



# ISBA Professional Conduct Advisory Opinion

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**Opinion No. 14-02**  
**May 2014**

**Subject:** Communication with Unrepresented Person; Plea Agreements; Prosecutors

**Digest:** In any criminal proceeding, a prosecutor may convey a plea offer to a pro se defendant prior to a court proceeding, regardless who initiates the contact. The communication must simply convey the plea offer and not make any recommendations as to the value of the offer. The communication must also identify that the prosecutor is not disinterested, clarify any misconception the person may have about the prosecutor's role and advise the person about the right to secure counsel.

**References:** Illinois Rules of the Professional Conduct, Rules 3.8 and 4.3;

Illinois Constitution, Sections 7 and 8;

Virginia Rules of Professional Conduct, Rule 3.8;

ISBA Opinion 88-3 (August 1988)

## **FACTS**

Pro se defendant #1 initiates contact with the State's Attorney's Office, prior to a court proceeding, to ask for a plea offer in a criminal matter. In a separate matter, the prosecutor tenders a plea offer to pro se defendant #2, prior to a court proceeding. In both matters, the prosecutor knows that the person is unrepresented, has not appeared in court and has not received approval from the Court to appear pro se.

## **QUESTIONS**

1. Can a prosecutor, prior to a court proceeding, tender a plea offer to a pro se defendant?

2. Does it make a difference whether the pro se defendant initiated the contact with the prosecutor?
3. Does it make a difference whether the charge is a felony, misdemeanor or petty offense?

### OPINION

A prosecutor may have contact with an unrepresented person but the prosecutor must comply with Rules 4.3 and 3.8 of the Illinois Rules of the Professional Conduct. Rule 4.3 outlines the general duties of any lawyer who deals with an unrepresented person.

“In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”

Comment 2 to Rule 4.3 does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person so long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person. The lawyer may also inform the person of the terms on which the lawyer’s client will enter into an agreement or settle a matter.

Rule 3.8 outlines special responsibilities of a prosecutor. It states, in part:

The prosecutor in a criminal case shall:

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.

Comment 1 to Rule 3.8 states that the rule is intended to remind prosecutors that the touchstone of ethical conduct is the duty to act fairly, honestly, and honorably. Comment 2 states that subsection (c) does not apply to an accused appearing pro se with the approval of the tribunal.

When read together, Rules 4.3 and 3.8 allow a prosecutor to communicate with pro se defendants before a court hearing has taken place so long as the prosecutor ensures that the pro se defendant understands that the State’s Attorney’s Office is prosecuting the matter, that the prosecutor is not disinterested, and that the pro se defendant has the right to secure counsel. Neither rule makes a distinction based on who initiates the contact nor the nature of the charges.

Assuming that the prosecutor complies with Rule 4.3, the issue becomes whether the content of the communication is an attempt to seek the waiver of an important pretrial right in violation of Rule 3.8. Other than listing the right to a preliminary hearing, Rule 3.8 and its comments do not define “important pretrial rights.” There are no more important pretrial rights than those afforded by the Constitutions of the United States and the State of Illinois. Section 7 of the Illinois Constitution provides for the right to a preliminary hearing as listed in Rule 3.8. Section 8 affords defendants with the rights to counsel, confrontation of witnesses, compelling of favorable witnesses and a speedy public trial by jury. Each of these rights are applicable to felony and misdemeanor cases. Some of these constitutional rights, namely the right to confront witnesses and to compel favorable witnesses to attend a trial, are equally applicable to petty offenses.

There is a dearth of legal opinions, not only in Illinois but in others states, on prosecutors seeking to obtain a waiver of an important pretrial right from a pro se defendant. Virtually every state that has adopted the American Bar Association’s Model Rules have used the identical language as Illinois Rule 3.8. One exception is instructive. Rule 3.8(b) of the Virginia Rules of Professional Conduct broadens the rule beyond trying to obtain a waiver of important rights: “A lawyer engaged in a prosecutorial function shall not knowingly take advantage of an unrepresented person.” Comment 1b to their Rule states that the purpose of the rule is to prevent overzealous prosecutors from using tactics intended to coerce or induce a defendant into taking some action. The comment mentions that it would be a violation of their Rule 3.8 for a prosecutor, in order to obtain a plea of guilty, to falsely represent to an unrepresented person that the court’s usual disposition of such charges is less harsh than is actually the case.

Although a civil matter, Illinois Bar Association Advisory Opinion 88-3 (1988) is instructive. In that matter, a divorce lawyer representing one party sent a letter to the other spouse, who was unrepresented. In that letter, the lawyer discussed the process of divorce proceedings but downplayed the need for the other party to obtain a lawyer and left the impression that it was in the other party’s best interest to waive counsel in order to save time and expense. The Opinion held that the lawyer violated section 7-104(a)(2) of the Illinois Code of Professional Responsibility. Although this section has been replaced by Rule 4.3, the Illinois State Bar Association affirmed Opinion 88-3 in May 2010 because of the consistency between the two ethical rules.

The facts presented for this opinion do not indicate the manner in which a plea offer is conveyed or the exact words that are conveyed. So long as the communication is a simple matter of presenting the offer (“If you plead guilty to the charge for a \$100 fine, we will dismiss other charges”), then there is no violation of Rule 3.8. It would be a violation of Rule 4.3, however, should the communication give value to the plea offer or in any way advise the pro se defendant (“It is a good offer” or “Take the deal.”)

## **CONCLUSION**

In any criminal proceeding, a prosecutor may convey a plea offer to a pro se defendant prior to a court proceeding, regardless who initiates the contact. When conveying the offer, the prosecutor must not recommend the plea or otherwise force, threaten or coerce the person to waive

any important pretrial right. Further, the prosecutor must clearly identify that he or she is not disinterested, clarify any misconception the person may have about the prosecutor's role and advise the person about the right to secure counsel.

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