

Judicial Inquiry Commission

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December 18, 1992

This is in response to your second request for an advisory opinion from the Judicial Inquiry Commission on the matter of ex parte communications.

In Advisory Opinion 92-456, issued to you on November 10, 1992, this Commission held 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), Alabama Canons of Judicial Ethics. This opinion was based on the informal nature of the "report."

Your present question is whether an improper ex parte communication is involved under the following circumstances.

Assuming a defendant, who cannot otherwise make bond, signs a pretrial release contract, as a condition of bond, whereby the defendant agrees in advance to an ex parte communication to the judge, when a condition of release is alleged to have been breached (for the purpose of issuance of an arrest warrant). Would this contractual agreement exonerate the judge from an ethical violation? It is my understanding that this procedure is proposed to be used only in emergency situations when a D.A. is unavailable to file a motion and there is a compelling need for immediate arrest.

This Commission has serious concerns about the "voluntary" nature of the "contractual agreement" the defendant must sign as a condition of being released on bond. Nevertheless, it is not necessary to answer your specific question for the following reason.

Although a judge may not ethically or legally issue a warrant of arrest on the basis of a "report" from a member of the pre-trial release staff, or anyone else, a judge is authorized to issue a warrant of arrest on the basis of a finding of probable cause after the making of a complaint. See Rule 3.1(a), A.R.Crim.P. "A complaint is a written statement made upon oath before a judge, . . . setting forth essential facts constituting an offense and alleging that the defendant committed the offense." Rule 2.3. Therefore, as a matter of judicial ethics, a judge could issue a warrant for the arrest of a defendant for a violation of the terms of the defendant's probation based upon the verified affidavit of a member of the pre-trial release staff.

The obtaining of a warrant for the arrest of the defendant prior to the defendant's actual arrest is an ex parte procedure at which the defendant is not constitutionally entitled to be present. See Rule 9.1, A.R.Crim.P. The ex parte communication which occurs between the judge and the affiant for a warrant of arrest does not constitute an unethical communication.

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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 contact me at your convenience.