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STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS

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PROPRIETY OF A JUDGE
PARTICIPATING IN EX PARTE
RESOLUTION OF MISDEMEANOR
TRAFFIC CITATIONS

ISSUE

May a judge participate in *ex parte* communications with a defendant or his or her counsel to negotiate an early case resolution of a misdemeanor traffic citation prior to the case going to trial?

ANSWER

In most cases, no. However, if the District Attorney adopts a matrix of specific narrow guidelines setting forth the terms upon which the District Attorney will agree to settle traffic citations and the District Attorney authorizes the judge in writing to relay such offers to a defendant *ex parte*, a judge may relay the District Attorney's offer set forth in the guidelines to a traffic citation defendant to resolve misdemeanor traffic citations prior to trial provided that the judge does not negotiate terms of settlement or engage in substantive settlement discussions with the defendant.

FACTS

The Nevada Commission on Judicial Discipline has presented the Committee with a hypothetical question inquiring whether it is a violation of the Nevada Code of Judicial Conduct ("NCJC") for a judge or justice of the peace to participate in *ex parte* communications with a defendant or his or her counsel to negotiate an early case resolution of misdemeanor traffic citations

prior to trial. In the hypothetical, the defendant or his or her counsel would contact the court directly seeking a reduction in the penalty for the traffic citation (e.g., reduction in points, reduction in fine, reduction to a non-moving violation, etc.). The judge or a clerk of the court¹ would respond directly to the defendant and either negotiate terms of a settlement or agree to the settlement terms proposed by the defendant. In all cases, the district attorney's office would not be involved in the negotiations or resolution of the case. If the judge is unable to resolve the case through settlement, the matter would proceed to trial at which point the district attorney's office would become involved. In the hypothetical, the district attorney's office would acquiesce informally to this early resolution process to facilitate expeditious resolution and ease workload constraints.

Under a second aspect of the hypothetical, the district attorney would prepare a matrix of specific settlement guidelines itemizing the plea reductions the district attorney's office will accept in various circumstances. The Committee has assumed that under this hypothetical, the judge would merely relay the district attorney's recommendations in an *ex parte* communication to the defendant or his or her counsel, rather than actively negotiate settlement terms.

¹ Pursuant to Rule 2.12, a judge shall require court staff and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under the Code.

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DISCUSSION

The Committee is authorized to render advisory opinions evaluating the scope of the NCJC. *Rule 5 Governing the Standing Committee On Judicial Ethics*. Accordingly, this opinion is limited by the authority granted in Rule 5.

An independent, fair and impartial judiciary is indispensable to our system of justice. *Preamble [1], Nev. Code Jud. Conduct*. Canon 2 of the NCJC states “[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.” Rule 1.2 imposes upon judges the obligation to act at all times in such a manner. *See Nev. Code Jud. Conduct Rule 1.2*.

Rule 2.9 addresses *ex parte* communications and states, in pertinent part:

(A) 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 or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, *ex parte* communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and gives the parties an opportunity to respond.

(5) A judge may initiate, permit, or consider any *ex parte* communication when authorized by law to do so.

See Nev. Code Jud. Conduct, Rule 2.9(A). Relevant to this issue, Rule 2.9A(4) states that a judge “may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.” To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge. *See Nev. Code Jud. Conduct Rule 2.9A, Comment 1*.

Rule 2.6B addresses aspects of settlement discussions, and provides that “a judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.” Comment 2 to Rule 2.6B states that the “judge should keep in mind the effect that the judge’s participation in settlement discussions may have, not only on the judge’s own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are whether: (1) the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) the parties and their counsel are relatively sophisticated in legal matters, (3) the case will be tried by the judge or a jury, (4) the parties participate with their counsel in settlement discussions.” *See Nev. Code Jud. Conduct Rule 2.6B, Comment 2*. Comment 3 further instructs judges to “be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality”, recognizing that information obtained during settlement discussions may lead to disqualification. *See Nev. Code Jud. Conduct Rule 2.6B, Comment 3*.

* * *

With this background, we turn to the issue presented. Traffic citations are uniform throughout the state and a citation constitutes a complaint for traffic offenses. See *NRS 484A.610 and 484A.620*. District Attorneys are charged with authority to prosecute offenders. See *NRS 252.090; NRS 484A.630*. As recognized by the Code, the doctrine of separation of powers is fundamental to our system of government and the judicial department may not invade the legislative and executive province. See *Nev. Code Jud. Conduct Application VI[1]* (citing *State v. District Court*, 85 Nev. 485, 457 P.2d 217 (1969); *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967)).

The Committee believes *ex parte* participation by a judge in substantive negotiations, where the judge has sole discretion to negotiate and accept settlement offers without input or consent of the district attorney's office, is inconsistent with the Code of Judicial Conduct. When a judge has sole discretion to negotiate the terms of and participates in *ex parte* substantive settlement negotiations without input or consent of the district attorney's office, it is contrary to the principles of maintaining the independence, integrity and impartiality of the judiciary under Canon 1 and may lead to frequent disqualification contrary to Rule 2.6. In this respect, the Committee finds *Cripps v. State*, 122 Nev. 764 (2006) instructive. In *Cripps*, the Nevada Supreme Court adopted a bright-line rule prohibiting judicial involvement in the plea negotiation process due to concerns of, among other things, appearance of fairness and coercion. While *Cripps* addressed felony plea negotiations, the concerns with appearance of fairness and coercion recognized by the Court in that case are equally present under the Code of Judicial Conduct in the present hypothetical. See *Nev. Code Jud. Conduct, Rule 2.6B* (judge may encourage settlement but shall not act in a manner that coerces settlement); *Comment 1 to Rule 2.6A* (right

to be heard is essential component of fair and impartial system of justice).

The fact that the district attorney's office may informally "acquiesce" to such a procedure does not eliminate issues under the Code of Judicial Conduct with the judge's *ex parte* participation in substantive settlement negotiations. As this Committee has previously opined, even "if the judge notifies all parties of the substance of the communication and allows them an opportunity to respond, *Matter of Fine* makes clear that a judge who initiates or willingly participates in *ex parte* discussions of substantive matters has violated the NCJC." See *Advisory Opinion 15-02* (citing *Matter of Fine*, 116 Nev. 1001, 1016 (2000) (construing Canon 3B(7), now codified in part as Rule 2.9)).

Therefore, with one narrow exception, the Committee concludes that judicial participation in *ex parte* traffic citation settlement negotiations, where the Court has discretion to negotiate and accept the terms of settlement without input or written authorization from the district attorney, is contrary to Canon 1 and Canon 2 of the Nevada Code of Judicial Conduct.

The exception falls within the second aspect of the hypothetical. Under the second aspect of the hypothetical, by preparing a specific matrix of settlement guidelines, the district attorney's office remains responsible for the specific terms and conditions under which the district attorney is willing to offer and accept a plea settlement. As a result, the judge is merely relaying the offer of the district attorney, rather than determining the substantive terms of settlement and actively negotiating with a defendant.

The Code of Judicial Conduct contains rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all

relevant circumstances. *Nev. Code Jud. Conduct, Preamble[5]*. Rule 2.9A(4) allows a judge to confer separately with the parties and their lawyers in an effort to settle matters, provided the parties consent. Given that the terms of settlement are prescribed and recommended by the district attorney, and the judge will not be negotiating the substantive terms, the process set forth in the second hypothetical appears consistent with the settlement discussions contemplated by Rule 2.9A.

The Committee cautions judges to be cognizant of the comments to Rule 2.6B when engaging in such discussions, and keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful as well as the effect settlement discussions can have, not only on a judge's objectivity and impartiality, but also on the appearance of a judge's objectivity and impartiality. Subject to that caution, so long as the district attorney's office provides express written authorization to the judge to relay such settlement offers *ex parte*, and provided the judge does not engage in any negotiation or substantive discussion regarding the settlement terms but merely relays the district attorney's offer, the Committee does not believe such *ex parte* communications are prohibited by the Code of Judicial Conduct.

CONCLUSION

The Committee concludes that with one narrow exception, the Code of Judicial Conduct does not allow a judge to participate in substantive, *ex parte* settlement negotiations with misdemeanor traffic offenders. However, where a district attorney prepares a specific matrix of settlement guidelines and authorizes a judge

in writing to relay such settlement offers to a defendant or its counsel *ex parte*, and provided the judge does not engage in any negotiation or substantive discussion regarding the settlement terms, such communications would not be prohibited by the Code of Judicial Conduct.

REFERENCES

Nev. Code Jud. Conduct, Canon 1 and Canon 2; Rule 1.2; Rule 2.6; Rule 2.9; Rule 5 Governing the Standing Committee On Judicial Ethics; Nev. Code Jud. Conduct, Preamble[5]; Nev. Code Jud. Conduct, Application IV (citing State v. District Court, 85 Nev. 485, 457 P.2d 217 (1969); Galloway v. Truesdell, 83 Nev. 13, 422 P.2d 237 (1967); NRS 252.090; 484A.610; 484A.620; 484A.630; Cripps v. State, 122 Nev. 764; Advisory Opinion 15-02 (citing Matter of Fine, 116 Nev. 1001, 1016 (2000)).

This opinion is issued by the Standing Committee on Judicial Ethics. 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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