ADVISORY OPINION

Code of Judicial Conduct **# 2-17**
Canon 2

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judiciary disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

Rule 2.9 of the Code of Judicial Conduct prohibits judges from engaging in *ex parte* communications or independently investigating facts in a matter other than those that may properly be judicially noticed pursuant to Indiana Rule of Evidence 201. While judges seek to adhere to this prohibition, there are some situations in which it is important for judges to be aware of other existing cases and orders involving the parties before them.

May judges who are presented with *ex parte* petitions for no contact orders, protection orders, or restraining orders take judicial notice of the records of other cases and other courts (whether by electronic means or otherwise) to determine whether there are outstanding cases and orders involving the same parties? Does this analysis change when judicial notice of the records of other cases or courts is taken while a judge is presiding over a hearing on the record?

The Commission's view is that judges are ethically permitted to take judicial notice of the records of other cases and courts involving the same parties, and to search online databases, such as those available at mycase.in.gov, to determine the existence of such records. The actions detailed in question (1) should fall squarely within one of the *ex parte* exceptions listed in Rule 2.9(A) so long as the parties are later provided with notice and an opportunity to be heard. For proceedings on the record, the parties should be provided with notice and an opportunity to respond before judicial notice of other court or case records is taken.

ANALYSIS

The Commission's Advisory Opinions #1-01 and #1-15 both concern the appropriate judicial response to requests for *ex parte* orders; however, these opinions specifically do not address *ex parte* orders restraining an individual's conduct. *See* Advisory Opinion #1-01 at 5, fn. 1 ("This opinion does not directly apply to proceedings which may involve custody issues but which properly are *ex parte*, such as protective order cases…").

***Ex Parte* Proceedings**

Rule 2.9 of the Code of Judicial Conduct generally prohibits judges from initiating, permitting, or considering *ex parte* communications and from independently investigating the facts of a matter. This prohibition contains certain exceptions, outlined below.

A. Scheduling, Administrative, or Emergency Purposes

Section (A)(1) allows a judge to engage in *ex parte* communications "for scheduling, administrative, or emergency purposes" when "circumstances require it," as long as the judge reasonably believes neither party will gain an advantage from the contact *and* the judge promptly notifies the parties and gives them an opportunity to respond.

B. When Authorized by Law

Section (A)(5) of Rule 2.9 also allows for an exception when the *ex parte* communication is "expressly authorized by law." Certain Indiana Code provisions allow a judge to issue an *ex parte* order when an emergency exists, such as would typically be found in cases involving juvenile matters[1], child maltreatment[2], domestic or family violence[3], or workplace violence.[4] Those laws empower judges to immediately issue orders restraining the conduct of a person to protect the safety of another without first holding a hearing.

C. Judicial Notice

Although Section (C) of Rule 2.9 generally prohibits a judge from investigating facts independently (including information available through electronic means, cmt. 6), judges can consider any facts that may properly be judicially noticed. Indiana Rule of Evidence 201 specifically empowers judges to judicially notice the existence of "records of a court in this state," both as facts and as laws.[5] Further, Rule 201 allows a court to take judicial notice on its own, at any stage of the proceeding, and even contemplates *ex parte* situations by stating in section (e) that if "the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard."

Consulting an online database such as mycase.in.gov, INcite, or the Odyssey case management system, whether to schedule a hearing in a civil protection order case, to determine whether the

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[1] Ind. Code § 31-32-13-7.
[2] I.C. § 31-34-2.3-2.
[3] I.C. §§ 34-26-5-9 (a) and (b).
[4] I.C. §§ 34-26-6-6 and -7.
[5] Before 2009, Indiana trial courts were prohibited from taking judicial notice of their own records in another case, even when both the subject and the parties were related. *See, e.g.* Whatley v. State, 847 N.E.2d 1007, 1009 (Ind. Ct. App. 2006) ("… it is widely recognized that a trial court may not take judicial notice of its own records in another case previously before the court even on a related subject with related parties."). However, since its amendment in 2009, Evid. R. 201(a)(2)(C) has permitted trial courts to take judicial notice of "records of a court of this state."

parties have another case pending, or to check the terms of an existing order restraining the conduct of a person, would likely fall within one of the exceptions to Rule 2.9 outlined above.

While a judge considering an *ex parte* petition for a civil protection order is permitted to consult online databases or other court records to inform himself or herself about the existence of (or terms of) another court order, the judge must later notify the parties and offer them an opportunity to be heard in order for the judge to remain within the safe harbor of this exception. In addition, the judge's ability to take notice of the *existence* of other records involving the parties, such as petitions for protective orders, does not mean the judge can take judicial notice of the facts alleged within the petition. *See, e.g.* Withers v. State, 15 N.E.3d 660 (Ind. Ct. App. 2014) (judicial notice permitted, but "does not mean that the facts within" records were conclusive); Twin Lakes Reg. Swr. Dist. v. Teumer, 992 N.E.2d 744 (Ind. Ct. App. 2013) (disputed facts within judicially-noticed report were not suitable for judicial notice).

The Indiana Court of Appeals has upheld a judge's examination of records of a party's prior civil protection order, even when these records were not admitted in a pending paternity case. In In Re Paternity of P.R., 940 N.E.2d 346, 350 (Ind. Ct. App. 2010), the Court of Appeals found no error in the judge's decision to examine court records relating to Mother's civil protection order against her boyfriend, even though this examination occurred *after* the hearing in the paternity matter, because the judge later informed the parties of his actions and provided them with an opportunity to respond.

The Court of Appeals did caution in its opinion that "the better course of action would have been for the court to have given the parties notice and an opportunity to be heard before taking judicial notice and issuing its order … *where practicable*, we believe that the best practice is for courts to notify the parties before taking notice of and issuing a ruling which utilizes this information." Id. at 350 (emphasis added). The Commission agrees that the best practice is for judges to notify the parties before taking judicial notice and issuing any orders; however, a judge who acts under a genuine belief that an emergency exists should not be penalized under the Code for taking *ex parte* judicial notice of prior court records involving the same parties.

Prior Indiana cases have examined the scope of judicial notice, finding that much wider latitude is granted when the trial court (rather than the jury) is the finder of fact, as is the case in *ex parte* petitions for orders restraining the conduct of a person. *See, e.g.* Belcher v. Buesking, 371 N.E.2d 417 (Ind. App. 1978); Beech v. State, 486 N.E.2d 606, 608 (Ind. Ct. App. 1985).

Other states have also afforded great deference to trial court judges who take judicial notice of court records *ex parte*. In Florida, Fla. Stat. § 90.204(1) allows judges who preside over family law cases to take judicial notice of court records and notify the parties later, "when imminent danger to persons or property has been alleged and it is impractical to give prior notice to the

parties of the intent to take judicial notice." Minnesota's counterpart to Indiana's Commission on Judicial Qualifications recommended a similar approach in its recent advisory opinion on this topic. *See* Minn. Bd. Jud. Standards Advisory Op. 2016-2, *Judicial Notice of Electronic Court Records in OFP Proceedings*. The Commission's interpretation of Rule 2.9 seeks consistency with the guidance offered in states that have adopted a similarly-worded rule.

Proceedings on the Record

Judges may need to check the records of other cases and courts in non-emergent civil and criminal cases as well. The Indiana Supreme Court's recent promulgation of Criminal Rule 26 permits judges to use evidence-based risk assessment tools to determine a defendant's pretrial release status; this makes it more important than ever for judges to be able to access court records to gather the information necessary to make a meaningful ruling.

It is the Commission's view that consulting an online database such as mycase.in.gov, INcite, or the Odyssey case management system, whether to check the terms of an existing order restraining the conduct of a person or to determine whether a defendant has other criminal cases pending in another county, does not violate the Code of Judicial Conduct so long as the judge (or court staff) indicates *on the record* that such a search has been conducted and shares the results in open court with both parties.

CONCLUSION

In general, a judge who takes judicial notice of his or her own court's, or another court's, records pursuant to Indiana Rule of Evidence 201, complies with Rule 2.9 of the Code of Judicial Conduct.

A judge considering an emergency *ex parte* petition for a juvenile protection order, a child protection order, a civil protection order, or a workplace violence restraining order may, without advance notice to the parties, review electronic court records to determine whether there are other cases (or orders) involving the protected person(s) or the person whose conduct is sought to be restrained. A judge presiding over a case on the record, when both parties have been given notice and an opportunity to be heard, may also review and take judicial notice of court records.

In both situations, if the judge does consult court records, the judge must notify the parties as soon as is practical and give them an opportunity to be heard on the propriety of judicial notice.