

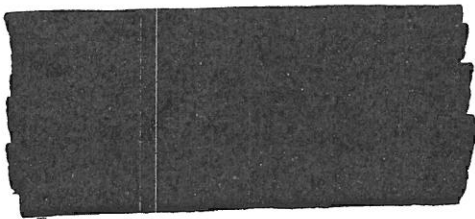


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SANTA FE, NEW MEXICO

## Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Chair  
~~Hon. Marie A. Baca~~  
~~Hon. Kevin L. Fitzwater~~  
Paul L. Biderman, Esq.  
Prof. Robert L. Schwartz  
Hon. Freddie Romero

November 25, 2013



Re: Judicial Advisory Opinion No. 13-12

Dear 

You have asked the Advisory Committee on the Code of Judicial Conduct for its guidance as to whether you, as a magistrate judge, may continue to preside over DWI/drug court proceedings of defendants whose cases were prosecuted while you served in the district attorney's office, if you obtain a signed waiver from them. As a prosecutor, you served on a panel that decided which defendants could be referred to the DWI/drug court program after entering guilty pleas in their cases, including cases you personally prosecuted. You have advised us that the magistrate judge presiding over DWI/drug court cases:

reviews the participants' progress, considers special requests from participants such as out-of-state travel or excusal from counseling sessions etc., imposes sanctions (including jail time) for non-compliance and awards incentives for compliance, and ultimately decides if a participant satisfactorily completes the program or is removed from the program for non-compliance.

Rule 21-211(A)(5)(b) NMRA requires judges to disqualify themselves from any proceedings in which the judge:

served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding ...

Paragraph C of Rule 21-211, however, provides a procedure for waiver of that disqualification. The procedure includes disclosure on the record by the judge of the conflict, and consideration by the parties, out of the presence and without participation by the judge or court personnel, as to whether to waive the disqualification. If the parties agree to waive the disqualification, their signed waiver form is entered into the record and the judge may proceed.

Under the circumstances you have described, it is the Committee's opinion that both these provisions apply to your ability to preside over DWI/drug court defendants in your court. This includes those defendants you may have, in your former prosecutorial role, been involved in assigning to that program. Your service as a prosecutor on the panel referring defendants to the DWI/drug court program would automatically disqualify you from presiding as a judge over the progress, conditions, sanctions, and disposition of defendants in this program. But for any defendants who voluntarily sign waivers satisfying the requirements of Rule 21-211(C), you will be able to undertake the judge's presiding role. The requirements for an effective waiver in this situation include:

- Defendants agreeing to waive your disqualification must do so individually;
- Prior to presentation of the form, defendants must be informed by you, and by their defense attorney, if any, that your disqualification from further proceedings in their case is mandatory unless they choose voluntarily to waive that disqualification;
- Defendants must be allowed to make their decisions outside of your presence or that of any court personnel, and with no involvement by you or court personnel other than your initial explanation as stated above;
- The waiver form, signed by a defendant, his or her counsel, and the prosecuting attorney, is entered into the court record.


You have also asked the Committee if the waiver form that you developed is adequate for this purpose. The Committee has reviewed the form, believes it is adequate, and has no modifications to suggest. Your form is attached to this advisory opinion.

In reaching this conclusion, the Committee has considered that all of the cases for which you are suggesting possible waiver of your disqualifying conflict involve your oversight of participation by defendants in DWI/drug court. We note that the nature of this program is more therapeutic and less adversarial than trials or other criminal proceedings. Since your service as prosecutor on the panel gives you some familiarity with each defendant who you helped refer to DWI/drug court, the therapeutic focus of this program could render your continued oversight beneficial. You have further advised the Committee that the attorney serving as the district public defender has requested that you continue serving in this role, presumably for that reason.

The Committee also notes that all pending criminal cases you had previously prosecuted that did not result in referrals to DWI/drug court have been assigned to another judge, and no waivers of your disqualification are under consideration in those cases. The Committee deems that action

highly appropriate. We note that the waiver provision of Rule 21-211(C) would appear broad enough to allow waiver even of such cases, but we believe that such a waiver would be highly inappropriate. For a judge to preside over a trial or other proceeding involving a defendant whom the judge had formerly prosecuted would make it all but impossible to sustain the appearance of impartiality. We note this conclusion to make sure that our opinion expressed here, that the mandatory disqualification is waivable to allow oversight of defendants in DWI/drug court, is not extended beyond that limited role, notwithstanding the apparent tolerance of the rule for such a waiver.

Very truly yours,

  
James J. Wechsler  
Chair

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

STATE OF NEW MEXICO  
COUNTY OF [REDACTED]  
MAGISTRATE COURT

STATE OF NEW MEXICO

No. \_\_\_\_\_

v.

\_\_\_\_\_, Defendant

### WAIVER OF JUDICIAL DISQUALIFICATION

I, the Defendant, have been informed that the assigned judge, the Honorable [REDACTED] is disqualified pursuant to Rule 21-211 NMRA from presiding over my case due to his previous role as the prosecutor for my case for the [REDACTED] Judicial District Attorney's Office.

I understand that my case will be reassigned to another judge unless I agree to waive the disqualification. I understand that I do not have to agree to waive the disqualification. I understand that I will not be penalized if I do not agree to waive the disqualification. I understand that all of my Constitutional, statutory, and procedural rights will be protected whether or not I agree to waive the disqualification.

After consultation with my assigned attorney, pursuant to Rule 21-211(C) NMRA, I agree to waive the judicial disqualification and I agree to allow the Honorable [REDACTED] to preside over my case as judge.

\_\_\_\_\_  
Signature of defendant

### CERTIFICATE OF DEFENSE COUNSEL

I have explained to the defendant the Waiver of Judicial Disqualification and I am satisfied that the defendant understands the waiver and has knowingly, intelligently, and voluntarily signed the waiver.

\_\_\_\_\_  
Defense counsel

\_\_\_\_\_  
Date

I CONCUR with the waiver of judicial disqualification:

\_\_\_\_\_  
Prosecutor

\_\_\_\_\_  
Date

I accept the waiver of judicial disqualification and I agree to preside over this matter:

[REDACTED] Magistrate Judge

\_\_\_\_\_  
Date

## **Rule 21-211 NMRA. Disqualification.**

A. A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

- (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.
- (2) The judge knows that the judge, the judge's spouse or domestic partner, or person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person, or a member of the judge's staff is:
  - (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
  - (b) acting as a lawyer in the proceeding;
  - (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
  - (d) likely to be a material witness in the proceeding.
- (3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or is a party to the proceeding.
- (4) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.
- (5) The judge:
  - (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
  - (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;
  - (c) was a material witness concerning the matter; or
  - (d) previously presided as a judge over the matter in another court.

B. A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

C. A judge subject to disqualification under this rule, other than for bias or prejudice under Paragraph A(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

[Adopted by Supreme Court Order No. 11-8300-045, effective January 1, 2012.]