

STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS

DATE ISSUED: July 23, 2015

ADVISORY OPINION: JE15-002

PROPRIETY OF A JUDGE
CONSIDERING NON-PARTY
COMMUNICATIONS DURING
ADMINISTRATION AND OVERSIGHT
OF ADULT GUARDIANSHIPS
PROCEEDINGS

recently formed Commission to Study the
Creation and Administration of
Guardianships.

FACTS

ISSUE

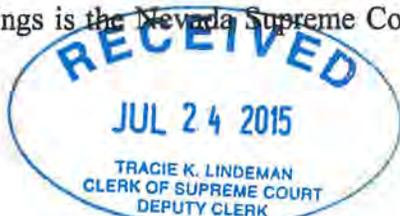
During administration of
guardianship proceedings and oversight of
the guardian, may a judge (1) consider non-
party communications concerning a
guardian’s conduct or the ward’s welfare;
and (2) initiate, permit, and consider an
investigation based upon a citizen’s
complaint or upon information received in an
investigation conducted by court officers.

A judge has presented two questions
arising from the administration of adult
guardianship proceedings and judicial
oversight of guardians. The request informs
the Committee about both the extreme
vulnerability of elderly wards to abuse and
neglect by guardians with the power to
control all aspects of a ward’s existence and
also Nevada’s lack of a statutory scheme for
reporting such conduct to the presiding judge
responsible for monitoring the ward’s
welfare and the guardian’s conduct.

ANSWER

No. A judge administering a
guardianship proceeding must adhere to the
NCJC’s general proscription against ex parte
communications. Although cognizant that
there is an urgent and growing need for
consistent and effective monitoring of
guardians in order to protect vulnerable
wards from abuse and exploitation, the
Committee also recognizes that the questions
addressed in this advisory opinion arise
chiefly from omissions in Nevada law. The
Committee therefore believes that the issues
require a statewide solution and that the
better forum for examining and
implementing changes in guardianship
proceedings is the Nevada Supreme Court’s

Due to the nature of guardianship
proceedings, it is uncertain that information
most relevant to protecting vulnerable wards
will be brought before the court by parties to
the proceeding. Because wards are rarely
represented independently by counsel, it is
often family members, friends, neighbors,
and community volunteers who come
forward with information relevant to a
guardian’s abuse and neglect of a ward and
depletion of a ward’s estate. In the absence of
specific statutory authority, the judge
requests this Committee to advise whether
the Nevada Code of Judicial Conduct
(“NCJC”) would permit the judge to consider
communications from a non-party which
raise concerns about a guardian’s compliance
with statutory duties and responsibilities, or



the welfare of the ward or the ward's estate. The judge also asks whether the NCJC permits a judge to initiate, permit, and consider an investigation, or the result thereof, based upon a citizen complaint or information received in an investigation conducted by court officers.

DISCUSSION

The Committee is authorized to render advisory opinions evaluating the scope of the NCJC. *Rule 5 Governing the Standing Committee On Judicial Ethics*. Accordingly, this opinion is limited by the authority granted in Rule 5.

Canon 2 states “[a] judge shall perform the duties of judicial office impartially, competently, and diligently.” *See Nev. Code Jud. Conduct, Canon 2*. Rule 2.9 proscribes ex parte communications with a judge concerning a pending matter and delineates limited exceptions to the prohibition. Rule 2.9(A) states, in pertinent part:

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a

procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and gives the parties an opportunity to respond.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(5) A judge may initiate, permit, or consider any ex parte communication when authorized by law to do so.

See Nev. Code Jud. Conduct, Rule 2.9(A).

Comment [3] to the Rule clarifies that “[t]he proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.” *See Nev. Code Jud. Conduct, Comment [3], Rule 2.9*.

In *Matter of Fine*, the Nevada Supreme Court held that a judge violates Canon 3B(7) by engaging in ex parte discussions with non-parties on substantive matters even if the judge later informs the parties of the ex parte

communications. See *Matter of Fine*, 116 Nev. 1001, 1016 (2000) (Canon 3B(7) is now codified in part as Rule 2.9). The court further admonished Judge Fine for acting “as an advocate for a particular position” in discussing substantive matters with a court-appointed expert outside the presence of the parties. 116 Nev. at 1023.

The requesting judge has raised an important and urgent issue respecting the protection of adult wards who are often unable to defend themselves against their guardians’ exploitation or mistreatment. Friends, family, neighbors, and others concerned for a ward’s welfare are to be commended and encouraged for coming forward with information relevant to a guardian’s possible abuse and neglect, and presiding judges should be able to act upon such information forcefully and expeditiously. Nevertheless, where Nevada’s statutory scheme provides no specific procedure for bringing such information before the presiding judge, or for the judge to consider communications from non-parties relevant to a guardian’s compliance with statutory duties and responsibilities, the Committee believes that the NCJC does not except these ex parte communications from the proscription of Rule 2.9 and, therefore, can offer only general guidance on the subject.

As ex parte communications are particularly pernicious, a judge must act with great care when a non-party communicates or attempts to communicate with the judge on substantive matters in a pending proceeding. Receiving or acting on such communications may not only impact a judge’s impartiality in deciding the matter, but may also place the

judge in the untenable position of advocating for one of the parties or allowing one party to gain an advantage over another party. Even if the judge notifies all parties of the substance of the communication and allows them an opportunity to respond, *Matter of Fine* makes clear that a judge who initiates or willingly participates in ex parte discussions of substantive matters has violated the NCJC.

The recently revised NCJC recognizes that there are some instances when a judge may properly assume a more interactive role in a proceeding. Comment [4] to Rule 2.9 states “[a] judge may initiate, permit, or consider ex parte communications authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.” See *Nev. Code Jud. Conduct, Comment [4], Rule 2.9*.

It appears to the Committee that a judge administering guardianship proceedings may very well be serving in the same role as a judge in a recognized therapeutic or problem-solving court – such as drug or mental health court – and that both the ward and guardian may be better served if the judge more directly interacted with family members, service providers, and others interested in the ward’s welfare. Rule 2.9(A)(5) and Comment [4], however, make it very clear that before a judge may initiate, permit or consider any ex parte communication that such communications must first be authorized by law. Here, as the requesting judge has pointed out, Nevada’s statutory scheme is silent and offers no

avenue for communications relevant to abuse and neglect which may be considered ex parte under the NCJC.

Given this omission in Nevada's statutory scheme, the Committee must advise that the NCJC prohibits non-party communications with a judge in guardianship proceedings. Despite the good intentions of those providing information pertinent to a judge's oversight of the guardian, and the often urgent need to protect wards from mistreatment, the NCJC does not allow a judge to solicit or consider such information ex parte under the present state of Nevada law.

The second question regarding whether a judge may initiate, permit, and consider an investigation, or result thereof, raises many of the same issues discussed above. Even though Nevada law authorizes a judge to appoint investigators, the central issue here is whether the judge may make such an appointment based on ex parte information obtained either through a citizen complaint or information received in an investigation conducted by court officers.

The Committee believes that Rule 2.9's proscription on ex parte communications would bar a judge from acting on information obtained in this manner. A judge cannot receive or discuss substantive information about a guardianship proceeding unless expressly authorized by law. As with the first question, Nevada law is silent on the issue and a judge may not receive or act on such information without running afoul of the NCJC.

In addition, the NCJC obligates a judge to ensure the right to be heard. Rule 2.6(A) states "[a] judge shall accord to every

person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." As emphasized in Comment [1] to this rule "[t]he right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed." *See Nev. Code Jud. Conduct, Comment [1], Rule 2.6.*

Again, as the requesting judge notes, Nevada law is silent on the procedures a judge is to follow in order to determine whether an investigation of a ward's situation or a guardian's actions is warranted. Given most guardians' plenary power over a ward and the ward's estate, it seems to the Committee that such investigations may indeed be a critical component in protecting a ward from exploitation and mistreatment, and that a judge ought to have as many tools as possible to ensure that guardians are held accountable for their actions. It is equally critical, however, that a judge protect the parties' right to be heard and adhere to procedures designed to ensure a fair and impartial process.

The Committee notes that this request for an advisory opinion raises issues of statewide concern that are better addressed in another forum. Although this advisory opinion provides general guidance on the subjects raised, the Committee believes that the formulation of a particular procedure to deal with guardianship abuse and overreaching needs to be vetted by those most familiar with the issues and adopted only after consideration of all competing interests. The Committee therefore respectfully refers these issues to the Nevada

Supreme Court Commission to Study the Creation and Administration of Guardianships for consideration as it deems appropriate. *See In the Matter of the Creation of a Commission to Study the Creation and Administration of Guardianships, ADKT No. 0507, Order dated June 8, 2015.*

CONCLUSION

The Committee concludes that Rule 2.9's prohibition against ex parte communications precludes a judge from considering non-party communications relating to a guardian's compliance with statutory duties and responsibilities or the welfare of the ward or the ward's estate. Although guardianship proceedings are akin to recognized therapeutic or problem-solving courts, Nevada law does not at present authorize a judge to initiate, permit, or consider any ex parte communication in a guardianship proceeding.

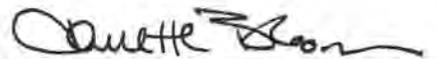
Further, Rule 2.6 obligates a judge to ensure the parties' right to be heard. Nevada law is again silent on the procedure a judge is to follow when determining whether to investigate a guardian's actions or ward's situation. The Committee therefore concludes that the NCJC does not allow a judge to consider information transmitted ex parte in determining whether to appoint

investigators in a guardianship action. The requesting judge has raised critical issues that are better resolved by the Nevada Supreme Court's Commission to Study the Creation and Administration of Guardianships. Accordingly, this Committee refers this request for an advisory opinion to the Commission for its consideration.

REFERENCES

Nev. Code Jud. Conduct, Canon 2; Rule 2.6 and 2.9; Commentary [1] to Rule 2.6 and Commentary [3] and [4] to Rule 2.9; Rule 5 Governing the Standing Committee On Judicial Ethics

This opinion is issued by the Standing Committee on Judicial Ethics. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory responsibilities, any member of the Nevada judiciary, or any person or entity which requested the opinion.



Janette Bloom
Vice-Chairperson