



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in May 2010. Please see the 2010 Illinois Rule of Professional Conduct 3.5(b). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 93-12
March, 1994

Topic: Ex Parte communication with judge; state's attorneys

Digest: It is improper for a state's attorney to communicate ex parte with a judge to obtain an emergency stay of a bail reduction order, except as provided for by statute.

Ref: Illinois Rules of Professional Conduct, Rule 3.5(i).
In re Conduct of Burrows (Or. 1981), 629 P.2d 820
In Re Samuels (1989), 126 Ill.2d 509

FACTS

Judge conducts bail reduction hearing of defendant charged with attempted murder at which assistant state's attorney and defense counsel are present. Hearing results in bail being substantially reduced; however, while defendant was in the process of posting bail, state's attorney learns of further information bearing on the amount of bail, including that the defendant had previously threatened harm to the victim if and when released upon bail. State's attorney contacts judge ex parte to obtain stay of order reducing bail by representing that previously unknown information had been discovered and seeking an emergency hearing on state's attorney's motion to reconsider based upon this previously unknown evidence. State's attorney obtains stay and is directed to notify defense attorney. Hearing held later that day, at which state's attorneys and defense counsel appear,

results in motion to reconsider being granted and bail being restored to initial amount.

QUESTION

Does state's attorney's ex parte communication with judge violate Rule 3.5(i) of the Illinois Rules of Professional Conduct?

OPINION

We are of the opinion that the state's attorney's ex parte communication with the judge violated Rule 3.5(i), which prohibits ex parte communications "as to the merits of the cause with a judge...before whom a proceeding is pending, except as ... permitted by law."

The threshold question is whether obtaining an emergency stay via an ex parte communication goes to the merits of the cause. The phrase "on the merits" has been interpreted to mean the content of a communication and not a particular phase of the proceedings. (See, In re Conduct of Burrows (Or. 1981), 629 P.2d 820.) In that the state's attorney obtained the relief he sought, i.e., an emergency stay of the bail reduction which resulted in the defendant remaining in custody, the content of the state's attorney's communication went to the merits, and thus is governed by Rule 3.5(i)'s prohibition.

Finding that the ex parte communication was on the merits, we next turn to whether the communication was authorized by law and thus not violative of Rule 3.5(i). Proceedings to increase bail are governed by §110-6 of the Criminal Code (725 ILCS 4/110-6), which provides that the state must give reasonable notice, pursuant to §110-6(d), of any request to increase bail. The statute further provides, pursuant to §110-6(e), that no notice need be given where "upon verified application by the State" facts or circumstances are stated "constituting a violation or a threatened violation of any of the conditions of the bail..." It is unclear from the facts set forth in the inquiry whether the state's attorney's motion to reconsider was filed before the ex parte communication and if so whether it was verified or constitutes a verified application within the meaning of the statute. Assuming that the motion was not filed before the communication or was not in the statutory format, then the state's attorney's ex parte communication violated Rule 3.5(i) because the communication was not authorized by law.

Although we are mindful that the state's attorney felt that an emergency existed which necessitated immediate action, no such exception to the rules exists. (Cf., In Re Samuels (1989), 126 Ill.2d 509 (no cut rate version of ethics exists).) Moreover, alternatives existed which argue against justifying the state's attorneys' conduct on the grounds of emergency, such as following the minimal requirements of §110-6(e), or arresting the defendant for threatening or intimidating the victim/witness, or obtaining protection for the victim/witness.

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