



The North Carolina State Bar

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November 1, 2024

Guidance on Use of the Notes Section Under the Task Feature in Odyssey eCourts System

Introduction

The following was approved by the Ethics Committee on October 31, 2024, and is intended to provide guidance to AOC, judges, members of both the district attorney's and public defender's offices, and private criminal defense lawyers using North Carolina's Enterprise Justice (hereinafter "Odyssey") eCourt system. The guidance is limited to the "task" function within the system and the notes that can be entered and attributed to a specific assigned task.

Background

Within the Administrative Office of the Courts's (AOC) new Odyssey eCourts system, certain actions in a particular criminal case can be assigned as a "task" to particular court personnel (e.g., a judge, a clerk, etc.). District attorneys (DA), assistant district attorneys (ADA), public defenders (PD), and assistant public defenders (APD) can add written notes to an assigned task. The notes section attached to a task is intended to assist the DA's office in carrying out its statutory requirement to set the calendar for district or superior court (*see* N.C. Gen. Stat. § 7A-61) by allowing the DA to describe the purpose of a case's appearance on the calendar (e.g., a note might be entered when the case is "tasked" to a judge to explain that the case is on the calendar to address a pending motion to continue). Any text entered in the notes section of a task is viewable by any clerk, any judge, and any member of the district attorney's office or public defender's office. Private counsel cannot view any notes entered on a task – they cannot view the notes entered on a task when logging into the eCourts system using their personal account nor do they have any ability to access the notes via public computer terminal. If a note is added to a particular task, the system does not alert or otherwise communicate with the litigants, including privately retained counsel, that text has been entered.

District Attorneys and Assistant District Attorneys Entering Administrative Notes Within an Assigned Task

The State Bar's Ethics Committee previously addressed a lawyer's professional responsibility when communicating with a judge in 2019 FEO 4. The opinion states, in pertinent part,

The Rules of Professional Conduct impose some limits on lawyers' communications with judges. These limits are designed to ensure fair and equal access to the presiding tribunal by the parties and their representative counsel. To this end, Rule 3.5(a)(3) prohibits a lawyer from communicating *ex parte* with a judge or other official unless authorized to do so by law or court order. Rule 3.5(d) defines "*ex parte* communication" as "a communication on behalf of a party to a matter pending before a tribunal that occurs in the absence of an opposing party, without notice to that party, and outside the record."

2019 FEO 4.

The DA/ADA is statutorily required to "prepare the trial dockets" for criminal cases heard in superior and district courts. N.C. Gen. Stat. § 7A-61. A reasonable aspect of preparing the court calendar is to note not only when a case is placed on the calendar, but also the objective, procedural purpose for the placement of the case on the calendar (i.e., the matter to be addressed), if identifiable. Examples include noting that a case is on the calendar for trial, or for entry of a plea, or to resolve a pending pre-trial motion (such as a party's motion to continue). Referencing the purpose of the case's appearance on the calendar can improve judicial efficiency by assisting the clerk, the court, and the litigants in being prepared to address the case when called. Therefore, it is appropriate for the DA/ADA to enter a note in the task function to alert the court and litigants of the status of the case. Even though the note can be viewed by a judge, but cannot be viewed by a privately retained lawyer, a note regarding the procedural posture of a defendant's case is not an impermissible *ex parte* communication governed by Rule 3.5(a)(3) or otherwise prejudicial to the administration of justice in violation of Rule 8.4(d) because the statement is authorized by law as a reasonable part of the DA/ADA carrying out the statutory requirement to prepare the trial docket pursuant to N.C. Gen. Stat. § 7A-61.

Unsolicited Substantive Remarks by the DA/ADA Addressing the Merits of the Underlying Case

As stated above, the DA/ADA may create a note within a task to comply with N.C. Gen. Stat. § 7A-61. However, the DA/ADA must not include in the note unsolicited substantive remarks addressing the merits of the underlying case, unless requested by the judge or allowed by law, court order, or a local rule.

For example, the DA/ADA includes the following language: "Defendant Motion to Continue; Defendant called and failed four times before and recently arrested in X County." Although factually correct, this additional comment is unsolicited by the court and is unnecessary to understand the procedural reason for the case's appearance on the court calendar or otherwise carry out the DA/ADA's responsibility to prepare the trial dockets pursuant to N.C. Gen. Stat. § 7A-61. Rather, this language addresses the merits of defendant's case – and particularly what the court should consider when ruling on the pending motion – and is therefore more appropriately reserved for argument by the DA/ADA in open court when defense counsel has an equal opportunity to respond. Accordingly, because the language is unsolicited and not authorized by law, court order,

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or a local rule, the language is prejudicial to the administration of justice in violation of Rule 8.4(d); *see* 2019 FEO 4.

Additionally, when Defendant is represented by private counsel as opposed to the Public Defender's Office, the language is also a prohibited *ex parte* communication in violation of Rule 3.5(a)(3). As stated above, private counsel does not have access to notes entered on the task function. Private counsel is not informed of additional commentary from DA/ADA on a particular task and has no reasonably prompt access to the language; rather, private counsel has the added burden of knowing (or speculating) to ask if any notes have been added and request such notes when no notice is provided to do so.

The fact that the notes section on the task function could be provided to private counsel does not equate the entry of text in the online case file with a potentially permissible electronic communication sent via email to a presiding judge with opposing counsel copied on the communication. In that scenario, opposing counsel is simultaneously provided with the communication; in the present scenario, private counsel is not simultaneously provided with the text entered by DA/ADA, nor is private counsel notified that the text even exists. The additional steps required of private counsel to anticipate and access the note place an unfair expectation and burden on private counsel.

Accordingly, because the language "Defendant called and failed four times before and recently arrested in X County" is unsolicited and not authorized by law, court order, or a local rule, and because private counsel will receive no notice of the entry in defendant's online case file and private counsel does not have reasonably prompt access to the Odyssey online case file to review any potential inclusion of additional commentary, the language entered by the DA/ADA in the notes section in the task function "might have the effect or give the appearance of granting undue advantage to one party" and is both a prohibited *ex parte* communication in violation of Rule 3.5(a)(3) and prejudicial to the administration of justice in violation of Rule 8.4(d). 2019 FEO 4. Notably, when Defendant is represented by the Public Defender/Assistant Public Defender, who has access to the notes in the task feature, substantive remarks addressing the merits of the case entered by the DA/ADA remains an "unsolicited communication addressing the merits of the underlying matter" that is prejudicial to the administration of justice in violation of Rule 8.4(d), although the language is not a prohibited *ex parte* communication in violation of Rule 3.5(a)(3). *See* 2019 FEO 4.

Unsolicited Substantive Remarks by the PD/APD Addressing the Merits of the Underlying Case

PDs and APDs can also add written notes to an assigned task. However, they are also prohibited from including unsolicited statements addressing the underlying matter's merits. For example, in an Assault on a Female case, the State files a motion to continue and the APD puts the following in a note to a task objecting to the continuance, "Case has been continued multiple times for the victim to appear. Victim has charged defendant multiple times in the past and has never shown. In fact, victim has been held in contempt for failing to appear." While the APD is free to enter a

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note on an assigned task regarding the procedural status of the case, such as her own motion to continue, adding a statement that attempts to argue that the victim is not reliable constitutes an unsolicited communication addressing the merits of the underlying matter that is prejudicial to the administration of justice in violation of Rule 8.4(d). *See* 2019 FEO 4. The note, however, is not prohibited *ex parte* communication because the DA/ADA has equal access to the note. *Id.*

Note: The Ethics Committee recognizes that although the North Carolina State Bar does not have the authority to make or suggest changes to Odyssey, the committee remains concerned that privately retained counsel does not have access to notes in the task function.

Should you have further questions, you may contact the State Bar's ethics staff by email at ethicsadvice@ncbar.gov or by telephone at (919) 828-4620.

Sincerely yours,

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