

KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-419

Issued: May 2002

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Subject: **Ex Parte Communication Issues in Meetings between Prosecutors and Judges**

Question: May prosecutors (Commonwealth's attorneys or county attorneys) arrange and conduct meetings with judges for the purpose of establishing informal policies or shared understandings on issues likely to influence outcomes in pending or future criminal cases?

Answer: No.

Principal References: Rules 3.5 and 8.3(e), Kentucky Rules of Professional Conduct (S.C.R. 3.130); Canon 3(B)(7), Kentucky Code of Judicial Conduct (S.C.R. 4.300); American Bar Association, Center for Professional Responsibility, *Annotated Model Rules of Professional Responsibility* (4th ed. 1999); American Law Institute, *Restatement (Third) of the Law Governing Lawyers* § 113 (2000)

OPINION

This inquiry calls upon us to examine ex parte aspects of meetings held by prosecutors with judges of a judicial district or circuit, for the purpose of establishing informal policies or shared understandings on issues of criminal justice and court administration. Our opinion is narrow in scope. It is not directed toward regular or recurrent training institutes or continuing professional education programs, where lawyers and judges necessarily and appropriately interact. Nor is it directed toward conferences, training institutes, or meetings on matters of case management, scheduling, and other topics relating generally to the efficient administration of justice. Rather, this opinion is directed toward meetings focusing on issues likely to influence outcomes in pending or future criminal cases. Furthermore, this opinion addresses only the professional responsibilities of lawyers; it does not purport to determine the responsibilities of judges or court staff.

The inquiry was prompted by a meeting in which the agenda, prepared by the county attorney, apparently included not only administrative issues regarding the scheduling of hearings and trials, but also such matters as the following: admissibility of evidence (e.g., scientific tests of intoxication); proper time at trial to introduce

defendants' prior criminal records; [dis]allowance of pleas to lesser offenses (e.g., driving under the influence with lower blood-alcohol content); circumstances in which the court should consider employing diversion programs, home incarceration, and other alternative dispositions; possible monetary sanctions against defense counsel who make last-minute requests for trial continuances or jury trials; and other, unstated concerns over the conduct of certain defense attorneys. No specific pending or impending cases were discussed at the meeting. Members of the defense bar evidently received copies of the agenda, and they were free to attend the meeting or to communicate their views, either to the county attorney or to the district judges.

The Committee recognizes that recurring issues in criminal justice and court administration inevitably will generate casual conversation among individual judges, court staff, prosecutors, and defense counsel. The Committee also acknowledges that professional education, training, and open communication are essential to developing case management systems and practices that promote efficiency while enabling the judiciary, the executive branch, and the bar to perform their distinctive responsibilities effectively. Thus, if a court engages in administrative rule-making, it may enlist the expertise of a bench-bar committee, and may provide opportunities for comment by the bar and the public, in order to understand the perspectives and needs of all constituencies and key role-players in the administration of justice. But if lawyers and judges meet outside the framework such professional education, training, or rule-making processes, for the purpose of exploring informal policies or shared understandings on the way certain issues will be handled – and if those issues are not limited to case management, but reach instead to substantive or procedural matters likely to influence the outcomes of pending or future cases – then such meetings have potential implications for lawyers under the Rules of Professional Conduct.

Our analysis begins with Rule 3.5 (S.C.R. 3.130 [3.5]) of the Kentucky Rules of Professional Conduct, which protects the “impartiality and decorum of the tribunal.” The rule provides that a lawyer shall not “seek to influence a judge ... by means prohibited by law,” nor shall a lawyer “[c]ommunicate ex parte ... as to the merits of the cause except as permitted by law” In general, the rule prohibits a lawyer from communicating with a judge outside the presence of opposing parties in litigation (or their counsel), without their knowledge or consent. *See generally*, American Bar Association, Center for Professional Responsibility, *Annotated Model Rules of Professional Responsibility* (4th ed. 1999), at pp. 343-45 (hereinafter cited as *Annotated Model Rules*). The interrelated purposes of the rule are to safeguard the integrity of the judicial system and to assure that each litigant receives a fair, unbiased hearing. *Id.* *See also*, American Law Institute, *Restatement (Third) of the Law Governing Lawyers* § 113, comment *b*.

Rule 3.5 imposes a constraint upon lawyers that appears to be parallel to the constraint imposed upon judges by Canon 3(B)(7) of the Kentucky Rules of Judicial Conduct (S.C.R. 4.300). The canon provides, in pertinent part, as follows:

[A] judge shall not initiate, permit, or consider ex parte communications with attorneys and shall not initiate, encourage or consider ex parte communications with parties, except that:

(a) Where circumstances require, ex parte communications for scheduling, initial fixing of bail, 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.

Canon 3(B)(7) is, of course, subject to interpretation by the Judicial Ethics Committee under S.C.R. 4.310, and nothing in our opinion is binding upon that body or upon Kentucky's judges. The canon is noted here, however, because it helps explain the importance and function of Rule 3.5. By preventing lawyers from exposing judges to improper ex parte communications, Rule 3.5 gives prophylactic support to the canon. The relationship between the rule and the canon is further strengthened by Rule 8.3(e), which makes it unprofessional misconduct for a lawyer to "[k]nowingly assist a judge or judicial officer in conduct that is a violation of the applicable Rules [sic] of Judicial Conduct or other law."

Of course, not all ex parte communications offend Rule 3.5. There are two exceptions. First, as both the rule and the canon recognize, a communication is not prohibited if it is specifically permitted by law. Second, if the subject matter of a communication is unrelated to, and remote from, any matter pending or impending before a judge, it is deemed to fall outside Rule 3.5. *Annotated Model Rules* at 349. This second exception turns on "whether a communication has the possibility or appearance of influencing the outcome of a case." *Id.* The test is an objective one; the rule applies regardless of whether a lawyer intends to influence an outcome. The rule also applies (a) regardless of whether the lawyer subjectively believes the communication would not put any litigant at a disadvantage, *see, e.g., In re Bemis*, 938 P.2d 1120 (Ariz. 1997); (b) regardless of whether the subject matter of the potentially outcome-influencing communication is substantive or procedural, *see Philadelphia Bar Association Professional Guidance Committee, Opinion No. 98-14* (1999); (c) regardless of whether the lawyer represents a party in the potentially affected case, *see, e.g., Florida Bar v. Saphirstein*, 376 So.2d 7 (1979) (decided under prior Code of Professional Responsibility); and (d) regardless whether the communication is initiated by the lawyer or a judge. *See, Annotated Model Rules* at 343-44, and Michigan Standing Committee on Professional and Judicial Ethics, Opinion No. RI-243 (1995) (observing that lawyer and judge have "reciprocal" duties to refrain from improper ex parte communications). Similarly, Canon 3(B)(7) imposes a broad prohibition against ex parte communications,

allowing exceptions only if the judge “reasonably” believes that “no party will gain a procedural or tactical advantage.”

Interpreted consistently with Canon 3(B)(7), Rule 3.5 allows an *ex parte* communication if it merely concerns the scheduling of a hearing or trial, or relates to some other administrative matter unlikely to influence the outcome of a particular case – although, even in such a case, the lawyer should make reasonable efforts to notify other counsel. *See* North Carolina State Bar Ethics Opinion No. 3 [1993].) Conversely, however, if a communication deals with an issue likely to influence the outcome of a case, the communication is prohibited if undertaken *ex parte*. This fundamental principle ordinarily is applied to communications between a lawyer and a single judge in a pending case; but the principle logically applies as well to communications by a lawyer or group of lawyers with several judges concerning issues likely to influence outcomes in cases pending or impending before them.

This principle is not avoided by simply labeling such communications as “meetings” or other gatherings. Although a lawyer’s presentation during a continuing legal education seminar is generally not considered to be outcome-influencing, even if judges are in attendance, *see, e.g.*, Michigan Standing Committee on Professional and Judicial Ethics, Opinion No. JI-84 (1994), a “training seminar” on DUI cases, prepared and presented by a county attorney specifically for the judges of that county, has been found to constitute an improper *ex parte* communication. *See* New York Advisory Committee on Judicial Ethics, Opinion No. 87-28 (1988) (expressing “apprehensions” that the prosecutor’s “educational” presentations on scientific evidence and sentencing recommendations could produce a “partisan conditioning” of the judges – including, but not limited to, part-time lay judges -- in future cases). Such an in-house “seminar,” transparently designed to influence outcomes of certain kinds of cases in the jurisdiction, is easily distinguished from regular or recurrent training and professional education programs that are not directed toward outcomes in pending or impending cases.

Accordingly, the Committee concludes that a meeting of the kind described at the outset of this opinion – where prosecutors seek to develop informal policies or shared understandings with judges of their jurisdiction regarding the admissibility of certain types of evidence, the timing for introduction of certain evidence, the disallowance of certain pleas, the selection of sentencing or other dispositive alternatives, and the consideration of methods for dealing with certain conduct of defense counsel -- constitute *ex parte* communications under Rule 3.5. The issues are likely to influence outcomes in pending and future cases in the jurisdiction. The fact that defense counsel may be invited to such a meeting does not, in our view, alter the *ex parte* character of the communications during the meeting. Not all of a county’s defense bar is likely to attend such a meeting. Moreover, defense counsel in impending cases might come from any county or any state, and it could hardly be argued that they had a voice in -- or that they should be charged with knowledge of -- any informal policies or shared understandings generated in their absence.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.