



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.

This Opinion was **AFFIRMED** by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 4.2. 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 Number 89-4
July 17, 1989

Topic: Communication with Adverse Party Represented by Counsel

Digest: It is professionally improper for newly elected State's Attorney to continue and expand his predecessor's direct communication with accused person represented by counsel without consent of lawyer for the accused.

Ref: Rule 7-104(a)(1); Rule 1-103(a); Rule 1-102(a)(3) and (4)
ISBA Opinion Nos. 320, 88-10
People v. Oden, 20 Ill.2d 470
In re Himmel, 125 Ill.2d 531

FACTS

On his own initiative, a person charged with a felony, with his attorney's knowledge, initiated plea negotiations with the State's Attorney who offered to reduce the charge to a misdemeanor. Subsequently, the client resumed plea negotiations with the newly elected State's Attorney who was known to the accused from the previous administration. After receiving the Miranda warnings, the accused person made oral admissions which jeopardized any defense to the felony charge. The attorney for the accused had no notice of the latter meeting, was not present and did

not consent to the conversation with his client.

QUESTION

1. May a newly elected State's Attorney relying on a prior communication with a predecessor State's Attorney conducted with the attorney's knowledge, continue and amplify communications with the accused without his attorney's consent.
2. If the communication by the State's Attorney offended the Code of Professional Responsibility, is the attorney for the accused required to report it to the Attorney Registration and Disciplinary Commission.

OPINION

Rule 7-104(a) provides that:

During the course of his representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

ISBA Advisory Opinion No. 320, reaffirmed in ISBA Advisory Opinion No. 88-10, states:

Members of the state's attorney's office may not ethically communicate with a criminal defendant represented by counsel outside the presence of and without the consent of that counsel.

That opinion concludes that the fact that the matter is a criminal one does not excuse the State's Attorney from the obligations of the Code of Professional Responsibility. In fact, the State's Attorney, in his official capacity has a unique responsibility toward the adverse party--a duty to safeguard the rights of the defendant as well as those of any other citizen. People v. Oden, (1961) 20 Ill.2d 470, 170 N.E. 2d 582. Ethical Considerations, adopted November 15, 1980, EC 7-13 at page 15 states:

The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.

The facts in this case suggest that the newly elected State's Attorney relied upon the fact that the attorney for the accused had knowledge of the plea negotiations with the former State's Attorney. However, the conversations were not restricted to the original plea bargain topic but expanded to a discussion of the merits to the point where the State's Attorney reiterated the Miranda warnings. Under those circumstances, the prior consent requirement applies.

The second question raises the issue of whether the conduct of the States Attorney must be reported to the Attorney Registration and Disciplinary Commission. Rule 1-103(a) requires that

a lawyer possessing unprivileged knowledge of a violation of Rule 1-102(a)(3) or (4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

Rule 1-102 provides, in pertinent part:

- (a) A lawyer shall not
 - (3) engage in illegal conduct involving moral turpitude;
 - (4) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

The facts presented here do not appear to involve the unprivileged knowledge of illegal conduct involving moral turpitude or conduct involving dishonesty, fraud, deceit or misrepresentation. Absent such knowledge, no such report is required by the Rule. In re Himmel, 125 Ill.2d 531.