

STATE OF NEVADA
STANDING COMMITTEE ON
JUDICIAL ETHICS AND ELECTION PRACTICES

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JE02-003

PROPRIETY OF JUDGES
COMMUNICATING WITH JAIL
PERSONNEL FOR THE PURPOSE OF
CHANGING BAIL AMOUNTS OR
GRANTING AN "OWN RECOGNIZANCE"
RELEASE

sets bail amounts on arrest warrants. On occasion, the marshal serving the warrant or some other law enforcement officer will contact the court about mitigating circumstances that would lead the court to issue an "OR" release pending arraignment.

Issue

May judges engage in ex parte communications with county jail personnel with regard to the amount of bail established following an arrest, or in order to grant an "own recognizance" ("OR") release?

While this is an issue that may involve both district judges and limited jurisdiction judges, it is primarily municipal court judges and justices of the peace who have the most contact with law enforcement and the jail. The judge wants to know whether this conduct violates ethical proscriptions against ex parte contact or whether such requests are ministerial in nature and acceptable under the rules.

Answer: Yes, as qualified herein.

Facts

The Committee has received a request for opinion from a limited jurisdiction judge who wants to know the extent to which judges may have contact with jail personnel with regard to the amounts of bail or in order to obtain an "OR" release. The judge points out that the municipal court has adopted a standard bail schedule for the convenience of jail staff. On many occasions, often after hours and on weekends, jail staff will call the "on call judge" to request an increase in bail because of the specific nature of the individual case, such as particularly aggravated facts or a prior arrest record. The jail staff has also called the "on call judge" to request an "OR" release for incarcerated individuals where there were mitigating circumstances such as the hospitalization of an ill or disabled inmate, with limited jail personnel available for supervision at the hospital. The judge also

Discussion

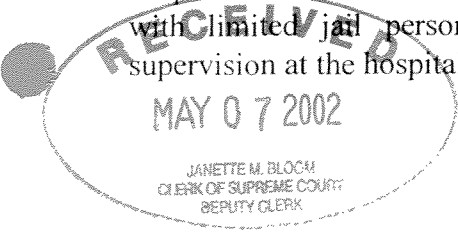
Canon 2 of the Nevada Code of Judicial Conduct states:

"A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

Canon 3B(7) states:

"A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, 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.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicated responsibilities or with other judges."

The commentary to Canon 3(B)(7) also makes it clear that "Certain ex parte communication is approved by Section 3(B)(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies." In general, however, a judge is discouraged from engaging in ex parte communication.

The issue raised by this opinion request is of great importance to all limited jurisdiction judges in this state. The Canons cited above acknowledge that in order for the system of justice to operate in an efficient manner, the judiciary must be able to communicate with court personnel, including jail personnel, without contacting counsel and setting a bail hearing. In most circumstances within the scope of this opinion, jail personnel initiate a contact with the court prior to arraignment, when neither a prosecutor nor defense counsel has appeared in the matter. In situations where the bail is increased at the request of jail staff due to unusual circumstances such as aggravated facts or a prior record, such an increase would only be temporary and

designed to insure appearance of the defendant at the next hearing, at which time the court should advise counsel of the circumstances relating to the increasing bail and allow the subject to be reconsidered on appropriate motion to decrease bail. With regard to an own recognizance release, jail staff and law enforcement officers must be given the flexibility to reduce the jail population in unusual or emergency circumstances or where further confinement pending arraignment does not appear warranted when, as a matter of necessity, jail personnel are not available to supervise a hospitalized inmate. Such contacts with judges are administrative in nature and do not violate the rule prohibiting ex parte contacts.

The circumstances described in this opinion would usually occur prior to arraignment and the appointment of counsel. Sometimes, the matter will not even have been assigned to a particular judge. The Committee has approved the ex parte contact described herein as it is initiated by jail or law enforcement personnel attempting to facilitate efficient operation of the justice system. Any contact of jail personnel initiated by a judge, especially after arraignment and the assignment of prosecutor and defense counsel, is more problematic and not within the scope of this opinion.

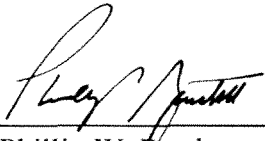
Conclusion

The Code of Judicial Conduct does not prevent jail or law enforcement personnel from contacting judges in an attempt to change bail amounts or facilitate an "own recognizance" release, as long as such contact takes place prior to the appointment of counsel and counsel are advised at the earliest convenient opportunity.

References

Nevada Code of Judicial Conduct, Canon 2, 3B(7)(a)(i)(ii) and 3B(7)(c) and Commentary.

This opinion is issued by the Standing Committee on Judicial Ethics and Election Practices. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory responsibilities, any member of the Nevada judiciary, or any person or entity which requested the opinion.



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