

# The Lawyer & The Judge - Three Scenarios

BY MARY C. DALY

**I**t's been a long week. Just as you are about to drag yourself out of the office late one Friday evening, the phone rings. Against your better judgment, you decide to answer the call. Your brother-in-law, a judge who is an avid fisherman when not sitting on the bench, is on the line. He has just found the perfect boat to buy. The problem is that he needs to borrow \$10,000. Is there any rule of professional conduct that prohibits you from lending him the money? What if the call came instead from your college roommate, who is running for a judicial office and needs \$10,000 to help finance her campaign? Or, in a different vein, suppose the caller is an irate client who is outraged because a judge has left a critical motion in the client's case undecided for over a year. The client demands that you call the judge's law clerk to find out the cause of the delay.

Each of these three scenarios raises an important issue under DR 7-110 of the New York Lawyer's Code of Professional Responsibility (Lawyer's Code). Captioned "Contact with Officials," DR 7-110 serves the critical function of preserving both the fact and appearance of judicial independence. It consists of two subsections. Subsection A aims to protect the "impartiality of a public servant." Subsection B is designed to assure "access to tribunals on an equal basis." See ECs 34 & 35.

## Lending Money to A Judge

With two limited exceptions, Subsection A essentially prohibits the giving or lending of "anything of value to a judge, official, or employee of a tribunal." The first exception is the general exception: "except as permitted by the Code of Judicial Conduct." Consequently, to answer the question, "Can I loan \$10,000 to my brother-in-law, the judge?" you must examine a separate ethics code, one that most lawyers are relatively unfamiliar with.

The provisions of the Code of Judicial Conduct have been officially adopted by the Chief Administrator of the Courts as the Rules Governing Judicial Conduct and are codified at 22 NYCRR §§ 100.0-5 (2003). The Rules consist of five sets of detailed proscriptions that govern the conduct of judges, both on and off the bench. See, generally, Marjorie E. Gross, Updated Rules on Judicial Conduct, N.Y.L.J., May 14, 1996, at 1. [Readers should be aware that references to the Rules can be confusing; they are controlled by §100.0(P).]

Paragraph (5) of Rule 4(D) expands slightly on the terse prohibition "a lawyer shall not give or lend anything of value" that is found in Subsection A of DR 7-110. The Paragraph bars a judge from accepting "a gift, bequest, favor or loan from anyone." Thus, it would appear to prevent you from making the \$10,000 loan. But Paragraph (5) contains a number of its own exceptions, including one that permits a judge to accept "a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under section 100.3(E)."

Thus, your ethical odyssey must continue. The question now becomes "if the lawyer were to appear before his brother-in-law, the judge, would section 100.3(E) require the judge's disqualification?" The answer to the question is clearly "yes." Because you are the spouse of a person "within the fourth degree of relationship" to the judge, the judge would be disqualified if you appeared before him. 22 NYCRR §100.3(E)(1)(e).

The scope of the exception carved out in subparagraph (e) is narrow. For example, loans are not permitted even in those situations in which the lawyer has no cases pending before the judge or promises not to appear before him or her. The leading New York case in this regard is *Matter of D'Addario*, 658 N.Y.S.2d 582 (1st Dep't 1997). *D'Addario* was admitted in both New York and Rhode Island. In 1991, the Rhode Island Supreme Court publicly censured him for lending money to a Family Court Judge. There was no evidence in the record to suggest that the Family Court Judge presided over any matter in which *D'Addario* appeared on behalf of a client. Approximately six years later, the Departmental Disciplinary Committee learned of the censure and commenced disciplinary proceedings. The Appellate Division, First Department, imposed a reciprocal sanction, noting that "the misconduct for which he was disciplined in Rhode Island constitutes misconduct in New York" under DR 7-110. (The court also faulted *D'Addario* for not reporting the Rhode Island discipline to the New York authorities). See 22 NYCRR § 603.3(d) (2003).

### **Lending Money to a Judicial Candidate**

What about the ethical propriety of your making a \$10,000 loan to your college roommate who is now running for a judicial office? This request triggers the second exception to DR 7-110(A). That exception allows a lawyer to "make a contribution to the campaign fund of a candidate for judicial office in conformity with the Code of Judicial Conduct." Once again, the inquiring lawyer must look beyond the Lawyer's Code for guidance. The Rules of Judicial Conduct constrain the fund raising activities of incumbent judges and lawyers who are candidates for judicial office in a number of ways. Two restraints bear most directly on your loan dilemma. Rule 5(A) (5) bars judges and candidates from *personally* soliciting or accepting contributions. The college roommate's direct request to you consequently appears to violate this provision. That provision, however, authorizes campaign committees to solicit contributions from lawyers. If the roommate's campaign committee seeks the \$10,000 loan, you may ethically comply with the request - provided, of course, that extending the loan does not violate any other ethical provision or federal or state law.

### **Ex Parte Contact with a Judge**

Subsection B of DR 7-110 prohibits a lawyer from communicating "as to the merits of the cause with a judge or an official before whom a matter is pending" and from causing another to do so. Not surprisingly, the phrase "judge or an official before whom the proceeding is pending," includes law clerks. See, *In Matter of Werner*, N.Y.L.J. (E.D.N.Y. Jan. 28, 1991) at 6. Subsection B allows four commonsensical exceptions. Two are self-explanatory and merit little discussion: communications are permitted in "the course of official proceedings in the cause" and as "otherwise authorized by law, or by the Code of Judicial Conduct."

The remaining two exceptions call for a more extended analysis. Subsection B (2) permits an ex parte communication "[i]n writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to an adverse party who is not represented by a lawyer." Subsection B (3) permits an ex parte communication "[o]rally upon adequate notice to opposing counsel or to an adverse party who is not represented by a lawyer." While neither "promptly" nor "adequate notice" is defined, the facts and circumstances surrounding the communication's delivery are the best measures of its timeliness. The opposing counsel or party should be given enough time to respond in an intelligent fashion before the judge acts on the contents of the communication.

### **Ex Parte Contact Can Lead to Sanctions**

Sanctions for violations of Subsections B (2) and B (3) have included both private and public discipline. See Hal R. Lieberman, *Informal Discipline: Tool to Upgrade Ethics Part I: Admonitions*, N.Y.L.J., Mar. 22, 1991, at 1. While there are not a large number of cases publicly disciplining a lawyer for improper *ex parte* communications, two observations merit discussion. First, a cause and effect relationship seems to exist between the intensity of the lawyer's emotional involvement in the proceeding and the forbidden conduct. The greater the emotional involvement, the more frequent the forbidden conduct. In Werner, for example, passing comments in an opinion that were critical of the lawyer's litigation tactics apparently triggered the *ex parte* communications. *Id.* Second, the courts often treat conduct prohibited by Subsection B as an aggravating factor in imposing discipline for more serious violations of the Lawyer's Code. E.g., *In Matter of Canavan*, 589 N.Y.S.2d 150 (1st Dep't 1992); *In Matter of Abbott*, 563 N.Y.S.2d 848 (3d Dep't 1990).

There is nothing inherently unethical in acceding to the client's request that the lawyer contact the judge's chambers. It is the manner of execution of the request that poses the problem. The safest course of action is a written communication to the court with a simultaneously delivered copy to the other parties. An *ex parte* communication, whether written or oral, is clearly suspect under DR 7-110.

Resolving ethical dilemmas under DR 7-110 often requires a careful weighing of competing public policies. Consider, for example, the ethical dilemma of a lawyer who receives unsolicited information from a former employee of an adversary's law firm suggesting that the law firm has engaged in criminal or fraudulent conduct. May the lawyer make *ex parte* contact with the judge presiding over the matter for guidance? The New York State Bar Association Committee on Professional Responsibility answered this question in the negative in Opinion 700 (1998), citing DR 7-110(B). (The Committee did, however, state that the inquiring lawyer could bring the allegation to the attention of another court or an appropriate authority *ex parte*.)

Weighing competing public policies can be especially difficult because the prohibitions of the Lawyer's Code and the Code of Judicial Conduct are expressed in vague and indeterminate language. Miscalculations can have serious consequences for both lawyers and judges.

### **Material To Consult**

Fortunately, it is possible to diminish the likelihood that these consequences will occur. Lawyers can always consult the ethics committees of the New York State and local bar associations. Judges can consult the Advisory Committee on Judicial Ethics. See George D. Marlow, *Opinions of the New York State Advisory Committee on Judicial Ethics: Their Language and Rhetoric*, N.Y.St.B.J., Nov. 1997, at 32.

Section 212(2)(l) of the Judiciary Law authorizes the Chief Administrator of the Courts to establish the Advisory Committee. More importantly, subsection (l)(iv) provides that the "[a]ctions of any judge ...taken in accordance with findings or recommendations contained in an advisory opinion issued by the panel shall be presumed proper for purposes of any subsequent investigation by the state commission on judicial conduct."

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