



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I filed suit for a client, among other things seeking interim relief in the form of a temporary restraining order. I gave notice to the defendant of an immediate hearing on the motion. They quickly engaged an attorney who came to the hearing, but knows nothing about the case yet. Do I have an obligation to inform the court and opposing counsel of material facts that run against my effort to secure a TRO, in making my argument at the hearing?

A: This question calls into question Model Rule 3.3(d), which provides that in an ex parte proceeding, a lawyer must inform the tribunal of "all material facts" known to the lawyer that will enable the tribunal to make an informed decision, "whether or not the facts are adverse." In this instance, because you gave notice to the defendant and it arranged for counsel to come to the hearing, it is not an ex parte proceeding even though the opposing lawyer is not up to speed. Therefore, you have no obligation under the rule to disclose facts adverse to your request for relief. Be careful though. You still have the obligation to make sure you do not knowingly make a false statement, Rule 3.3(a)(1). In addition, from a strategic standpoint, you may wish to consider whether it is wise not to disclose and argue around any important adverse fact that is going to come to light eventually, so as to maintain your credibility with the court in this matter and others.

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 132 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.