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TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
CHIEF DEPUTY CLERK

STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS

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ADVISORY OPINION: JE16-001

PROPRIETY OF A JUDGE ACCEPTING, CONSIDERING, AND ACTING UPON PAROLE AND PROBATION DOCUMENTS NOT SERVED ON THE PARTIES

FACTS

The request for an advisory opinion arises out of the Division of Parole and Probation’s long-standing practice of submitting probation related documents directly to the court without serving the documents on the State or the defense. Operating under the statutory mandate set forth in the NRS, the Division of Parole and Probation (“Parole and Probation”) makes sentencing recommendations to the courts and also monitors and enforces a probationer’s compliance with the conditions of his or her release. *See Nevada Revised Statutes Chapters 176, 176A, 209, and 213.*

In furtherance of these responsibilities, Parole and Probation submits various documents to the court including those at issue here: a probation agreement and order admitting a person to probation and setting the terms and conditions of probation (“Probation Agreement”); reports and recommendations regarding any violations of the conditions of probation, including a proposed bench warrant for the person’s arrest (“Violation Report” and “Bench Warrant”); and petitions to discharge a probationer – including a recommendation for either honorable or dishonorable discharge – together with a proposed order granting the person’s discharge from Parole and Probation’s supervision (“Discharge Petition”). In addition, under this statutory scheme, the courts have authority over decisions

ISSUE

Whether a judge violates the Code of Judicial Conduct when the judge accepts, considers, and acts upon documents received from the Division of Parole and Probation that are not served on the State or the defense.

ANSWER

No, a judge does not violate the NCJC in accepting, considering, or acting upon Parole and Probation documents submitted post-conviction and post-sentencing, despite that the documents are not served on the State or the defense. The Committee concludes that the Probation Agreement and Discharge Request are not *ex parte* communications on a pending or impending matter under Rule 2.9(A). In addition, although it seems to the Committee that the Violation Report and Bench Warrant may be *ex parte* communications concerning an impending matter, these documents fall within the exceptions delineated in Rule 2.9(A)(3) and possibly (5) and it is therefore permissible for a judge to act on these documents even though they are not served prior to the probationer’s arrest.



regarding the conditions of probation, revocation of probation, and discharge from probation.

The request for an advisory opinion indicates that Parole and Probation serves none of these documents on the State or the defense prior to submitting them to the court. The request further advises that if one district court were to require Parole and Probation to serve these documents on the State and defense, then Parole and Probation would have to effectuate an expensive statewide change to its procedures because a person placed on probation in one county may reside in any other county.

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.

In the request before the Committee, the judge asks for an advisory opinion on a judge's ethical duties under the NCJC when accepting, considering, and acting upon documents Parole and Probation submits without service on the State or the defense. The Committee notes at the outset that the questions raised in the request are intertwined with constitutional and legal issues that are beyond the Committee's prerogative to answer. The Committee has therefore endeavored to confine this advisory opinion to the ethical issues before it.

The first document in question is the Probation Agreement which memorializes any special conditions the judge has imposed at sentencing. Parole and Probation prepares the document, reviews it with the defendant,

has the defendant sign it, and submits it to the judge for signature. The judge questions whether it is ethical to act on this document because defense counsel is not included in the process nor is the document served on the State or defense prior to submission to the court for signature.

The next two documents are the Violation Report wherein Parole and Probation details a probationer's failure to comply with the conditions of probation and the Bench Warrant for the person's arrest and detention by the Chief Parole and Probation Officer. The judge questions whether it is ethical to consider the Violation Report and issue the Bench Warrant when neither the State nor the defense has notice of the alleged violations or request for a warrant prior to the probationer's arrest.

The judge also questions Parole and Probation's Discharge Requests. The concern with the request for an honorable discharge is that failure to serve the State with the petition deprives it of an opportunity to object to the discharge if the defendant has not paid court-ordered administrative assessment or attorney fees. On the other hand, failure to serve the defendant with a dishonorable discharge petition deprives the probationer of an opportunity to respond to the allegations before the court enters a dishonorable discharge.

Canon 2 states "[a] judge shall perform the duties of judicial office impartially, competently, and diligently." *See Nev. Code Jud. Conduct, Canon 2*. Relevant to the question presented, Rule 2.9(A) further provides that: "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” unless an exception applies. *See Nev. Code Jud. Conduct, Rule 2.9.*

The Committee first considers whether the Parole and Probation documents are prohibited *ex parte* communications concerning a pending or impending matter under Rule 2.9(A). The NCJC defines “pending matter” as “a matter that has commenced” and clarifies that the “matter continues to be pending through any appellate process until final disposition.” *See NCJC Terminology.* The Code defines “impending matter” as one “that is imminent or expected to occur in the near future.” *Id.*

The Committee notes that under Nevada’s statutory scheme Parole and Probation submits all of the documents at issue here at the conclusion of both the guilt and sentencing phase of a criminal prosecution. That is, the defendant has been tried, found guilty, sentenced to a term of imprisonment, and granted probation on conditions set by the judge during sentencing. In addition, pursuant to NRS 176A.210, a person is “deemed accepted for probation for all purposes” upon entry of an order of probation by the court. Further, the Committee notes that the documents at issue do not relate to the defendant’s guilt or innocence, but rather concern Parole and Probation’s supervision of a convicted offender admitted to probation and that any violation results in, at most, imposition of the previously determined sentence. Because the documents are not submitted in connection with the criminal proceedings against the defendant, the Committee concludes that

they are not improper *ex parte* communications on a pending matter.

Whether Parole and Probation’s documents concern an impending proceeding is not as certain, at least with respect to the Violation Report and Bench Warrant. Unlike a bench warrant issued to command a person’s appearance before the court, a probation violation bench warrant requires that the arrested person be delivered to the Chief Probation Officer. An inquiry is then conducted to determine whether probable cause exists to hold a probation revocation hearing before the court. *NRS 176A.580; 176A.610.* Because this intervening hearing and the required assessment of probable cause are held independently of the judge issuing the violation warrant, it is possible to conclude that the Violation Report and Bench warrant do not concern an impending matter before the judge. However, there is no doubt that the judge will be called upon to conduct a probation revocation hearing with respect to some of the violators and that such hearing, although not “imminent,” can be “expected to occur in the near future.” Thus, the Committee considers whether the Violation Report and Bench Warrant fall within one of the exceptions to Rule 2.9’s proscription against *ex parte* communications.

The exceptions enumerated in Rule 2.9(A) relevant to the present inquiry are the following:

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge’s adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid

receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

* * *

(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).

Exception (3) would allow a judge to consider the Violation Report and Bench warrant provided that probation officers fall into the category of court staff or officials who “aid the judge in carrying out the judge’s adjudicative responsibilities.” The Committee could find no case law delineating the role of probation officers in the Nevada court system. Nonetheless, the Committee notes that other jurisdictions recognize that a probation officer acts as an “aide to the court” by preparing reports, conducting investigations, and supplying recommendations. *See State v. Gomez*, 887 P.2d 853 (Utah 1994); *California Judges Association Committee on Judicial Ethics, Opinion 37* (1987, revised 1998). Also, Comment [4] recognizes that in certain circumstances *ex parte* communications with a probation officer is appropriate. *See Nev. Code Jud. Conduct, Comment [4], Rule 2.9.* Despite that probation officers are neither appointed nor supervised by the courts, it seems reasonable to the Committee that with respect to all submittals presently under consideration Parole and Probation acts as an arm of the court and that therefore such *ex parte* communications are permissible.

Further, with respect to exception (5), communications authorized by law, the Committee notes that Parole and Probation submits all documents to the court under Nevada’s statutory scheme. The Committee further notes, and the requester acknowledges, that Parole and Probation’s direct submittal of these documents is a long standing one, perhaps even decades long.

While it is beyond the Committee’s purview to determine whether the practice of submitting the documents without service is both authorized by law and constitutional, there is Nevada precedent to support such a conclusion given that the process has continued without challenge for a very long time. The Nevada Supreme Court has held that a judge, acting in accord with the spirit of a 30-year long custom and practice of granting OR releases without notice to the district attorney, does not engage in an improper *ex parte* communication where the district attorney’s office has acquiesced in the practice. *See Matter of Mosley*, 120 Nev. 908, 917, 102 P.3d 555, 562 (2004). Further, the court has also held that a probationer, as a person released into the community in lieu of serving a term of imprisonment, is not entitled to the same level of due process as a criminal defendant. *See Anaya v. State*, 96 Nev. 119, 122, 606 P.2d 156, 157 (1980) (“probation revocations are not criminal prosecutions; the full panoply of constitutional protections afforded a criminal defendant does not apply.”)

The requesting judge also asks the more subtle question of whether it is ethical for the judge to act when the judge perceives that the established procedure may impinge on a party’s right to notice and an opportunity to

be heard. Rule 2.6(A) provides that: "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." *See Nev. Code Jud. Conduct, Rule 2.6. Comment [1] to Rule 2.6* further instructs that: "The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed."

Central to the resolution of this question is whether the law requires notice and an opportunity to be heard before the judge accepts, considers, or acts upon the Parole and Probation documents at issue. As noted above, the Committee is not empowered to give opinions on legal issues and thus can give only general guidance on the question.

A judge is in control of the judge's own courtroom and may make any order necessary to protect the substantive rights of the litigants before the court. The Committee understands that the judge may be hesitant to require Parole and Probation to serve all documents given the impact this will have on an established, statewide system. It seems, however, that there may be other methods a judge could employ on a case-by-case basis to ensure that the interests of both the State and the defense are ensured, such as, for example, ordering Parole and Probation to allow defense counsel's presence at the signing of the probation agreement; issuing an order to show cause prior to acting on the discharge requests; or requesting

supplemental information missing from a submittal.

CONCLUSION

The Committee concludes that it is ethical for a judge to accept, consider, and act upon the Parole and Probation documents considered in this advisory opinion. Under Rule 2.9(A), the documents are either not improper *ex parte* communications because they do not involve a pending or impending proceeding, or they are permissible communications under Rule 2.9(A)(3) and possibly (5).

REFERENCES

Nev. Code Jud. Conduct, Terminology: "Pending Matter" and "Impending Matter"; Canon 2; Rule 2.6 and 2.9; Commentary [1] to Rule 2.6; Commentary [4] to Rule 2.9; Rule 5 Governing the Standing Committee On Judicial Ethics.

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.



Janette Bloom
Vice-Chairperson