

*Arizona Supreme Court  
Judicial Ethics Advisory Committee*

ADVISORY OPINION 97-11  
(September 24, 1997)

**Use of Police Report Prior to  
Admission into Evidence**

**Issues**

1. Is it ethically improper for a court to serve as a repository and conduit of sealed police reports which may be used in pending or prospective DUI criminal and civil traffic cases in that court?

**Answer:** No.

2. Is it ethically improper for a judge in such a case to review and consider information in a police report while a case is pending, when the report has not been admitted into evidence in the case?

**Answer:** Yes, except in connection with pretrial motions or in connection with sentencing after a determination of guilt (in the DUI context) or responsibility (in the civil traffic context) has been made.

**Facts**

A justice court routinely receives from police officers copies of police reports, in sealed envelopes, accompanied by the corresponding citations. If the defendant enters a “not guilty” plea, the report is forwarded to the prosecutor along with the court order setting a trial date. If the defendant enters a “guilty” plea, the police report remains sealed and with the court file in the case.

Two examples are cited of how the court reviews and utilizes information contained in the police report. First, at the time of sentencing following a defendant’s guilty plea in a DUI case, the judge reviews the police report for any mitigating or aggravating circumstances and furnishes a copy to the defendant to review. Typically the defendant is *pro per* and no prosecutor is present to make sentencing recommendations. Sentencing is the first time either the defendant or the judge has seen the police report, which may contain information on such topics as whether the defendant was cooperative with the police during the arrest, whether other people were involved, whether the defendant had prior contact with the police, whether an accident was involved and, if so, the nature and extent of any damage. The judge uses such information in determining whether to impose the mandatory minimum sentence or a harsher sentence.

The second example involves cases where a defendant has been cited for a civil traffic violation involving an accident and seeks to attend defensive driving school in order to have

## Advisory Opinion 97-11

the charge dismissed. In such cases, the judge reviews the police report to see if the accident resulted in death or any serious physical injuries that would eliminate defensive driving school as an option.

### Discussion

#### Issue 1

The administrative procedure by which the court serves as repository and conduit of sealed police reports does not violate ethical standards. The police reports are furnished to the court in sealed envelopes and remain sealed until use at trial or sentencing. According to the court, in cases of “not guilty” pleas, the procedure has been an efficient and timely method of transmitting the police report to the prosecutor, who then can make the report available to the defendant.

There is nothing improper in the judiciary and law enforcement cooperating in this manner. *See* Opinion 95-15 (court may cooperate with police in sending letters to persons with outstanding arrest warrants). Any arguable concerns about appearance of impropriety, impartiality, or judicial independence relating to this purely administrative procedure do not compare to those addressed in Opinions 85-01 (Issue 2) (improper for judge to hear criminal cases when judge’s secretary is county sheriff’s wife), 94-03 (improper for JP to serve as member of sheriff’s posse), or 96-01 (improper for court to sign verifications of city police overtime records). The procedure involved here does not undermine the court’s impartiality or appearance of propriety (Canon 2A), nor does it impair the judiciary’s integrity or independence. (Canon 1).

#### Issue 2

There do not appear to be any Arizona Ethics advisory opinions or any out-of-state opinions specifically dealing with this issue, which implicates several provisions in the Code of Judicial Conduct. Canon 2A requires a judge to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Canon 3B(5) obligates a judge to “perform judicial duties without bias or prejudice.” Canon 3B(7) provides in pertinent part:

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. 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 concerning a pending or impending proceeding except that:

- (e) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

The commentary to Canon 3B(7) states “[t]he proscription against communications concerning a proceeding includes communications from . . . persons who are not participants in the proceeding, except to the limited extent permitted.” The commentary further provides that “[t]o the extent reasonably possible, all parties or their lawyers shall be included in

## Advisory Opinion 97-11

communications with a judge,” and that “[w]henver presence of a party or notice to a party is required by Section 3B(7),” the party must be present or be given notice if he or she is unrepresented. Finally, the commentary states that “[e]xcept as provided by law, a judge must not independently investigate facts in a case and must consider only the evidence presented.”

In our view, a judge’s review of police reports not offered as evidence constitutes “*ex parte* communications” for purposes of Canon 3B(7). Like *ex parte*, direct contact with a reporting officer, a police report furnishes information to the judge that may influence his or her view of the defendant and the case. Our supreme court has described a judge’s “repeated use of a bench side telephone for *ex parte* contact with, among others, arresting officers in criminal cases, to assist him with the resolution of matters before him” as “highly improper” and “serious judicial misconduct.” *In re Anderson*, 168 Ariz. 432, 436, 814 P.2d 773, 777 (1991).

Police reports are public records which are available for inspection and copying by any person. A.R.S. §§ 39-121, 39-121.01; *Carlson v. Pima County*, 141 Ariz. 487, 687 P.2d 1242 (1984). Because of their public nature and availability, police reports do not constitute the same type of *ex parte* communications condemned in *Anderson*. Nonetheless, a judge’s *ex parte* review and consideration of a police report which has not been properly introduced in a pretrial proceeding or admitted into evidence, before any determination of guilt and before sentencing, violates Canon 3B(7).

Such pre-sentencing use of police reports also implicates other ethical concerns under Canon 2A and Canon 3B(5). Of course, there is no ethical impropriety in a court reviewing and considering information in a police report after it has been properly introduced in a pretrial proceeding or admitted into evidence at trial. In contrast, it would be improper for a judge sitting as trier of fact in a bench trial to review and consider a police report which had not been properly introduced in a pretrial proceeding or admitted into evidence because “facts are to be determined on the basis of evidence presented in court within the adversary process so that each side can present its version of the facts.” Jeffrey L. Shaman, *et al. Judicial Conduct and Ethics*, § 4.10, at 113. Moreover, even where a judge is not sitting as a fact-finder, he or she should not obtain extrajudicial knowledge of facts, “because that knowledge could unfairly influence the judge’s rulings and other actions in the case.” *Id.*

Use of police reports strictly for sentencing purposes, on the other hand, does not violate the Code. *Ex parte* review or use of a police report “concerning a pending or impending proceeding” is prohibited unless one of the five exceptions under Canon 3B(7) applies. One of the exceptions permits a judge to “initiate or consider any *ex parte* communications when expressly authorized to do so.” Section 3B(7)(e). As defined in the terminology section of the code, the term “law” denotes “court rules as well as statutes, constitutional provisions and decisional law.” In Arizona, a court may consider police reports before entering a judgment of guilt against a criminal defendant. Ariz. R. Crim. P. 26.2(c), 17 A.R.S. Therefore, so long as the defendant is furnished with a copy of the police report and given reasonable time and opportunity to respond to information contained therein, a judge may ethically review and

## Advisory Opinion 97-11

consider information in the report for sentencing purposes after a determination of guilt or guilty plea in the DUI context, or for disposition purposes after a determination of responsibility in the civil traffic context. Under those circumstances, such use of the report at sentencing for informational aggravation or mitigation purposes does not violate the provisions of Canon 2 or 3.

### **Applicable Code Sections**

Arizona Code of Judicial Conduct, Canons 2A, 3B(5) and (7) (1993).

### **Other References**

A.R.S. §§ 39-121, 39-121.01

*In re Anderson*, 168 Ariz. 432, 814 P.2d 773 (1991).

*Carlson v. Pima County*, 141 Ariz. 487, 687 P.2d 1242 (1984).

Arizona Rules Criminal Procedure, 26.2(c), 17 A.R.S.

Arizona Judicial Ethics Advisory Committee, Opinions [85-01](#) (1985); [94-03](#) (Feb. 18, 1994); [95-15](#) (Aug. 3, 1995); [96-01](#) (Feb. 23, 1996).

Jeffrey M. Shaman, Steven Lubet & James J. Alfani, *Judicial Conduct and Ethics* (2d ed. 1995).