

ETHICS OPINION

030703

The following Ethics Opinion was issued on July 3, 2003, by the Ethics Committee of the State Bar of Montana in response to a question submitted by a Bar member:

QUESTION PRESENTED:

When a court or other tribunal requests counsel for a party to prepare an order for the court's signature, does Rule 3.5 of the Montana Rules of Professional Conduct require the attorney preparing the order to serve the order on opposing counsel at the same time attorney submits the order to the court?

SHORT ANSWER:

While as a rule of law such service may not be mandated, it is appropriate within the Rules of Professional Conduct that service of proposed orders are made on opposing counsel.

DISCUSSION:

Rule 3.5 of the Montana Rules of Professional Conduct addresses a lawyer's duty to maintain the impartiality of a tribunal. Rule 3.5 provides:

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;*
- (b) communicate ex parte with such a person except as permitted by law;*
- or*
- (c) engage in conduct intended to disrupt a tribunal.*

All litigants and lawyers should have access to tribunals on an equal basis. Generally, a lawyer should not communicate with a judge relative to a matter over which the judge is or will preside in circumstances that might have the effect or give the appearance of granting undue advantage to one party.

Failure to give the opposing counsel an opportunity to comment upon or object to a proposed order before it is submitted to the judge is unprofessional and may be prejudicial to the administration of justice. It is the more professional practice for an attorney to provide the opposition with a copy of a proposed order in advance of delivering the proposed order to the judge and thereby give the opposing counsel an adequate opportunity to comment upon or object to the proposed order. At a minimum, if the lawyer conveys the proposed order simultaneously with its delivery to the judge, Rule 3.3(d)[1] suggests the lawyer disclose to the judge in the ex parte communication that the opposing counsel has received a copy of the proposed order but has not had an opportunity to present any comments or objections to the judge.

CONCLUSION:

When a court or other tribunal requests counsel for a party to prepare an order for the Court's signature, it is appropriate under Rule 3.5 of the Montana Rules of Professional Conduct that counsel preparing the order serve the order submitted to the court to opposing counsel.

THIS OPINION IS ADVISORY ONLY**Note**

1. Rule 3.3(d) provides that "in an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."