

ADVISORY OPINION

Code of Judicial Conduct
Canon 2

#1 - 15

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 Commission's Advisory Opinion #1-01 addresses the appropriate judicial response to a petition for a temporary custody order filed without an attempt to provide notice to the adverse party. Advisory Opinion #1-01 concluded that a judge who fails to abide by the directives of Trial Rule 65(B) in the issuance of a temporary custody order violates the Code of Judicial Conduct, whether the proceeding is a dissolution, guardianship, or adoption. This Opinion was issued in response to a number of ethical complaints the Commission received alleging that judges were frequently granting *ex parte* petitions for temporary custody in which the grounds stated for relief were factually insufficient to establish exigent circumstances or in which there was no attempt to provide notice to the adverse party.

The Commission has likewise received a number of ethical complaints alleging that judges have granted *ex parte* petitions for temporary guardianship when the "irreparable harm" alleged as a factual basis for the petition is neither exigent nor irreversible. In some juvenile cases, these petitions have been granted without notice to one or both biological parents, even when the petition itself set out the contact information for these parties. In other cases, *ex parte* petitions for guardianship of an adult have been granted without notice to an appointed Guardian Ad Litem (GAL) or other interested party.

The Commission wishes to again impress upon Indiana judicial officers the importance of abiding by the attempted notice and proof requirements contained within Trial Rule 65(B). Judges should also consider their ethical responsibility with regard to attorneys who file facially deficient *ex parte* petitions for temporary guardianship.

ANALYSIS

Trial Rule 65(B) regulates a judge's ability to issue a temporary restraining order (TRO) without notice to an adverse party. Due process, including proper notice of any proceeding which will

affect a party's fundamental rights, is an essential constitutional liberty – and so very stringent requirements must be fulfilled before a TRO can be granted without notice. Specifically, Trial Rule 65(B) states:

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**
- (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.

The Indiana Code contains several sections addressing the procedures for appointing a temporary guardian for an incapacitated person or minor. But these statutes do not displace the Trial Rules' notice obligations. To the contrary, Ind. Code § 29-3-3-4(b) specifically states:

The requirements of this subsection are **in addition to** the petitioner's obligations under Rule 65 of the Indiana Rules of Trial Procedure to make a specific showing of the petitioner's efforts to provide advance notice to all interested persons or the reasons why advance notice cannot or should not be given. (emphasis added)

Even for seeking guardianship over a person who cannot advocate for his or her own interests, the legislature required the petitioner's adherence to the requirements of Trial Rule 65(B).

It is clear from both Trial Rule 65(B) and the Indiana Code sections on guardianship that a TRO may be issued without notice for a temporary guardianship in only the most exigent situations, and only when the potential damage to the applicant is sufficiently grave to justify denying due process rights to the other party(ies) involved.

Advisory Opinion #1-01 discusses some of the situations the Commission did not believe would establish "truly emergency circumstances" with regard to *ex parte* petitions for modifying custody. These examples include violating an existing custody order or the custodial parent moving out of state. Although these situations might provide valid grounds for a custody modification, neither were deemed severe enough to result in immediate harm before a hearing could be held or notice could be provided to all parties.

Several of the more recent complaints before the Commission involve petitions in which the alleged emergency is merely the acting guardian's inability to obtain health insurance or Medicaid benefits for a child without a guardianship order, or the guardian's inability to enroll a child in school. Although it is important for children to have access to health care and education, neither a lack of insurance coverage nor an inability to be enrolled in school are emergencies which would – or should – override the custodial parents' rights to be heard.

Judges are afforded great discretion in the content of their rulings, and legal error alone is not generally grounds for ethical discipline. But when procedures exist to protect parties' due process rights, these procedures must be followed. Judges who fail to follow Trial Rule 65(B)'s procedures when granting *ex parte* petitions for temporary guardianship may run afoul of Rule 2.9 of the Code of Judicial Conduct, which prohibits improper *ex parte* communications; Rule 2.6, which requires judges to accord the right to be heard to each person who has a legal interest in a proceeding; Rule 1.1, which requires judges to comply with the law; and Rule 1.2, which requires judges to act at all times in a manner which promotes public confidence in the judiciary.

Judges also have a responsibility under the Code of Judicial Conduct to inform the appropriate authority when the judge knows or believes that an attorney has violated the Rules of Professional Conduct. Professional Conduct Rule 3.5(b) prohibits attorneys from engaging in any improper *ex parte* communication with judges, jurors, prospective jurors, or other officials. If an attorney solicits a judge to grant an emergency petition for temporary guardianship without alleging sufficient facts and proof of the efforts to notify the other party (or the reasons supporting why notice should not be mandated) as T.R. 65(B)(1) and (2) require, the attorney may be in violation of the Rules of Professional Conduct – and the judge's knowledge of this potential violation may require a confidential report to the Attorney Disciplinary Commission under Rule 2.15 of the Code of Judicial Conduct.

CONCLUSION

To comply with the requirements of Trial Rule 65(B) and the Code of Judicial Conduct, judges who receive *ex parte* petitions for temporary guardianship must evaluate the petitions carefully, ensuring that the petition contains sufficient facts and proof of attempted notice (or a sufficient explanation of why notice should not be required) and including those facts in a written order if the petition is granted. Petitions that allege circumstances not rising to the level of emergency required to deprive parents of their custodial rights without notice should be set for hearing as swiftly as possible.