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The New *Ex Parte* Communications Rule in Illinois: A Step Forward?

Ann Lousin*

In 1974, while on a visit to Lewes, England, I witnessed an example of the lengths to which the British will go to protect both the integrity and the appearance of integrity of their judicial system. I stayed at a hotel directly opposite the building housing the assizes, or local felony court. As I returned to the hotel about noon one day, two constables politely, but very firmly, prevented all of the passers-by from entering the pedestrian crossing between the hotel and the courthouse. As we all waited, a bailiff suddenly emerged from the courthouse. He was escorting a judge, robes flying in the haste with which he was striding from the courthouse to the hotel. I learned that the judge was a circuit judge temporarily assigned to Lewes assizes and was housed in a suite in the hotel. Every morning and evening, as well as at the noon luncheon recess, he went to and from the courthouse and his suite under escort. The bailiff and constable ensured that no one could speak to the judge on this route, however short, so that the litigants, lawyers, and the British public could be morally certain that the judge received no *ex parte* communications during the course of the trial.

We do things differently in Illinois. The recent Greylord investigation has uncovered not only bribery, but also what most citizens of Illinois already knew: there are lawyers and litigants who virtually try to camp in a judge's chambers. The problem of *ex parte* communications, especially those clearly designed to influence the judge's rulings in a case he is currently hearing, is most acute in Chicago, but it is known in other parts of Illinois, too.

When the Administrative Office of the Illinois Courts appointed me a Professor-Reporter for the Judicial Ethics Committee of the 1987 Associate Judges Seminar, I thought of the incident in Lewes and particularly of the differences between the British and Illinois attitudes toward the problem of *ex parte* communications. This Article describes the new version of Illinois Supreme Court Rule

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63(A)(4)¹ on *ex parte* communications; traces its origin; summarizes my research on the relevant cases in Illinois and other states; and gives my assessment of the rule and suggestions for both implementation and change.

The roots of any rule regulating or banning *ex parte* communications are a stated need to protect the integrity and impartiality of a judicial officer. A judge must not only be impartial, he must also appear to be impartial. As the Alabama Supreme Court stated:

Any time a judge of any court is charged with misconduct in office, it shivers the timbers of the judicial system. Public confidence in the courts is shaken and the administration of justice is rendered suspect in the eyes of the citizens; the impartiality of the judge is questioned.²

The court's point, that the questioning of the impartiality of a judge renders the administration of justice suspect, is the basis of Canon 3 of the Illinois Code of Judicial Conduct, as revised in 1987. According to the Committee Commentary, written by those who drafted the 1987 revised rules, Illinois had no judicially mandated rules before 1970.³ Since March 15, 1970, when the first Supreme Court rules on judicial conduct became effective, there have been rules of conduct for the Illinois judiciary. The first judicial code was based upon drafts of the Supreme Court Committee on Judicial Ethics. That committee recommended that the court keep the questions of a judicial code and of judicial conduct under constant review, particularly, it said "in view of the current work of the American Bar Association in this area and the approaching Constitutional Convention in the State."⁴

The 1970 committee might have added that the entire judiciary

1. ILL. S. CT. R. 63(A)(4), ILL. REV. STAT. ch. 110A, para. 63(A)(4) (1987).

2. *In re Emmet*, 293 Ala. 143, 147, 300 So. 2d 435, 438 (1974).

3. The first paragraph of the preface to the committee commentary to the Code of Judicial Conduct, in the order of the Supreme Court of the State of Illinois entered December 2, 1986, states:

Prior to 1964, Illinois left the matter of judicial ethics to the individual conscience of the judge, subject to the impeachment power of the General Assembly and the requirement that each judge run for reelection at the expiration of his term in office. On January 1, 1964, the effective date of the amendment to the judicial article of the 1870 Constitution, the Courts Commission was established to investigate, prosecute and adjudicate complaints of judicial misconduct and judicial officers. Concomitantly, the Illinois Judicial Conference adopted advisory Canons of Judicial Ethics.

ILL. S. CT. R. 61-68, ILL. ANN. STAT. ch. 110A, paras. 61-68 (Smith-Hurd Supp. 1987) (Committee Commentary to the Background Section to the Code of Judicial Conduct) [hereinafter "Background Committee Commentary"].

4. *Id.*

was under a cloud of allegations and investigations of misconduct by certain members of the Illinois Supreme Court in the late 1960's. This became known as "the Solfisburg-Klingbiel scandal," after the two Supreme Court justices whose conduct was under the heaviest accusations. As Professor Rubin G. Cohn later noted, "the chain reaction of events had stunning public and professional impact."⁵

One result of the scandal was the resignation of Justices Solfisburg and Klingbiel. Another result was the realization that neither the Illinois Constitution of 1870 nor the rules of the supreme court provided any real mechanism for promoting judicial ethics or disciplining judges. The Courts Commission, created by the 1962 Judicial Amendment to the old constitution, was composed solely of judges, a circumstance scarcely likely to induce confidence in their power to investigate other judges, especially members of the supreme court.⁶ The 1969-70 Constitutional Convention sought to remedy the constitutional problem by creating the Judicial Inquiry Board, which is composed of judges, lawyers and non-lawyers, to investigate and bring charges against judges before the Illinois Courts Commission. The Illinois Courts Commission still is composed solely of judges.⁷ The Constitutional Convention further specified that the General Assembly could impeach and remove judges for misconduct.⁸ This new constitutional framework became effective in 1971.

In 1972, when the Board was well underway, the American Bar Association adopted a new code of judicial ethics. A joint committee of the Illinois State Bar Association and Chicago Bar Association later recommended this code as the basis for a new Illinois judicial code.⁹ In 1976 this recommendation resulted in amendments to the 1970 version of the Illinois Judicial Code.¹⁰

Since then there has been a strong correlation between the ABA Canons in effect and the proposals for an Illinois Code of Judicial Conduct. In fact, the committee commentary to the 1987 rules

5. R. COHN, *TO JUDGE WITH JUSTICE: HISTORY AND POLITICS OF ILLINOIS JUDICIAL REFORM* 28 (1973). Professor Cohn's description of the scandal and the utter inability of the then-existing machinery of the judicial and legislative branches to cope with it is very instructive and can be found at pages 28-30 of his book.

6. ILL. CONST. of 1870 art. VI, § 18.

7. Today, both the Board and the Commission are creatures of article VI, section 15 of the 1970 Illinois Constitution.

8. ILL. CONST. of 1970 art. IV, § 14.

9. Background Committee Commentary, *supra* note 3.

10. *Id.*

noted the considerable moral influence of the ABA draft.¹¹ This influence generally affects the 1987 Illinois Code of Judicial Conduct and particularly affects the regulation of *ex parte* communications.

The previous Illinois rule, Rule 61(c)(16) reads:

Except as permitted by law, a judge should not permit private or *ex parte* interviews, arguments or communication designed to influence his judicial action in any case, either civil or criminal.

A judge should not accept in any case briefs, documents or written communications intended or calculated to influence his action unless the contents are promptly made known to all parties.¹²

The thrust of this rule was to prevent attempts to influence a judge's decision without affording the other litigant an opportunity to challenge or respond.

The new rule, Rule 63(A)(4), effective since January 1, 1987, reads:

A judge should accord to every person who is legally interested in a proceeding, or his lawyer, a full right to be heard according to the law, and, except as authorized by law, shall not permit *ex*

11. The Commentary provides:

The initial determination of the present committee was to propose the adoption of a new code based on the ABA canons. There was general agreement that revisions of the existing code would be sufficient to keep Illinois at the forefront of judicial ethics. Indeed, the comprehensiveness and wisdom of that code is reflected in the fact that it was the committee's conclusion that the adoption of the ABA canons would work no significant substantive changes in the existing law. The unanimous decision of the committee to recommend that the ABA canons be adopted as the foundation of the Illinois rules was primarily predicated on two interrelated factors: the desire for uniformity with the rules governing judicial officers in other states and the need for a body of interpretive decisions to guide judicial officers when the application of a rule in a particular factual situation is not clear. With regard to the latter problem, an additional benefit lies in the fact that the ABA has established a Standing Committee on Ethics and Professional Responsibility which renders opinions on matters of proper professional or judicial conduct.

It was, of course, not feasible that the ABA canons be adopted verbatim. Specific provisions of the Illinois Constitution and statutes as well as circumstances unique to Illinois required that canons be modified in accord with any superseding legal requirements and extraordinary circumstances. The committee commentary is primarily concerned with these modifications, however, wherever appropriate, the ABA commentary has been incorporated into the committee. For an excellent background commentary on the ABA canons themselves see Thode, *Reporter's Notes to Code of Judicial Conduct* (ABA 1973).

Id.

12. ILL. S. CT. R. 61(c)(16), ILL. REV. STAT. ch. 110A, para. 61(c)(16) (1985).

parte or other communications concerning a pending or impending proceeding.¹³

The new rule is much broader and, in my opinion, not nearly as clear as the old rule. The committee commentary makes it clear that the drafters used the ABA Model Canon, rather than the old Illinois Rule, as their starting point.¹⁴ The drafters of the 1987 rule, however, were concerned with two types of influence that did not especially perturb the drafters of the ABA Model Canon: masters in chancery and law professors.

When I first read these reasons, I was both surprised and amused; for masters of chancery have been out of favor, as well as out of a job, since 1964.¹⁵ And law professors? I cannot remember a single instance, within or without the Greylord scandal, in which a professor's out-of-court conversation with a judge tainted the trial. Nonetheless, professors, although they have no stake in the outcome of the litigation, are not really neutral parties. They have strong views on legal issues and enjoy considerable prestige among the bench and bar. As even the ABA Model Canon recognizes, however, law professors' views are not infallible. To be on the safe side, the parties ought to be certain that an academic does not influence a judge by offering authoritative-sounding opinions that a judge may well accept without seeking a second opinion.

The ABA canon handled the problem of a professors out-of-court conversation with a judge by mandating both disclosure of

13. ILL. S. CT. R. 63(A)(4), ILL. REV. STAT. ch. 110A, para. 63(A)(4) (1987).

14. Referring to the new rule, the Committee Commentary states:

This paragraph modified ABA Canon 3(A)(4) by deleting the last sentence, which provides: "A judge, however may obtain the advice of a distinguished expert in the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond." The committee believed that such procedure would be too close to the former practice of using masters in chancery which was abolished by the 1962 amendment of the judicial article. Furthermore both bar association committees were concerned with the possibility of a judge seeking advice from a law professor. The committee does not believe that the deletion of this provision affects the obligation of a judge to disclose any extra-judicial communication concerning a case pending before him to the parties or their attorneys. The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding. It does not preclude a judge from consulting with other judges, or with the court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

ILL. S. CT. R. 63, ILL. ANN. STAT. ch. 110A, para. 63 (Smith-Hurd Supp. 1987) (committee commentary to Rule 63) [hereinafter Rule 63 Committee Commentary].

15. The office of Master in Chancery was abolished by the 1962 amendment to the Illinois Constitution, effective in 1964. See ILL. CONST. of 1870 art. VI, § 8 (1969).

the consultation and an opportunity to challenge the opinion given. The Illinois solution is different. The Illinois canon now forbids consulting a law professor, but it also says that a judge's response to an *ex parte* communication should be disclosure of the communication to both litigants or their lawyers. How does this result differ from the ABA's? Apparently, the intended result of the Illinois Rule was to require a professor whose opinions as a "distinguished expert in the law applicable to a proceeding" are desired to testify as an expert witness or write books and articles that counsel may dispute in their briefs.

What will, in fact, be the effect of the new rule? While we can only guess, we can make educated guesses. The cases in Illinois under the old prohibition, and elsewhere under similar canons, provide some guidance. The courts look to three independent but interrelated factors: (1) Was there a "communication?"; (2) Was it *ex parte*?; and (3) Was it of the type prohibited by the canon?

The cases and canons make it clear that the goal is to avoid both impropriety and the *appearance* of impropriety. A judge who lunches during the trial with a lawyer for one of the parties may not have discussed legal issues with his luncheon companion, but he certainly makes opposing counsel feel insecure and creates the appearance of impropriety.¹⁶

Between 1980 and 1986, two Illinois cases addressed the old rule. In *Estate of Denaro*,¹⁷ the executor of an estate corresponded with the judge concerning the proper settlement of the estate. The judge responded by trying to determine if a wrong had occurred. He informed the executor in open court. The appellate court held that the situation did not violate the old rule because the executor's letter apparently sought the court's aid in technical administrative matters, but did not attempt to influence the court's judgment. Under the 1987 rule, however, the "intent of the communicator" is not a factor in determining if there has been an improper communication. Presumably, therefore, the executor's communication would be a violation of the new rule.

*People v. Dunigan*¹⁸ presented a more perplexing scenario. The defendant's attorney received a notice of a motion to quash his subpoena pursuant to an "attached memorandum of law." There were no attachments. The prosecutor brought a U.S. Attorney and F.B.I. agent to the judge, apologized for not attaching the memo to

16. *In re Fisher*, 31 Cal. 3d 919, 647 P.2d 1075, 184 Cal. Rptr. 296 (1982).

17. 112 Ill. App. 3d 872, 445 N.E.2d 1308 (1st Dist. 1983).

18. 96 Ill. App. 3d 799, 421 N.E.2d 1319 (1st Dist. 1981).

his notices, and proffered the memo. The judge was reading the memo when the defendant's attorney entered the room and observed the scene. The appellate court said the defendant had not demonstrated prejudice, because the memo was not tendered secretly and because there was no pre-trial discussion of the merits of the case.

After Dunigan was convicted but before sentence was imposed, the same judge was drinking tomato juice in a tavern at the invitation of the prosecutor. The victims of the crime, whose presence the judge had not anticipated, spoke with him in generalities at that time, but not about the sentence or disposition of the case. The appellate court said that this meeting did not require recusal, noting that the Illinois Supreme Court had stated: "To say that any involuntary meeting or conversation, no matter how trivial, gives rise to cause for disqualification would present too easy a weapon with which to harass the administration of criminal justice and obtain a substitution of judges."¹⁹

Would the *Dunigan* scenario survive today's rule? It is doubtful. Clearly, the prosecutor ought to have called the defendant's counsel and told him that he would send the missing memo to the judge and the defendant's counsel. The only reason that delivery of the memorandum to the judge was not *ex parte*, however, was that the defendant's counsel walked into the room and received his own copy to read. If the defendant's counsel had not appeared, the memo would have been *ex parte* communication and a violation of the new rule. The tavern scene, despite the suspicious invitation from the prosecutor, is probably not a violation of the new rule because the victim did not discuss the case with the judge.

Since January 1, 1980, there have been several noteworthy decisions from other states on *ex parte* communications. The following cases held the communications to be improper, the judge's conduct to be subject to discipline, and/or the decision to be reversible on grounds of prejudicial error.

In *Commonwealth v. Peacock*,²⁰ the Kentucky Supreme Court found that an appellate court abused its discretion by having direct *ex parte* contacts with a probation officer, parole officer, and trial judge and attempted contact with the prosecuting attorney concerning the review of the trial court's denial of bail pending appeal. The court further held that these *ex parte* communications were

19. *Id.* at 812, 421 N.E.2d at 1330 (quoting *People v. Hicks*, 44 Ill. 2d 550, 256 N.E.2d 823, cert. denied, 400 U.S. 845 (1970)).

20. 701 S.W.2d 397 (Ky. 1985).

improper, inadmissible, and should not have been considered in ruling on the appeal.

In *Caldwell v. State*,²¹ the Maryland Court of Special Appeals found reversible error where (1) a prosecutor and trial judge engaged in *ex parte* communications regarding a sentencing matter as to one or more of the co-defendants and co-conspirators, and (2) the inter-relationship of various defendants' culpability could have heavily influenced the trial court in determining sentences to be imposed. Even though the *ex parte* communication might have been offered innocently and in good faith and the defendant's case was not discussed, the defendant was prejudiced. The court vacated her sentence.

In *People v. Black*,²² the Michigan Court of Appeals held that if the trial court has communicated with the probation officer *ex parte*, it must be assumed that the defendant's right to assistance of counsel has been denied. In *State v. Romano*,²³ the sentencing judge communicated *ex parte* with two of his friends in the jewelry business to verify the defendant's statement regarding the seasonality of his income, for the purpose of adjusting the defendant's restitution plan. These communications, which were not revealed to the defendant until sentence was imposed, violated due process by creating an appearance of unfairness even though the judge may have acted in a forthright and open manner and the inquiries probably simply verified information provided by defendant.

On the other hand, there are several equally recent and noteworthy cases from other jurisdictions holding the communication not to be of the type prohibited and/or not so harmful as to warrant discipline and reversal—the "harmless error doctrine."

For example, in *People v. Smith*,²⁴ the Michigan Supreme Court held that an *ex parte* communication between a sentencing judge and a probation officer concerning correction of a technical error regarding the statutorily permitted maximum sentence was not improper. Moreover, the court stated that when a probation officer is preparing a pre-sentence report, the officer is acting as an arm of the court, thereby permitting *ex parte* communications.

In *Matter of Cunningham*,²⁵ a county judge wrote letters to a city court judge in order to calm the city court judge's anger at him

21. 51 Md. App. 703, 455 A.2d 1069 (1982).

22. 103 Mich. App. 109, 302 N.W.2d 612 (1981).

23. 34 Wash. App. 567, 662 P.2d 406 (1983).

24. 423 Mich. 427, 378 N.W.2d 384 (1985).

25. 57 N.Y.2d 270, 442 N.E.2d 434, 456 N.Y.S.2d 36 (1982).

and to avoid the county court judge's criticism. The letters stated that the county court judge would never change a sentence imposed by the city court judge. These letters constituted misconduct because they gave the appearance of impropriety by creating the impression that the county court judge had prejudged certain cases. However, because the record indicated that the county court judge did not actually abrogate his appellate duty, and because the letters were not meant to be disseminated publicly, a sanction of censure, rather than removal from office, was appropriate.

In *Pack v. State*,²⁶ the Oklahoma Court of Criminal Appeals held that an *ex parte* communication between the trial judge and a prosecutrix prior to trial, by which the trial judge sought information to decide whether to accept the prosecutor's proposed plea agreement, created the appearance of impropriety. It was, however, harmless error. The trial judge explained that she could not accept the defendant's plea without a pre-sentence investigation report and that the defendant received an impartial trial.

Finally, in *Commonwealth v. Bradley*,²⁷ the Pennsylvania Supreme Court held that no reversal of conviction was required when the defendant showed no reasonable likelihood of prejudice arising from the trial judge's *ex parte* communication with the jury. Moreover, the court said that only those *ex parte* communications between a judge and jury that are likely to prejudice a party will require reversal of a conviction.

These cases cannot be reconciled; indeed, it would be useless to try. Perhaps the variations are due to the differences in rules on *ex parte* communications from state to state. Perhaps the judges whose conduct resulted in discipline or reversible error were judges whose conduct had been under suspicion for some time and this instance was simply the most obvious and egregious transgression.

The only way to distinguish the two lines of cases, or, to use a current phrase, the only "bright line" I can find, is this: a judge who communicates with someone outside the judicial personnel system is probably violating the rule. A probation officer is really a non-adversarial participant in the court system, and communications with probation officers are less opprobrious than those with adversarial participants, such as prosecutors, and with private parties, who are not members of the judicial system. As the committee commentary to the Illinois Rule noted, a judge may consult with

26. 725 P.2d 870 (Okla. Crim. App. 1986).

27. 501 Pa. 25, 459 A.2d 733 (1983).

“the court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.”²⁸

How would these non-Illinois cases fare under the new Illinois rule? Certainly the judges in all those cases would have been well-advised to have consulted counsel both before and immediately after the communication. It is hard to say, however, whether they would have been found to have violated Rule 63(A)(4).

The committee of judges to which I was assigned last winter devised several hypotheticals on *ex parte* communications. The judges presenting the problems to the associate judges at the March, 1987, seminar had no firm answers to these hypotheticals, each of which was based on real-life experiences:

1. A new judge is assigned to an outlying court in which traffic and municipal ordinances written by a small municipal police department are regularly heard. The Chief of Police graciously greets the judge in the morning, points out a reserved parking space, offers other amenities and remarks that in three (3) weeks a group of disorderly conduct charges are coming up against some young people who have been very troublesome to the police department. The Chief adds that he hopes that the judge will “do the right thing.” The judge is startled by these comments and firmly explains that decisions will turn on the law and facts, and not on favor to the police department. Sending the case to another judge would be very cumbersome due to geographical locations and the assignment systems. The judge heard the cases.

2. A deputy sheriff stops you before you begin your heavy traffic call and says . . .

“Just thought you’d want to know that you got a “big one” on your call today”

“You got Congressman Snow on your call today”

“You got my son’s basketball coach, Jerry Jones, on your call today. They say that the Warriors are going to go all the way this summer”

“You have Joe Blow on your call today . . . You know, he is the one that beat up that cop’s little girl”

3. Judge Thomas is assigned to Felony Court. He presides over a jury trial in which the defendant is charged with reckless homicide. The charge alleges that the defendant was under the influence of alcohol. The jury finds the defendant guilty, and the matter is set for post-trial motions and sentencing. About fifteen minutes before the sentencing hearing, the Assistant State’s Attorney assigned to the case walks into chambers and says to Judge Thomas: “You remember this defendant, Judge; he’s the one

28. See Rule 63 Committee Commentary, *supra* note 14.

who beat the DUI rap two years ago because the cops blew the administration of the breathalyzer test.”

4. A week before a regularly scheduled DUI call, the Assistant State's Attorney assigned to the call mails an envelope to the judge presiding marked “personal.” Inside, the judge finds a letter that states: “I have conducted a survey of sentences imposed by judges in our circuit on people convicted of a second DUI offense. The average sentence imposed is sixty days and \$500.” On the day of the court call, the Assistant State's Attorney repeatedly argues that judges need to impose harsher sentences upon offenders to teach them a lesson and deter others who may have similar problems and ideas.

5. Judge Jones received a Friday telephone call from Attorney Smith who has four jury trials set before Judge Jones the following week. Attorney White is the opposing attorney in all four cases. There is a third-party defendant in case number three who is represented by Attorney Black. Smith tells the judge that “White has asked me to inform you that we are requesting a continuance on case number four because of the crowded docket. Thank God he doesn't know I've got a hot lead on the locating of the only occurrence witness. We will probably settle case number one. We are \$5,000 apart. I told him I am standing firm, but between you and me, if he comes up with another \$1,500, this case is over. I'm going to surprise White on Monday by voluntarily dismissing case number two with leave to reinstate. I'll be ready on case number three. I hope White and Black are too.”

6. Officer Jones arrives at Judge Smith's home on Saturday night with a complaint and affidavit for a search warrant. The affidavit stated: “Joan White was in Tom Brown's home last night. She saw him give Sharon Black a white substance which appeared to be cocaine.” Judge Smith declined to issue the search warrant. Neither the complaint nor the affidavit was filed. Later Brown was indicted for selling cocaine to Sharon Black on the same night mentioned in the affidavit and search warrant. The case is assigned to Judge Smith. Joan White's name does not appear on any of the discovery material.

7. Over morning coffee, your spouse notes an article in the paper that the mayor of your town has been arrested for DUI and that the case has been assigned to you. Your spouse says “I certainly hope that you are going to make an example of the mayor. After all, if he gets off, how can you expect anyone to take drunk driving seriously.”

8. The mayor of a major suburban village is before you for a DUI charge. You receive various communications concerning your “responsibility” from constituents of the mayor.

9. A prominent sports figure is charged with DUI, and the court file reflects that a personal injury occurred. You receive a mass mailing form a citizens' group reminding you of your "responsibility" to the public and youth of the area.

10. You are at the breakfast table and your teenage child tells you that you are the talk of the school corridors. Your policy concerning the consumption of alcohol by minors is well known and three of your child's classmates are appearing before you on alcohol charges today. Your child tells you that Susie Smith, president of the class and honor student, is a first offender; that Tommy Tune is real rich, real smart, and a very bad alcoholic; that Joe Jones is the school pusher but he has never been caught.

The consensus of the participants was (1) that almost all communication to or by a judge about a case that is or might reasonably come before him is presumed to be a violation of the new rule, and (2) that a judge who thinks there has been a violation should disclose the communication to both counsel in open court. Nonetheless, the increased breadth of the new rule poses a dilemma for every judge. The best way a judge can alleviate this dilemma is to let the personnel around him—secretaries, bailiffs, clerks, police officers, etc.—know that he does not want to speak with anyone connected with any cases before him or about to be before him.

Another way is to inform counsel at the beginning of a case that no *ex parte* communications will be tolerated and that both they and their clients must obey the rule. After that, the judge should be careful never to speak with one counsel outside the presence of the other during the trial. Of course, the judge should not speak with a party or a witness outside the presence of both counsel, at least not as long as any matter involving the judge's official discretion is raised.

Finally, if a judge speaks with or receives a communication from anyone with an economic or personal interest in a case, he or she should ask himself or herself, "Would the other side want a chance to dispute the information I am hearing?" If the answer is yes, the best thing to do is to make sure the other side gets the chance to do so.

I realize that there are several practical problems with these suggested guidelines. The first problem arises from the over-inclusive wording of the rule itself. Because Illinois has simply repeated language drafted by the American Bar Association, we can assume that these problems of interpretation are present in every state that has adopted the A.B.A. draft. What is meant by "*ex parte* or other"? Logically, it means "any communication which is either

ex parte or not” which is the equivalent of “any communication.” Surely this is nonsense. Does the rule mean that all communications to which a judge is a party are prohibited unless allowed by law? The Illinois Supreme Court ought to clarify this ambiguous language as soon as possible. In terms of clarity, the old Illinois rule was superior.

Secondly, there is no way that a judge can know if a lawyer or litigant seeking to communicate with the judge is committing an act prohibited by the rule until the judge hears or reads the contents of the communication. No judge can function efficiently if he or she is isolated from lawyers, litigants, and strangers, or if all attempts to communicate with the judge have to be screened by an agent of the judge. Yet if a judge receives the communication and it is a prohibited communication, the judge is already “tainted.”

Third, the rule seems to be an absolute bar on all communications with interested parties “except as authorized by law,” but it is unclear what is “authorized by law.” May a judge converse with a lawyer about a scheduling question? Is it a prohibited communication if a lawyer stops the judge in the hall and asks, “Is it true you’re going out of town next week? I have a hearing set for Wednesday; have you forgotten?”

Fourth, the very nature of our judicial system, especially in the Circuit Court of Cook County, makes enforcement of the ban difficult. An Assistant State’s Attorney normally is assigned to one courtroom, one “call,” and, therefore, one judge. Such an on-going professional relationship means that communications, even prohibited communications, are almost inevitable. Furthermore, cases that linger at trial for five years engender communications of all kinds among the judge, parties, witnesses, and lawyers.

The most reasonable solution is to address the problem of the rule directly. The Supreme Court should re-consider the language of the rule. Although it is probable that a judge who is honest and takes pains to insure the appearance of honesty will not be charged with violation of the rule, it is far better to clean up ambiguities openly. The perceived problem, moreover, is not discussions about schedules; it is “backdooring” at the trial level. Federal district court judges do not seem to have as much difficulty with “backdooring” counsel as Illinois state judges do. We might well ask ourselves why.

We might also ask ourselves why the British insist upon escorting judges to and from lunch. Is it just to avoid the *appearance* of impropriety (actual impropriety among British judges is virtually

unknown), or do the British wish to make it impossible for even innocent but prejudicial communications to reach the judge? Is this sensitivity, which most would regard as excessive attempts to place judges into hermetically-sealed cocoons, part of the secret of their enviably clean judicial system? We should ask ourselves to what lengths we are prepared to go to insure that our judges neither make nor receive *ex parte* communications. Then, perhaps, we can formulate a better rule.²⁹

29. Further recommended readings include: Andy Knott, *A New Code for Illinois Judges*, CBA RECORD (April 1987); Warren D. Wolfson, *No Judge is an Island - A Brief Look at the New Code of Judicial Conduct*, 16 YLS JOURNAL (The Young Lawyers Section of the Chicago Bar Association) 3 (May-June, 1987).