

1989

## *People v. Bradshaw*: Has the Appearance of Impropriety Standard Supplanted the Requirement of Demonstrating Prejudice in *Ex Parte* Communications?

Charles F. Scott Honorable  
Circuit Judge, 19th Judicial Circuit

Leo J. Delaney  
Staff Attorney, 19th Judicial Circuit

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>

 Part of the [Rule of Law Commons](#)

---

### Recommended Citation

Charles F. Scott Honorable, & Leo J. Delaney, *People v. Bradshaw: Has the Appearance of Impropriety Standard Supplanted the Requirement of Demonstrating Prejudice in Ex Parte Communications?*, 20 Loy. U. Chi. L. J. 1013 (1989).

Available at: <http://lawcommons.luc.edu/lucj/vol20/iss4/8>

# *People v. Bradshaw*: Has the Appearance of Impropriety Standard Supplanted the Requirement of Demonstrating Prejudice in *Ex Parte* Communications?

Honorable Charles F. Scott\*  
and Leo J. Delaney\*\*

## I. INTRODUCTION

An *ex parte* communication occurs when a judge discusses a pending or impending matter with a person interested in the outcome of the case and without notice to all the parties or their attorneys. Upon discovery of an *ex parte* communication, the excluded party often moves that the trial judge withdraw from the case. If the judge does not withdraw, the movant can contend on appeal that the *ex parte* communication tainted the proceedings and mandates reversal. Since 1970, the rule in Illinois has been that an *ex parte* communication with a judge does not require reversal of a criminal conviction unless the defendant demonstrates that actual prejudice resulted from the communication.<sup>1</sup>

In *People v. Bradshaw*,<sup>2</sup> the Illinois Appellate Court for the First District overturned two convictions because an *ex parte* communication created an appearance of impropriety.<sup>3</sup> In so holding, the court did not address the issue of whether the communication resulted in any prejudice to the defendants. The *Bradshaw* decision engrafts upon existing *ex parte* law a standard designed and heretofore used only to govern ethical conduct.

This Article will first examine the actual prejudice rule as it has

---

\* Circuit Judge, 19th Judicial Circuit; B.A., 1964, Northwestern University; J.D., 1967, Northwestern University.

\*\* Staff Attorney, 19th Judicial Circuit; B.A., 1983, Loras College; J.D., 1986, Northern Illinois University.

1. *People v. Hicks*, 44 Ill. 2d 550, 557, 256 N.E.2d 823, 827, cert. denied, 400 U.S. 845 (1970). See generally Lousin, *The New Ex Parte Communication Rule in Illinois: A Step Forward?*, 19 LOY. U. CHI. L.J. 1031 (1988).

2. 171 Ill. App. 3d 971, 525 N.E.2d 1098 (1st Dist.), appeal denied, 122 Ill. 2d 580, 530 N.E.2d 251 (1988). This case had two defendants: Bradshaw and Hines. *Id.* at 973, 525 N.E.2d at 1099.

3. *Id.* at 976-77, 525 N.E.2d at 1101.

been developed and applied in Illinois.<sup>4</sup> Then it will discuss and analyze the *Bradshaw* opinion, arguing that *Bradshaw* creates an improper standard for *ex parte* communications.<sup>5</sup> Finally, this Article considers the effect the decision will have upon both the criminal and civil law.<sup>6</sup>

## II. BACKGROUND

In 1970, the Illinois Supreme Court's decision in *People v. Hicks*<sup>7</sup> established that actual prejudice is required before a criminal conviction will be overturned as the result of an *ex parte* communication.<sup>8</sup> Subsequently, in *People v. Dunigan*,<sup>9</sup> the Illinois Appellate Court for the First District required a showing of actual prejudice to overturn a criminal conviction based on an *ex parte* communication.

### A. *People v. Hicks*

In *Hicks*, the defendant appealed his murder conviction, arguing that on two occasions the trial judge had an *ex parte* communication with a woman who was supposedly a relative of the victim.<sup>10</sup> In the first *ex parte* communication, there was a dispute over whether the woman objected to a continuance of the trial in open court or privately in chambers.<sup>11</sup> The Illinois Supreme Court inferred from the record that the communication actually took place in open court in the presence of defense counsel, and thus was not an *ex parte* communication.<sup>12</sup> In the second communication, the trial judge received the woman into chambers where she requested permission to sit in the front of the courtroom, which the judge granted.<sup>13</sup>

---

4. See *infra* notes 7-29 and accompanying text.

5. See *infra* notes 30-69 and accompanying text.

6. See *infra* notes 70-88 and accompanying text.

7. 44 Ill. 2d 550, 256 N.E.2d 823, *cert. denied*, 400 U.S. 845 (1970).

8. *Id.* at 557, 256 N.E.2d at 827.

9. 96 Ill. App. 3d 799, 421 N.E.2d 1319 (1st Dist. 1981).

10. *Hicks*, 44 Ill. 2d at 557, 256 N.E.2d at 827. The supreme court found no support in the record for the defendant's contention that the communicant was related to the victim, but acknowledged that she was in court as a potential "life and death" witness for the prosecution. *Id.*

11. *Id.* The communicant had voiced her objection to the continuance and expressed her doubts that the defendant would ever be brought to justice. *Id.*

12. *Id.* The court noted: "[F]rom the tenor of the record, it took place in open court and in the presence of defendant's trial counsel, inasmuch as the latter, in recalling the incident to the court, commented as follows: 'A special explanation was made on the record to her at that time.'" *Id.*

13. *Id.*

The *Hicks* court held that the trial judge's conversations, including the one in open court, did not warrant disqualification of the judge.<sup>14</sup> The court reasoned that to warrant disqualification, the communication must rise to the level of unfairness or the probability of unfairness in the trial.<sup>15</sup> The court further reasoned that the defendant had the burden of showing prejudice when motioning for substitution of judges. In ruling that the defendant failed to sustain this burden, the court noted: "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 to obtain a substitution of judges."<sup>16</sup>

### B. People v. Dunigan

The Appellate Court for the First District applied the *Hicks* legal standard in a situation in which a trial judge had *ex parte* communications with the prosecuting attorney and the victims of the crime for which the defendant was charged. In *People v. Dunigan*,<sup>17</sup> the defendant argued that two contacts with the trial judge merited a reversal of his convictions.<sup>18</sup> First, the defendant alleged that the trial judge met *ex parte* with the assistant state's attorney assigned to the case, a federal prosecutor, and an F.B.I. agent.<sup>19</sup> At the meeting, the judge read a memorandum about the defendant which he had just received from the federal prosecutor. The State had never sent the memorandum to defendant's counsel and it was not in the court file.<sup>20</sup> All conversation ceased when one of the defendant's attorneys entered the judge's chambers. Then the federal prosecutor provided defendant's attorney with a copy of the

---

14. *Id.* The court stated: "In our opinion, the judge's conversation with Mrs. Washington, one of which was in open court, did not give cause for his disqualification, or give rise to either unfairness or a probability of unfairness which fatally infected the trial." *Id.*

15. *Id.*

16. *Id.*

17. 96 Ill. App. 3d 799, 421 N.E.2d 1319 (1st Dist. 1981).

18. *Id.* at 809, 421 N.E.2d at 1327. The defendant also alleged that the trial judge had participated in *ex parte* communications prior to trial and had socialized with the victims between the jury's verdict and the sentencing hearing. *Id.*

19. *Id.* at 810, 421 N.E.2d at 1328. The defendant's attorneys had subpoenaed the United States Attorney's Office and the Federal Bureau of Investigation for production of a relocated federal witness. *Id.* at 819, 421 N.E.2d at 1327. The U.S. Attorney served notice that it would seek to quash the subpoena in accord with a memorandum of law attached to the motion. *Id.* The parties were giving the judge a copy of the memorandum in chambers at the time of the *ex parte* incident. *Id.* at 810, 421 N.E.2d at 1328.

20. *Id.*

memorandum.<sup>21</sup>

In its analysis of the record, the appellate court determined that no pretrial discussion occurred regarding the merits of the case.<sup>22</sup> The court noted that the sole support for the defendant's position came from defense counsel's suppositions that such a conversation had occurred prior to his arrival at the judge's chambers.<sup>23</sup> The court concluded that mere conjecture is "not sufficient to warrant a judge's recusal."<sup>24</sup>

The defendant also sought reversal for a second *ex parte* communication between the trial judge and the defendant's victims. The trial judge and the victims met by chance in a local tavern the same night that the guilty verdicts had been returned.<sup>25</sup> The judge stated that he and the victims discussed "generalities."<sup>26</sup> Thereafter, the judge denied a motion that he withdraw before sentencing.<sup>27</sup> The appellate court affirmed the convictions and the sentences because the defendant failed to show prejudice.<sup>28</sup> The court did not find any malice toward the defendant on the part of the trial judge and

---

21. *Id.*

22. At the hearing on the matter before the trial judge, the assistant state's attorney testified that the federal prosecutor and F.B.I. agent came to her office on the morning in question and they then proceeded to the chambers of the trial judge. *Id.* After she had introduced them to the judge, the federal prosecutor handed him a copy of the memorandum. The federal prosecutor testified that after arriving in the chambers, he discovered that the judge had not received a copy of the memorandum. He apologized and tendered a copy to the judge. The judge started to read the memorandum as defense counsel walked in the room. Both the federal prosecutor and the F.B.I agent testified that the merits of the case were never discussed with the judge. Defense counsel testified that although he did not receive a copy of the memorandum, he had not contacted the State's Attorney's Office to obtain a copy. *Id.* at 810-11, 421 N.E.2d at 1328. He conceded that he had no personal knowledge of the contents of any conversation prior to entering the chambers, only that one had ceased when he arrived. *Id.* at 811, 421 N.E.2d at 1328.

23. *Id.*

24. *Id.* Additionally, the court stated:

[W]e find that the memorandum was not secretly furnished to the trial judge in an effort to influence his actions. It was only through an administrative mishap that the defense counsel did not originally receive a copy of the memorandum . . . . Regardless of whether the trial judge read the memorandum in part or in its entirety before defendant's attorneys arrived, its contents were not discussed and no efforts were made to conceal it from defendant or his attorneys. In short, defendant suffered no prejudice simply because the memorandum reached the judge's hands moments before his attorney received a copy.

*Id.* at 811-12, 421 N.E.2d at 1329.

25. *Id.* at 812, 421 N.E.2d at 1329. The judge had stopped at the tavern at the invitation of one of the assistant state's attorneys after the return of the verdict. *Id.*

26. *Id.* The judge did not know that the victims would be at the tavern that evening. He stated that he did not discuss the defendant's sentence or the outcome of the case with them. An assistant state's attorney who was also present verified the judge's story. *Id.*

27. *Id.*

28. *Id.* at 813, 421 N.E.2d at 1330. The exact issue, as framed by the court, was

determined that the contact did not make prejudice likely.<sup>29</sup>

### III. *PEOPLE V. BRADSHAW*

#### A. *The Facts*

In 1988, the Appellate Court for the First District was again called upon to determine whether to reverse a conviction based upon an *ex parte* communication at the trial level. In *People v. Bradshaw*,<sup>30</sup> the trial judge met in chambers with a deputy sheriff who was assigned to the Criminal Courts building and who was the mother of the victim in a case before the court.<sup>31</sup> The incident began when the judge's bailiff passed the judge a note while he was on the bench.<sup>32</sup> The judge recessed court soon thereafter and met the deputy sheriff in his chambers.<sup>33</sup> Upon learning that the deputy sheriff was the victim's mother, the judge "terminated the conversation."<sup>34</sup> Apparently, the judge did not disclose the meeting to either defense counsel or the prosecution at that time.<sup>35</sup>

Prior to trial, defendant Bradshaw moved for substitution of judges.<sup>36</sup> A second judge heard the motion and denied it.<sup>37</sup> Subse-

---

"whether the trial judge was required to recuse himself by virtue of the meeting itself, in the absence of evidence that the case was discussed." *Id.* at 812, 421 N.E.2d at 1329.

29. *Id.* at 813, 421 N.E.2d at 1330. The court stated:

We . . . believe that the involuntary meeting that occurred between the judge and the victims of the crime did not, in itself, disqualify him from presiding at the sentencing hearing. Our review of the record reveals no malice directed toward defendant by the trial judge as a result of his contact with the [victims], and it is unlikely that this single event resulted in such an increased level of emotional involvement as to make prejudice likely and disqualification necessary.

*Id.*

30. 171 Ill. App. 3d 971, 525 N.E.2d 1098 (1st Dist.), *appeal denied*, 122 Ill. 2d 580, 530 N.E.2d 251 (1988).

31. *Id.* at 974, 525 N.E.2d at 1100.

32. *Id.* at 974-75, 525 N.E.2d at 1100. There was some discrepancy over whether a state's attorney or the court bailiff handed the note to the trial judge. In his pre-trial motion, Bradshaw offered to have co-defendant Hines's mother testify that an assistant state's attorney passed the index card to the judge. *Id.* at 974, 525 N.E.2d at 1100. During a hearing on a post-trial motion, Hines's mother and another woman testified that a second deputy sheriff passed the note to the judge. *Id.* at 975, 525 N.E.2d at 1100. The appellate court accepted the second version. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 976, 525 N.E.2d at 1101. The *ex parte* communication was not made a part of the record until Bradshaw made a motion for substitution of judges.

36. *Id.* at 974, 525 N.E.2d at 1100. Co-defendant Hines did not join in this motion. *Id.*

37. *Id.* In his motion, Bradshaw, proceeding *pro se*, alleged that the trial judge was prejudiced because the victim's mother had spoken with the trial judge. *Id.*

quently, a jury found Bradshaw guilty of aggravated battery, armed violence, and attempted murder.<sup>38</sup> The trial judge found co-defendant Hines guilty in a simultaneously held bench trial. In his post-trial motion, Bradshaw renewed his argument concerning the *ex parte* communication.<sup>39</sup> During a hearing on the post-trial motion, the trial judge confirmed that he had received a note from his bailiff, which stated that "a deputy sheriff would like to see you," and that he adjourned the court and met with the deputy sheriff.<sup>40</sup> The judge claimed that upon learning the sheriff's identity he "terminated the conversation."<sup>41</sup> After denying the motions for new trials, the judge sentenced the defendants to the penitentiary.<sup>42</sup>

### B. The Appellate Court's Decision

The appellate court reversed the defendants' convictions on the basis that the factual scenario created an appearance of impropriety.<sup>43</sup> The decision was based upon an *ex parte* provision of the former Standards of Judicial Conduct which provided that: "Except . . . as permitted by law, a judge should not permit private or *ex parte* interviews, arguments or communications designed to influence his judicial action in any case, either civil or criminal."<sup>44</sup> Interpreting this and other rules governing judicial conduct,<sup>45</sup> the *Bradshaw* court concluded that a trial judge has an obligation "to recuse himself whenever necessary to protect the right of an accused to a fair and impartial trial."<sup>46</sup> The court explained that a trial judge must assure the public "that justice is administered

---

38. *Id.* at 973-74, 525 N.E.2d at 1099-1100.

39. *Id.* at 974, 525 N.E.2d at 1100. In his post-trial motion, co-defendant Hines argued that he did not join in the pre-trial motion because he did not know about the *ex parte* communication. *Id.* at 974-75, 525 N.E.2d at 1100. He also argued that he did not knowingly and intelligently waive his right to a jury trial because he did not know about the *ex parte* communication. *Id.*

40. *Id.* at 975, 525 N.E.2d at 1100.

41. *Id.*

42. *Id.* at 973, 525 N.E.2d at 1099.

43. *Id.* at 976-77, 525 N.E.2d at 1101.

44. *Id.* at 975-76, 525 N.E.2d at 1101 (citing ILL. REV. STAT. ch. 110A, para. 61(c)(16)(1985)).

45. The court also considered ILL. REV. STAT. ch. 110A, para. 61(c)(4) (1987), which provides that "[a] judge's official conduct should be free from impropriety and the appearance of impropriety." *Bradshaw*, 171 Ill. App. 3d at 975-76, 525 N.E.2d at 1101. In addition, the court referred to rule 17 of the Circuit Court of Cook County which requires the disclosure of any *ex parte* communication in connection with any manner pending before a court. For the text of rule 17, see *infra* note 49. Finally, the court looked to the A.B.A. Standards, *The Function of the Trial Judge* 35-36 (Approved Draft 1972). *Bradshaw*, 171 Ill. App. 3d at 975-76, 525 N.E.2d at 1101.

46. *Bradshaw*, 171 Ill. App. 3d at 975, 525 N.E.2d at 1101.

fairly” because the appearance of bias or prejudice can be just as damaging to the public as actual bias or prejudice.<sup>47</sup> Thus, the trial judge must ensure that the rights of the accused are protected and that the public impression will be favorable.<sup>48</sup> The court also noted that the trial judge failed to inform the parties that an *ex parte* communication had taken place as required by rule 17 of the Circuit Court of Cook County.<sup>49</sup> The court reasoned that these judicial obligations required it to hold that a judge must recuse himself even when the judge is personally convinced that he is not partial to either side.<sup>50</sup> The court held that recusal is mandated by the appearance created when an officer of the court is a relative of a party before the court and that officer passes notes to the judge and immediately enters the judge’s chambers.<sup>51</sup>

#### IV. ANALYSIS

##### A. Actual Prejudice Requirement Ignored

The *Bradshaw* opinion ignored the actual prejudice standard established in *Hicks* and *Dunigan*. Furthermore, the decision overlooked two relevant facts. First, *Bradshaw* was convicted by a jury that was not tainted by the *ex parte* communication. Second, Hines did not join the pre-trial motion for substitution of judges, which would normally waive the issue on appeal.<sup>52</sup> Additionally,

---

47. *Id.* at 975-76, 525 N.E.2d at 1101.

48. *Id.* at 976, 525 N.E.2d at 1101 (citing *People v. Austin*, 116 Ill. App. 3d 95, 101-02, 451 N.E.2d 593, 597 (1st Dist. 1983); ABA Standards, *The Function of the Trial Judge* 35-36 (Approved Draft 1972)). The court also stated that “[t]he judiciary is bound to maintain a favorable public impression that all defendants receive impartial trials . . . .” *Id.*

49. *Id.* Rule 17 states in pertinent part:

17.1 No judge shall permit and no lawyer shall engage in *ex parte* communications, unless allowed by law, in connection with any matter pending before said judge. 17.2(a) If an *ex parte* communication in connection with any matter pending before the judge occurs, the judge shall disclose the circumstance and substance of said communication to all parties of record at the next hearing in open court and, if a court reporter is available, on the record. 17.2(b) If a hearing is not scheduled within two full court days of said communication, the lawyer who has initiated said communication shall promptly serve a written summary of the contents of said communication on all parties of record and the judge.

ILLINOIS COURTS RULE BOOK, RULES OF THE CIRCUIT COURT OF COOK COUNTY Rule 17.

50. *Bradshaw*, 171 Ill. App. 3d at 976, 525 N.E.2d at 1101. The court stated that the obligations to our system of justice remain steadfast “even though a judge is unequivocally sure that he is not partial to either litigant in a case pending before the court.” *Id.*

51. *Id.*

52. See generally *People v. Friedman*, 144 Ill. App. 3d 895, 494 N.E.2d 760 (1st Dist. 1986); *People v. Pettit*, 114 Ill. App. 3d 876, 449 N.E.2d 1044 (2d Dist. 1983).

the court did not discuss the content of the deputy sheriff's conversation with the trial judge and what prejudice, if any, may have resulted to the defendants as a result of that discussion.<sup>53</sup>

The *Bradshaw* court accepted at face value the trial judge's representation that he terminated the conversation upon learning the identity and interest of the deputy sheriff.<sup>54</sup> The appellate court stated: "[W]e do not imply that any improper motive existed on the part of the trial judge."<sup>55</sup> According to the court, the trial judge learned nothing more than that the deputy sheriff was the victim's mother. The *Bradshaw* opinion fails to indicate whether the judge knew the deputy beforehand. The opinion does not mention the sheriff's success in making any arguments or communications designed to influence the trial judge's action in the case as prescribed by the ethics rule then in force.<sup>56</sup> Absent any such factual findings, the contact with the deputy sheriff was an attempted *ex parte* communication, in which case the convictions should have been affirmed. In addition, under the *Hicks* and *Dunigan* prejudice standard, the convictions should have been affirmed because no actual prejudice was shown by the defendants.

Accordingly, the *Bradshaw* decision signals a shift in the standard of review for an *ex parte* communication. Even if the judge had made an immediate disclosure after meeting with the victim's mother, the *Bradshaw* reasoning would have required recusal. The court agreed with the defendants that "the trial judge erred in not recusing himself from their case following his *ex parte* communication with [the victim's] mother."<sup>57</sup> The court stated that "[a]lthough the judge maintains that he terminated the conversation when he ascertained the deputy sheriff's relation to the case, at that point, the appearance of impropriety had already been created."<sup>58</sup> Under *Bradshaw*, only recusal, and not mere disclosure, is

---

53. The court could have grounded its decision upon rule 17 of the Circuit Court of Cook County, which provides that the judge must disclose any *ex parte* communication in connection with any matter pending before the court to all parties at the next hearing date following that communication. The court noted that: "[T]he record does not evince that immediately following the *ex parte* communication the judge informed the parties that an *ex parte* communication had taken place." *Bradshaw*, 171 Ill. App. 3d at 976, 525 N.E.2d at 1101.

54. *Id.*

55. *Id.*

56. ILL. REV. STAT. ch. 110A, para. 61(c)(16) (1985). The court implied that because the appearance of impropriety was created prior to the time the communicant had identified herself, her statements to the judge were immaterial. *Bradshaw*, 171 Ill. App. 3d at 976, 525 N.E.2d at 1101.

57. *Bradshaw*, 171 Ill. App. 3d at 975, 525 N.E.2d at 1100.

58. *Id.* at 976, 525 N.E.2d at 1101.

available to the judge once an appearance of impropriety arises.

### B. *Appearance of Impropriety*

The fact that the *ex parte* communication in *Bradshaw* was made by someone with an official status before the court apparently weighed heavily in the appellate court's assessment of the appearance of impropriety. The *Bradshaw* court noted: "Here, [the victim's] mother was a deputy sheriff in the court building where Bradshaw's and Hines' trials were being conducted. As a deputy sheriff, she is a part of the justice system and therefore plays an integral role in the overall administration of justice."<sup>59</sup>

The official status of the communicator presents a point of comparison between *Bradshaw* and its predecessors, *Hicks* and *Dunigan*. In *Hicks*, the *ex parte* communicator was supposedly the victim's relative, but was merely a court spectator and not an officer of the court as in *Bradshaw*.<sup>60</sup> This distinguishing factor is less evident in *Dunigan*, where the judge had conversations not only with the victims, but also with the assistant state's attorney, a federal prosecutor, and an F.B.I. agent.<sup>61</sup> Apparently, the *Dunigan* court considered the meeting with the governmental officials harmless. The *Bradshaw* court did not share the *Dunigan* court's willingness to accept the characterization of a court officer's *ex parte* communication with the judge as harmless error.

The *Bradshaw* court superimposes a higher standard upon criminal substantive law based on its interpretation of the Code of Judicial Conduct.<sup>62</sup> Under Illinois law, granting a defendant's motion for substitution of judges requires that the defendant show that the "judge is so prejudiced against him that he cannot receive a fair trial."<sup>63</sup> Yet, the *Bradshaw* decision acknowledged that prejudice need not be shown to prove that a defendant cannot receive a fair trial. In light of the Greylord investigation, the *Bradshaw* court's unstated concern may be that judges are less than candid in recounting the contents of *ex parte* communications and the effect such communications have upon them. The words "appearance of impropriety" supply a convenient shorthand to avoid weighing the veracity of a judge's testimony. The *Bradshaw* court cautioned in effect that if the circumstance of the *ex parte* communication ap-

---

59. *Id.*

60. See *Hicks*, 44 Ill. 2d at 855, 256 N.E.2d at 826.

61. *Dunigan*, 96 Ill. App. 3d at 810, 421 N.E.2d at 1327.

62. CODE OF JUDICIAL CONDUCT, ILL. REV. STAT. ch. 110A, paras. 61-76 (1987).

63. ILL. REV. STAT. ch. 38, para. 114-5 (1987).

pears reprehensible, the judge must recuse himself irrespective of good motives and the lack of prejudice.

## V. FUTURE USE OF THE "APPEARANCE OF IMPROPRIETY" STANDARD

### A. *The New Code of Judicial Conduct*

The *Bradshaw* decision is a crucial development in *ex parte* law in light of the new *ex parte* rule in the Code of Judicial Conduct.<sup>64</sup> The rule provides that a judge shall not permit *ex parte* communications concerning a pending proceeding.<sup>65</sup> Unlike the former rule, the new rule does not require that the *ex parte* communication be designed to influence a judge's judicial action in a case in order to be culpable.<sup>66</sup> Instead, the new rule prohibits the judge from participating in communications concerning pending proceedings.<sup>67</sup> Therefore, an appearance of impropriety requiring recusal is created when a judge bumps into a deputy sheriff, who has an interest in a pending case, in a coffee shop and discusses the latest Chicago Bears game.

The *Bradshaw* decision takes the rules one step further by making the content and context of the *ex parte* communication irrelevant.<sup>68</sup> The length of the *ex parte* conversation, no matter how brief, is no longer important. Moreover, the location of the communication is not significant, whether it occurred in the judge's chambers, the coffee room, or on the street. It is now of little weight whether the meeting was planned or accidental, whether the communicator succeeded in imparting a message to the judge, succeeded in convincing the judge of the communicator's position, or succeeded in tainting and despoiling the judge to the prejudice of the criminal defendants.

---

64. CODE OF JUDICIAL CONDUCT Rule 63(A)(4), ILL. REV. STAT. ch. 110A, para. 63(A)(4) (1987).

65. *Id.* The rule states that: "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, shall not permit *ex parte* or other communications concerning a pending or impending proceeding." *Id.*

66. See ILL. REV. STAT. ch. 110A, para. 61(C)(16) (1985). The former rule provided: "Except . . . as permitted by law, a judge should not permit private or *ex parte* interviews, arguments or communications *designed* to influence his judicial action in any case, either civil or criminal." *Id.* (emphasis added).

67. CODE OF JUDICIAL CONDUCT Rule 63(A)(4), ILL. REV. STAT. ch. 110A, para. 63(A)(4) (1987).

68. For example, the record in *Bradshaw* did not disclose what words, if any, the deputy sheriff spoke to the trial judge. See *Bradshaw*, 171 Ill. App. 3d at 975, 525 N.E.2d at 1100.

In establishing the appearance of impropriety standard, the *Bradshaw* court has not only ignored the Code of Judicial Conduct, it has created a dangerous standard for recusal. Under *Bradshaw*, a judge can be removed from a case simply by an attempt at discussing a case with a judge. Once an individual has gained entry to chambers, or gained a judge's attention in a parking lot or restaurant, the appearance of impropriety is created, even if the judge refuses to discuss the case. The *Bradshaw* rule creates a tempting alternative for a defendant whose case is going badly. The temptation may prove stronger than a defendant's interest in fair play and ethical conduct. As stated by the Illinois Supreme Court in *Hicks*, such a scenario presents "too easy a weapon with which to harass the administration of justice and to obtain a substitution of judges."<sup>69</sup>

### B. Civil Law

The arena of civil law does not have the stringent constitutional demands as does criminal law. Nonetheless, the twin considerations of ethics and due process can lead to reversals of civil decisions because of an *ex parte* communication upon a showing of prejudice.

A recent decision of the Illinois Appellate Court for the First District indicates that a judgment obtained without notice to the opposing party can be construed as an *ex parte* communication requiring reversal. In *City of Chicago v. American National Bank & Trust Co.*,<sup>70</sup> the court voided several orders that a trial judge entered on behalf of the City of Chicago because the opposing party had not received notice of the hearing.<sup>71</sup> In reaching its decision, the court considered the ethical aspects of the trial judge's actions by addressing the *ex parte* communications which result when an opposing party is not given notice of a hearing that proceeds in his absence.<sup>72</sup>

---

69. *Hicks*, 44 Ill. 2d at 557, 256 N.E.2d at 827. In federal courts, motions alleging an appearance of impropriety are brought under 28 U.S.C. § 455(a) (1982). In *Liljeberg v. Health Care Acquisition Corp.*, 108 S. Ct. 2194 (1988), the United States Supreme Court construed the federal rules of procedure to determine under what circumstances a judgment should be vacated when a judge fails to recuse himself. The Court concluded that a reviewing court should consider "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* at 2204. This test combines the actual prejudice requirement with the appearance of impropriety rule.

70. 171 Ill. App. 3d 680, 525 N.E.2d 915 (1st Dist. 1988).

71. *Id.* at 689, 525 N.E.2d at 920.

72. *Id.* at 689, 525 N.E.2d at 921.

Justice Hartman, writing for the majority, reasoned that the trial judge and the attorneys for the city must have engaged in *ex parte* communications because there was no notice of the orders to the party against whom they were directed.<sup>73</sup> The court's opinion seemed to combine the policy considerations which underlie the rules against both *ex parte* communications and the appearance of impropriety. The court stated:

In these changing times, with ever-increasing emphasis upon moral conduct, lawyers and judges must become more acutely aware of and attentive to ethical considerations, presently casting deeper shadows of impropriety or its appearance than ever before, with special attention to *ex parte* actions, which lend themselves to suspicion by their very nature and often enough turn up issues of due process violations when carefully scrutinized.<sup>74</sup>

Although the opinion is not grounded upon a violation of the *ex parte* communication, this language clearly indicates that obtaining a judgment through an *ex parte* communication can be the basis for reversal.<sup>75</sup>

The decision *Faris v. Faris*,<sup>76</sup> though not an *ex parte* case, illustrates a rejection of the "appearance of impropriety" analysis in the civil context. In *Faris*, the Illinois Appellate Court for the Second District held that in an action for divorce, the wife of a judge is not entitled to a change of venue from all the judges in the judicial circuit where he sits, absent specific allegations of prejudice.<sup>77</sup> The judge's wife moved for a change of venue from all judges of the Eighteenth Judicial Circuit because her husband practiced there for many years as an attorney and had been appointed an associate judge in that circuit shortly before trial.<sup>78</sup> The trial court denied the motion for change of venue because the former wife could not

---

73. *Id.*

74. *Id.* at 690, 525 N.E.2d at 921.

75. The dissent by Justice Scariano noted that this language is *obiter dictum* and should have awaited a more appropriate case where the facts were better framed. *Id.* at 690, 525 N.E.2d at 922 (Scariano, J., dissenting). Justice Scariano stated:

Every effort was made to secure the transcripts relating to the events of the crucial dates in this matter, but they are unavailable and are therefore not part of the record on appeal; consequently, we do not know what representations were made to the trial judge nor under what other circumstances the order was entered.

*Id.* (Scariano, J., dissenting).

76. 142 Ill. App. 3d 987, 492 N.E.2d 645 (2d Dist.), *appeal denied*, 112 Ill. 2d 572, 497 N.E.2d 781 (1986).

77. *Id.* at 996, 492 N.E.2d at 652.

78. *Id.* at 990, 492 N.E.2d at 647. The wife filed her petition for change of venue on February 20, 1985. The husband was to be sworn in as judge on February 28, 1985.

show prejudice.<sup>79</sup>

The Illinois Appellate Court for the Second District affirmed.<sup>80</sup> Although the former wife argued on appeal that the facts presented an untenable appearance of impropriety, the court found that a petition for a change of venue from all the judges in a circuit must contain specific allegations of prejudice and the question of whether to grant the motion is left to the discretion of the trial judge.<sup>81</sup> The court noted that the Code of Judicial Conduct neither specifically addressed the issue, nor did it suggest any impropriety in hearing a case in which a judge is a party.<sup>82</sup> In short, the change of venue was properly denied because prejudice had not been shown.

In his dissenting opinion, Justice Schnake argued that an actual showing of prejudice is not required where the facts show an appearance of prejudice.<sup>83</sup> Justice Schnake observed that: "To avoid the appearance of judicial impropriety is always of paramount importance."<sup>84</sup> Problems of this nature could easily be avoided, he wrote, through the use of common sense and "routine administrative handling."<sup>85</sup>

The Illinois Supreme Court denied leave to appeal in *Faris*,<sup>86</sup> but Justice Simon filed a dissent stating that avoidance of the appearance of impropriety required that the motion for change of venue be granted.<sup>87</sup> Justice Simon stated:

Here a judge of the Eighteenth Judicial Circuit was being called

---

After the petition was denied, the matter proceeded to trial on February 27 and 28, 1985.  
*Id.*

79. *Id.*

80. *Id.* at 998, 492 N.E.2d at 653.

81. *Id.* at 996, 492 N.E.2d at 652. The court found no Illinois decisions where a judge is a party to a suit and the opposing party seeks a change of venue from all the judges in the circuit. *Id.* Reasoning by analogy, the court required the same showing of prejudice as for a change of venue from all the judges of a circuit or county where the judge is not a party to the suit. *Id.* (citing *Rosewood Corp. v. Transamerica Ins. Co.*, 57 Ill. 2d 247, 311 N.E.2d 673 (1974)).

82. *Id.* at 997, 492 N.E.2d at 652 (citing ILL. REV. STAT. ch. 110A, para. 61 (1985)). The court stated:

While judges in Illinois are subject to the standards of judicial conduct, the standards do not specifically address the issue before us or suggest impropriety in hearing a case in which a judge is a party. Accordingly, we reject wife's contention that she is entitled to a change of venue from all judges of the eighteenth circuit as of right . . . .

*Id.*

83. *Id.* at 1004, 492 N.E.2d at 656 (Schnake, J., dissenting).

84. *Id.* (Schnake, J., dissenting).

85. *Id.* (Schnake, J., dissenting).

86. 112 Ill. 2d 572, 497 N.E.2d 781 (1986).

87. *Id.* at 573, 497 N.E.2d at 781 (Simon, J., dissenting).

upon to determine a matter involving a substantial financial interest of a new colleague. In order to forestall apprehension by the petitioner and the public that favoritism could taint the outcome of the trial, the change of venue should have been allowed.<sup>88</sup>

The present state of Illinois law presents a dichotomy between criminal and civil law. If *Bradshaw* sub silentio dispenses with the established requirement of actual prejudice in a criminal case, it is at loggerheads with *Faris*, which strictly applies the established requirement of actual prejudice in a civil case. The result of this conflict is that the test for a criminal motion for substitution of a judge can be the appearance of impropriety, whereas a civil motion for a change of venue requires of showing of actual prejudice.

## VI. CONCLUSION

It remains an open question whether *Bradshaw* establishes a narrow application of the appearance to impropriety rule to the decision's limited facts or a broad new criminal law rule dispensing with the requirement of prejudice established by *Hicks* and *Dunigan*. The Illinois Supreme Court declined to address this issue when it denied leave to appeal in *Bradshaw*.<sup>89</sup> Because the Illinois Supreme Court also denied leave to appeal in *Faris*,<sup>90</sup> the courts have yet to write the final word in the civil area of the appearance of impropriety. Based on *Bradshaw*, judges may scrutinize claims of prejudice with less reference to the facts surrounding the communication and find them to be proven when a reasonable suspicion, or some other lesser standard, is shown. Although the actual prejudice rule of *Hicks* and *Dunigan* may yet prevail, future decisions will likely expand usage of the "appearance of impropriety" standard established by *Bradshaw*.

---

88. *Id.* (Simon, J., dissenting).

89. 122 Ill. 2d 580, 530 N.E.2d 251 (1988).

90. 112 Ill. 2d 572, 497 N.E.2d 781 (1986).