have the effect or give the appearance of granting undue advantage to one party" contrary to the principle of EC 7-35.

* Delivery by regular mail instead of by hand is commonly assumed to delay receipt by the addressee by three to five days. See CPLR Rule 2103(b)(2); Fed. R. Civ. P. Rule 6(e)

In the case of such by-hand letter communications to a tribunal, in the Committee's opinion, prompt receipt by opposing counsel should be ensured by delivering the letter by hand or by simultaneous electronic transmission to them as well. Where this cannot be accomplished because of circumstances such as an excessive number of copies or geographic distribution of opposing counsel, methods such as electronic transmission, express courier or overnight mail should be employed to deliver the communication to opposition counsel in a truly prompt manner.

While the Committee recognizes that the general rules for delivery set forth in this opinion should not be strictly applied in an unreasonable manner to litigants with limited resources, exceptions to these rules should be made only where clearly justified.

In every instance, however, an attorney should state affirmatively in a letter to a tribunal both the date a copy was sent to opposing counsel and the method used to deliver that copy.

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