

Judicial Inquiry Commission

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This is in response to your request for an advisory opinion from the Judicial Inquiry Commission. Your question is whether an improper ex parte communication is involved under the following circumstances.

Your county has a pre-trial release program. The scope of this program involves incarcerated indigent defendants who cannot make the bond set by the court. A defendant is released on his own recognizance conditioned upon restrictive written provisions. If a defendant is alleged to have violated a written condition of this recognizance bond, the pre-trial release staff comes to the judge and 'ex parte' relates to the judge what the defendant did, and requests that their bond be revoked."

Canon 3A(4), Alabama Canons of Judicial Ethics provides in pertinent part:

"A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte communications concerning a pending or impending proceeding."

"Ex parte communications are those that involve fewer than all of the parties who are legally entitled to be present during the discussion of any matter. They are barred in order to ensure that every person who is legally interested in a proceeding [is given the] full right to be heard according to law." J. Shaman, S. Lubet, J. Alfani, Judicial Conduct and Ethics, 149 (1990).

This Commission has neither found nor been cited to any authority authorizing a member of a pre-trial release staff to report alleged violations of the conditions of pre-trial release directly to the judge. Rule 7.5, A.R.Crim.P. provides, in effect, that "[i]f the defendant violates the conditions of his or her release, and the district attorney files a motion with the court, specifying the circumstances which constitute the breach of the conditions of the release, the court can issue a warrant for the arrest of the defendant." H. Maddox, Alabama Rules of Criminal Procedure § 7.5 at 231 (199) (Emphasis added). Rule 7.5 states:

"(a) Issuance of Warrant. Upon motion of the prosecutor stating with particularity the facts or circumstances constituting a material breach of the conditions of release or stating with particularity that material misrepresentations or omissions of fact were made in securing the defendant's release, the court having jurisdiction over the defendant released shall issue an arrest warrant under rule 3.1 to secure the defendant's presence in court.

A copy of the motion shall be served with the warrant, and a hearing shall be held on the motion without undue delay, except in no event later than seventy-two (72) hours after the arrest of the defendant released, as provided in Rule 4.3(a).

“(b) Hearing; Review of Conditions; Revocation of Release. If, after a hearing on the matters set forth in the motion, the court finds that the defendant released has not complied with or has violated the conditions of release, or that material misrepresentations or omissions of fact were made in securing the defendant’s release, the court may modify the conditions or revoke the release.” (Emphasis added).

Rule 1.4(y) defines “prosecutor” to mean “any municipal attorney, district attorney, attorney general, and others acting under his or her specific direction and authority, appointed or charged by law with the responsibility for prosecuting an offense.” The term does not include a member of the “pre-trial release staff.” In fact, in many cases, it would be a member of the pre-trial release staff who would provide the evidence of the defendant’s violation of the term or terms of his or her release at the Rule 7.5 hearing.

Therefore, it is the opinion of this Commission that a report to a judge by a member of the pre-trial release staff that a defendant has violated a condition of his release and a request for the judge to revoke the defendant’s pre-trial release constitutes an improper ex parte communication in violation of Canon 3A(4).

This advisory opinion has been approved by the Commission. If you have any question about this or any other matter please do not hesitate to telephone me at your convenience.

Respectfully,