MINNESOTA BOARD ON JUDICIAL STANDARDS

Advisory Opinion 2016-2

Judicial Notice of Electronic Court Records in OFP Proceedings

Summary. In an order for protection (OFP) proceeding, a judge may access electronic court records of other cases to determine whether there are outstanding orders involving the parties. Generally, under Rule 2.9(C) of the Code of Judicial Conduct, the judge must give the parties a meaningful opportunity to challenge the propriety of taking judicial notice, preferably before the judge reviews the evidence in question. However, given the need for a prompt decision when a party applies for an ex parte OFP, a judge may, without advance notice to the parties, review records of other cases to determine whether there are orders involving the petitioner or respondent that could affect the decision whether to issue an OFP or the terms of the OFP. If advance notice is not practical, the Board recommends that the judge give the parties an opportunity to be heard on the propriety of taking judicial notice after issuing the ex parte order.

Judicial Notice in Civil Cases. While Judicial Code Rule 2.9(C) generally prohibits a judge from investigating facts independently, a judge may consider "facts that may properly be judicially noticed." Thus, unlike most provisions of the Code of Judicial Conduct, Rule 2.9(C) incorporates a section of the law extrinsic to the Code; specifically, the law relating to judicial notice.

In civil cases, judicial notice is governed by Rule 201 of the Rules of Evidence. If a judge believes that it is appropriate to take judicial notice of a fact, Rule 201 requires that the parties be given an opportunity to be heard:

> **(e) Opportunity to be heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

In general, if a judge takes judicial notice in compliance with Evidence Rule 201, then the judge will be in compliance with Judicial Code Rule 2.9(C); if a judge violates Rule 201, the judge may also violate Judicial Code Rule 2.9(C). Nevertheless, if a judge, in a good faith effort to comply with Rule 201, gives the parties notice and an opportunity to be heard on the question of judicial notice, the judge's conduct normally will not warrant discipline even if the taking of judicial notice is later found to be improper by an appellate court. Rule 4(c), Rules of the Board on Judicial Standards, provides:

> The board shall not take action against a judge for making findings of fact, reaching a legal conclusion, or applying the law as understood by the judge unless the judge acts contrary to clear and determined law and the error is egregious, made in bad faith, or made as part of a pattern or practice of legal error. Claims of error shall otherwise be left to the appellate process.

Information is now easily available through electronic access to court records such as those in the Minnesota State Court Information System (MNCIS) as well as on the internet. This does not, however, change the traditional rules on judicial notice. "The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic." Judicial Code Rule 2.9 cmt. 5. A detailed discussion of when judicial notice is permitted under the law of evidence is beyond the scope of this opinion. In broad outline, however, a judge's independent investigation of facts relevant to a case before the judge is generally prohibited unless (1) the investigation concerns nonadjudicative facts or (2) the judge properly takes judicial notice.

As to the first exception, a judge is permitted to investigate nonadjudicative facts without informing the parties. This includes research on the general subject areas of cases coming before the judge. For example, if a judge is regularly assigned personal injury cases, the judge may read books on medicine to obtain general knowledge of the subject.[1] Similarly, a judge may research "legislative facts," i.e., "facts [that] involve questions of law and policy," without informing the parties. Minn. R. Evid. 201, Comm. Cmt. – 1989. However, the judge may not research facts specific to a case before the judge. For example, a judge should not go on the internet to view a scene.[2] If there is any doubt as to whether the research involves adjudicative or nonadjudicative facts, the Board recommends that the judge err on the side of caution and give the parties an opportunity to be heard.

As to the second exception, a judge may take judicial notice of an adjudicative fact if the fact is not subject to reasonable dispute and the parties are given an opportunity to be heard. Minn. R. Evid. 201(b). Facts not subject to reasonable dispute include the existence of a document in another court file. It is well-established that a court may take judicial notice of its own files. *In re Welfare of Clausen*, 289 N.W.2d 153, 157 (Minn. 1980) (holding that a court may take "[j]udicial notice of records from the court in which a judge sits").

However, "the law treats different portions of the files and records differently." *In re Welfare of D.J.N.*, 568 N.W.2d 170, 175 (Minn. Ct. App. 1997) (holding that the district court should not have taken judicial notice of entire juvenile-protection file). Thus, a judge may properly take judicial notice of the existence of an order in another file, but may not take judicial notice of facts that are alleged in a complaint or affidavit in another file but that have not been admitted or

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[1] *See* California Judges Association, *Formal Ethics Opinion 68: Ethics of Internet Research of Facts by Trial Judges*, (2013) at 5, available at *http://www.caljudges.org/docs/Ethics%20Opinions/Op%2068%20Final.pdf*; C. Gray, *Independent Investigations*, 34 Judicial Conduct Reporter No. 2 (Summer 2012), Judicial Conduct Reporter, Vol. 34, No. 2, Summer 2012 - Judicial Officers - National Center for State Courts

[2] In 2010, the Board issued a private admonition to a judge based on the following facts: The judge permitted staff to search the internet for a video that was the subject of the case. Then, without first hearing from either party, the judge viewed the video and made a preliminary determination that one of the parties and his attorney may not have been truthful with the court.

proved because those facts are "subject to reasonable dispute." Minn. R. Evid. 201(b). *See Matter of Zemple*, 489 N.W.2d 818 (Minn. Ct. App. 1992) (holding that trial court properly took judicial notice of findings in another case but should not have taken judicial notice of testimony).

Judicial Notice in Criminal Cases. Evidence Rule 201 "governs only judicial notice of adjudicative facts in civil cases." "Criminal cases are not normally the appropriate setting for judicial notice, particularly of disputed facts." *State v. Pierson*, 368 N.W.2d 427, 434 (Minn. Ct. App. 1985). Nevertheless, in criminal cases, a court may in some circumstances take judicial notice of facts that are not subject to reasonable dispute. *See State v. Trezona*, 286 Minn. 531, 532, 176 N.W.2d 95, 96 (1970) (holding that it was proper for district court to take judicial notice that a highway intersection was located within the county).

A judge's consideration of electronic records of other cases must comply with due process. *Bradley v. Dist. of Columbia*, 107 A.3d 586, 599-601 (D.C. 2015) (concluding that defendant's due process rights were violated because the magistrate judge relied on misinformation in making his sentencing determination and because the magistrate judge failed to disclose and make a record of the extra-record information in the court's electronic record system that the judge erroneously thought provided a foundation for his sentencing determination).

Judges commonly review records of other case when setting bail or sentencing a defendant. Typically, notice to the defendants in not an issue because the defendant is present in court and notified of the other case records reviewed by the judge. A 2010 Board Advisory Opinion stated that "it is proper for a judge to consult and consider an electronic judicial information system such as MNCIS for the limited purpose of setting bail and issuing misdemeanor sentences if (1) all interested parties are present, (2) the pertinent information is provided to the defendant in open court, and (3) the defendant has an opportunity to dispute the information or otherwise be heard." *See also* Ill. Judicial Ethics Comm. Op. 2016-2 ("A judge may, under the authority of judicial notice, review criminal history contained in the Court's computerized records as part of sentencing, as long as the established procedural safeguards for taking judicial notice are adhered to.").

Notice to Parties. Notice to the parties that the judge is taking judicial notice serves two purposes:

> First, it gives the affected party an adequate opportunity to refute the likely implications of the record. . . . Second, it permits a meaningful determination of objections premised on the language of Minn R. Evid. 201(b).

In re Welfare of D.J.N., 568 N.W.2d at 175. Notice to the parties "is critical, because even court records may contain inaccurate or incomplete information. And accurate records can be misinterpreted or misunderstood." *Bradley*, 107 A.3d at 600.

An Indiana court has noted that "where practicable, the best practice is for courts to notify the parties before taking notice of and issuing a ruling which utilizes this information." *In re Paternity of P.R.*, 940 N.E.2d 346, 349-50 (Ind. Ct. App. 2010) (holding that in modification of custody proceeding, trial court did not err in taking judicial notice of court records in protective order proceeding filed by mother against former boyfriend); *see also Pickett v. Sheridan Health*

Care Ctr., 664 F.3d 632, 648 (7th Cir. 2011) ("[I]t is especially important for parties to have the opportunity to be heard prior to the taking of judicial notice of [internet] websites.").

Despite the preference for advance notice, Evidence Rule 201(e) contemplates that the parties might not be given notice until after that the judge has taken judicial notice. In that situation, Rule 201(e) requires the judge to give the parties an opportunity to be heard after the fact. The rule does not describe how the parties are to be given a meaningful opportunity to challenge the propriety of judicial notice after the judge has already taken judicial notice sua sponte. Presumably, the rule contemplates that the parties be given an opportunity to be heard before any ruling based on a judicially noticed fact is made final. *See* Ill. Judicial Ethics Comm. Op. 2016-2 ("The judge must make clear during the course of the proceeding, and not after the evidence is closed, what matters are being judicially noticed.").

Ex parte matters. While a great deal has been written about the propriety of a judge conducting independent research, case law and ethics opinions in Minnesota and other states do not provide guidance on taking judicial notice when the judge is deciding a motion for an ex parte order. In that situation, the usual preference to give parties advance notice that a judge intends to take judicial notice may conflict with the need for immediate relief. This issue involves balancing the parties' legitimate interest in knowing the evidence on which an order is based against the court's need to operate efficiently.

When a judge is presented with an application for immediate ex parte relief, such as an application for an OFP, the application may be accompanied by records of other cases involving the party that have been located by a court clerk. Alternatively, the judge may wish to personally check MNCIS to determine whether another judge has issued an order in a related proceeding. For example, a judge who intends to issue an ex parte OFP may wish to determine whether there is an outstanding domestic abuse no-contact order[3] concerning the respondent or an order in a dissolution proceeding so that the judge can ensure that particular provisions of the OFP do not conflict with those of the other order.

A judge may consider an ex parte communication that is "expressly authorized by law." Judicial Code Rule 2.9(A)(5). The purpose of the Domestic Abuse Act is "to provide speedy, effective relief to victims of domestic abuse." *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 209, 213 (Minn. 2001). The Act expressly authorizes a judge to issue an ex parte OFP. Minn. Stat. § 518B.01, subd. 7 (2014). The Act specifically contemplates that the judge will be informed of any existing orders governing the parties. Minn. Stat. § 518B.01, subd. 4(d). Delay and a potential safety risk to the petitioner could result if the judge gave the parties notice and an opportunity to object to judicial notice before the judge acted on an application for ex parte relief.

Consequently, the usual preference to give parties advance notice that a judge intends to take judicial notice appears inconsistent with the intent of the Domestic Abuse Act to give a petitioner immediate protection when physical safety is at risk. If a judge considers court records

[3] A domestic abuse no-contact order (DANCO) may be issued to a defendant in a criminal proceeding for certain domestic violence-related offenses. Minn. Stat. § 629.75, subd. 1.

of other cases when deciding a motion for an ex parte OFP, notice to the parties after taking judicial notice, rather than before, is generally permissible.[4]

If a judge issues an ex parte OFP and the petitioner has not requested a hearing, the respondent is notified that he or she may request an evidentiary hearing within five days of service of the order. Minn. Stat. § 518B.01, subd. 7(c). Thus, if the respondent is notified in the ex parte order or in a separate document that a fact was judicially noticed, the respondent will have the opportunity to request a hearing and challenge the judicially noticed fact at the hearing.

Florida has specifically addressed the notice issue. In family cases, Florida statute allows the court to postpone notice to the parties of taking judicial notice of court records "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." Fla. Stat. § 90.204(1). The Board recommends this approach. Nevertheless, the Board's current position is that in light of the present lack of clarity in the law, the Board will not discipline or seek to discipline a judge for failing to notify the parties that the judge has reviewed records of other cases when considering an application for an ex parte OFP.

Conclusion. In general, if a judge takes judicial notice in compliance with Evidence Rule 201, then the judge will be in compliance with Judicial Code Rule 2.9(C). A judge considering an application for an ex parte OFP may, without advance notice to the parties, review MNCIS records to determine whether there are orders in other cases involving the petitioner or respondent that could affect the decision whether to issue an OFP or the terms of the OFP. If the judge relies on a court record in another file, the Board recommends that the judge give the parties an opportunity to be heard on the propriety of taking judicial notice after issuing the ex parte order.[5]

Adopted December 16, 2016

[4] In the context of an application for an ex parte OFP, a judge is not required to notify the parties of records of records of cases that the judge did not consider relevant.

[5] The principles in this letter may apply to other ex parte matters. However, when issuing this opinion, the Board did not specifically consider any other ex parte situations.