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Ex Parte Communication by the Judiciary



Introduction

The recent establishment of an Individual Assignment System in New York has introduced what one commentator has referred to as new "rules of the game".¹ Nonetheless, the old rules still apply with respect to ex parte communication by judges which is governed by Canon 3(A)(4) of the Code of Judicial Conduct. Canon 3(A)(4), as adopted by the New York State Bar Association in 1973, prohibits a judge from initiating or considering exparte communications concerning a pending or impending proceeding. This prohibition, which has been strictly construed by decisional law and bar association advisory opinions, has new significance under the IAS because of the new system's mandate that there be continuous supervision of each case by a single judge.²

Part I: Historical Perspective Toward Ex Parte Communication

"It is of course true that most judges are influenced only by what

they see and hear in Court."³ Nonetheless it is common knowledge that a judge often seeks the aid and assistance of others outside the courtroom.⁴ As former Chief Judge Charles Breitel of the New York State Court of Appeals has remarked, "The impulse for seeking assistance, of course, is the desire to learn and to make sure that one's reasoning and conclusions will more likely be correct. This is done quite often, from what I learn."⁵

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¹ Martin A. Fox, Comment on *McLoughlin v. Henke* (NY Law Journal Vol. 195, No. 32 p. 1 col. 3, Feb. 19, 1986).

² 22 NYCRR 202.3(A).

³ *Cox v. Louisiana* 379 U.S. 559, 563 (1965).

⁴ Address by Hon. Charles Breitel to a conference on Judicial Ethics at the Chicago Law School reprinted in 154 N.L.J. 1 (Oct. 8, 1965).

⁵ *Id.*

Canon 3(A)(4) of the Code of Judicial Conduct specifically prohibits ex parte communication between a judge and a lawyer in any pending or impending proceeding; however, a judge may under some circumstances obtain the advice of a disinterested expert on the law applicable to the proceeding.⁶ Canon 3(A)(4) was drafted by the American Bar Association's Special Committee on Judicial Conduct, and was adopted by the ABA's House of Delegates in 1972. Subsection 4 of the Canon is based in part on old Canon 17⁷ of the Canons of Judicial Ethics. Canon 17, entitled "Ex Parte Communication" was adopted in 1924 by the American Bar Association and remained virtually unchanged for nearly half a century. Canon 17 specifically prohibited all communications, arguments, and interviews for the purpose of assisting a judge in the rendering of a decision unless representatives of all interested parties were actually present at such time.

The very strict and limited terms of Canon 17 provoked a good number of judges to ignore it. Over 40 years after the enactment of Canon 17, a distinguished judge from the New York State Court of Appeals admitted that "the rule cannot be applied absolutely, nor should it be. There are unusual cases where a judge ought to be permitted to probe for a consensus where a consensus is relevant, or where attenuated analysis ought to be tested."⁸ It has also been frequently observed that the published correspondence of some of our nation's greatest judges includes many examples of generalized discussions with outsiders about pending cases.⁹

Few guidelines were available to help judges decide whether or not their performance met the letter and spirit of Canon 17. It was obvious that in a proceeding, ex parte communications by a judge to a party or his lawyer or by a party or his lawyer to the judge clearly should

be precluded,¹⁰ but it was not clear if such transactions as a telephone call by the judge to a law professor to obtain advice on a contested issue within the area of the professor's expertise, or consultation by the judge with another judge not on the same panel or the same court would be permitted.¹¹ The onus was therefore placed on the Special Committee on Standards of Judicial Conduct to set forth a more flexible and easily used procedure, one which would meet the stringent standards of Canon 17, but provide for certain instances where a judge would be permitted to consult with a disinterested expert on the law, perhaps even in an emergency situation by telephone.¹²

Professor E. Wayne Thode, Reporter to the Special Committee on Judicial Standards, stated that during the meetings of the Special Committee which was convened to study and revise the Canons of Judicial Ethics, it was argued that the gathering of advice from disinterested experts on the law should be permitted with respect to a proceeding before a judge.¹³ The Committee recognized both the possibility that such extra-judicial consultations might lead to improved decisions and the possibility for a breakdown of the adversary system inherent in these suggestions. Naturally, one way to allow outside input was to invite parties to file Amicus Curiae briefs. However, this was recognized as being "too formal, time-consuming, and cumbersome a procedure to be useful in every situation."¹⁴ It was thus determined at the first meeting of the Special Committee that revision of the old Canons would not suffice because "neither the form or the style of the old Canons of Judicial Ethics was satisfactory."¹⁵ It was concluded that the Special Committee should start anew.

Part II: The Solution Proffered By Canon 3(A)(4)

A. The Intended Results

The solution proffered by the Special Committee to the dilemma surrounding ex parte communications was Canon 3(A)(4) of the Code of Judicial Conduct. This established the Code as the Official Statement of the ABA on Judicial Ethics but did not make it binding in any jurisdiction. Shortly thereafter, the Judicial Conference of the United States adopted the Code as the governing authority on Judicial Ethics for all federal judges (except justices of the Supreme Court who are not under the jurisdiction of Judicial Conference), full-time referees on bankruptcy, and full-time Magistrates, with some modifications.¹⁶ In November 1972, the Supreme Court of Colorado became the first state court to adopt the code. Today, virtually every jurisdiction has adopted the Code in part or in full, some modifying it, others adopting parts of it. Some states like Wisconsin and Illinois, recently adopted new Codes of their own, and others like Maryland and Rhode Island, integrated parts of the Code of Judicial Conduct with parts of the old Canons of Judicial Ethics. Canon 3(A)(4) was adopted by the New York State Bar Association on March 3, 1973.

Canon 3(A)(4) can be segregated into two parts. The first sentence sets forth the adjudicative responsibilities under the Canon and the second sentence recites a suggestion for a workable method for engaging

⁶ Commentary to Canon 3(A)(4).

⁷ Canon 17 of Judicial Ethics as promulgated in 1924 by the ABA and as amended in 1937 62 ABA reports 352, 767.

⁸ See Note 4, supra.

⁹ *Id.*

¹⁰ Commentary to Canon 3(A)(4).

¹¹ *Id.*

¹² *Id.*

¹³ E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* (1973).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Report of the Judicial Conference of the United States, pp. 9-11, 52 (1973); Report of the Judicial Conference of the United States, p. 17 (1974).

extrajudicial aid while not compromising the rights of the parties. The rules of Conduct found in the first sentence of the Canon are likewise twofold. Initially, it is stated that a judge should accord every interested person (or his lawyer) a "full right to be heard according to the law". This requirement covers a vast area of judicial activities and has been applied several times in judicial proceedings in New York.¹⁷ The second part of adjudicative responsibilities required by Canon 3(A)(4) deals with ex parte communication and states that it is expressly prohibited. It specifically allows a judge to receive the opinion of a disinterested expert, as long as the fact that such an opinion sought is conveyed to the parties, and they are given an opportunity to respond. The Canon's Commentary states that the prohibition against seeking advice on pending or impending proceedings includes advice gathered from lawyers and law teachers. Advice gained from other judges and court personnel is permissible. The filing of an amicus curiae brief is favored, but the procedure is by no means limited.

B. The Effect of 3(A)(4) On Would Be Communicators

When applying the rules governing ex parte Communication under Canon 3(A)(4), two basic observations come to mind: first, an objective standard was needed for evaluating the performance of judges in this area and such a standard has been set forth by the Code;¹⁸ second, it is clear that the Code provides for disciplinary action against a judge to be carried out by the Advisory Committee of a particular jurisdiction. However, the judicial action on the part of a particular case handled by a judge under investigation is subject to regular channels of appeal.¹⁹

C. Specific Applications of Canon 3(A)(4)

Although there are few New York cases interpreting Canon 3(A)(4), it has been held that a judge cannot reduce a felony charge, on defense counsel's request, without consulting with the district attorney,²⁰ and it is clear that a judge is prohibited from consulting law professors or legislators in connection with pending cases.²¹ However, ex parte communications with a judge have been condoned in some situations. In *B.G. Equipment Co., Inc. v. American Insurance Co.*,²² the Appellate Division for the Fourth Department held that the ex parte submission by the plaintiff of a trial memorandum did not warrant a mistrial because it found that the trial judge had not been unfairly influenced by the ex parte communication. More recently, in *People v. Insignares*,²³ the Appellate Division for the First Department held that an ex parte report by a special counsel appointed by the trial judge did not violate the prohibitions set forth in Canon 3(A)(4) but was merely a factor to be considered in determining whether the judge had abused his discretion in favoring one party over the other. Other exceptions to the general rule against ex parte contacts with a judge include those authorized by law. For example, ex parte motions under C.P.L.R. 2212(b) and 2213(b); provisional remedies under C.P.L.R. 6211 and 6313; and applications under Rule 65(b) of the Federal Rules of Civil Procedure are authorized by statute. Examples of ex parte submissions that may be permitted under substantive legal and equitable principles are found in proceedings involving claimed privileges or claimed trade secrets.²⁴

Committees on Professional Ethics for the New York County Lawyers' Association, the Association of the Bar of the City of New York, and the New York State Bar Association have issued ethical opinions expressly prohibiting ex parte submissions of trial brief, memoranda and other communica-

tion.²⁵ These opinions rest on the rationale that a first impression conveyed in an ex parte submission, however unfair or erroneous, may be decisive, or that a judge may be influenced by matters that never should have come to his attention. Thus mere notice to one's adversary of an ex parte contact with a judge may not be sufficient because a party who does not wish to consent to it may be in the position of antagonizing the judge. In addition, there is an abundance of decisional law from other jurisdictions that provide guidance to the New York bar.²⁶

In two related cases,²⁷ two justices of the Supreme Court of

¹⁷ *Application of Weingarten*, 94 Misc.2d 788, 405 N.Y.S.2d 605 (Ct. Cl. N.Y. 1978); *Sengstack v. Sengstack*, 4 N.Y.2d 502, 176 N.Y.S.2d 337 (1958); *Matter of Waltermade*, 409 N.Y.S.2d 991 (Court on the Judiciary, 1975).

¹⁸ *B.G. Equipment Co., Inc. v. American Ins. Co.* 61 A.D.2d 247, 402 N.Y.S.2d 479 (4th Dept. 1978), *aff'd.*, 46 N.Y.2d 811, 413 N.Y.S.2d 922 (1978).

¹⁹ *Antoci v. Antoci*, 113 A.D. 2d 857, 493 N.Y.S. 2d 588 (2d Dept., 1985).

²⁰ *Murtagh v. Maglio*, 9 A.D.2d 915, 195 N.Y.S.2d 900 (2d. Dept. 1960) See also Committee on Professional Ethics of the New York State Bar Association, Opinion No. 420.

²¹ *Matter of Fuchsberg, U.S. v. Diaz* (slip opinion 86-1126, 2d Cir., August 1, 1986). 179 N.Y.L.J. 1 (March 17, 1978).

²² 61 A.D.2d 247, 402 NYS2d. 479 (4th Dept. 1978), *aff'd.*, 46 N.Y.2d 811, 413 N.Y.S.2d 922 (1978).

²³ 109 A.D.2d. 221, 491 N.Y.S.2d 166 (1st Dept. 1985).

²⁴ Opinion No. 887, The Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York.

²⁵ *Id.*; Opinion No. 221 of the Committee on Professional Ethics of the New York County Lawyers' Association; Opinion 325 of the Committee on Professional Ethics of the New York State Bar Association.

²⁶ For a general discussion of cases where judges initiated ex parte communications see: *In re Scott* 386 N.E.2d 218 (Mass. 1979); *In re Stuhl* 233 S.E.2d 562 (N.C. 1977); *In re Nowell* 237 S.E.2d 250 (N.C. 1977); *In re Hardy* 240 S.E.2d 373 (N.C. 1978); *In re Martin* 245 S.E.2d 773 (N.C. 1978); *In re Peoples* 250 S.E.2d 915 (N.C. 1978); *In re Laster* 274 N.W.2d 745 (Mich. 1979); *Matter of Buford* 577 S.W.2d 809 (Mo. 1979)

²⁷ *In re Deckle* 308 So.2d 5 (Fla. 1975); *In re Boyd* 308 So.2d 13 (Fla. 1975).

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Florida were considering a public utility rate matter, and had taken opposing sides of the issue. A lawyer who was a friend of one of the two discussed the pending case with him on the golf course and prepared a memorandum at the justice's request. The judge subsequently considered the memorandum and then destroyed it for fear that he would be disciplined later, as he was. However, because it was believed that outside pressures lead to the destruction of the evidence and because the opinion rendered by the judge disagreed with the memorandum, testifying to the fact that it played no part in his opinion, the judge was merely publicly censured and not removed. Perhaps of more relevance is the case of the other Florida judge, who picked up a memorandum from his cluttered desk, apparently several months after it had been placed there without the judge's knowledge. He assumed it was a properly filed amicus curiae brief or other document which belonged with the file of the pending case and considered it in his opinion. The memorandum actually figured very heavily in the opinion developed by the judge and was so convincing that he was instructed by the Chief Justice to convert it into a majority opinion. After discovering the origin of the memorandum, the opinion was rewritten to make no mention thereof. The judge was censured as well, even though it was not established that he intended to misuse the paper.

In *re Edens*,²⁸ a North Carolina court determined that a judge who sets a sentence without notifying one of the parties counsel had violated Canon 3(A)(4). A judge in Massachusetts was removed from office and later disbarred in another proceeding, after a case dealing with

twenty-two specific counts of misconduct, only two of which dealt with Canon 3(A)(4). The judge had used the services of a court officer and attorney without disclosing their relationship with him, and he set bail without allowing the defendant to speak.²⁹ In a driving privilege case, a North Carolina judge was censured for communicating ex parte with counsel for defendant in a pending matter and for deciding issues of fact and law based on this communication.³⁰ The Chief Justice of the Supreme Judicial Court of Massachusetts was publicly censured and suspended for a period of time for attending a fund raiser for litigants in a pending case, thus communicating ex parte and putting his neutrality in question.³¹

Part III: Some Objections to Canon 3(A)(4)

With Canon 3(A)(4) "a method is established whereby a judge may consult with a disinterested person on issues of law, but he must give notice of the name of the person consulted and the substance of the advice received."³² But, is this limitation flexible enough? Professor Grossman would add a sentence to the end of Canon 3(A)(4) inviting judges to take advantage of the procedure described and to use whatever resources available to enhance a judge's ability to decide a case justly.³³ This, it is felt, would broaden a judge's horizons and perspectives and give him the time to do so. On the other hand, to permit a judge to obtain facts and opinions from any source would lead to a basic change in our adversarial system.

Canon 3(A)(4) has authorized a judge to receive advice after meeting the two requirements of notice to the parties and supplying an opportunity for response. Implicit in these requirements is the notion that such advice could be gathered over the telephone as well as in person.³⁴ This procedure will preserve the adver-

sary process and allow a judge to obtain outside expert aid which would not otherwise be available. The parties are, in effect, given a choice as to whether to allow ex parte communication, with notice and opportunity to respond, or else have the impending case free of such communications. If the judge or the expert does not want the name of the expert to be known, the notice requirement has not been met and the communication cannot be accepted by the judge.³⁵

Conclusion

Judges should be careful not to initiate or accept any ex parte communication from anyone other than a judicial colleague or appropriate court officer. In the event other ex parte communication is necessary, the notice and hearing requirements of Canon 3(A)(4) must be strictly adhered to.³⁶

²⁸ 290 N.C. 299, 226, S.E.2d 5 (1976).

²⁹ *In re Troy*, 364 Mass. 15, 300 N.E.2d 159 (1973).

³⁰ *In re Crutchfield* 289 N.C. 577, 223, S.E.2d 822 (1975).

³¹ *Matter of Bonin*, 375 Mass. 680, 378 N.E.2d 669 (1978). See also Wise, "New Rule Clarifies Activities For Judges Running For Office," N.Y.L.J. (August 1, 1986, p. 1) (§100.7 of the Rules of the Chief Administrator Governing Judicial Conduct, relating to political activity of judges, amended to provide for new rules restricting their political activities.)

³² 9 San Diego Rev. 793 (1972).

³³ *Id.* at 803.

³⁴ *Id.*

³⁵ See ABA Informal Opinion 1346 (Nov. 26, 1975)

³⁶ See also note 31, *supra*.

