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 and its Comment [2]. 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. 94-7
September, 1994

Topic: Ex Parte Communications.

Digest: It is improper for a lawyer to engage in or to respond to ex parte communications from a judge concerning the drafting of an order or judgment without giving prompt notice to opposing counsel.

Ref: Illinois Rules of Professional Conduct, Rule 3.5(i).
Illinois Supreme Court Rules, Rule 63(A)(4) and Rule 271.
ISBA Opinion No. 93-12.
City of Chicago v. American National Bank & Trust Co., 171 Ill.App.3d 680, 525 N.E.2d 915 (1st Dist. 1988).
In re Ragatz, 146 Wis.2d 80, 429 N.W.2d 488 (1988).
In re Wisconsin Steel Corp., 48 Bankr. Rep. 753 (N.D.Ill. 1985).
C.W. Wolfram, Modern Legal Ethics (1986) § 11.3.3.

FACTS
An inquiring lawyer has written as follows:

> Many Judges lack the resources and time necessary to handle responsibilities assigned to them, including the responsibility of preparing the necessary Order or Orders at the end of a particular hearing or at the end of the case itself. Because of the lack of resources or the lack of time or perhaps even the lack of something else, Judges will from time to time contact ex parte one of the attorneys in the case and request that attorney prepare whatever Order is deemed appropriate by the Judge. Ordinarily, when this happens, the Judge lets the attorney know in at least general terms what the ruling is to be. The attorney then prepares the Order or Orders, filling in the details as he or she--the attorney--deems appropriate based on his or her own judgement and not based on any directions of the Judge. The Order prepared by the attorney is then provided to the Judge who can accept it or reject it. All of these communications are ex parte, and the other attorney or attorneys in the case are at no time made aware of the communications or how the Order or Orders have been prepared.

The inquiring lawyer also states the belief that this practice is common.

QUESTIONS

The inquiring lawyer asks: (1) are ex parte communications in the situation described professionally proper? and; (2) is a lawyer contacted by a judge in such a situation obligated to at some time disclose the ex parte contact to opposing counsel?

OPINION

At the outset, the Committee notes that despite the statement of the inquiring lawyer that the practice described above is common, the Committee believes that such circumstances are in fact rare. The usual Illinois practice, consistent with Supreme Court Rule 271, is for the lawyer for the prevailing party on a contested motion to prepare and present a draft order for entry by the judge. Whether a proposed order is prepared and presented in open court or circulated by mail or other means, any draft order is virtually always submitted to all interested counsel before the proposed order is presented to the court. Thus, the Committee considers the fact situation as stated to be aberrant from common Illinois practice.

The Committee also notes that the expression of opinion on the conduct of judges is beyond the scope of the Committee. The Committee observes, however, that Illinois Supreme Court Rule 63(A)(4); part of the Code of Judicial Conduct provides:

> (4) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
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> > (a) Where circumstances require, *ex parte* communications for scheduling administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.

(b) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(c) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(d) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

The duty of lawyers with regard to ex parte contacts is congruent with the duty of judges. Rule 3.5(i) of the Illinois Rules of Professional Conduct provides:

(i) 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 the lawyer promptly delivers a copy of the writing to opposing counsel or the adverse party if such party is not represented by a lawyer;

(3) orally upon adequate notice to opposing counsel or to the adverse party if such party is not represented by a lawyer; or

(4) as otherwise authorized by law.

The situation presented in this inquiry is subject to Rule 3.5(i). The communications described with the judge are clearly ex parte. The communications also concern the "merits" of the causes in question. While the Rules do not define the "merits" in this context, the Committee has previously stated that the phrase "on the merits" relates to the content of a communication. ISBA Opinion No. 93-12. Professor Wolfram suggests that the "merits" exception should be "confined strictly to trivial details of housekeeping in a case." C.W. Wolfram, Modern Legal Ethics (1986) § 11.3.3, at 605. The wording of a judgment or other order entered following a contested hearing cannot be considered a "trivial" detail in any matter in litigation. In a bankruptcy matter where the debtor's lawyer was asked, without notice to opposing parties, to write the bankruptcy judge's opinion denying a motion to dismiss a creditor's counterclaim, the debtor's lawyer argued that the draft opinion was merely a proposal. The district court vacated the opinion on the grounds that the bankruptcy judge in requesting the opinion, and the debtor's lawyer in submitting it, were engaging in an ex parte communication concerning the merits of

the case. "Indeed, it is difficult to imagine a communication that concerns the merits of the case in a way more plenary than the writing of a judge's opinion." In re Wisconsin Steel Corp., 48 Bankr. Rep. 753, 760 (N.D.Ill. 1985). The Committee finds it difficult to imagine that judgments and other orders entered after contested hearings will not affect the "merits" of the action.

The ex parte contact described is not "otherwise authorized by law" within the meaning of Rule 3.5(i)(4). The Committee is aware that the Supreme Court Rule 271 provides that, with respect to motions, when a court rules upon a motion other than in the course of trial, the lawyer for the prevailing party shall prepare and present the order to be entered to the court, unless the court directs otherwise. Rule 271 does not, however, excuse notice to opposing counsel.

The fact that an ex parte contact is initiated by a judge does not excuse a lawyer's separate duties under Rule 3.5(i). A lawyer's responsibility to avoid ex parte contacts is expressed in the official Comment to Rule 3.5 of the American Bar Association Model Rules of Professional Conduct, which is similar to Illinois Rule 3.5(i). The ABA Comment notes that improper ex parte contacts are proscribed by both the criminal law and the rules of judicial conduct, and further states: "A lawyer is required to avoid contributing to a violation of such provisions."

The Illinois courts have held that orders entered without notice to opposing counsel are void. In City of Chicago v. American National Bank & Trust Co., 171 Ill. App. 3d 680, 525 N.E.2d 915 (1st Dist. 1988), counsel for the City prepared a judgement order in a housing code enforcement matter and presented the order to the circuit court for entry without notifying counsel for the defendant. The Appellate Court reversed the judgement on various grounds, including Rule 7-110(b) of the Illinois Code of Professional Responsibility [the prior version of Rule 3.5(i)], and observed: "The relaxation of these ethical standards is not to be countenanced even in high volume courtrooms, such as those hearing housing violations, as in this case." 171 Ill. App. 3d at 689.

Failure to notify other counsel of ex parte contacts may also result in professional discipline for lawyers. In its City of Chicago opinion, the Appellate Court stated: "Future compliance with these rules [the prior version of Rule 3.5(i)] is essential if serious disciplinary action is to be avoided." 171 Ill. App. 3d at 690. The Wisconsin Supreme Court disciplined, with a 60-day suspension, a lawyer who responded to but did not initiate an ex parte conversation about a pending action and replied to a letter sent by the judge without providing opposing counsel with a copy of the response. In re Ragatz, 146 Wis.2d 80, 429 N.W.2d 488 (1988). The fact that the lawyer did not initiate the ex parte contact was considered in mitigation in determining the length of the suspension, but it did not justify the lawyer's failure to notify opposing counsel. 429 N.W.2d at 491.

In conclusion, the Committee believes that if a lawyer were to receive an ex parte request from a judge to prepare an order or judgment, under the circumstances described by the inquiring lawyer, the lawyer should suggest that the judge either include other interested counsel in the conversation by means of a telephone conference call or send all counsel a brief letter or other written notice advising of the judge's ruling and directing the appropriate lawyer to draft and

submit a proposed order or judgment to the court and other interested counsel. At a minimum, a lawyer receiving such a request must give timely notice to counsel for all interested parties of the fact and substance of the ex parte communication and also promptly deliver to all counsel copies of any draft orders or other written material submitted to the court.

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