

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

Opinion 99-03
(July 23, 1999)

**Use of Police Report for Pretrial Release Determination
Clarification of Opinion 97-11**

Issues

Is it ethically improper for a judge to review and consider information contained in a police report or release questionnaire in determining pretrial conditions of release of an in-custody defendant and in determining whether to appoint a public defender in a particular case?

Answer: No.

Facts

Judges in a municipal court routinely see in-custody defendants for initial appearances or arraignments without prosecutors present. At that court appearance, judges sometimes consider police reports in deciding conditions of release and whether to appoint a public defender in a particular case. In addition, judges usually consider information concerning circumstances of the offense and the arrest contained in a release questionnaire, which is completed in part by police and in part by the defendant. Judges also often ask the defendants whether they have anything to add to the information in the questionnaire.

Discussion

This inquiry was prompted by Opinion 97-11, which addressed, *inter alia*, courts' use of a police report in a pending case when the report has not been admitted into evidence in that case. In response to the second issue in that opinion, we stated that courts generally should not review and consider information in unadmitted police reports except in connection with pretrial motions or for sentencing purposes. We further stated that "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) of the Code of Judicial Conduct." We went on to recognize, however, that Canon 3B(7)(e) permits a judge to "initiate or consider any *ex parte* communications when expressly authorized by law to do so." We further noted that the term "law" denotes "court rules as well as statutes, constitutional provisions and decisional law."

The exception provided by Canon 3B(7)(e) applies to the issue raised here. Whether the defendant is separately arraigned under the Arizona Rules of Criminal Procedure ("Rule"), Rule 14 or in conjunction with the initial appearance under Rule 4, the judge must determine the conditions of release pursuant to Rule 7. *See* Ariz. R. Crim. P. R. 4.2(a)(6), 14.3(b). Pursuant to Rule 7.4(c), release determinations "may be based on evidence not admissible

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under the rules of evidence.” In addition, A.R.S. §13-3967(C) provides, in part: “In determining the method of release or the amount of bail, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of evidence against the accused,” and other prescribed factors. Thus, judges have broad latitude, and in fact are required, to consider any “available information” for evaluating the various factors in making release and bail determinations. The “available information” may include police reports, and “[i]nformation stated or offered in connection with any order pursuant to [§13-3967(C)] need not conform to the rules pertaining to admissibility of evidence in a court of law.” A.R.S. §13-3967(H).

To assist the court in fulfilling its duty under A.R.S. §13-3967(C), our supreme court has approved and adopted a “Release Questionnaire.” See Ariz. R. Crim. P., Form 4. A court’s reference to the police report may be useful or necessary for the purpose of supplementing or clarifying information contained in that questionnaire. Therefore, it is not unethical for a judge to refer to a police report at the initial appearance or arraignment stage for the limited purpose of supplementing the release questionnaire and for determining conditions of release, amount of bail, and appointment of counsel. Rather, such use of police reports falls within the exception of Canon 3B(7)(e) because it is “expressly authorized by law.” See *San Carlos Apache Tribe v. Bolton*, 194 Ariz. 68, 977 P. 2d 790 (1999). Opinion 97-11 was neither intended, nor should it be construed, to suggest otherwise.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 3B(7) and 3B(7)(e) (1993).

Other References

Arizona Revised Statutes §§13-3967(C) and (H).

San Carlos Apache Tribe v. Bolton, 194 Ariz. 68, 977 P.2d 790 (1999).

Arizona Rules of Criminal Procedure, 4, 4.2(a)(6), 7, 7.4(c), 14, and 14.3(b).

Arizona Judicial Ethics Advisory Committee, Opinion 97-11 (Sept. 24, 1997).