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STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS

DATE ISSUED: November 9, 2021

ADVISORY OPINION: JE21-001

**PROPRIETY OF A JUSTICE OF THE PEACE
AMENDING MISDEMEANOR CHARGES,
DISMISSING MISDEMEANOR CASES, AND/OR
PARTICIPATING IN MISDEMEANOR PLEA
NEGOTIATIONS WITHOUT SUBSTANTIVE
DISTRICT ATTORNEY INVOLVEMENT**

the District Attorney (presumably by and through a Deputy District Attorney).

ISSUE

DISCUSSION

Whether a Justice of the Peace can amend misdemeanor charges, dismiss misdemeanor cases, and/or participate in misdemeanor plea negotiations without substantive District Attorney involvement.

Article 3 of the Nevada Constitution provides that the powers of the Government of the State of Nevada shall be divided into three separate branches, the Legislative, the Executive, and the Judicial, and no persons charged with the exercise of powers properly belonging to one of these branches shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in the Constitution.

ANSWER

The District Attorney is part of the Executive branch, whereas the Courts are a part of the Judicial branch; and, pursuant to NRS 252.080, the District Attorney in each county shall be the public prosecutor therein. NRS 252.090 further provides that the District Attorney shall attend justice courts in his or her county, when required by justices of the peace, *and conduct all prosecutions on behalf of the people for public offenses*. Emphasis added. There is no constitutional exception to this directive.

No. Pursuant to NRS 252.080, the District Attorney of each county shall be the public prosecutor therein and, as the public prosecutor, it is within the purview of the District Attorney, as a member of the Executive branch, to conduct all prosecutions on behalf of the people for public offenses. The Court taking on such a role would violate the separation of powers between the Executive and Judicial branches of the government and would raise significant ethical issues under the judicial canons.

FACTS

The fact that a Justice of the Peace cannot act to usurp the required role of District Attorney is supported by previously issued opinions from both this Committee as well as from the Nevada Attorney General. In particular, Nevada Attorney General Opinion No. 2016-06 provides in relevant part that the Nevada Legislature intended for misdemeanor citations to be treated procedurally like misdemeanor arrests and to be subject to the same prosecutorial scrutiny. 2016-06 Op. Nev. Att’y Gen.

The Standing Committee on Judicial Ethics received an inquiry regarding whether misdemeanor charges filed by citation can be “disposed of” by the state Justice Courts such that Justices of the Peace may negotiate the terms of the disposition of charges directly with defendants *without* the participation of a District Attorney but on the record in open court in the presence of



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(August 15, 2016). Thus, when a citation is filed and becomes a complaint, it is the District Attorney's sole responsibility to prosecute the complaint. The opinion notes the impropriety of a Court substituting its judgment for that of the prosecutor with respect to the merits of the case, given that such determinations properly fall under prosecutorial discretion. *Id.* The opinion further recognizes that "prosecutors are the proper authority to negotiate resolution of charges brought by citation," and that "it is inappropriate for a judge to engage in substantive negotiation of a traffic citation, the same would be equally true with respect to the negotiation of a non-traffic misdemeanor citation." *Id.* (citing *Propriety of a Judge Participating in Ex Parte Resolution of Misdemeanor Traffic Citations*, NV Standing Comm. Judicial Ethics Op. JE15-003 (2015) ("JE15-003")).

The cited Standing Comm. Judicial Ethics Op. JE15-003 relied upon in Nevada Attorney General Opinion 2016-06 further provides that "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." JE15-003 (citing 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))).

It is the conclusion of this Committee that the fundamental separation of powers constraint set forth by the Nevada Constitution cannot be cured by a District Attorney or representative thereof merely sitting in a courtroom while the Court undertakes to negotiate and resolve a misdemeanor charge. Merely sitting in the Courtroom does not equate to actively prosecuting a charge as is required and results in a District Attorney relegating its

obligations to another branch of government, which is impermissible.

Although the conclusion reached herein is premised upon the separation of powers, putting that issue aside for purposes of additional analysis, a Justice of the Peace would still be precluded from so acting for the reasons set forth in NV Standing Comm. Judicial Ethics Op. JE15-003. Therein, in considering whether a Justice of the Peace could participate in *ex parte* communications with a defendant or defendant's counsel to negotiate an early resolution of a misdemeanor traffic citation, this Committee recognized that, with the one narrow exception of a Justice of the Peace conveying an offer of resolution from a District Attorney pursuant to an adopted matrix of specific narrow guidelines for approved resolution provided for in writing by the District Attorney, judicial participation in citation negotiations is contrary to Canon 1 and Canon 2 of the Nevada Code of Judicial Conduct. JE15-003.

For the same reasoning set forth therein, it remains that a Justice of the Peace addressing a misdemeanor charge, whether or not a District Attorney or a representative thereof was in the room, and whether or not any such discussions were on the record, would interfere with a judge's duty to uphold and promote the independence, integrity, and impartiality of the judiciary by implicating concerns of the appearance of fairness and coercion, which would violate Canon 1 of the Nevada Code of Judicial Conduct. It is for this very reason that the Nevada Supreme Court has indicated that a judge may not be involved, nor participate, in the plea negotiation process other than indicating a willingness to accept a sentencing recommendation reached between a defendant and the District

Attorney. Cripps v. State, 122 Nev. 764, 772-73, 137 P.3d 1187, 1192-93 (2006).

Canon 2 of the Nevada Code of Judicial Conduct, requiring a judge to perform all duties of judicial office impartially, competently, and diligently, would further be impacted in that Rule 2.6(B) of the Nevada Code of Judicial Conduct precludes a judge from acting in a manner that would appear to coerce any party into settlement, and Rule 2.9 of the Nevada Code of Judicial Conduct precludes a judge from initiating or willingly participating in *ex parte* discussions of substantive matters. Under the scenario presented, although the District Attorney or a representative thereof is present and discussions are undertaken on the record, it remains that the District Attorney's presence is designed to have no substantive value and places the responsibility on the judge to negotiate a plea, which has explicitly been deemed to carry an inherent risk of improper judicial coercion and is, therefore, contrary to Canon 1 of the Nevada Code of Judicial Conduct. Further, the proposed process would have the judge inquire of facts and evidence that is properly required to be considered and presented by the District Attorney, and which the judge is specifically precluded from investigating. *See* Nevada Code of Judicial Conduct, Rule 2.9(C); Cripps v. State, 122 Nev. at 770, 137 P.3d at 1191. Such a scenario further impedes upon the discretion of a prosecutor to evaluate and address the charges. *See, e.g., Sandy v. Fifth Judicial Dist. Ct.*, 113 Nev. 435, 440, 935 P.2d 1148, 1151 (1997) (acknowledging the division of executive and judicial authority and recognizing a judge's limited role in rejecting a plea agreement absent a violation of prosecutorial discretion based upon prosecutorial discretion and the Court's prohibition from invading the legitimate function of the prosecutor).

CONCLUSION

The Committee concludes that, under the circumstances the Committee is asked to consider, a Court may not undertake any obligations conferred upon a District Attorney with respect to prosecuting misdemeanor charges. The Court must honor its role as an impartial adjudicator of the matters that come before it as prosecuted by the District Attorney of the county in which the Court sits.

REFERENCES

Nevada Constitution, Article 3; NRS 252.080; NRS 252.090; Nev. Code Judicial Conduct Application VI [1]; Nev. Code Judicial Conduct, Canon 1, Rule 1.2, and Canon 2, Rules 2.6 and 2.9; Cripps v. State, 122 Nev. 764, 137 P.3d 1187 (2006); Sandy v. Fifth Judicial Dist. Ct., 113 Nev. 435, 935 P.2d 1148 (1997); State v. District Court, 85 Nev. 485, 457 P.2d 217 (1969); Galloway v. Truesdell, 83 Nev. 13, 422 P.2d 237 (1967); 2016-06 Op. Nev. Att'y Gen. (August 15, 2016); *Propriety of a Judge Participating in Ex Parte Resolution of Misdemeanor Traffic Citations*, NV Standing Comm. Judicial Ethics Op. JE15-003 (2015).

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.



Patricia Halstead, Chairperson