

New Mexico Judicial Ethics Handbook

Judicial Ethics for New Mexico Courts

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New Mexico Judicial Education Center
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New Mexico Judicial Ethics Handbook

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This handbook is intended for educational and informational purposes only. It is not intended to provide legal advice. Readers are responsible for consulting the statutes, ordinances, rules and cases pertinent to their issue or proceeding. Readers should keep in mind that laws and procedures are subject to change.

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FOREWORD TO THE JUDICIAL ETHICS HANDBOOK

The Judicial Ethics Handbook incorporates references to Supreme Court cases, opinions of the Advisory Committee on the Code of Judicial Conduct, and reports from the Judicial Standards Commission issued since April 1999.

The Judicial Education Center prepared this Judicial Ethics Handbook, but could not have done so without the help of the many people, organizations, and publications that contributed to the preparation of the original Handbook in 1999, including:

- The State Justice Institute.
- Supreme Court law clerk Jenise Flowers and law student Holly Harvey for their technical assistance with citations and references.
- The Rules Committee for the Courts of Limited Jurisdiction and its former chair, Susan Page.
- Judith Olean, former staff attorney for the New Mexico Municipal League and former municipal judge for the City of Rio Rancho.
- The Judicial Standards Commission and its former Executive Director, Peg Holguin.
- The Honorable Rozier E. Sanchez.
- The Administrative Office of the Courts, especially attorneys Alicia Mason-Miller and Fern Goodman.
- Thaddeus Bejnar, member of the Supreme Court Advisory Committee on the Code of Judicial Ethics.
- Former Institute of Public Law attorney Ann Goodman.
- Several publications of the American Judicature Society and its sponsoring organizations, the Henry Luce Foundation and the W.M. Keck Foundation.
- Judge David Rothman's California Judicial Conduct Handbook.
- Jeffrey Shaman, Steven Lubet and James Alfini's Judicial Conduct and Ethics.

The Judicial Education Center welcomes your suggestions for improvement of the Judicial Ethics Handbook. Please submit your comments to Pam Lambert, Director, at 505-277-1052 or plams@unm.edu.

Introduction

1-100. Purpose

Many judges take the bench without having read the Code of Judicial Conduct, and some may not read it afterwards.¹ The Judicial Education Center has designed this judicial handbook to give the concepts contained in the Code a practical context in which judges, especially non-lawyer judges in the courts of limited jurisdiction, can deal with ethical issues as they arise in everyday life. The courts of limited jurisdiction play a critical role in maintaining the credibility of the courts because it is there that most people encounter the judicial system. We hope this guide will help judges remain involved in their communities while maintaining the integrity and independence of their offices. The discussion in this judicial handbook presumes that most ethical violations by judges result from inadequate information or failure to ask necessary questions, and not from any actual intent to engage in misconduct.

1-200. Scope

This is a handbook, designed to make practical information available quickly and easily. It is designed to complement already available materials, such as the New Mexico Municipal Benchbook and the New Mexico Magistrate and Metropolitan Court Benchbook. The discussion is organized under general topics, encompassing a range of situations in which ethical issues arise. Every situation will not be relevant for every judge--for example, issues relating to ex parte communications between a judge and jurors is not an issue for municipal judges--but it is hoped that by illustrating various applications of the rules the judicial handbook will enhance each judge's understanding of his or her specific role.

1-300. Format

A judicial handbook, as distinguished from a benchbook, is not intended as an exhaustive treatment of its subject. The discussions of ethical issues in this judicial handbook are presented in the form of an expanded outline, in order to cover as much ground as possible within limited space. Checklists are included as procedural aids for most topics. It has been necessary to paraphrase facts and holdings of cases, as well as the substance of rules and statutes. The last word on the subject is, of course, the original text.

Each topic is addressed in a brief introductory section followed by a discussion of the substantive law and authorities, organized under subtopics. Factual summaries of cases are included in many instances to illustrate the principle or problem in question. A checklist precedes each discussion, including references to the corresponding discussion in the text. The materials are presented in loose-leaf form, so that each judge may annotate, amplify, expand or otherwise tailor these materials to meet his or her specific need.

The New Mexico Supreme Court has adopted a policy of gender neutrality in all documents. We have chosen to alternate use of the terms "he", "she," "him" and "her," unless the stated facts require a particular reference.

¹See Jeffrey Shaman, Steven Lubet and James Alfini, *JUDICIAL CONDUCT AND ETHICS*, viii, (1990). Referred to in following footnotes as Shaman.

1-400. Authorities

The authorities cited include the New Mexico Constitution, the New Mexico Statutes Annotated, and court rules, including the Code of Judicial Conduct, in effect at the time of writing. These authorities are legally binding in New Mexico. Excerpts from the annual reports of the Judicial Standards Commission are also included, as well as summaries of the Advisory Committee on the Code of Judicial Conduct. These opinions do not have the force of law because the Supreme Court has ultimate authority over the conduct of judges; however, they are highly persuasive statements of the ethical standards applicable to judges in New Mexico.

The judicial handbook also includes factual summaries of cases from other states, which are useful illustrations of how generally accepted ethical principles have been applied. The consequences of the conduct described could be different in New Mexico.

1-500. Citations and References

Citations to legal authorities use the most concise style possible while still providing adequate reference information. In general, citation use the following forms:

- **New Mexico Constitution.** Provisions of the New Mexico Constitution are cited by Article, in Roman numerals, followed by the section, marked by a "\$" sign. For example, N.M. Const. art. VI, §32.
- **New Mexico laws.** Statutes are cited as §__-__-__, such as §66-8-135, without NMSA 1978 or the year of enactment. Unless otherwise noted, the statutes cited are the statutes in effect at the time of writing.
- **New Mexico cases.** Where available, New Mexico cases are cited using the vendor-neutral citation form adopted in 1998, such as 1998-NMCA-039, where the first number is the year of decision and the second number is the opinion number. In this form, cases from the New Mexico Supreme Court will be cited to NMSC and cases to the New Mexico Court of Appeals will be cited to NMCA. Where there is no vendor-neutral citation, citations will be to the New Mexico Reports and Pacific Reporter. For example, *State v. Lucero*, 104 N.M. 587, 725 P.2d 266 (Ct. App. 1986) gives the name of the parties, the volume number and page of the New Mexico reports, the volume number and page of the Pacific Second Reporter, followed by the deciding court and date in parenthesis. If no court is identified, the deciding court is the New Mexico Supreme Court.
- **Other state appellate decisions.** These decisions are cited according to the regional reporter in which they appear: i.e., Northwest (N.W.), Southern (So. 2d), in the same form as for New Mexico decisions.
- **United States Supreme Court.** U.S. Supreme Court decisions are cited by volume and page to the United States Reports: ___ U.S. __ (19__).
- **New Mexico Attorney General opinions.** N.M. Att'y Gen. Op. 90-03 (1990) indicates the third opinion issued in 1990.

- **Judicial Standards Commission.** Actions of the Judicial Standards Commission are cited by reference to the Commission's annual reports. JSC 89-2F means the second matter reported under formal proceedings in the 1989 annual report. JSC 89-3I means the third entry in the 1989 annual report under the category of "Investigations Not Resulting In Formal Hearings." Rules of the Commission are cited as JSC Rule 20.
- **Advisory Committee.** Opinions issued by the Supreme Court Advisory Committee on the Code of Judicial Conduct are in the form AO 90-3, indicating the opinion was the third issued by the Committee in 1990.
- **Code of Judicial Conduct.** References to "the Code" are to the New Mexico Code of Judicial Conduct, which is cited in the form NMRA 21-100. The "1972 Model Code" means the Model Code of Judicial Conduct adopted in 1972 by the American Bar Association. The newest version of the ABA code is referred to as the "1990 Code." The "1990 Code" has been adopted, with substantial modifications, by the New Mexico Supreme Court, effective February 16, 1995. Sometimes reference is made to a "Canon," which is the designation used by the ABA for separate provisions of the 1972 and 1990 Model Codes. "Canon 3A" is comparable to New Mexico NMRA 21-300A.
- **Other New Mexico Supreme Court rules.** The Code is part of the Supreme Court's rules governing courts. These rules are cited as NMRA __-__ or Rule __-__, such as NMRA 6-106, indicating reference to rule 106 in set 6 of the New Mexico Rules Annotated. Unless otherwise noted, the rules cited are the rules in effect at the time of writing.

Legal Authorities

2-100. Applicable Law

N.M. Const. art. VI, §§1, 3 and 32.

N.M. Const. art. IV, §§35 and 36.

NMSA 1978, §§34-10-1 and following.

Procedural Rules and Regulations of the New Mexico Judicial Standards Commission.

NMRA 21-200 through -900: Code of Judicial Conduct (revised 2/16/95; copy included).

2-200. Introduction

Historically, improper conduct by judges was dealt with by removal proceedings such as impeachment. *See E. Schoenbaum, A Historical Look at Judicial Discipline*, 54 CHI.-KENT L.REV. 1 (1977). This process was cumbersome, time-consuming and sometimes politically motivated, and resulted in either complete removal from office or no action at all. *Schoenbaum* at 5-7. Judicial conduct organizations such as the New Mexico Judicial Standards Commission are modern creations, authorized to impose a more flexible range of sanctions and structured so that complaints can be addressed with greater efficiency. In recent years most states have also adopted codes of judicial conduct.

2-300. Constitutional provisions

The New Mexico Constitution grants exclusive authority to the New Mexico Supreme Court to regulate the conduct of judges. No legislatively created means of disciplining or removing judicial officers is recognized. *Cooper v. Albuquerque City Comm'n*, 85 N.M. 786, 793, 518 P.2d 275, 282 (1974).

The Board of Bar Commissioners has no jurisdiction over a complaint made against a district judge concerning the judge's actions in rebuking a grand jury. *In re Board of Comm'rs*, 65 N.M. 332, 335, 337 P.2d 400,403 (1959).

2-310. General grant of judicial power. Article VI, Section 1 of the New Mexico Constitution creates the courts.

The judicial power of the state shall be vested in the senate when sitting as a court of impeachment, a supreme court, a court of appeals, district courts, probate courts, magistrate courts and such other courts inferior to the district courts as may be established by law from time to time in any district, county or municipality of the state.

2-320. Superintending control. Article VI, Section 3 provides in part that "[t]he supreme court . . . shall have a superintending control over all inferior courts" Superintending control is a broad grant of inherent authority allowing the Supreme Court to regulate the affairs of the courts as a separate branch of government. *See J.D. Cameron, The Inherent Power of a State's Highest Court to Discipline the Judiciary*, 54 CHI.-KENT L.REV. 45 (1977).

2-321. Authority. Superintending control gives the Supreme Court the power to issue writs to control litigation in the lower courts, *State v. Roy*, 40 N.M. 397, 421, 60 P.2d 646, 661 (1936); to supervise personnel decisions by inferior courts, *Mowrer v. Rusk*, 95 N.M. 48, 52, 618 P.2d 886,

893 (1980); to control the administrative functions of inferior courts, *Russillo v. Scarborough*, 727 F. Supp. 1402, 1409 (D.N.M. 1989); and to regulate procedure in the courts, *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 310, 551 P.2d 1354, 1357 (1976). This power is distinct from other authority granted to the Supreme Court under the Constitution. It is to be used only when the remedy by appeal is inadequate or where necessary to prevent unusual hardship or expense. *Montoya v. McManus*, 68 N.M. 381, 392, 362 P.2d 771, 782 (1961).

2-322. Purpose. Superintending control exists so that the Supreme Court can ensure that inferior courts do not depart from proper judicial activity, become dictatorial or oppressive in their conduct, or otherwise behave improperly so as to interfere with or reflect upon the court system or shake public confidence in the administration of justice and the judiciary. It is the duty of the court to make certain that the traditional high regard in which courts generally are held will in no way be encroached upon. *State ex rel. Anaya v. Scarborough*, 75 N.M. 702, 410 P.2d 732 (1966). A matter that could bring the judicial system into disrepute invokes the Supreme Court's supervisory control. *In re Board of Comm'rs*, 65 N.M. 332, 334, 337 P.2d 400, 402 (1959).

2-323. Application to judicial discipline. The New Mexico Supreme Court invoked its power of superintending control to remove a judge from a case because the court concluded it would be improper to require the defendant to be tried before that judge.

A writ of prohibition was issued to remove a judge from continuing to preside over a murder trial, after the judge had tried to get the defendant to plead guilty and had conducted unauthorized proceedings in the case. *State ex rel. Anaya v. Scarborough*, 75 N.M. 702, 713, 410 P.2d 732, 734 (1966).

The grant of superintending control under Article VI, Section 3 is one of three constitutional provisions pursuant to which judicial officers may be disciplined or removed from office, all of which co-exist as alternatives. *In re Castellano*, 119 N.M. 140, 889 P.2d 175, 178 (1995); *Cooper v. Albuquerque City Comm'n*, 85 N.M. 786, 793, 518 P.2d 275, 282 (1974). The other two are impeachment and proceedings before the Judicial Standards Commission.

2-330. Impeachment. N.M. Const. art. IV, §§35 and 36. Impeachment is a criminal proceeding against a public official before a quasi-political court. *Black's Law Dictionary* 753 (6th ed. 1990). The New Mexico Constitution allows a district judge to be tried by the senate for crimes, misdemeanors and malfeasance in office; by implication, judges of the lower courts are not subject to impeachment. An impeached judge who is convicted is removed from office.

2-340. New Mexico Judicial Standards Commission.

2-341. Creation. The New Mexico Judicial Standards Commission came into being on July 1, 1968, following the adoption in 1967 of Article VI, Section 32. California was the first state to create such a commission; all states now have similar organizations. *Shaman, supra* §1.03 at 5-6.

2-342. Jurisdiction of the Commission. The Commission may discipline, or recommend to the Supreme Court that it remove from office, any justice, judge or magistrate of any court for: (1) willful misconduct in office;

(2) persistent failure or inability to perform a judge's duties, or

(3) habitual intemperance. N.M. Const. art. VI, §32; §34-10-2.1.

The Commission may also retire a judge for disability that seriously and permanently interferes with the performance of the judge's duties. *NMRA 27-401*. Prior acts of misconduct in a judicial office follow the judge to subsequent judicial office and may be the subject of disciplinary proceedings before the commission. *In re Romero*, 100 N.M. 180, 183, 668 P.2d 296, 299 (1983). The Commission's jurisdiction is invoked when a notice of formal proceeding is served upon the judge under investigation. The jurisdiction continues even if the judge subsequently resigns or is terminated from office. *JSC Rule 39*.

2-343. Powers. The Commission investigates all allegations of inappropriate judicial conduct within its constitutional jurisdiction, including violations of the Code. N.M. Const. article VI, §32; §34-10-2.1. It has the power to receive information, investigate, conduct hearings, take informal remedial action, and make recommendation to the Supreme Court concerning allegations against judges. *JSC Rule 4(a)*.

2-344. Membership. The Commission consists of eleven members: two justices or judges, one magistrate, two lawyers, and six citizens, appointed by the governor in staggered terms. N.M. Const. art. VI, §32; §34-10-1. The Commission maintains a permanent office and staff in Albuquerque. *See* §§34-10-3, 34-10-4; *see also* RESOURCES.

2-345. Procedures.

Anyone may file a complaint against a judge. *JSC Rule 11*. If, after initial investigation or preliminary investigation the Commission determines that a formal hearing should be held, the Commission issues a formal notice and may appoint three special masters to hear and take evidence. The parties have a right to discovery. *JSC Rule 24*. At the hearing, the Rules of Evidence apply, *JSC Rule 22*, and the judge has a right to an attorney. *JSC Rule 24*. Formal charges must be proved by clear and convincing evidence. *In re Martinez*, 99 N.M. 198, 203, 656 P.2d 861, 866 (1982).

Failure to cooperate with the Commission is itself a violation of the Code. *NMRA 21-900B*. The Commission may issue subpoenas, §34-10-2.1, and may compel physical and mental examinations for good cause in disability cases. *JSC Rule 8*. The Supreme Court may impose penalties for contempt of the Commission. *JSC Rule 4*.

2-346. Confidentiality. The filing of papers with the Commission, or testimony, is privileged in any action for defamation. Hearings before the Commission are closed. *JSC Rule 23*. Papers and testimony filed with the Commission are confidential; however, the record filed by the Commission with the Supreme Court does not remain confidential. N.M. Const. art. VI, §32; *JSC Rule 7*.

2-347. Authorized actions.

The Commission may make any of the following dispositions:

- (a) dismissal of complaint;
- (b) privately informing the judge that his conduct may be violative of the standards of judicial conduct;
- (c) proposing professional counseling or assistance. *JSC Rule 35*.

Based on the judge's admissions or following a formal hearing, the Commission may recommend to the Supreme Court the following formal sanctions:

- (a) removal;
- (b) retirement;
- (c) discipline, including one or more of the following:
 - (1) suspension;
 - (2) imposition of limitations or conditions on the performance of judicial duties;
 - (3) reprimand or censure;
 - (4) fine; and
 - (5) assessment of costs and expenses; or
- (d) imposition of any combination of the above sanctions. *JSC Rule 36.*

If the Commission determines that discipline, retirement or removal is merited, it makes its recommendation to the Supreme Court. The Supreme Court makes its own independent decision about the merits of the complaint. *See Martinez*, 99 N.M. at 202, 656 P.2d at 865.

2-400. Code of Judicial Conduct

2-410. Citation. The Code of Judicial Conduct is found in Judicial Volume 3, Rules 21-100 through 21-900. The Code is part of the Supreme Court Rules Annotated, adopted under the court's rulemaking authority.

2-420. History. The first code of judicial ethics in the United States was adopted as an advisory code by the American Bar Association in 1924. In 1972, the ABA adopted a new Model Code, which became the basis for most state ethics codes, including New Mexico's. The ABA revised the Model Code again, in 1990. The New Mexico Code has been amended periodically, most recently on February 16, 1995, when the Supreme Court adopted the 1990 ABA Code, with modifications.

2-430. Judges subject to Code.

All judges in New Mexico are subject to the Code, except as specifically exempted.

Except as provided in this rule, all judges and all candidates for judicial office shall comply with the provisions of this Code, including, but not limited to all judges and justices and all judicial candidates of the Supreme Court, Court of Appeals, district court magistrate court, metropolitan court, probate court, and municipal court. Any person who serves as a full-time or part-time judge is a "judge" within the meaning of this Code. NMRA 21-901(A).

Rule 21-901 lists certain rules from which full-time magistrate and municipal judges are exempt in Rule 21-901(B); other exempt provisions for probate and part-time magistrate and municipal judges are in Rule 21-901(C); and still other exempt provisions for pro tempore and periodic part-time judges in Rule 21-901(D). Any judge consulting these rules should be certain to check these exemption provisions to be sure that the rules actually apply to them.

2-440. Conduct subject to Code. Both intentional and unintentional violations of the standards of judicial conduct can be the subject of disciplinary action. Both public and private conduct is subject to discipline under the Code. "Personal" conduct off the bench is relevant to a person's qualifications to be a judge. *Napolitano v. Ward*, 457 F.2d 279, 284 (7th Cir. 1972). Previous acts of misconduct committed by a judge in his official capacity during a prior term of judicial office follow the judge to any subsequent judicial office. *In re Romero*, 100 N.M. 180, 183, 668 P.2d 296, 299 (1983).

2-450. Applicability of Code.

The Code is applied to judges by the Judicial Standards Commission, acting under its constitutional authority, and by the Supreme Court.

Violations of any of the rules of the Code of Judicial Conduct by incumbent judges shall be investigated, proceeded upon, and disposed of by the Judicial Standards Commission in accordance with its authority and rules of procedure, and by the Supreme Court of New Mexico acting under its powers of contempt and superintending control. Judges shall comply with all rules, requirements and procedures of the Judicial Standards Commission, shall cooperate with the Judicial Standards Commission in the performance of its functions and shall comply with all laws applicable to judicial office. NMRA 21-900(A).

Candidates for judicial office are subject to certain rules as well, and may be disciplined either by the state bar if they are lawyers; or by the Supreme Court if they are non-lawyers. NMRA 21-900(C).

2-460. Standard of review. A judge's conduct is reviewed objectively. The standard is whether a reasonable person--especially a "reasonably prudent and competent judge"--considers the conduct wrong under the circumstances. *In re Benoit*, 487 A.2d 1158, 1162-3 (Me. 1985).

2-500. Other Court rules

The Supreme Court rules contain procedural and administrative requirements that, if violated, can be subject to disciplinary review.

2-600. Statutes

The New Mexico statutes contain jurisdictional limitations and impose duties on judges. Although the discipline of New Mexico's judges is largely directed by court rule or constitutional provision, a judge's failure to comply with statutory requirements raises ethical issues because it indicates the judge is not performing judicial duties properly.

Some statutes even address judicial conduct issues specifically. For example, Section 66-8-135 requires the courts to send abstracts of DWI convictions to the Motor Vehicle Division and states that "failure to comply with this section is misconduct in office and grounds for removal." §66-8-135(F).

2-700. Advisory Committee on the Code of Judicial Conduct

The Advisory Committee on the Code of Judicial Conduct is a permanent committee of the

Supreme Court to which judges may refer questions about the ethical implications of their conduct or relationships. Any judge may address a letter to the Committee explaining the facts involved and requesting an opinion. The Committee issues its opinion in the form of a personal letter to the judge. The opinion is assigned a number and retained in the Committee's files, where it remains available for review without identifying the judge. Most of the opinions address questions relating to charitable work, financial dealings, conflicts due to family and professional relationships, and political campaigning. Although an Advisory Opinion is not binding in a disciplinary proceeding, a judge's reliance on the Committee's opinion demonstrates the judge's good faith if the question is ever raised. See RESOURCES.

2-800. Types of Ethical Violations

2-810. Standard of conduct. Judges are held to a more stringent standard of conduct than other public officials. *In re Romero*, 100 N.M. 180, 183, 668 P.2d 296, 299 (1983). A judge must expect to be the subject of constant public scrutiny, and must therefore willingly accept restrictions on his or her conduct that might be viewed as burdensome by the ordinary citizen. *Commentary to NMRA 21-200*. A judge's behavior will be judged objectively--does it look bad to someone else--even if the judge's motive is pure or in fact there is nothing unethical about what happened.

Judges are held to higher standards of integrity and ethical conduct than attorneys or other persons not invested with the public trust. *In re Piper*, 534 P.2d 159, 164 (Or. 1975).

2-820. Willful misconduct.

Article VI, Section 32 of the constitution states that "...[A]ny justice, judge or magistrate of any court may be disciplined or removed for willful misconduct in office... ." Conduct that is so serious that (1) the judge knew or should have known the conduct overstepped the bounds of her authority or (2) that was committed for a corrupt purpose will be treated as willful misconduct. The most serious cases of wrongdoing amount to willful misconduct. Before the Code was adopted, willful misconduct was the basis on which judges could be disciplined, usually resulting in removal from office.

2-821. Definition. Willful misconduct is based on proof of bad faith on the judge's part in carrying out judicial responsibilities. Willful misconduct in office is the bad faith misconduct of a judge acting in his judicial capacity. It is the improper or wrongful use of the power of her office by a judge acting intentionally, or with gross unconcern for her conduct. It involves more than an error of judgment or a mere lack of diligence. A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith. *In re Martinez*, 99 N.M. 198, 203, 656 P.2d 861, 866 (1982).

2-822. Relationship to Code. The Code does not control the determination of willful misconduct; it only furnishes proof of what constitutes appropriate judicial conduct. *In re Martinez*, 99 N.M. 198, 204, 656 P.2d 861, 867 (1982). Disciplinary decisions that include findings of willful misconduct typically also include findings of specific code sections, such as the appearance of impropriety, *NMRA 21-200*, or failure to follow the law, *NMRA 21-300(B)*.

2-823. Examples. "Willful misconduct" encompasses conduct involving moral turpitude, dishonesty, corruption, and any knowing misuse of the office, whatever the motive, but these elements are not necessary to a finding of bad faith. *In re Martinez*, 99 N.M. 198, 203, 656 P.2d 861, 866 (1982).

In *Martinez*, a New Mexico district judge was suspended for willful misconduct for having knowingly countermanded ex parte another judge's order to transport prisoners to the penitentiary and ordered that the District Attorney be denied his right to perform duties in children's court. The court found that the judge had acted in bad faith by knowingly and intentionally misusing the authority of his office to effect a purpose beyond his legitimate authority.

Willful misconduct can be found for acts that the judge knew or should have known were beyond his lawful power, or were within the lawful power but committed for corrupt purposes.

A California municipal judge acted vindictively toward attorneys by making rude gestures to them, used the power of his office to influence the disposition of cases before other judges to help friends and political supporters, and circumvented court procedures to have his own traffic ticket dismissed. This conduct went way beyond ignorance. The municipal court fulfills an important role in the justice system. "The Municipal court is the only court that the average citizen is likely to observe or participate in." *Spruance v. Comm'n on Judicial Qualifications*, 532 P.2d 1209, 1225 (Cal. 1975).

A California judge engaged in vulgar conduct in order to curtail lawyers' effective cross-examination of witnesses and was abusive to court employees. The judge knew or should have known these acts were beyond his lawful power. A judge's conduct must constantly reaffirm the judge's fitness for the responsibilities of judicial office. The canons of ethics relating to maintaining high standards of conduct and avoiding the appearance of impropriety emphasize the importance of appraising judicial misconduct objectively rather than subjectively. *Geiler v. Comm'n on Judicial Qualifications*, 515 P.2d 1, 8 (Cal. 1973).

Prior admonitions by the Judicial Standards Commission against a judge's association with fundraising efforts by a not-for-profit organization providing volunteer services for children involved in court proceedings supported a finding of willful judicial misconduct when similar associations with the organization's fundraising efforts continued. *In re Castellano*, 119 N.M. 140, 889 P.2d 175, 184 (1995).

2-824. Defense. There is no defense or mitigation for maliciously motivated, unjudicial conduct. *Spruance v. Comm'n on Judicial Qualifications*, 532 P.2d 1209, 1224 (Cal. 1975).

2-830. Other ethical violations. Most ethical violations are not willful, but result from poor judgment, lack of knowledge or negligent disregard of ethical standards. Although these violations do not rise to the level of willful misconduct, they will result in disciplinary action.

A magistrate who failed to follow the law in connection with a cash bond and was rude and angry toward a defendant's relatives was suspended from office for thirty days for violations of the Code, although his conduct did not rise to the level of "willful misconduct" as defined in *Martinez*. *In re Romero*, 100 N.M. 180, 669 P.2d 296 (1983)

2-840. Relevant factors in determining appropriate sanctions. The Washington Supreme Court has identified the following, non-exclusive factors as being relevant in determining the severity of sanction to be imposed for an ethical violation:

- whether the misconduct is an isolated instance or there is evidence of a pattern of misconduct
- the nature, extent and frequency of occurrence of the acts
- whether the misconduct occurred in or out of the courtroom
- whether the misconduct occurred in the judge's official capacity or in private life
- whether the judge has acknowledged or recognized that the acts occurred
- whether the judge has shown an effort to change or modify the conduct
- the length of service on the bench
- whether there have been prior complaints about this judge
- the effect the misconduct has on the integrity and respect for the judiciary
- the extent to which the judge exploited his position to satisfy his personal desires.

In re Deming, 736 P.2d 639, 659 (Wash. 1987).

Basic Principles of Judicial Conduct

3-100. Checklist

HOW DOES YOUR CONDUCT APPEAR TO SOMEONE ELSE?

A California judge suggests that judges apply the "headline test" when deciding whether or not certain conduct is appropriate: would you mind seeing a headline in tomorrow's newspaper reporting that you engaged in that conduct? *David Rothman, CALIFORNIA JUDICIAL CONDUCT HANDBOOK §100.200 (1990) [hereinafter Rothman]*.

Do you benefit personally from the conduct?

Is the conduct motivated by personal feelings toward a party or an attorney?

Is the conduct undignified or does it otherwise reflect poorly on the judiciary?

Does the conduct involve contact with a party or an attorney outside the court?

Does the conduct make it appear you are doing something improper, even if you are not?

Are you personally involved in a legal proceeding related to any of the parties, the attorneys, or the subject matter of a case brought before you?

Is the conduct to be engaged in publicly or privately?

Do you, as an individual, have a right to engage in the conduct?

Does the conduct offend anyone or make you appear to be prejudiced or biased?

Is the conduct law-abiding?

Basic Principles of Judicial Conduct

3-200. *Applicable Law*

Preamble to Code of Judicial Conduct
NMRA 21-100, 21-200, and 21-300.

3-300. **Introduction**

Judges wield great power and are expected to conduct themselves according to the highest standards, both on and off the bench. The prestige of the judiciary is essential in a system of government in which the judiciary functions independently. The behavior of judges is closely scrutinized to ensure continued confidence in the integrity of the courts; however, judges also are human beings with feelings, opinions and private lives. "Judges are not essentially different from other government officials. . . . [T]hey remain human even after assuming their judicial duties." *Green v. United States*, 356 U.S. 165, 198 (1958) (Black, J., dissenting). This combination of power, responsibility and humanity accounts for both the most exemplary and the most regrettable judicial conduct.

The achievement of justice is the inherent ethic in judging. *Rothman, supra*, at xxxiii. This goal is thwarted if:

the judge, consciously or unconsciously, [has] allowed the intrusion of insidious bias to command; or allowed case load and time pressures to transcend justice; or given the pretense of a hearing when, in fact, no listening took place; or failed to throw off the role of advocate on assuming the bench; or bowed to popular opinion in reaching decisions for public favor, career advancement or electoral victory. *Rothman, supra*, at xxxiii.

The Code's initial provisions reflect this concern with independence, integrity, impartiality and competence. These essential values underlie the more specific sections of the Code of Judicial Conduct and frequently are cited in conjunction with them. For example, conduct that undermines public confidence in the judiciary under NMRA 21-200(A) may also violate the conflict-of-interest provisions of NMRA 21-500. The basic provisions also operate independently in cases that the Code does not address specifically. The Code cannot anticipate every situation a judge may face. "To answer the questions that arise, judges must extrapolate from the language of the Code and the principles and policies underlying the Code and consider all the relevant circumstances." *Shaman, supra*, at x.

These principles are broad and frequently overlap. Typically, more than one ethical principle applies in a given fact situation, so that the same facts may be discussed in several ethical contexts.

3-400. **Integrity and Independence.**

An independent and honorable judiciary is indispensable to justice in our society. The provisions of this Code should be construed and applied to further that

objective. Preamble to Code of Judicial Conduct.

Judges, through their conduct, are held responsible for maintaining the credibility of the judicial system.

A judge shall participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. NMRA 21-100.

Judges have been disciplined, and sometimes removed from office, for engaging in conduct that violates this principle. Typically, this kind of unethical conduct constitutes abuse of power or seriously conflicts with the judicial role.

The judge may not use his power by retaliating for a personal affront;

A Kansas judge refused a request for probation in order to punish a defendant whose attorney had displeased the judge. *State ex rel. Committee on Judicial Qualifications v. Rome*, 623 P.2d 1307, 1310 (Kan. 1981).

A Florida judge was offended by the din of a police radio in a restaurant, and sent the officer a letter on official stationery threatening him with contempt. *In re Muszynski*, 471 So. 2d 1284, 1285 (Fla. 1985).

A municipal judge received a letter of caution for becoming impatient with police officers in his courtroom. After the hearing, the judge went to the police department and engaged in a heated discussion with the officers. The conduct prescribed for judges is more stringent than the conduct generally imposed on other public officials. *JSC 91-14*.

or by promoting a personal interest;

A magistrate was removed from office after filing two criminal complaints in his own court against a former tenant in the judge's apartment building and a visitor to a tenant, although the facts indicated the charges were for civil damages, proceeding to hear the cases in which he had an interest, and arresting one defendant and jailing him without authority. *In re Lucero*, 102 N.M. 745, 700 P.2d 648 (1985).

A judge was disciplined for intervening after his son was cited for drinking alcohol in public. The judge identified himself to the officers, showing his judicial identification, and asked one of them if she knew who he was. He further directed his volunteer bailiff to assist his son in responding to the citation. *Matter of Hon. Florencio "Larry" Ramirez*, 2006-NMSC-021.

or for direct financial gain.

A New York judge accepted money in exchange for dismissing charges against individuals. *In re Kuehnel*, 403 N.E.2d 167 (N.Y. App. 1980).

The judge may become inappropriately involved with a party outside the courtroom,

A magistrate was suspended and publicly reprimanded for willful misconduct and violating the Code for drinking in his home with a man who had alcohol-related charges pending against him in the judge's court and going with him to buy more beer. The judge threatened to throw the man's "ass in jail" if he didn't clear up his court problems that week. *JSC 90-F1*.

or behave publicly in a manner that demeans the judiciary.

A municipal court judge attended a wedding at which an altercation occurred. The judge intervened in the fight and was charged with obstruction of justice. The judge was admonished that such conduct did not display good judgment and tended to place the judiciary in disrepute and decrease public confidence in judicial system. *JSC 88-13*.

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including cursing in court offices, use of alcohol during court and other official proceedings, abuse of court staff, making racially biased references about court staff, and public derision of the chief judge. *In re Angie Vigil-Perez, NM Supreme Court Nos. 99-15 and 99-70.*

Judges have also been disciplined for stepping outside their judicial roles,

A magistrate judge was cautioned not to deliver messages from a defendant's father to a law enforcement officer because such an act is unseemly and not in the best interests of the judiciary. *JSC 92-12.*

A magistrate judge was admonished not to perform the services of a law enforcement officer after he accompanied a citizen to the home of the citizen's estranged wife in order to collect some personal items. *JSC 92-14.*

A judge was alleged to have requested the police allow him to participate in undercover drug operations. *JSC 87-13(g).*

A judge was alleged to have conducted investigations of complaints against police officers instead of referring them to the proper investigative agency. *JSC 87-13(j).*

A municipal judge was cautioned for attempting to counsel his niece, the complainant in a trial in magistrate court. *JSC 88-11.*

or for patterns of conduct demeaning that role.

A district judge was removed from office, among other reasons, for engaging in a pattern of conduct toward court staff, litigants, and his judicial colleagues as well as his own workload, which pattern adversely affected his reputation for impartiality, independence, and integrity. *In re Castellano*, 119 N.M. 140, 889 P.2d 175 (1995).

3-500. Impropriety and appearance of impropriety.

3-510. General rule.

A judge shall avoid impropriety and the appearance of impropriety in all the judge's activities. NMRA 21-200.

3-520. Scope of rule.

This general principle frequently applies as much to off-the-bench conduct as to conduct on the bench. *Rothman, supra*, §100.200. Both the *appearance* of impropriety and impropriety itself are prohibited, regardless of a good faith defense or exonerating facts.

The appearance of impropriety and public confidence in the impartiality of the judiciary, raise issues that must be viewed from the standpoint of the perception of the public. The question is not what a judge does or does not do, but what do others think he has done or might do. *AO 88-8.*

This objective standard is needed because public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. *Commentary to NMRA 21-200.* For example, a judge who speaks at length with a litigant in a pending case appears to be giving that party an advantage, even if in fact the conversation is unrelated to the case. This rule "places an especially heavy burden on the rural judge because of the intense public scrutiny, but rural communities like urban

communities still need to be assured that their judges are impartial and have integrity." 1990 Code, Annotation to 2A.

A metropolitan court judge who was charged with criminal offenses, being abusive toward staff and engaging in public criticism of police department practices was suspended from the bench, and eventually resigned. *JSC 02-F3*.

The Advisory Committee set out guidelines for distributing proceeds of an unclaimed litigation fund without undermining public confidence in the impartiality and integrity of the judiciary. *AO 00-01*.

A municipal judge who failed to sign over 700 outstanding bench warrants, routinely started court late, scheduled trials late in the evening to discourage their use, and met outside of court with defendants demonstrated a clear and convincing pattern of behavior that lacked respect for the constitutional, statutory and procedural limitations upon the judge's authority and conduct and lacked respect for the concept of avoiding the appearance of impropriety. The Judicial Standards Commission recommended that the judge be permanently removed; the charges ultimately were dismissed as moot when the judge was not re-elected. *JSC 97-1F*.

A magistrate judge who served as a firearms instructor for the sheriff's department, had regular contact with the sheriff's department through two-way radio, maintained a commission with the sheriff's department, carried a concealed loaded firearm, acted without jurisdiction in a domestic relations matter, unilaterally reduced a charge without an adversarial proceeding, and handled a plea and sentence over the phone with the defendant violated the Code of Judicial Conduct and demonstrated willful misconduct in office. The judge was temporarily suspended and placed on supervised probation. *JSC 97-2F*.

A district judge who repeatedly used contumacious language from the bench, failed to follow the law, treated litigants inappropriately, and publicly displayed contempt for the judicial system demonstrated a clear and convincing pattern of behavior that lacked respect for the constitutional, statutory and procedural limitations upon the judge's authority and conduct and lacked respect for the concept of avoiding the appearance of impropriety. The judge was ordered to resign. *JSC 98-1F*.

A judge was cautioned about not drinking alcoholic beverages in the courthouse or during court hours and not hosting holiday parties with alcohol in the courthouse. The judge also was cautioned that the odor of alcohol on his breath may itself give rise to the appearance of impropriety. *JSC 97-II(1)*.

A judge was cautioned about not using judicial letterhead to write letters to the police department concerning a complaint the judge's family had about a local business. *JSC 97-II(3)*.

A judge was cautioned against serving as a police dispatcher to avoid the appearance of impropriety. *JSC 97-II(4)*.

Magistrate judge who used intemperate language in referring to presiding judge and who napped on bench during a trial was disciplined. In the Matter of Joseph Guillory, No. 31,920 NM S.Ct. (49 NM State Bar Bulletin 18, December 27, 2010).

3-530. Injudicious conduct. Like NMRA 21-100, the rule prohibiting impropriety applies to conduct unbecoming a judge.

A judge who wrote bad checks, failed to pay taxes and used county facilities for her private business was placed under the mentorship of a district judge and required to repay her obligations. After failing to meet her obligations, she resigned from office. *JSC 02-F1*.

A municipal judge was cautioned to avoid activities giving the appearance of impropriety. The judge placed a call to an individual's place of employment after the person was involved in a confrontation with members of the judge's family, and threatened the person with criminal charges. *JSC 93-16*.

A magistrate was publicly reprimanded and suspended for 120 days by the Supreme Court for willful misconduct and violations of the Code because of conduct with a defendant who had appeared before him on arraignment for two felonies. One of the conditions of release the judge had imposed was that the defendant refrain from alcoholic beverages. Several weeks later judge encountered defendant in liquor store, gave her a ride home, drank with her, and allegedly had sexual intercourse with her. *JSC 92-F4*.

3-540. Misuse of power. It is highly unethical for a judge to misuse judicial power to advance judge's personal interests or the interests of others.

A municipal judge was suspended for thirty days for willfully accepting a favor from a person appearing before his court, creating an appearance of impropriety. The judge accepted a bundle of lumber from a trucker who was convicted by the judge of having an overweight load. The trucker paid the fine and then unloaded the lumber on the judge's property. *In re Terry*, 101 N.M. 360, 683 P.2d 42 (1984).

3-550. Criminal charges. When a judge is charged with a criminal offense, there is an appearance of impropriety as well as a conflict of interest in continuing to hear criminal cases.

A district judge who entered a no-contest plea to DWI and other motor vehicle code violations was reprimanded and resigned from office. *JSC 02-F4*

A magistrate judge indicted on thirteen criminal charges, including battery, criminal sexual contact, stalking, demanding a bribe, and soliciting commission of a felony, agreed to suspension without pay pending the resolution of the criminal charges, and ultimately retired with a commitment never again to seek judicial office. *JSC 01-F3*

Although it is not a violation of the Code to be charged with a crime, a judge who has been charged with DWI should not continue to preside in such cases because of the appearance of impropriety and the conflict between the authority that is bringing the charges against the judge. The judge should disqualify him/herself after charges are filed and proceed in all due speed in getting the matter resolved. For similar reasons, a judge charged with a felony should recuse him/herself from all criminal matters in which the DA's office prosecutes a case due to the appearance of impropriety and the obvious conflict with that office. *AO 89-1*.

A magistrate judge was suspended from office after being charged with DWI and domestic violence and related offenses. The judge subsequently entered into a plea agreement and resigned from the bench. *JSC 99-1F*.

The Supreme Court removed a municipal judge from office after he was convicted of DWI, continued to serve in a judicial capacity after the Supreme Court had suspended him while the DWI charges were pending, and was not truthful to the Court and the Judicial Standards Commission during oral argument in his disciplinary proceedings. *JSC 99-3F*.

The facts underlying a criminal charge may be grounds for discipline against a judge even if the charges are not proven.

An Illinois circuit judge testified under a grant of immunity about benefits he improperly received in connection with the management of the state fair. The grand jury named him an unindicted co-conspirator. The court ordered him removed from office, finding the grant of immunity did not apply to the disciplinary proceeding and the judge's personal conduct off the bench was relevant to his qualifications to be a judge. Conduct that does not constitute a criminal offense may still violate the Judicial Canons. *Napolitano v. Ward*, 457 F.2d 279 (7th Cir. 1972).

3-560. Creating potential conflict-of-interest. A judge should avoid situations that may create bias in her decisionmaking.

It is improper for part-time municipal judges to represent criminal defendants in other courts in the same county in which the judges serve. It is also improper to represent clients in civil actions against the same city in which the judges serve as alternative municipal judge. Police officers who appear before the judge in municipal court are likely to testify or act as opposing parties; therefore the judge may not represent criminal defendants. Even if no actual conflict of interest existed, a reasonable person could assume that a conflict did exist, and this would create the appearance of impropriety. *NMRA 21-200(A); AO 89-1. But compare NMRA 21-901 (C)(2)*, limiting restriction of law practice by probate and part-time magistrate and municipal judges to the court on which judge serves or to which appeals may be taken.

A magistrate judge was cautioned about the appearance of impropriety created when he was present when persons whom he had convicted were being supervised outside the judicial complex, in order to prevent ex parte communications between the judge and defendants attending meetings in the probation department whose cases have not been adjudicated. *JSC 93-17*.

3-570. Relevant factors. The following factors may be relevant in determining impropriety:

1. The public or private nature of the act when done.
The more private the conduct, the greater the judge's expectation of privacy. But even private conduct is subject to disciplinary measures if it indicates bias.
2. The extent to which the conduct is protected as an individual right.
Speech is constitutionally protected but a judge's speech is circumscribed by the requirements that judges avoid the appearance of impropriety and bias in decisionmaking.
3. Whether the conduct was harmful or offensive to others.
Such conduct is inherently objectionable.
4. The degree of respect or lack of respect for the public or individuals that the conduct demonstrates.
Frequent use of biased epithets or stereotypes demonstrates disrespect for the public.
5. The degree to which the conduct is indicative of bias, prejudice, or improper influence.
Judges must be impartial both in appearance and in fact. *Shaman, supra*, §10.22 at 303.

3-600. Respect for the law. Disrespect for the law is a specific form of impropriety.

3-610. General rule.

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. NMRA 21-200(A).

3-620. Scope of rule.

This is one of two provisions of the Code explicitly concerned with a judge's adherence to the law. NMRA 21-200(A) relates primarily to a judge's personal conduct; NMRA 21-300(B) pertains to a judge's application of the law in deciding cases. *See* EXERCISE OF JUDICIAL POWER. "Requiring adherence to the law . . . even in strictly private matters is a given." *Shaman, supra*, §10.08 at 280. Violations of the law also implicate NMRA 21-100.

A district judge who gave written notice that an appellate court's order "will not be honored" expressed contempt for the law in a public manner calculated to undermine the integrity of the judicial system, in defiance of the judge's solemn obligation to respect and comply with the law. The judge was suspended, placed on probation and publicly censured. *In re Hon. Benjamin S. Eastburn*, 121 N.M. 531 (1996).

A district judge who repeatedly used contumacious language from the bench, failed to follow the law, treated litigants inappropriately, and publicly displayed contempt for the judicial system demonstrated a clear and convincing pattern of behavior that lacked respect for the constitutional, statutory and procedural limitations upon the judge's authority and conduct and lacked respect for the concept of avoiding the appearance of impropriety. The judge was ordered to resign. *JSC 98-1F*.

A judge who cannot obey the law cannot be expected to apply it.

A probate judge was charged with cocaine trafficking. The JSC charged him with misconduct and when the judge did not respond, suspended him until final disposition of the charges. After the conviction the judge was charged with willful misconduct and resigned before the disciplinary hearing. *JSC 90-F3*.

Bribery not only is a crime but also directly undermines public confidence in the judicial system.

A municipal judge was removed from office for misconduct for taking bribes in exchange for dismissing serious traffic charges. *JSC 91-F4*.

Similarly, criminally fraudulent conduct committed by a judge undermines public confidence in the courts.

A Michigan judge was removed from office for conduct including solicitation to commit perjury and intentional misrepresentation on an insurance application and solicitation to commit perjury. *In re Jenkins*, 465 N.W. 2d 317, 318 (Mich. 1991).

Violations of alcohol laws have subjected New Mexico judges to disciplinary action.

The Supreme Court found willful misconduct and violations of the Code in the case of a municipal judge who accompanied his minor son to a liquor store where they purchased a keg of beer that was made available to minors at the judge's home at a going away party for his son. The judge was subsequently convicted of the criminal charge of giving alcoholic beverages to minors. The judge was suspended from office for 30 days. *JSC 90-F4*.

A municipal judge was arrested for DWI. His breath test registered .21. The judge's actions in driving while intoxicated, causing an accident and not cooperating fully with investigating officers constituted willful misconduct and were in violation of NMRA 21-200. The Supreme Court imposed one month's suspension because of the judge's cooperative attitude in seeking alcohol counseling. *JSC 88-F5*.

A magistrate was stopped for DWI, led officers on a high-speed chase and attempted to avoid arrest. He was found not guilty of criminal charges, but was suspended from office by the Supreme Court for willful misconduct. While still under suspension, he was again arrested for DWI. This time, he was removed from office. *JSC 89-F1; JSC 89-F3*.

3-630. Statutory duties. A judge may also be prosecuted for violating statutory requirements.

Section 14-12-18 makes it a misdemeanor for a person to authenticate a document in the absence of the proper party.

3-700. Impartiality.

3-710. General rule.

A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interest of the judge or others; nor should a judge convey or permit others subject to the judge's direction and control to convey the impression that they are in a special position to influence the judge. NMRA 21-200(B).

The general prohibition against partiality is NMRA 21-200(B). Other provisions of the Code also are concerned with maintaining impartiality, especially NMRA 21-300 and NMRA 21-500.

3-720. Policy. If a judge appears partial, public confidence in the judiciary is eroded, the public loses confidence in the judiciary, and the judicial system cannot function. Therefore a judge must avoid all activity suggesting the judge's decisions are affected by self-interest or favoritism. The Code prohibits activities that are deemed inherently inconsistent with the appearance of impartiality. As with questions of impropriety, an objective standard applies: does the conduct create the *appearance* that the judge is less than partial?

A municipal judge's ownership and directorship of a DWI school created an appearance of impropriety and reflected adversely on his impartiality because the judge had a direct financial interest in having individuals appear before him and then attend the school. Even if the judge had not been paid, there was an appearance of partiality because the school's existence was directly related to the number of people sentenced in his court. *In re Rainaldi*, 104 N.M. 762, 762, 727 P.2d 70 (1986).

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including dismissing DWI and other cases of friends and relatives, without notice to the prosecutor, based upon ex parte communications, and even though some of the cases had been assigned to other judges. *In re Angie Vigil-Perez*, NM Supreme Court Nos. 99-15 and 99-70.

Municipal judge cautioned against attending seminar put on by defense attorney who practices in front of the judge, when only defense perspectives will be presented at the seminar. *AO06-04*

3-730. Effect.

3-731. Distinguish impartiality from opinion.

The requirement of impartiality means the judge's opinions about a case cannot be influenced by external factors--such as a judge's personal relationship with a party or interest in the outcome. Of course the judge will have opinions, but they must be formed in the course of the legal proceeding.

The judge must shrewdly observe the parties and their lawyers: "He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. . . . If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." *In re International Business Machines Corp.*, 618 F.2d 923, 930 (quoted in *United Nuclear Corp. v.*

General Atomic Co., 96 N.M. 249, 629 P.2d at 324); *see also* DISQUALIFICATION.

3-732. Other activities.

A judge may not take on activities, including law-related activities, that conflict with judicial duties.

An alternate municipal judge cannot defend criminal defendants before the municipal court. Holding both positions would create the appearance of impropriety and a conflict with judge's independence. The judge would be in an adversarial relationship with certain attorneys while acting as a lawyer, and yet would have to be impartial as a judge when ruling on cases involving those lawyers. When his criminal clients are sentenced he must pray for leniency and then as judge he must sentence other defendants for the same crime under similar situations. The dual position also would involve the judge in financial dealings that involve frequent transactions with attorneys likely to come before the court. *AO 89-5*.

3-740. Testimony as a character witness.

A judge shall not testify voluntarily as a character witness. NMRA 21-200(B).

A judge's testimony as a character witness injects the prestige of the judicial office into a proceeding and may be misunderstood to lend the prestige of the judicial office in support of the party for whom the judge testifies. The rule does not apply to testimony given in response to an official summons. *Commentary to NMRA 21-200*.

The reports of the Judicial Standards Commission report violations of this rule. *JSC 84-I; JSC 88-I6*.

A judge may not use rulings in a case in a manner that creates an appearance of bias.

A district judge was removed from office for a pattern of conduct, including creating an appearance of bias and partiality in his rulings on a case. The judge had delayed entry of judgment against a losing party, apparently to forestall an appeal; after being ordered to file the judgment, had attempted to prolong the case by enlarging the scope of issues to be litigated; after reversal on the merits, refused to award costs on remand, forcing another appeal. *In re Castellano*, 119 N.M. 140, 889 P.2d 175, 183 (1995).

3-800. Related topics

EXERCISE OF JUDICIAL POWER

DEMEANOR AND IMPARTIALITY

DISQUALIFICATION

Exercise of Judicial Power

4-100. Checklist

The following checklist is based on *Rothman, supra, Appendix A, Direct and Hybrid Contempt--Checklist*. See also *American Judicature Society, ETHICS TRAINING FOR NON-LAWYER JUDGES 70-71* [hereinafter *AJS Ethics Training*].

CONTEMPT

- Observe the act in the presence of the court or in the court's vicinity.
- Consider taking a recess for reflection.
- Decide whether the act is contemptuous. Is the act:
 - disorderly or insolent language or acts that interfere with the conduct of the court and with the orderly administration of justice, and tend to impair the respect due to the authority of the court;
 - disobedience of court order;
 - any other unlawful interference with the proceedings of the court.
- Decide whether to ignore the act or deal with it. Is action needed to preserve order or the authority of the judge? If you deal with it, do so out of the presence of the jury.
- Decide if a warning is necessary. A warning is required if the act is not contemptuous on its face.
 - Document the warning in the court file.
 - Observe the act again.
- Cite the offending person for contempt.
 - Recite if there was an order or warning given.
 - Describe the contemptuous act in detail.
 - Recite that it occurred in the presence of the court.
- Decide whether you should not preside at the hearing because of personal embroilment.
- Hearing:
 - Advise the person of the contempt charge.
 - Offer opportunity to explain or apologize.
- Weigh the effect of explanation or apology.

- Adjudicate the contempt charge--proof beyond a reasonable doubt.
- Impose punishment.
- Prepare written order, making specific findings of each element of contempt.

PROHIBITED CONDUCT

- Using your authority to benefit a friend or other person.
- Using the powers of your office for your own benefit.
- Using the powers of your office to retaliate against others.
- Wearing judicial robe when you are not conducting official judicial business.
- Pre-signing orders, warrants or other documents requiring a judge's signature.
- Delegating judicial acts to non-judges.
- Investigating facts in a case on your own. You must decide the case on the evidence brought before you.
- Giving personal assistance or legal advice to a party or to someone reasonably likely to appear in your court.
- Conducting judicial business behind closed doors or in the absence of a party or her attorney.
- Making rulings not in accordance with the law.
- Becoming involved in plea bargaining.

Exercise of Judicial Power

4-200. Applicable Law

NMRA 21-100, 21-200, and 21-300(A).

4-300. Introduction

Judges have the power and the duty to make choices. Much of this power is discretionary. Judicial discretion is the power to decide those matters that call for the exercise of personal judgment rather than the application of strict rules. *Shaman, supra*, §4.01 at 79. A judge exercises discretion when she grants a continuance, weighs evidence, imposes a non-mandatory jail sentence, or holds a person in contempt. In order to preserve judicial independence, few fixed rules apply to the exercise of this authority. If the judge commits "mere legal error"--a mistaken exercise of judicial discretion--the mistake can be corrected on appeal. *Shaman, supra*, §1.12 at 20. But judicial power can be abused, such as by "fixing" a speeding ticket for a friend, or by making legal mistakes so serious that the judge's conduct becomes unethical. Basically, if a judge's misuse of power is flagrant enough, serious enough, or frequent enough to raise concern about the judge's good faith or fitness to hold office, the judge risks being sanctioned for ethical violations.

Several code sections relate to the exercise of power. Two general principles apply, especially to the use of power for personal gain: NMRA 21-100 requiring a judge to uphold the integrity and independence of the judiciary by observing and maintaining high standards of conduct, and NMRA 21-200, relating to impropriety and the appearance of impropriety. *See* BASIC PRINCIPLES. NMRA 21-300(B)(2) relates specifically to a judge's standards while performing her judicial duties:

A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.
NMRA 21-300(B)(2).

4-400. Abuse of power

A judge abuses power when he takes advantage of his judicial position for personal reasons, including personal gain, retaliation, or helping friends or family. These abuses profoundly violate the public's trust in the judiciary.

4-410. Advancing private interests of others. A judge cannot use her judicial position to gain favored treatment in court for anyone. Typically, such violations occur when friends, relatives, business or political associates have an interest in the outcome of a pending case.

4-411. Judge's own action. A judge may not extend special favors to litigants or otherwise give an advantage for personal reasons to someone appearing before him.

Judge who summarily adjudicated 24 traffic cases for family and friends over three year period without hearings or evidence was removed from the bench. *Matter of Hon. J. Wayne Griego*, 2008-NMSC-020.

Municipal judge who called friend on bail to warn him about bail enforcement agent going to question and possibly arrest him was disciplined for conduct undermining the integrity and independence of the judiciary. *In the Matter of Barbara Aldaz-Mills*, No. 31,197, S. Ct. (48 NM State Bar Bulletin 24, May 21, 2009).

A municipal judge received a letter of caution for declining to accept a complaint filed against a relative. The judge sent the complainant to file in magistrate court. The judge said he wanted to avoid the problem of having a complaint filed regarding his relative. The judge should have accepted the complaint and recused himself later. *JSC 85-16*.

A magistrate was convinced by relatives of a repeat DWI offender to release him from jail because of his grandmother's illness. Without conducting a hearing, the judge suspended the jail term and released the offender, entering an amended judgment contrary to law. The judge resigned prior to the Supreme Court hearing on a charge of willful misconduct and violations of code. *JSC 90-F5*.

A magistrate caused a court document to be backdated to allow a criminal complaint to be made before the running of the statute of limitations. These acts were committed in violation of NMRA 21-200 (disrespect for law) and NMRA 21-300 (unfaithful to law) and together constituted misconduct in office. He was suspended without pay for two months. *JSC 88-F1*.

Improper dismissal of proceedings is a commonly cited ethical violation.

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including dismissing DWI and other cases of friends and relatives, without notice to the prosecutor, based upon ex parte communications, and even though some of the cases had been assigned to other judges. *In re Angie Vigil-Perez, NM Supreme Court Nos. 99-15 and 99-70*.

A North Carolina judge dismissed traffic tickets of family and friends. *In re Kivett*, 309 S.E. 2d 442, 449 (N.C. 1983).

In a case involving a friend's nephew, a judge reduced a misdemeanor traffic offense to a parking ticket, without giving notice to the district attorney. He also dismissed a criminal case on a technicality, motivated by his relationship to the defendant's father. *Spruance v. Comm'n on Judicial Qualifications*, 532 P.2d 1209, 1217-1219 (Cal. 1975.)

4-412. Influencing others. It is unethical for a judge to attempt to influence others, such as judges or court personnel, for the purpose of affecting the course or outcome of a proceeding.

A metropolitan court judge accused of using or allowing the use of her name and title by a friend to influence the outcome of judicial and other matters in which he was involved was suspended from the bench and ultimately resigned office. *JSC 02-F3*.

A municipal judge who admitted to seeking favorable treatment from police for a friend accused of DWI was suspended, reprimanded, required to attend an ethics training at his own expense, and otherwise required to abide by the orders of the Supreme Court. *JSC 02-F6*.

A magistrate judge who admitted to intervening with a state police officer on behalf of a friend charged with aggravated DWI, ordering detention officers to release the defendant into his custody, and interfering in the police investigation by contacting a witness, received a formal reprimand from the court and was assigned a district judge mentor. *JSC 01-F2*

A Kansas district judge attempted to have a friend's traffic ticket dismissed or the fine reduced. When the other judge refused, the district judge left in a huff saying, "Well, I guess that is one favor I don't owe you." The intervention of a judge on behalf of a friend violates the code whether whispered in secret or shouted in public. *In re Miller*, 572 P.2d 896, 896 (Kan. 1977).

A New York judge attempted to influence a prosecutor to drop charges against a friend's son. The judge discussed the case with the Assistant District Attorney and the presiding judge, informing them of recent tragedies within the family. *In re Kiley*, 546 N.E. 2d 916, 917 (N.Y. 1989).

A judge received a letter of caution for allegedly calling a district court judge's secretary to request more time for the judge's spouse to prepare for a hearing in which the spouse was a litigant. *JSC 91-13*.

4-420. Use of judicial power for personal gain. A judge flagrantly violates ethical rules by using power for the judge's personal advantage.

4-421. Avoiding prosecution.

A California judge received a traffic ticket, intimidated another judge into dismissing it and then secretly altered it to indicate it was dismissed after the judge attended traffic school, which he had not done. *Spruance v. Comm'n on Judicial Qualifications*, 532 P.2d 1209, 1220 (Cal. 1975).

After his DWI arrest, a California judge asked the supervising officer if the arresting patrolman could "lose" the paperwork somewhere between the office and the court. *Kennick v. Comm'n on Judicial Performance*, 787 P.2d 591, 599 (Cal. 1990).

4-422. Retaliation and embroilment. A judge may be tempted to use power vindictively, in retaliation for a personal offense.

A district judge was removed from office for a pattern of misconduct, which included ordering the court administrator jailed for contempt. The administrator had transferred the judge's files to other judges at the direction of the chief judge, and refused to obey the judge's order seeking to countermand the transfer. *In re Castellano*, 119 N.M 140, 889 P.2d 175, 180-181 (1995).

A Florida judge was disturbed by a police radio at lunch and ordered the officer to turn it off. The officer could not do so because of police regulations. The judge later sent the officer a letter on official stationery and threatened him with contempt. *In re Muszinski*, 471 So.2d 1284, 1285 (Fla. 1985).

A California judge was censured for conduct including publicly calling a soccer coach, a "pervert," based on the judge's knowledge the coach had once been convicted of child molestation, and initiating a probation revocation proceeding against a probationer for personal reasons. *In re Rasmussen*, 734 P.2d 988 (Cal. 1987).

A West Virginia magistrate was publicly reprimanded for threatening her estranged husband with arrest for DWI. The judge had left a threatening message on her spouse's answering machine. *In re Boese*, 410 S.E. 2d 282, 283 (W. Va. 1991).

Nor may a judge lose self-control in a manner unbecoming a judge, even if the threatened action is not judicial.

A district judge was removed from office for a pattern of misconduct, which included the use of profane language and other discourteous, disrespectful and undignified treatment of court staff. *In re Castellano*, 119 N.M 140, 889 P.2d at 181-182.

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including cursing in court offices, use of alcohol during court and other official proceedings, abuse of court staff, making racially biased references about court

staff, and public derision of the chief judge. *In re Angie Vigil-Perez, NM Supreme Court Nos. 99-15 and 99-70.*

A magistrate's daughter was the subject of a law enforcement action. Later that evening the magistrate castigated and threatened to whip the chief of police. The magistrate received a letter of caution. *JSC 85-F2.*

When a California judge was stopped by a policeman for excessively using her horn, she told the officer to "go to hell," and at the office told her bailiff to find the officer so she could "shoot his balls off and give him a .38 vasectomy." The officer was made to appear in court. In a separate incident, the judge threatened to shoot the manager of her apartment building because of a confrontation they had. For this and other misconduct, the judge was removed from office. *Cannon v. Comm'n on Judicial Performance, 537 P.2d 898, 902, 913-14 (Cal. 1975).*

4-430. Resolving controversies outside the judicial process. Judges have been disciplined for asserting their authority on behalf of others when no judicial proceeding is involved. In these cases, the judge abuses authority by assuming an adversarial role while cloaked with judicial authority.

A New York judge, on the basis of an ex parte communication from a landlord, wrote a letter to the landlord's tenants and signed a warrant to evict them, although no legal action was pending. *In re Kristoffersen* (unreported determination N.Y. 1990)(cited in *Shaman, supra*, §6.04 at n. 48).

A magistrate who assisted creditors in the collection of debts by writing letters to alleged debtors in matters in which no complaints were filed was issued an oral caution for misusing his authority. He had used court office supplies in preparing the letters. The judge had said he believed he was only helping to reduce the amount of litigation. *JSC 85-F1.*

Municipal judge who became advocate for claimant when no case was even pending before the judge undermined public confidence in integrity and impartiality of the judiciary and used prestige of judicial office for the private benefit of another person. *In the Matter of Sabino Ramirez*, No. 31,664 S. Ct. (48 NM State Bar Bulletin 31, June 26, 2009).

4-500. Legal Error. A judge's failure to follow the law may violate NMRA 21-200, which requires the judge to comply with the law and promote public confidence in the judiciary, or NMRA 21-300(B)(2), which requires the judge to be faithful to the law and maintain professional competence in it. In the most serious cases, the judge's actions may indicate bad faith, supporting a finding of willful misconduct.

4-510. Pattern of legal error. Violations of NMRA 21-200A are more likely to be found when there is a pattern of legal error, indicating the judge lacks competence in the law. Continuous conduct of this sort demonstrates that a judge has not maintained a professional competence in the law and is not fit to hold office.

A New York judge was removed from office for repeatedly neglecting to inform litigants of their rights, including right to counsel, and coercing defendants to make damaging admissions by threatening them with incarceration. *In re Esworthy*, 568 N.E.2d 1195, 1196 (N.Y. 1991).

In 62 cases over a two-year period a New York judge routinely denied criminal defendants their rights, abused the bail process, ordered defendants held in custody without justification, assumed an adversarial role at arraignments, and otherwise demeaned the judicial process. The judge was removed from office. *Sardino v. State Comm'n on Judicial Conduct*, 448 N.E. 2d 83, 84 (N.Y. 1983).

4-520. Egregious legal error. Extremely serious legal error can subject a judge to discipline, even if there is no continuous pattern of violations. In the following cases, the judge simply refused to follow the law.

A Michigan judge intentionally disregarded a binding appellate decision in which a gun control ordinance was held constitutional, and refused to impose the mandatory penalty under the ordinance. *In re Hague*, 315 N.W.2d 524, 531 (Mich. 1982).

A West Virginia magistrate failed to assess minimum penalties for offenses and withdrew a criminal complaint without the approval of the prosecuting attorney. *In re Crislip*, 391 S.E.2d 84, 86-87 (W. Va. 1990).

4-530. Specific situations. Judges have been disciplined for failure to follow the law in various situations, including:

4-531. Abdicating decision-making responsibilities. These cases demonstrate flagrant disregard of judicial responsibilities.

A Louisiana judge was disciplined for flipping a coin or taking ballots from spectators in the courtroom to determine guilt or innocence. This conduct was a complete abdication of judicial duty. *In re Daniels*, 340 So. 2d 301, 307-308 (La. 1976).

A judge was alleged to have delayed bringing criminal cases to trial until six months had passed and then dismissing under the six-month rule to avoid making a decision. *JSC 87-13(k)*.

4-532. Improper delegation of judicial responsibilities. A judge may not delegate judicial duties or authority to non-judicial staff, even with the best intentions. Such delegation shows a lack of care in exercising judicial responsibilities, which undermines public confidence in the judiciary.

A magistrate delegated to a municipal clerk the authority to solemnize marriages, without statutory authorization, in violation of former NMRA 21-200(A), 21-300(A)(1) and 21-300(B)(2). The judge received a 5-day suspension and reprimand. *In re Perea*, 103 N.M. 61, 711 P.2d 894 (1986).

A municipal judge was disciplined for asking his staff to “vote” on whether the judge should dismiss a traffic citation. *JSC 97-1F*.

A magistrate was issued a letter of caution for having signed a criminal order expecting the accused to plead guilty and left instructions for the clerk to handle the case in his absence, in violation of the procedural requirements for entry of judgment. *NMRA 6-701; JSC 89-11*.

4-533. Improperly assuming jurisdiction. A judge is responsible for ensuring that she has jurisdiction before proceeding with the case.

A magistrate assumed jurisdiction over a case inappropriately, and was admonished to study the Supreme Court rules and not accept the advice of law enforcement officers. *JSC 88-14*.

4-534. Ignoring required procedures. A judge does not have discretion to bypass statutory and procedural requirements in exercising authority.

A magistrate was publicly censured for issuing a writ of replevin without having received a formal complaint. *JSC 84-F*.

A letter of admonishment was issued to a judge for failing to issue a proper order when releasing an inmate from jail prior to completion of the sentence. *JSC 84-I*.

A municipal judge received a 15-day suspension for authenticating both an application for an absentee ballot and ballot in the absence of the voter, contrary to statutory requirements, in violation of former NMRA 21-200(A) and Code 21-300(A)(1). *JSC 85-F6*.

4-535. Swearing of witnesses. Witnesses must be properly sworn before testifying.

The JSC has reported at least three instances in which municipal court judges heard testimony from witnesses without first swearing them in. The judges were issued letters of caution. *JSC 85-I5 JSC 86-I5 JSC 88-I2*.

4-536. Bonds. Irregular procedures in connection with bonds have also raised ethical issues.

A judge was alleged to have established a bond for defendant after imposing a fine and ordering DWI school. After completion of school and payment of fine, judge refused to return the bond. *JSC 87-I3*.

A defendant's uncle posted an appearance bond in municipal court in a "driving on suspended license" case. The judge found the defendant guilty, fined him, and tendered to the uncle the difference in the amount of the fine and the bond, although the bond was for appearance only and not a guarantee of payment. The judge received a letter of admonition, cautioning that such actions tend to bring the judiciary into disrepute. *JSC 88-I5*.

4-600. Abuse of contempt power

4-610. Introduction. Abuse of contempt power is a specific kind of failure to follow the law, and as such is governed by NMRA 21-100, NMRA 21-200, and NMRA 21-300(B)(2). Abuse of contempt authority also implicates NMRA 21-300(B)(4) and NMRA 300(B)(7), relating to judicial demeanor and protecting the parties' right to be heard. *See* Demeanor and Impartiality.

The contempt power is the judge's ultimate weapon, which enables him to control the courtroom to maintain decorum. Unfortunately contempt is subject to abuse by judges who have lost control of their own composure or the situation in the courtroom. Most commonly, judges get into trouble when they use contempt to settle a personal score, especially in retaliation against a party, attorney or witness with whom the judge has been drawn into personal conflict. Because it carries criminal penalties, contempt should be used as a last resort, only for legally valid reasons, and in strict conformity with procedural requirements. "It should be used with great prudence and caution and never to intimidate litigants and witnesses or in a manner that interferes unnecessarily with a litigant's ability to consult with counsel." *AJS, ETHICS TRAINING FOR NONLAWYER JUDGES 73 (1993)*. Any other use of the contempt power falls outside the scope of judicial authority and may subject the judge to disciplinary action, often for willful misconduct.

The following discussion looks at contempt in the context of judicial ethics, and is not a complete discussion of the substantive law. Judges should refer to their statutes, court rules and benchbook

for the substantive law of contempt. *Metro/Magistrate Benchbook* §3.4; *Municipal Benchbook* §7.5.

4-620. Contempt defined. Contempt of court is an act, which is calculated to lessen the authority or degrade the dignity of the court by embarrassing, hindering, or obstructing the court in the administration of justice. *Metro/Magistrate Benchbook* §3.4(A).

4-630. Basic legal requirements. For a finding of contempt to be supported, the conduct must be contemptuous, and the judge must follow all procedural requirements, including warning, any required notice, hearing, and the entry of a written order.

4-631. Grounds. Judges of the courts of limited jurisdiction can punish for contempt only for (1) misbehavior that obstructs the administration of justice and has occurred in the presence of the court; (2) misbehavior of court officers (clerks and bailiffs) in official transactions; or (3) disobedience or resistance to any lawful order, rule, process, decree or command of the court. A magistrate has jurisdiction to punish for contempt only for disorderly behavior or breach of the peace tending to interrupt or disturb a judicial proceeding in progress before the magistrate or for disobedience of any lawful order or process of the court. No person shall be punished until given an opportunity to be heard in his defense. §35-3-9.

4-632. Direct contempt. Direct contempt is contemptuous conduct that takes place in the judge's presence or the court's vicinity and interrupts the course of proceedings so that the judge must take corrective action. Any person present in the courtroom can be charged with contempt, including an observer. Direct contempt often involves disorderly or insolent behavior and is punished summarily. Prior notice is not required because the judge usually deals with the offending conduct immediately. For the judge to punish direct contempt, the judge must certify that she saw or heard the conduct and that it was committed in the presence of the court. Unless the conduct in question is contemptuous on its face, the judge should warn the contemnor specifically that the judge finds the conduct contemptuous and allow an opportunity for apology or change in conduct. A hearing must be held before a contempt order can be entered. The order must be in writing, so it can be appealed.

4-633. Indirect contempt. Indirect contempt includes all contemptuous behavior that is not direct contempt, including disobeying a court order. Punishment for indirect contempt requires a complaint, notice, hearing and a written order.

4-640. Contempt hearing. The judge who charges the contempt is not required to disqualify herself from presiding over the contempt hearing. However, the judge should disqualify herself if she is so personally embroiled in the controversy that she cannot rule fairly.

A judge who initiated a contempt proceeding against an attorney was not disqualified from presiding over the contempt hearing. The court rejected the per se rule of disqualification for contempt hearings and adopted the "sounder determination" of the United States Supreme Court in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) that a judge should be prohibited from presiding only if the judge becomes so embroiled that it is unlikely he can maintain the necessary detachment. *State v. Stout*, 100 N.M. 472, 475, 672 P.2d 645, 648 (1983).

4-650. Pattern of abuse. Where judges have been disciplined for abuse of contempt power, there is usually a pattern of repeated misuse. *Shaman, supra*, §4.02 at 82.

A Florida judge held an attorney in contempt without allowing him to explain why he was late to court, and held a boy's father in contempt for asking why the boy had been confined in a juvenile shelter. *In re Crowell*, 379 So. 2d 107, 108 (Fla. 1980).

A Nevada judge was removed from office for a long-standing pattern of abuse of contempt power that involved at least three instances in which the contempt had been reversed on appeal. The judge had ignored binding precedent and the fact that the judge was experienced but continued to ignore proper procedure was held to constitute the bad faith necessary to find willful misconduct. *Goldman v. Nevada Comm'n on Judicial Discipline*, 830 P.2d 107, 135 (Nev. 1992).

4-660. Embroilment. Personal embroilment in a controversy is a frequent cause of abuse of the contempt power. Some litigants intentionally try to make the judge lose control. An angry judge is more likely to abuse this authority than a judge who remains above the fray.

A judge must not . . . place the defense of his own character above his obligation to promote respect for the law in adjudicating contempts of court. . . . No matter how provocative are the personal attacks or innuendos by lawyers against a judge, the judge simply "should not himself give vent to personal spleen or respond to a personal grievance" because "Justice must satisfy the appearance of justice." *McCartney v. Commission*, 526 P.2d 268, 287 (Cal. 1974).

Judges should not overreact when a party disqualifies the judge or files disciplinary charges.

A California judge used contempt to retaliate against an attorney who disqualified the judge from cases. *In re Wenger*, 630 P.2d 954, 958 (Cal. 1981).

A California judge held a litigant in contempt after she publicly posted a copy of her letter of complaint about the judge to the state's judicial conduct organization. The judge was removed from office for this and other misconduct. *Furey v. Comm'n on Judicial Performance*, 743 P.2d 919, 926-27 (Cal. 1987).

4-670. Common scenarios demonstrating abuse of the contempt power. Attorneys, litigants, witnesses, and even persons unrelated to a court proceeding can be the subject of a judge's misuse of the contempt power. The judge's overreaction can arise from conduct in court, retaliation for past conduct, or events in the judge's personal life.

4-671. Invalid underlying basis. The conduct itself must be contemptuous for a judge to punish someone for contempt.

A California judge arbitrarily entered an order to refrain from examining a witness. *Cannon v. Comm'n on Judicial Qualifications*, 537 P.2d 898, 904 (Cal. 1975).

Misuse of the contempt power by a judge is willful misconduct and can be grounds for removal from office.

A district judge was removed from office for a pattern of misconduct, which included ordering the court administrator jailed for contempt. The administrator had transferred the judge's files to other judges at the

direction of the chief judge, and refused to obey the judge's order seeking to countermand the transfer. *In re Castellano*, 119 N.M 140, 889 P.2d 175, 180-181 (1995).

A California judge was removed from office for conduct including threatening incarceration to ensure defendant would comply; threatening contempt sanctions on a defendant who whispered to his attorney without further inquiry; holding defendant in contempt after the defendant asked "how come" after the judge denied his request to say something; and threatening a witness with jail or fine when defense counsel objected to the witness's answer; and finding a spectator in contempt when she swore after tripping over her son's feet. *Kloepfer v. Comm'n on Judicial Performance*, 782 Pd 239, 256-57 (Cal. 1989).

Rudeness, while demeaning to the court, does not always justify a finding of contempt.

A California judge added to sentence for contempt when defendant was rude to judge at sentencing. *Furey v. Comm'n on Judicial Performance*, 743 P.2d 919, 923 (Cal. 1987).

Judges have been disciplined for holding people in contempt while knowing there was an insufficient basis for the charge,

A California judge threatened to hold an attorney in contempt if he brought any more prostitution cases. *In re Hague*, 315 N.W.2d 524, 533 (Mich. 1982).

or, for imposing contempt sanctions when the reasons cited by judge are not supported by the facts.

The court record did not support the judge's claim that a lawyer whom the judge had held in contempt repeatedly ignored the rules about impeaching witnesses. *In re Turner*, 421 So. 2d 1077, 1079 (Fla. 1982).

A Florida judge held an attorney in contempt for refusing to answer the judge's questions, although the transcript showed the lawyer tried to answer. *In re Crowell*, 379 So. 2d 107, 109 (Fla. 1979).

A North Carolina judge was censured for briefly confining attorney in court after attorney had properly refused to explain reasons for motion to be relieved of representing a criminal defendant. *In re Bullock*, 403 S.E.2d 264, 267 (N.C. 1991).

4-672. Animosity toward attorneys. Judges must maintain control of the courtroom. Lawyers must represent their clients zealously. An aggressive attorney may easily provoke the judge to use the contempt power inappropriately, especially when the attorney and judge have a history of antagonism. The judge may be biased for or against a certain group of attorneys, such as all public defenders, or be overly authoritarian and quick to sanction for contempt without pursuing alternative means to control the situation.

A California judge was removed from office for a pattern of misconduct that included numerous instances of abuse of contempt power. The judge ordered incarceration of public defenders, without a hearing, for asking questions the judge did not like and for not being in the courtroom when the case was called; would appoint substitute counsel and not give them adequate time to prepare. The judge's failure to follow procedures was in bad faith, not mere legal error. *Cannon v. Comm'n on Judicial Qualifications*, 537 P.2d 898, 908-12 (Cal. 1975)

Judges have held attorneys in contempt immediately, without a hearing, for failure to appear in court at an appointed time. The court cannot hold the attorney in contempt without first giving notice and an opportunity to explain the absence, unless the judge has personal knowledge that the attorney is absent for an unacceptable reason. *Metro/Mag. Benchbook* §3.4.

Holding an attorney in contempt for exercising a right is clearly abusive.

A judge was suspended for sixty days without pay and ordered to pay costs of disciplinary proceeding for conduct including citing a district attorney for contempt for filing a writ of prohibition to prevent the judge from removing the attorney from juvenile cases without authority. The judge "knowingly and intentionally misused the authority of his office to effect a purpose beyond his legitimate authority, which constituted bad faith, malicious abuse of power, and thus willful misconduct in office." *In re Martinez*, 99 N.M. 198, 204, 656 P.2d 861, 867 (1982).

A Pennsylvania judge was removed for abuse of the contempt power, including holding an attorney in contempt for persistently trying to state an objection after the judge refused to permit it. The judge was annoyed by the attorney for having asked the judge to recuse himself from a case. *Judicial Inquiry & Review Bd. v. Fink*, 532 A.2d 358, 365 (Pa. 1987).

4-673. *Animosity toward parties and witnesses.* Parties and witnesses may have limited understanding or appreciation for procedural rules. They may also be quick to provoke the judge by using the courtroom to vent anger and frustration.

A New Jersey judge, among other abuses, held a defendant in contempt for a remark that the defendant made to his attorney outside the courtroom. *In re Yengo*, 371 A.2d 41, 55 (N.J. 1977).

A Florida judge held an attorney in contempt and jailed him for not following the proper method of impeaching a witness; ordering the arrest of two witnesses who had given conflicting testimony until it was determined who was lying; and holding a female attorney in contempt for making objections to his comments from the bench. *In re Turner*, 421 So. 2d 1077, 1079 (Fla. 1982).

Serious abuses can occur when the judge appears to be biased and uses contempt as pre-judgment punishment. *See NMRA 21-300(B)(5)*.

4-674. *Animosity toward others.* A judge should not use indirect contempt improperly, such as by threatening or punishing a person who personally offends the judge. This is an especially serious abuse of authority because it arises in a non-judicial context, when the judge lacks even apparent authority.

Public censure was ordered of a magistrate who exceeded his authority and acted improperly by issuing a bench warrant for the arrest of a man with whom he'd had an altercation in a bar. The judge had charged the man with indirect contempt of court. *JSC 84-F*.

A Georgia judge threatened to hold a person in contempt for writing letters critical of the court to a local paper. *In re Inquiry no. 693*, 321 S.E. 2d 743, 744 (Ga. 1984).

A Florida judge was reprimanded for ordering a police officer to appear before the judge under threat of contempt for refusing to turn down his police radio in a restaurant. *In re Muszynski*, 471 So.2d 1284, 1285 (Fla. 1985).

4-680. *Controlling the courtroom while avoiding contempt.* Court proceedings may be emotionally charged. If the judge remains calm and acts quickly to diffuse a potentially volatile situation, the judge may control the problem without resorting to contempt. Judge David Rothman of the Superior Court of California suggests several ways to deal with such problems. A judge can:

- Instruct court staff to maintain dignity, order and decorum even when the judge is not in the courtroom.
 - Open court formally to give a message of dignity.
 - Provide a written set of rules to provide a clear message that certain conduct is expected.
 - Notice and respond to even the first transgression.
 - Escalate the penalties for each successive transgression.
 - Take a recess to reflect prior to finding someone in contempt. *Rothman, supra*, at I-19-20.

4-700. Abuse of adversary process

Judges also abuse their authority when they deprive parties of their rights or interfere with the judicial process by failing to follow the law. Abuses of this sort are treated as serious offenses by disciplinary authorities.

A judge shall be faithful to the law and maintain professional competence in it. NMRA 21-300(B)(2).

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. NMRA 21-300(B)(7).

4-710. The pro se litigant. In dealing with the pro se litigant, a judge must remain impartial but ensure that the litigant receives a fair hearing. If the judge does too much to help the party, she risks becoming an advocate; if she does too little, the party is denied the fundamental right to a fair hearing. The problem is compounded if the pro se party tests the limits of the court's patience and the judge overreacts.

A judge was publicly censured and suspended for twenty days for his rude treatment of a pro se litigant despite his claim that the behavior was dictated by administrative necessity and practical problems created by the litigant's appearance in court without an attorney. The judge interrupted witnesses and litigants "without regard to the effect on the confidence of witnesses, parties, attorneys and the public generally in the integrity, competence and fairness of the judicial system." *In re Kellam*, 503 A.2d 1308, 1309 (Me. 1981).

4-720. Interfering with attorney-client relationship. It is unethical for a judge to engage in conduct that detrimentally affects the attorney-client relationship.

4-721. Proceeding in absence of counsel. The most serious problem in this category is conducting court proceedings in the absence of counsel when the judge knows the party is represented.

A California judge appointed an attorney in a probation violation proceeding and before counsel arrived asked the accused whether the alleged events had taken place. *Ryan v. Comm'n on Judicial Performance*,

754 P.2d 724, 737 (Cal. 1988).

A California judge was removed from office for willful misconduct including conducting court proceedings in the absence of counsel. *Gonzales v. Comm'n on Judicial Performances*, 657 P.2d 372, 380-81 (Cal. 1983).

4-722. Denying or trivializing right to counsel. Judges in criminal proceedings must affirmatively advise unrepresented defendants of their Sixth Amendment right to counsel so that they understand the right and the implications of proceeding without an attorney. If the judge fails to advise, or disparages the right by tone of voice or body language, the defendant is denied a constitutional right.

A Florida judge threatened a defendant with a harsher sentence to discourage him from requesting a public defender. *In re Damron*, 487 So. 2d 1, 2 (Fla. 1985).

A New Jersey judge stated to defendant: "I have to go through this drill and ask you if you want a lawyer or not. . . . They make me do it. I know you don't want one, you know you don't want one but I have to go through this and waste your time anyhow." *In re Bozarth*, 604 A.2d 100, 102 (N.J. 1992).

A Maine judge detained a juvenile for almost six weeks before he received assistance of counsel. *In re Benoit*, 487 A.2d 1158, 1167 (Me. 1985).

A California judge wrongfully proceeded with a probation revocation hearing for a defendant who appeared without counsel, without appointing counsel or advising the defendant of the right to counsel. *Kloepfer v. Comm'n on Judicial Qualifications*, 782 P.2d 239, 252 (Cal. 1989).

The fact that the court is busy does not excuse a judge from advising a defendant of the right to counsel.

A high volume of cases does not justify a judge's failure to determine whether a defendant is indigent and entitled to an attorney. *In re Field*, 576 P.2d 348, 353 (Ore. 1978).

It is also unethical to discourage a defendant from obtaining counsel by subtle means, such as giving reassurances that the defendant has nothing to worry about.

4-723. Undermining the attorney-client relationship. The quality of legal representation varies and judges inevitably form opinions about the skills of attorneys appearing before them. The judge may not express negative opinions about the representation to a party, either directly or indirectly. If the attorney's conduct is unethical, the judge should report it to the attorney disciplinary board.

A Pennsylvania judge attempted to convince the son of a litigant that the father's lawyer was not to be trusted. *Judicial Inquiry & Review Bd. v. Fink*, 532 A.2d 358, 362 (Pa. 1987).

A California judge willfully interfered with the attorney-client relationship by forcing newly appointed public defenders to proceed unprepared; refused to explain why she had overruled objections; told an attorney not to ask "stupid" questions, advising the attorney might want to check on the quality of the food in the county jail. *Cannon v. Comm'n on Judicial Qualifications*, 537 P.2d 898, 900-01 (Cal. 1975).

In full court with the client present, a California judge accused a defense attorney of being psychologically afraid of going to trial and inquired about the number of cases she had tried. *Kloepfer v. Comm'n on Judicial Performance*, 782 P.2d 239, 248 (Cal. 1989).

The judge also must respect the confidentiality of attorney-client communications.

A judge ordered a defendant to answer questions in a contempt hearing about the advice the lawyer gave the client. *Wenger v. Comm'n on Judicial Performance*, 630 P.2d 954, 960 (Cal. 1981).

4-730. Allowing non-attorney representation. A judge may not allow a person to be represented by a non-attorney. *JSC 90 F2*.

4-740. Assuming adversarial role. Judges have been disciplined for abandoning their judicial function in the course of a proceeding, such as by usurping the jury's role,

A California judge unlawfully directed jurors to return a guilty verdict. *McCullough v. Comm'n on Judicial Performance*, 776 P.2d 259, 262 (Cal. 1989).

or examining witnesses in an adversarial manner.

A judge was disciplined for examining witnesses like an advocate, creating "the impression that there was no impartial, truth-seeking judge in the courtroom." *In re McCartney*, 526 P.2d 268, 283 (Cal. 1974).

4-750. Coercing case dispositions.

A judge's desire to expedite case dispositions may increase the temptation to force settlement and pleas. Undue pressure from the judge is unethical because it deprives parties of their day in court and indicates the judge is no longer impartial.

This is especially true where plea bargains are concerned. A judge should not be involved in discussions about possible plea bargains, or engage in efforts to make a defendant plead. Some court rules address this problem directly, by expressly prohibiting judges from participating in plea discussions. *See NMRA 8-502(D)(1)*.

A district judge was removed from a case under the Supreme Court's power of superintending control when the judge had actively engaged in efforts to get the defendant to plead guilty. *State ex rel. Anaya v. Scarborough*, 75 N.M. 702, 706, 410 P.2d 732, 736 (1966).

A Michigan judge was suspended for five years for misconduct including threatening defendants with imprisonment, over counsel's objection, if they did not take guilty pleas. The judge told one defendant he should take the plea because his attorney did not have his case together. *In re Del Rio*, 256 N.W.2d 727, 742 (Mich. 1977).

By holding "bargain days" when the judge imposed one-half of his customary sentence on defendants pleading guilty on those days, a California judge deliberately misused his power and abrogated his duty to decide each case on its own merits. *Gonzalez v. Comm'n on Judicial Performance*, 657 P.2d 372, 381 (Cal. 1983).

A Maine judge threatened to impose a significantly more severe sentence if the defendant rejected the judge's plea offer and was subsequently tried and found guilty. *In re Cox*, 553 A.2d 1255, 1256 (Me. 1989).

4-760. Participating in settlement discussions. Even if the judge's conduct is not coercive, she should not be involved in settlement discussions.

A judge has no alternative but to recuse himself if he has participated in settlement discussions to such an extent that the judge becomes a witness to crucial fact issues. *Collins v. Dixie Transp. Inc.* 543 So. 2d 160, 167 (Miss. 1989).

4-770. Other procedures resulting in denial of due process. A judge who abandons proper procedure deprives parties of their rights.

A California judge's direction to the jury to "go in that room and find the defendant guilty" constituted willful misconduct. *McCulloch v. Comm'n on Judicial Performance*, 776 P.2d 259, 262 (1989).

A magistrate resigned pending allegations that he had dismissed criminal charges against a defendant without a hearing or agreement of the state. *JSC 85-II*.

The JSC noted with disapproval an allegation that a judge had accepted guilty pleas from defendants and then proceeded with trial on the merits. *JSC 87-13*.

4-780. Abuse of bail. Coercive or punitive use of bail is another form of abuse of power.

A California judge's willful misconduct included ordering a defendant back into custody when he refused to stipulate to probable cause, arbitrarily increasing bail when the defendant complained about not being released on his own recognizance, and raising bail from \$500 to \$50,000 after a defendant did not appear in court because he was in the hospital. *Cannon v. Comm'n on Judicial Qualifications*, 537 P.2d 898 (Cal. 1975).

4-790. Inappropriate criminal sanctions and civil remedies.

4-791. External factors. A judge's discretion does not extend to allowing criminal sentences to be based on arbitrary, external factors,

A Louisiana judge was reprimanded for basing fines on amount of money defendants had with them at sentencing. *In re Daniels*, 340 So. 2d 301, 308 (La. 1976).

A Florida judge improperly allowed traffic offenders to avoid appearing in court by paying double the statutory fine. *In re DeFoor*, 494 So. 2d 1121, 1122 (Fla. 1986).

or for imposing punishment beyond the court's authority.

A Maine judge ordered unrepresented defendants to jail for failure to complete community service that had not been court ordered. *In re Benoit*, 487 A.2d 1158, 1165-66 (Me. 1985).

4-792. Fees and costs. Failure to ensure proper payment of fees and costs also can be unethical.

A magistrate was counseled for failing to award to plaintiff court costs as required by court rule. *JSC 86-I6*.

A California judge improperly made attorney's fees payable before fines, leaving defendants subject to further proceedings, such as probation revocation and contempt, when they could not pay both. *In re Gubler*, 688 P.2d 551, 555 (Cal. 1984).

A judge's authority does not extend to ordering a defendant to contribute to a judge's special fund instead of paying a fine, or making attorneys pay for infractions of court rules.

A judge obtained monies for a special fund he had established to assist indigent drug and alcohol abusers by fining attorneys who arrived in court late, failed to appear, etc. *In re Merritt*, 432 N.W. 2d 170 (Mich. 1988).

A California judge offered an attorney who had missed an appearance in court the choice between having a failure to appear on the client's driving record or the attorney paying a sum into the court's automation fund. *Rothman, supra*, §130.800 at n. 138.

4-7100. Favoritism. Allowing personal relationships to affect decisions is an obvious abuse of the judicial process.

A judge was censured for releasing a friend on his own recognizance, giving him money and the telephone number of his clothing store, and offering him a ride home. *In re Lehman*, 812 P.2d 992, 993 (Ariz. 1991).

A judge dismissed a criminal case involving a personal friend without explaining his actions or advising the prosecutor. *McCullogh v. Comm'n on Judicial Performance*, 776 P.2d 259, 263 (Cal. 1989).

This prohibition includes abusing the power of appointment to benefit others.

Judge's appointments of counsel for indigent defendants demonstrated favoritism toward two attorneys. *Kennick v. Comm'n on Judicial Performance*, 787 P.2d 591, 607 (Cal. 1990).

Probate judge showed favoritism in granting appointments in hundreds of probate matters to three attorneys connected with a corporation in which the judge had an interest. *In re Ford*, 535 N.E.2d 225, 226-28 (Mass. 1989).

A Texas judge was censured for appointing his son-in-law as master in numerous cases and awarded excessive fees. *Inquiry concerning Davila*, (Texas Comm. 1981). *AJS, ETHICS TRAINING* at 79.

4-800. Related topics

ADMINISTRATIVE DUTIES

DEMEANOR AND IMPARTIALITY

Ex Parte Communications

5-100. Checklist

Identification

- You engage in conversation with a party, witness, attorney or other person interested in the subject matter of a case pending in your court.
All parties are not present and absent parties did not receive notice.
The subject of the conversation relates, either directly or indirectly, to the subject matter of the case.
You are not authorized by law to make the communication.
- You engage in a conversation with any other person about the subject matter of a case pending in your court, and that person is not another judge or member of your court staff.
All parties are not present and absent parties did not receive notice.
The subject of the conversation relates, either directly or indirectly, to the subject matter of a pending case.
You are not authorized by law to make the communication.
- Another judge contacts you to influence the disposition of a case pending in your court.
- You personally, or through a representative, conduct an investigation outside of court to obtain factual information relevant to a pending case.
- You engage in conversation with a person about a specific legal problem the person is having.
The problem could become a case in your court.

Intervention

"I'm sorry, but we have to wait until both sides are in court."

"I'm sorry, but I'm not allowed to discuss the case with you."

"I'm sorry, but if I talk to you I may have to take myself off the case."

Prevention

- Avoid all out-of-court conversations with people involved in cases before you. If a conversation occurs, be alert if it veers toward the subject of the pending case.
- Do not engage in ex parte communications even if you think the conversation will aid disposition of the case, help a reluctant witness, or improve your knowledge about the subject matter.
- Be careful about discussing potential cases with attorneys and members of the public.

If the matter comes before you later, you may have to recuse yourself.

- Institute procedures in your court to minimize the opportunity for ex parte communications:
 - Avoid answering the telephone at your office.
 - Don't accept calls at home relating to your judicial duties.
 - Have court staff "run interference" between you and the public.
 - Train court staff about the effect of ex parte communications.
 - Avoid opening your own mail.
 - Do not correct technical errors in orders without giving notice to all parties.

- Discourage social visiting in chambers that creates opportunities for ex parte communications.

- Avoid private social activities that will bring you into close contact with parties, witnesses or attorneys involved in pending cases.

- If recusal is necessary, do so promptly. *See AJS ETHICS TRAINING at 6-7.*

Ex Parte Communications

5-200. Applicable Law

NMRA 21-200 and 21-300(B)(7).

5-300. Introduction

"Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts." *Rose v. Florida*, 601 So. 2d 1181 (Fla. 1992). A judge's dilemma is remaining fair and unbiased while administering the court and living in the community.

5-400. General rule

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 concerning a pending or impending proceeding. NMRA 21-300(B)(7).

This rule is subject to certain exceptions described below.

"Ex parte" means "one-sided." An ex parte communication is any communication:

- 1) involving less than all the parties who have a legal interest in the case; and
- 2) is either oral or written; and
- 3) is about a pending or impending case; and
- 4) is made to or by the judge presiding over the case. *AJS, ETHICS TRAINING* at 9.

The principles of fairness, impartiality, and the importance of maintaining public confidence in the judiciary underlie the prohibition against ex parte communications. Therefore, ex parte communications have subjected judges to discipline under both a specific rule, NMRA 21-300(B)(7), and the general requirement of avoiding the appearance of impropriety, NMRA 21-200.

5-500. Scope of rule

5-510. Persons. The proscription against communications concerning a proceeding includes communications from lawyers, law teachers and other persons who are not participants in the proceeding, except to the limited extent permitted. *Commentary to NMRA 21-300.* An ex parte communication can be initiated by either the judge or another person. Incidental contact between a judge and a party or attorney does not violate the rule as long as a case is not discussed.

Note that a communication with a single party by definition is not ex parte if there is only one party to the case. Therefore, a probate judge in an informal, and therefore uncontested, proceeding is not precluded from discussing procedural requirements with the petitioner.

5-520. Subject matter. Ex parte communications can occur regarding both pending and impending proceedings, until all appeals are completed or the time for filing an appeal has expired. A general discussion of law unrelated to a case pending before the judge is not prohibited; however, the communication can violate the prohibition even if it does not address the ultimate

merits of the case.

5-530. Negative repercussions of ex parte communications.

- An ex parte communication can result in bias because the absent party does not have an opportunity to respond.
- A judge may be influenced by the communication without realizing it.
- The judge may receive inaccurate information as a result of the communication.
- Even if the communication does not result in bias or misinformation, its occurrence destroys the court's reputation for impartiality and creates an appearance of impropriety.
- The judge who engages in ex parte communications may be seen in the community as being open to improper influence, affecting her credibility.
- Even the appearance of an ex parte communication makes the litigant feel cheated.
- A judge can be disqualified from a case because of an ex parte communication, which disrupts the judicial process and encourages forum shopping.
- The judge can be disciplined for the communication.
- Practical remedies are few. *AJS ETHICS TRAINING* at 9; *American Judicature Society, AJS JUDICIAL CONDUCT AND ETHICS CURRICULUM, Ex Parte* at 9 (1993) [hereinafter *AJS, Curriculum.*]
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5-600. Permitted ex parte communications

Not all ex parte communications are prohibited. NMRA 21-300(B)(7)(a) through (e) lists allowable communications.

5-610. Communications authorized by law. Communications authorized by law, such as issuance of temporary restraining orders, protective orders and search warrants are permitted. Entry of a default judgment (or certain other actions taken in court in the absence of a party) is not ex parte if the absent party has received prior notice of the proceeding. *NMRA 21-300 (B)(7)(e).*

5-620. Communications with judges and court personnel. The rule against ex parte communications does not preclude a judge from consulting with other judges or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities. *NMRA 21-300(B)(7)(c).* Lawyers in a proceeding before the judge are not "court personnel," even if the lawyer is assigned to a judge's courtroom regularly.

5-621. Scope of exception. This is a narrow exception. A judge may ask another judge for clarification of a point of law, but cannot delegate her judicial responsibility to decide the case.

5-622. Cases pending on appeal. The exception does not permit communications with judges having appellate jurisdiction over a pending case.

A trial judge violated the Code by sending inappropriate letters to the attorney general and a supreme court justice in connection with a murder case he had tried. After his decision was reversed by the state supreme court, the judge wrote to the attorney general asking him to petition for rehearing. He then wrote to a dissenting justice to express approval of the justice's minority position, stating he hoped the court would give serious consideration to the petition. *Harrington v. Indiana*, 584 N.E.2d 558, 560-61 (Ind. 1992).

5-623. Influencing other judges' decisions. Under no circumstances does a judge have authority to contact another judge in order to influence the disposition of a case pending before that judge.

5-624. Court personnel.

5-624a. Probation officers. Probation officers act as "court personnel" in preparing presentence reports. Factual inquiries about a probationer's status usually are not ex parte. *AJS CURRICULUM, Ex Parte* at 5.

A judge's ex parte contact with a probation officer about an error in sentencing was not improper because the error in question was technical and the communication did not include information absent from the presentence report. *People v. Smith*, 378 N.W.2d 384, 394 (Mich. 1985).

However, a communication with a probation officer could be improper if the judge receives information that the defendant does not know has been conveyed to the judge. If this happens the judge should give the defendant the opportunity to respond.

A federal judge did not have to resentence the defendant because the judge conveyed to the defendant the facts received from the probation officer. Resentencing would have been required if the judge had relied on the additional facts and not disclosed them. *U.S. v. Gonzales*, 765 F.2d 1393, 1397 (9th Cir. 1985).

5-624b. Improper contacts. Parties, especially pro se litigants, frequently try to reach the judge through court staff. Court personnel should be instructed not to relay inappropriate information to the judge. Proper training of staff is part of a judge's administrative responsibilities. *See ADMINISTRATIVE DUTIES.*

It was improper for a judge to take into consideration material that had been presented to him by a prosecutor through the judge's courtroom clerk, without making it available to the defendant. *California Comm'n Annual Report, 1991*; see also *AJS, CURRICULUM, Ex Parte* at 13.

5-630. Communications with legal experts. The Code permits communications with experts on the law, under limited circumstances.

A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. NMRA 21-300(B)(7)(b).

A "disinterested expert" is a person who "has no connection with any party or participant in [the] lawsuit." *Shaman, supra*, §6.07 at 37. Note that the expert opinion allowed by this rule must concern a legal issue and the parties must have an opportunity to respond. An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite him to file a brief *amicus curiae*. *Commentary to NMRA 21-300*. Separate rules apply to the qualification of expert witnesses on factual issues.

5-640. Scheduling and administrative matters.

Under the newly adopted rule, *ex parte* communications are allowable where circumstances require for scheduling, administrative matters, or emergencies, under several severe conditions. *NMRA 21-300(B)(7)(a)*. These conditions include that the communications must not deal with substantive matters or issues on the merits; the judge must reasonably believe that no party will gain a procedural or tactical advantage by the communication; and if such an advantage might reasonably be perceived, the judge must provide for notice of the substance of the communication to all other parties. Even if all of these criteria are met, however, *ex parte* communications are still generally discouraged. *Commentary to NMRA 21-300 (B)(7)*.

5-650. Settlement discussions.

The revised rule now also permits a judge to confer with the parties and their lawyers to attempt to mediate or settle matters pending before the judge, if the parties consent. *NMRA 21-300(B)(7)(d)*. This rule allows the judge, in these rare circumstances, to meet separately with the parties with their consent. *Commentary to NMRA 21-300*. But ordinarily such meetings should include both parties.

5-700. Good faith or non-lawyer status not a defense.

The importance of maintaining the impartiality of the courts outweighs the judge's ignorance or good faith in making the communication. Good faith is not a defense to a charge of violating the rule against *ex parte* communications. The fact that a judge is not a lawyer is not a defense.

A judge's *ex parte* communications with litigants or lawyers in child custody cases violated the Code, despite strong evidence of the judge's overwhelming concern for children's welfare, which motivated the communications. *In re Sturgis*, 529 So. 2d 281, 283 (Fla. 1988).

Several judges received letters of caution advising them about *ex parte* communications and in particular those meetings or conversations that might give the suggestion of being *ex parte*. Judges should avoid the very appearance of wrongdoing even when the judge might be seeking to further the cause of justice in good faith. *JSC 89-12*.

5-800. Typical Circumstances

Some *ex parte* communications are blatantly improper, and many occur out of ignorance. Many members of the public simply do not understand that a judge cannot discuss any aspect of a pending case outside of court. This problem is compounded when the judge is a friend or neighbor.

Judges are members of the community, and rural and small town judges in particular frequently will run into parties who will be tempted to talk to the judge about their cases. . . . As soon as you realize that an *ex parte* communication is about to be made, you must end the conversation even if you appear to be discourteous. *AJS, ETHICS TRAINING* at 9.

Ex parte communications can occur in any situation in which the judge interacts with persons interested in the outcome of a case, including but by no means limited to the following.

5-810. Communications with attorneys. The daily interactions between judges and attorneys create the ideal setting for ex parte communications, or at least for their appearance. These communications can range from outright discussion of the merits of a case to granting a request for a continuance without notice to the other party.

5-811. Preparing orders. The language of orders and decrees should be discussed with all attorneys present, or should be communicated in writing by the trial judge to all attorneys. Discussions about the language to be used in an order should include all parties; otherwise, the risk of prejudice is substantial. See *Medical Arts Clinic, P.C. v. Henry*, 484 So. 2d 385, 388 (Ala. 1986).

The defendant in a murder case filed a motion for post-conviction relief, and the trial judge adopted the state's proposed order denying the motion without giving a hearing to defense counsel. The Florida Supreme Court noted that the practice of asking only one party to prepare an order without involving the other side is timesaving, but "is fraught with danger and gives the appearance of impropriety." *Rose v. Florida*, 601 So. 2d 1181, 1183 (Fla. 1992)

It is preferable to correct a drafting error in an order pointed out by one side only after giving the other side appropriate notice of the proposed change. *Judicial Conduct Comm'n v. Wilson*, 461 N.W. 2d 105, 109 (N.D. 1990).

One party can prepare an order if the other side has opportunity to object to the form of the order.

It is acceptable for a judge in open court to instruct the prevailing party to prepare an order reflecting the ruling and serve it on the other side, then to enter the order without changes. *AJS, CURRICULUM, Ex Parte* at 13.

5-812. Special meetings. Judges should discourage practices that appear to favor lawyers over litigants, or certain lawyers over others.

A California municipal judge had a practice of visiting socially in chambers with favorite attorneys on days they appeared before him in court. It was not established that pending cases were discussed on those occasions, but the practice created at the least an appearance of impropriety. *Kennick v. Comm'n on Judicial Performance*, 787 P.2d 591, 609 (Cal. 1990).

5-813. Improper communications with prosecutors. Under no circumstances may a judge ask a prosecutor to dismiss a case.

5-820. Communications with parties.

5-821. Potential for abuse. Ex parte communication with a litigant greatly increases the likelihood of bias and opportunities for improper disposition of cases.

A municipal judge, who communicated privately with police, through conversations and a system of drawings on citations, about the demeanor and behavior of traffic defendants appearing before the judge, was reprimanded and assigned a mentor district judge. *JSC 01-F4*

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including dismissing DWI and other cases of friends and relatives, without notice to the prosecutor, based upon *ex parte* communications, and even though some of the cases had been assigned to other judges. *In re Angie Vigil-Perez, NM Supreme Court Nos. 99-15 and 99-70.*

An inexperienced lay judge was disciplined for finding defendants not guilty without a trial. The fact that the judge's predecessor had established these and other improper practices did not excuse the misconduct, and his inexperience and generally good intentions were not mitigating factors. *In re Seal*, 585 So.2d 741, 745-46 (Miss. 1991)

A New Mexico magistrate was disciplined for modifying a judgment based on an *ex parte* conference with defendant. *JSC 84-F.*

A judge who accepted a guilty plea in chambers without the district attorney receiving notice and being given an opportunity to be present engaged in an improper *ex parte* communication. *In re Edens*, 226 S.E.2d 5, 7 (N.C. 1976).

5-822. Impending proceedings. Prohibited *ex parte* communications pertain to "impending" as well as "pending" proceedings. This prevents litigants from judge-shopping before the case is filed to determine how a judge might rule in a case. *AJS, CURRICULUM, Ex Parte* at 2.

A trial judge participated in a meeting of the community child protection team to consider facts supporting a petition in a child in need of services matter. This was a classic example of prohibited *ex parte* communication: a prospective litigant discussing possible evidence in the presence of a judge who would hear the case, and without the other party present. *Stivers v. Knox County Dep't of Pub. Welfare*, 482 N.E.2d 748, 751 (Ind. App. 1985)

A magistrate received a letter of caution for having entertained a potential litigator in his office and discussing a problem which he had reason to believe could become the subject of a future case before him. *JSC 91-15.*

5-823. Discussions about legal representation. It is improper for a judge to discuss the quality of a party's legal representation.

A juvenile court judge attempted to discuss the legal representation of a mother in a dependency proceeding with her without her counsel present. *S.S. v. Wakefield*, 764 P.2d 70, 72 (Colo. 1988).

A judge should not discuss with a party the party's desire to discharge an attorney and seek new counsel. Any discussion of this issue should be in court, with all parties present. *Maneikis v. State*, 411 N.E.2d 669 (Ind. App. 1980).

5-830. Communications with others.

5-831. Jurors. *Ex parte* communications with jurors about a case at any stage of the proceedings is an ethical violation. Although it is not an ethical violation to discuss a case once it is completely concluded, including any appeal, the judge should make sure that any comments she makes do not reflect adversely on her impartiality.

5-832. Witnesses.

It is improper for a judge to meet with nervous witnesses to encourage them to testify. *California Commission, 1991 Annual Report; see also AJS, CURRICULUM, Ex Parte* at 13.

5-833. Law enforcement personnel.

5-833a. As experts. Judges, especially in courts of limited jurisdiction, have frequent contact with law enforcement officers. These officers often try their own cases and are well versed in the law of certain types of cases. Judges must resist the temptation to treat police officers as outside consultants. Under no circumstances may a judge discuss a case with an officer who is prosecuting or serving as a witness in the case.

An Arizona judge was censured for obtaining advice from police officers. The judge telephoned the officers from the courtroom. *In re Anderson*, 814 P.2d 773 (1991).

5-833b. To influence outcome. A judge may not respond to an officer's attempt to obtain a conviction for reasons other than the evidence presented in court. Conversely, the judge may not intercede to get charges dropped or initiate prosecution of charges.

A Maine judge got an officer to file charges against a young man for squealing tires and caused the complaint to be rescheduled so he could discourage such conduct. *In re Ross*, 428 A.2d 858, 864 (Me. 1981).

5-840. Independent investigation by judge.

5-841. Prohibition. A judge may not act as an independent fact-finder in a case. Her decision must be based only on evidence presented in court. The judge may not interview outside witnesses or talk to outside experts, even in the honest belief that the information obtained will be helpful to the judge. A judge also is prohibited from conducting investigations to fill gaps in the court record. Independent investigations can result in serious bias, particularly in a bench trial. Consequently, a judge who gains information about disputed evidentiary facts from sources outside the courtroom can be disqualified under NMRA 21-400(A).

A judge should have recused himself after conducting an ex parte pre-sentencing inquiry into the defendant's background. *State v. Emmanuel*, 768 P.2d 196, 197-98 (Ariz. 1989). The defendant had stolen money while employed by the county court. The judge imposed a prison term, although the probation officer had recommended probation. Before sentencing, the judge had personally contacted former employers to obtain information not included in the presentence report.

Before ordering restitution, a judge contacted two friends in the jewelry business to confirm defendant's statements that his income as a jewelry salesman was highly seasonal. These were improper ex parte communications even though no actual bias was shown. "Even where there is no actual bias, justice must satisfy the appearance of fairness." *State v. Romano*, 662 P.2d 406, 407 (Wash. Ct. App. 1983).

A judge cannot ask others to conduct the investigation for him.

A judge's decision to send his law clerk to view a machine that was the subject of a breach of contract suit resulted in a motion for disqualification. The clerk's viewing of the machine without defense counsel present created a presumption of prejudice in favor of the party controlling the machine, because defendant could not rebut any off-the-record information received at the viewing. ". . . [A] judge may not direct his

law clerk to do that which is prohibited to the judge." *Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980).

5-842. Permitted investigation.

5-842a. In-court questioning. A judge is allowed to question witnesses directly during a court proceeding to elicit or clarify testimony. The judge must ensure that his questioning is non-adversarial. *See* Demeanor and Impartiality.

5-842b. Judicial notice. The Rules of Evidence permit a judge to take judicial notice in court of certain facts not in evidence that are either generally known in the community or easily verifiable. *NMRA 11-201.*

5-900. Abuse and prevention

5-910. Misuse of authority. Ex parte communications initiated by judges may amount to misuse of judicial authority.

A New York judge acted as a collection agency for local businesses. He wrote to alleged debtors on court stationery, spoke about pending cases with litigants, and in several instances collected disputed debts by intimidation. The judge was removed from office for prejudging cases on the basis of ex parte information and thereafter denying the litigants their right to be heard. *In re Mayville*, Unreported Determination (N.Y. 1984). *Shaman, supra*, §6.04 at 155.

A trial judge telephoned the president of a corporation involved in a pending case. The judge claimed he called to ensure that the president would be present at the next hearing, but the president interpreted the call as an attempt to get the company to change its position in the case. The court found that the motivation was irrelevant, because the mere fact that the call was made is a violation of the Code. These "routine" types of ex parte communications can expose the court system in general, and the individual judge in particular, to precisely the types of charges that the Judicial Conduct Code is designed to prevent. *In re Kaufman*, 416 S.E. 2d 480 (W. Va. 1992).

A Metropolitan court judge was cautioned to avoid ex parte communications and to avoid assuming the role of law enforcement officer by calling the litigant and personally reiterating the judgment order. *JSC 93-12.*

A California municipal judge engaged in willful misconduct by writing an unsolicited note to another judicial officer regarding attorney's fees in a case from which the judge had been disqualified. *Gubler v. Comm'n on Judicial Performance*, 688 P.2d 551, 566 (Cal. 1984).

5-920. Avoiding the risk. Judges should avoid situations that can increase the risk of ex parte communication.

A New Mexico magistrate received a letter of caution instructing him to avoid the appearance of impropriety by refraining from being present during supervision of persons convicted by the judge outside the judicial complex, thereby preventing any ex parte communications between the judge and defendants attending meetings in the probation department who may not yet have had their cases adjudicated. *JSC 93-17.*

5-930. Remedies. If an ex parte communication occurs, and the judge is biased as a result, the judge should recuse herself from the case. *See* DISQUALIFICATION. The judge may be able to avoid stepping down, however, by promptly disclosing the communication to the parties and holding a hearing at which the previously absent party can respond. If the judge is satisfied that any prejudice

has been corrected, she may continue to hear the case.

During a criminal trial, a co-defendant sent two letters to the trial judge that strongly implied that the defendants were involved in the crimes charged, and made negative comments about the other defendant. After consulting with other judges about what to do, the judge immediately informed all counsel about the letters, furnished copies, and asked for the defendant to stop sending letters. These actions were proper, and the trial record did not reveal any prejudice on the judge's part resulting from reading the letters. *State v. Perkins*, 686 P.2d 1248, 1255-56 (Ariz. 1984).

5-1000. Related topics

Disqualification

Demeanor and Impartiality

Disqualification

6-100. Checklist

Investigate early and recuse yourself early.

When a case is assigned to you, consider:

Do you have a financial interest in the outcome of the case?

Does anyone in your family have a financial interest in the outcome?

Are you related to a party in the case?

Are you related to any of the lawyers involved?

Do you have personal knowledge about relevant facts?

Could you possibly be a witness in the case?

Have you ever served as a lawyer in connection with the subject matter?

Do you have strong personal feelings, either positive or negative, about the subject matter that could affect your ability to be impartial?

Do you have strong personal feelings, either positive or negative, about any party or attorney that could affect your ability to be impartial?

Is your spouse an attorney in a firm or agency involved in a case? If so, has your spouse:

- entered an appearance in the case;
- inspected the file in the case; or
- discussed the case with anyone in the firm.

Disqualification

6-200. *Applicable Law*

N.M. Const. article VI, §18

NMSA 1978 §§38-3-8, 38-3-9 and 38-3-10.

NMRA 1-088.1, 2-106, 3-106, 6-106, 7-106, 8-106, 21-200, and 21-400.

6-300. **Introduction**

A judge cannot, and should not, operate in a social vacuum, but a judge's relationships and interests--family, personal and professional--can affect her impartiality. A biased judge deprives the parties of the fundamental right to an impartial tribunal. Even if the judge is not actually biased, the appearance of impropriety undermines the credibility of the judicial process.

In New Mexico a constitutional provision, as well as the Code, statutes and court rules, address the question of when a judge should not preside over a case because of the risk to impartiality. Disqualification is mandatory in some instances, as when a member of the judge's family is a party to a case. In other instances, the disqualifying condition is less clear and the judge will have to exercise discretion, such as when the judge's personal friendship with an attorney could affect the judge's rulings.

The issue of "[d]isqualification is often problematic for the rural judge. The rural judge knows many of the litigants and lawyers that come before the court." *Model Code of Judicial Conduct, Rule 3(E) (Annotation) (1990)*. It is often difficult to arrange for a substitute judge to hear the case, and frequent disqualifications seriously disrupt the court's calendar and the schedules of substitute judges. Nevertheless, each judge must be concerned about the appearance of impropriety, make appropriate disclosure of potential conflicts to the parties, and in every case consider whether the circumstances pose any threat to his impartiality.

6-400. **Policies: impartiality and the "duty to sit"**

The principle of impartiality governs the disqualification and recusal of judges. A judge who both is neutral and appears neutral is a necessary element of justice. *AJS, CURRICULUM, Disqualification* at 1. The parties have a fundamental right to an impartial tribunal. A prejudiced or biased judge would deprive a party of due process of law. *Beall v. Reidy*, 80 N.M. 444, 446, 457 P.2d 376, 378 (1969).

A judge also has an affirmative "duty to sit"--to hear a case if at all possible. "A judge shall hear and decide matters assigned to the judge except those in which disqualification is required." *NMRA 21-300(B)(1)*. This duty coexists with the parties' right to an unbiased judge. The modern disqualification rules curtail the "duty to sit" in cases in which a judge's impartiality might reasonably be questioned. "While a judge still may have a duty to sit in cases where he or she is not disqualified, there is an equally strong duty not to sit in cases where he or she is disqualified." *Shaman, supra*, §5.02.

6-500. General rule

A judge should not hear a case when there is any appearance that the judge is partial. The trend today is toward substituting a "reasonableness" test" for the "duty to sit." *Thode*, 1977 UTAH L. REV. 395 (1977). This trend has been incorporated by New Mexico's newly adopted rules: "A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." *NMRA 21-400(A)*. The test is whether a person of ordinary prudence, placed in the judge's position and knowing all the facts, would find a reasonable basis for questioning the judge's impartiality. *1990 Code, Annotation to 3E*. If so, the judge should disqualify himself. If the judge is not disqualified, she has a duty to decide the case.

6-600. Duty to disclose

A judge should disclose to the parties any facts known to the judge that could lead a reasonable person to believe the judge cannot preside with impartiality, even if the judge believes he can be objective. "A judge who is or may be disqualified must disclose the interest or the relationship to the parties. It is not the duty of the parties to search out disqualifying facts about you; it is your obligation as the judge to disclose all facts that might be grounds for disqualification." *AJS, ETHICS TRAINING* at 24. The parties then can decide whether they want to waive the disqualifying condition.

6-700. Procedures

Generally, a judge may be removed from a case:

- (1) by a party exercising a peremptory disqualification;
- (2) by the judge's own action (recusal); or
- (3) by the filing of a motion to disqualify by a party.

Peremptory disqualification and disqualification by motion do not apply in municipal court. *See* Section 6-931 below.

In New Mexico, the term "disqualification" refers to the procedure by which a judge is removed from a case by a party. A party may also "excuse" a judge, which is to disqualify him. To say that a judge "disqualifies herself" usually means that the judge recuses herself.

Disqualification by motion and recusal raise ethical issues directly because in both cases the judge must consider specific facts favoring disqualification. The peremptory right to disqualify is exercised unilaterally by a party without involving the judge.

6-710. Peremptory disqualification. Sometimes a party has an absolute right to disqualify a judge from hearing a case. The rights created by a right to disqualify are in addition to any arising under Article VI of the Constitution of New Mexico. District, metropolitan, magistrate, and probate judges are subject to peremptory disqualification; municipal judges are not. The party exercises the peremptory right by filing a notice. *See* §35-3-7, *NMRA 2-106* and *6-106* (relating to disqualification of magistrates); *NMRA 3-106* and *7-106* (relating to disqualification of Metropolitan court judges); §34-7-9 (disqualification of probate judges); §38-3-9 and *NMRA 1-088.1* (peremptory challenge of district judges); and *NMRA 8-106* (no right to disqualify municipal judges). The ethical issue raised by a peremptory challenge is that a judge cannot retaliate against the disqualifying party in a subsequent proceeding.

A California judge angrily criticized public defenders for filing affidavits and said he would not put up with it and would take his case to the people. *McCartney v. Comm'n on Judicial Performance*, 526 P.2d 268, 280-81 (Cal. 1974).

6-720. Recusal. Recusal is the process by which a judge disqualifies herself from hearing a case.

6-721. Basis for recusal. "No district judge shall sit in any action in which impartiality might reasonably be questioned under the constitution or the Code of Judicial Conduct, and shall recuse himself in any such action." *NMRA 1-088.1*. New Mexico follows the standard enunciated in *State v. Logan*, 689 P.2d 778, 784 (Kan. 1984):

The standard which federal courts use is whether [the]facts. . . would create reasonable doubt concerning the judge's impartiality, *not* in the mind of the judge himself. . . but rather in the mind of a reasonable person with knowledge of the circumstances. *AO 88-5*.

6-722. Decision to recuse. The decision to recuse is discretionary with the judge. *Martinez v. Carmona*, 95 N.M. 545, 550, 624 P.2d 54, 59 (Ct. App. 1980). If the judge decides to recuse, she does not have to state the reason, but must have a compelling reason for the recusal. *Gerety v. Demers*, 92 N.M. 396, 401, 589 P.2d 180, 185 (1978). Because the judge must hear all cases assigned to her if she is not disqualified, she may not use recusal frivolously, simply to avoid disagreeable or unpopular cases.

6-723. Procedure. A judge recuses himself by giving notice to the parties.

6-724. Timing of recusal. A judge should recuse as soon as possible after the need for recusal is determined. Often the need to recuse should be obvious as soon as the case is filed, because of either the judge's personal connection with a party or attorney or the judge's interest in the case. A late recusal inconveniences the parties and court staff, and usually means that disposition is delayed, sometimes resulting in dismissal under the six-month rule. Delay raises questions about the judge's ability to manage the docket and also may suggest the judge waited intentionally so that the case would be dismissed.

6-730. Disqualification by motion. If a party believes the judge is not impartial, and cannot remove the judge by peremptory challenge, the party must file a motion to disqualify the judge and state the grounds. There must be a reasonable factual basis for doubting the judge's impartiality. *State ex rel. Bardacke v. Welsh*, 102 N.M. 592, 606, 698 P.2d 462, 476 (Ct. App. 1985).

6-731. Timing of motion. A disqualification motion that is not a peremptory challenge must nevertheless be filed within a reasonable time after the party becomes aware of the grounds for disqualification. *United Nuclear Corp. v. General Atomic Corp.*, 96 N.M. 155, 247, 629 P.2d 231, 323 (1980).

6-732. Ruling on motion. The judge who is the subject of the motion to disqualify will hear the motion unless the judge has become so embroiled in the case that she cannot preside objectively. If the judge decides not to disqualify herself, the decision usually is reviewed on appeal, under an "abuse of discretion" standard, although the Supreme Court has superintending authority to issue a

writ sooner, in unusual circumstances. *State ex rel. Anaya v. Scarborough*, 75 N.M. 702, 410 P.2d 732 (1966).

6-733. *Response to motion.* A judge should not overreact if he is asked to disqualify himself. Judges have been disciplined by ethics commissions for retaliation, loss of temper, and other inappropriate conduct directed toward parties.

An attorney filed a motion to disqualify a California judge because of animosity between the two arising from a case in which they had represented opposing parties. The judge conditioned the disqualification on the attorney paying all the witness fees in the case. *Spruance v. Comm'n on Judicial Qualifications*, 532 P.2d 1209, 1214 (Cal. 1975).

A California judge was publicly censured for lack of impartiality and petty harassment of attorneys who filed affidavits of prejudice against him, including making intemperate remarks to counsel and attempting to inconvenience them by withholding judgments in unrelated cases. *In re Rasmussen*, 734 P.2d 988 (Cal. 1987).

6-740. Consequences of disqualification or recusal. A judge who has been removed from a case should have no further involvement in it or attempt to communicate with the judge to whom it is assigned except to accomplish reassignment of the case.

6-750. Waiver. In New Mexico, the parties can waive their objections to the possible cause of bias and allow the judge to proceed. *State v. Lucero*, 104 N.M. 587, 594, 725 P.2d 266, 273 (Ct. App. 1986). The parties must have actual knowledge of the grounds for disqualification in order to waive it. The judge should not attempt to persuade the parties to waive the grounds for disqualification by assuring them the judge can be impartial.

6-751. *Procedure for waiver.* After the ground for disqualification is disclosed, the parties may waive the disqualification by stating on the record that they have no objection to the judge presiding. It is preferable to obtain a written waiver, signed by all of the parties. At least, the judge should note the disclosure and response in the court file.

6-752. *Effect of waiver.* After waiver, the judge may proceed. However, even if there is a waiver the judge is ethically prohibited from continuing to preside if the judge does not believe he can be impartial, or if the appearance of impropriety is great.

6-760. Rule of necessity. Sometimes a judge will need to hear a case even if there are grounds for disqualifying him. If no judge can be found who possesses the requisite degree of impartiality, the rule dictates that the original judge need not be disqualified despite her partiality. *Shaman, supra*, §5.03. "Although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise." *United States v. Will*, 449 U.S. 200, 213 (1980).

Where disqualification results in an absence of judicial machinery capable of dealing with a matter, disqualification must yield to necessity. *Eisemann v. Miller*, 619 P.2d 1145, 1149 (Idaho 1980).

6-800. Remittal of Disqualification.

The revised code provides for a voluntary remittal procedure by the parties and lawyers even though a disqualification would otherwise be required. *NMRA 21-400(C)*. Key factors of this procedure are that the judge must disclose the basis for the disqualification; and the agreement is incorporated into the record. The remittal procedure is not available where the basis for disqualification is the judge's personal bias or prejudice concerning a party.

6-900. Reasons for recusal or disqualification.

Article VI Section 18 of the New Mexico Constitution and NMRA 21-400 state both general and specific conditions in which a judge should not hear a case. Also, the general provisions of NMRA 21-200 concerning ensuring impartiality and maintaining the appearance of impropriety are relevant in disqualification cases. *See also* §35-3-8 for magistrate recusal.

6-910. Relationship between the Constitution and the Code. The Constitutional provision predates the Code. The Code expands upon the constitutional criteria for disqualification. *State ex rel. Bardacke v. Welsh*, 102 N.M. 592, 605, 698 P.2d 462, 475 (Ct. App. 1985).

6-920. Relationship to a party.

6-921. Prohibition.

No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which either of the parties are related to him by affinity or consanguinity within the degree of first cousin N.M. Const. art. VI, §18.

The Code expands the prohibited degree of relationship to the third degree (parents, grandparents, great-grandparents, grandchildren, great-grandchildren, uncles, aunts, brothers, sisters, nieces, nephews, children) and includes not only the judge but also the judge's spouse. *NMRA 21-400(D)(3)*.

A judge is disqualified and shall recuse himself or herself in a proceeding in which . . . the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person, is a party to the proceeding, or an officer, director or trustee of a party. *NMRA 21-400(A)(5)(a)*.

6-922. Policy. General principles of impartiality dictate that a judge should not promote her personal interests, or those of her family or persons close to her, by hearing a matter in which any of those persons is a party.

6-923. Interest as a party. If a judge is a party, he obviously has an interest in the case and cannot be impartial. Both the appearance and reality of impartiality are annulled.

A magistrate was removed from office after filing two criminal complaints in his own court against a former tenant in the judge's apartment building and a visitor to a tenant, although the facts indicated the charges were for civil damages, proceeding to hear the cases in which he had an interest, and arresting one defendant and jailing him without authority. *In re Lucero*, 102 N.M. 745, 700 P.2d 648 (1985).

An Oregon judge filed trespass charges against a person who damaged an apartment house owned by the judge, then presided over the proceedings. *In re Jenkins*, 419 P.2d 618, 620 (Ore. 1966).

6-924. Family relationship to a party.

For similar reasons, a judge also is precluded from hearing cases in which she is related to either of the parties.

The New Mexico Supreme Court construes "party" in the constitutional provision to mean any person having a substantial pecuniary interest in the outcome of a lawsuit, whether mentioned in the pleadings or not.

A trial judge was disqualified from hearing a case in which his son appeared as an attorney for the plaintiff when the son's law firm would be paid a contingent fee if plaintiff won the case. Because the son's compensation depended on the judge ruling a certain way, he was disqualified. *Tharp v. Massengill*, 38 N.M. 58, 28 P.2d 502 (1933). (This case was decided before adoption of the Code, which also prohibits a judge from presiding in a case in which a relative appears as an attorney.)

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including dismissing DWI and other cases of friends and relatives, without notice to the prosecutor, based upon ex parte communications, and even though some of the cases had been assigned to other judges. *In re Angie Vigil-Perez, NM Supreme Court Nos. 99-15 and 99-70.*

Therefore, if the judge is related within the third degree to a person who will benefit if the judge decides a certain way, Article VI, Section 18 requires the judge to recuse unless the parties waive the disqualifying condition.

A judge should recuse himself in a case in which the judge's close relative has posted bond. The relative is within the third degree of relationship to the judge and in his capacity as bondsman and has a financial interest in the proceedings. *AO 87-3.*

Note that the revised rules extend this constitutional prohibition to include persons, *or spouses of persons*, related to the judge *or the judge's spouse* within the third degree of relationship.

If the judge's spouse is employed by a law enforcement agency involved in the case but the spouse is not involved, the judge is not necessarily disqualified.

A judge is not required to automatically recuse him/herself from all cases involving the law enforcement agency in which the judge's spouse is employed. If the spouse has participated in the case, the judge should recuse. If the spouse does not participate in the case, the judge must evaluate the circumstances on a case-by-case basis in light of a possible appearance of impropriety. *AO 88-5.*

6-925. Employee as a party. The revised code eliminates the prior code's blanket disqualification of a judge from a case when an employee of the court is a party to it. Instead, the commentary to NMRA 21-400(A) states that "The judge shall consider the specifics of the case in determining whether the judge's impartiality might reasonably be questioned and if a recusal is required" in such cases.

6-930. Judge's service as attorney.

Judges who are lawyers may have to decide whether to hear a case involving a former client or former law partner. Part-time judges who continue to practice law especially must screen their cases carefully to avoid conflicts in this area.

6-931. Representation of a party.

A judge is disqualified and shall recuse himself or herself in any proceeding in which . . . the judge served as a lawyer in the matter in controversy [and in which] the judge . . . is acting as a lawyer in the proceeding NMRA 21-400(A)(2) and 21-400 (A)(5)(b).

Similarly, the New Mexico Constitution prohibits a judge from sitting in a cause

in which he was counsel. N.M. Const. art. VI, §18.

This restriction applies not only to the obvious case in which the judge has represented the party in the matter at hand, but also to representation of the party in a related matter arising from the same facts. *Shaman, supra*, §5.16 at 128. Even if the judge has only given advice informally in the matter, the judge is probably disqualified.

A Maryland judge should have recused himself from a zoning case involving a private airstrip where as attorney the judge had drafted the restrictive covenants on the property years earlier. *Sharp v. Howard County*, 607 A.2d 545, 547 (Md. Ct. App. 1992)

A party's right to disqualify a judge because of the judge's prior involvement in a case can be waived.

The sentencing judge had been a prosecutor in the original criminal proceeding. The defendant was fully aware and advised and consented. Article VI Section 18 was complied with. *State v. French*, 82 N.M. 209, 210, 478 P.2d 537, 538 (1970).

If a party is a former client and the case in question is unrelated to the prior representation, the judge still may want to recuse in order to avoid the appearance of partiality.

6-932. Representation of witness.

If the judge represented a witness in a matter completely unrelated to the current matter, the judge does not have to recuse himself, unless he feels his impartiality is affected by the relationship.

6-933. Former association with lawyer.

6-933a. Prohibition.

A judge is disqualified and should recuse himself or herself in a proceeding in which a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter. NMRA 21-400(A)(2).

In other words, a judge should not hear a case if the subject of the case was a matter handled by the judge's former firm while the judge was there. *See AO 89-6.*

Usually recusal is not required solely because one of the attorneys is a lawyer with the judge's former firm; however, the judge should remove herself if she retains a financial interest in the firm.

The judge should not hear cases in which members of his/her former firm represent parties if the judge still has financial dealings with the firm, such as deferred compensation or a payout for the value of his partnership interest. *AO 89-6.*

The length of time during which a judge must recuse from cases involving a former law partner or associate depends on circumstances. *AO07-05*

In any event, a judge may need to recuse because of the appearance of impropriety unless a reasonable time period has passed since his association with the former law firm.

It is advisable that a reasonable period of time pass before a case involving former partners or associates be heard by the judge. That time period will vary depending upon the length of the association, the size of the firm and any financial arrangement that exists between the judge and the firm. A period of five years is recommended. *AO 89-6.*

6-933b. Former association with attorney as judge:

A judge need not recuse when a former colleague on the same court appears as an attorney before the judge. *AO 07-07.*

6-933c. *Government attorneys.* A lawyer in a governmental agency does not necessarily have an association with other attorneys employed by that agency within the meaning of this subsection. A judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association. *Commentary to NMRA 21-400.*

A district judge who was formerly a Deputy District Attorney does not have to recuse himself from criminal cases unless his impartiality might reasonably be questioned. *AO 90-2.*

6-934. *Part-time judge practicing law--special case.* The part-time judge maintaining a private law practice or otherwise working in a law firm must exercise an abundance of caution to avoid the appearance of impropriety and the possibility of partiality due to a financial interest in the case. A part-time judge should not allow his or her partner to practice before the court, because it may appear the partner could influence the result in the case.

A part-time probate judge is prohibited from conducting probate proceedings when the attorneys involved in those proceedings are associated with the law firm that employs the judge. This prohibition helps to promote public confidence in the integrity and impartiality of the judiciary and prevents the appearance that the attorneys of the judge's firm are in a position to influence the judge. The commercial nature of the relationship between the judge and an attorney in the judge's firm will reflect on the judge's impartiality. *AO 86-7.*

6-940. Family relationship to an attorney Questions concerning the relationship of judges to attorneys having a connection with a case are the subject of numerous advisory opinions. Although the answer in some circumstances is clear, typically the factors lie in a gray area and the judge must decide whether there is or will be an appearance of impropriety if he presides in the case, decided according to the "reasonable person standard": whether the facts would create reasonable doubt about the judge's impartiality in the mind of a reasonable person with knowledge of all the circumstances. *AO 87-6.*

6-941. Third degree of relationship to attorney of record. The judge must recuse if she or her spouse is within the third degree of relationship to an attorney of record or the spouse of the attorney in the case. The purpose of this rule is to keep litigants from seeking favoritism by retaining a judge's relative as counsel.

A judge is disqualified and shall recuse himself or herself in a proceeding in which . . . the judge or the judge's spouse, or a person within a third degree relationship to either of them, or the spouse of such a person . . . is acting as a lawyer in the proceeding NMRA 21-400(A)(5).

6-942. Relative has worked on the case. The judge also must recuse if the relative has worked on the case in any capacity, although the relative is not counsel of record. This would include conducting discovery or researching legal issues. *See AO 87-2.*

6-943. Financial benefit to relative.

The judge should recuse himself from any case in which the judge, her spouse, parent or child (wherever they live), or any other family member residing in the judge's household is in a position to gain or lose financially from its resolution. *NMRA 21-400(A)(3); Smith v. Beckman*, 683 P.2d 1214, 1216 (Colo. Ct. App. 1984). For example, recusal is ethically required in cases involving a law firm in which a relative of the judge is a partner, because the relative, especially if she is a partner, could be affected financially by the outcome.

Judges should recuse themselves in any case involving a law firm in which a close relative of the judge is an associate. Even if the relative is not directly involved as a member of the firm, he/she has an interest that could be affected by the outcome of the proceedings. *AO 86-10.*

A judge whose attorney/son-in-law is a shareholder in a firm should recuse him/herself when the firm enters an appearance in the case, even when the son-in-law is not counsel of record. Judges should appear to be impartial and therefore should not preside where counsel is a family member. *AO 89-7.*

Financial issues of this sort usually are not a factor for a lawyer in government service, because her compensation and clientele are set and the prestige of the office is not greatly affected by the outcome of a particular case.

6-944. Judge's relative is affiliated with law firm or agency appearing in case.

Assuming the relative in question has not participated in the case, the fact that a relative of the judge is employed by a law firm or governmental agency that has litigation pending before a judge, taken alone, does not determine whether the rules of ethics require the judge to recuse. *AO 87-2.*

However, he should do so if his impartiality might reasonably be questioned, because of the appearance of impropriety. *NMRA 21-400(A)*. This determination is made on a case-by-case basis. *AO 87-2*.

The appearance of impropriety may require a judge to recuse because of a marital relationship to an attorney, even if the spouse has not worked on the case,

District judge whose wife serves as chief deputy district attorney must recuse from all criminal cases involving her office, due to her supervisory role there. *AO 07-04*.

although a parental relationship may not require this result.

Judge whose son-in-law is sergeant in sheriff's office must recuse from cases involving son-in-law or deputies he supervises, but not from cases involving other officers. *AO 10-07*

A Kansas judge was not disqualified from criminal cases because his son worked as a prosecutor, when son was not involved in the case. *State v. Logan*, 689 P.2d 778 (Kan. 1984).

A judge confronted with this dilemma should disclose the relationship to the parties and give them a chance to object.

A judge whose son is employed as an Assistant District Attorney should disclose the relationship to all defendants appearing in his court, advise them that the son does not practice before the judge or participate in cases in the judge's court, and recuse himself if the defendant feels uncomfortable with the situation. *AO 87-6*.

A judge whose husband is a public defender may hear cases in which the public defender's office appears as counsel, provided she recuses herself in any case in which her husband is counsel of record. Even if her husband is not appearing, however, the judge should inform the prosecutors of the relationship, and should recuse herself in any case in which the relationship would raise a question of impropriety in a reasonable mind. *AO 91-1*.

6-945. Judge's relative represents party in another case. It appears improper for a judge to hear a case involving a party who is represented by the judge's lawyer-spouse in a case before another judge.

A judge cannot hear cases involving a party who is represented by the judge's spouse in another case before a different judge. Although each case has its own peculiar fact situation, legal questions may be common in all the pending cases involving the party. The party might deem it inappropriate for the judge to act under these circumstances, and this would reflect on the judge's impartiality. A husband and wife are within the third degree of relationship, and ex parte communications between the judge and the attorney/spouse are considerations in determining whether the judge should recuse him/herself. *AO 86-9*.

Even if disqualification is not mandatory because the facts of *NMRA 21-400(A)(5)* do not exist, the appearance of impropriety may require the judge to recuse himself because of his kinship relationship to an attorney involved with a party appearing before him.

A judge whose close relative represents a client in a matter not before the judge need not necessarily recuse him/herself in a case in which the client appears before the judge. However, the judge should consider the appearance of impropriety under these circumstances. *AO 87-7*.

6-950. Personal knowledge.

6-951. Knowledge of facts.

A judge is disqualified and shall recuse himself or herself in a proceeding in which . . . the judge has. . . personal knowledge of disputed evidentiary facts concerning the proceeding;. . . NMRA 21-400(A)(1).

This rule applies to information gained before the case is assigned, as well as knowledge acquired from an extrajudicial source or personal inspection by the judge while the case is ongoing.

A judge should recuse himself from a case involving a landowner who has sued an electric co-op for breach of contract and trespass, when the judge previously represented the plaintiff in acquiring the property and did legal work concerning it over a fifteen-year period. The judge has knowledge of disputed evidentiary facts and previously represented the plaintiff. *AO 87-7.*

See also discussion in EX PARTE regarding independent investigation by a judge.

Recusal is not required if the knowledge comes from prior rulings in the same case, or adjudicating the case of related parties to the same underlying transaction, or because the party has appeared before the judge in a previous case. *AJS, ETHICS TRAINING at 22-23.*

6-952. Material witness.

A judge is disqualified and shall recuse himself or herself in a proceeding in which: . . . the judge or the judge's spouse, or a person within the third degree of relationship to either of them or the spouse of such a person; . . . is to the judge's knowledge likely to be a material witness in the proceeding; . . . NMRA 21-400(A)(5)(d).

The reason for this rule is that a judge cannot make evidentiary rulings on her own testimony, and cannot be expected to impartially assess the credibility of the testimony of a family member.

A judge was with his brother, a police officer, when several people were arrested. The judge then presided over the arraignment. The judge violated the code both because he was a material witness and was related to another material witness, his brother. *In re Scacchetti (unreported determination N.Y. 1981); see also Shaman, supra, §5.13 at n.172.*

6-960. Personal interest.

6-961. General rule. Under both the Constitution and the Code, a judge may not hear a case if she has an interest in the outcome.

No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which . . . he has an interest. N.M. Const. art. VI, §18.

The Code recognizes that the judge's interest also may be indirect, through members of his family.

A judge is disqualified and shall recuse himself or herself in a proceeding in which . . . the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter of the controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the outcome of the proceeding NMRA 21-400(A)(3).

The definition of "interest" in New Mexico has developed through case law under the Constitutional provision and is further defined in the revised Code.

6-962. Economic interest. The most commonly understood form of "interest" is economic interest. Two sections of the Code relate to economic interest. NMRA 21-400(D)(2), discussed in this part, is concerned with those interests, including economic interests, that require the judge to recuse himself or subject him to a motion to disqualify. (The revised New Mexico Code has changed significantly from the prior Code in that previously financial interest was not necessarily a bar to sitting on a case.) In NMRA 21-500(D), discussed in Business and Financial Dealings, the Code deals with situations that commonly create financial conflicts of interest that can result in ethical violations. These provisions, while related, are discussed separately.

6-962a. General rule. A judge is disqualified if he or she or a relative as defined in the rule has an economic interest that is more than de minimis and that could be substantially affected by the outcome of the case. A judge's direct pecuniary interest in a case is an especially serious ethical violation because of the risk of depriving a party of a fair trial.

A state statute provided for trial by the mayor of a municipality of charges of violations of the Prohibition Act. The mayor had a pecuniary interest in the outcome because the mayor would receive fees and costs only if the defendant was convicted, amounting to a substantial income. The United States Supreme Court held that this was a violation of defendant's due process rights. *Tumey v. Ohio*, 273 U.S. 510, 512 (1927).

6-962b. Nature of interest. "Economic interest" is defined at length in the revised rule, NMRA 21-400(D)(2). It includes legal and equitable interests, and active participation (such as serving as a director, officer, or advisor) in a party's affairs. Exceptions are allowed in certain cases involving ownership, mutual investment funds, participation in charitable organizations, deposit in financial institutions, or ownership of government securities. *See NMRA 21-400(D)(2)(a) through (d)* should any such circumstances apply.

A "de minimis" interest, which does not require disqualification, is defined as "an insignificant interest that could not raise reasonable questions as to a judge's impartiality." *NMRA 21-400(D)(1)*.

Furthermore, the judge's interest must not be remote or speculative. *State ex rel. Anaya v. Scarborough*, 75 N.M. 702, 705, 410 P.2d 732, 735 (1966). For example, the fact that a judge's ruling in a case could raise property taxes, including the judge's, is not disqualifying. *AJS, ETHICS TRAINING* at 23.

6-962c. Business interest.

New Mexico is among the minority of states permitting judges to operate a business while on the bench, subject to certain restrictions. *See* BUSINESS AND FINANCIAL DEALINGS. If that interest is substantially affected by the outcome of the case, the judge is disqualified.

Ongoing business relationships are especially likely to create problems for part-time judges, many of whom operate businesses. Recusal is advisable when a judge has a business relationship with an attorney appearing before the court that could be affected by the outcome of the proceedings.

A NY municipal judge was censured for presiding over cases in which the attorneys were regular customers of justice's private investigation business and judge personally conducted investigations for the attorneys while the cases were pending. *In re Orloff* (unreported determination N.Y. 1987); *AJS, ETHICS TRAINING* at 23.

The prohibited interest may be a passive investment interest. If a judge held a limited partnership interest in a real estate venture, she would be disqualified from hearing a case in which the value of the judge's investment could be affected.

6-962d. Interest of family member. The Code prohibits a judge from presiding if the case involves an interest of a member of the judge's family. The "third degree of relationship" whose interests may require the judge's disqualification is defined at NMRA 21-400(D)(3) to include: a great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece. An interest held by any spouse of such a person, or any person so related to the judge's spouse may also disqualify the judge. The disqualifying interest includes not only investments and business interests, but also shareholder interest in a law firm.

A judge should recuse in all proceedings in which members of his/her son-in-law's law firm is counsel. Because the son-in-law is a stockholder in the firm, he could be said to have a financial interest in the outcome of any proceedings where the firm represents a party. The son-in-law has an interest that could be substantially affected by the outcome of the proceedings. *AO89-7/issue 2*.

The revised Code has now added a duty by the judge to keep informed both about personal and fiduciary economic interests and about those of the judge's spouse and minor children residing at home. *NMRA 21-400(B)*.

6-970. Personal bias. A judge may not preside if she is biased against a party or her lawyer for personal reasons. Bias is prohibited generally under NMRA 2-200(B), dealing with impartiality, and specifically by 21-400(A)(1), which requires a judge to recuse if he has personal bias or prejudice concerning a party or the party's lawyer. Personal bias is also disqualifying under the Article VI, Section 18 of the Constitution because it is a form of "interest." *State v. Armijo*, 38 N.M. 73, 80-83, 28 P.2d 511, 514-16.

A judge is disqualified and shall recuse himself or herself in a proceeding in which . . . the judge has a personal bias or prejudice concerning a party or a party's lawyer NMRA 21-400(A)(1).

6-971. Directed toward a party. To be disqualifying, the bias must be personal, and directed toward one of the parties, either individually or as a representative of a class. *See State v. Hernandez*, 115 N.M. 6, 20, 846 P.2d 312, 326 (1993). Bias based on considerations of race, ethnicity and gender are discussed under Demeanor and Impartiality.

6-972. Extrajudicial source rule. Bias caused by occurrences in court is not grounds for disqualification. *Shaman, supra*, §5.05 at 105. To be disqualifying, the bias must be extrajudicial--it must stem from a source outside the courtroom and must result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *United States v. Grinnell Corp.* 384 U.S. 563, 583 (1966).

The issue is the origin of the judge's bias rather than the place of its expression. *United Nuclear, supra*, 96 N.M. at 248 n. 159, 629 P.2d at 324 n. 159. A party should not be allowed to behave outrageously and then disqualify the judge because of the bias created by the party.

If a party or an attorney yells at the judge, threatens the judge, or even files a disciplinary complaint against a judge, the recusal of the judge is usually not required. This is because parties or attorneys should not be able to shop for judges by creating bias or prejudice of the judge that did not previously exist. *AJS, CURRICULUM, Disqualification* at 9.

An Idaho judge's comments, which were reported in the newspaper, about a defendant who had threatened the judge and others with citizen's arrest showed a strained relationship between the judge and the defendant but were not a basis for disqualification. *Yager v. State*, 437 N.E.2d 454, 462 (Idaho 1982).

Judge need not automatically recuse because pro se party files frivolous claim against judge, and may conduct hearing on party's disqualification motion. *AO 08-03*.

The fact that a judge has some personal connection with a case does not automatically mean the judge has been biased by an extrajudicial source.

A judge was not disqualified in a murder case because he had known the victim and had attended the victim's funeral, where the judge had not obtained any extra-judicial information about the defendant. *United States ex rel. Perry v. Cuyler*, 584 F.2d 644, 647 (3rd Cir. 1978).

but information obtained from improper ex parte communications may create bias and can be grounds for disqualification.

An Arizona judge's telephone conversation with a victim's relatives outside of court prior to sentencing mandated disqualification. *State v. Leslie*, 666 P.2d 1072, 1073 (Ariz. 1983).

6-973. Personal beliefs. A judge's personal values, philosophy, or beliefs about the law are not considered personal biases that require disqualification. *AJS, CURRICULUM, Disqualification* at 1. The fact that a judge may have a general opinion about a legal or social matter directly relating to the case does not disqualify the judge from presiding. *Shaman, supra*, §5.04 at 105; *see also Laird v. Tatum*, 409 U.S. 824, 836 (1972).

6-974. Judicial opinions or remarks. Judicial rulings or comments on the evidence made during the course of proceedings do not fall within the rule. *United Nuclear*, 96 N.M. at 248, 629 P.2d at 324. Opinions expressed during trial are not disqualifying unless it appears that the judge has a closed mind and is no longer considering all the evidence.

A judge's comments in a public speech that he had never seen a stronger government case and that some of the jurors would not convict under any circumstances did not call for disqualification because of bias. Strong views do not call for recusal when they do not stem from an extrajudicial source. *United States v. Barry*, 961 F.2d 260, 263-64 (D.C. Cir. 1992).

A district judge's comment to counsel in a rape trial--"at the time when I took the plea [agreement] there were red flags that popped up all over this courtroom. . . as counsel are well aware, defense counsel, how I feel about violent crimes once there's been a conviction, especially rape cases, I have strong feelings about them"-- did not indicate bias because it did not suggest the judge had a personal bias against the defendant during the trial. *State v. Swafford*, 109 N.M. 132, 136, 782 P.2d 385, 389 (Ct. App. 1989).

Bias will be found, however, if the judge's remarks are extreme.

A California judge was publicly censured for stating to an attorney who has said he would appeal a ruling, "Buddy boy, you're not going to get away with this. . . .I'm going to see that you lose this case big." *Roberts v. Comm'n on Judicial Performance*, 661 P.2d 1064, 1066 (Cal. 1983).

Except in the extreme case, a judge may avoid charges of bias based on comments made during trial by acknowledging her continued impartiality. "In fact, the case law suggests that a judge can successfully fend off a charge of improper bias or prejudice merely by stating on the record that his or her mind is still open and that a final decision on the matter will not be made until the close of all the evidence." *Shaman, supra*, §5.07.

6-975. Sentencing and rulings. A claim of judicial bias cannot be based upon the imposition of the maximum legal sentence. *State v. Augustus*, 97 N.M. 100, 101, 637 P.2d 50, 51 (Ct. App. 1981). Adverse rulings do not necessarily show the judge is biased against that party, even if the rulings are later found legally incorrect. Judges must be free to make a disproportionate number of rulings in favor of one party without being accused of bias. *United Nuclear*, 96 N.M. at 249, 629 P.2d at 325.

6-976. Prior cases involving defendant. The fact that the judge has previously heard cases involving a party does not disqualify him.

A judge was not required to disqualify himself when the defendant had appeared before the judge on at least three previous occasions and had been sentenced by him on one other occasion, when there was no evidence of bias or prejudice. *State v. Cabiness*, 254 S.E. 2d 291, 292 (S.C. 1979).

6-977. Judge as adversary. A judge cannot preside in a case if he is personally at odds with a party.

A Kansas judge should have disqualified himself from cases involving his creditors where judge had defaulted on loans, stalled creditors and written rubber checks. "There is no way that a judge's impartiality could go unquestioned in a situation like that." If he rules for the bank, he is trying to gain their favor; if

he rules against the bank, it appears it is because of its actions toward him. *In re Yandell*, 772 P.2d 807, 812 (Kan. 1989).

6-978. Bias against attorneys.

Bias against an attorney is a basis for disqualification, *NMRA 21-400(A)(1)*, but will not disqualify a judge unless it is of such a degree that it adversely affects the interest of the client represented by that attorney. *Martinez v. Carmona*, 95 N.M. 545, 550, 624 P.2d 54, 59 (Ct. App. 1980).

The fact that an attorney has filed a disciplinary complaint against a judge is not necessarily disqualifying. *AJS, ETHICS TRAINING* at 23.

The fact that a judge has been represented personally by an attorney, or opposed by an attorney, should be disclosed, but is not disqualifying if the parties agree the judge can hear the case.

The judges of a judicial district are not required to recuse themselves in cases merely because the cases involve law firms that are serving as counsel in a separate case brought by the judges against the County Commission. The judges should disclose these circumstances on the record and, if there is no objection, the judge properly may participate in the proceeding. If the parties ask the judge to enter a recusal, he should do so. *AO89-8*.

Judges who harbor no adverse personal feelings need not automatically recuse from all cases involving attorney held in contempt by one judge, and tried by other judge. *AO 08-02*.

The commentary to Paragraph(A) of the revised rule recommends disclosure by the judge on the record of "information the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification."

6-979. Social relationship.

Especially in small communities, a judge's social relationships--with both parties and lawyers--can raise disqualification issues.

Friendships within the bench and bar do not, of themselves, cause prejudice. After all, judges in rural, semi-rural and even some metropolitan areas would be subject to a large number of disqualifications if friendship with a lawyer was the sole basis for finding prejudice. *In re estate of Carlton*, 378 So. 2d 1212, 1220 (Fla. 1980).

A judge should not socialize, even at the courthouse, with parties or attorneys involved in a pending case.

It was disqualifying for a hearing officer, during a break, to sit at the same restaurant table with counsel and one of the parties, even though there was no evidence of inappropriate discussion. It is important to maintain the appearance of neutrality. *Wells v. Del Norte Sch. Dist.*, 753 P.2d 770, 772 (Colo. Ct. App. 1987).

Whether a judge should recuse herself because of a social relationship depends on how close the relationship is. The test is whether the judge feels capable of disregarding the relationship and whether others can reasonably be expected to believe the judge can do so. *AJS, ETHICS TRAINING* at 23.

A federal district judge should have recused himself in this case because a reasonable observer would doubt the ability of the judge to act with disinterest when he was such a close friend of the prosecutor that

their families were going to vacation together after the trial. The mere fact that they were friends did not require recusal. *United States v. Murphy*, 768 F.2d 1518, 1537 (7th Cir. 1985).

Although friendship in and of itself does not mean the judge should recuse, the closer the friendship, the more problematic the situation.

A New York judge was suspended without pay for six months for failing to disqualify himself from presiding over a nonjury small claims trial in which his close friend was a defendant. There was an appearance of impropriety even in the absence of evidence the friend received any preferential treatment. *In re Vaccaro*, 409 N.Y.S.2d 1009, 1011 (Ct. Jud. 1977).

6-9710. Other interests. Judges should recuse themselves in any other instance in which there is an appearance of partiality to a reasonable observer.

A federal judge who was considering retiring from the bench had contacted an employment recruiter about employment with a law firm. The recruiter contacted two law firms that happened to represent opposing parties in a case before the judge. Although the judge's name was not used in the contact, it was generally known that this was the only federal judge considering retirement. The judge should have granted the motion to disqualify filed by one of the firms. Objectively, there was an appearance of partiality, although no actual bias was shown. *Pepsico v. McMillan*, 764 F.2d 458, 460-61 (7th Cir. 1985)

6-9711. Proof of bias.

For a judge to be disqualified because of bias, there should be objective proof that the judge cannot preside with impartiality: would a reasonable person, knowing all the circumstances, harbor doubts about the judge's impartiality? The party filing a motion to disqualify because of bias must be able to show a reasonable, factual basis for doubting the judge's impartiality.

A corporate defendant alleged, but failed to prove, its claims that the trial judge was biased because he had used a vituperative tone toward defendant in his orders and statements, and his actions were one-sided in favor of the plaintiff. Absent extrajudicial bias, judge's refusal to disqualify himself is proper. *United Nuclear*, 96 N.M. at 247-48, 629 P.2d at 323-24.

The mere fact that the party fears the judge may rule against him does not warrant disqualifying the judge. *United Nuclear*, 96 N.M. at 247-48, 629 P.2d at 323-24.

Nevertheless, under the revised rule, the standard for disqualification is whether "the judge's impartiality "might reasonably be questioned." *NMRA 21-400(A)*. Whether or not any specific disqualifying circumstances are listed in the rule, the fact that impartiality might be reasonably questioned is determinative. *Commentary to NMRA 21-400(A)*.

Ultimately, of course, only the judge knows if in fact she is biased. If a judge believes she cannot preside with impartiality, she should recuse herself regardless of whether a party files a motion to disqualify her.

6-1000. Related topics

Civic, Charitable and Social Activities

Financial and Business Dealings

Demeanor and Impartiality

7-100. Checklists

Rule of thumb:

A judge should (1) hear courteously (2) answer wisely (3) consider soberly (4) decide impartially. *American Judicature Society, HANDBOOK FOR JUDGES* (1961).

Do:

- Address women and men with gender-neutral terms, such as "counselor" or "ladies and gentlemen."
- Recognize and acknowledge stereotypes based on gender, race, ethnic background, age, physical limitation, sexual orientation, social class or ability to speak English, and remove those biases from the courtroom.
- Address all individuals by last name and appropriate titles in the public setting.
- Discuss biased actions with individuals who may be unaware of their behavior and its impact, and stress that such behavior will not be tolerated.
- Recognize that all matters heard by the court are important.
- Understand that the impact of biased behavior on the receiver is more important than the intent of the speaker/actor.
- Speak respectfully to parties and counsel.
- Take a deep breath and count to five before responding to a rude or disrespectful remark.
- Require the parties, attorneys, and court staff in your courtroom to observe all of the above requirements.

Don't:

- Use terms of endearment toward women or men, such as "honey" or "dear" in courthouse interactions.
- Make assumptions about individuals based on stereotypes.
- Subject victims of crime to unjust scrutiny because of the nature of the act(s) perpetrated against them, their gender, race, ethnicity, sexual orientation, or social class.
- Subject individuals to comments, gestures, touching or other actions that can offend them or make them feel uncomfortable.

- Make sexual jokes or other remarks that play on sexual stereotypes in a courtroom setting.
- Comment on the physical appearance of others.
- Exchange personal remarks with persons present in court.
- Speak rudely to persons present in court.
- Perform judicial duties while impaired by alcohol.
- Hold membership in any discriminatory organizations.

Demeanor and Impartiality

7-200. Applicable Law

NMRA 21-100, 21-200 and 21-300.

7-300. Introduction.

The purpose of judicial proceedings is to ascertain the truth. Such proceedings should be conducted with fitting dignity and decorum, in a manner conducive to undisturbed deliberation, indicative of their importance to the people and to the litigants, and in an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice. *NMRA 23-104(A)*.

The requirement that judges be impartial dictates that parties and their attorneys be treated respectfully, and that a dignified atmosphere prevail in court. A judge's demeanor is crucial to maintaining impartiality, because it is what others see. Improper demeanor can undermine the judicial process by conveying an impression of bias or indifference. "A judge's courtroom conduct symbolizes the law in action. . . ." *Shaman, supra*, §2.01 at 25. In addition to demonstrating bias, disrespectful behavior toward a litigant infringes on the litigant's right to be heard and compromises the dignity and decorum of the courtroom. Lack of courtesy also affects litigants' satisfaction with the handling of their cases and creates a negative impression of courts in general. *AJS, ETHICS TRAINING* at 63.

7-310. Courts of limited jurisdiction.

Demeanor and decorum are no less important in the courts of limited jurisdiction than in the general jurisdiction courts.

The vast majority of Americans have their sole contact with American Courts in state courts of limited jurisdiction--the small claims, police and magistrate courts. Judges of those courts should be no less courteous to and considerate of litigants and counsel than should judges of other trial and appellate tribunals. While we recognize the vast volume of litigation handled by the magistrate courts, the pressures of such caseloads, and the ever present need to terminate cases with dispatch, we cannot countenance the handling of cases in any court in such a manner as to preclude to the litigants a fair opportunity to be heard, nor can we sanction judicial discourtesy to litigants and counsel. *In re Sorter*, 551 P.2d 1255, 1256 (Kan. 1976).

7-320. Actions and words.

Body language, as well as words, is relevant to a judge's impartiality. Physical demeanor may indicate disbelief of a witness, thereby improperly influencing the jury. Treating witnesses in ways that may enhance or diminish credibility in front of the jury runs counter to a judge's duty to remain impartial. For example, a judge should not shake hands with a witness in front of the jury. *American Judicature Society, JUDICIAL ETHICS AND THE ADMINISTRATION OF JUSTICE: SELF-STUDY GUIDE*, 16 (1990) [hereinafter *AJS Self-Study Guide*].

7-400. Decorum

A judge shall maintain order and decorum in judicial proceedings. NMRA 21-300(B)(3).

7-410. Physical surroundings. The courtroom should be quiet and organized so that those involved are allowed an environment in which they can proceed undisturbed. *NMRA 8-102(A)*. In smaller communities, the courtroom may be a multi-purpose room. A judge should schedule and conduct court proceedings to avoid disruptions, conduct himself with appropriate seriousness and see to it that others maintain proper respect for the court. Due process and concerns about impropriety require proceedings to be held in open court.

A judge held the majority of arraignments and initial appearances in felony cases in chambers, over objection, and made some final dispositions in chambers. Conditions were crowded. The judge was publicly censured for this and other misconduct. *In re Dwyer*, 572 P.2d 898, 899 (Kan. 1977).

7-420. Relationships with other judges. A judge who criticizes another judge publicly undermines public confidence in the judiciary. This restriction does not apply to exchanges between judges that occur in private. *National Judicial College, ETHICS WORKSHOP, Part 2, Answers III and VI*. Also, a judge is expected to take appropriate action when another judge commits a violation of the Code of Judicial Conduct. *NMRA 21-300(D)*.

7-500. Temperament

Judicial temperament is an essential virtue. The judge must ensure the propriety of his own conduct and of staff and others subject to his judicial authority.

A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity and shall require similar conduct of lawyers, staff, court officials and others subject to the judge's direction and control. NMRA 21-300(B)(4).

7-510. Loss of temper.

Judges have extraordinarily difficult jobs, beset on a daily basis with problems, some of which appear insoluble: large calendars; dilatory, unprepared and provocative attorneys; witnesses who lie; bad faith violations of court orders and rules; wastefulness; difficult decisions under high pressure; and lack of resources needed to do the work. The experience of feeling helpless, powerless or frustrated in dealing with these and other recurrent problems presented to judges can produce anger. *Rothman, supra*, §115.200 at I-6.

A judge must channel anger appropriately. If a party has violated a court order by failing to appear in court, the punishment must fit the "crime." Vindictive conduct can only get the judge in trouble and complicate the matter further.

7-520. Pattern of conduct. An isolated lapse of temper is forgivable unless it is very serious, but "where the comments are overly aggressive or threatening, or where they occur repeatedly, they may amount to improper behavior that justifies discipline." *AJS, CURRICULUM, Demeanor* at 8.

A district judge was removed from the bench for, among other reasons, using profanity and shouting at court staff, sometimes in public places. *In re Castellano*, 119 N.M 140, 889 P.2d 175, 181 (1995).

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including cursing in court offices, use of alcohol during court and other official proceedings, abuse of court staff, making racially biased references about court staff, and public derision of the chief judge. *In re Angie Vigil-Perez, NM Supreme Court Nos. 99-15 and 99-70*.

A California judge argued with a witness and told him his testimony did not make sense, accused an attorney in court of being afraid to take a case to trial, told an inexperienced lay witness to keep her mouth shut, threatened to jail a defendant for talking to his attorney during court, and jailed a spectator who swore after tripping over her son's feet in the courtroom. *Kloepfer v. Comm'n on Judicial Performance*, 782 P.2d 239, 249-57 (Cal. 1989).

7-530. Unsuccessful defenses.

7-531. Provocation. Judges are held to a higher standard of conduct than attorneys. Provocation by attorneys is not a legitimate excuse for being discourteous. "Problems with demeanor are less a matter of mastering the rules than of mastering self-control." *Shaman, supra*, at xi. The judge should resist the temptation to respond to provocative remarks by attorneys or parties.

"Civility is relevant to judges and especially trial judges because they are under greater stress than other judges and subject to the temptation to respond in kind to the insolence and bad manners of lawyers. Every judge must remember that no matter what the provocation, the judicial response must be a judicious response and that no one more surely sets a tone and pattern for courtroom conduct than the presider." *AJS SELF-STUDY GUIDE* at 21 (quoting former Chief Justice Warren Burger).

"No matter how provocative are the personal attacks or innuendos by lawyers against a judge, the judge simply should not himself give vent to personal spleen or respond to a personal grievance. . ." *McCartney v. Comm'n on Judicial Qualifications*, 526 P.2d 268, 287 (Cal. 1974).

A judge's motivation in making a rude comment may be relevant in a disciplinary action. For example, the judge compounds the problem by retaliating against a party who has moved to disqualify the judge or has filed disciplinary charges against him.

7-532. Heavy caseload. The fact that the court is overburdened does not excuse a judge's bad temper. The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate. *NMRA 21-300*.

Necessary as it is to try cases expeditiously and to keep the court's docket current, this can be accomplished without displays of rudeness to litigants and lawyers, and it does not justify interfering with the legal representation of litigants to which the law entitled them." *In re Gustafson*, 756 P.2d 21, 29 (Or. 1988).

7-533. Humor.

A judge cannot claim humor as a defense to a charge of rude or biased conduct. This is especially true of jokes with a sexual or ethnic content.

[S]ubjective intent is not an issue. . . . [A] judge is charged with the obligation to conduct himself at all times in a manner that promotes public confidence and esteem for the judiciary. . . . [F]acially blatant ethnic slurs are apt to offend minority members. . . . and may be construed by the public at large as highly demeaning to minorities. *Gonzales v. Comm'n on Judicial Performance*, 657 P.2d 372, 382 (Cal. 1983).

A judge was censured, placed on six months supervised probation, and otherwise disciplined by the Supreme Court for making offensive jokes and comments about women to attorneys. *JSC 99-2F*

In *Gonzalez*, a California judge was removed from office for misconduct, including making racial and sexual comments he claimed were in jest. During voir dire he asked an African-American woman who had said she worked as a grocery clerk if she knew the price of watermelon, and asked a female Jewish district attorney at a party if she was afraid "her people" would produce a race of idiots because of "all the inbreeding" they do.

Even if humor is not blatantly offensive, it should be used with care. Humor can reduce tension and help the judge maintain control of the courtroom, but often humor is at someone's expense. ". . . [A] seemingly innocuous joke by the judge may assume disproportionate significance in the eyes of the parties, counsel, jurors, or other. Moreover, a captive attorney audience may feel compelled to laugh rather than risk an objection." *Rothman, supra*, §137 at I-22 (quoting *1988 Report, California Commission on Judicial Performance*). Making fun of litigants is improper.

A Kansas judge was censured for writing a memorandum opinion in the form of a humorous poem that ridiculed the defendant. The problem was not the form of the opinion, but the ridicule cast on the defendant. *In re Rome*, 542 P.2d 676, 685 (Kan. 1975).

7-600. Rude and abusive behavior

"Regardless of personal problems, a judge is required to show patience and dignity and use common courtesy in daily interaction with members of the public." *In re Kellam*, 503 A.2d 1308, 1311 (Me. 1986). Improper language is (1) disrespectful and (2) indicative of bias, either personal or based on gender or ethnicity. The public will complain about rude treatment, even if disciplinary action does not always result. *See JSC 84* (complaints about rudeness, improper procedures and bias, though found insubstantial, nevertheless were complained about). Abusive treatment that is disruptive or indicative of bias also violates the parties' rights to a fair hearing and therefore violates the Code:

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. NMRA 21-300(B)(7).

The JSC noted with disapproval an allegation that a judge abused the power of office by being abusive, discourteous and undignified toward prisoners, litigants and attorneys. *JSC 87-13*.

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including cursing in court offices, use of alcohol during court and other official proceedings, abuse of court staff, making racially biased references about court staff, and public derision of the chief judge. *In re Angie Vigil-Perez, NM Supreme Court Nos. 99-15*

and 99-70.

A New Jersey judge demonstrated discourteous behavior, disrespect, and impatience toward litigants, witnesses and others. The judge improperly invoked personal beliefs not legally relevant to the case: children of a plaintiff called plaintiff by first name, not "daddy." Judge said "If I had a kid and he called my wife Gail, his nose would be out of joint and his teeth would rattle." *In re Yaccarino*, 502 A.2d 3, 10 (N.J. 1985).

7-610. Toward parties. There is no excuse for a judge verbally abusing or demeaning a party.

A Metropolitan court judge was reminded to exercise judicial wisdom in utterance of instructions and statements to litigants so they do not come away with a misunderstanding or the feeling that the judge is harsh, rude or biased. *JSC 92-17*.

The New Jersey Supreme Court disciplined a judge after he humiliated a plaintiff in small claims court in which she claimed a check cashing service had cashed her welfare check incorrectly. The judge lectured her in open court because she was an unwed mother on welfare, which was irrelevant to the proceedings. "People are being inundated, taking care of all these children out-of-wedlock. Money doesn't come out of the sky, does it?... Why shouldn't you be working? You're an able-bodied woman, aren't you?" The court found that a judge who intentionally demeans a litigant misconceives his judicial responsibility. *Judge Kenny*, Order (N.J. 1991)(cited in *AJS, ETHICS TRAINING* at 64).

A Texas judge was publicly reprimanded for frequent use of hostile, often racially derogatory language, such as "I wish I could be a mean, ugly gorilla and take a baseball bat and beat the living hell out of you until you pled for mercy while two others held you down..." and "[i]f you ever come after me in my private life, sir, I hope I've got a shotgun in my possession . . .and I hope God gives me two seconds to blow you to hell." *Public Reprimand of Garza* (Tex. 1993)(cited in *AJS ETHICS TRAINING* at 64-65).

A California judge's willful misconduct included making a vulgar gesture to a defendant in a traffic case and giving another the "raspberry" while the defendant was testifying. *Spruance v. Comm'n on Judicial Qualifications*, 532 P.2d 1209, 1222 (Cal. 1975).

A Kansas judge was disciplined for abusive conduct toward parties such as telling a defendant who has asked a question to sit there and shut up and threatening to "throw her ass out" when she responded she wished to be treated like a human being. *In re Dwyer*, 572 P.2d 898, 899 (Kan. 1977).

Such remarks are even more inexcusable if made before a jury. Jurors react to a negative tone set by the judge. *R. Weeks, Appropriate Courtroom Conduct*, 7 *NBA Magazine* 14, 22 (1993).

A judge's hostile remarks can also indicate the judge has prejudged the case.

The JSC sent a letter of caution to a magistrate instructing the judge to exercise care and discretion in making statements to litigants. The Judge made the following inappropriate remark to a litigant: "It's a good thing the defendant did not show up for court because I would have ruled against you." *JSC 93-F3*.

A judge should not engage in emotional exchanges with parties about the judge's decision.

A municipal judge was cautioned to avoid making inappropriate remarks to litigants. He was encouraged to let litigants appeal decisions they are unhappy with rather than engaging in confrontation and inappropriate conversations and letters. *JSC 93-14*.

7-620. *Toward lawyers.* "When a judge is rude and discourteous to an attorney in court, it seriously diminishes an attorney's ability to effectively represent his or her client. In fact, jurors and others are sometimes negatively influenced by the tone set by a judge." *R. Weeks, Appropriate Courtroom Conduct, 7 NBA Magazine 14, 22 (1993).*

Impatience, irritation or indications of bias by the judge can impede presentation of evidence or legal argument and interfere with parties' right to be heard.

7-621. *Notable examples.*

Judges have been disciplined for improper treatment of attorneys such as:

- telling an attorney he was wasting the court's time
- interrupting the attorney when he was addressing the court
- implying the attorney was not being truthful
- asking the attorney "Why, do you want to get some more of this woman's money?" after the client pleaded not guilty to a traffic charge
- rude treatment after attorney filed a motion to disqualify the judge
- accusing an attorney of unethical conduct in open court
- belittling an attorney in front of client or jury
- making an adverse ruling out of pique
- accusing attorney of incompetence and questioning legal experience
- telling an attorney to shut up
- using obscenity in telephone conversation with prosecutor
- telling attorney "I don't have time to practice law for you"
- being rude to encourage settlement
- showing anger when attorney refused to stipulate to probable cause. *Rothman, supra*, §140.100.

A two-year suspension was ordered for a Wisconsin judge who during trial interrupted the prosecutor's attempt to make an offer of proof, improperly impeached a witness in front of the jury, repeatedly insulted and verbally abused prosecuting attorneys. *In re Breitenbach*, 482 N.W.2d 52, 54-56 (Wis. 1992).

An Iowa District Court judge was suspended for continually harassing a lawyer and his firm because the judge disapproved of the lawyer's handling of a divorce case, including warning the lawyer that judges rate lawyers. *In re Eads*, 362 N.W.2d 541, 544-46 (Iowa 1985).

A Wisconsin judge was sanctioned for rude comments to attorneys, including telling an attorney who tried to vigorously defend his client that if he opened his mouth once more he was "going to have you in the pokey with your client." *In re Seraphim*, 294 N.W. 2d 485, 497 (Wis. 1980).

A California judge's misconduct included abruptly interrupting defense attorneys on a number of occasions with comments such as "why don't you try opening your ears and closing your mouth for a bit," and "please don't make these phony motions and don't lie to me in open court." *Cannon v. Comm'n on Judicial Qualifications*, 537 P.2d 898, 904 (Cal. 1975).

7-622. *Provocation.* Even if a judge's rude behavior toward attorneys is provoked by the attorney's rude conduct, the judge must take appropriate steps to control the courtroom without retaliating. If

a reprimand is warranted, it should take place away from the jury. It is never appropriate to repeatedly interrupt an attorney without justification or be abusive or ridiculing. See EXERCISE OF JUDICIAL POWER, Contempt.

During a custody arraignment a judge ordered a defense attorney to "get your butt out of here" after the attorney had made a disrespectful answer to the judge. An improper response by the attorney did not justify the judge's statement. The judge received a letter of admonition. *JSC 86-F2*.

7-630. Toward witnesses. Trial judges have authority to question witnesses during courtroom proceedings in order to elicit or clarify testimony. The manner of questioning is subject to Code restrictions. The judge must not become an advocate for one side or interfere with a lawyer's representation. It is never permissible to ridicule or discredit the witness. The judge must be especially careful if there is a jury.

A letter of caution went to judge who allegedly made the following remarks to a potential witness in a case dismissed under the six-month rule: "I know who's guilty," "You know, it cost the defendant quite a bit of money to get off" an "If you really fear for your life, I suggest you carry a gun. This is still part of the Old West." *JSC86-II*.

A judge was alleged to have ridiculed police officers publicly for making minor errors on citations, and to have publicly ordered them to stand up straight in the courtroom. *JSC 87-13(a) and (b)*.

7-640. Toward others.

A judge acted improperly in connection with cash bond posted by a defendant's mother and verbally abused her when she tried to get it back. The Canons require a judge to be patient, dignified and courteous, perform duties diligently and discharge administrative responsibilities. *In re Romero*, 100 N.M. 180, 181-83, 668 P.2d 296, 297-99 (1983).

A municipal judge who was alleged to have used vulgar and obscene language and who participated in a protest against the local school board received a letter of caution to avoid using language that could bring the judiciary into disrepute and to avoid appearance of impropriety. *JSC 92-15*.

A judge received a cautionary letter for making flippant and inappropriate remarks about the deceased victim of a shooting during the suspect's arraignment. *JSC 91-15*.

A district judge was removed from the bench for, among other reasons, using profanity and shouting at court staff, sometimes in public places. *In re Castellano*, 119 N.M 140, 889 P.2d 174, 181 (1995).

It is also unseemly to fight with other judges or make uncomplimentary remarks about other judges in public.

7-700. Bias

7-710. Introduction. "Bias is an attitude or point of view that colors our judgments." *New Mexico Supreme Court, HANDBOOK ON GENDER EQUALITY IN THE COURTS*, 3 (1994). Bias is one of the most common complaints lodged against judges. *Y. Begue and C. Goldstein, How Judges Get Into Trouble*, 26 *The Judges Journal* 8 (1987). The bias may be reflected in rude behavior, motivated by personal dislike, or by bias based on gender, cultural or racial stereotypes. Personal bias is discussed in DISQUALIFICATION.

7-711. Manifestations of bias. Bias may be manifested either verbally or physically. Either can violate NMRA 21-200 requiring a judge to avoid the appearance of impropriety and remain impartial, or NMRA 21-300 relating to impartiality and proper demeanor in the courtroom. "Any sign that a judge is predisposed toward a party, group, or a particular point of view undermines judicial integrity. The duty of a judge to conduct himself or herself impartially remains in effect regardless of whether a jury is present." *AJS STUDY GUIDE* at 13.

7-712. Bias distinguished from opinion. Opinion, which is acceptable, should be distinguished from bias, which is unacceptable. "Proof that a Justice's mind. . . is a tabula rasa [blank slate]. . . would be evidence of lack of qualification, not lack of bias." *Laird v. Tatum*, 409 U.S. 824, 835 (1972).

Notable examples. Judge Rothman notes the following examples of bias revealed through demeanor:

- making prosecutorial recommendations
- giving a witness the raspberry
- passing a sympathetic note to a victim
- excessive examination of a witness
- inappropriately curtailing the examination of a witness
- disallowing cross-examination
- conducting investigation in a case
- entering judgement without giving opportunity for defense
- hometowning
- acting out of revenge
- using language that infers defendant's guilt
- making inappropriate comments to the jury after verdict. *Rothman, supra*, §110.500.

7-720. Judicial Intervention. A judge is obliged to intervene if others make biased statements in the judge's presence, including staff and court officials under the judge's direction and control, as well as attorneys appearing before the judge. *NMRA 21-300(B)(5) and (6), and 21-300(C)(2)*; see also *Handbook on Gender Bias in the Courts* at 4.

7-730. Race and culture.

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, marital status, sexual orientation, or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. NMRA 21-300(B)(5).

This newly adopted provision reaffirms the prohibition against bias or prejudice in the courts on many categories, including some not previously protected, including sexual orientation and

socioeconomic status. Commentary to this section warns judges against "[f]acial expressions and body language, in addition to oral communication," that can give an appearance of bias.

The revised Code also explicitly instructs judges to require lawyers in proceedings before the judge to refrain from manifesting bias based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses or others. *NMRA 21-300(B)(6)*. This does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

Racial slurs are improper in and of themselves, irrespective of whether the bias is reflected in the judge's decision. It is also irrelevant that the comments are made outside the courtroom.

A California judge's repeated use of racial slurs violated the code even though most of the remarks were made during in-chamber conferences, and not in open court. *In re Stevens*, 645 P. 2d 99, 100 (Cal. 1982).

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including cursing in court offices, use of alcohol during court and other official proceedings, abuse of court staff, making racially biased references about court staff, and public derision of the chief judge. *In re Angie Vigil-Perez*, *NM Supreme Court Nos. 99-15 and 99-70*.

Racially derogatory statements, whether motivated by actual bias or not, can easily be understood to erode public confidence in the impartiality of the judiciary.

A New York judge was censured for referring to a black person as "another nigger in the woodpile." The remark was made at the sentencing hearing of two black defendants. The judge claimed he did not intend the statement as racial slur, but as a "metaphor" not directed at the defendant. The reviewing court found that all racial slurs are indefensible because they are insulting and erode public confidence in the judiciary. *In re Agresta*, 476 N.E.2d 285, 286 (N.Y. 1985).

A judge's comments about ethnic origins, including his own, are also undignified and discourteous.

A Texas judge had remarked to a defendant that the defendant's ancestors used to be called "jungle bunnies," while the judge's ancestor had to put up with being called "pepper belly." *Public Reprimand of Garza* (Texas 1993). *AJS, ETHICS TRAINING* at 65-66.

A Florida judge was reprimanded for stating at a hearing, "Now, you can throw your Italian temper around in the bars but you don't throw it around in my courtroom. . . .I'm just as Irish as you are Dago." *In re Carr*, 593 So. 2d 1044, 1045 (Fla. 1992).

Racial bias is treated as a serious problem by disciplinary authorities.

A Wisconsin judge was suspended for acting in a blatantly disrespectful manner toward black litigants. During a review of probation status, the judge said "Seventy-five percent to eighty percent, Miss Harwich, of the people I see in court are born illegitimate and black and come from welfare families, and I pay for this courtroom and the staff and I am sick of it and so is the rest of Wisconsin." Even if the statements were true the judge failed to realize that individuals are not on trial as members of a race. *In re Gorenstein*, 434 N.W.2d 603, 604-5 (Wis. 1989).

A Wisconsin judge was suspended for judicial misconduct and mistreatment of litigants. After imposing sentence on a defendant, the judge told him that when he completed his sentence he should "get out of this

town and go back to Puerto Rico. . . because you can't make it in a civilized community." *In re Seraphim*, 294 N.W. 2d 485, 498 (Wis. 1980).

A pattern of such conduct may result in removal from office.

A New York family court judge was removed from office for conduct including twice making racially charged comments. This pattern of conduct created the appearance of an unfair system for litigants and damaged public confidence in the judiciary. *In re Esworthy*, 568 N.E. 2d 1195, 1196 (N.Y. 1991).

7-731. Club Membership. A major revision in the revised Code is the prohibition of membership by judges in discriminatory organizations - - a ban on conduct outside of court.

A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. NMRA 21-200(C).

The commentary to this section indicates that the judge must evaluate the current practices of the organization for signs of invidious discrimination. Member selection practices that lead to discrimination are suspect, but an organization "dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members" would be acceptable regardless of the composition of its membership. Similarly, a truly intimate, purely private organization may be allowed. Organizations that otherwise arbitrarily exclude persons based on race, religion, sex, or national origin are not acceptable.

A judge may not belong to a discriminatory organization; may not arrange meetings there; and may not regularly use its facilities. But, before resigning, a judge who learns of such practices may attempt, for up to one year, to free the organization from its unacceptable practices so long as the judge suspends participation in other organizational activities while so attempting; and provided the judge resigns if the efforts fail.

7-740. Gender. "*Gender bias is a bias based on sexual stereotypes and culturally-defined gender roles.*" *Gender Bias Handbook* at 3; *see also NMRA 21-300(B)(5) and (6)*. Judges have a role to play in ensuring that courts offer equal access to men and women. These obligations apply to the judge's own relationships with parties, lawyers and court personnel, as well as the relationships of court staff and lawyers with others. Gender still matters in the legal profession, and women suffer injuries from gender bias more frequently than men; overt instances of gender bias by judges towards lawyers is unusual in formal courtroom settings but more common in informal settings of pretrial conferences and interactions with colleagues or opposing counsel. *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force* (1993).

Commentary to the revised rule explains that: "[a] judge must refrain from speech, gestures, or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control."

Patronizing conduct by judges and lawyers affects the effectiveness of women as attorneys by decreasing the level of confidence in their skills. Insensitive treatment of female litigants may directly affect their legal rights. Sexual harassment of court staff is illegal as well as unethical.

7-741. New Mexico Supreme Court policy.

In 1992, the New Mexico Supreme Court issued a statement about gender bias in the courtroom, in response to the 1990 report of the State Bar's Task Force on Women and the Legal Profession. The Task Force found that unacceptable practices reflecting gender bias occur in New Mexico's courts, including:

- (1) addressing women attorneys in an unprofessional manner, either by first names or terms such as "girls," "sweetie," or "honey;"
- (2) comments on the physical attributes or clothing of women attorneys;
- (3) gender-based jokes or comments concerning women attorneys.

The court identified areas of concern including:

- (1) awards of attorney fees should be the same for male and female attorneys;
- (2) equal deference should be given to female expert witnesses;
- (3) courtroom documents should be worded in a gender-neutral manner.
- (4) employees should be informed about and asked to refrain from gender-biased conduct, and be admonished if it occurs;
- (5) judges must strive to accord attorneys the same respect and credibility, regardless of sex.

The court recommended that aggrieved counsel request a conference with the judge in chambers to point out the conduct, either by the judge or others under the judge's direction. If the conduct continues, the attorney should make a record of the occurrence.

7-742. Examples of improper conduct.

7-742a. Terms of endearment. Familiar forms of address, particularly to female attorneys, are highly improper in a professional setting. Until recently, the judiciary has been predominantly male and judges should be sensitive to the resulting disadvantage many female attorneys have encountered. Some examples are obvious,

A magistrate judge who referred to female attorneys using such terms as "little girl," "kiddo," "little sister," and "missy," was formally reprimanded, assigned a district judge mentor, and required to attend a training program on gender bias at his own expense. *JSC 02-F5*

A California judge's misconduct included regularly addressing women as "Sweetie" and "baby" at the courthouse during business hours. *Kennick v. Comm'n on Judicial Performance*, 787 P.2d 591, 604 (Cal. 1990).

while others are subtle, such as addressing a female lawyer by her first name but calling a male attorney "Mister." The fact that the remark is inadvertent does not lessen the effect on the recipient, who must either let it go or confront the judge and risk prejudicing her client. Similarly, referring to a middle-aged female lawyer as "young lady," is not only unrealistic but patronizing. Lawyers appropriately are addressed in court as "counsel" or "counselor." Lawyers, parties and witnesses should be addressed by last name and appropriate title: "Miss," "Mrs.," or "Ms." First names should be avoided for adults in formal courtroom proceedings. Judges should be alert to similar remarks by opposing counsel when used to demean, and are required, under NMRA 21-300(B)(6), to intervene when they occur.

7-742b. Comments about physical appearance.

Commenting on physical appearance or dress calls special attention to gender and sets women apart from male colleagues. Such remarks directed to a female attorney can affect the attorney-client relationship by undermining her credibility if made in the presence of her client or the jury.

7-742c. Offensive remarks.

A magistrate judge who criticized a female attorney for serving as a public defender when her brother was a police officer, asking "How could your brother let you do this kind of work," and comparing her unfavorably to her predecessor, was formally reprimanded, assigned a district judge mentor, and required to attend a training program on gender bias at his own expense. *JSC 02-F5*

A Minnesota judge was censured in part for calling an assistant attorney general an "attorney generalette" and a female prosecutor a "lawyerette," and asking her why she wasn't wearing a tie. The statements were not good-humored banter. Such statements are "offensive and tend to demean and place the lawyer referred to on a less than equal footing with other lawyers." *Complaint concerning Kirby*, 354 N.W. 2d 410, 414-15 (Minn. 1984).

A judge was censured, placed on six months supervised probation, and otherwise disciplined by the Supreme Court for making offensive jokes and comments about women to attorneys. *JSC 99-2F*.

7-742d. Physical advances. Unwelcome sexual advances made by a judge, while acting in a judicial capacity, toward a lawyer or litigant are an unethical abuse of power. If directed toward an employee, such conduct is also grounds for a sexual harassment lawsuit.

A West Virginia judge was alleged to have directed improper sexual advances toward a woman who had a case pending before him, and toward a woman who had visited his office to discuss her son's arraignment. *In re Wilson*, 411 S.E. 2d 847, 848-49 (W. Va. 1991).

Municipal court judge whose prior conduct toward a woman had led to an EEOC complaint and settlement against the city was suspended and reprimanded for subsequent inappropriate conduct toward the same woman. *In the matter of Javier Lozano*, No. 29,264 S. Ct. (49 NM State Bar Bulletin 20, June 8, 2010)

A municipal court judge instructed a convicted traffic offender to pay installment fines directly to the judge instead of to the court clerk. When the last fine was paid, the judge, in his office, embraced and kissed the defendant. The judge resigned before the commission hearing. *JSC 91-16*.

7-742e. Disparagement. The "putting down" of women litigants and attorneys by male judges indicates a lack of impartiality. When directed toward litigants, disparaging comments can be devastating, both personally and legally, particularly for victims of domestic violence or rape.

A magistrate judge who referred to a female judge on the same bench as "that stupid woman" was formally reprimanded, assigned a district judge mentor, and required to attend a training program on gender bias at his own expense. *JSC 02-F5*

A North Carolina judge was censured for improper treatment of a female victim of domestic violence. He humiliated the witness by counseling her to reconcile with her husband and stated that failure to do so would ruin her children's lives. The judge also polled the spectators about the frequency of marital spats. *In re Greene*, 403 S.E.2d 257, 260 (N.C. 1991).

Gender-based stereotypes can also directly affect the outcome of cases if, for example, a judge discredits or harasses female witnesses or trivializes legitimate legal claims brought by women.

A Pennsylvania judge harassed a female witness and would not let her continue to testify. *In re Morrow*, 583 A.2d 816, 817 (Pa. Super. Ct. 1990).

A California judge was censured for cutting off testimony of a witness in a child neglect hearing and telling the mother he didn't believe a word she had said. *Roberts v. Comm'n on Judicial Performance*, 661 P.2d 1064, 1066 (Cal. 1983).

Negative comments about female lawyers, such as "this pleading must have been prepared by a woman," whether or not made directly to a particular lawyer, indicate that all female attorneys are at a disadvantage in that judge's courtroom. More subtly, judges may ignore female counsel, or cut off the comments of female lawyers but not of male lawyers in the same circumstances. Judges should intervene if male lawyers engage in such conduct in the judge's presence.

7-743. Sexual harassment. Sexual harassment is illegal as well as unethical. A judge who engages in prohibited conduct toward an employee of the court can be liable for damages, as well as be subject to disciplinary charges of ethical misconduct. Judges are also responsible for intervening if other court employees, such as bailiffs, engage in such conduct. *NMRA 21-300(B)(6)*.

7-743a. Definition. Sexual harassment is unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment
- (2) submission to or rejection of such conduct is used as the basis for employment decisions affecting such individual, or
- (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R. §1604.11(a).

The conduct must be both subjectively and objectively abusive. *Harris v. Forklift Sys.*, 510 U.S. 17 (1993).

7-743b. Prohibited conduct. Sexually harassing conduct includes sexual propositions, touching, insulting sounds, comments about the body, sexually degrading jokes, cartoons, pin-ups, and suggestions that employment is conditioned on sexual favors.

A Kansas judge was publicly censured for having exacted and demanded sexual favors as a condition of employment. The judge had sexual relations in chambers with a female employee and demanded sex from another employee, who had refused. The judge fired both employees. *In re Hammond*, 585 P.2d 1066 (Kan. 1978).

A judge was removed from office for sexually harassing and intimidating women. He had touched employees and attorneys without consent, and made offensive comments to them. He engaged in blatantly improper sexual behavior toward women, in public and in the courtroom, such as winking at and kissing an attorney in open court and referring to his physical attraction to certain female attorneys. There was no

justifiable excuse for his conduct, including "insecurity," "sense of humor" or "social maladjustment." *In re Deming*, 736 P.2d 639, 654-57 (Wash. 1987).

7-750. Religious affiliation.

See discussion of NMRA 21-300(B)(5) and (6) above.

A judge may not demonstrate bias for or against a particular religious group based on an extrajudicial source.

A Pennsylvania judge favored persons appearing before him based on their religious beliefs. He left the bench and physically embraced defendants as "brothers in Christ." *Judicial Inquiry & Review Board v. Fink*, 532 A.2d 358, 368 (Pa. 1987).

But religious affiliation alone does not disqualify a judge.

"When a suit is brought challenging the erection of the Nativity scene in a city hall at Christmas, who shall hear it? Must a Jewish judge recuse himself or herself? If so, must not a Christian judge?" *Menora v. Illinois High School Ass'n*, 527 F. Supp. 632, 634 (N.D. Ill. 1981).

7-800. Substance abuse

Substance abuse by a judge directly violates NMRA 21-100, 21-200, and 21-300(B)(4), and usually interferes with his administrative abilities. A judge should observe complete sobriety while conducting court business.

An Ohio judge received a public reprimand for carrying out his judicial duties in an intoxicated state. He had regularly appeared in court late as a result of overindulgence in alcohol, and demeaned himself and members of the bar association by presiding over court in an intoxicated state. *Stark County Bar Ass'n. v. Weber*, 190 N.E. 2d 918, 918-19 (Ohio 1963).

A judge was removed from the bench for use of cocaine and for evading order by Judicial Standards Commission to submit to drug testing. *Matter of Hon. Carlos Garza*, 2007-NMSC-028.

Consumption of illegal drugs is a direct violation of a judge's obligation to respect and comply with the law.

7-900. Related Topics

Exercise of Judicial Power

Disqualification

Administrative Duties

8-100. Checklist

Diligence

- Keep regular hours.
- Keep track of cases subject to dismissal under the six-month rule.
- Rule promptly.
- Monitor cases taken under advisement.
- Give highest priority to your judicial duties.

Personnel

- Explain the standards of appropriate conduct clearly to court staff.
- Be alert to instances of inappropriate behavior and intervene promptly.
- Do not ask your staff to do personal favors for you as part of their employment.
- Do not ask your staff to perform judicial responsibilities.

Financial

- Regularly review your court's receipts and expenditures.
- Screen prospective employees for trustworthiness.
- Make sure more than one person handles court funds.
- Require employees who handle money to take vacations.
- Train your employees properly.
- Do not handle money yourself.

Reporting requirements

- Conform to AOC regulatory requirements.
- Ensure compliance with statutory requirements such as transmittal of MVD abstracts.
- Be alert to ethical violations of others and report as appropriate.

Power of appointment

- Ensure that appointments are based on the competence of the appointee.

Administrative Duties

8-200. Applicable Law

NMRA 21-300(B)(8), 21-300(C), and 25-101 through 104.

NMSA 1978 §§34-13-1 and -2

8-300. Introduction: Administrative diligence requirement

Judges must manage as well as decide cases. A judge is responsible for the efficient administration of justice in her court. This involves case management--including the prompt disposition of cases, recordkeeping, management of funds, and supervision of personnel. If a judge is not diligent in monitoring and disposing of cases, the resulting inefficiency increases costs and undermines the administration of justice. A judge must also initiate disciplinary action in some instances, and exercise the court's authority to appoint lawyers and personnel fairly and on the basis of merit.

NMRA 21-300(C)(1) states the "administrative diligence standard." *Shaman, supra*, §3.08 at 69.

A judge shall diligently discharge the judge's administrative responsibilities, maintain professional competence in judicial administration and without bias and should cooperate with other judges and court officials in the administration of court business.

Prompt disposition of the court's business requires a judge to devote adequate time to his duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with him to that end. Moreover, the judge must work to have issues resolved without unnecessary cost or delay. *Commentary to NMRA 21-300.*

Sometimes administrative problems within a court are widespread.

A magistrate failed to perform his duties by (1) accepting partial payment of fines contrary to Supreme Court memorandum; (b) keeping money received from defendants in court files; (c) delaying the issuance of final orders in civil cases; (d) taking criminal misdemeanor cases under advisement for excessive periods of time thereby preventing preparation of DMV abstracts; (e) failing to properly administer a traffic citation tickler system (f) disposing of cases without properly recording his decisions and (g) failing to properly perform his administrative duties. The Supreme Court suspended the judge for 2 months, ordered 1 year of probation, and required him to participate in judicial training. *JSC 89-F2.*

A judge may participate in a mediation in which his court is a party, so long as the judge does not act as an attorney in the proceeding. *AO 07-10.*

8-400. Issues relating to diligence

8-410. Delay in deciding cases. The most common complaint about judges is that they take too long to decide cases. *Shaman, supra*, §3.02 at 54.

A judge shall dispose of all judicial matters promptly, efficiently, and fairly.
NMRA 21-300(B)(8).

This section of the Code creates a duty to establish and maintain an adequate case management system. In a criminal case, if a judge delays bringing the case to trial, it can be dismissed under the six-month rule. Once the case is heard, additional unreasonable delay in reaching a decision not only is frustrating and detrimental to the parties but also undermines the credibility of the judiciary. Reasonable delays are acceptable. A judge should not go to the other extreme by rushing through the calendar and taking shortcuts at the expense of defendants' constitutional rights.

8-411. Supervising judges. Judges who supervise other judges are required "to take reasonable measures" to assure the prompt disposition of pending matters. *NMRA 21-300(C)(3)*.

8-412. Unsuccessful excuses. The fact that the judge delayed out of good intentions generally does not excuse the delay.

A Missouri judge delayed a decision in a probate case for four years in the hope the case would settle. The judge said he wanted to avoid disrupting the relationship between the aunt and the niece concerned. *In re Kohn*, 568 S.W. 2d 255, 260-61 (Mo. 1978).

A North Dakota judge had delayed judgment in small claims cases to accommodate informal case disposition procedures. He was disciplined although he was motivated by a "strong sense of morals and a gentle heart." *In re Cieminski*, 326 N.W. 2d 883, 888 (N.D. 1982).

The Maine Supreme Court publicly reprimanded a judge for delaying a decision in a probate case for seven years, believing he was fulfilling an obligation to the testator, and in a guardianship case for eighteen months. The judge mistakenly believed the delay was in the best interest of the parties, but the court found the judge had administered his "own personal brand of justice" that interfered with the parties' right to prompt disposition of their cases. *In re Barrett*, 512 A.2d 1030, 1034 (Me. 1986).

A heavy caseload usually is not a defense. In fact, the judge is ethically required to minimize the impact of delay on the most pressing cases.

A California judge was censured for failing to decide cases within the time limits set by court rule and the state constitution. The judge also executed required salary affidavits stating he had met the required time limits. *Mardikian v. Commission*, 709 P.2d 852, 857 (Cal. 1985).

A Wisconsin judge was reprimanded for persistently failing to perform judicial duties and decide cases within the required time limits, and repeatedly misrepresenting in administrative reports the filing dates of cases pending in his court. *In re Grady*, 348 N.W. 2d 559, 561-62 (Wis. 1984).

Family responsibilities are not an excuse.

A Delaware judge's chronic tardiness was not excused by heavy family responsibilities. She was the widowed mother of four children. The judge violated her obligation to diligently discharge administrative responsibilities and to set an appropriate standard for other court personnel. *In re Barrett*, 593 A.2d 529, 534 (Del. 1991).

8-413. Pattern of delay. Ethical concerns arise when there is a pattern of delay.

The administrative diligence requirement is violated when a judge's record indicates a pattern of unreasonable delay or when a particular instance of delay so lacks legitimate justification that it is willful.

In re Kilburn, 599 A.2d 1377, 1379 (Vt. 1991).

A judge was removed from office for conduct including failing to rule promptly in over forty cases and leaving matters pending for as long as fifty-nine months (one \$325 claim was pending for over six years). The judge either failed to schedule criminal cases or allowed cases to be continued whenever attorneys or defendants failed to appear, perpetuating delayed disposition of cases. *In re Lenney*, 522 N.E. 2d 38, 39 (N.Y. 1988).

An Arizona judge had allowed excessive delays in numerous cases over a significant time period. The judge's repeated failure to adhere to the prompt disposition standard constituted misconduct that was prejudicial to the administration of justice and brought the office into disrepute. *In re Weeks*, 658 P.2d 174, 177 (Ariz. 1983).

New Mexico's judges are not immune from these problems.

The JSC has investigated complaints of unreasonable delay on the part of certain judges, including neglecting setting trial dates, taking an inordinate amount of time to render a judgment after trial, and being dilatory in completing the business of the court, in violation of [NMRA 21-300(B)(8)]. The Commission took note of large caseloads assigned to judges and crowded calendars and concluded that such delays are inconsistent with requirements of that rule and do not promote public confidence in the integrity of the judiciary. Two district judges and one magistrate were privately admonished. *JSC 86-2, 3, and 4*.

A district court judge was admonished for delaying a decision in a case for an inordinate amount of time. This conduct brings the judiciary into disrepute. *JSC 88-18*.

A magistrate was admonished in letter of caution not to take criminal cases under advisement, as in civil cases, but to rule immediately. *JSC 92-II*.

A district court judge was admonished for not diligently rendering decisions in cases involving appeals by the Motor Vehicle Division. The judge had left cases undecided for at least a year. *JSC 93-18*.

8-420. Keeping hours.

A judge's irregular or nonexistent hours contribute to delay and create a negative impression of the courts. Judges, including municipal judges and especially part-time judges, usually have considerable discretion in setting their hours; the hours must be reasonable and the judge must adhere to them. *Mowrer v. Rusk*, 95 N.M. 48, 618 P.2d 886 (1980) (explaining that the judge, not the municipal authorities, sets the hours of the court). Judges need to ensure that absence and tardiness are minimized.

According to the commentary to NMRA 21-300(B)(8), time off "should leave no public perception that the business of the court is not a full-time demand."

A district judge was removed from office, among other reasons, for "working very little" and for having "deliberately failed to devote to the court the number of hours required of a district judge." *In re Castellano*, 119 N.M. 140, 889 P.2d 175, 182 (1995).

A Delaware judge's chronic tardiness was an ongoing violation of Canon 3B(1) [NMRA 21-300(B)(1)] in that it kept another judge on duty until her arrival, thereby interfering with the routine performance of the court's work and having a negative effect on the morale of other court employees. *In re Barrett*, 593 A.2d 529, 531 (Del. 1991).

A California judge was removed from office for misconduct including leaving the court regularly at 2 p.m. and earlier on Fridays. *Ryan v. Comm'n on Judicial Performance*, 754 P.2d 724, 740 (Cal. 1988).

A Minnesota judge's lateness in beginning court varied from 15 minutes to over an hour and a half; and had caused great inconvenience to the parties. The judge's repeated tardiness is prejudicial to the administration of justice and brings the judicial office into disrepute. *In re Kirby*, 354 N.W.2d 410, 417 (Minn. 1984).

If the activity causing the absence is undertaken for personal gain, the absence is unjustified even if the activity itself would be allowed if it occurred outside of the court's business hours.

A judge's misconduct included conducting personal business on court time. The judge personally supervised operations at a development project in which he held a financial interest during regular court hours, averaging only three hours per day at the courthouse. *In re Troy*, 306 N.E. 2d 203, 232-33 (Mass. 1973).

A Missouri judge's failure to keep regular hours resulted in numerous administrative shortcomings, including inadequate supervision, maintenance of records, and unprofessional conduct of proceedings. There was some suggestion that the absence was caused by "excessive involvement in partisan political activities." *In re Briggs*, 595 S.W. 2d 270, 277 (Mo. 1980).

Gross indifference to maintaining regular hours can amount to willful misconduct and removal from office.

A municipal judge was found to have engaged in willful misconduct in office for her refusal to be available for court at scheduled time and refusal to hold court for a period of four months. The judge had agreed to hold court two days a week from 8-12 as a condition of her reinstatement, but then informed police officers that unless they presented their citations before 9 a.m. she would dismiss them. For this conduct, which violated NMRA 21-300, and other violations, the judge was removed from office and her pay forfeited. *JSC 88-F4*.

A probate judge was charged with persistent failure to perform the duties of a judge. He failed to keep office hours and appointments with court patrons. The Supreme Court ordered public censure and counseling and training from district judge. *JSC 93-F1*.

8-500. Management of court staff

8-510. Supervision of court personnel.

A judge shall inform and require the judge's staff, court officials, and others subject to the judge's direction and control to observe the standards of confidentiality, fidelity and diligence that apply to the judge. NMRA 21-300(C)(2).

The administrative diligence requirement of NMRA 21-300(C)(1) also applies to staff. The judge will be held accountable for the shortcomings of the court staff.

The Judicial Standards Commission cautioned a judge, whose administrative assistant had not brought requests for hearings to the judge's attention, to ensure that the assistant do so in the future. *JSC 99-31*.

A probate judge was suspended for failing to dispose of cases, largely because he did not instruct court personnel to ensure that matters did not become delinquent. *In re Van Susteren*, 348 N.W. 2d 579, 580-81

(Wis. 1984).

A judge's general failure to perform his duties promptly and to organize his court and supervise his staff so that business could be promptly dispatched constituted misconduct under the code. *In re Grady*, 348 N.W. 2d 559, 570 (Wis. 1984).

The judge must be able to control the conduct of staff who, along with the judge, set the tone for the operations of the court. What is improper for the judge is also improper for staff. Staff attorneys may not accept favors not permitted the judge.

A justice of the Texas Supreme Court was publicly admonished because two of his staff attorneys had accepted a free weekend trip to Las Vegas from a member of a law firm that had cases pending before the court. The judge violated the Code by failing to instruct staff that they were required to observe same standards as applied to him. *9 Jud. Conduct Rptr. 1 (1987)*.

Staff must maintain appropriate demeanor in dealing with the public. Judges should be alert to reports of rude and discourteous behavior by court staff.

Court personnel should not be permitted to take advantage of their association with the court for personal gain, such as in a political campaign.

A judge's secretary may continue to work for the judge while seeking full-time nonjudicial public office. The secretary need not resign or take a leave of absence. However, no campaigning is permitted during work hours. The secretary may not use his/her judicial position or title in connection with the campaign, and no court supplies, equipment or facilities may be used in connection with the campaign. *JSC 89-4*.

8-520. Model Code of Conduct for court employees.

The Model Code of Conduct for nonjudicial court employees developed in 1989 by the American Judicature Society suggests standards of conduct for nonjudicial court employees, including court clerks, bailiffs, secretaries and court administrators. The recommendations include:

- (1) Employees shall not accept gifts or favors based upon any understanding that the gift will influence the employee's actions.
- (2) Employees shall not accept tips or other compensation for performing the duties of their job.
- (3) Employees shall not disclose confidential information gained in the course of employment. Court employees should receive proper training about what information is confidential.
- (4) Court employees may answer inquiries about standard court procedures but shall not give legal advice. It is recommended that the court prepare written summaries of standard procedures to be made available to litigants.
- (5) Court employees may not initiate or repeat ex parte communications from litigants, witnesses or attorneys to anyone, especially the judge or jury members.
- (6) Employees shall not alter, destroy, mutilate or fail or make required entries on any records within the employee's control. *See AJS, CURRICULUM, Administrative at 15.*

An important area of supervision is financial management.

8-530. Misuse of staff.

A judge's use of judicial staff inappropriately is an abuse of judicial authority that places the employee in a no-win situation. Judges have been disciplined for abusing their authority by requiring staff to perform personal services,

A state supreme court justice was admonished for requiring his secretary to baby-sit his child after working hours as a condition of employment and fired her when she said she could not continue. A judge should not require extensive personal services from staff. *In re Neely*, 364 S.E.2d 250, 253-54 (W. Va. 1987).

or other non-court-related functions for the judge's benefit, either financial

A judge required a court officer to operate a bulldozer for a project in which the judge had an interest. The work was done during court hours and the officer did not receive additional compensation for the work. *In re Troy*, 306 N.E.2d 203, 220 (Mass. 1973).

or political.

A Missouri judge improperly had his employees type political correspondence and make political telephone calls in the course of their official duties. *In re Briggs*, 595 S.W.2d 270, 276 (Mo. 1980).

A judge does not have the right to direct court personnel to perform court-related duties improperly.

8-540. Improper delegation of judicial duties.

A judge may not delegate those responsibilities requiring the exercise of judicial discretion or the ultimate exercise of her authority.

It is improper for a judge to delegate to a clerk the performance of marriage ceremonies. *In re Perea*, 711 P.2d 894 (1986).

A Mississippi judge was fined and reprimanded for egregious delegation of authority, including dismissing traffic offenses at the request of persons with no prosecutorial authority, allowing clerical personnel to adjudicate criminal cases, and allowing clerks and highway patrol officers to adjudicate traffic cases. *In re Seal*, 585 So. 2d 741, 744-45 (Miss. 1991).

A California judge deprived defendants of their rights at the sentencing phase by allowing his bailiff to propose sentences. Even in cases where the judge did not take the bailiff's advice, there was an appearance of impropriety. *McCartney v. Comm'n on Judicial Qualifications*, 526 P.2d 268, 282 (Cal. 1974).

An Arizona justice of the peace was publicly censured for instructing and permitting clerks to sign guilty pleas in DWI cases. Many defendants who pled guilty did not see the judge at all. *In re Lockwood*, 804 P.2d 738 (Ariz. 1990).

Under no circumstances should a judge sign forms in advance.

A West Virginia magistrate was reprimanded for signing blank arrest warrants and jail commitment release forms in violation of established procedures. *In re Eplin*, 410 S.E. 2d 273, 274 (W. Va. 1991).

A judge had signed blank arrest warrants and there was improper handling of warrants from a clerical standpoint. He was cautioned to exercise great care in the issuance of warrants and ensure that staff did likewise. *JSC 85-12*.

8-600. Financial Management

The administrative diligence requirement applies to the management of fines and fees collected by the court. Specific requirements are set by the Administrative Office of the Courts. These requirements are strictly adhered to because courts have a fiduciary duty to the public to account for funds received and processed by the courts.

Outright misappropriation of funds is a criminal offense. Even if there is no criminal conduct, however, judges have been disciplined for failing to follow proper financial procedures. Disciplinary authorities generally are unswayed by judges' pleas of ignorance or lack of sophistication.

A nonlawyer Mississippi Justice of the peace was removed for failing to report at least fifty-nine fines totaling \$3,626. *In re Garner*, 466 So. 2d 884 (Miss. 1985)

8-610. Duty to collect. The courts have a statutory duty to collect, deposit and report certain monies, including but not limited to:

- (1) the corrections fee, §35-14-11;
- (2) the intoxication test fee, §31-12-7;
- (3) the DWI community prevention fee, §31-12-9;
- (4) the controlled substance fee, §31-12-8;
- (5) the Traffic Safety fee, §66-8-116.3;
- (6) the Judicial Education fee, §35-14-11.

8-620. Payments to judge. Judges should avoid the practice of accepting payment of fines and fees directly from a party. Payments made directly to the judge appear improper even if in fact they are not. Such payments should be made to the court clerk or other designated administrative staff, especially if payment is made in cash. If the judge must accept funds, a receipt should be issued and a copy retained for the court's records.

8-630. Timely deposit of funds.

A New York judge was removed from office for financial mismanagement, including failing to follow required procedures regarding timely deposit of monies received in a judicial capacity. Such conduct was a breach of the public trust. *Bartlett v. Flynn*, 378 N.Y.S.2d 145, 148 (1976).

8-640. Documenting and segregating funds. All monies received by the court must be documented, allocated to the proper fund and accounted for. Standard accounting procedures should be followed. Strict accounting should be maintained for each kind of fee, to avoid commingling with other public funds.

A New York judge was removed from office for financial mismanagement, including the fact that substantial monies collected by the town court were commingled with village funds, and vice versa. *Bartlett v. Flynn*, 378 N.Y.S.2d 145, 147 (S. Ct. App. Div. 1976).

Public funds should never be commingled with personal funds.

A Michigan judge was suspended from office for one year for failing to maintain a separate account while serving as justice of the peace, resulting in the commingling of personal and public funds. *Lavan v. State Bar*, 186 N.W.2d 331, 334 (Mich. 1971).

8-650. Embezzlement.

At least six cases of embezzlement by judges or court employees have been documented by the Administrative Office of the Courts in New Mexico's courts since 1981, in amounts ranging from \$2,000 to \$128,000. The AOC assigns a full-time audit staff to investigate the financial management of the courts. To prevent misappropriation of funds by court employees, a court's internal procedures should make it impossible for a single person to have complete administrative authority over receipts and expenditures.

8-660. Honest expense claims

Judges who claim expense reimbursements to which they are not entitled violate the public trust.

Municipal court judge who claimed expenses for traveling to a meeting despite having learned that it would not occur was reprimanded and suspended without pay for 90 days. *In the matter of Javier Lozano*, No. 29,264 S. Ct. (49 NM State Bar Bulletin 20, June 8, 2010)

8-700. Recordkeeping, case management and reporting

The judge is responsible for the accuracy and security of court records, financial and otherwise. Dockets must be kept current. Public inspection of court files must be permitted as allowed by law,

A municipal court judge was admonished for failure to properly instruct court clerks to allow public access to court files. *JSC 88-17*.

but under appropriate supervision by court staff to prevent removal or alteration of documents.

Courts also are subject to certain statutory reporting requirements. For example, the courts must transmit abstracts to the Motor Vehicle Division reporting the disposition of traffic offenses. The statute provides that failure of a judicial officer to do so is misconduct in office and grounds for removal. §66-8-135(F).

8-800. Reporting of other professional personnel

A judge can be disciplined for failure to inform the appropriate disciplinary authorities if judges or attorneys engage in misconduct. The Code expects judges to monitor others in the judicial system to ensure its credibility.

A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge who knows that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the New Mexico Judicial Standards Commission. NMRA 21-300(D)(1)

A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate

action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority. NMRA 21-300(D)(2).

8-810. Persons to be reported. The reporting requirement applies to judges or lawyers. Lawyer misconduct should be reported to the Disciplinary Board. The commentary defines "appropriate action" to include direct communication with the offender and reporting the offensive conduct. Judge misconduct may be reported to the Judicial Standards Commission. See RESOURCES. The lawyers' Code of Professional Responsibility contains a comparable provision requiring a lawyer who has knowledge of an ethical violation by a judge to inform the judicial disciplinary authority. *NMRA 16-803(B)*. In addition, NMRA 23-109 requires the chief judge of a district or metropolitan court to advise the supreme court of the failure or refusal of any judge in that court to comply with the Code.

The Judicial Standards Commission cautioned a judge to notify the Commission when the judge convicted another judge of a crime. *JSC 99-41*.

8-820. Reportable offenses. This is understandably a difficult area for judges. The revised Code has clarified the standard as to what kind of conduct should be acted upon. Judges are encouraged to take appropriate action when (1) the judge receives information indicating a "substantial likelihood" that another judge or lawyer has committed an ethical violation; (2) the judge learns of a violation that raises a substantial question about the other judge's fitness for office; or the (3) judge learns about a lawyer's violation that raises a substantial question about the lawyer's honesty or fitness.

Ultimately, the judge must make a judgment call in determining whether the conduct in question should be reported. Considerations include:

1. the amount and quality of the judge's knowledge of the misconduct;
2. the seriousness of the offense; and
3. the possible remedial measures the judge can take to correct the problem. *AJS, CURRICULUM, Administrative at 12.*

Conduct designed to influence the disposition of a case definitely is reportable, such as the offering of a bribe by an attorney, or ex parte requests from another judge made to influence the outcome of a case.

8-830. Exception for substance abuse.

The obligation to report is limited when a judge learns of substance abuse by a colleague in circumstances where help is being sought.

The requirements of subparagraphs (1) and (2) of this paragraph do not apply to any communication concerning alcohol or substance abuse by a judge or attorney that is (a) made for the purpose of reporting substance abuse or recommending, seeking or furthering the diagnosis, counseling or treatment of a

judge or an attorney for alcohol or substance abuse; and (b) made to, by or among members or representatives of the Lawyers' Assistance Committee of the State Bar., Alcoholics Anonymous, Narcotics Anonymous or other support group recognized by the Judicial Standards Commission or the Disciplinary Board... This exception does not apply to information that is required by law to be reported, including information that must be reported under Paragraph E of this rule, or to disclosures or threats of future criminal acts or violations of these rules. NMRA 21-300(D)(3).

8-840. Judges must report other judges' illegal drug use.

Judge who illegally sells, purchases, possesses or uses unlawful controlled substances is subject to discipline, and other judges are required to report specific, objective and articulable facts concerning such conduct to Judicial Standard Commission. *NMRA 21-300 (E).*

8-900. Power of appointment

Judges have authority to appoint people to compensated positions.

A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered. NMRA 21-300(C)(4).

Appointees of the judge include officials such as referees, receivers, guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection. *Commentary to NMRA 21-300.*

One area of abuse is in the appointment of attorneys in court proceedings, especially where there is the appearance of a quid pro quo.

A California judge's misconduct included appointing two attorneys who were friends and political supporters to represent defendants in 27 criminal cases, bypassing the public defender's office and without determining indigency. *Spruance v. Comm'n on Judicial Qualifications*, 532 P.2d 1209, 1220-1223 (Cal. 1975).

A California judge appointed two attorneys who had contributed to the judge's campaign and one who owned property with the judge in a disproportionate number of criminal cases. *Kennick v. Comm'n on Judicial Performance*, 787 P.2d 591, 607-08 (Cal. 1990).

Hiring of court personnel also must be even-handed.

A judge was publicly censured for conduct including employing as secretaries employees of former clients. *In re Bonin*, 378 N.E.2d 669, 674 (Mass. 1978).

8-1000. Other administrative requirements

8-1010. Administrative Office of the Courts. The Administrative Office of the Courts (AOC) is the administrative arm of the New Mexico Supreme Court. It supervises the administration of all but the municipal courts, regarding administrative matters, including management of cases and budgets. §§34-9-3 and 34-9-7. The manuals compiled by the AOC for use by the courts have the force of law. §34-9-8. A judge's failure to adhere to AOC requirements is, by definition, a breach of judicial responsibility and as such is subject to review as an ethical violation.

8-1020. New Mexico Municipal League. The New Mexico Municipal League is a nonprofit, nonpartisan association representing New Mexico's towns and cities. One of its subsections is the New Mexico Municipal Judges' Association, which assists in training municipal judges. While the League has no authority over municipal judges, its staff is available to assist judges in performing their duties.

8-1030. Americans With Disabilities Act (ADA). The ADA applies to the courts.

1. The courtroom must be accessible.
2. The court must provide a sign language interpreter if requested.
3. Hiring decisions must be made in compliance with the ADA.

8-1040. Recording of judicial proceedings. Although the revised rules on judicial conduct no longer refer to permissible uses of media in the courtroom, other Supreme Court rules address such procedures. NMRA 23-107 prohibits broadcasting of proceedings in the magistrate, municipal or probate courts. Broadcasting is permitted from metropolitan court if safeguards are in place to ensure that media coverage does not detract from the dignity of the proceedings or interfere with the achievement of a fair hearing.

8-1050. Judicial Education requirement

8-1051. Judicial Education Center. Judicial education programs are provided through the Rozier E. Sanchez Judicial Education Center, Institute of Public Law, University of New Mexico School of Law. §34-13-2. The center provides education, training and instruction for the judges and court personnel of the state, municipalities and counties. The center is funded by judicial education fees. §34-13-1(C).

8-1052. Limited jurisdiction judges: qualification for office. Each magistrate court judge, municipal court judge, and probate court judge shall qualify for office by attending a judicial qualification training course approved by the Administrative Office of the Courts. NMRA 25-102(A). The Administrative Office of the Courts approves a judicial qualification training plan for the judge. NMRA 25-102(C).

8-1053. Continuing education requirement.

Every magistrate court judge, municipal court judge and probate court judge must attend annually an approved judicial education program for not less than the required minimum number of continuing judicial education hours. NMRA 25-103(A). The requirements are: 15 hours for magistrates; 12 hours for municipal judges; 7 hours for probate judges. Each requirement includes one hour of training in judicial ethics.

The annual requirements may be satisfied for any calendar year by:

1. attending an annual training program conducted by the Administrative Office of the Courts;
2. attending a minimum number of hours of continuing judicial education programs approved by the Administrative Office of the Courts; or
3. attending the initial judicial education program required by NMRA 25-102.

NMRA 25-103(B).

8-1054. Reporting requirement. Unless a certificate for the year has been issued previously by the Administrative Office of the Courts, on or before December 31 of each calendar year, each magistrate court judge, municipal court judge and probate court judge shall certify to the Administrative Office of the Courts that the judge has attended approved continuing judicial education programs for not less than the minimum number of hours required by the Administrative Office of the Courts. *NMRA 25-103(C).*

8-1055. Failure to attend required training. The supreme court may suspend or remove any magistrate or metropolitan court judge, municipal court judge or probate court judge who fails to attend the initial judicial training or the required minimum number of annual judicial education hours. *NMRA 25-104.*

8-1060. Assistance for judges. New judges, especially those without legal training, may find their administrative responsibilities overwhelming. The staff of the Administrative Office of the Courts and the New Mexico Municipal League are available to answer questions from judges and their staff about administrative matters. The Judicial Education Center and AOC assign a mentor judge to each new magistrate and municipal court judge. The presiding district judge, either informally or through the Supreme Court's mentor program, can also assist judges in this area.

A municipal court judge was reported for apparent lack of understanding of court procedure and poor handling of cases. Referred to presiding district judge, who provided training resulting in significant improvement. *JSC 89-I.*

8-1100. Related topics

Exercise of Judicial Power

Speaking, Writing and Teaching

9-100. Checklist

Is your audience for your speaking, writing or teaching public or private?

Is it reasonable to assume the content will be reported or otherwise repeated?

If your audience is a governmental body, are you speaking on a law-related topic?

Does what you say cast doubt on your impartiality concerning an issue within your jurisdiction?

Do the remarks detract from the dignity of the judiciary?

Do the remarks make it appear you have prejudged an issue?

Do the remarks constitute comment on a pending case?

Does your presence at the function where you are speaking advance the interests of the sponsoring group?

Are you being asked to write a letter of recommendation for a person you do not know well?

Does the prospective employer frequently appear as a party or law firm in your court?

Would your public response to criticism solve the problem or only engage you in undignified debate?

Speaking, Writing and Teaching

9-200. Applicable Law

NMRA 21-200, 21-300(B)(10) through (12), and 21-500(A),(B), and (C).

9-300. Introduction When a person becomes a judge, she is no longer a private citizen and cannot speak out as she could before taking office. *AJS, ETHICS TRAINING* at 15. In the area of speech, "the important issues of judicial discipline focus upon either the use of insulting language or the expression of controversial views." *Shaman, supra*, §10.30 at 309. The judge cannot exercise her first amendment rights when to do so would create an impression (1) that she is biased; (2) that her judicial duties take second place to other commitments; (3) that she is using the judicial office to promote private interests. *AJS, CURRICULUM, Teaching, Writing and Speaking* at 1.

9-400. Basic rule

A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- 1. cast doubt on the judge's capacity to act impartially as a judge;*
- 2. demean the judicial office;*
- 3. interfere with the proper performance of judicial duties; or*
- 4. violate the judge's oath and obligation to uphold the laws and constitutions of the United States and the State of the New Mexico.*

NMRA 21-500(A).

9-410. Policy. The Code attempts to balance the judge's individual First Amendment right to free speech with the concern for maintaining the dignity and impartiality of the judicial office.

9-420. Private conversation. "Judges are free to engage in private discourse on any subject. Judges, however, need to keep in mind that confidences may not be kept." *Rothman, supra*, §210.120.

9-500. Limitations

9-510. Appearance before governmental bodies. A judge's appearance before a governmental body is limited to matters concerning the law, the judiciary, or matters relating to the judiciary or which affect the interests of the judiciary, the legal system, or the administration of justice. *NMRA 21-500(C).*

The commentary to this section notes the unique position of a judge to contribute in these areas of public inquiry, in a variety of forums. Such statements, however, are always subject to other requirements of the Code. The revised Code permits a judge to appear on her own behalf, publicly or privately, before a public body or official, in support of the judge's own interests. *NMRA 21-500(C).*

9-520. Other forms of verbal expression. With the adoption of the 1990 Model Code, New Mexico has now limited the permitted content of a judge's speaking, writing and teaching to the topics of law, the legal system and the administration of justice and non-legal subjects. The content of these expressive activities remains limited both by the introductory language of NMRA 21-500 and by other considerations.

9-521. Appearance of impropriety. The content of a judge's speech outside the courtroom is limited by NMRA 21-200, which requires a judge to avoid the appearance of impropriety and bias and promote public confidence in the integrity and impartiality of the judiciary.

9-521a. Prejudging issues. A judge must avoid any speech that gives the impression the judge is predisposed on the merits of a particular type of case or has predetermined a legal issue.

A judge should not participate in a talk show where listeners call in legal questions, because the judge would be asked to give spontaneous opinions based on incomplete facts. A judge could, however, moderate the discussion of a panel of attorneys responding to pre-screened questions. *South Carolina Advisory Op. 14-1991*; see also *AJS, CURRICULUM, Speaking* at 10.

A Florida judge expressed his opposition to capital punishment in letters to a local newspaper in which he also affirmed he would nevertheless follow the law. The judge did not violate the Code but his criticism "came close to the dividing line." *In re Gridley*, 417 So. 2d 950, 954 (Fla. 1982).

A judge may teach and consult on law-related subjects provided she does not appear to be prejudging legal issues or taking an adversarial position on someone's behalf.

A judge may participate on a consulting team that makes recommendations to various states in the field of juvenile justice, provided the activity will not interfere with the impartial performance of judicial duties or conflict with these duties. *AO88-6*.

A probate judge may receive reasonable compensation for the preparation and airing of a program on public television concerning wills, trusts, probate, and health laws that she prepared before becoming a judge. *AO 03-02*

A judge may receive reasonable compensation for teaching a community college class on juvenile justice, subject to certain conditions. *AO 01-08*

A judge may receive reasonable compensation for teaching a community college class on business law, subject to certain conditions. *AO 02-07*

Judge may teach teenagers to avoid substance abuse where few if any would appear in judge's court, and despite stipend derived from DWI fees. *AO 10-08*.

Statements indicating that a judge is predisposed on sentencing issues can implicate several ethical rules.

A group of judges may not publicly announce that they will sentence all convicted DWI offenders to some jail sentence. This proposed action makes it appear that the judges have been swayed by public clamor and fear of criticism, and that defendants are being denied their full right to be heard, may be a comment on a pending proceeding, and creates an appearance of impropriety. The statements could also be grounds for disqualifying the judge in a DWI case. *AO91-2*.

9-521b. Bias re: litigants. Biased statements are improper because they indicate a judge may favor one type of litigant over another. Racially charged and insulting remarks are rarely protected in disciplinary actions because they can have no possible relevance to the judge's decision.

A Michigan judge was publicly censured for stating in a telephone interview that one circumstance in which he might permit a minor to have an abortion would be when a white girl is raped by black man. The state supreme court found the remarks were offensive, called into question the impartiality of the judiciary, and eroded public confidence in the judiciary. *In re Bourisseau*, 480 N.W.2d 270 (Mich. 1992).

A Florida judge was removed from office for making racially biased remarks in a published interview, including about the prevalence of blacks on welfare and in the criminal justice system and the propriety of making racial slurs. The state supreme court found the discriminatory stereotypes were inimical to state law and had eroded his ability to work with all segments of the community. *In re Petition for Removal of a Chief Judge*, 592 So. 2d 671, 672 (Fla. 1992).

9-521c. Unseemly or undignified subjects.

A judge's public persona must not demean the dignity of the judge's office.

A Michigan judge was censured for making flippant remarks in the press about his visit to a Nevada brothel. *In re Tschirhart*, 371 N.W. 2d 850, 851-52 (Mich. 1985).

9-522. Comment on pending cases. A case is pending until it is fully resolved, including while it is on appeal or possibly could be appealed.

A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This subparagraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This subparagraph does not apply to proceedings in which the judge is a litigant in a personal capacity. NMRA 21-300(B)(10).

If a judge makes comments about a case pending in his court, it may appear to the public that the judge has already decided the case before considering the evidence and arguments; a judge also cannot comment about a case pending before another judge, because it may look like an attempt to lobby for a particular decision in the case. *AJS, ETHICS TRAINING* at 15.

The New Mexico JSC sent a letter of caution to a magistrate in response to allegations that before trial he had discussed the merits of a case involving violations of the game and fish laws. He had expressed his opinion publicly that the use of a flashlight was not sufficient to amount to a violation of spotlighting laws. The Commission found that these comments would violate (now) NMRA 21-300(B)(10). A judge should not engage in ex parte or other communications regarding pending prosecution, or give advance advisory opinions regarding a case. *JSC 86-17*.

Nor should a judge enter into public debate about another judge's handling of a case.

A judge improperly defended the actions of another judge who was criticized in the newspaper for his handling of a case. Neither judge could comment on judicial conduct in a pending case. *Fla. AO 90-8. AJS, CURRICULUM, Speaking at 9.*

The revised Code explicitly prohibits a judge from commending or criticizing a jury for their verdict, except through court order or opinion, except to express appreciation. *NMRA 21-300(B)(11).*

9-523. Advancing private interests of the judge or others. A judge may not use the judicial office to advance private interests, whether his own or others. *NMRA 21-200(B).* This issue arises in the context of speaking, writing and teaching when someone may benefit personally or financially from the judge's activity. Additionally, a judge may not make any inappropriate use of nonpublic information acquired in a judicial capacity. *NMRA 21-300(B)(12)*

A district judge was removed from office, among other reasons, for inquiring about and revealing information about an adoption proceeding involving the relative of the district's chief judge. *In re Castellano*, 119 N.M. 140, 889 P.2d 175, 182 (1995).

9-523a. Publications. Judges are encouraged to publish articles and books on legal subjects. "There can be little doubt that the public benefits greatly from the involvement of learned judges in educational activities." *AO 93-2.* Advertising of the publication should be tasteful and not designed to exploit the judge's position to benefit either the publisher or the judge personally.

A municipal judge may write newspaper articles to educate the public as to the operation of the court. *AO 02-04*

A judge may list her judicial title on the title page of a book on a legal subject. Judges may author books without restriction on the use of their judicial titles. The judge should retain a measure of control over the advertising so it does not exploit the judicial position or advance the private interests of others. The advertising used to promote the book should be limited to nothing more than a factual description of the author. *AO93-2.*

Judge may submit essay for publication in national magazine discussing same sex partners and their legal rights, addressing judge's own experiences, subject to conditions. *AO 09-01.*

9-523b. Law firm-sponsored programs. A judge should exercise caution if invited to speak at a function sponsored by a law firm. The underlying issues are the perceived effect on the judge's impartiality and the use of the prestige of the judge's office to advance the interests of others.

A judge may not speak at a legal seminar sponsored by a law firm for current and prospective clients of the firm or on a radio program discussing legal matters when the name of the sponsoring firm was made clear at the beginning of and during the program. It is irrelevant that the subject of the programs is the administration of justice. "There is no way of escaping the fact that the judge is lending the prestige of his office to advance the private interest of the sponsoring firm." *AO91-6.*

9-523c. Grants. A judge may voice support for a program designed to improve the legal system.

A judge may write a letter underscoring the need for a study of the use of languages other than English in the courts. The request was initiated by recognized authorities in the fields of law and language who are concerned with difficulties encountered by witnesses having limited English-speaking ability. The persons

requesting the letter will seek funding for the study from foundations and agencies. Nothing in the Code prohibits a judge from expressing a need to study a problem associated with the legal system; however, the letter itself may not solicit or endorse the collection of funds for any particular person or organization. *AO 93-5*.

9-523d. Letters of reference.

Judges often are asked to provide letters of recommendation. Each request must be decided on its own facts. A judge may respond to a request for a personal letter of recommendation if she can do so sincerely and with personal knowledge. However, the judge should be cautious if the prospective employer frequently appears in the judge's court or has a case pending when the request is made. *AJS, ETHICS TRAINING at 8*. The judge should use personal stationery, not court letterhead, for the letter, to avoid the inference that the judge is using the prestige of office to advance the personal interests of others.

A pro tem magistrate judge was advised not to write a letter recommending a pardon on behalf of a convicted felon. *AO 02-3*

All recommendations do not lend the prestige of the judicial office to advance the interests of others. Many are no different than a request made to a respected citizen or businessperson for information of value to a potential employer or educational institution. The request is improper if it is being made only because of the prestige of the judge's office; if it is to be made public; if the judge will benefit by obtaining a return favor; if the recommendation is being made for or to a lawyer or party appearing before the court; and if the judge exercises any control over the person to whom the recommendation is being made. See *AO 90-3*.

9-600. Responding to criticism

Judges are frequently subjected to unfair criticism and may be tempted to defend themselves. Such exchanges usually do not correct the misperception.

A New Mexico magistrate who had been criticized in letters to the editor by a defendant answered the criticism by writing a letter to the newspaper. The JSC admonished the judge not to repeat this conduct and to exercise judicial patience in dealing with the public even in the face of criticism that the judge might consider unfair. *JSC 92-16*.

A judge cannot respond to criticism of a judge's handling of a pending case. *Rothman, supra, 160.551*. The judge may respond to criticism about the law or the courts in general as long as the comment does not involve the merits of a pending or impending proceeding.

Judge Rothman of the California Superior court suggests that in responding to criticism the judge should consider:

- (1) Is the story really important? If not, forget it
- (2) Can you simply redirect the criticism to a more legitimate target? If the problem is really that of the legislature or the governor, point that out.
- (3) Don't try to defend the indefensible. If the story contains legitimate criticism, correct any important errors quickly and get it over with.
- (4) Never deny the truth of a story unless you are sure that it is wrong.
- (5) If a story is harmful and unfair, consider getting some advice from other judges or knowledgeable professionals. If it is up to you, make your statement quickly and

without emotion. Do not engage in a dialogue. Make a dignified reply and disengage. *Rothman, supra*, 160.553.

9-700. Dealing with the media and interest groups

9-710. Responding to questions. A judge should explain to media representatives that some questions cannot be answered because of the Canons of ethics; the reporter will be less likely to see the judge as uncooperative. A judge can speak with the media about the procedures of the court and the status of the case as long as the judge does not discuss contested issues or suggest any future action. For example, a judge could explain the jury selection process, or arraignment procedure, but should steer clear of topics that could suggest partiality or premature determination of contested issues. *Rothman, supra*, 160.552.

A judge was reprimanded for holding off-the-record conversations with a reporter in the midst of a murder trial in which he gave his impressions of the attorneys, witnesses, and jury. The remarks were published. *In re Hayes*, 541 So. 2d 105 (Fla. 1989).

A New Mexico judge received a letter of admonishment for commenting to a newspaper reporter that he suspected improprieties existed in the court of another judge. Any inappropriate conduct should have been reported to the appropriate disciplinary body. *JSC 85-13*.

9-720. Judicial questionnaires. Newspapers and special interest groups often use questionnaires to determine the views of judicial candidates during elections. These questionnaires are problematic because they may ask the candidate to prejudge a legal issue.

The California Judges Association has commented that a questionnaire should not be answered if it asks for comments about pending matters, or if a response would either cast doubt on a judge's impartiality or indicate political bias or impropriety. *Rothman, supra*, 160.554.

9-730. Media in the courtroom. *See* ADMINISTRATIVE DUTIES.

9-740. Limitations on audience. A judge must be cautious in accepting invitations to speak to specialized audiences to avoid questions about her impartiality. These concerns are similar to those raised by a judge's involvement in civic and charitable organizations. *See* CIVIC, CHARITABLE AND SOCIAL ACTIVITIES.

9-741. Law enforcement officers. There is a division of authority about whether judges properly may teach law enforcement officers.

A Utah advisory opinion states that a judge may not teach officers about courtroom demeanor and testimony because this benefits only a single adversarial component of the legal system and creates an impression of partiality, especially in a small community. However, the Missouri disciplinary commission allowed a judge to speak at a training session for police officers to discuss problems in the presentation of DWI cases. *AJS, CURRICULUM, Speaking at 3*.

9-742. One-sided educational programs.

Judge advised against attending DWI defense seminar to protect public perception of impartiality. *AO 06-04*.

Judge advised not to speak at seminar for defense counsel to protect public perception of impartiality. *AO 08-06*

9-800. Related topics

Demeanor and Impartiality

Ex parte communications

Civic, charitable and Social Activities

Administrative Duties

Financial and Business Dealings

10-100. Checklist

BUSINESS ACTIVITY

Does the activity or investment tend to reflect adversely on the judge's impartiality?

Does the activity or investment interfere with the proper performance of judicial duties?

Does the activity or investment exploit the judicial position?

Does the activity or investment involve frequent transactions with lawyers or persons likely to come before the court?

Will the activity or investment require you to disqualify yourself frequently?

Are you considering making an investment because of information you obtained from a case?

Does the compensation you are paid for an extrajudicial activity appear excessive?

****Have you filed your annual disclosure statement?*****

GIFTS, LOANS

Is the source of a gift, favor or loan you are considering accepting a person who has been a party to a case or whose interests are otherwise likely to come before you in court? *See AJS ETHICS TRAINING* at 52 (adapted from *JUDICIAL ETHICS AND COMMUNITY ACTIVITIES, California Court Commentary (March/April 1993)*).

Is the loan a "better deal" than someone else would get?

Does the hospitality you are receiving have a monetary benefit?

FIDUCIARY DUTIES

Are you being asked to serve as a fiduciary for someone other than a member of your immediate family?

Financial and Business Dealings

10-200. Applicable Law

NMRA 21-100, 21-200, 21-500(D) through (I), and 21-600.
NMSA 1978 §3-10-4

10-300. Introduction

Business and finance is another area in which judges must accept restrictions on their activities not required of ordinary citizens. Because financial activities can create an appearance that the judicial office is being used to advance private interests of the judge or others, restrictions are necessary to preserve the judge's independence and impartiality. *AJS, ETHICS TRAINING* at 53. A related problem is that the judge may neglect judicial duties in favor of personal financial pursuits. The Code tries to preserve judicial independence while recognizing that judges necessarily have financial interests.

Under the common law, the only way a judge could be disqualified from a case was if the judge had a financial interest in the outcome. In addressing financial issues, the Code deals with both disqualification and those situations requiring a judge's attention even if absolute disqualification is not required. *Shaman, supra*, §7.01 at 164. NMRA 21-400 requires disqualification if the judge has a financial interest; NMRA 21-500 requires a judge to refrain from business and financial activities that might interfere with impartial performance of judicial duties. *Commentary to NMRA 21-500*. See DISQUALIFICATION.

10-400. General Rule; Exceptions

A judge shall not engage in financial and business dealings that: (a) may reasonably be perceived to exploit the judge's judicial position; or (b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves. NMRA 21-500(D)(1).

The exceptions are consistent with those relating to other off-the-bench activities such as speaking and writing or involvement in charitable work. The activity is not allowed if it exploits the judge's position or brings the judge into frequent contact with persons likely to appear in court.

10-500. Investments

Judges may hold passive investments, subject to the exceptions. Stock ownership is a problem when the corporation appears as a party in a judge's court, because the judge's financial interest may appear to be affected by the outcome of the case. It is the appearance of a conflict, and not the actual existence of a conflict, that is significant. A judge who owns interests in several local businesses or real estate ventures could, as a consequence, be required to disqualify himself from cases involving those interests.

A New York judge should not have continued to invest heavily in New York City bonds during a financial crisis, while there was a chance that a lawsuit challenging the city's financial plan would reach the judge's court. The investments created the impression that the judge was trading on inside information, although there was no evidence he did so. *In re Fuchsberg*, 426 N.Y.S.2d 639, 642-43 (Ct. Jud. 1978).

10-600. Direct involvement in business

10-610. New Mexico rule. New Mexico, unlike many other states, does not completely bar judges from engaging in business. There are restrictions, however, on business activities and relationships that can be a trap for the unwary. In particular, the adoption of the 1990 Model Code by the Supreme Court may now render formerly permissible business relationships unethical. Judges should therefore review their business dealings and associations in light of the change in rules.

The general rule is that:

A judge shall not engage in financial and business dealing that: (a) may reasonably be perceived to exploit the judge's judicial position, or (b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves. NMRA 21-500 (D)(1).

In particular, under the revised rule effective February 16, 1996, a judge may only manage and participate in a business that is either closely held by the judge or a member of the judge's family; or a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family. *NMRA 21-500(D)(3)*. The adoption of this provision means that any judge employed by, managing or otherwise participating in any business that is not such a personal or family enterprise should evaluate whether such continued business activity conforms to the new ethical requirements. A judge newly appointed to the bench has up to one year to divest herself of any impermissible business interests. *NMRA 21-901(E) and commentary*. But a judge may hold and manage personal and family investments, including real estate, subject to the Code's requirements. *NMRA 21-500(D)(2)*.

10-620. Examples of permitted and prohibited business activity.

A national survey of decisions relating to judges' business activity illustrates the kinds of conflicts that can surface. Judges have been allowed to:

- maintain a shareholder interest in a title company (but not serve as a director)
- maintain an interest as tenant-in-common in a strip mine
- work as town park manager
- work as a federal customs inspector
- write and sell law-related computer programs;

but not to:

- sell computer programs to attorneys who appear before the judge
- organize an insurance company in which the judge will be sole stockholder
- mediate criminal cases for the DA's office
- be a police officer
- serve as instructor in a state-certified driver improvement clinic
- have an interest in a defensive driving school to which other judges send defendants
- own real estate jointly with an attorney who regularly appears in the court

- serve as mediator with an agency to which the judge refers court cases
- act as a collection agent. *AJS, ETHICS TRAINING at 53-54.*

A pro tem judge was advised as to the limitations of serving as a private investigator. *AO 02-3*

10-700. Divestiture

Judicial efficiency and the judge's "duty to sit" require judges to divest themselves of financial interests that will require frequent disqualification. New judges especially should be aware of this rule.

A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge should divest himself or herself of investments and other financial interests that might require frequent disqualification. NMRA 21-500(D)(4).

A magistrate judge who rented office space to an organization to which the court refers defendants for counseling, as well as to a driving improvement program that takes referrals from the court, was advised to divest himself or herself of the property. *AO 01-04*

Frequent recusal slows down the judicial process, especially in rural areas where an alternate judge may not always be available. Therefore, a magistrate who holds stock in a local bank should sell it if the bank frequently files collection cases in that judge's court.

10-800. Prohibited business and financial activity .

10-810. Improper management of personal finances. Impropriety in the management of a judge's personal finances can justify discipline. *AJS, ETHICS TRAINING at 55.*

A Kansas judge pledged the same car as security for two different loans; sold the car without the consent of the creditor; defaulted on notes to several financial institutions in his district, stalled creditors, made false promises of payment, evaded attempts to contact him, and wrote over 100 rubber checks. This conduct showed a total disregard for judicial system and its processes, the laws the judge had sworn to uphold, and the contractual and legal rights of creditors. *In re Yandell, 772 P.2d 807, 810-11 (Kan. 1989).*

In some jurisdictions judges may not operate gambling or liquor establishments because of the appearance of impropriety. New Mexico does not have any opinions on this subject.

Ownership of a bar was not a per se conflict of interest with the office of justice of the peace *In re Biggins, 737 P.2d 1077, 1082 (Ariz. 1987).*

10-820. Apparent bias. More often, the nature of the interest is the problem. A judge should not have a financial interest that could appear to affect the judge's impartiality. For example, there have been problems with judges having financial interests in court-related services such as DWI schools.

A magistrate judge who rented office space to an organization to which the court refers defendants for counseling, as well as to a driving improvement program that takes referrals from the court, was advised to divest himself or herself of the property. *AO 01-04*

A municipal judge's ownership and directorship of a DWI school created an appearance of impropriety and tended to reflect adversely on his impartiality, because the judge had a direct financial gain from those he sentenced to school. The judge was paid \$5,000 per year for running the school, so had a direct pecuniary interest in having individuals appear before him and then attend the school. Even if he received no compensation, there was an appearance of partiality. The existence of the school was directly related to the number of people sentenced. *In re Rainaldi*, 104 N.M. 762, 727 P.2d 70 (1986).

A district judge owned a partnership interest in a company that conducted DWI schools. The judge's participation in this business simultaneously with his role as district judge violated NMRA 21-200(A) and NMRA 21-500(D). *JSC 87-F2*.

A process-serving business also presents conflicts.

A probate judge may not operate a legal process service in the same county in which the judge serves. The business serves summons and subpoenas for the district court, magistrate court, sheriff's office, county commission and all local attorneys. The service would create the appearance of impropriety and a conflict of interest with the judge's duties since attorneys using the service may appear frequently before the judge. Also, the judge could be placed in an adversarial position with the attorneys if he is called upon to testify when the return of service is challenged. The fact that lawyers who use the service appear before the judge creates an appearance of impropriety. *AO 88-1*.

10-830. Exploiting judicial position.

It is an abuse of power for a judge to benefit personally from knowledge gained from a case. *See also* EXERCISE OF JUDICIAL POWER. Even the appearance of exploitation is unethical, so the problem is compounded if deceit is involved.

A New Jersey judge used confidential information obtained in the course of proceedings to develop an interest in real property that was the subject of litigation. The judge tried to buy the property at an unreasonably favorable price and pressured the owner, a litigant, to make the sale. *In re Yaccarino*, 502 A.2d 3, 19-24 (N.J. 1985).

10-831. Property. Judges have improperly dealt in property that is the subject of judicial proceedings.

A Maryland judge violated code by selling real estate that was listed in inventories filed in her court. *In re Happ*, 566 A.2d 763, 764 (Md. 1990).

A Florida trial judge's conduct in suggesting a buyer for marital property in a divorce case that the judge was hearing raised a question of impartiality. *Wayland v. Wayland*, 595 So. 2d 234 (Fla. Dist. Ct. App. 1992).

10-832. Personal benefit. Judges may not benefit personally from relationships with litigants.

A judge accepted favorable rental rates from auto dealer, during which time he presided over two cases involving the dealership. *In re Seraphim*, 294 N.W.2d 485, 494 (Wis. 1980).

An Alaska judge met with the governor in an effort to have the governor intervene in a manner favorable to the judge's substantial business interests in a case pending against the state. *Inquiry concerning a Judge*, 822 P.2d 1333, 1342 (Alaska 1991).

A judge directed that a large settlement be deposited in a credit union from which he had interest-free loans, creating the appearance that his decision was influenced by personal profit motives. *In re Cohen*, 543 N.E.2d 711, 713 (N.Y. 1989).

10-833. Court facilities and personnel. Court supplies and office space must be used only for official business. Court personnel may not conduct personal business for the judge. The judge may not conduct personal business on court time.

An Ohio judge improperly used his courtroom to conduct private business, *Ohio State Bar Ass'n v. Dye*, 572 N.E.2d 666, 667 (Ohio 1991).

A Massachusetts judge instructed an officer of the court to provide bulldozing services for a project in which the judge held a financial interest. The work was conducted on court time and without additional compensation to the officer. *In re Troy*, 306 N.E.2d 203 (Mass. 1973).

The JSC sent a letter of caution to a judge who was alleged to have conducted a pawn business during court hours. *JSC 9111*.

Conversely, the judge should not conduct court business while acting in a personal capacity.

A pro-tem judge was cautioned not to use the stationery of his law office to correspond with parties about official court business. *JSC 9213*.

10-834. Asserting judicial authority. It is an ethical violation for a judge to use his official position to promote his private business, for example, by persuading lawyers and parties to patronize the business or mentioning his judicial position in advertising. Judges have been disciplined for asserting their judicial authority when acting as bail bondsmen, or in conducting a collection business. *See also* EXERCISE OF JUDICIAL POWER.

A New York judge who acted as loan broker was disciplined for operating a business and "exploiting judicial position" in collecting debts. The judge's conduct justified the suspicion that he was using the prestige of his office to persuade or coerce others to patronize or contribute to the success of his private business venture. *Steinberg v. State Comm'n on Judicial Conduct*, 409 N.E. 2d 1378, 1382 (N.Y. Ct. App. 1980).

A Mississippi judge operated a check collection business out of the same office in which he held court and basically with the same personnel. *In re Lambert*, 421 So. 2d 1023, 1023-24 (Miss. 1980).

10-840. Interference with judicial duties.

A judge may not allow financial interests to interfere with the judge's performance of judicial duties. *See also* ADMINISTRATIVE DUTIES.

10-841. Conflicting compensated activities.

A judge shall not hold any other paid position, judicial or otherwise, that conflicts with the hours and duties the judge is required to perform for every judicial position. A judge shall devote the number of hours that is required by any judicial position held. In no event shall other paid employment or compensable activity hours be performed simultaneously. NMRA 21-500(H).

A district judge was removed from office, among other reasons, for having "deliberately failed to the court the number of hours required of a district judge." *In re Castellano*, 119 N.M. 140, 889 P.2d 175, 182 (1995).

A judge's misconduct included personally supervising operations at a development project in which he held a financial interest during regular court hours, averaging only three hours per day at the courthouse. *In re Troy*, 306 N.E. 2d 203, 232-33 (Mass. 1973).

A municipal judge and his staff may not operate a DWI school, even if there is no compensation. A judge, and the judge's staff, must devote his full time during working hours to the operation of the court, not to the operation of other activities, even those related to the court. Even if the judge were not involved, court staff could not do administrative work for the school during court hours. The judge's clerk may work as an instructor in the school on her own time. *AO 88-4*.

Part-time probate judge may also serve as municipal police chief so long as there is no conflict of time or interest. *AO-07-02*.

10-842. Other judicial positions. No full-time judge, except for a probate judge, may hold another judicial position. The Code presumes that the holding of a full-time judicial position is incompatible with the holding of another judicial position. *See also* POLITICAL ACTIVITIES.

No full-time municipal, magistrate, metropolitan, district or appellate judge may hold any other judicial position, elected or appointed. NMRA 21-500(I).

A judge may not also serve as a tribal court judge, even though the hours the courts are in session do not conflict. *AO 01-07*

A magistrate who was also serving as a municipal court judge resigned his municipal court position after being informed by the Commission that this was a violation of 21-500(I), prohibiting conflicting compensated activity. *JSC 87-II*.

A part-time probate judge may hold another judicial position, provided there are no other conflicts.

In New Mexico, the position of probate judge is part-time. Therefore the judge may hold another paid position, judicial or otherwise, as long as the paid position does not conflict with the hours and duties required of a probate judge. The other position may not interfere with the integrity and independence of the judiciary, give the appearance of impropriety or interfere with the duty to perform impartially and diligently. *AO 88-3*.

Part-time probate judge may serve as municipal chief of police provided that the job allows the judge time to perform judicial duties. *AO07-02*

10-850. Financial dealings with parties or lawyers.

To avoid the appearance of partiality and impropriety, a judge should avoid financial ties to anyone reasonably likely to appear in his court as a party or lawyer.

A judge was advised to use commercial financing to sell an office building to an attorney who appears before the judge, rather than to finance the sale personally, to avoid creating a continuing business relationship with the attorney. *AO 01-09*

A judge may not sell his house to an attorney involved in a pending case, even with full disclosure to the parties. It is unclear whether the sale would be proper after the case is decided. Both the judge and the attorney attempted to avoid knowing about the other's involvement in the contingent sale; however, the situation gives the appearance of impropriety, and judges should not engage in financial transactions with lawyers appearing before them. *AO 91-5*.

A hearing officer may not sell his house to an attorney who appears before him on a real estate contract, which would create a continuing business relationship with the attorney. However, after the attorney obtained commercial financing allowing him to buy the hearing officer's home outright, the transaction was acceptable, so long as the attorney did not appear before the hearing officer until after closing. *AO 06-06 and 07-06*.

A district judge was removed from office, among other reasons, for having cooperated with his wife, a salaried employee of a non-profit child advocacy organization, in her fund solicitation efforts. These efforts included distribution of a brochure featuring the judge's name and photograph; and acceptance of contributions from law firms with a client or relative of firm members appearing before the judge. *In re Castellano, supra*, 889 P.2d at 182.

By borrowing money from at least six different banks within his jurisdiction, a Kansas judge failed to manage his financial interests so as to minimize the number of cases in which he might be disqualified. *In re Yandell*, 772 P.2d 807, 812 (Kan. 1989).

Judge may sell phone number of prior law firm to an attorney who solicited the sale and does not practice before judge, but parties must dispel any suggestion of special relationship between them. *AO-07-01*.

10-860. Statutory prohibitions.

10-861. Municipal officers. By statute, an elected municipal officer, including a municipal judge, may not acquire a financial interest during her term if she has reason to believe that the interest will be directly affected by any of her official acts; and cannot use confidential information gained in office for her or another's gain. The judge can be removed from office if found guilty. §3-10-4.

10-862. Magistrates. There is also a conflict-of-interest statute for magistrates providing that a magistrate may not, directly or indirectly:

- (1) buy or be interested in buying any evidence of indebtedness or cause of action for the purpose of bringing any action before any court;
- (2) lend or advance or procure to be lent or advanced any money or other valuable thing or any person in consideration of or as a reward or inducement for placing any cause of action for prosecution or collection in any court;
- (3) operate or be interested in a collection agency;
- (4) with or without suit, collect or attempt to collect or become interested in collecting any claim where he receives any commission, percentage, fee or charge other than those allowed by law;
- (5) institute or influence any other person to institute any suit in any magistrate court;
- (6) publish advertising relating to his office;
- (7) operate or be interested in a bail or appeal bond business; or
- (8) serve as surety on any bond posted in any court.

Violators are guilty of a misdemeanor and may be removed from office. §35-7-7.

10-900. Gifts, loans and scholarships.

The Code limits the right of judges and their families to accept gifts or other financial benefits out of concern for compromising the judge's impartiality. Gifts from anyone with whom the judge might have a professional association are discouraged, with exceptions.

A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept a gift, bequest, favor or loan from anyone except for:

(a) a gift incident to a public testimonial; books, tapes and other resource materials supplied by publishers on a complimentary basis for official use; or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion, including, but not limited to, a wedding anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative;

(f) a loan from a lending or similar institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants. NMRA 21-500(D)(5).

10-910. "Members of the family" defined.

"Members of the judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. NMRA 21-001(G).

10-920. Gifts.

Any time a judge accepts a gift, her judicial independence and impartiality might be questioned. *See AJS, ETHICS TRAINING* at 56. A gift is a voluntary transfer of property with no strings attached. A "gift" to a judge is a bribe, not a gift, if it is given in exchange for favorable treatment by the judge. The question underlying the propriety of any gift is whether the person making the gift could have an interest in a case that could come before the judge.

While a judge must discourage family members from accepting improper gifts, "a judge cannot . . . reasonably be expected to know or control all of the financial or business activities of all family

members" *Commentary to NMRA 21-500(D)(5)*.

Some examples of improper "gifts" are obvious.

Eight judges were removed from office for accepting cash gifts ranging from \$200 to \$500 from a union official, when they knew or should have known that the gifts were offered to obtain favorable results for the union in litigation. The size of the gift was irrelevant if given and received to influence a judge. The judge's intent not to show favor is irrelevant. *In re Cunningham*, 538 A.2d 473, 479-80 (Pa. 1988).

An improper "gift" also may be made if the judge is offered something on more favorable terms than are available to the general public.

Accepting a gift of items at a price not offered to the general public from persons likely to appear before the judge is a violation of the rule against creating the appearance of impropriety. *In re Seraphim*, 294 N.W.2d 485, 499 (Wis. 1980).

10-921. Gifts from parties. Accepting a gift from a party in a pending case creates an immediate appearance of favored treatment.

A Massachusetts judge accepted a \$4,000 gift from a person who had a case pending in federal court. *In re Morrissey*, 313 N.E. 2d 878, 879 (Mass. 1974).

A municipal judge was suspended for 30 days for accepting a favor from a person appearing before his court, creating an appearance of impropriety. *In re Terry*, 101 N.M. 360, 683 P.2d 42 (1984).

10-922. Gifts from attorneys. Professional courtesies extended to judges may be improper. For example, judges should not accept free legal services from lawyers who appear in their courts. An implicit quid pro quo may result.

A Michigan judge received free legal services from lawyers practicing before him. *In re Lawrence*, 335 N.W. 2d 456, 461 (Mich. 1983).

A Massachusetts judge appointed lawyers who did private legal work for him without charge as attorneys in over 200 cases. *In re Troy*, 306 N.E.2d 203, 228-29 (Mass. 1973).

Neither the judge nor the judge's staff should accept business gifts from attorneys or others with whom they have had a professional relationship. The impartiality of the court comes into question if the court accepts candy, food, etc. from attorneys at the Christmas season. *Arizona Advisory Op. 90-5*.

10-923. "Safe" gifts. A judge or a member of his family residing in his household may accept:

- a gift incident to a public testimonial
- books, tapes or other resource materials supplied by a publisher on a complimentary basis for official use
- a wedding or engagement gift
- a gift from a relative.
- a gift to a family member arising from his or her business or other separate activity.

NMRA 500(D)(5).

Other gifts are acceptable as long as person making the gift is not a party or other person whose interests have come or are likely to come before the judge, and the gift is not disproportionately large for the occasion. The judge's jurisdictional authority is an important consideration.

An administrative law judge should not accept a \$25,000 gift from a close personal friend who is an executive with a large company that is occasionally involved in proceedings before the judge. *Georgia AO 96 (1987)*(cited in *AJS, Ethics Training at 56*).

10-930. Loans. Judges and family members may accept a loan from a relative, or from a lending or similar institution on the terms available to other people. *NMRA 21-500(D)(5)(f)*.

Judges may not solicit loans from attorneys or others over whom they have power.

An Indiana judge was removed from office for soliciting and accepting a \$2,000 loan from an attorney practicing in his court, failing to report it as required, failing to disclose the loan to parties and attorneys in lawsuits over which the judge presided that involved the attorney's law firm, and failing to disqualify himself in those cases; misrepresenting the source of a loan that in fact was from one of his girlfriends; failing to report loans from a girlfriend and her mother and retaliating against them for cooperating in the investigation; and soliciting a large loan from his court reporter. *In re Drury*, 602 N.E.2d 1000, 1010 (Ind. 1992).

These restrictions also apply to the co-signing of loans. *See Rothman, supra*, 210.500.

10-940. Scholarships. Judges and family members may also accept scholarships or fellowships awarded on the terms and based on the same criteria applied to other applicants.

10-950. Awards. A judge may accept an award as long as it does not appear to exploit the judge's judicial position or interfere with the performance of judicial duties; however, the occasion in question should not be a fundraising event, or the judge implicitly is participating in impermissible fundraising and allowing the organization to benefit from the prestige of the judicial office. *See Rothman, supra*, 210.500. Judges may accept a gift incident to a public testimonial to the judge. *NMRA 21-500(D)(5)(a)*.

10-960. Hospitality.

10-961. Bar-related functions. A judge and her spouse may accept an invitation to attend a bar-related function devoted to improvement of the law, the legal system or the administration of justice. This rule is not absolute. Accepting an invitation from a law firm for a lavish trip to an out-of-town convention probably falls outside the scope of this rule.

It is usually permissible to accept honorary membership in a bar associations, if other judges receive such invitations. The judge probably should decline, however, if the association has a definable slant, such as the defense lawyer's association.

A judge may accept free memberships and hospitality from bar associations. The meetings are law related and all judges receive honorary memberships. *Fl. AO84-4*.

10-962. Social hospitality. To be acceptable, the social hospitality must be "ordinary." Problems arise when the judge has a social relationship with attorneys and interest groups. *See CIVIC*,

CHARITABLE AND SOCIAL ACTIVITIES.

A New York judge violated the Code by allowing the law firm of a close friend to pay for the judge and his wife to spend a weekend at a country club. Although there was no evidence of favored treatment by judge, acceptance of gift went well beyond ordinary social hospitality. *In re Vaccaro*, 409 N.Y.S.2d 1009, 1010 (N.Y. Court on Judiciary 1977).

A worker's compensation judge was a regular lunch guest of lawyers and representatives of insurance companies. The association created an appearance of impropriety. *In re D'Auria*, 334 A.2d 332, 333 (N.J. 1975).

Holiday parties usually are acceptable as "ordinary social hospitality."

A judge may attend an ordinary holiday party given by a law firm. The party is not "ordinary" if it is lavish. A judge may attend a bar association function even if it is lavish. *NYAO 87-12*.

10-1000. Serving as fiduciary

10-1010. Prohibition. Judges generally may not serve in a fiduciary capacity. The Code has ended the previously-accepted practice of naming a judge as the executor of wills, which was typically an attempt by lawyers to gain the judge's favor and also effectively disqualified that judge in many probate matters. It is irrelevant that the judge would serve without compensation. This provision becomes effective February 16, 1996, although judges serving as fiduciary are expected to end their relationships sooner if it will not cause serious adverse consequences to their beneficiaries. *NMRA 21-901(E) and commentary*.

A judge shall not serve as the executor, administrator, or other personal representative, trustee, guardian, attorney in fact, or other fiduciary, except for the estate, trust or person of a member of the judge's family, or the family of a close friend, and then only if such service will not interfere with performance of judicial duties. NMRA 21-500(E)(1).

10-1020. Exception. The judge may serve as a fiduciary for a family member of herself or of a close friend, as defined in the Code, but only if the service will not interfere with the judge's duties. The judge should not serve if it is reasonably likely that the estate or person for whom the judge is acting will come before the judge's own court, or if an interest of that person could be affected by proceedings before the judge. *NMRA 21-500(E)(2)*.

10-1100. Serving as arbitrator/mediator.

A judge shall not act as arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law. This rule does not prevent a judge from participating in arbitration, mediation, or settlement conferences as part of judicial duties, however. Commentary to NMRA 21-500(F).

A judge may not advertise or offer his/her services as a dispute mediator. Arbitration and mediation are prohibited activities. It is irrelevant whether fees would be charged for these services. *AO 88-6*.

10-1200. Practice of law

10-1210. Practice of law prohibited for full-time judges.

10-1211. General rule.

A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family. NMRA 21-500(G).

The limitations on practicing law apply not only to appearance in court, but to any form of legal advice. A judge cannot prepare documents, promissory notes, wills or any legal document for anyone except herself and except for giving legal advice or preparing or reviewing documents for a family member. Implicitly, part-time judges who are licensed attorneys may practice law, although the representation may still be prohibited by other provisions of the Code. For example, a lawyer-judge should not represent a party in a matter that is reasonably likely to be filed in that judge's court.

10-1212. Prohibited conduct. The practice of law encompasses the representation of parties and the giving of legal advice or counsel, including the preparation of pleadings.

A judge may not prepare form pleadings to be used by litigants to initiate actions in the judge's court. The pleadings would provide instructions to litigants reflect the judge's experience in raising justiciable issues. Providing these forms falls within the limitation on the "practice of law" in the Code. These actions also could create a perception of partiality, because in a contested action the court would appear unlikely to uphold a legal challenge to the pleadings. *AO 93-3.*

10-1213. Pro se representation. Judges, like anyone else, have the right to represent themselves in court.

A state court judge's pro se appearance as a party defendant in a lawsuit pending before the federal district court does not constitute the practice of law in violation of canons. A pro se appearance is not representation, and the judge has a sixth amendment right to self-representation in the first stage of a criminal action and a qualified right to appear pro se in a civil action. *U.S. v. Martinez*, 101 N.M. 423, 424, 684 P.2d 509, 510 (1984).

10-1220. Practice of law by part-time judges. Because of an exemption in NMRA 21-901(C)(1), part-time judges, by implication, may engage in law practice. But that exemption does not apply, and a part-time judge is thereby barred from practicing, in the court on which the judge sits, or in any proceeding in which the judge has served as a judge. *NMRA 21-901(D)(2)*. There is great potential for conflict between the judicial and adversarial roles. A judge may not ethically hear cases in which members of her firm appear as counsel. *See AO 86-7*. A judge may not serve as a contract public defender in the municipal court in which he serves as an alternate judge. *AO 89-5*. An alternate municipal judge also is precluded from representing clients in other courts located within the same county. *AO 89-1. See DISQUALIFICATION.*

An attorney who applied to be a part-time municipal judge had a full-time practice in the municipality of the court that included representation of law enforcement officers and organizations within the municipality. Because law enforcement officers regularly appear in the municipal court, the attorney could

not serve as a judge while representing clients involved in law enforcement. To do so would create an appearance of impropriety and partiality that is prohibited by Rule 21-200(A) ("A judge must avoid all impropriety and appearance of impropriety"). *AO 04-02*.

10-1300. Compensation

10-1310. General rule.

A judge may receive compensation and reimbursement of expenses for the quasijudicial and extrajudicial activities permitted by this code, if neither the source nor amount of such payments gives the appearance of influencing the judge's official duties or otherwise gives the appearance of impropriety. NMRA 21-600(A).

This provision allows judges to accept compensation for all extrajudicial and quasi-judicial activity allowed by the Code, unless there is an appearance of impropriety. The compensated activity must not be a part of the judge's official duties--in other words, the judge may not be paid for something that is already required of her.

10-1320. Definition of "compensation."

Extra-judicial compensation is defined as being the consideration received for services rendered by a judge to a person, firm, corporation or association other than the salary, benefits and perquisites of office provided to the judge for the performance of official judicial duties. Extra-judicial compensation does not include income from interest, dividends, rents, royalties, working interests, proceeds of or profits from the sale or exchange of capital assets as defined by the Internal Revenue Code and regulations, or collection of fees or retirement benefits earned or reimbursement of expenses incurred prior to entering judicial service. Compensation or income of a spouse attributed to the judge by operation of community property or other law is not extra-judicial compensation of the judge. Extra-judicial compensation should not exceed a reasonable amount for the activities performed, and should not exceed what a person who is not a judge would receive for the same activity. NMRA 21-600(B).

10-1330. Definition of "expense reimbursement." A judge may receive reasonable reimbursement for expenses.

Expense reimbursement should be limited to the actual cost of travel, food and lodging and other expenses reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse. Any payment in excess of actual cost is extra-judicial compensation subject to the requirements of this rule. NMRA 21-600(C).

10-1340. Marriage ceremonies. The Code now allows a judge to accept an unsolicited gratuity for performing marriages outside of business hours. *Commentary to NMRA 21-500(B)*. The gratuity must be offered willingly, and the amount must be commensurate with the service provided. The

receipt of the gratuity should be reported as "compensation" under NMRA 21-600(D), or as an "expense reimbursement" only if it is designated as such by the person giving the gratuity.

A magistrate may accept a reasonable unsolicited gratuity for performing a marriage ceremony, provided it is performed outside of the court's ordinary business hours; the amount is in accordance with the services performed; and the source of the payment does not give rise to an appearance of impropriety. The receipt should be treated as "compensation" unless it is expressly an "expense reimbursement." *AO 93-6*.

10-1400. Disclosure requirements. New Mexico, like most states, requires some financial disclosure by judges. *See Shaman, supra*, §8.02 at 207 (forty-eight of fifty-two jurisdictions require some type of financial disclosure by judges).

10-1410. Annual report. Every judge must file an annual report with the Supreme Court indicating income from quasi-judicial and extrajudicial activities. The reports are public records. The extent of the disclosure is determined by the Code.

10-1420. Contents of annual report.

Reporting requirements are at NMRA 21-600(D).

In addition to all other reports required by law, a judge should report the date, place and nature of any activity for which the judge received extra-judicial compensation as defined in this rule, including the name of the payor and the amount, or character and value, of extra-judicial compensation so received. The judge's report shall be filed as a public record in the office of the clerk of the Supreme Court of New Mexico on or before April 15 of each year covering the preceding calendar year. NMRA 21-600(D).

Failure to file as required can result in disciplinary action.

A South Carolina magistrate was publicly reprimanded for filing a false affidavit to avoid paying taxes on a truck purchased in-state and for failing to file reports of gifts and compensation. *In re Henderson*, 387 S.E.2d 264, 264-65 (S.C. 1990).

10-1500. Related topics

Disqualification

Exercise of Judicial Power

Administrative Duties

Civic, Charitable, Social Activities

11-100. Checklist

Does the proposed activity reflect adversely on your impartiality?

Does the proposed activity detract from the dignity of your office?

Does the proposed activity interfere with the proper performance of judicial duties?

Does the proposed activity involve considerable controversy?

Does the proposed activity have the appearance of an improper political endorsement?

Does the proposed activity involve membership or leadership in an organization that frequently comes before your court?

Does the proposed activity involve the use of the prestige of your office to promote the private interests of others?

Are you being asked for fund-raising or membership solicitation?

Does the organization involved practice invidious discrimination? *See AJS, Ethics Training* at 42.

Civic, Charitable, Social Activities

11-200. Applicable Law

NMRA 21-100, 21-200, and 21-500(C) and (H).

11-300. Introduction

Judges are, and should remain, active in their communities. Complete separation of a judge from extrajudicial activities is neither possible nor wise. *Commentary to NMRA 21-500.* The activity is not permitted if it (1) makes the judge appear biased; (2) allows a private organization to exploit the judicial office; or (3) interferes with the performance of judicial duties. In addition, judges may not raise funds for organizations. Several other specific limitations also apply to judges serving as officers or directors of organizations.

Even laudable civic and charitable activities may create the impression that a judge is biased in favor of particular causes or issues, may distract or appear to distract a judge from judicial duties, or may exploit or appear to exploit the judicial office for the benefit of private organizations. Therefore, judges need to carefully examine their membership and involvement in and fund-raising on behalf of civic and charitable organizations even, or perhaps particularly, law-related organizations. See AJS, CURRICULUM, Civic and Charitable Activities at 7.

Judge may host music program on local radio, so long as he says nothing to undermine his appearance of impartiality or to demean the judicial position. *AO 07-11*

Judges can refer their questions in this area to the Supreme Court Advisory Committee on the Code of Judicial Conduct. *See* RESOURCES.

11-400. Affiliation with civic and charitable organizations

A judge may serve as an officer, director, trustee or nonlegal advisor of an educational, religious, charitable, fraternal or civic organization not conducted for profit. However, a judge should not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be engaged frequently in adversary proceedings in the court of which the judge is a member. *NMRA 21-500(C)(3).*

The judge's ability to serve in a membership or leadership role in a charitable organization has been limited by the revised Code. While the judge may assist in planning fund-raising or in managing funds, the judge may not personally participate in any fund-raising except from certain other judges. Nor may the judge personally participate in soliciting members, at least where that might reasonably be seen as coercive or is essentially a fund-raising mechanism. *NMRA 21-500(C)(3).*

Any service to an organization is prohibited if it will conflict with the performance of the judge's duties. The conflict can include demands on the judge's time, or service to an organization that would make the judge appear partisan in deciding cases.

11-410. Membership

The primary limitation on membership is the possible appearance of bias resulting from the judge's affiliation. Obviously, this restriction excludes membership in an organization that is philosophically committed to discrimination, such as the Ku Klux Klan. Even membership in a club that does not advocate, but simply practices, discrimination in its membership or other policies is now barred. *NMRA 21-200(C)*. But membership in any organization which espouses a particular legal philosophy or position calls into question the judge's capacity to preside impartially over certain trials--for example, Mothers Against Drunk Driving (MADD) or an "anti-shoplifting" organization. *AO 88-7. See also Shaman, supra, §9.11 at 268*. Membership in law enforcement organizations such as the Fraternal Order of Police or the Sheriff's posse and specialized bar associations such as a defense lawyers association also reflect on a judge's impartiality; membership in the American Bar Association is acceptable if the judge does not participate in debates and resolutions on controversial legal issues. *See AJS CURRICULUM, Civic and Charitable pp. 2-3. Rothman, supra, 210.950.*

11-420. Service as officer or director.

Judges may serve in a leadership role in an organization devoted to the improvement of the law, the legal system, or the administration of justice, or a charitable organization, with exceptions. *NMRA 21-500(C)(3)*.

A judge may serve as a member or officer in a council on crime and delinquency as long as the prestige of office is not used for the benefit of the organization. *AO 86-4*.

A judge may serve on New Mexico Intimate Partner Violence Death Review Team since it will not reflect on judge's impartiality, has no formal authority and is not identified with any particular view or position, so long as the team will not ordinarily come before the judge. *AO 06-2*.

Judges seeking to join or serve as director in NM Association of Drug Court Professionals is given detailed guidance on conditions to ensure no damage to appearance of impartiality. *AO 10-04*.

11-421. Organizations conducted for profit. A judge may not serve as a director, officer, trustee or nonlegal advisor of an organization operated for profit unless that organization is closely held by the judge or members of the judge's family, or is primarily engaged in investing their financial resources. *NMRA 21-300(D)(3). SEE FINANCIAL AND BUSINESS DEALINGS.*

A judge may not accept the directorship of a bank. Acting as a director for a commercial entity is not an allowed extra-judicial activity. A bank conducts business for the economic or political advantage of its members and would regularly be engaged in adversary proceedings. As a director the judge could become involved in frequent transactions with attorneys or others likely to come before the court. *AO 87-1*.

11-422. Frequent litigants. A judge may not serve in a leadership role in an organization that is likely to appear in the judge's court or is regularly engaged in adversary proceedings in the court of which the judge is a member.

Service to organizations whose mission specifically includes bringing lawsuits is precluded by the rule, such as the American Civil Liberties Union, the Mexican-American Legal Defense Fund, the Sierra Club and the NAACP. Judges also have been advised not to serve on the boards of more

neutral organizations because they are frequently engaged in litigation: legal aid, alcohol treatment centers that receive court referrals, charitable hospitals, organizations that establish protocols for police intervention in domestic violence cases, community mental health intervention groups. *AJS, CURRICULUM, Civic and Charitable Activities* at 1-2.

Service to such an organization raises a question of appearance rather than conduct.

A judge should not serve as the president of the board of directors of a shelter for victims of domestic violence. Although the board has no fund-raising responsibilities, limits its activities to approving budget items and has no access to the names of those served by the charity, service on this committee would create the appearance of impropriety and cast doubt on the judge's impartiality. The charity is organized to shelter victims of domestic violence, and these persons are likely to appear in court. The defendants in such actions could reasonably believe that the judge knew the victim or that the judge was biased in favor of the victim. *AO88-7*.

A judge was advised against serving on a DWI program advisory council whose activities were closely associated with support for law enforcement and prosecution-oriented organizations. *AO 02-05*

A judge was advised that service on several non-profit boards and on a governmental commission involving the administration of justice would be allowable, but that service on another non-profit board that might appear in judicial proceedings would not be. *AO 02-06*

If this conflict does arise, the judge should recuse himself from the case.

A judge was publicly censured for serving on board of a hospital but refusing to disqualify himself from cases in which the hospital was a party. *In re Anderson*, 814 P.2d 773, 776 (Ariz. 1991).

Even service to educational institutions can be a problem if the institution has interests that could be affected by litigation.

A judge may not serve as member of the Board of Regents of a state educational institution. *AO 90-9*.

The United States Supreme Court upheld the disqualification from a case of a judge who sat on a university board of directors, even though the university was not a party to the case, because the university operated a hospital whose interests would be affected by the outcome. *Liljeberg v. Health Service Acquisition Co.*, 486 U.S. 847, 848 (1988).

Of course, direct intervention in a legal proceeding involving a charity in which the judge has a personal interest is a serious ethical misconduct.

A New York judge was removed from office for attempting to use judicial status to secure preferential treatment from city health law enforcement agencies for a charity of which he was trustee, and appeared at court hearing involving the charity and attempted to engage in ex parte conversation with the trial judge. *Shilling v. State Comm'n on Judicial Conduct*, 415 N.E.2d 900, 900-01 (NY 1980).

Acceptable organizations include the Salvation Army, the Red Cross, and educational associations such as citizens for better libraries. *AJS, CURRICULUM, Civic and Charitable Activities* at 1-2. Service to law-related organizations such as the local bar association is acceptable, subject to the limitations imposed on all extrajudicial activities.

11-430. Fundraising

11-431. General anti-solicitation rule.

A judge shall not lend the prestige of judicial office to advance the private interest of the judge or others NMRA 21-200(B).

A judge . . . shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation. NMRA 21-500(C)(3)(b)(iv).

These rules are strictly construed by advisory committees and disciplinary organizations to prohibit all fundraising activity by judges.

11-432. Policy. The purpose of the anti-solicitation rules is to prevent people from donating money because they fear they will offend the judge or because they hope to gain favorable treatment. It is also inappropriate for the prestige of the judicial office to be used to promote a separate interest.

11-433. Scope of prohibition. The rule is strictly interpreted to prevent a judge from raising funds on behalf of an organization. A judge must disassociate himself from the fundraising activities of an organization in which he is involved in any capacity, except for participating in planning, or in soliciting from certain other judges. *NMRA 21-500(C)(2)(b)(i)*. Both indirect and direct solicitation are prohibited. The critical question is whether the judge's participation is designed to entice people to attend an event and/or encourage donors to contribute to the organization.

11-433a. Direct solicitation. The obvious case of direct solicitation is when a judge personally, in chambers, asks for charitable contributions--such as cash contributions or ticket purchases--from lawyers or employees. Outside the courthouse, judges may not canvass door-to-door, for example, for church or the Red Cross, or participate in a phone-a-thon where the judge speaks to, but does not see, the person being solicited. Speaking at fundraising events also is prohibited, even if the judge does not approach people individually.

A judge may not ask individuals or associations to purchase a ticket or table for a luncheon for The New Mexico Council on Crime and Delinquency. The judge would be using the prestige of office for the benefit of the organization. It is irrelevant that the ticket purchaser is an attorney. *AO 86-4*.

The restriction on fundraising also applies to law-related organizations.

A judge may not participate in either the fellow nominating process of the New Mexico Bar Foundation or fund-raising for it. A judge's prestige would be used to solicit money from attorneys who appear in front of the judge, and the prestige would extend to 'encouraging' an attorney/nominee to accept an invitation to become a fellow since that requires a certain contribution. *AO 89-3*.

11-433b. Indirect solicitation. Solicitation may occur without face-to-face contact. A judge's appearance on a telethon is a problem because the judge is lending the prestige of her office to a non-judicial organization. Even bagging groceries at a fundraiser where a portion of the proceeds went to charity has been prohibited. *Shaman, supra*, §9.06 at n. 47.1.

A probate judge's name may be aired during a public television fundraiser in a program created by the judge on wills, trusts, probate and health laws without violating the prohibition against direct solicitation of funds by judges as long as the judge did not personally participate in any fundraising activities. *AO-03-02*.

A district judge was removed from the bench for, among other reasons, allowing his chambers, telephone, stationery, photograph, name and title to be used on a solicitation letter for a non-profit organization. The organization's volunteers would frequently appear in court on behalf of children. The judge's wife served as the organization's director. The judge was found to have used the prestige of his office to solicit funds, and to have conveyed the appearance that persons who contributed to the organization would be able to influence the court. *In re Castellano*, 119 N.M. 140, 889 P.2d 175, 182-183 (1995).

11-433c. Solicitation letters. The commentary to the revised Code provides that "use of an organization letterhead for fund-raising or membership solicitation does not violate Paragraph (C)(3)(b) [of NMRA 21-500] provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation."

A family court judge should not allow a non-profit family services organization to continue using the judge's name on its letterhead, where the judge resigned as a director upon taking the bench, where potential contributors would be likely to appear before the judge. *AO 07-08*.

11-433d. Creative sentencing. The practice of allowing traffic offenders to make contributions to charity in lieu of paying a fine is a prohibited form of solicitation. *Shaman, supra*, §9.06 (Supp.) at n. 46. This prohibition does not apply to a defendant's fulfillment of a community service obligation imposed as part of sentencing.

The Judicial Standards Commission recommended that the Supreme Court impose sanctions against a municipal judge for conducting an annual "turkey for tickets" program, whereby traffic fines were substantially reduced for violators who donated Thanksgiving turkeys to the court for distribution to charity. The judge agreed to comply voluntarily with the Commission's recommendations out of respect for its role within the judiciary and the Supreme Court dismissed the petition. *In re Fiorina*, JSC 93-61.

11-433e. Attending fundraising events. A judge may *attend* fund-raising functions of nonprofit organizations as a contributor. *AJS, ETHICS TRAINING* at 45. But if requested to be a speaker, a guest of honor or to allow his name to be used to promote the event, "the judge should seriously consider whether the acceptance of such a role would constitute the use of the prestige of judicial office for fund-raising purposes." *Commentary to NMRA 21-500(C)(3)(b)*.

Sometimes the restriction on fundraising is one of several factors making a judge's service to an organization inappropriate.

A judge should not serve as co-chairman of a national committee for the racing industry. Serving on this committee would appear inappropriate and would not promote confidence in the integrity and impartiality of the judiciary. The judge cannot speak on behalf of the organization in matters of fund-raising since that conduct is strictly prohibited. "It would be impossible to separate the prestige of your office from the message you would be giving (requesting funds). The same prohibition would extend to the proposed use of your name on organization stationery if your title were to be used." Various groups that fund the racing commissions, including the commissions themselves, are likely to appear before the judge's court. Because the racing industry is an important state industry, the judge's capacity for impartially deciding cases dealing with horse racing might detract from the dignity of judicial office. *AO 88-8*.

11-440. Duty to review activity. The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which he is affiliated to determine if it is proper to continue the relationship. For example, charitable hospitals are more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication. *Commentary to NMRA 21-500.*

11-500. Government Commissions

With the adoption of the Model Code, the New Mexico Code now specifically limits a judge's involvement on government commissions to law-related commissions, except for representing a governmental entity at ceremonial or similar events. *NMRA 21-500(C)(2)*. Even permissible service remains subject to the general constraints of *NMRA 21-500(A)*.

The Code also provides that:

A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the judiciary or matters relating to the judiciary or which affect the interests of the judiciary, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests. NMRA 21-500(C)(1).

11-600. Social

11-610. Social hospitality.

A judge or his family may accept ordinary social hospitality NMRA 21-500(D)(5)(c).

The line between "ordinary social hospitality" and improper attempts to gain the judge's favor can be difficult to draw. The context is important and no one factor will determine whether it is proper for the judge to attend the event.

Six factors are relevant to judicial conduct in a social situation. Will the given behavior adversely affect any of the following qualities of a judge:

- (1) independence;
- (2) integrity;
- (3) the obligation to respect the law;
- (4) impartiality;
- (5) dignity; or
- (6) the timely performance of judicial duties. *McFadden, Hors d'Oeuvres and Ethics: Social Relations of Judges and Lawyers*, 77 ILL. B.J. 358, 360 (Mar. 1989).

In that light, the judge should consider: Is the person making the social contact an old friend or recent acquaintance? Does the person have an unsavory reputation in the community? Is the

gathering large or intimate? Is it spontaneous or prearranged? Is alcohol served? Does anyone attending have a case coming before the judge? Is the judge receiving a benefit not offered to others?

New York judges were disciplined for accepting hotel and vacation discounts from a court appointed receiver. The association could have been social but the relationship between discounts and court appointments created the appearance of impropriety. *See Shaman, supra*, §7.29 at 202.

11-611. Relationships with attorneys. Most judges, especially those who are lawyers, have friends who are attorneys. Judges are not expected to abandon such friendships, but should be careful about social contacts with attorneys in certain situations.

A New York judge allowed a law firm to pay the expenses of the judge and his wife for a weekend at a country club. This went well beyond "ordinary social hospitality." *In re Vaccarro*, 409 N.Y.S.2d 1009 (N.Y. Court on Judiciary 1977).

11-611a. Pending cases. Judges should avoid socializing with attorneys who have cases pending before the judge, to avoid ex parte communications and the appearance of impropriety. The smaller the group, the greater the restriction. For example, the judge may attend a public function such as a community picnic or even a bar association function, but not an intimate dinner party when the lawyer will be present.

11-611b. Prior friendship. This question arises in the context of disqualification. Should a judge have to recuse himself when a close friend is an attorney in a case? Depending on the extent of the personal relationship, the relationship can create the appearance that the attorney will receive special treatment. An objective test applies: whether the judge feels capable of disregarding the relationship and whether others can reasonably be expected to believe that the relationship is disregarded. *Shaman, supra*, §5.15 at 126; *see also* DISQUALIFICATION.

A judge presided over a criminal case in which one of the prosecutors was a close friend. The relationship was so close that the two families were going on vacation together immediately after the sentencing in the case. The reviewing court found there was a reasonable question about the judge's impartiality in this instance, but upheld the conviction because the other lawyer knew about the friendship and did not object until after the conviction. *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985).

In itself, the fact that the judge is acquainted with the attorney is not disqualifying.

11-612. Relationships with parties. The same analysis applies to parties. Under the objective test, a judge should probably recuse himself if one of the parties is an intimate friend. *See* DISQUALIFICATION. It is also improper for a judge to have social contact with someone close to the pending case.

A Florida judge was removed from office for misconduct including engaging in sale of land to the father of a daughter whose case was pending in his court. *In re Leon*, 440 So. 2d 1267, 1269 (Fla. 1983).

11-613. Relationships with criminals. A judge who engages in a "close and intimate association" with a criminal compromises the integrity of the judiciary.

A New Jersey judge attended a picnic hosted by old friend who had recently entered a plea to racketeering charges. This was an annual event the judge had attended for years. The judge's attendance could be perceived as indicating judge's disagreement with the criminal justice system or cast doubt on his allegiance to it. Conduct, not motivation, was the issue. The judge's attendance was perceived as endorsing not only the event, but also the persons associated with it. *In re Blackman*, 591 A.2d 1339, 1341-42 (N.J. 1991).

A Louisiana judge accepted meals, drinks and travel expenses from a known felon and aided him in trying to have the conviction overturned. The association created an appearance of disrespect for the law. *State v. O'Hara*, 211 So.2d 641, 644-46 (La. 1968).

Another Louisiana judge associated with prostitutes and smoked marijuana. Judges must avoid fraternizing with persons who are known criminals. Intentional association with such persons is prejudicial to the administration of justice and brings discredit to the judicial office. *In re Whitaker*, 463 So. 2d 1291, 1303 (La. 1985).

11-620. Membership in clubs.

Social clubs have been a subject of debate because of the possible appearance of bias. A judge's membership in a club that discriminates against a particular racial, religious, or ethnic group, or against anyone on the basis of sex creates the appearance, at least, that the judge may also discriminate from the bench. New Mexico has adopted the Model Code's express restriction against membership in such clubs. *NMRA 21-200(C)*.

Advisory opinions and case law indicate that a judge should consider the following:

- (1) Is the organization exclusive or inclusive?
Inclusive clubs based on shared beliefs or culture are acceptable, while clubs that stigmatize others and exclude them are not.
- (2) Is the organization purely private or does it perform the functions of a public entity?
Large organizations that engage in commerce probably do not have the right to exclude members arbitrarily.
- (3) Is there a business advantage to belonging?
Denying access to significant business opportunities makes it harder to justify excluding members.
- (4) Does the membership itself indicate bias?
Are the policies of the organization discriminatory? Membership indicates subscribing to policies of the organization. *AJS, ETHICS TRAINING* at 41.

The Commentary to the new rule states that a judge who belongs to or arranges a meeting at a club she knows to practice invidious discrimination violates this rule of conduct. A judge, may, however, make immediate efforts to have the organization discontinue its discriminatory practices, but must otherwise suspend participation in the organization while doing so. Should the judge's efforts be unsuccessful after no more than a year, the judge must resign immediately.

11-700. Related topics

Disqualification

Political Activities

12-100. Checklist

Are you personally soliciting campaign funds from a party in a pending case?

Are you personally soliciting campaign funds from an attorney?

Are you engaging in fundraising for another political candidate?

Does your campaign advertising accurately represent your qualifications and experience?

Are you attending a fundraiser for another political candidate?

Are you using judicial letterhead for campaign literature?

Is your staff campaigning for you while on duty?

Political Activities

12-200. Applicable Law

NMRA 21-100, 21-200, 21-700, 21-800, 21-900, and 21-901.

12-300. Introduction

Politics are a fact of life for judges in New Mexico. Although appellate, district and metropolitan court judges are appointed under the Judicial Selection process, they still must run in contested and retention elections. Magistrates, municipal and probate judges are elected. The code tries to balance political reality and the appearance of impartiality. *Shaman, supra*, §11.01 at 317. When judges campaign or engage in other political activity, the public may conclude that they are indebted to particular supporters, parties or politicians. To increase the independence of the judiciary and decrease the appearance of impropriety, the Code places restrictions on judges' political activity and campaign conduct. *AJS ETHICS TRAINING* at 31. The limitations apply to all judges and to all other candidates for election, retention, or appointment to judicial office. *NMRA 21-900(C)*.

12-400. Law-Related Political Activity.

The revised Code establishes that judges may engage in law-related political activity.

A judge may engage in political activity on behalf of the legal system, the administration of justice, measures to improve the law and as expressly authorized by law or by this Code. NMRA 21-700(A)(1).

This is consistent with the judge's authority to appear at public hearings, serve on governmental commissions and serve as director or advisor to organizations committed to such activity. *NMRA 21-500(C)(1) through (3)*.

Judges may not campaign in the same way as candidates for non-judicial offices can. These limitations can be frustrating, as well as foreign to judicial candidates who previously have campaigned for other elected offices. The revised rules have removed some of the prior restrictions on campaigns, but other restrictions have been added.

12-500. Disciplinary Action: Incumbents and Candidates

Incumbent judges and candidates who are members of the bar will be subject to disciplinary action for engaging in improper campaign conduct.

Violations of any of the rules of the Code of Judicial Conduct by incumbent judges shall be investigated, proceeded upon and disposed of by the Judicial Standards Commission in accordance with its authority and rules of procedure, and by the Supreme Court of New Mexico acting under its powers of contempt and superintending control. NMRA 21-900(A).

Violations of these rules by persons who are members of the bar shall be deemed to constitute violations of the Rules of Professional Conduct. Violations of these

rules by candidates who are not lawyers are within the superintending control of the Supreme Court, and may be grounds for petitioning the Supreme Court by way of mandamus, injunction or other equitable relief to require compliance and rectify non-compliance. NMRA 21-900(B).

Ethical violations committed by a non-attorney who is successful in the campaign are subject to discipline by the judicial disciplinary authority. *Shaman, supra*, §11.03 at 324; *AO90-7*.

New Mexico Constitution authorizes Judicial Standards Commission to investigate and recommend sanctions against a judge accused of misconduct during his election campaign. A magistrate judge who, while a candidate, promised to rule in favor of a couple whose votes he sought, and who advised them on how to excuse another judge to ensure that the candidate would hear the case, was removed from the bench. *In re Rodella*, 2008-NMSC-050.

12-600. Holding Office: The Resign-to-Run Rule

The holding of a judicial office is incompatible with holding, or running for, nonjudicial office.

No judge of any court in the State of New Mexico may while in office be nominated or elected to a public or non-judicial office. A judge must, when filing a statement of candidacy for a non-judicial office, resign the judge's office immediately. NMRA 21-700(C).

A part-time municipal judge was instructed to resign to run for non-judicial office. *AO 01-10*

A magistrate running for District Attorney was required to take leave without pay upon filing of statement of candidacy. The office of District Attorney is not a judicial office for purposes of NMRA 21-700. *In re Amended Canon 7 of Code of Judicial Conduct*, 101 N.M. 220, 680 P.2d 601 (1984).

An incumbent probate judge must relinquish his/her position before the filing date when seeking to run for a different elected public position. Although judges may participate in the political process as candidates for judicial office, when filing for candidacy for nonjudicial office, judges must take a leave of absence pending either the results of the nominating process or until after the primary. Once they are nominated or placed on the ballot for nonjudicial office, judges must resign from their judicial office. 21-700. *AO 88-2*.

Once elected, a probate judge must give up his position as a member of a community college board of trustees. *AO 07-03*.

12-700. Types of Elections

Before the adoption of Article VI, Section 33, establishing a judicial selection process for the appellate, district and metropolitan courts, all judges in New Mexico were elected, in contested elections. Now the judges whose positions are subject to the selection process will, after one contested election, run in nonpartisan retention elections. However, the distinctions between how a judge or other candidates may campaign in these different kinds of elections have been considerably reduced by the revised Code. Basically, all candidates are held to the same general standards.

Candidates for election to judicial office in partisan, non-partisan, and retention elections, including judges, lawyers, and non-lawyers are permitted to participate in the electoral process, subject to [certain] requirements . . . NMRA 21-700(B).

12-800. Campaigning: Judge's Own Campaign

12-810. General standard of conduct. Judges running in both contested and uncontested elections are subject to general standards of conduct. A judge or other candidate in any such election is subject to the constraints of propriety and protecting the integrity of the judicial system. Concern for the appearance of impropriety especially governs the conduct of a candidate for judicial office.

12-811. Maintain dignity

[A]ll candidates [for judicial office] shall maintain the dignity appropriate to judicial office, and should encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate. NMRA 21-700(B)(1).

A judge's wife may be an officer of a political party even if the judge may not do so. AO 90-5.

12-812. Supervise others. Political campaigns are governed by the general rule that a judge may not accomplish through employees what she may not do herself.

Candidates for election to judicial office in partisan, non-partisan, or retention elections . . . shall prohibit public officials and employees subject to the candidate's direction or control from doing for the judge what the candidate is prohibited from doing under these rules; [and] shall not allow any other person to do for the candidate what the candidate is prohibited from doing under these rules, except activities permitted to a campaign committee NMRA 21-700(B)(2) and (3).

This means that court staff may not campaign for the judge in locations or by means not allowed to the judge. Staff may not distribute campaign literature on behalf of the judge while they are performing their duties as employees. Regarding campaign committees, see below, *FUNDRAISING*.

12-820. Campaign promises. Although the New Mexico Code of Judicial Conduct prohibits judicial candidates from declaring their positions on issues they might be called upon to rule on in court if elected, the U.S. Supreme Court has thrown such ethical rules into considerable doubt. Specifically, the Court invalidated a Minnesota judicial ethics rule that prohibited a judicial candidate in a contested election from “announc[ing] his or her views on disputed legal or political issues.” *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S. Ct. 2528 (2002). The Court determined that prohibiting a candidate for election to judicial office from expressing publicly his or her views on matters of interest to the electorate is a deprivation of the candidate’s First Amendment rights and undermines the electoral process.

The implications for New Mexico's campaign ethics rules are not entirely clear, because the language of this State's corresponding rule is not exactly like that of Minnesota. The New Mexico rule, 21-700 B(4), states that candidates for contested judicial offices may not:

- (a) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
- (b) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or
- (c) announce how the candidate would rule on any case or issue that may come before the court.

The Court's opinion explicitly did *not* address the validity of (a). Therefore, a judicial candidate still may not make any pledge or promise of conduct in office except as allowed in (a). As for the other two paragraphs, they may or may not continue to be valid restrictions. The Court's concerns in its opinion seemed mostly directed against restrictions that prevent candidates from speaking out during their election campaigns on specific legal topics or commenting on prior court rulings. It is less clear whether the Court's ruling allows the continued application of paragraphs (b) and (c). It is especially questionable whether New Mexico's prohibition in (b) against "statements . . . that *appear* to commit the candidate with respect to cases, controversies or issues that are likely to come before the court" can withstand this ruling's support for public debate on disputed legal and political issues. Moreover, the Court distinguishes in its opinion between candidate statements announcing what *party* a judge might rule for (which remains prohibited) versus announcing views on *issues* (which is now permitted). This will likely leave NMRA 21-700(B)(4)(c) with little or no strength.

Because the language of the Minnesota rule invalidated by the *White* decision does not exactly match the language of the New Mexico rule, the effect on the New Mexico Code of Judicial Conduct may not become clear without further court rulings. But it seems clear from the opinion that judicial candidates have a First Amendment right to discuss their positions on legal and political issues during political campaigns, even to the point of addressing specific topics. Where the lines will be drawn to prevent the process from affecting the integrity of the judicial process may be so clear.

Notwithstanding the *White* decision, judges must decide cases based on the merits, and not on the basis of commitments made as a candidate.

However, general statements are permissible, such as promises to meet the responsibilities of judicial office.

It is not an ethical violation for a judicial candidate to promise that court will start at 9:00; that there will be no unnecessary delays or recesses; that business will be expedited diligently; court will serve citizens instead of being a convenience to lawyers. These pledges of efficiency were for the faithful performance of a judge's duties. *In re Baker*, 542 P.2d 701 (Kan. 1975).

Statements that a judge is "tough on crime" or "for the victims of crime" have been treated as general comment and not as promises. *Shaman, supra*, §11.08.

Prior to the Supreme Court decision in *Minnesota v. White, supra*, the risk of appearing to pre-judge issues led state advisory committees to suggest avoiding the following topics in campaigning: pre-trial release, plea bargaining, criminal sentencing, capital punishment, abortion, gun control, equal rights amendment, drug laws, gambling laws, liquor licensing, dram shop, labor laws, tax exemptions, court rules, prior court decisions, specific legal questions and hypotheticals. Whether those decisions are still valid in view of *White* is now questionable. *AJS, ETHICS TRAINING* at 32.

12-830. Campaign advertising.

12-831. Truthfulness standard. The Code expressly addresses the question of truth in advertising in judicial campaigns.

Candidates for election to judicial office in partisan, non-partisan and retention elections . . . shall not misrepresent the candidate's identity, qualifications, present position or other material fact . . . [but] may use advertising that does not contain any misleading contents, provided that the advertising is within the bounds of proper judicial decorum NMRA 21-700(B)(4)(d) and (B)(6).

A municipal judge charged by the Judicial Standards Commission with making false statements as to his education, military experience and work history during the election campaign agreed to permanently resign his position after the Supreme Court was asked to suspend him pending the investigation. *JSC 02-F10*.

A judge's proposed campaign literature advertising "23 years of judicial experience" was misleading because the candidate's experience was within the executive branch, not the judicial branch, and did not involve judging. *AO90-6*.

One problem area has been the suggestion that an appointed judge has previously been elected.

A Metropolitan court judge who had been appointed was counseled not to use the term "re-elect" in campaign literature and to be circumspect in soliciting financial contributions. *JSC9312*.

A magistrate judge was cautioned about distributing campaign literature containing misleading information. The campaign literature asked voters to re-elect the judge when the judge had never been elected. *JSC9014*.

The use of judicial robes and title in campaign literature must not misrepresent the candidate's status. The literature must not inaccurately suggest the candidate holds the office she is seeking.

An incumbent judge may be pictured in a robe and use the title "Judge" in campaign materials. A non-incumbent may be pictured in a robe IF the candidate has prior judicial experience AND the literature clearly states where the candidate previously served.

If, for example, a magistrate is running for district court, the advertisement should read, "Joe Jones for District Court," not "Joe Jones, District Court Judge." *AO92-3*.

A probate judge running for magistrate court should specify the court on which the judge currently serves in campaign literature identifying him as “Judge,” e.g., “John Smith, *Probate* Judge, for Magistrate Court.”
AO 02-01.

12-832. Party Affiliation. Candidates for judicial office in non-partisan elections may not advertise their party affiliation. *NMRA 21-700(B)(6)*. Apart from that restriction, a judge may identify himself or herself as a member of a political party. *NMRA 21-700(A)(2)(b)*.

A judge running for non-partisan retention may not provide a photograph to his or her political party under circumstances that indicate that the photo will be used in an advertisement that will reflect or imply the candidate’s affiliation with that party. *AO 02-08.*

12-840. Fundraising: Judge's Own Campaign. Avoiding appearances of impropriety is the guiding principle behind the rules governing campaign fundraising.

12-841. Contributions with appearance of impropriety. A judge may not accept a campaign contribution that looks improper, even if it is otherwise permitted by the Code.

Candidates for judicial office in both partisan and retention elections shall refrain from campaign fundraising activity which has the appearance of impropriety, and shall not accept any contribution that creates an appearance of impropriety. NMRA 21-800(A).

12-842. Soliciting or accepting contributions. A candidate for judicial office may solicit funds for her own campaign, subject to restrictions in the Code. One such restriction is that the candidate must be careful not to accept contributions from people who might have a present interest at stake in the judge's court.

Candidates for judicial office, in both partisan and retention elections, shall not personally solicit or personally accept campaign contributions from any attorney, or from any litigant in a case pending before the candidate. NMRA 21-800(F).

Campaign committees may receive such campaign contributions under certain conditions. They may even solicit contributions from attorneys, although not from litigants with pending cases before the candidate. Since the campaign committee may not disclose to the candidate any specifics about contributors, it is assumed to be impossible for such a contribution to influence a judge's decision.

It is important to note that if a party is litigating a case before a sitting judge, that party is equally restricted from contributing not only to the election campaign of that judge, but also of any other candidate for that same office.

Even if an attorney is not involved in a pending case and the judge does not solicit the contribution, it is preferable to refer the donor to the judge's campaign committee. A judge should be shielded from information about contributors. *AO 94-3.*

This suggestion has now become mandatory.

12-842.5. Use of campaign contributions.

A candidate who expends his or her own funds during a campaign may repay herself either by using balances remaining in the campaign account or through fundraising after election, if the fundraising avoids any impropriety and if any excess funds are properly disposed of.

See analysis in AO06-05.

12-843. Campaign Committees. Under the revised rule, every candidate for elective judicial office is required to set up a campaign committee.

Candidates in both partisan and retention elections shall establish committees of one or more responsible persons to conduct campaigns for the candidate using media advertisements, brochures, mailings, candidate forums and other means not prohibited by law or these rules. Campaign committees may solicit and accept reasonable campaign contributions, and obtain public statements of support in behalf of the candidate, subject to the restrictions of these rules. All campaign contributions shall be paid or turned over to the campaign committee, and shall be managed and disbursed by the committee. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others. NMRA 21-800(C).

A committee to retain a judge may invite attorneys to a gathering to meet and hear the judicial candidate, and may solicit voluntary contributions from those attending. The candidate may not personally solicit and must have no knowledge of the contributors' names. *AO86-1.*

Even a judge planning to finance his or her own re-election campaign only with personal funds must form a campaign committee, since that is the exclusive means for managing and disbursing funds. *AO 10-02.*

But a judge running for retention is not required to form a campaign committee if she or he does not intend to engage in any campaigning or to expend any funds on the election. *AO 10-3.*

The use of a committee enables a judge to accept contributions from attorneys without violating NMRA 21-800(A), because in that case the judge does not personally solicit funds from an attorney.

A judicial candidate may accept contributions through a Political Action Committee. The PAC must be separate and distinct from the judge's campaign committee. These contributions can be from attorneys who have a case pending before the judge. The judge may not personally solicit or accept any contributions since this would create the appearance of impropriety. *AO85-1.*

A committee to retain a judge may solicit contributions through a letter signed by attorneys selected by the committee. The names of the contributors may not be made known to the judge/candidate. *AO86-2 Issue 1.*

12-844. Unexpended Campaign Funds - Unopposed Candidates. Unopposed candidates for judicial office may not retain unused campaign funds. Unopposed candidates must either return or donate all campaign funds.

Candidates in partisan elections for judicial office who have a campaign fund, but who are unopposed or become unopposed in the campaign, shall return all unused and uncommitted campaign funds pro rata to the contributors of the funds, or donate the funds to a charitable organization, or to the State of New Mexico, as the candidate may choose, with disbursement of such funds to occur within thirty (30) days after the absence of opposition becomes known. NMRA 21-800(D).

12-845. Opposed Candidates.

A candidate for judicial office in either a partisan or retention election who has unused campaign funds remaining after election, and after all expenses of the campaign and election have been paid, shall refund the remaining funds pro rata to the campaign contributors, or donate the funds to a charitable organization, or to the State of New Mexico, as the candidate may choose, within thirty (30) days after the date the election results are certified. NMRA 21-800(E).

A judge may use unexpended campaign funds, or engage in allowable fundraising efforts, to pay off the judge's personal loan to the campaign, provided that excess donations must be returned. *AO-06-05*

12-846. Campaign Reporting Act. Candidates for judicial offices in both contested and retention elections are subject to the Campaign Reporting Act. §§1-19-26 through 1-19-36. The act imposes very explicit and detailed reporting requirements. It also limits anonymous contributions to \$100 per contribution; and \$500 total for non-statewide races (\$2000 for statewide races). A judge cannot knowingly accept a contribution from a person in excess of those limits when the candidate knows the source of the funds is a donor who does not want to have the contribution reported. §1-19-34(B). Contributions received at special events are subject to a limitation of \$1000 per event when individual contributors cannot be identified, but modified disclosure requirements still apply. §1-19-34(C).

12-850. Misuse of authority. The general prohibition against misusing one's judicial authority for personal benefit applies in the political arena. The risk that an incumbent judge will take advantage of his office improperly is especially great when re-election is at stake.

A magistrate asked permission to place a campaign sign on a businessman's property and upon being refused made statements that were interpreted by the businessman as threats. *JSC9013*.

It is clearly inappropriate for an incumbent to exploit the prestige of his office to promote his candidacy, such as by using court stationery for campaigning. *Shaman, supra*, §11.11.

An incumbent judge may not mail a campaign letter to voters on judicial letterhead, even if the stationery is paid for with campaign funds. The use of the letterhead in a political mailing creates at least the appearance of impropriety, similar to that created by an appeal for campaign funds. *AO90-8*.

It is also an abuse of authority, and therefore an ethical violation, for a judge to campaign or distribute campaign literature while carrying out judicial duties.

12-900. Campaigning: Appointive Office

12-910. Judicial Office. The revised Code distinguishes judges who campaign for elective office from those seeking appointment to a judgeship. No solicitation of funds or other political activity is permitted to an applicant for appointment. A candidate may, however, communicate with the appointing authority, seek endorsements, and provide information or qualifications. *NMRA 21-700(D)*.

12-920. Public Non-Judicial Office. A sitting judge who applies for appointment to public, non-judicial office is under the same constraints against fund-raising or political activity as is the applicant for judicial office. Additionally, such an applicant is disqualified from hearing any cases involving the appointing authority or any person or organization the candidate knows to be making recommendation on that appointment. *NMRA 21-700(E)*.

12-1000. Campaigning: Other Campaigns

12-1010. Supporting Judicial Candidates. Under the revised rule, a judge may no longer publicly endorse or oppose a candidate for public office through new media or campaign literature. *NMRA 21-700(A)(3)(b)*. Judicial candidates may, however, run as part of a slate and participate in joint fund-raising events with other judicial candidates. *NMRA 21-800(B)*.

One or more district judges may pay for and run an advertisement in a local newspaper concerning the family court and the candidates running for judgeship who are associated with the family court. If the advertisement does not compromise the integrity and independence of the judiciary, interfere with the impartial and diligent performance of their duties or create an appearance of impropriety, there is no violation of the Code. The advertisement should be fair, accurate and in good taste. *AO86-8*.

A judge's secretary, unaware of the Code restrictions, provided the judge's name for use in a newspaper ad in support of another judge's retention election. The judge did not correct this error upon learning of it, and was cautioned to ensure that the judge's staff does not violate the prohibition on public endorsements through the news media for candidates for public office. *JSC 97-II(5)*.

Judge may campaign against proposed city charter amendment requiring all candidates for municipal judge to be licensed attorneys. *AO 08-01*.

But active support is inappropriate if that judge could exercise influence over the judicial candidate, if elected.

A district court judge may not serve on the campaign committee for the election, retention or re-election of a judge to the metropolitan court. This would be inappropriate since the district court hears appeals from the metropolitan court. It would also give the impression that the metropolitan court judge is subject to the district court judge's influence. The independence and integrity of the judicial system must be upheld. *AO86-3*.

12-1020. Supporting Nonjudicial Candidates. Judges may lend their personal support to candidates for nonjudicial office, but must ensure that in the process their judicial office is not exploited. The support by the judge, under the revised rule, may not be publicized in the news media or campaign literature. *NMRA 21-700(A)(3)(b)*. A common scenario is when a relative of the judge is running for office.

A candidate for political office who is the relative of a judge may state that the candidate is related to the judge in the candidate's campaign literature, provided other members of the immediate family are similarly referred to. However, indication of the judge's office or use of the judicial title in person's campaign literature or in any other aspects of the campaign, such as introductions at political functions, is not permitted. *AO89-2 Issue 1*.

A judge who authorized use of his name in a newspaper advertisement supporting re-election of a mayoral candidate was formally reprimanded. The Supreme Court upheld the Code's prohibition against public endorsement of a non-judicial candidate, against the judge's objection that it violated his free speech rights. *Matter of Hon. William A. Vincent, Jr.*, 2007-NMSC-056.

Judges may attend nonfund-raising political functions for members of their families who are running for political office. The judge must attend as a private individual, not as a member of the judiciary. The judge may not speak on behalf of the candidate. *AO89-2 Issue 3*.

12-1025. Campaigning on Issues.

A judge may campaign publicly on issues involving qualifications for holding judicial office, or other issues of public policy.

A magistrate judge was free to campaign against a proposed amendment to require municipal judges to be attorneys. *AO 08-01*.

12-1030. Fundraising. A judge may not solicit funds for any other candidate, judicial or otherwise, except when participating in joint fund-raising events with other judicial candidates.

[C]andidates in both partisan and retention elections for judicial office . . . shall not solicit funds for any other political campaign, or for any candidate for any other office. NMRA 21-800(B).

A letter of caution was sent to a magistrate who did not take sufficient care to ensure his name did not appear on invitation to fund-raising dinner for a non-judicial candidate. Invitations were prepared by his wife and a friend. He was also cautioned to ensure that others, including his wife, use the same degree of care to avoid the appearance of impropriety. *JSC9011*.

This is the case even if the candidate is a family member.

A judge may not attend fund-raising events in support of his/her spouse's candidacy. Although the passive appearance at a fund-raiser is not necessarily improper, it has the appearance of soliciting funds, and is therefore precluded activity. *AO89-2 Issue 2*.

12-1100. Other political activity.

12-1110. Personal beliefs. A judge's personal political beliefs are her own concern. But those beliefs may not affect her judicial conduct. *State ex rel. Comm'n on Judicial Qualifications v. Rome*, 623 P.2d 1307 (1981).

12-1120. Personal participation in political organizations.

12-1121. Membership. Subject to the requirement to avoid the appearance of impropriety and avoid associations that could cast doubt on a judge's impartiality, a judge may be a member of a political organization. *NMRA 21-700(A)(2)*.

12-1122. Contributions. A judge may buy tickets for political functions, attend such gatherings, and contribute to political organizations. *NMRA 21-700(A)(2)*.

12-1123. Leadership role. However, a leadership position in a political organization can create an apparent conflict-of-interest and is forbidden to judges by the rules. *NMRA 21-700(A)(3)*.

A judge may not serve on an advisory candidate service committee sponsored by the Democratic Party. The purpose of the committee is to develop a statewide voter file for the use of both judicial and non-judicial Democratic Party candidates. Serving on this committee would create the appearance of impropriety and shed doubt on the integrity and independence of the judiciary by giving the appearance that the judge cannot perform impartially and/or that a conflict of interest exists. *AO87-4*

A magistrate may not hold office in a county political organization. The appearance of partiality undermines public confidence in the judiciary. *AO92-5*.

Judges may not serve as delegates to political party conventions. *AO09-02*.

12-1124. Speaking. Nor may a judge make speeches on behalf of a political organization. *NMRA 21-700(B)(3)(d)*.

12-1200. Related topics

Business and Financial Dealings

Speaking, Writing and Teaching

Resources

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Code of Judicial Conduct

Preamble

- 21-001 Definitions.
- 21-100 A judge shall uphold the integrity and independence of the judiciary.
- 21-200 A judge shall avoid impropriety and the appearance of impropriety in all the judge's activities.
- 21-300 A judge shall perform the duties of office impartially and diligently.
- 21-400 Disqualification.
- 21-500 A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.
- 21-600 Reporting quasi-judicial and extra-judicial activities and compensation.
- 21-700 Elections and political activity.
- 21-800 A judge shall refrain from campaign fund-raising activity which has the appearance of impropriety.
- 21-900 Violations.
- 21-901 Applicability.

Preamble

An independent and honorable judiciary is indispensable to justice in our society. The provisions of this Code should be construed and applied to further that objective.

21-001. Definitions.

As used in this Code:

A. "candidate" means a person seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as the person makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support. The term "candidate" has the same meaning when applied to a judge seeking election or appointment to nonjudicial office;

B. "election" means a municipal, primary or general election and includes partisan elections, nonpartisan elections and retention elections;

C. "fiduciary" includes such relationships as executor, personal representative, attorney in fact, trustee and guardian;

D. "impartiality" or "impartial" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

E. "knowingly," "knowledge," "known" or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances;

F. "law" means court rules, statutes, the United States Constitution, the Constitution of the State of New Mexico and decisional law of this jurisdiction;

G. "member of the candidate's family" or "member of the judge's family" means a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship;

H. "member of the judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household;

I. "nonpublic information" means information that, by law or court order, is not available to the public; and

J. "require," when used in rules prescribing that a judge "require" certain conduct of others, means that a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

[Adopted, effective February 16, 1995; as amended, effective August 31, 2004.]

The 2004 amendment, effective August 31, 2004, added a new Paragraph D defining "impartiality" or "impartial" and relettered former Paragraphs D to I as present Paragraphs E to J.

21-100. A judge shall uphold the integrity and independence of the judiciary.

A judge shall participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.

[As amended, effective February 16, 1995.]

COMMITTEE COMMENTARY

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness and soundness of character. An independent judiciary is one free of inappropriate outside influences. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

COMPILER'S ANNOTATIONS

The 1995 amendment, effective February 16, 1995, rewrote the rule and rewrote the commentary.

The 2004 amendment, effective August 31, 2004, added two new sentences to the commentary as follows: "A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness and soundness of character. An independent judiciary is one free of inappropriate outside influences."

Failure to recuse when appearance of impropriety occurs. — Where district judge had a personal relationship with the defendant's attorney, who was defendant's boyfriend and who subsequently became the defendant's husband, and where district judge continued to preside over criminal case even though he acknowledged that his continued involvement in the case would foster the appearance of impropriety, the actions of district judge constituted willful misconduct in office. In re McBee, 2006-NMSC-024, 139 N.M.

529, 134 P.3d 769.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 1 et seq.

48A C.J.S. Judges § 35 et seq.

21-200. A judge shall avoid impropriety and the appearance of impropriety in all the judge's activities.

A. **Respect for the law.** A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. **Impartiality.** A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interest of the judge or others; nor should a judge convey or permit others subject to the judge's direction and control to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. **Membership in organizations.** A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. [As amended, effective February 16, 1995.]

COMMITTEE COMMENTARY

Paragraph A

The commentary to Rule 21-100 NMRA also applies to Paragraph A.

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Examples are the restrictions on judicial speech imposed by Subparagraphs (10) and (11) of Paragraph B of Rules 21-300 NMRA that are indispensable to the maintenance of the integrity, impartiality and independence of the judiciary.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

See *also* Commentary to Paragraph C of this rule.

Paragraph B

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. (As to the acceptance of awards, see Paragraph D(5)(a) of Rule 21-500 and Committee Commentary.)

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation.

Judges may participate in the process of judicial selection as provided by law and by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for judgeship. (See *also* Rule 21-700 regarding use of a judge's name in political activities.)

A judge must not testify voluntarily as a character witness because to do so might lend the prestige of the judicial office in support of the party for whom the judge testifies, and such testimony may be misunderstood to be an official testimonial. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

Paragraph C

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Paragraph C of this rule refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited.

Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership. See *New York State Club Ass'n Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

It would be a violation of this rule for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under this rule and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Paragraph A of this rule.

When a judge learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Paragraph C or Paragraph A of this rule, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization.

If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

COMPILER'S ANNOTATIONS

The 1995 amendment, effective February 16, 1995, added Paragraph C, made gender neutral changes throughout the rule, and rewrote the commentary.

The 2004 amendment, effective August 31, 2004, added a new sentence to the second paragraph of Paragraph A of the commentary as follows: "Examples are the restrictions on judicial speech imposed by Subparagraphs (10) and (11) of Paragraph B of Rules 21-300 NMRA that are indispensable to the maintenance of the integrity, impartiality and independence of the judiciary".

Stringent code of conduct. — The conduct prescribed for judges and justices is more stringent than conduct generally imposed on other public officials. *In re Romero*, 100 N.M. 180, 668 P.2d 296 (1983) (decided prior to 1995 amendment).

Suspension resulting from willful violation. — Judge who willfully violated Code of Judicial Conduct in that he accepted favor from a person appearing before his court, thus giving rise to an appearance of impropriety, was suspended for 30 days without pay. *In re Terry*, 101 N.M. 360, 683 P.2d 42 (1984) (decided prior to 1995 amendment).

Improper comments. — Judge who was critical of the legal system during voir dire, implying that the system is governed by legislative whim rather than by well-settled principles, and who told the jury during trial of the consequences of their verdict, in terms of the mandated sentences for first- and second-degree murder, committed reversible error by depriving defendant of a fair trial. *State v. Henderson*, 1998-NMSC-018, 125 N.M. 434, 963 P.2d 511.

Circumspect behavior off the bench. — Judge who identified himself as a judge during issuance of citations to his son and his son's friends for violation of municipal ordinance, who asked officer issuing the citations if she knew who he was, and who involved himself in the municipal court proceedings on the citations acted with impropriety and his conduct constituted willful misconduct in office. *In re Ramirez*, 2006-NMSC-021, 139 N.M. 529, 135 P.3d 230.

Delegation of duty. — A judge was suspended for having delegated the duty to perform marriages to a municipal court clerk. *In re Perea*, 103 N.M. 617, 711 P.2d 894 (Ct. App. 1985) (decided prior to 1995 amendment).

Judge's relatives having ties to victim. — Recusal of a judge at a murder trial was not required where the judge's brother-in-law was the attorney representing the victim's family in a wrongful death action against defendant and the judge's son was employed as a law clerk by the district attorney. *State v. Fero*, 105 N.M. 339, 732 P.2d 866 (1987), *aff'd*, 107 N.M. 369, 758 P.2d 783 (1988) (decided prior to 1995 amendment).

Request for findings of fact and conclusions of law. — Because the court had decided in the state's favor, it was reasonable for the trial court to want to see requested findings of fact and conclusions of law from the plaintiff. Its request for those findings and conclusions did not show a bias or prejudice that would necessitate recusal, despite the defendants assertion of an apparent personal interest of the court in ensuring that the state submit its requested findings and conclusions. *State ex rel. Taxation & Revenue Dep't Motor Vehicle Div. v. Van Ruiten*, 107 N.M. 536, 760 P.2d 1302 (Ct. App.), *cert. denied*, 107 N.M. 413, 759 P.2d 200 (1988) (decided prior to 1995 amendment).

Failure to recuse when appearance of impropriety occurs. — Where district judge had a personal relationship with the defendant's attorney, who was defendant's boyfriend and who subsequently became the defendant's husband, and where district judge continued to preside over criminal case even though he acknowledged that his continued involvement in the case would foster the appearance of impropriety, the actions of district judge constituted willful misconduct in office. *In re McBee*, 2006-NMSC-024, 139 N.M.

529, 134 P.3d 769.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 86, 88.

Judge as witness in cause not on trial before him, 86 A.L.R.3d 633.

Consorting with, or maintaining social relations with, criminal figure as ground for disciplinary action against judge, 15 A.L.R.5th 923.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case, 85 A.L.R.5th 471.

Disqualification of judge for having decided different case against litigant - state cases, 85 A.L.R.5th 547.

48A C.J.S. Judges §§ 36, 37, 59, 107 to 129.

21-300. A judge shall perform the duties of office impartially and diligently.

A. **Judicial duties in general.** The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. **Adjudicative responsibilities.**

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall maintain order and decorum in judicial proceedings.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, marital status, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, marital status, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This subparagraph does not preclude legitimate advocacy or consideration by the court when race, sex, religion, national origin, disability, age, marital status, sexual orientation or socioeconomic status, or other similar factors, are issues in or relevant to the proceeding.

(7) 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. 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 concerning a pending or impending proceeding except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication if it might reasonably be perceived that the party contacting the judge may have gained a tactical advantage.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer with the parties and their lawyers in an effort to mediate or settle matters pending before the judge. Ordinarily the judge will meet jointly with the parties.

(e) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

(9) All cases decided by an opinion of an appellate court shall be by a collegial opinion. Before an opinion is placed in final form, the participating justices or judges shall attempt to reconcile any differences between them. Each justice or judge on each panel is charged with the duty of carefully reading and analyzing the pertinent submitted material on each case in which the justice or judge participates.

(10) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This subparagraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This subparagraph does not apply to proceedings in which the judge is a litigant in a personal capacity.

(11) A judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

(12) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(13) A judge shall not disclose or use, for any purpose unrelated to judicial duties,

nonpublic information acquired in a judicial capacity.

C. Administrative responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall inform and require the judge's staff, court officials and others subject to the judge's direction and control to observe the standards of confidentiality, fidelity and diligence that apply to the judge and to refrain from manifesting bias and prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

D. Disciplinary responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge who knows that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the New Mexico Judicial Standards Commission.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. A judge who knows that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the New Mexico Disciplinary Board.

(3) The requirements of Subparagraphs (1) and (2) of this paragraph do not apply to any communication concerning alcohol or substance abuse by a judge or attorney that is:

(a) made for the purpose of reporting substance abuse or recommending, seeking or furthering the diagnosis, counseling or treatment of a judge or an attorney for alcohol or substance abuse; and

(b) made to, by or among members or representatives of the Lawyer's Assistance Committee of the State Bar, Alcoholics Anonymous, Narcotics Anonymous or other support group recognized by the Judicial Standards Commission or the Disciplinary Board. Recognition of any additional support group by the Judicial Standards Commission or Disciplinary Board shall be published in the Bar Bulletin.

This exception does not apply to information that is required by law to be reported, including information that must be reported under Paragraph E of this rule, or to disclosures or threats of future criminal acts or violations of these rules.

(4) Acts of a judge, in the discharge of disciplinary responsibilities, required or

permitted by Subparagraphs (1) and (2) of Paragraph D of this rule are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

E. Judicial misconduct involving unlawful drugs; reporting requirement.

Notwithstanding the provisions of Paragraph D, any incumbent judge who illegally sells, purchases, possesses, or uses drugs or any substance considered unlawful under the provisions of the Controlled Substances Act, shall be subject to discipline under the Code of Judicial Conduct.

Any judge who has specific, objective, and articulable facts, or reasonable inferences that can be drawn from those facts, that a judge has engaged in such misconduct shall report those facts to the New Mexico Judicial Standards Commission. Reports of such misconduct shall include the following information:

- (1) name of the person filing the report;
- (2) address and telephone number where the person may be contacted;
- (3) a detailed description of the alleged misconduct;
- (4) dates of the alleged misconduct; and
- (5) any supporting evidence or material that may be available to the reporting person.

The Judicial Standards Commission shall review and evaluate reports of such misconduct to determine if the report warrants further review or investigation.

F. Definition. As used in this rule, "court personnel" does not include the lawyers in a proceeding before a judge.

[As amended, effective March 1, 1991; February 16, 1995; August 31, 2004; as amended by Supreme Court Order No. 09-8300-002, effective March 23, 2009.]

COMMITTEE COMMENTARY

Paragraph A

The commentary to Rule 21-100 NMRA also applies to Paragraph A of this rule.

Paragraph B (4)

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

Commentary B (5)

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

Paragraph B (7)

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers and other persons who are not participants in the proceeding, except to the limited

extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Subparagraph (7) of Paragraph B, it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus curiae*.

Certain *ex parte* communication is approved by Subparagraph (7) of Paragraph B to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage *ex parte* communication and allow it only if all the criteria stated in Subparagraph (7) are clearly met. A judge must disclose to all parties all *ex parte* communications described in Subparagraphs (a) and (b) of Subparagraph (7) of this paragraph regarding a proceeding pending or impending before the judge if it might reasonably be perceived that the party contacting the judge may have gained a tactical advantage. On rare occasions the judge may, with the consent of the parties, meet separately with the parties.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Subparagraph (7) of Paragraph B of this rule is not violated through law clerks or other personnel on the judge's staff. See Paragraph E of this rule for the definition of "court personnel".

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

Paragraph B (8)

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts. See Rule 11-408 NMRA of the Rules of Evidence relating to communications relating to compromise.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

The practices of a judge in the enjoyment of hours of personal holiday or recreation should leave no public perception that the business of the court is not a full-time demand or that the avoidance of delays in the administration of justice is not dependent upon active management of the judiciary.

Paragraphs B (10) and (11)

Paragraphs B (10) and (11) restrictions on judicial speech are essential to the maintenance of the integrity, impartiality and independence of the judiciary. A pending proceeding is one that has begun but not yet reached final disposition. An impending proceeding is one that is anticipated but not yet begun. The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. Subparagraphs (10) and (11) of Paragraph B do not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly.

Paragraph B (12)

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

Paragraph C

Appointees of the judge include officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

Paragraph D

Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.

Paragraph E

The definition of "court personnel" was taken from the Model Code of Judicial Conduct "terminology" section. It is used in Subparagraph (7)(c) and Subparagraph (9) of Paragraph B of this rule.

2008 Committee Commentary. — Notwithstanding the provisions of Paragraph D, Paragraph E sets forth the requirements for mandatory reporting of judicial misconduct involving unlawful drugs. See *In re Garza*, 2007-NMSC-028, 141 N.M. 831, 161 P.3d 876. In addition to the mandatory reporting requirements set forth in Paragraph E, the Supreme Court encourages any judge, employee of the judiciary, or lawyer who has a good faith basis to believe a judge is engaged in such misconduct, but does not have specific and articulable facts regarding such conduct, to report such belief to the Lawyer Assistance Committee hotline. The suggested reporting is to encourage members of the judiciary to seek appropriate help for alcohol and/or substance abuse problems.

[As amended, effective March 1, 1991; February 16, 1995; August 31, 2004; as amended by Supreme Court Order No. 09-8300-002, effective March 23, 2009.]

COMPILER'S ANNOTATIONS

Cross references. — For broadcasting, televising, photographing and recording of court proceedings, see Rule 23-107 NMRA.

The 1995 amendment, effective February 16, 1995, rewrote the rule and rewrote the commentary.

The 2004 amendment, effective August 31, 2004, added a new Subparagraph (11) of Paragraph B prohibiting a judge with respect to cases, controversies or issues from making pledges, promises or commitments "that are inconsistent with the impartial performance of the adjudicative duties of the office", redesignated Subparagraphs (11) and (12) as Subparagraphs (12) and (13); amended the commentary to change the heading "Paragraph B (9)" to "Paragraphs B (10) and (11)"; added the first three sentences after the rewritten heading relating to restrictions on judicial speech; and revised internal references in the commentary to be consistent with the 2004 amendment.

The 2009 amendment, as approved by Supreme Court Order 09-8300-002, effective March 23, 2009, in Subparagraph (1) of Paragraph D, replaced "having knowledge" with "who knows" and replaced "appropriate authority" with "New Mexico Judicial Standards Commission"; in Subparagraph (2) of Paragraph D, replaced "having knowledge" with "who knows" and replaced "appropriate authority" with "New Mexico Disciplinary Board"; in Subparagraph (3) of Paragraph D, deleted "(a) intended to be confidential"; renumbered "(b)" as "(a)" and "(c)" as "(b)"; in renumbered "(b)", replaced "a lawyers support group" with "the Lawyers Assistance Committee of the State Bar" and added "including information that must be reported under Paragraph E of this rule,"; added a new Paragraph E; and renumbered former Paragraph E as Paragraph F.

Delegation of duty. — A judge was suspended for having delegated the duty to perform marriages to a municipal court clerk. *In re Perea*, 103 N.M. 617, 711 P.2d 894 (Ct. App. 1985) (decided prior to 1995 amendment).

Order and decorum. — Judge failed to maintain order and decorum in the courtroom when he raised his voice to attorney appearing before him, prevented attorney from making full objections for the record, and admonished attorney in front of her client and his conduct constituted misconduct in office. *In re Ramirez*, 2006-NMSC-021, 139 N.M. 529, 135 P.3d 230.

Breach of agreement with chief judge. — Where district judge agreed with chief judge of district court that district judge would recuse himself in a case in which his continued involvement would create the appearance of impropriety and where district judge subsequently breached the agreement and reinserted himself in the case, the actions of district judge constituted willful misconduct in office. *In re McBee*, 2006-NMSC-024, 139 N.M. 529, 134 P.3d 769.

Ex parte communications. — Where district judge recused himself in a criminal case, but subsequently engaged in ex parte communications with defense counsel concerning his plans to reassert control over the case, the actions of district judge constituted willful misconduct in office. *In re McBee*, 2006-NMSC-024, 139 N.M. 529, 134 P.3d 769.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Abuse or misuse of contempt power as ground for removal or discipline of judge, 76 A.L.R.4th 982.

Disciplinary action against judge for engaging in ex parte communication with attorney, party, or witness, 82 A.L.R.4th 567.

Removal or discipline of state judge for neglect of, or failure to perform, judicial duties, 87 A.L.R.4th 727.

Disciplinary action against judge on ground of abusive or intemperate language or conduct toward attorneys, court personnel, or parties to or witnesses in actions, and the like, 89 A.L.R.4th 278.

Gestures, facial expressions, or other nonverbal communication of trial judge in criminal case as ground for relief, 45 A.L.R.5th 531.

Disqualification of judge based on property-ownership interest in litigation which consists of more than mere stock-state cases, 56 A.L.R.5th 783.

21-400. Disqualification.

A. **Recusal.** A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(1) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a witness concerning it;

(3) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child, wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter of the controversy or in a party to the proceeding or has any other more than *de minimis* interest that could be substantially affected by the proceeding;

(4) the judge acted in an official capacity in any inferior court;

(5) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(a) is a party to the proceeding, or an officer, director or trustee of a party;

(b) is acting as a lawyer in the proceeding;

(c) is known by the judge to have a more than *de minimis* interest that could be substantially affected by the proceeding; or

(d) is to the judge's knowledge likely to be a material witness in the proceeding;

(6) the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to:

(a) an issue in the proceeding; or

(b) the controversy in the proceeding.

B. Duty to be informed. A judge shall use reasonable efforts to keep informed about the judge's personal and fiduciary economic interests, and make reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household. In keeping informed about the judge's personal economic and fiduciary interests, the judge may rely on representations of professional investment or financial advisors.

C. Remittal of disqualification. A judge disqualified by the terms of Paragraph A of this rule may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

D. Definitions. As used in this rule:

(1) "*de minimis*" means an insignificant interest that could not raise reasonable question as to a judge's impartiality;

(2) "economic interest" means ownership of a more than *de minimis* legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a

party, except that:

(a) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(b) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(c) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(d) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities; and

(3) "third degree of relationship" means the following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

[Approved, January 1, 1984; as amended, effective February 16, 1995; August 31, 2004.]

Committee commentary.—

Paragraph A. Recusal.

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Paragraph A of this rule apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge. A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

The fact that an employee of the court is a party to the proceeding does not of itself disqualify the judge. The judge shall consider the specifics of the case in determining whether the judge's impartiality might reasonably be questioned and if a recusal is required.

Paragraph A (1) and (2)

A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of Subparagraph (2) of Paragraph A; a judge formerly employed by a

governmental agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

Paragraph A (3)

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Subparagraph (1) of Paragraph A, or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Paragraph A(5)(c) of this rule may require the judge's disqualification.

Paragraph A (6)

Subparagraph (6) of Paragraph A prohibits a judge from pre-judging an issue. This Subparagraph is not intended to limit any comment allowed under Rule 21-500 NMRA.

Paragraph C. Remittal of disqualification.

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

The issue of whether a judge is required to recuse for an appearance of impropriety after being threatened by a defendant is "whether an objective, disinterested observer, fully informed of the underlying facts, would entertain significant doubt that justice would be done absent recusal." *State v. Riordan*, 2009-NMSC-022, ¶ 11, 146 N.M. 281, 209 P.3d 773 (internal quotation marks and citations omitted). Threats alone do not require recusal, and deference should be given to the trial court's decision when there is a significant possibility that the defendant is attempting to manipulate the justice system. [Amended by Supreme Court Order No. 09-8300-023, effective September 4, 2009.]

COMPILER'S ANNOTATIONS

Compiler's notes. — The commentary relating to A(6) is not a part of the ABA commentary.

The 1995 amendment, effective February 16, 1995, rewrote the prior rule to comprise Paragraph A, added Subparagraph A(3), added Paragraphs B, C, and D, and rewrote the commentary.

The 2004 amendment, effective August 31, 2004, added a new Subparagraph (6) of Paragraph A providing for the recusal of a judge in a judicial proceeding if the judge, while a judge or a candidate for judicial office, made a public statement that commits, or appears to commit, the judge with respect to an issue or controversy in the judicial proceeding; and added Paragraph A (6) of the committee commentary.

The 2009 amendment, approved by Supreme Court Order No. 09-8300-023, effective September 4, 2009, added the last paragraph of the committee commentary.

Threats against a presiding judge. — Where three criminal cases pending against the defendant were assigned to the same judge; during the pendency of the three cases, the defendant was charged with conspiring to commit an assault with a deadly weapon on the judge; the judge filed a recusal in the conspiracy case, but not in the other three pending cases; and there was no showing of bias by the judge against the defendant, the judge did not abuse the judge's discretion in denying the defendant's motion requesting the recusal of the judge. *State v. Riordan*, 2009-NMSC-022, 146 N.M. 281, 209 P.3d 773.

Denial of recusal not an abuse of discretion. — Where defendant was a child offender under the juvenile system; the court determined that defendant was not amenable to rehabilitation or treatment as a child and sentenced defendant as an adult after defendant pled guilty to second degree murder; prior to being appointed as district judge, the trial judge had been appointed as a contract public defender to represent the victim, who had been murdered by defendant, in a juvenile delinquency proceeding; the judge's former law partner actually appeared at all the hearings in the victim's case; and the judge did not personally represent the victim, engage in plea negotiations on the victim's behalf, discuss a plea with the victim or the victim's parents, appear before the court on behalf of the victim or the victim's parents, or have direct contact with the victim in the juvenile proceedings, the judge did not err in denying defendant's request for recusal. *State v. Trujillo*, 2009-NMCA-128, 147 N.M. 334, 222 P.3d 1040, cert. granted, 2009-NMCERT-011.

Judge acting as mediator and as hearing officer to impose sanctions. — Where a district judge appointed another district judge as a mediator to conduct a settlement conference; the mediator judge was subsequently appointed to hear motions for sanctions against one party for alleged bad faith participation in the settlement conference; the mediator judge heard the motions, made findings of fact, concluded that the party had conducted itself in bad faith at the conference, and entered an order requiring the party to pay a sanction; and the appointing district judge independently reviewed the mediator judge's decision and came to its own independent conclusions regarding sanctions; the appointing judge did not abuse its discretion in appointing the mediator judge to hear the motions for sanctions. *Carlsbad Hotel Associates, L.L.C. v. Patterson-UTI Drilling Co.*, 2009-NMCA-005, 145 N.M. 385, 199 P.3d 288, cert. granted, 2009-NMCERT-001.

Motion to recuse after waiver. — Where the district judge disclosed the basis for his disqualification and the respondent waived disqualification by agreeing to abide by the judge's decisions on all issues of the case, the judge was not required to recuse himself upon the motion of the petitioner after the waiver. In the Matter of Adoption Petn. of Rebecca M., 2008-NMCA-038, 143 NM 554, 178 P.3d 839.

Stringent code of conduct. — The conduct prescribed for judges and justices is more stringent than conduct generally imposed on other public officials. *In re Romero*, 100 N.M. 180, 668 P.2d 296 (1983) (decided prior to 1995 amendment).

Duty to exercise judicial function. — Except in those cases where a judge's impartiality might be reasonably questioned, he must exercise his judicial function. *Gerety v. Demers*, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

Recusal rests within discretion of trial judge. *Demers v. Gerety*, 92 N.M. 749, 595 P.2d 387 (Ct. App.), aff'd in part, rev'd on other grounds, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment); *Klindere v. Worley Mills, Inc.*, 96 N.M. 743, 634 P.2d 1295 (Ct. App. 1981);(decided prior to 1995 amendment).

Judge has discretionary power to disqualify himself sua sponte whenever the existence of any semblance of judicial bias or impropriety in a proceeding in his court comes to his attention. *Demers v. Gerety*, 92 N.M. 749, 595 P.2d 387 (Ct. App.), aff'd in part, rev'd on other grounds, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

Statement of reasons for recusal not required. — When a recusal is challenged, and the challenge is denied, a district judge does not have a duty to state in the order of denial that he has valid reasons for recusing himself. *Gerety v. Demers*, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

Compelling constitutional, statutory or ethical reason for recusal required. — Although the reasons for a judge to disqualify himself may be personal and he need not state them, nonetheless a judge has a duty to perform his judicial role, and he has no right to disqualify himself unless there is a compelling

constitutional, statutory or ethical cause for so doing. *Gerety v. Demers*, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

Grounds relied on for disqualification must be adequate, because a judge has no right to disqualify himself in the absence of a valid reason. *Demers v. Gerety*, 92 N.M. 749, 595 P.2d 387 (Ct. App.), *aff'd in part, rev'd on other grounds*, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

Suspicion of bias or prejudice is not enough to disqualify a judge. *Roybal v. Morris*, 100 N.M. 305, 669 P.2d 1100 (Ct. App. 1983) (decided prior to 1995 amendment).

Casual transaction cannot be basis of disqualification. — A casual transaction between two people is not a negative confrontation, so as to amount to an appearance of bias requiring voluntary disqualification. *Lujan v. New Mexico State Police Bd.*, 100 N.M. 149, 667 P.2d 456 (1983) (decided prior to 1995 amendment).

Establishing record of impropriety. — Improper for trial judge to refuse defense counsel an opportunity to establish on the record defense counsel's objections to comments he claimed the trial judge had made during a recess. *State v. Martin*, 101 N.M. 595, 686 P.2d 937 (1984) (decided prior to 1995 amendment).

Impartiality throughout case required. — When judge believes he will be unable to remain impartial he should remove himself from the case in order to avoid any hint of impropriety. *Gerety v. Demers*, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

Bias or prejudice as grounds for disqualification. — Bias or prejudice towards an attorney on each matter raised in the trial court is insufficient to disqualify a judge. This rule, however, is not absolute. If the bias and prejudice toward an attorney is of such a degree as to adversely affect the interest of the client, bias and prejudice toward an attorney is sufficient. *Martinez v. Carmona*, 95 N.M. 545, 624 P.2d 54 (Ct. App. 1980) (decided prior to 1995 amendment).

When a district judge believes that his impartiality might reasonably be questioned with reference to bias and prejudice concerning a party, he must not exercise his judicial function. *Martinez v. Carmona*, 95 N.M. 545, 624 P.2d 54 (Ct. App. 1980) (decided prior to 1995 amendment) *Klindera v. Worley Mills, Inc.*, 96 N.M. 743, 634 P.2d 1295 (Ct. App. 1981);(decided prior to 1995 amendment).

Extrajudicial source. — Refusal of the judge to recuse himself in a malicious abuse of process case was proper pursuant to this rule where the analogy the court drew between a party and a well-known literary character (*Jay Gatsby*) did not establish any meaningful extrajudicial source. *Dawley v. La Puerta Architectural Antiques, Inc.*, 2003-NMCA-029, 133 N.M. 389, 62 P.3d 1271.

Recusal not required for prior judicial encounters. — The defendant's arguments that the trial judge was biased, based on the judge's previous contempt charges and sanctions or dislike toward the defendant, were without merit, since bias requiring recusal must arise from a personal, extra-judicial source, not a judicial source. *Purpura v. Purpura*, 115 N.M. 80, 847 P.2d 314 (Ct. App. 1993) (decided prior to 1995 amendment).

Failure to recuse when appearance of impropriety occurs. — Where district judge had a personal relationship with the defendant's attorney, who was defendant's boyfriend and who subsequently became the defendant's husband, and where district judge continued to preside over criminal case even though he acknowledged that his continued involvement in the case would foster the appearance of impropriety, the actions of district judge constituted willful misconduct in office. *In re McBee*, 2006-NMSC-024, 139 N.M. 529, 134 P.3d 769.

Review of decision not to recuse. — A decision contrary to recusal is reviewable on appeal only if it amounts to an abuse of sound judicial discretion. *Martinez v. Carmona*, 95 N.M. 545, 624 P.2d 54 (Ct.

App. 1980) (decided prior to 1995 amendment).

When a movant has failed to meet its burden of establishing that the judge has a personal or extrajudicial bias or prejudice against it, the judge's refusal to disqualify himself is proper. *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981) (decided prior to 1995 amendment).

The constitutional right to disqualify a judge may be waived. *State v. Lucero*, 104 N.M. 587, 725 P.2d 266 (Ct. App. 1986) (decided prior to 1995 amendment).

Comment reflecting feelings about violent crimes after conviction obtained. — Comment reflecting judge's feelings about violent crimes once a conviction was obtained did not suggest that the judge had a personal bias or prejudice against defendant during trial. *State v. Swafford*, 109 N.M. 132, 782 P.2d 385 (Ct. App. 1989) (decided prior to 1995 amendment).

A claim of judicial bias cannot be based upon the imposition of the maximum legal sentence. *State v. Swafford*, 109 N.M. 132, 782 P.2d 385 (Ct. App. 1989) (decided prior to 1995 amendment).

Judge's refusal to accept a tendered plea agreement did not demonstrate judicial bias or prejudice, where, when the plea and disposition agreement was tendered, the judge reserved ruling on it until he could consider a presentence report, information on treatment programs, and written statements from the victim of the crime and her brother regarding their feelings and views on the proposed disposition. *State v. Swafford*, 109 N.M. 132, 782 P.2d 385 (Ct. App. 1989) (decided prior to 1995 amendment).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 95 et seq.

Relationship of judge to one who is party in an official or representative capacity as disqualification, 10 A.L.R.2d 1307.

Relationship to attorney in case as disqualifying judge, 50 A.L.R.2d 143.

Remarks or acts of trial judge criticizing, rebuking or punishing defense counsel in criminal case, as requiring reversal, 62 A.L.R.2d 166.

Prior representation or activity as attorney or counsel as disqualifying judge, 72 A.L.R.2d 443, 16 A.L.R.4th 550.

Prejudicial effect of trial judge's remark during civil jury trial disparaging the litigants, the witnesses or the subject matter of the litigation, 83 A.L.R.2d 1128, 35 A.L.R.5th 1.

Prejudicial effect of remarks of trial judge criticizing counsel in civil case, 94 A.L.R.2d 826.

Disqualification of judge for bias against counsel for litigant, 23 A.L.R.3d 1416.

Disqualification of judge by relative's ownership of stock in corporation which is party to action or proceeding, 25 A.L.R.3d 1331.

Prejudicial effect of trial judge's remarks, during criminal trial, disparaging accused, 34 A.L.R.3d 1313.

Disqualification of judge or one acting in judicial capacity to preside in a case in which he has a pecuniary interest in the fine, penalty or forfeiture imposed upon the defendant, 72 A.L.R.3d 375.

Membership in fraternal or social club or order affected by a case as ground for disqualification of judge, 75 A.L.R.3d 1021.

Validity, propriety, and effect of allowing or prohibiting media's broadcasting, recording, or photographing court proceedings, 14 A.L.R.4th 121.

Waiver or loss of right to disqualify judge by participation in proceedings - modern state civil cases, 24 A.L.R.4th 870.

Disqualification of judge because of assault or threat against him by party or person associated with party, 25 A.L.R.4th 923.

Disqualification of judge because of political association or relation to attorney in case, 65 A.L.R.4th 73.

Judge's previous legal association with attorney connected to current case as warranting disqualification, 85 A.L.R.4th 700.

Disqualification of judge as affecting validity of decision in which other nondisqualified judges participated, 29 A.L.R.5th 722.

Disqualification of judge for bias against counsel for litigant, 54 A.L.R.5th 575.

Disqualification of judge based on property-ownership interest in litigation which consists of more than mere stock-state cases, 56 A.L.R.5th 783.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case, 85 A.L.R.5th 471.

Disqualification of judge for having decided different case against litigant - state cases, 85 A.L.R.5th 547.

Conduct or bias of law clerk or other judicial support personnel as warranting recusal of federal judge or magistrate, 65 A.L.R. Fed. 775.

48A C.J.S. Judges §§ 107 to 129.

21-500. A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

A. **Extra-judicial activities in general.** A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast doubt on the judge's capacity to act impartially as a judge;
- (2) demean the judicial office;
- (3) interfere with the proper performance of judicial duties; or
- (4) violate the judge's oath and obligation to uphold the laws and constitutions of the United States and the State of New Mexico.

B. **Avocational activities.** A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

C. **Governmental, civic or charitable activities.**

(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the judiciary or matters relating to the judiciary or which affect the interests of the judiciary, the legal system or the administration of justice or except when acting *pro se* in a matter involving the judge or the judge's interests;

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities;

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal, or civic organization not conducted for profit, subject to the following limitations and other requirements of this Code:

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization:

(i) will be engaged in proceedings that would ordinarily come before the judge; or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Subparagraph (3)(b)(i) of this paragraph, if the membership solicitation is essentially a fund-raising mechanism;

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

D. Financial activities.

(1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position; or

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

(3) A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this

Code, manage and participate in:

- (a) a business closely held by the judge or members of the judge's family; or
- (b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept a gift, bequest, favor or loan from anyone except for:

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion, including, but not limited to, a wedding anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative;

(f) a loan from a lending or similar institution in its regular course of business on the same terms generally available to persons who are not judges; or

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants.

E. Fiduciary activities.

(1) A judge shall not serve as the executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family or the family of a close friend, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

F. Service as an arbitrator or mediator. A judge shall not act as an arbitrator or mediator

or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

G. Practice of law. A judge shall not practice law. Notwithstanding this prohibition, a judge may act *pro se* and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

H. Conflicting compensated activities. A judge shall not hold any other paid position, judicial or otherwise, that conflicts with the hours and duties the judge is required to perform for every judicial position. A judge shall devote the number of hours that is required by any judicial position held. In no event shall other paid employment or compensable activity hours be performed simultaneously.

I. No full-time municipal, magistrate, metropolitan, district or appellate judge may hold any other judicial position, elected or appointed.

[As amended, effective January 1, 1987; March 1, 1988 and October 1, 1989; February 16, 1995.]

COMMITTEE COMMENTARY

Paragraph A. Extra-judicial activities in general

Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.

Paragraph B. Avocational activities

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

In Paragraph B and other paragraphs of this rule, the phrase "subject to the requirements of this Code" is used, notably, in connection with a judge's governmental, civic or charitable activities. This phrase is included to remind judges that the use of permissive language in various provisions of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

Paragraph C. Governmental, civic or charitable activities

Paragraph C(1)

See Paragraph B of Rule 21-200 regarding the obligation to avoid improper influence.

Paragraph C(2)

Paragraph C(2) prohibits a judge from accepting any governmental position except one relating to the law, legal system or administration of justice as authorized by Paragraph C(3). The appropriateness of accepting extra judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra judicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary.

Paragraph C(2) does not govern a judge's service in a nongovernmental position. See Paragraph C(3) of this rule permitting service by a judge with organizations devoted to the improvement of the law, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civic organizations not conducted for profit. For example, service on the board of a public educational

institution, unless it were a law school, would be prohibited under Paragraph C(2), but service on the board of a public law school or any private educational institution would generally be permitted under Paragraph C(3).

Paragraph C(3)

Paragraph C(3) of this rule does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice; see Paragraph C(2).

See Commentary to Paragraph B of this rule regarding use of the phrase "subject to the following limitations and the other requirements of this Code". As an example of the meaning of the phrase, a judge permitted by Paragraph C(3) of this rule to serve on the board of a fraternal institution may be prohibited from such service by Paragraph A of Rule 21-200 if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.

Service by a judge on behalf of a civic or charitable organization may be governed by other provisions of Rule 21-400 in addition to Paragraph C of this rule. For example, a judge is prohibited by Paragraph G from serving as a legal advisor to a civic or charitable organization.

Paragraph C(3)(a)

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the court for adjudication.

Paragraph C(3)(b)

A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system or the administration of justice or a nonprofit educational, religious, charitable, fraternal or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing or by telephone except in the following cases: (1) a judge may solicit for funds or memberships other judges over whom the judge does not exercise supervisory or appellate authority; (2) a judge may solicit other persons for membership in the organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves; and (3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge's signature.

Use of an organization letterhead for fund-raising or membership solicitation does not violate Paragraph C(3)(b) provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

If requested to be a speaker or guest of honor at an organization or fund-raising event, the judge should seriously consider whether the acceptance of such a role would constitute the use of the prestige of judicial office for fund-raising purposes. Mere attendance at such an event is permissible if otherwise consistent with this Code.

Paragraph D. Financial activities

Paragraph D(1)

When a judge acquires information in a judicial capacity, such as material contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain. See Rule 21-200 B; see also Rule 21-300 B(12).

A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's court. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification. With respect to affiliation of relatives of judge with law firms appearing before the judge, see Commentary to Paragraph A of Rule 21-400 relating to disqualification.

Participation by a judge in financial and business dealings is subject to the general prohibitions in Paragraph A of this rule against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Rule 21-200 against activities involving impropriety or the appearance of impropriety and the prohibition in Paragraph B of Rule 21-200 against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Rule 21-100. See Commentary for Paragraph B of this rule regarding use of the phrase "subject to the requirements of this Code."

Paragraph D(2)

This subparagraph provides that, subject to the requirements of this Code, a judge may hold and manage investments owned solely by the judge, investments owned solely by a member or members of the judge's family, and investments owned jointly by the judge and members of the judge's family.

Paragraph D(3)

Subject to the requirements of this Code, a judge may participate in a business that is closely held either by the judge alone, by members of the judge's family, or by the judge and members of the judge's family.

Although participation by a judge in a closely-held family business might otherwise be permitted by Paragraph D(3) of this rule, a judge may be prohibited from participation by other provisions of this Code when, for example, the business entity frequently appears before the judge's court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a closely-held family business if the judge's participation would involve misuse of the prestige of judicial office.

Paragraph D(5)

Paragraph D(5) does not apply to contributions to a judge's campaign for judicial office, a matter governed by Rule 21-800. Because a gift, bequest, favor or loan to a member of the judge's family residing in the judge's household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.

Paragraph D(5)(d)

A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required. See, however, Paragraph D(5)(e).

Paragraph D(5)(h)

Paragraph D(5)(h) prohibits judges from accepting gifts, favors, bequests or loans from lawyers or their

firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.

Paragraph E. Fiduciary activities

The restrictions imposed by this rule may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Subparagraph (4) of Paragraph D.

Paragraph F. Service as an arbitrator or mediator

Paragraph F does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties.

Paragraph G. Practice of law

This prohibition refers to the practice of law in a representative capacity and not in a *pro se* capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Paragraph B of Rule 21-200.

The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

COMPILER'S ANNOTATIONS

The 1995 amendment, effective February 16, 1995, rewrote the rule and rewrote the commentary.

Financial activity posing conflict of interest. — A municipal judge was in violation of this canon because he owned and directed a "driving while intoxicated school" while serving on the bench and sentencing people to attend said school; this conflict in interest reflected adversely on his impartiality as a member of the judiciary. *In re Rainaldi*, 104 N.M. 762, 727 P.2d 70 (1986) (decided prior to 1995 amendment).

Pro se appearance as party defendant not violative of Paragraph F (now G). — State court judge's pro se appearance as a party defendant in law suit pending before federal district court does not constitute practice of law in violation of Paragraph F (now see Paragraph G). *United States v. Martinez*, 101 N.M. 423, 684 P.2d 509 (1984) (decided prior to 1995 amendment).

Acceptance of gratuity for marriage ceremony. — Except for municipal judges, a judge may not accept a gratuity in connection with the performance of a marriage ceremony without violating the New Mexico Constitution. 1991 Op. Att'y Gen. No. 91-09 (decided prior to 1995 amendment).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 44 et seq.

Other public offices or employments within prohibitions as regards judicial officers of constitutional or statutory provisions against holding more than one office, 89 A.L.R. 1113.

What amounts to practice of law within contemplation of constitutional or statutory provision which makes such practice a condition of eligibility to a judicial office or forbids it by one holding judicial position, 106 A.L.R. 508.

Propriety and permissibility of judge engaging in practice of law, 89 A.L.R.2d 886.

Validity and application of state statute prohibiting judge from practicing law, 17 A.L.R.4th 829.

Disqualification of judge based on property-ownership interest in litigation which consists of more than mere stock-state cases, 56 A.L.R.5th 783.

48A C.J.S. Judges §§ 35 to 38.

21-600. Reporting quasi-judicial and extra-judicial activities and compensation.

A. **Compensation and reimbursement.** A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if neither the source nor amount of such payments gives the appearance of influencing the judge's official duties, or otherwise gives the appearance of impropriety.

B. **Extra-judicial compensation.** Extra-judicial compensation is defined as being the consideration received for services rendered by a judge to a person, firm, corporation or association other than the salary, benefits and perquisites of office provided to the judge for the performance of official judicial duties. Extra-judicial compensation does not include income from interest, dividends, rents, royalties, working interests, proceeds of or profits from the sale or exchange of capital assets as defined by the Internal Revenue Code and regulations, or collection of fees or retirement benefits earned or reimbursement of expenses incurred prior to entering judicial service. Compensation or income of a spouse attributed to the judge by operation of community property or other law is not extra-judicial compensation of the judge. Extra-judicial compensation should not exceed a reasonable amount for the activities performed, and should not exceed what a person who is not a judge would receive for the same activity.

C. **Expense reimbursement.** Expense reimbursement should be limited to the actual cost of travel, food and lodging and other expenses reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse. Any payment in excess of actual cost is extra-judicial compensation subject to the requirements of this rule.

D. **Public reports.** In addition to all other reports required by law, a judge should report the date, place and nature of any activity for which the judge received extra-judicial compensation as defined in this rule, including the name of the payor and the amount, or character and value, of extra-judicial compensation so received. The judge's report shall be filed as a public record in the office of the clerk of the Supreme Court of New Mexico on or before April 15 of each year covering the preceding calendar year.

[As amended, effective January 1, 1987; February 16, 1995.]

COMMITTEE COMMENTARY

Paragraph A. Compensation and reimbursement

The Code does not prohibit a judge from accepting honoraria or speaking fees provided that the amount of the extra-judicial compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts of interest are created by the arrangements. A judge must not appear to trade on judicial office for personal advantage. A judge shall not spend significant time away from court duties in order to meet speaking or writing commitments. Neither the source of payment nor the amount paid as extra-judicial compensation must raise any question of undue influence or the judge's ability or willingness to be impartial. Engaging in business for profit with the State of New Mexico or any of its departments, officials, or political subdivisions, either in person or through an entity in which the judge

owns an interest, should be carefully scrutinized to avoid creating a conflict of interest or suggesting that the judge is exploiting judicial office for personal advantage.

Paragraph B. Extra-judicial compensation

No judge may ask for any remuneration for performing a marriage ceremony, but may receive an unsolicited gratuity for performing a marriage outside normal business hours.

COMPILER'S ANNOTATIONS

The 1995 amendment, effective February 16, 1995, rewrote the rule and added the commentary.

Internal Revenue Code. — For the Internal Revenue Code, referred to in Paragraph B, see 26 U.S.C. § 1 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 27.

48A C.J.S. Judges § 35.

21-700. Elections and political activity.

A. Incumbent judges.

(1) A judge may engage in political activity on behalf of the legal system, the administration of justice, measures to improve the law and as expressly authorized by law or by this Code.

(2) A judge may, unless and except as prohibited by law:

(a) purchase tickets for and attend political gatherings;

(b) identify the political party of the judge, except as prohibited by Subparagraph (6) of Paragraph B of this rule; and

(c) contribute to a political organization.

(3) A judge shall not:

(a) act as a leader or hold an office in a political organization;

(b) publicly endorse or publicly oppose a candidate for public office through the news media or in campaign literature;

(c) make speeches on behalf of a political organization; or

(d) solicit funds for a political organization or candidate.

B. Candidates for election to judicial office. Candidates for election to judicial office in partisan, non-partisan and retention elections, including judges, lawyers and non-lawyers, are permitted to participate in the electoral process, subject to the requirements that all candidates:

(1) shall maintain the dignity appropriate to judicial office, act in a manner consistent with the impartiality, integrity and independence of the judiciary and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate;

(2) shall prohibit public officials and employees subject to the candidate's direction or

control from doing for the judge what the candidate is prohibited from doing under these rules;

(3) shall not allow any other person to do for the candidate what the candidate is prohibited from doing under these rules, except activities permitted to a campaign committee;

(4) shall not:

(a) with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office; or

(b) misrepresent the candidate's or the candidate's opponent's identity, qualifications, present position or other material fact;

(5) may speak at public meetings, subject to these rules;

(6) may use advertising that does not contain any misleading contents, provided that the advertising is within the bounds of proper judicial decorum and does not, in nonpartisan elections, contain any reference to the candidate's affiliation with a political party; and

(7) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Paragraph B(4) of this rule.

C. Elections for non-judicial offices. No judge of any court in the State of New Mexico may while in office be nominated or elected to a public non-judicial office. A judge must, when filing a statement of candidacy for a non-judicial office, resign the judge's office immediately.

D. Candidates seeking appointment to judicial office.

(1) A candidate for appointment to judicial office shall not solicit or accept funds, personally or through a committee or otherwise, to support the candidacy.

(2) A candidate for appointment to judicial office shall not engage in political activity to secure the appointment except that such candidate may:

(a) communicate with the appointing authority, including any nominating commission designated to screen candidates;

(b) seek support or endorsement for the appointment from organizations and from individuals to the extent requested, required or permitted by the appointing authority and the nominating commission; and

(c) provide to the appointing authority and the nominating commission information as to the candidate's qualifications for office.

E. Judges seeking appointment to public, non-judicial office.

(1) A judge seeking appointment to a public, non-judicial office shall not:

(a) solicit or accept funds, personally or through a committee, or otherwise, to support the candidacy;

(b) engage in any political activity to secure the appointment except:

(i) communicating with the appointing authority;

(ii) seeking the support or endorsement for the appointment from organizations and from individuals to the extent requested, required or permitted by the appointing authority; and

(iii) providing to the appointing authority information concerning the candidate's qualifications for the office.

(2) A judge seeking appointment to a public non-judicial office, during the time the appointment is sought, shall be disqualified from presiding or participating as a judge in any legal proceeding involving or materially affecting the interests of:

(a) the appointing authority; or

(b) an organization or individual that has been contacted by the candidate to make, or is known by the candidate to be making, a recommendation to the appointing authority concerning the appointment.

F. **Definition.** As used in this rule "political organization" means a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

[As amended, effective June 1, 1990; July 1, 1990; February 16, 1995; August 31, 2004.]

COMMITTEE COMMENTARY

With respect to a judge's activity on behalf of measures to improve the law, the legal system and the administration of justice, see Subparagraphs (1) through (3) of Paragraph C of Rule 21-500 NMRA. The Code does not prohibit a judge in the exercise of administrative functions from engaging in planning and other official activities with members of the executive and legislative branches of government.

A judge or candidate for judicial office retains the right to participate in the political process as a voter.

Where false information concerning a judicial candidate is made public, a judge or another judicial candidate having knowledge of the facts is not prohibited from making the facts public.

A candidate for elective judicial office is not prohibited from retaining during candidacy a public office such as county prosecutor, which is not an office in a "political organization".

A judge or judicial candidate is not prohibited from privately expressing the judge's or judicial candidate's views on judicial candidates or other candidates for public office.

A candidate for judicial office does not publicly endorse another candidate for public office by having that candidate's name on the same ticket, or by participating in joint fund-raising with other judicial candidates, or by running for election as part of a slate of judicial candidates.

Although a judicial candidate must encourage members of the judicial candidate's family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.

The Code prohibits a candidate for judicial office from making statements that commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of the candidate's personal views. The Code does not prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. Paragraph B(4) of this rule applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment.

This rule does not prohibit a candidate from initiating an evaluation by a judicial selection commission or bar association, or, subject to the requirements of the Code of Judicial Conduct, from responding to a

request for information from any organization.

COMPILER'S ANNOTATIONS

Compiler's notes. — The ABA model rule provides that a candidate may not "knowingly" misrepresent the candidate's identity, qualifications, present position or other material fact.

The 1995 amendment, effective February 16, 1995, rewrote the rule and added the commentary.

The 2004 amendment, effective August 31, 2004, made gender neutral revisions; added to Subparagraph (1) of Paragraph B to require judicial candidates to "act in a manner consistent with the impartiality, integrity and independence of the judiciary; amended Subparagraph (4)(a) of Paragraph B to prohibit judicial candidates from making pledges or commitments with respect to cases, controversies or issues that are likely to come before the court that are inconsistent with the impartial performance of the adjudicative duties; deleted former Subparagraphs (4)(b) and (4)(c) of Paragraph B; redesignated former Subparagraph (4)(d) of Paragraph B as present Subparagraph (4)(b) and amended Subparagraph (4)(b) to prohibit a candidate from misrepresenting the candidate's opponent's position or other material fact.

The endorsement clause is a constitutional limitation on a judge's right to endorse political candidates. In the Matter of William A. Vincent, Jr., 2007-NMSC-056, 143 N.M. 56, 172 P.3d 605.

Judge cannot simultaneously run for separate judicial positions. — Paragraph B indicates that a judge may be nominated or run for another judicial office without resigning. It does not, however, state that a judge may simultaneously run for separate judicial positions. 1990 Op. Att'y Gen. No. 90-04 (decided prior to 1995 amendment).

Judicial candidate advertising. — Minnesota judicial advertising rule held unconstitutional under the strict scrutiny test. Republican Party of MN v. White, 536 U.S. 765 (2002).

Law reviews. — For article, "Judges and Politics: Accountability and Independence in an Election Year," see 12 N.M.L. Rev. 873 (1982).

For note, "Are There Any Limits on Judicial Candidates' Political Speech After Republican Party of Minnesota v. White," see 33 N.M.L. Rev. 449 (2003).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 47.

48A C.J.S. Judges § 37.

21-800. A judge shall refrain from campaign fund-raising activity which has the appearance of impropriety.

A. Contributions creating appearance of impropriety. Candidates for judicial office in both partisan and retention elections shall refrain from campaign fund-raising activity which has the appearance of impropriety, and shall not accept any contribution that creates an appearance of impropriety.

B. Solicitation for other campaigns and candidates. Subject to the restrictions of this rule, candidates in both partisan and retention elections for judicial office may solicit contributions for their own campaigns, but shall not solicit funds for any other political campaign, or for any candidate for any other office. Judicial candidates may run for election as part of a slate of judicial candidates and may participate in joint fund-raising events with other judicial candidates.

C. **Campaign committees.** Candidates in both partisan and retention elections shall establish committees of one or more responsible persons to conduct campaigns for the candidate using media advertisements, brochures, mailings, candidate forums and other means not prohibited by law or these rules. Campaign committees may solicit and accept reasonable campaign contributions, and obtain public statements of support in behalf of the candidate, subject to the restrictions of these rules. All campaign contributions shall be paid or turned over to the campaign committee, and shall be managed and disbursed by the committee. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

D. **Unopposed candidates in partisan elections.** Candidates in partisan elections for judicial office who have a campaign fund, but who are unopposed or become unopposed in the campaign, shall return all unused and uncommitted campaign funds pro rata to the contributors of the funds, or donate the funds to a charitable organization, or to the State of New Mexico, as the candidate may choose, with disbursement of such funds to occur within thirty (30) days after the absence of opposition becomes known.

E. **Unused campaign funds.** A candidate for judicial office in either a partisan or retention election who has unused campaign funds remaining after election, and after all expenses of the campaign and election have been paid, shall refund the remaining funds pro rata to the campaign contributors, or donate the funds to a charitable organization, or to the State of New Mexico, as the candidate may choose, within thirty (30) days after the date the election results are certified.

F. **Contributions by attorneys and litigants.** Candidates for judicial office, in both partisan and retention elections, shall not personally solicit or personally accept campaign contributions from any attorney, or from any litigant in a case pending before the candidate. Contributions from attorneys and litigants shall be made only to a campaign committee, and are subject to all the requirements of this rule. Campaign committees may solicit contributions from attorneys. Campaign committees shall not knowingly solicit a contribution from a litigant whose case is then pending before the candidate. Campaign committees shall not disclose to the judge or candidate the identity or source of any funds raised by the committee. If a case is pending before any candidate for the judicial office being contested, restrictions of this subparagraph apply to all candidates for that office.

[As amended, effective February 16, 1995.]

COMMITTEE COMMENTARY

This rule restricts contributions for campaigns for judicial office to sources and amounts that do not create an appearance of impropriety. Candidates for judicial office may solicit contributions for their own campaigns, within the restrictions of this rule, but not for the campaigns for other candidates or offices. Candidates for election to judicial office are required to create campaign committees to solicit and accept contributions, to solicit public support, and to receive, manage and disburse all campaign contributions. Each candidate must instruct the campaign committee to solicit or accept only those contributions that are reasonable under the circumstances, and that meet the requirement of this rule.

Attorneys and litigants have the right as citizens to participate in the electoral process of public officers, including judges, and have the right to support and make contributions to candidates for judicial office. Therefore, campaign contributions by attorneys and litigants are permitted, within the restrictions of this rule. However, campaign contributions from litigants with cases pending before any candidate for the

judicial office being contested may not be knowingly solicited or accepted by any candidate for that office, or that candidate's campaign committee.

Campaign committees established under this rule should attempt to manage campaign finances responsibly, avoiding deficits that may necessitate post-election fund-raising.

COMPILER'S ANNOTATIONS

The 1995 amendment, effective February 16, 1995, rewrote the rule and added the commentary.

21-900. Violations.

A. Violations by incumbents. Violations of any of the rules of the Code of Judicial Conduct by incumbent judges shall be investigated, proceeded upon and disposed of by the Judicial Standards Commission in accordance with its authority and rules of procedure, and by the Supreme Court of New Mexico acting under its powers of contempt and superintending control. Judges shall comply with all rules, requirements and procedures of the Judicial Standards Commission, shall cooperate with the Judicial Standards Commission in the performance of its functions and shall comply with all laws applicable to judicial office.

B. Violations by candidates for judicial office. All candidates for judicial office shall comply with Rules 21-700, 21-800, 21-900 and 21-901 NMRA of the Code of Judicial Conduct. Violations of those rules by persons who are members of the bar shall be deemed to constitute violations of the Rules of Professional Conduct. Violations of those rules by candidates who are not lawyers are within the superintending control of the Supreme Court, and may be grounds for petitioning the Supreme Court for relief by way of mandamus, injunction or other equitable relief to require compliance and rectify non-compliance.

C. Challenges of violations in election campaigns. A candidate may bring an action to challenge a violation by the candidate's opponent of Paragraph B of Rule 21-700 NMRA or Rule 21-800 NMRA occurring in election campaigns for judicial office.

(1) Filing and venue. In election campaigns for the Supreme Court and Court of Appeals, by filing a complaint in the district court for Santa Fe County. In election campaigns for district, metropolitan, magistrate, municipal and probate courts, by filing a complaint in the district court of the county in which the complainant or the defendant resides, but only within the judicial district where the election is to occur. The complainant shall serve all parties within three (3) days after filing the action. If available, any statement, advertisement or publication alleged to constitute a violation shall be filed with the complaint.

(2) Standing; parties. Violations by a candidate or by a candidate's campaign committee can be challenged by an opposing candidate. The alleged violator shall be joined as a defendant and shall be served forthwith in person with the complaint, summons and notice of hearing when issued. A candidate who has not been joined as a party may intervene in the proceeding by filing a notice of intervention and a response to the complaint within the time required by this rule.

(3) Hearing. The complaint shall be heard by the district court without a jury within ten (10) days after the action is filed, unless the time is extended for good cause. Peremptory

challenges to the district judge shall be filed by the complainant within three (3) days after the action is filed and by a defendant within three (3) days after service of process on that defendant.

The district court shall enter its decision, findings of fact and conclusions of law, within not more than three (3) days after the hearing is completed. The decision of the district court shall constitute a final judgment immediately upon entry.

(4) Remedies. The district court is authorized to issue any order provided by the Rules of Civil Procedure for the District Courts and any remedial decrees for cessation of violations, retractions, corrective publications or other relief as may be reasonably required to rectify the effects of the violation. The district court may also refer any violation to the Judicial Standards Commission or the Disciplinary Board of the Supreme Court for additional action.

(5) Discovery. Any documentary or demonstrative evidence to be offered at the hearing shall be exchanged by the opposing parties as ordered by the district court, and in any case not less than twenty-four (24) hours prior to the commencement of the hearing. Discovery shall not delay the hearing on the merits, but wrongful refusal, obstruction or delay in discovery may be sanctioned in the discretion of the district court. The parties may by subpoena require the appearance of witnesses and the production of evidence at the hearing. The district court may allow oral testimony to be admitted telephonically.

(6) Appeals. Appeals shall be taken directly to the Supreme Court of New Mexico pursuant to the provisions of Rule 12-603 NMRA of the Rules of Appellate Procedure.

(7) Other rules applicable. The Rules of Civil Procedure for the District Courts, Rules of Appellate Procedure and Rules of Evidence shall apply unless inconsistent with this rule.

(8) Other proceedings. The jurisdiction of the Judicial Standards Commission, the Supreme Court and the Disciplinary Board to hear violations of the Code of Judicial Conduct is not affected by this paragraph.

[As amended, effective February 16, 1995; September 21, 2004.]

COMPILER'S ANNOTATIONS

Cross references. — For supreme court's power of superintending control over inferior courts, see N.M. Const., art. VI, § 3.

For judicial standards commission, see N.M. Const., art. VI, § 32, and 34-10-1 to 34-10-4 NMSA 1978.

The 1995 amendment, effective February 16, 1995, rewrote the rule.

The 2004 amendment, effective September 21, 2004, added Paragraph C.

Campaign promises. — Where a candidate for judicial office promised landlords that he would help them in court with their landlord-tenant case and advised the landlords on how to excuse the other judges, the actions of the candidate constituted willful misconduct. In the Matter of Rodella, 2008-NMSC-050, 144 N.M. 617, 190 P.3d 338.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 48A C.J.S. Judges § 48.

21-901. Applicability.

A. **Scope.** Except as provided in this rule, all judges and all candidates for judicial office shall comply with the provisions of this Code, including, but not limited to, all judges and justices and all judicial candidates of the Supreme Court, Court of Appeals, district court, magistrate court, metropolitan court, probate court and municipal court. Any person who serves as a full-time or part-time judge is a "judge" within the meaning of this Code.

B. **Full-time magistrate and municipal judges.** A full-time magistrate or municipal court judge is not required to:

- (1) comply with the provisions of Paragraph B (7)(b) of Rule 21-300 which requires notice to the parties of advice obtained by the judge from a disinterested expert on the law; or
- (2) comply with the provisions of Paragraphs E of Rule 21-500.

C. **Probate and part-time magistrate and municipal judges.** A probate judge or part-time magistrate or municipal judge:

- (1) is not required to:
 - (a) except while serving as a judge, comply with Paragraph B(10) of Rule 21-300;
 - (b) comply with the provisions of Paragraph C(2) of Rule 21-500 relating to appointment to other governmental positions;
 - (c) comply with the provisions of Paragraph B (7)(b) of Rule 21-300 which requires notice to the parties of advice obtained by the judge from a disinterested expert on the law;
 - (d) comply with the provisions of Paragraph D of Rule 21-500, relating to financial activities, except:
 - (i) the requirement of Rule 21-500(D)(1)(a) that the judge not engage in financial and business dealings that may reasonably be perceived to exploit the judge's judicial position; and
 - (ii) the requirement of Rule 21-500(D)(5) that the judge not accept gifts, bequests, favors or loans except as permitted by the Code of Judicial Conduct;
 - (e) comply with Paragraphs E through G of Rule 21-500;
 - (f) comply with Paragraphs A through D of Rule 21-600; or
 - (g) comply with the provisions of Paragraphs C and F of Rule 21-800;
- (2) shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

D. **Campaign Reporting Act.** The provisions of the Campaign Reporting Act [1-19-25 to 1-19-36 NMSA 1978] shall apply to all judges who run in a primary and general election, including a judicial retention election.

E. **Time for Compliance.** A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Subparagraphs (2) and (3) of Paragraph D and Paragraph E of Rule 21-500 and shall comply with these paragraphs as soon as reasonably

possible within one year after the effective date of this Code.
 [As adopted, effective February 16, 1995.]

COMMITTEE COMMENTARY

The two categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. For the purposes of this section, as long as a retired judge is subject to recall the judge is considered to "perform judicial functions." The determination of which category and, accordingly, which specific Code provisions apply to an individual judicial officer, depend upon the facts of the particular judicial service.

Time for compliance

If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Paragraph E of Rule 21-500, continue to serve as fiduciary but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Paragraph D (3) of Rule 21-500, continue in that activity for a reasonable period but in no event longer than one year.

Table Of Corresponding Canons

The first table below reflects the disposition of the former canons of the Code of Judicial Conduct. The left-hand column contains the former canon number, and the right-hand column contains the corresponding present canon number.

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