

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2025-03
(Finalized and effective August 12, 2025)

BACKGROUND:

The requesting judge is the presiding judge of a municipal court. She recently received notice from the City Attorney of her jurisdiction that, as of September 1, 2025, that office would no longer provide certain information to the court while cases are pending. Specifically, the City Attorney has concluded that it is likely improper under the Colorado Rules of Professional Conduct for that office to provide the court with information favorable to the prosecution—including police reports, accident reports, driver’s histories, criminal histories, and the like—because that would constitute improper ex parte communication.

The requesting judge has asked whether the court may continue to receive those materials, which the court uses for purposes of setting bond, holding bond hearings, and sentencing.

ISSUE PRESENTED:

Whether courts can receive police reports, accident reports, driver’s histories, criminal histories, etc. from a prosecutor while a case is pending.

SUMMARY:

Under the Colorado Code of Judicial Conduct (“Code”), the court may receive and consider items such as police reports, criminal histories, and driving records as long as expressly authorized by law to do so.¹ The court may do so even when those documents are provided by a prosecutor, but the court should give a copy of any such materials to the defendant’s counsel (or to the defendant personally if they lack counsel).

APPLICABLE PROVISIONS OF THE CODE:

Rule 1.2 provides that “[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”

¹ The Board is only authorized to provide advisory opinions “concerning the compliance of intended, future conduct with the Colorado Code of Judicial Conduct.” Amended C.J.D. 94-01, sec. I. This opinion discusses the court’s ability to receive certain documents from prosecutors. It does not discuss any ethical obligations the prosecution may have to comply with the Colorado Rules of Professional Conduct, nor does it address how the court can obtain these documents if not through the prosecutor, as those questions fall outside of the Board’s authority.

Rule 2.3(A) states that “[a] judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.”

Rule 2.9 of the Code addresses ex parte communication. It directs that “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 under certain exceptions. As pertinent here, subsection (A)(5) provides, “A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law or by consent of the parties to do so.” Separately, subsection (C) states that “A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.”

ANALYSIS:

A judge is generally prohibited from engaging in ex parte communications about pending or impending matters. “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.’” *In re Thoma*, 873 S.W.2d 477, 496 (Tex. Rev. Trib. 1994) (alteration in original) (quoting JEFFREY M. SHAMAN, ET AL., JUDICIAL CONDUCT AND ETHICS, § 6.01 at 145 (1990)).

The requesting judge informs the Board that, historically, the court has received certain documents from prosecutors upon the filing of a criminal case. The documents the judge mentions include police reports, accident reports, driver’s histories, and criminal histories; and the court then adds those documents to the court’s online case management system. The judge notes that these documents are used for three primary purposes: (1) to determine the type and amount of bond to set when a defendant fails to appear for court; (2) for so-called “Jail Videos,” or bond hearings, for defendants in custody, to whose counsel the documents were provided in order to allow effective representation;² and (3) to determine the appropriate sentence to impose on criminal defendants who have pled guilty or been convicted.

This Board has not previously considered the issue presented here, but a number of other jurisdictions have addressed it. *See, e.g.*, NY Jud. Eth. Adv. Op. 15-85 (considering whether a judge may review a defendant’s driving history before accepting or rejecting a proposed plea agreement in a traffic law matter); NE Jud. Eth. Adv. Op. 19-1 (considering whether a judge may meet with a representative of the county attorney’s office in order to discuss affidavits for warrantless arrest and criminal histories of persons arrested without warrant for the purposes of setting appearance bonds for those arrestees); FL Jud. Eth. Adv. Op. 2007-19 (considering whether a judge may review sworn arrest reports and other probable cause documents before a defendant’s first appearance hearing); AZ Jud. Eth. Adv. Op. 97-11 (considering whether a judge can ethically review and consider information in a police report while a case is pending when that report has not been admitted into evidence).

² The requesting judge notes that counsel for the accused use the materials to provide legal advice on whether to accept pleas, to make sentencing arguments, or to request bond modifications and continuances. The judge also points out that “it is routine practice for cases to be resolved at Jail Videos in Municipal Court.”

To begin with, the requesting judge does not appear to contest that receiving the documents at issue does constitute ex parte communication. Other jurisdictions have agreed that a judge's review of police reports, driver's histories, and criminal histories either does, or at least may, constitute ex parte communication. *See, e.g.*, NE Jud. Eth. Adv. Op. 19-1 (concluding that a judge's review of an arrest affidavit "may be an ex parte communication"); NY Jud. Eth. Adv. Op. 09-96 (concluding that "a judge who reviews a defendant's criminal record and/or driver's abstract may be, in certain circumstances, engaging in ex parte communication"); FL Jud. Eth. Adv. Op. 2007-19 (assuming, for purposes of the opinion, that the sworn arrest reports and other probable cause documents being provided to the court by the state qualify as ex parte communications); AZ Jud. Eth. Adv. Op. 97-11 (determining that "a judge's review of police reports not offered as evidence constitutes 'ex parte communications'" for purposes of the Arizona Code of Judicial Conduct). We agree with these jurisdictions and conclude that, as described by the requesting judge, the communications at issue are ex parte. As presented here, the judges of the municipal court are receiving information from prosecutors without the involvement of the defendants. Thus, unless the communication falls under one of the exceptions in the Code, it is prohibited.

Other jurisdictions have consistently concluded that the situation presented here falls within one of the ethical exceptions permitting ex parte communications. Specifically, those jurisdictions have concluded that courts may review such materials when "authorized by law to do so." *See, e.g.*, NE Jud. Eth. Adv. Op. 19-1 (concluding that a judge may properly review an arrest affidavit for the purpose of setting an appearance bond without violating the ethical rules because such ex parte communications are expressly authorized); SC Jud. Eth. Adv. Op. 11-2014 (concluding that under South Carolina law a judge may consider information from an arresting agency for purposes of a bond hearing and is thus "expressly authorized by law" to consider such ex parte communications); FL Jud. Eth. Adv. Op. 2007-19 (concluding that "Florida law expressly allows judges to base their nonadversarial probable cause determinations on a review of sworn arrest reports and other probable cause documents"); AZ Jud. Eth. Adv. Op. 97-11 (concluding that the "[u]se of police reports strictly for sentencing purposes . . . does not violate the Code" because such use is expressly authorized by law).

As previously noted, the Code, like those of these other jurisdictions, includes an exception allowing a judge to permit or consider ex parte communication when expressly authorized by law. Rule 2.9(A)(5). The Code defines "law," stating that it "encompasses court rules and orders as well as statutes, constitutional provisions, and decisional law." Several such laws are implicated here. Under section 16-4-103(5), C.R.S. (2024), when setting bond, courts are permitted to consider, among other things, "[t]he likely sentence, considering the nature and the offense presently charged," and "[t]he prior criminal record, if any, of the person in custody and any prior failures to appear for court." Additionally, section 16-4-104, C.R.S. (2024), provides that prior to the initial hearing, any pretrial services agency operating in the jurisdiction, or any other agency reporting to the court, that has conducted a pretrial assessment or gathered information for the court's consideration can provide the court with the defendant's "arrest warrant, the probable cause statement, and the person's criminal history." Moreover, the criminal code indicates that for purposes of sentencing, a court *must* consider, among other things, the seriousness of any offense committed by the offender, the original charges in the case, and the offender's prior criminal history. *See, e.g.*, § 18-1.3-105(1)(b), C.R.S. (2024) (relating to granting a sentence of home detention); § 18-1.3-203(2), C.R.S. (2024) (relating to the granting of probation).

In this case, the requesting judge has stated that the court uses the provided materials both when setting bond and at sentencing. Thus, at least in those circumstances, a judge's review of the specified documents is "expressly authorized by law."

Whether any other particular ex parte communication is authorized by law is a legal question that is beyond the scope of this Board's authority. The Board notes, however, that irrespective of *how* the court obtains the information, it can and should give copies to the parties, at which point "it is ethical for a judge to review such record(s)." NY Jud. Eth. Adv. Op. 09-96. Generally, as long as both parties are furnished with copies of the documents at issue and given a reasonable time to respond to the information contained therein, a judge can consider the contents of those documents without engaging in prohibited ex parte communications. As a matter of prudence, a judge who receives such documents from either a law enforcement agency or the prosecution should give copies of those documents to the defendant's counsel (or to the defendant personally if they lack counsel). *See*, NY Jud. Eth. Adv. Op. 09-96; AZ Jud. Eth. Adv. Op. 97-11

CONCLUSION:

The Code does not prevent a municipal judge from reviewing materials such as police reports, criminal records, and driving records pertaining to pending cases so long as the use of such ex parte communications is authorized by law. The Board notes that it is best practice for the court to provide any such documents received to any party that did not also receive them.

FINALIZED AND EFFECTIVE this 12th day of August, 2025.

Board Chair Alec Rothrock does not participate in this opinion.