

Nebraska Judicial Ethics Committee Opinion 19-1

Question Presented--

“Does the Code of Judicial Conduct permit [sic] a county court duty judge from having ex parte communication with a county attorney to discuss warrantless affidavits and the arrestee’s criminal record for the purpose of setting an appropriate appearance bond when the courts are closed over the weekend and holidays?”

Applicable Code Sections

Preamble to the Code (Reissue 2008 & Cum. Supp. 2014)

Neb. Rev. Code of Judicial Conduct, § 5-302.9

The revised Code took effect January 1, 2011, and replaced the former Code of Judicial Conduct. The preamble to the Nebraska Code of Judicial Conduct states:

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The Nebraska legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

[3] The Nebraska Revised Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

The applicable Code sections read as follows:

§ 5-302.9. Ex Parte Communications.

(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 reasonable 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 expressly authorized to do so.

Analysis and Opinion

Section 5-302.9 of the Code governs ex parte communications. The request for opinion, on its face, states that an ex parte communication is taking place. The request sets out that the duty judge is meeting with a representative of the county attorney's office and that the judge and the attorney are discussing affidavits for warrantless arrest, as well as any criminal history of the persons who have been arrested without a warrant. The stated purpose of these discussions is for the county attorney to provide information to the judge to be used in setting an appearance bond for the persons who have been arrested without a warrant.

The review of the affidavit itself is not problematic. It may be an ex parte communication, but it would appear to be expressly authorized. § 5-302.9(A)(5). Judges are required to make a probable cause determination within 48 hours of a warrantless arrest. This determination may be based on an affidavit for warrantless arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991).

The request for opinion, however, refers to an interaction which goes beyond a review of an affidavit. The request for opinion references a discussion between the judge and an attorney from the office which will be prosecuting the person who has been arrested. This conversation is to "discuss warrantless affidavits and the arrestee's criminal record for the purpose of setting an appropriate appearance bond." The communication is between the judge and a prosecuting attorney, outside the presence of the arrestee or his counsel, so it is clearly an "ex parte communication." The issues being discussed are the persons who have been arrested over the weekend. Presumably, a criminal complaint will soon be filed regarding these persons. Therefore, the discussions would clearly be "concerning a pending or impending matter" and, under § 5-302.9, such communication would only be allowed pursuant to one of the enumerated exceptions to the prohibition on ex parte communications. Ex parte communications are permitted only if they are for "scheduling, administrative, or emergency purposes," and if such communications "do[] not address substantive matters." § 5-302.9(A)(1).

The communication described in the request for opinion is not for "scheduling" or "administrative" purposes. Given the time constraints on reviewing probable cause affidavits and setting bond, the communication could be construed as for "emergency" purposes. However, even if the communication was for "emergency" purposes, the communication would only be allowed if it "d[id] not address substantive matters." The committee believes that a discussion regarding the arrestees' criminal history and any other matters bearing on the amount of the arrestees' appearance bond is clearly "substantive." Therefore, the communication would be prohibited even if it was for "emergency" purposes.

The committee believes that the Nebraska Code of Judicial Conduct prohibits the communication set forth in the request for opinion.

Disclaimer

This opinion is advisory only and is based on the specific facts and questions submitted by the person or organization requesting the opinion pursuant to appendix A of the Nebraska Revised Code of Judicial Conduct. Questions concerning ethical matters for judges should be directed to the Judicial Ethics Committee.

APPROVED AND ADOPTED BY THE COMMITTEE
ON JUNE 18, 2019

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