ADVISORY OPINION

Code of Judicial Conduct **#1-01**
Canon 3
***Ex Parte* Custody Orders**

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 judicial 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

The issue in this Advisory Opinion is the appropriate judicial response to an *ex parte* child custody request in which a party seeks a temporary custody order without prior notice or an opportunity for a hearing afforded any other party with a legal interest. It focuses on the application of Trial Rule 65(B), governing temporary restraining orders, and its pertinence in the contexts of legal separations, dissolutions, post-dissolutions, guardianships, or adoptions, when a party requests a custody order without notice or a hearing.[1]

The Commission concludes that a judge must follow T.R. 65(B) when petitioned for an *ex parte* temporary custody order; otherwise, the judge violates Canon 3B(8) of the Code of Judicial Conduct prohibiting improper *ex parte* contacts, as well as Canons 1 and 2 of the Code, which require judges to uphold the integrity and independence of the judiciary, to respect and comply with the law, and to act at all times in a manner which promotes the public's confidence in the integrity of the court. Lawyers seeking this relief without adherence to the rules may violate Rule 3.5(b) of the Rules of Professional Conduct, which prohibits improper *ex parte* communications by lawyers. *See Matter of Anonymous*, 729 E.2d 566 (Ind. 2000).

ANALYSIS

This opinion does not represent a change or evolution in the Commission's views or in its interpretation of the relevant sections of the Code of Judicial Conduct. Rather, the opinion is generated by a substantial number of ethics complaints reviewed by the Commission in which judges have granted *ex parte* temporary child custody petitions which may state insufficient grounds for extraordinary relief or, in any case, where the judge does not adequately ensure the fairness of the proceedings, which is accomplished

by careful adherence to T.R. 65(B).[2] *Id*.

Trial Rule 65(B) protects against abuses by requiring the petitioner to state by affidavit specific facts showing that immediate and irreparable injury, loss, or damage will result before an adverse party may be heard in opposition, and by requiring the petitioner to certify in writing any efforts made to give notice and the reasons supporting the claim that notice should not be required. It calls for security in a sum deemed appropriate by the court for the payment of costs and damages which may be incurred by a party wrongfully enjoined or restrained. It requires the judge to define the injury in the order, and to state why it is irreparable and why the order was granted without notice. When a temporary restraining order is granted without notice, the court must set it for a hearing at the earliest possible time, giving precedence to it above all other matters.

The cases the Commission has scrutinized indicate a lack of mindfulness that *ex parte* requests and resultant orders affecting custodial rights are extraordinary, and that the relief depends upon the existence of exigent circumstances – irreparable injury, loss, or damage without immediate relief. A request for emergency relief should not supplant what in reality constitutes a standard invocation of the court's powers through the trial rules, which rules generally are premised on the notion that a fair proceeding involves the commencement of a proceeding, reasonable notice, and a chance to be heard on the merits by any party with a legal interest before judicial action occurs. Judges and lawyers should proceed with meticulous attention to T.R. 65(B) whenever emergency custody is requested, whether upon the commencement of an adoption proceeding, a guardianship of a child, a legal separation or divorce, or a post-dissolution modification. Inattention to the extraordinary nature of the relief, and to the procedural demands the rules impose, undermines judicial fairness and integrity, and the public's trust.

The circumstances leading to the ethics inquiries reviewed by the Commission sometimes involve a non-custodial parent who, instead of returning a child after a visitation period, determines he or she wants custody – a modification – and files for, and obtains, immediate custody. The custodial parent, perhaps out-of-state, discovers only after the fact that an Indiana court has suspended the parent's custodial rights to their children. The parent then is compelled to make arrangements to obtain counsel, travel to Indiana for an immediate hearing, if the judge has expedited the case as required, and, if not, or if a continuance is needed for preparation, the custodial rights are suspended even longer. Of course, many are without the resources to defend the action at all.

Sometimes all the parties are local residents, and, perhaps, both have attorneys. The proceeding may be a new dissolution, or a guardianship or adoption. What is wrong is when an *ex parte* custody decision is made absent truly emergency circumstances and without regard to the details of T.R. 65(B). When this occurs, the perception is that custodial rights have been affected based only upon whether the petitioner has won a "race to the courthouse."

The Commission's intention is not to curtail the proper exercise of broad judicial discretion, nor do the members intend to substitute their judgments for that of a judge who finds on some rational basis that circumstances warrant emergency relief. The Commission members hope to improve and promote the

integrity of our judiciary, and to help promote the public's confidence in the judiciary, by alerting judges, and lawyers, to the stringent and imposing ethical duties judicial officers undertake when considering whether to affect custodial rights *ex parte*. In considering a request for emergency custody of a child, or any other request under T.R. 65(B), a judge should be as cautious with the rights of the opposing party as with scrutinizing the merits of the petition.

A petitioner for a temporary restraining order under T.R. 65(B) must establish not only the potential for irreparable harm, but that the harm will occur before an adverse party may be heard; the petitioner must certify also what efforts at notice have been made and why notice is not required. A judge should carefully determine whether these elements are established. While the Commission hesitates to suggest a list of circumstances which the members would not favor, some examples may be helpful.

Many times, of course, these petitions present compelling reasons for an eventual custody order; yet, if the pleading really is a request for custodial rights, whether or not captioned as an emergency, it should not be treated as an emergency. An *ex parte* custody order is not properly a means to initiate a modification proceeding or to obtain an advantage in a subsequent petition on the merits of modification or other custody issue. Again, the custody request may be in the context of an adoption or guardianship, and not necessarily a dispute between two parents. Those proceedings, like modifications, presumably are not adjudicated without first providing any interested party the right to be heard, including on an interim custody issue. In those cases, too, petitioners for *ex parte* relief must set out a verified claim that irreparable injury will result without the emergency relief.

A claim that the custodial parent has violated an existing order, perhaps concerning visitation, should not alone justify emergency custodial relief. Those issues are addressed through the contempt process, or by injunction pursuant to I.C. 31-14-5-1. Similarly, a claim that the custodial parent has decided to move out of state, or that the child has expressed a desire to reside with the petitioner, does not justify emergency relief. These are issues for a modification hearing and for the application of the appropriate standard supporting a modification order.

Also, for example, the desire to enroll a child in school, if it requires custodial rights, does not in the Commission's view, *in itself*, justify a temporary modification of custody before the parent who currently has the custodial rights to make those arrangements has been heard. The petitioner may allege that harm will result if he or she cannot enroll the child, but the requisite potential harm cannot be only a personal or strategic disadvantage or the fact that existing orders keep the party from his or her objectives. Again, the standard is *irreparable harm or injury*. Some real emergency must exist which changes the complexion of the case from one which simply involves a parent who desires a modification and custodial rights, to one possibly warranting emergency action in the petitioner's favor. Even then, T.R. 65(B) must guide the process, providing the safeguards of the affidavit, detailed findings, and an immediate hearing.

Concerning the absence of notice and a hearing in these proceedings, the rule similarly provides safeguards against abuse. The rule requires a showing that irreparable harm will occur before notice may be given or before an adverse party may be heard. It can mean only that, where those representations indicate that

notice and a hearing could be accomplished without harm, they should occur. A judge should insist on notice and a hearing if it is feasible and would not result in the alleged irreparable harm. In other words, there may be no good reason, even under the petitioner's claim, why notice should not be given and a hearing held before a ruling. A simple telephone call to opposing counsel, or to the other parent, and an offer to schedule a hearing before ruling, only promotes the integrity of the process.

In assessing both the sworn statements of the alleged irreparable harm which could result without the order, and the written certifications about notice or reasons for not providing it, if the judge does not insist on an abundance of facts in the pleadings, the judge should be prepared to actively question the petitioner or the petitioner's attorney about these claims. The key inquiries pertain to why the petition is submitted *ex parte*. Where is the other party? What notice has been accomplished? Why should this matter be heard without the opposing party's participation? What exactly is the *irreparable harm* which would result if the case simply is set for a hearing after notice is made? No such potential harm was indicated in the instances investigated by the Commission.

Some judges insist that counsel bring in the petitioner to discuss these aspects of the petition. Other judges have expressed concern that these recommended discussions themselves constitute improper *ex parte* contacts. These concerns are misplaced. After all, the judge properly has entered into an *ex parte* proceeding if T.R. 65(B) is followed. To gather information which helps the judge determine whether the extraordinary relief is warranted only bolsters the fairness of the *ex parte* process which is underway. Nonetheless, the judge should not entertain discussions which go beyond what he or she believes is necessary to adequately entertain the petition. Ideally, the conversation will be recorded.

Surely, many petitions for emergency custody raise issues which appear to require immediate action. Judges often are faced with real emergencies, and they may deem a situation an emergency where other reasonable people would differ. But even in those cases, consideration of the opposing party's rights is required. Again, T.R. 65(B) provides this underpinning of fairness. Of course, judges should be able to trust in the veracity of a sworn petition alleging that harm will result without an *ex parte* order. In reality, some are less than truthful, for which the judge is not accountable. However, T.R. 65(B) imposes important burdens on the petitioner, which likely will reduce the instances of false or unfounded petitions.

The Commission calls on the profession to eliminate the seemingly wide-spread practice in Indiana where lawyers seek, and judges provide, *ex parte* emergency custody where no irreparable harm or injury reasonably is foreseen without notice and a hearing – the fundamentals of our adversarial process. T.R. 65(B) provides the framework for fairness; judges and lawyers must make genuine assessments about whether the circumstances really invoke the rule at all. When this occurs, the Commission expects to review fewer citizen complaints about a lax and unfair procedure which adversely affects their most precious rights.[3]

CONCLUSION

Ex parte emergency custody orders in dissolution, post-dissolution, guardianship, and adoption proceedings must be considered the rare exceptions to the general premise that a fair proceeding includes reasonable notice and an opportunity to be heard. When the circumstances do warrant emergency *ex parte* relief, petitioners and judges must follow T.R. 65(B).

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[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, or other matters which operate pursuant to their own statutory provisions, such as
juvenile detention or CHINS placement proceedings. Generally, it does apply to any petition for a temporary restraining order under T.R. 65(B), whether or not custody issues are involved. *See Matter of Jacobi*, 715 N.E.2d 873 (Ind. 1999).

[2] Black's Law Dictionary describes a temporary restraining order as "an emergency remedy of short duration which may issue only in exceptional circumstances and only until the trial court can hear arguments or evidence, as the circumstances require…A temporary restraining order may be granted without written or oral notice to the adverse party or attorney only if…it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition".

Trial Rule 65(B),(C), (D), and (E) provide as follows:

(B) Temporary restraining order – Notice – Hearing – Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

> (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and
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> (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.

Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten [10] days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the whereabouts of the party against whom the order is granted is unknown and cannot be determined by reasonable diligence or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two (2) days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(C) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of a governmental organization, but such governmental organization shall be responsible for costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(D) Form and scope of injunction or restraining order. Every order granting temporary injunction and every restraining order shall include or be accompanied by findings as required by Rule 52; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(E) Temporary Restraining Orders – Domestic Relations Cases. Subject to the provision set forth in this paragraph, in an action for dissolution of marriage, separation, or child support, the court may issue a Temporary Restraining Order, without hearing or security, if ether party files a verified petition alleging an injury would result to the moving party if no immediate order were issued.

(1) *Joint Order*. If the court finds that an order shall be entered under this paragraph, the court may enjoin both parties from:

(a) transferring, encumbering, concealing, selling or otherwise disposing of any joint property of the parties or asset of the marriage except in the usual course of business or for the necessities of life, without the written consent of the parties or the permission of the court; and/or

(b) removing any child of the parties then residing in the State of Indiana from the State with the intent to deprive the court of jurisdiction over such child without the prior written consent of all parties or the permission of the court.

(2) *Separate Order Required*. In the event a party seeks to enjoin the non-moving party from abusing, harassing, disturbing the peace, or committing a battery on the petitioning party or any child or step-child of the parties, or exclude the non-moving party from the family dwelling, the dwelling of the non-moving party, or any other place, and the court determines that an order shall be issued, such order shall be addressed to one person. A joint or mutual restraining or protective order shall not be issued. If both parties allege injury, they shall do so by separate petitions. The trial court shall review each petition separately and grant or deny each petition on its individual merits. In the event the trial court finds cause to grant both petitions, it shall do so by separate orders.

(3) *Effect of Order*. An order entered under this paragraph is automatically effective upon service. Such orders are enforceable by all remedies provided by law including contempt. Once issued, such orders remain in effect until the entry of a decree or final order or until modified or dissolved by the court.

(F) Statutory Provision Unaffected by this Rule. Nothing in this rule shall affect provisions of statutes extending or limiting the power of a court to grant injunctions. By way of example and not by way of limitation, this rule shall not affect the provisions of 1967 Indiana Acts, ch. 357, § § 1-8[1] relating to public lawsuits, and Indiana Acts, ch. 7, § § 1-15[2] providing for removal of injunctive and mandamus actions to the Court of Appeals of Indiana, and Indiana Acts, ch. 12 (1933).[3]

[1] IC 34-4-17-1 to 34-4-17-8.
[2] IC 34-4-18-1 to 34-4-18-13 (Repealed).
[3] IC 22-6-1-1 to 22-6-1-12.

[3] The Commission, clearly, cannot contemplate all the potential circumstances which may arise. Judges may find themselves faced with truly unusual or unexpected sets of facts, and they must be able to proceed within their sound

discretion. Nonetheless, these are not the circumstances which inspired this opinion.