Advisory Committee on the Code of Judicial Conduct

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[redacted]

February 28, 2020

Re: AO 20-02

Dear [redacted]

Your court has recently hired a domestic relations hearing officer who was formerly employed by the child support enforcement division. You understand that the hearing officer is disqualified under Rule 21-211(A)(5)(b) NMRA from hearing child support enforcement cases on which he personally and substantially participated while working for the child support enforcement division.

You have informed the Committee that the hearing officer has applied the remittal of disqualification rule in a case that has come before him. In that case, the hearing officer advised the parties of the basis for his disqualification and of their ability to waive the disqualification. He then recessed. When the proceeding resumed, the parties (and counsel for the child support enforcement division) agreed on the record to waive the disqualification. They entered into a written stipulation that was approved by a district judge.

Rule 21-211(C) provides in pertinent part:

> A judge subject to disqualification under this rule, . . . 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 . . . 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.

Rule 21-211 applies to hearing officers. See Rule 21-004(C) NMRA (requiring hearing officers to comply with portions of the code of judicial conduct, including Rule 21-211).

In your request of the Committee, you inquire whether the procedure the hearing officer followed complies with Rule 21-211(C) because the respondent was not represented by counsel, and the hearing officer therefore did not, in the wording of Rule 21-211(C), "ask the parties and their lawyers to consider" and "the parties and their lawyers" did not agree to the waiver. As you have noted, respondents in child support enforcement cases are not generally represented by counsel.

The Committee does not believe that there was any deficiency in the hearing officer's procedure. Self-represented litigants have the same standing before the courts as litigants with counsel. *See Newsome v. Farer*, 1985-NMSC-096, ¶ 18, 103 N.M. 415, 708 P.2d 327 (stating that a self-represented litigant "must comply with the rules and orders of the court, enjoying no greater rights than those who employ counsel"); *Bruce v. Lester*, 1999-NMCA-051, ¶ 4, 127 N.M. 301, 980 P.2d 84 (stating that a self-represented litigant "is not entitled to special privileges"). If Rule 21-211(C) required involvement of attorneys regardless of whether parties have counsel, self-represented parties would not be able to exercise their right under the rule to proceed with the assigned judge if they do not object to the judge's disqualification. The Committee interprets Rule 21-211(C) to require a judge to involve attorneys for parties only if the parties are represented by attorneys.

The Committee understands that, because of the hearing officer's previous employment, the issue of his disqualification will arise in other cases in the future. The Committee recommends that the Court prepare a notice to be provided to future litigants, and their attorneys if they have attorneys, informing them that (1) the judge is disqualified from hearing the case under Rule 21-211 and the basis for the disqualification; (2) the parties, and their attorneys if they have attorneys, may waive the judge's disqualification and the procedure for doing so; (3) if a party is not represented by an attorney, the party may consult an attorney if the party wishes to

do so; and (4) the party's case will not be prejudiced if the party does not elect to waive the judge's disqualification.

James J. Wechsler
Co-chair

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