

ADVISORY OPINION

**Code of Judicial Conduct
Canon 3B(8)**

#1-98

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

The issue is whether it is appropriate for a judge to inform one party of a decision the judge has made for the purpose of instructing that party to prepare an order for the judge's signature. The Commission concludes it is not.

ANALYSIS

The circumstances brought to the Commission's attention, and which prompted this Advisory Opinion, were that a judge presided over a contested support hearing. Each party had counsel. At the conclusion of the hearing, the judge took the matter under advisement. A few weeks later, the judge made his decision on the several issues presented, and telephoned the attorney whose client primarily had prevailed in the case. The judge outlined his decision for the attorney, and instructed him to prepare an order reflecting that decision. After a few weeks, the attorney did so, and, a few weeks later, the judge signed the order after making some minor changes or corrections. The attorney for the other party was unaware of the judge's decision, or of his instruction to opposing counsel to prepare an order, until after the order was signed.

While, of course, a judge may instruct one or both parties to prepare proposed Orders, the practice just described is inappropriate, and the Commission has concluded that the judge here violated Canon 3B(8) of the Code of Judicial Conduct. Canon 3B(8) provides in part that a judge shall not initiate ex parte communications on issues dealing with substantive matters or issues on the merits of a case, except that a judge may communicate with one party ex parte on issues relating to scheduling or administration if the judge reasonably believes that no party will gain a procedural or tactical advantage and the judge promptly notifies all other parties about the communication.

In the case at hand, one party's lawyer had the advantage, first, of speaking with the judge ex parte about the judge's decision. Even assuming the judge's decision was firm, and the conversation involved only its announcement and instructions to prepare an order, the party whose lawyer was not asked to participate justifiably would question the fairness of the conduct and might question whether the conversation, from which his or her attorney was excluded, went beyond a simple announcement and might have involved further argument or comment on the merits. Then, subsequent to the ex parte conversation, for a period of time, one party only was privy to the outcome. The potential for abuse is great and, even where the informed party has no occasion or reason to exploit that information, the negative impact on the other party's perception of the judge's neutrality and impartiality is rightfully compromised.

A judge must never announce his or her decisions to one party, to the exclusion of others, except in extraordinary circumstances. A judge who is not inclined to ask for proposed orders from all parties prior to rendering the decision, and who, instead, prefers to instruct only the prevailing party to prepare a proposed order conforming with the judge's decision, must give that instruction under circumstances in which both parties are made aware of the decision at the same time.

CONCLUSION

A judge violates Canon 3B(8) of the Code of Judicial Conduct by notifying one party only, or that party's attorney, of the judge's decision in a contested matter and instructing the attorney to prepare an order conforming to the decision, while withholding notice to the other party until the order is filed.