

A Look At Ex Parte Contacts

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Lawyers in litigation matters are duty-bound to represent their clients zealously. Lawyers appearing pro se advocate their own interests zealously. In the adversary system, it is assumed that the presentations by each side will produce all available material evidence. When only one party is present, as in an ex parte proceeding, however, there is no counterbalance.

Accordingly, the Rules of Professional Conduct impose obligations on attorneys appearing ex parte in addition to the obligations on attorneys generally. These enhanced obligations include Rule 3.3(d), Minnesota Rules of Professional Conduct (MRPC). This rule provides:

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.

Failure to recognize the enhanced duties can lead an attorney into professional misconduct.

In a matter before the Office of Lawyers Professional Responsibility, a lawyer was pro se in a domestic proceeding. The lawyer's significant other obtained an ex parte order for protection against the lawyer. The order for protection prohibited the lawyer from contacting or communicating with his significant other. When the ex parte order for protection was issued, a subsequent hearing on the matter was scheduled for a week later.

On the day of the hearing, the lawyer saw his significant other in a hallway of the courthouse. The lawyer asked her if she had counsel. She did not respond and went into the county attorney's office in the building.

Fifteen minutes after the hearing was scheduled to begin, the judge noted that the party who had obtained the ex parte order for protection was not in the courtroom. The court clerk informed the judge that the lawyer's significant other had not checked in with the court administrator's office.

The judge therefore dismissed the order for protection. The lawyer was present in the courtroom throughout this time. The lawyer, however, failed to inform the judge that he had seen his significant other in the building earlier that afternoon.

Later that afternoon the lawyer's significant other appeared before the judge with an assistant county attorney. She reported that she had not checked in at the court administrator's office or attended the hearing because she was afraid of the lawyer and had gone to the county attorney's office for security. The judge reinstated the order for protection and set the matter on for hearing one week later. The lawyer then appealed the order for protection.

In this matter, the lawyer failed to disclose a material fact to the tribunal, that the opposing party was present in the building. This violated Rule 3.3(d), MRPC. The lawyer's obligation to reveal this fact was

unique to this ex parte proceeding.

Parenthetically, the lawyer also violated Rule 3.4(c), MRPC, when he communicated with his significant other in the hallway before the hearing.

This rule provides, "A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." The lawyer's communication with his significant other violated the order for protection and hence violated Rule 3.4(c), MRPC.