



Advisory Committee on the Code of Judicial Conduct

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[REDACTED]

February 4, 2020

AO 20-01

Re: Your inquiry regarding recusal

Dear Judge [REDACTED]

You have requested an opinion from the Advisory Committee on the Code of Judicial Conduct as to whether a magistrate judge must, when requested, recuse from all cases filed by the District Attorney when the magistrate judge has, prior to appointment to the bench, filed a lawsuit which is still pending against that district attorney. Before responding to your inquiry, the Committee notes the unusual situation underlying your request, and the possibility that our response might become public within your community. Indeed, your original lawsuit has already been publicized and the District Attorney's pleading asking you to recuse is a public record. It is therefore possible that this letter will also become public, to disclose our Committee's independent opinion as to whether you are required to recuse yourself. Since, in this respect, this advisory letter may deviate from the confidentiality under which we issue letters, we first explain our procedure and purpose for potential readers from outside the judiciary.

The Advisory Committee on the Code of Judicial Conduct is a Supreme Court-appointed body comprising active and retired judges and retired faculty of the University of New Mexico School of Law. Our sole responsibility is to respond to inquiries from judges as to their obligations under the New Mexico Code of Judicial Conduct, Rules 21-100 to 21-406 (2012, as amended through 2015) NMRA. The Committee offers only its best advice, and only to judges who are subject to the superintending control of the New Mexico Supreme Court. Our duty is to respond in confidence and not reveal the source of any inquiry, to ensure that no judge is deterred by threat of adverse publicity from making inquiries. The Committee has no authority to require any judge

to take or refrain from taking any action, nor can we investigate any charges of misconduct or discipline any judge. Only a higher court can take such actions, and no such court is bound by our advice. Because the Committee has been created as an advisory service to judges, we do not attempt to ascertain facts independently, but rather analyze the facts assuming they are exactly as presented to us in each judge's letter of inquiry. Finally, it should be emphasized that the Committee is evaluating your inquiry by our own interpretation of the Code of Judicial Conduct; we are not suggesting how to rule on the pending pleading requesting that you recuse. With those understandings, the Committee will make its best efforts to advise you on your question.

You have stated the facts from your perspective, while also helpfully providing a Notice of Facts Requiring Recusal filed in your court by the District Attorney pursuant to 6-106 (G), NMRA. (This Notice shall herein be referred to as a "request for disqualification.") There appears to be no substantive disagreement on the facts that have led to this request—understanding that the allegations of your lawsuit are themselves vehemently in dispute. We consider only the fact that the lawsuit has been filed; our opinion is not dependent on the validity of the allegations.

Before your appointment to the bench, you were an assistant district attorney for the district in which you now serve as a judge. You filed three complaints with administrative agencies against that office over several years. You were fired from that office in mid-2018. Your complaints culminated in a lawsuit, still pending, which you filed in district court alleging sex discrimination that took the form of pay discrimination, sexual harassment, first amendment rights violations and whistleblower violations. Your lawsuit names the District Attorney and chief deputy as defendants in their official capacities; they continue to serve in those capacities. You have stated that neither of these attorneys will appear in your court. Rather, the office will be represented in criminal cases by assistant district attorneys who were hired after you left the office, and who are not involved in any way in your lawsuit. The District Attorney's request for your disqualification points to strong language in your civil complaint challenging the ethics of the District Attorney's office in support of the allegation that you cannot try their cases impartially.

Your inquiry, as to whether you must recuse from any cases brought by the office which you have sued, presents a difficult conflict between several important values. This Committee has not previously addressed such an issue, nor have we found any New Mexico appellate decisions on point. On the one hand, the Code of Judicial Conduct requires that judges recuse themselves not only from cases in which they know they cannot be impartial, but even when their impartiality "might reasonably be questioned." Rule 21-211, NMRA. The requirement to recuse when circumstances could lead reasonable observers to question the judge's impartiality is important to preserve public confidence in the fairness of the judiciary. The first example cited in this rule of a circumstance requiring recusal is: "The judge has a personal bias or prejudice concerning . . . a party's lawyer." *Id.* at 1. The District Attorney, in filing criminal charges, is the lawyer for the people. (The request for your recusal does not cite this rule, but this Committee believes it provides the clearest guidance on your obligations.) Moreover, in rejecting claims of judicial prejudice arising from allegedly unfair prior rulings made by a judge, our courts have emphasized that: "Bias requiring recusal must arise from a personal, extra-judicial source, not a judicial source." *Purpura v. Purpura*, 1993-NMCA-001, ¶ 17, 115 N.M. 80, 847 P.2d 314. Your lawsuit against the District

Attorney alleging misconduct during your tenure in that office clearly arose from "a personal, extra-judicial source."

On the other hand, cases interpreting earlier but substantially similar versions of the current rule leave to the judge's own discretion the preliminary decision as to whether the judge must step aside. The judge's decision is subject to review for abuse of discretion. *State v. Riordan*, 2009-NMSC-022, ¶ 6, 146 N.M. 281, 209 P.3d 773. As the Court explains, "[a]n abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason; . . . *disqualification requires an examination of the specific facts in the case.*" *Id.* (emphasis added) (internal quotation marks and citations omitted).

We note that the suit you have brought and continue to prosecute alleges violations of important laws protecting against discrimination, as is your right. While we express no opinion as to the validity of your claims, to require you to recuse from a major part of your judicial caseload for having asserted that right could cast a chilling effect on such efforts by others at vindication. We are also concerned that too strict an interpretation of the recusal rule in this case could place unnecessarily large criminal caseloads on other judges in your court, possibly delaying the administration of justice to the detriment of the public interest.

From the authorities we have reviewed, the advisory Committee believes that judicial recusal in New Mexico is a case-by-case determination, with the initial decision to be made by the judge whose impartiality has been questioned. In your situation, the Committee believes that such a case-by-case determination precludes a blanket disqualification of a judge from hearing any and all cases brought by the District Attorney's office, unless the judge's finding that he or she can be impartial in at least some cases is "clearly untenable or not justified by reason." *Id.* Based on the reasons you have explained in your letter of inquiry, and the assertions in the request for your recusal filed by the District Attorney, we do not believe that standard is met here.

While we have been unable to identify any directly applicable New Mexico authority, we have found instructive a published summary of a very similar case decided by the New York Advisory Committee on Judicial Ethics, Opinion 16-146:

(1) A judge who has filed a disciplinary complaint against the District Attorney is disqualified while the disciplinary proceeding is pending, and for two years after it is resolved, in any case *where the District Attorney personally appears*. . . . (2) The judge may preside in cases where assistant district attorneys of the same office appear, even though the District Attorney is counsel of record, provided the judge is satisfied they were not involved in the District Attorney's purported misconduct and assuming he/she can be fair and impartial. (emphasis added).

Your complaint against the District Attorney, as we understand it, alleges unfairness in the treatment of you as a former staff member. We do not understand you to allege any misconduct or incompetence in that office's prosecution of criminal complaints. You have pointed out that the assistant district attorneys who will try cases in your court for the District Attorney's office were

all hired after your employment with that office. Our understanding is that by that time, all the events leading to the filing of your lawsuit had been completed, and none of those events involved these assistants.

We agree with the reasoning of the New York Advisory Committee. We believe, in light of the strong allegations asserted against them in your lawsuit, you will have to recuse from any case in which the District Attorney or Chief Deputy personally appeared in your court. If a case were to come before you requiring a finding as to discriminatory conduct by that office along the lines you have alleged, you would have to consider recusing as well. But we do not believe that a fair observer could reasonably question your determination that you can proceed impartially to preside over a criminal case prosecuted by other attorneys for that office, so long as those attorneys were not involved in the allegedly unlawful conduct and practices claimed in your lawsuit.

Every judge takes an oath to adhere to the law. Judges pledge to do justice to the parties who come before them, both the accused and the victim. Judges are also accountable to their communities to ensure their safety from those whose guilt is proven according to due process. To assume that a judge would systematically ignore those basic responsibilities because of a personal dispute with the management of the prosecutor's office would be to admit to a lack of integrity and commitment to basic principles of our system of justice. This Committee is unwilling to lend credence to such an assumption by recommending that you recuse on all cases brought by the office of the District Attorney.



James J. Wechsler
Co-chair

Judge Julie J. Vargas did not participate in this opinion.