



Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Chair
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Paul L. Biderman, Esq.
Prof. Robert L. Schwartz
Hon. Freddie Romero

October 30, 2013

[REDACTED]

Re: Judicial Advisory Opinion No. 13-08

Dear [REDACTED]

You have inquired of the Advisory Committee on the Code of Judicial Conduct whether submission to a judge of post-sentencing orders of probation in adult criminal cases and post-disposition orders and agreement for probation in juvenile cases, without the opportunity for review by counsel, are ex parte communications violative of Rule 21-209 NMRA. As we describe below, the issue is one that likely bears upon the practices of the district courts throughout the state. In this regard, although you have posed an inquiry under the Code of Judicial Conduct, the implications of the inquiry also bear on the Rules of Criminal Procedure for the District Courts. Because of this overlap, the Committee suggests that further review of this issue is proper by the Rules of Criminal Procedure Committee.

As to the Code of Judicial Conduct, Rule 21-209 provides:

21-209. Ex parte communications.

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

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

- (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
- (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

Procedures at Issue

The procedures you present describe what appears to be a long-standing practice in the district courts with some minor variations. The Committee understands the practice to involve the court's imposing of conditions of probation in an adult criminal case, after sentencing when a sentence is fully or partially suspended. Normally, those conditions include standard conditions that are commonly known by the bar to apply to all probationers as well as special conditions imposed with regard to the particular defendant. While the practice is similar in juvenile delinquency cases, the basis for the standard conditions of probation and the uniformity with which they are applied may be different.

Adult Criminal Cases

The Committee additionally understands that in adult criminal cases the statewide standard conditions of probation are promulgated by the Probation and Parole Board of the Department of Corrections, are posted on its website, and, for purposes of this opinion, are uniformly used throughout all the courts in New Mexico. Further, after the defendant is sentenced, a judgment and sentence is prepared by the district attorney and approved by defense counsel and submitted to the court. While there may be some lack of uniformity regarding the judgment and sentence or judgment and order suspending sentence, they all appear to state that the defendant's sentence shall be suspended in whole or in part and that the defendant will be placed on supervised probation. They also routinely provide that the defendant will be placed on an appropriate level of supervision as directed by the Probation and Parole Division of the Department of Corrections and comply with the standard conditions of probation for that level of supervision.

The judgment and sentence or order provided to the court by counsel also generally sets forth the special conditions of probation because they have been part of the court's oral sentencing at the hearing. The court then generally enters the judgment and sentence or order, and the adult probation officer meets with the defendant and reviews a form order of the probation. The defendant indicates his or her understanding with the order by initialing each standard and special condition and by signing an acknowledgment that states "I have read and understand the terms of this Probation Order and will abide by its terms." The order is signed by the defendant/probationer and the probation officer. It is then submitted to the court for review, signature, and filing. It is not forwarded to the district attorney or defense counsel for review and comment.

Juvenile Cases

In juvenile cases, the same procedure is used at disposition as is used in adult sentencing. The children's court judge holds a dispositional hearing and, if the period of probation is pursuant to a six-month consent decree or one- or two-year probation, the court places the child on supervised probation with the juvenile probation office and announces that the child will be subject to the standard conditions of probation and certain special conditions that are announced during the hearing. Many times the special conditions have already been agreed to as part of the discussions between the child's attorney and the children's court attorney.

While in some districts both a judgment and disposition and order placing the child on supervised probation and a separate probationary agreement are presented at the hearing for review and signature, that procedure appears to be the exception rather than the rule. Normally, the judgment is prepared at the hearing or shortly thereafter. In some districts, it is provided to counsel for review and in others it is not. Usually, the probationary agreement is provided by juvenile probation and parole a few days after the judgment is entered and after the juvenile probation officer meets with the child and the parent or guardian to review the agreement in much the same manner as the adult process. It does not appear that there is uniformity regarding standard conditions of probation applied statewide.

In addition, it appears that for juvenile cases, the Field Services Division of the Children, Youth and Families Department has created a document referred to as a "Probationary Agreement" that provides for the term of probation as ordered by the court, seventeen standard conditions of probation, and a paragraph in which special conditions of probation as ordered by the court may be added. This document has signature lines for the child, the child's parent/guardian/custodian, the juvenile probation officer, the child's attorney, the children's court attorney, and the children's court judge. Although the document is titled "Probationary Agreement," it also contains decretal language: "It is ordered that the above agreed to conditions of probation be approved and adopted." It appears that this form is modified somewhat among probation offices and may not contain signature lines for counsel or be provided to counsel for review.

Discussion

The Committee understands that these practices are perhaps decades old and ubiquitous and that they do not exhibit the normal concerns associated with ex parte communications regarding substantive matters discussed before the court has issued its decision. Yet, it is understandable that there would not be an issue of notice for a defendant/child/probationer with regard to any of the standard conditions of probation that are either explained by counsel or the court at a sentencing or dispositional hearing and the special conditions imposed orally at those hearings and specifically referenced in the judgment that has been reviewed and signed by both counsel. The order of probation in adult cases and the Probationary Agreement with decretal language in juvenile cases are standard forms that simply explain and seek understanding and acknowledgment of the conditions the court has clearly placed on the person.

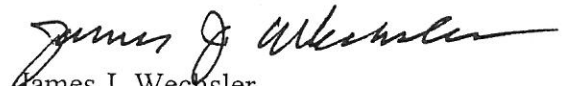
As a matter of procedure in criminal cases, Rule 5-121 NMRA of the Rules of Criminal Procedure requires a reasonable opportunity for counsel to examine and make suggestions before

the court signs any order or judgment. The children's court rules do not have a similar provision. Therefore, in adult criminal cases, submission to counsel before signature by the court appears to be required.

This observation, however, does not answer the question of whether the submission of orders by probation officers are ex parte communications. Such submissions appear to be ex parte communications. They may arguably fall within the exception in Rule 21-209(1) for administrative purposes. In this regard, because the submissions are standard and based on the court's rulings, judgments, or orders already entered, the judge might reasonably believe that no party will gain a substantive or tactical advantage as a result of the submissions. Rule 21-209(1)(a). However, even if the administrative exception of Rule 21-209 applied, Rule 21-209(1)(b) nevertheless requires the judge to make provision for prompt notice and an opportunity to respond.

The Committee has the concern that even though the vast majority of cases involve only standard probation conditions and/or special conditions acknowledged by the defendant, the judgment or order at issue has significant legal consequence both in the existing proceeding and in possible later proceedings. On the other hand, the procedures we have described are currently in effect throughout most if not all of the judicial districts and modifying them may cause unwarranted delay and inefficiency. The usual process for such a procedural modification is through the appropriate rules committee of the Supreme Court. Through such process, modifications of statewide practices include the opportunity for input through publication and comment that seems appropriate for this particular situation. In addition, the Committee is aware that the Supreme Court is currently considering a standardized system for creating judgments and sentences that would appear to obviate the issues you have raised. Therefore, although the Committee believes that notice of and opportunity to review such judgments and orders provide a level of confidence in the correctness of the judgment or order that supports compliance with the ex parte rule, it suggests that the issue should also be addressed by the Rules of Criminal Procedure Committee. In the interim, the Committee suggests that you consider reviewing your own practice with respect to probation orders based on our above discussion.

Very truly yours,


James J. Wechsler
Chair

cc: Paul L. Biderman, Esq.
Professor Robert L. Schwartz
Hon. Freddie J. Romero