

**NORTH DAKOTA JUDICIAL ETHICS ADVISORY COMMITTEE
OPINION 2022-1**

ISSUES

1. Is a court-appointed guardian an officer of the court subject to the court's control, rather than a party with an interest in the proceeding or an issue subject to factual dispute in the matter?
2. Whether, in a guardianship case (initial appointment or review), Rule 2.9 is implicated when the Judge gains information from discussions with other judges, court staff, and committees as well as a public judgment against the guardian?
3. Would the Judge's impartiality be reasonably questioned under Rule 2.11?

FACTS

A civil judgment was issued against Company A and the opinion circulated to state judges. Judge read the civil opinion which disclosed alleged misconduct by Company A. Judge is assigned to guardianship matters in which Company A is the court-appointed guardian.

ANALYSIS

- 1. Is a court-appointed guardian an officer of the court subject to the court's control, rather than a party with an interest in the proceeding or an issue subject to factual dispute in the matter?**

A "guardian" is "a person who or nonprofit corporation that has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, and includes limited guardians as defined in this section, but excludes one who is merely a guardian ad litem." N.D.C.C. § 30.1-01-06(22). A guardian is a fiduciary and owes a high degree of good faith to the ward. N.D.C.C. § 30.1-01-06(18) and Matter of Mangnall, 1997 ND 19, ¶ 11, 559 N.W.2d 221.

2. A guardian is a fiduciary, and, as an officer of the court appointing him, he is subject to the orders and directions of that court. Generally speaking, his standard of conduct may be summarized thus: 'In the discharge of his duties a guardian is bound to exercise reasonable care and diligence, in other words, such care and diligence as persons of ordinary care and diligence as persons of ordinary care and diligence usually exercised in their own affairs of a like nature and under similar circumstances.

3. A guardian has no title to or personal interest in his ward's property. His authority to deal with it is limited to his capacity as a fiduciary. His possession is for the

limited purpose of executing his trust, which clearly must be for the benefit of his ward.

Hoverson v. Hoverson, 12 N.W.2d 497, 500 (Minn. 1943) (internal citations omitted).

“A guardianship is a trust relationship of the most sacred character, in which one person, called a ‘guardian,’ acts for another, called the ‘ward,’ whom the law regards as incapable of managing his own affairs. The purpose of statutes relating to guardianship is to safeguard the rights and interests of minors and incompetent persons, and the courts should be vigilant to see that the rights of such persons are properly protected. The court having jurisdiction of a guardianship matter is said to be the superior guardian, while the guardian himself is deemed to be an officer of the court.”

Grayson v. Linton, 125 P.2d 318, 320 (Idaho 1942) (quoting 25 Am.Jur., sec. 2, page 7); see also Seattle-First Nat’l Bank v. Brommers, 570 P.2d 1035, 1041 (Wash. 1977), In re Disciplinary Proceeding Against Petersen, 329 P.3d 853, 860 (Wash. 2014).

The court has the obligation to appoint a guardian in accordance with the best interests of the ward. The court is given oversight over the guardians in the absence of a separate board to do so. Administrative Rule 59 provides the requirements a guardian must meet in order to be eligible to be appointed a guardian in North Dakota. The guardian is not a party with an interest in the action like a party typically would be in a case such as a contract collection action or a divorce action. This is particularly true in a case in which there are not multiple qualified guardians seeking appointment. Instead, the guardian is an officer of the court having a duty to be forthright and honest with the court. The guardian’s role is to act in the best interests of the ward and provide annual accountings of the actions undertaken by the guardian in this role. The court has a duty to periodically review the actions of the guardian and determine whether the appointed guardian is still the best-suited for the appointment. See N.D.C.C. ch. 30.1-28.

2. Whether, in a guardianship case (initial appointment or review), Rule 2.9 is implicated when the Judge gains information from discussions with other judges, court staff, and committees as well as a public judgment against the guardian?

Canon 2, Rule 2.9 of the Code of Judicial Conduct governs ex parte communications, including consideration of facts outside of evidence presented.

Rule 2.9 states, in part:

B. If a judge inadvertently receives unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the subject matter of the communication and provide the parties with an opportunity to respond.

C. Except as otherwise provided by law, 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.

A hypothetical presented in ABA Formal Opinion 478 is as follows:

Hypothetical #5: To render an accurate decision in a pending matter, a judge needs to know whether a party is or was the subject of other judicial proceedings. The judge searches the court's electronic files of other cases and the facts of each case, including sealed information. The search reveals other cases, some pending and some concluded and some within and some outside the judge's jurisdiction. Does the judge's search violate Rule 2.9(C) of the Model Code of Judicial Conduct?

Analysis #5: Model Rule 2.9(C) does not prohibit consideration of "facts that may properly be judicially noticed." For example, a judge may take judicial notice of a guilty plea entered before the judge in a previous case and other court records maintained by the clerk of the court in which the judge sits. Court records can be judicially noticed for their factual existence, and the occurrence and timing of matters like hearings held and pleadings filed, but not for the truth of the allegations or findings therein. "[T]he law treats different portions of the files and records differently." Standards of judicial notice require the judge to give notice and an opportunity to be heard either before or after taking judicial notice. Again, each judge should determine the law of judicial notice in the applicable jurisdiction.

The Indiana Commission on Judicial Qualifications issued an advisory opinion regarding Rule 2.9 and Rule 201.

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.

The commission stated "[c]onsulting 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 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. . ." However, the judge must provide the parties notice and an opportunity to be heard regarding the records. "[M]uch 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."

The commission determined that checking a database such as Odyssey does not violate the code as long as the judge "indicates on the record that such a search has been conducted and shares the results in open court with both parties." "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."

Here, Judge may have received communication from other judges, staff, or committees bearing on the substance of a matter (assuming a matter was pending or impending at the time of the discussions). If so, Judge should comply with the requirements of Rule 2.9(B) by making provision promptly to notify the parties of the subject matter of the communications and providing the parties with an opportunity to respond. In addition, another court in the state has issued an opinion regarding conduct of Company A. This opinion is a matter of public record and was circulated to judges within the state. Such an opinion would not constitute ex parte communication and would be the appropriate subject of judicial notice under North Dakota Rule of Evidence 201.

3. Would the Judge's impartiality be reasonably questioned under Rule 2.11?

Canon 2, Rule 2.11(A)(1) states:

A judge shall disqualify in any proceeding in which the judge's impartiality might reasonably be questioned including the following circumstances:

- (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

Personal knowledge is not defined. In State v. Dorsey, 701 N.W.2d 238 (Minn. 2005), the Minnesota Supreme Court determined that it is a narrow prohibition.

[T]he word "personal" should be interpreted according to its common usage. "Personal" is primarily defined as "of, relating to, or affecting a person," and is regarded as synonymous with "private." Webster's Ninth New Collegiate Dictionary 877 (1987). "Private," in turn, is defined as "restricted to the individual or arising independently of others." *Id.* at 936. For the purposes of Canon 3D(1)(a), "personal knowledge" pertains to knowledge that arises out of a judge's private, individual connection to particular facts. We conclude that it does not include the vast realm of general knowledge that a judge acquires in her day-to-day life as a judge and citizen.

A judge is presumed to be unbiased and not prejudiced. State v. Jacobson, 2008 ND 73, ¶ 13, 747 N.W.2d 481. "A judge's disqualification decision is directed by the North Dakota Code of Judicial Conduct." *Id.* at ¶ 7 (citing Sargent County Bank v. Wentworth, 500 N.W.2d 862, 877 (N.D. 1993)). When a judge's impartiality could be reasonably questioned, a judge must disqualify himself or herself. *Id.* (citing N.D. Code Jud. Conduct Canon 3(E)(1) (Rule 2.11 in the current Code of Judicial Conduct is largely a restatement of prior Canon 3(E))). The North Dakota Supreme Court has stated the test as follows:

An objective standard is used to determine whether a judge must recuse himself. Brakke, 512 N.W.2d at 721. "[T]he judge must determine whether a reasonable person could, on the basis of all the facts, reasonably question the judge's impartiality." *Id.* "Even without intentional bias, disqualification can be essential to satisfy the appearance of justice." Wentworth, 500 N.W.2d at 877-78.

Jacobson, 2008 ND at ¶ 7. The list in Rule 2.11(A) is not exhaustive and disqualification is required if a judge's impartiality "might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply." Rule 2.11, cmt. 1.

While a judge has a duty to recuse as required, the judge also has a duty not to recuse when the circumstances do not require it. Jacobson, 2008 ND 73 at ¶ 13. "Although it has been said that judges should err on the side of caution and always disqualify themselves in cases raising 'close questions,' recusal is not required in response to spurious or vague charges of partiality. Farm Credit Bank of St. Paul v. Brakke, 512 N.W.2d 718, 721 (N.D. 1994) (internal citations omitted).

In this case, it is likely that many of the judges in the district, if not the state, are aware of the opinion. However, someone will need to preside over the guardianship cases in which Company A is appointed. The opinion was provided to Judge within Judge's day-to-day life as a judge and would not be "personal knowledge." The Judge in this case must determine if they can be impartial despite having read the opinion.

CONCLUSION

A guardian does not have an interest in a guardianship action in the same manner as a plaintiff or defendant in a contract collection or divorce action. A guardian is appointed by the court to act in the best interests of the ward. The court maintains oversight responsibility over the guardian and the ward. In providing this oversight, it is important that the court be aware of other cases in which the guardian is involved. The court may take judicial notice of those other matters, including an opinion issued by another judge within the state. However, Judge must determine for themselves if they can be impartial despite the information learned from the other matter. If Judge can be impartial, they should remain on the case but indicate that they have reviewed the opinion from the other matter and provide both sides an opportunity to be heard.