Advisory Committee on the Code of Judicial Conduct

January 17, 2014

[redacted]

Re: Judicial Advisory Opinion No. 14-01

Dear [redacted]

You have asked the Advisory Committee on the Code of Judicial Conduct whether it is permissible under the Code of Judicial Conduct for you to search the judiciary's case management system prior to an arraignment to ascertain the criminal history of a defendant who will be appearing before you. You believe that such information is necessary for your understanding of the risk to the safety of the community when determining the appropriate bond.

The issue you raise is addressed in Rule 21-209 NMRA with regard to ex parte communications. As a general rule, subject to exceptions that are not relevant to your inquiry, a judge "shall not initiate, permit or consider ex parte communications . . . outside the presence of the parties or their lawyers, concerning pending or impending" cases. Rule 21-209(A). Specifically, the rule provides that "[a] judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." Rule 21-209(C).

A criminal record is a type of fact that "may properly be judicially noticed." Under the Rules of Evidence, a court may take judicial notice of an adjudicative fact that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Rule 11-201(A), (B)(2) NMRA. A conviction, by its very nature, is an "adjudicative" fact. Court records are subject to judicial notice. *See State v. Tave*, 1996-NMCA-056, ¶ 15, 122 N.M. 29, 919 P.2d 1094 (noting that the status of a felon may be proven by judicial notice of a prior felony conviction) (overruled on other grounds, *State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110); *State v. Ross*, 1986-NMCA-015, ¶ 8, 104 N.M. 23, 715 P.2d 471 (taking judicial notice of court records in the case); *State v. Deats*, 1971-NMCA-136, ¶ 12, 83 N.M. 154, 489 P.2d 662 (taking judicial notice of the defendant's conviction in proceeding for post-conviction relief). The Committee believes that the judiciary's

case management system is the type of source addressed in Rule 11-201(B)(2) "whose accuracy cannot reasonably be questioned." Moreover, as expressly stated in Rule 11-201(C), a court "may take judicial notice on its own."

Your inquiry raises the tangential issue of whether a criminal history search would establish an impermissible bias or prejudice that would affect your impartiality. *See* Rule 21-100 NMRA ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety."). However, all information or evidence that a judge receives in a case has the potential to alter or prejudice the judge's decision. *See State v. King*, 2012-NMCA-119, ¶ 21, 291 P.3d 160 ("The admission of evidence is not unfairly prejudicial simply because it damages a party's cause."). Only unfair prejudice is impermissible. *See* Rule 11-403 NMRA ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . ."). Given the purpose of an arraignment, a criminal history is relevant to the judge's determination. The Committee does not believe that it is unfair for a judge to use information available to the judge under the Rules of Evidence for judicial notice, provided that the judge discloses the information at the arraignment.

The Committee therefore believes that the Code of Judicial Conduct does not prohibit you from searching the judicial case management system prior to an arraignment. However, although there is no express requirement in either Rule 21-209 or Rule 11-201 that the court inform the parties when taking judicial notice on its own, the Committee nevertheless believes that you must inform the parties at the arraignment of adjudicative facts that you have considered prior to the arraignment.

Very truly yours,

James J. Wechsler
Chair

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