



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

Yesterday I received findings of fact and conclusions of law in which the judge in a court-tried case decided against our client. This morning, I received a copy of an e-mail to the judge from opposing counsel congratulating the judge on what she characterized as a scholarly decision and bemoaning the fact that the judge was recently passed over for an appellate court appointment. I believe from the tone and content of the email that this was sent to me by mistake, and it was actually intended as a private message. Was this an improper ex parte communication? Do I have obligation to report this conduct?

A: Your set of facts implicates Model Rule 3.5 concerning impartiality and decorum of a tribunal. Among other things, the rule provides that a lawyer shall not "seek to influence a judge...by means prohibited by law," Rule 3.5(a); and shall not communicate ex parte with a judge "during the proceeding unless authorized to do so by law or court order." Assuming that the findings of fact and conclusions of law in your case did not conclude the proceeding before the court with finality, then this communication would have been in violation of Rule 3.5(b) if made ex parte. Perhaps ironically, your receipt of a contemporaneous copy, however unintended it was, kept this from being the case. But, note that Rule 8.4(a) also classifies as "professional misconduct" a lawyer's "attempt to violate the Rules of Professional Conduct." How about the smarmy congratulations of the judge and commiseration with the judge's appellate bench aspirations—was this an effort to seek to influence the judge in violation of Rule 3.5(a)? Perhaps, but by means prohibited by law? No, although query whether it would have been if made by an ex parte communication otherwise prohibited by Model Rule 3.5? In any event, you have no reporting obligation. You may wish to consider objecting to the nature of the communication, but of course make sure you copy opposing counsel.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.