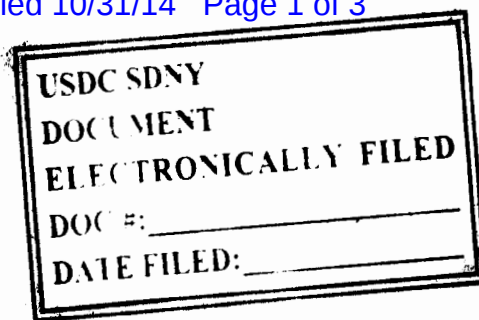


UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA,  
  
-v-  
  
MALCOLM SMITH et al.,  
  
Defendants.

13-CR-297 (KMK)

ORDER TO PROHIBIT EX PARTE  
CONTACTS AND CALENDAR NOTICE

KENNETH M. KARAS, District Judge:

On October 30, 2014, the Court issued a Calendar Notice that a status conference would be held on Thursday, November 6, 2014 at 11:00 a.m. On October 30, 2014, Deborah Misir, counsel for Defendant Vincent Tabone, submitted a fax to the Court stating that she “will be out of town November 5-7, 2014, traveling to Washington DC to speak at and attend the National Association of Criminal Defense Counsel,” (Letter to Court from Deborah N. Misir (Oct. 30, 2014)), despite the fact that in her request for an adjournment of her client’s trial she stated that she had been ordered “to restrict travel and activity during the remainder of [her] pregnancy,” (Letter to Court from Deborah N. Misir (Oct. 16, 2014) 1 (Dkt. No. 304)).

Additionally, the Court notes that on October 30, 2014, after an employee of Lally & Misir, LLP already called to inform the Court of Ms. Misir’s conflict on November 6, 2014, Ms. Misir called the Court and spoke to a law clerk for approximately 10 minutes regarding the scheduling of the status conference, the Government’s Superseding Indictment against Mr. Tabone, Ms. Misir’s belief that the Superseding Indictment was retaliatory, the fact that Ms. Misir was considering filing an ethics complaint against the Government lawyers in this case, and Ms. Misir’s adjournment request.

The Court orders Ms. Misir, as well as any other attorneys and staff in her law firm, to cease any ex parte communications with chambers about this case or any pending motion or request. The Court admonishes Ms. Misir for her ex parte communications with the Court, and reminds her of her ethical obligation to, in an adversarial proceeding, not “communicate or cause another person to do so on the lawyer’s behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except (i) in the course of official proceedings in the matter; (ii) in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer; (iii) orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or (iv) as otherwise authorized by law, or by Part 100 of the Rules of the Chief Administrator of the Courts[.]” N.Y. R. Prof. Conduct 3.5(2). *See also Kaufman v. Am. Family Mut. Ins. Co.*, No. 05-CV-2311, 2008 WL 4980360, at \* 3 (C.D. Colo. Nov. 19, 2008) (“[E]x parte communications relating to the merits of a pending case or efforts to influence or learn the judge’s mind are most definitely improper.” (emphasis omitted)), *aff’d*, 601 F.3d 1088 (10th Cir. 2010); N.Y. Code Jud. Conduct § 100.3(B)(6) (“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 or their lawyers concerning a pending or impending proceeding” and listing exceptions). The Court emphasizes that the law clerk who took Ms. Misir’s call did not make any improper ex parte communications to Ms. Misir about the merits of the issues raised, and the Court will not consider any statements made by Ms. Misir during the course of this call.

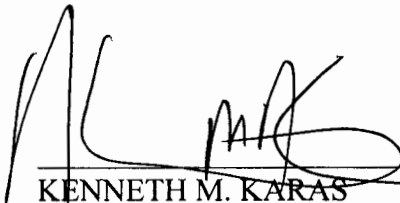
Furthermore, the Court orders Ms. Misir or anyone on her behalf to make or cause to be made any communications with the Court in writing, and copied to all Parties; Ms. Misir is

hereby barred from contacting chambers via telephone. *See Hussein v. Pierre Hotel*, No. 93-CV-3698, 1994 WL 172409, at \*10 (S.D.N.Y. May 3, 1994) (barring all attorneys from communicating with the court via telephone); *see also Kaufman*, 2008 WL 4980360, at \*4 (barring counsel from any further ex parte communications with the court).

The status conference previously scheduled for November 6, 2014 is hereby rescheduled for November 12, 2014 at 10:00 a.m. to accommodate Ms. Misir's travel schedule.

SO ORDERED.

Dated:           October 31, 2014  
                  White Plains, New York



KENNETH M. KARAS  
UNITED STATES DISTRICT JUDGE