



Committee on Professional Ethics

Opinion #325 - 1/24/74 (51-73) Topic: Briefs

Digest: Improper to submit a brief
without delivering copy to
opposing counsel

Code: EC 7-35; DR 7-110(B)
Judicial Code: Canon 3(A)(4)

QUESTION

May an attorney submit a brief to a court without furnishing a copy to opposing counsel?

OPINION

EC 7-35 provides:

"All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client."

DR 7-110(B) provides:

"In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

"(1) In the course of official proceedings in the cause.

"(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

"(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

"(4) As otherwise authorized by law."

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Canon 3(A)(4) of the Code of Judicial Conduct and Section 33.3(a)(4) of General Rules of the Administrative Board of the Judicial Conference provides in pertinent part:

"A judge shall. . .except as authorized by law, neither institute nor consider ex parte or other communications concerning a pending or impending proceeding."

The Code makes no distinction between a "trial brief" and a "brief of argument;" the rule is the same for both. cf. N.Y. City 852 (1961); N.Y. County 227 (1923). Accordingly, unless expressly permitted by the court upon application on notice to all parties or authorized by law, it is improper to submit a brief or other communication to the court without promptly delivering a copy to opposing counsel. See, Drinker, Legal Ethics 78, 198, 278 (1953).
