

ADVISORY COMMITTEE
ON STANDARDS OF JUDICIAL CONDUCT
OPINION OPINION NO.1 - 1994

RE: Propriety of a magistrate-father handling bond matters for clients of the attorney-son of the magistrate.

After a judge has ruled in open court and has directed one of the attorneys to prepare an order in accordance with his instructions, (1) may the judge thereafter discuss the contents

RE: of the order with that attorney out of the presence of opposing counsel; and (2) must a copy of the proposed order be sent to the opposing counsel at the time it is forwarded to the judge for signature?

FACTS

In January 1988, the Advisory Committee issued Opinion No. 2-1988 which concluded that a judge who directs one counsel to draft an order may do so only after he has given a ruling in the matter, and further, that he may not engage in ex parte discussion with counsel without notice to opposing counsel. The Judicial Standards Commission has asked the Committee to clarify Opinion No. 2-1988 in the below-stated particulars.

CONCLUSION

After a judge has ruled in open court and directed one attorney to prepare an order in accordance with his instructions, he may not discuss the order, except for minor, non substantive corrections with the drafting attorney. A copy of the proposed order must also be sent to opposing counsel at the time it is forwarded to the judge for signature.

DISCUSSION

After a judge has ruled in open court and has directed one of the attorneys to prepare an order in accordance with his instructions, he may not thereafter discuss the substance of the order, except minor corrections, with that attorney out of the presence of opposing counsel, as this conduct would amount to ex parte communications. Canon 3 specifically prohibits ex parte discussions and states:

A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning pending or impending proceeding.

Rule 501, Canon 3(A)(4).

If the drafting attorney were allowed to discuss the order, other than minor corrections, with the judge outside the presence of opposing counsel, they could potentially discuss substantive matters of the order. Such discussions could give the drafting attorney an unfair advantage in influencing the opinions of the judge. If there are substantive corrections or changes, the judge may only discuss these in the presence of both attorneys or in open court. This procedure should be followed even in a default matter.

After the judge has ruled in open court and has directed one of the attorneys to prepare an order in accordance with his instructions, a copy of the proposed order must be sent to opposing counsel at the time it is forwarded to the judge for signature. If opposing counsel does not receive a copy of the proposed order, the drafting attorney is essentially engaging in ex parte communications with the judge. Again, Canon 3A(4) prohibits the judge from considering any ex parte communications. If the opposing counsel is not afforded the opportunity to see the order prior to the judge's signing it, he is denied the opportunity to object to any portions. If the judge signs an order with changes or corrections of which the opposing counsel is unaware, the drafting attorney has gained that which the Code seeks to limit in prohibiting ex parte communications, an unfair advantage. Therefore, in order to prohibit the appearance of impropriety and protect the impartibility of the judiciary, drafting counsel must send a copy of the proposed order to opposing counsel when it is submitted to the judge for signature. This should be done by the same means as used to deliver the proposed order to the judge.

A. CAMDEN LEWIS, CHAIRMAN
HONORABLE DONALD A. FANNING
HONORABLE HENRY F. FLOYD

January 4, 1994