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The Honorable Paula M. Carey
Chief Justice of the Trial Court
John Adams Courthouse
One Pemberton Square, Floor 1M
Boston, MA 02108

Re: Middlesex Superior Court Assistant Clerk Magistrate Michael Brennan

Dear Chief Justice Carey:

Pursuant to its statutory authority under Chapter 12A of the Massachusetts General Laws, the Office of the Inspector General (“Office”) is writing to report upon suspicious banking activity conducted by Assistant Clerk Magistrate Michael Brennan (“Brennan”).

The Office found evidence that Brennan accepted more than \$10,000 in cash as bail from a surety on behalf of an individual charged with a narcotics offense and failed to file a Form 8300 with the Internal Revenue Service (“IRS”) or the Financial Crimes Enforcement Network (“FinCEN”), which is a violation of federal law.¹ Further, evidence suggests that Brennan structured deposits into his bail account so that no single deposit exceeded \$10,000.² As a result, the bank did not file a Currency Transaction Report as required under federal law.³ Moreover, Brennan violated the Rules Governing Persons Authorized to Take Bail (“Bail Rules”) when he commingled his personal funds with bail funds.⁴ Finally, the Office found that Brennan was not forthcoming when speaking with its investigators about the reasons for his suspicious banking practices.

¹ See 31 U.S.C. § 5331 (2011); 26 U.S.C. § 6050I(g) (1996).

² Structuring includes the breaking down of a single sum of currency exceeding \$10,000 into smaller sums, including sums at or below \$10,000, and depositing the money in a financial institution. Structuring violates federal law if it is done with knowledge of the currency reporting requirements and for the purpose of evading such requirements. *United States v. MacPherson*, 424 F.3d 183, 188-189 (2d Cir. 2005).

³ See 31 U.S.C. § 5313(a) (1994); 31 C.F.R. § 103.22(b) (2008).

⁴ See Rule 39 of the Rules Governing Persons Authorized to Take Bail (1996).

Assistant Clerk and Bail Magistrate Michael Brennan

Brennan has been an assistant clerk magistrate at the Middlesex Superior Court in Lowell since 1979. Brennan was first appointed as a bail magistrate in 1984 and was assigned to admit bail in Middlesex County. As a bail magistrate, Brennan was authorized to release individuals in custody on bail if he found that such release would assure the person's appearance in court and would not endanger the safety of any other person or the community.⁵ Brennan maintained a dedicated checking account for depositing and transferring bail proceeds, named "Middlesex Superior Court Cash Bails," with TD Bank.

As a bail magistrate, he performed the same bail duties as a judge or clerk magistrate, except that he typically held bail hearings at night or on weekends, in police stations or other places of detention where a person under arrest is held.⁶ In exchange for his services, Brennan was eligible to receive a fee of up to \$40 from each arrested person released on bail or recognizance.⁷ Brennan was also responsible for the timely transmission to the courts of all "recognizances, certificates (affidavits) of sureties, other necessary documents, and all money, bank books and bonds . . . deposited with him."⁸

Brennan reported to Michael McEneaney ("McEneaney"), the former State Bail Administrator, who oversaw approximately 230 bail magistrates and 54 bail commissioners statewide. The Bail Rules in effect at the time of Brennan's suspicious banking activities required bail magistrates and commissioners to send the bank records from their dedicated bail accounts to the State Bail Administrator.⁹

In May 2014, after the Office contacted McEneaney, Brennan agreed to voluntarily suspend his appointment as a bail magistrate. At the time, McEneaney informed Brennan that his suspension should remain in effect until further notice.¹⁰ Brennan's suspension is still in effect, but he continues to serve as an assistant clerk magistrate.

Findings

1. Brennan Failed to Disclose to the IRS and the FinCEN that He Accepted Over \$10,000 in Cash from a Surety on Behalf of a Suspected Drug Dealer.

Federal law requires criminal court clerks to report to the IRS and the FinCEN, using a Form 8300, bail received in excess of \$10,000 from a surety on behalf of an individual charged with (1) any federal offense involving a controlled substance; (2) racketeering; (3) money laundering; or (4) any state offense substantially similar to (1), (2) or (3) above.¹¹ The clerk can

⁵ See M.G.L. c. 276, § 57.

⁶ *Quinn v. State Ethics Comm'n*, 401 Mass. 210, 212-214 (1987).

⁷ Rule 12 of the Rules Governing Persons Authorized to Take Bail (1996).

⁸ Rule 39 of the Rules Governing Persons Authorized to Take Bail (1996).

⁹ *Id.*

¹⁰ McEneaney retired in late 2014, but continues to provide consulting services to the Trial Court on bail matters.

¹¹ 31 U.S.C. § 5331 (2011); 26 U.S.C. § 6050I(g) (1996). See also IRS Publication 1544, *Reporting Cash Payment of Over \$10,000 (Received in a Trade or Business)*, available at www.irs.gov/pub/irs-pdf/p1544.pdf; see also

comply with these reporting requirements by submitting a Form 8300 to either the IRS or the FinCEN.¹² The willful failure to file a Form 8300 in these circumstances constitutes a federal felony punishable by up to five years of incarceration.¹³

When interviewed, Brennan admitted that he knew he should file a Form 8300 in drug cases. Nevertheless, on April 13, 2013, Brennan received \$15,000 in cash as bail for an individual arrested on a controlled substance charge, but the FinCEN's records indicate that he failed to file a Form 8300 with the FinCEN or the IRS.

2. Over the Course of Nine Days in April 2013, Brennan Structured Cash Deposits So That No Single Transaction Exceeded \$10,000.

The Bank Secrecy Act requires U.S. financial institutions to file a Currency Transaction Report ("CTR") for bank transactions of more than \$10,000 in United States currency.¹⁴ "Underlying the [Bank Secrecy Act] was Congress's recognition of the importance of reports of large and unusual currency transactions in ferreting out criminal activity."¹⁵ A violation of federal law occurs when an individual breaks down a single sum of currency exceeding \$10,000 into smaller sums, including sums at or below \$10,000, with knowledge of the CTR requirements and for the purpose of evading such requirements.¹⁶ Under the caselaw, a fact-finder may infer that the defendant has the requisite knowledge and intent to evade the CTR requirements based, in part, on a pattern of structuring.¹⁷

The Office compared the bail recognizance sheets for the bails Brennan set from March 2013 through May 2013 with his bail account records from the same time frame. The Office identified suspicious activity reflected in his bail account during the month of April 2013.

Specifically, between April 8, 2013 and April 15, 2013, Brennan collected \$48,301 in cash bail from 30 individuals arrested for various offenses in Middlesex County. Rather than deposit the bail at the earliest possible time after he collected it, Brennan made five structured deposits into his dedicated bail account at three different TD Bank locations over seven days. The details of the April 2013 bail receipts and deposits are as follows:

IRS/FinCEN Form 8300, *available at* www.irs.gov/pub/irs-pdf/f8300.pdf. The IRS filing requirement has existed since 1996. The FinCEN filing requirement was added on December 23, 2011.

¹² The clerk is also required to notify the appropriate United States Attorney's Office. 26 U.S.C. § 6050I(g)(4) (1996).

¹³ 26 U.S.C. § 6050I(g) (1996); 26 U.S.C. § 7203 (1990) (penalty). *See also* 31 U.S.C. § 5322 (2001) (penalty for failure to file with the FinCEN).

¹⁴ *See* 31 U.S.C. § 5313(a); 31 C.F.R. § 103.22(b) (2008).

¹⁵ *United States v. MacPherson*, 424 F.3d 183, 188 (2d Cir. 2005).

¹⁶ *MacPherson*, 424 F.3d at 188-189.

¹⁷ *Id.*

April 2013: Bail Proceeds Collected and Deposited by Bail Magistrate Michael Brennan

Date	Bail Collected	Deposit Amount	Bank Location	Bail on Hand
4/8/2013	\$3,350.00	\$0.00	Not applicable ("N/A")	\$3,350.00
4/9/2013	\$16,501.00	\$0.00	N/A	\$19,851.00
4/10/2013	\$4,250.00	\$9,000.00	Lowell, MA	\$15,101.00
4/11/2013	\$20,250.00	\$9,000.00	Lowell, MA	\$26,351.00
4/12/2013	\$2,250.00	\$9,000.00	Lowell, MA	\$19,601.00
4/13/2013	\$500.00	\$9,000.00	Arlington, MA	\$11,101.00
4/14/2013	\$500.00	\$7,731.00	Lexington, MA	\$3,870.00
4/15/2013	\$700.00	\$0.00	N/A	\$4,570.00
4/16/2013	\$0.00	\$4,570.00	Lexington, MA	\$0.00

As the above chart shows, on April 10, 2013, Brennan only deposited \$9,000 in his dedicated bail bank account despite the fact that he had \$19,851 of bail money in his custody and control. The next day, when Brennan went back to the bank, he had \$15,101 in his custody and control – but he only deposited \$9,000. That pattern continued for three more days. Brennan ultimately deposited an amount equal to the cash bails that he had collected.

When questioned, Brennan stated that he did not know why he made four \$9,000 deposits; he said that he just randomly chose the \$9,000 figure. Brennan blamed “bad bookkeeping,” “slacking off” and “stupidity” for his actions. He went on to state that he was tired and had some personal issues he was dealing with that were not work related.

Considering his thirty years of experience as a bail magistrate, and the fact that the Trial Court’s Fiscal Systems Manual specifically states that a bank may file a CTR for deposits over \$10,000, Brennan’s claim that he did not know about the CTR reporting requirements is not credible.¹⁸ Furthermore, Brennan’s efforts to break down his banking transactions into five cash deposits of less than \$10,000 at three banks over seven days appears to demonstrate his intent to avoid triggering a CTR, which would constitute a federal offense.¹⁹

However, even if Brennan’s conduct were not ultimately found to be a violation of federal law, his retention of thousands of dollars of cash – which Brennan could have deposited during the three times in one week that he was at the bank – is an unreasonable action and creates the appearance of impropriety and unwarranted privilege.

3. Brennan Commingled Personal Funds with Bail Funds.

A review of Brennan’s bail magistrate bank account records from January 2007 to June 2013 showed that Brennan commingled over \$9,000 worth of personal checks with the bail

¹⁸ See Office of Court Management, Fiscal Affairs Department, Fiscal Systems Manual, Section 1, Page 6 (Eff. Date 2/1/13).

¹⁹ See 26 U.S.C. § 6050I(f)(1)(c) (1996). See also *MacPherson*, 424 F.3d at 183 (the jury could have inferred that the defendant knew of and intended to evade reporting requirements for cash transactions exceeding \$10,000 when he made 32 cash deposits at three banks, structured so that no single transaction exceeded \$10,000).

proceeds he collected. Brennan received checks from various individuals and organizations, unrelated to his duties as a bail magistrate. Rather than depositing the personal checks into his private checking account, Brennan took cash from the bails he collected and substituted the personal checks into his bail magistrate account. Brennan's conduct violated Rule 39 of the Bail Rules, which states in part, "[i]f a person authorized to take bail maintains a bank account for depositing and transferring bail funds to the appropriate courts, it shall be used exclusively for that purpose" As a result, Brennan breached his professional duties and responsibilities as a bail magistrate by mixing his personal funds with the bail proceeds.

In an interview with investigators from this Office, Brennan claimed that he did not know that commingling bail proceeds with his personal funds was wrong. Since as early as 1996, the Bail Rules have required bail magistrates to keep bail funds separate from all other funds.²⁰ Brennan had a duty to know the rules that governed his bail magistrate activities.²¹

Additionally, McEneaney said that he did not know that Brennan commingled funds until the Office brought it to his attention. He reported that he knew the Bail Rules prohibited combining personal and bail funds. A review of Brennan's monthly bank statements covering a six-year period showed a consistent pattern of commingling funds. Because McEneaney did not adequately examine Brennan's monthly banking statements and bail sheet reports, Brennan was able to commingle funds for years without notice or repercussion.

4. Brennan Received No Formal Training as a Bail Magistrate.

According to Brennan, he received no formal training on the rules, regulations and laws pertaining to the roles and responsibilities of a bail magistrate at any time during his thirty years of service. Brennan said that when he was appointed as a bail magistrate, a clerk from the Cambridge District Court took him around and "showed him the ropes" for two weeks. After the two weeks of hands-on training ended, Brennan began his tenure as a bail magistrate. Brennan relied upon his experience as an assistant clerk magistrate as the basis for his understanding of how the bail process works within the Massachusetts judicial system. It was only in June 2014 that the Office of the Bail Administration provided Brennan a manual on the updated Bail Rules, which took effect in July 2014.

Conclusion

The Commonwealth is ultimately responsible for any mismanagement of bail money.²² This Office found evidence that Brennan may have violated federal law by failing to file a Form 8300 in April 2013. Further, Brennan potentially violated federal law by structuring deposits of bail money so that no deposit exceeded \$10,000. He had access to a large amount of cash and he did not handle it properly. Moreover, between January 2007 and June 2013, Brennan repeatedly commingled bail proceeds with personal funds, thereby violating Rule 39 of the Bail Rules. As a

²⁰ Rule 39 of the Rules Governing Persons Authorized to Take Bail (1996).

²¹ Rule 4 of the Rules Governing Persons Authorized to Take Bail (1996).

²² Office of Court Management, Fiscal Affairs Department, Fiscal Systems Manual, Section 1, Page 6 (Eff. Date 2/1/13).

result, Brennan's actions exposed the Commonwealth to potential liability and the Trial Court to potential theft.

Recommendations

Based on its review of Brennan's banking practices related to his bail account, this Office recommends the following:

1. The State Bail Administrator should review Brennan's actions to determine if he violated any additional laws, regulations or rules, and she should institute disciplinary proceedings as deemed appropriate.
2. The State Bail Administrator should review bail magistrates' and commissioners' monthly bail sheets and the Form 8300s that each bail magistrate and commissioner is required to retain for five years to determine whether any bail magistrates, including Brennan, or commissioners failed to file the required Form 8300 on other occasions. This inquiry should focus on cash bail collected during the past five years from individuals arrested on an offense involving a controlled substance, money laundering or racketeering when bail was set at or above \$10,000. If other violations are found, the Bail Administrator should institute disciplinary proceedings as deemed appropriate and should refer the matter to the IRS and the FinCEN.
3. The State Bail Administrator should provide adequate, ongoing training to all bail magistrates and commissioners on the laws, rules and regulations regarding the procedures for handling bail money, including the obligation to file certain disclosures.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Glenn Cunha
Inspector General

cc: The Honorable Judith Fabricant, Chief Justice of the Superior Court
Daniel Sullivan, Esq., General Counsel, Executive Office of the Trial Court
Maria Pena, Esq., General Counsel and Associate Court Administrator, Superior Court
Administrative Office
Catherine Coughlin, Esq., State Bail Administrator