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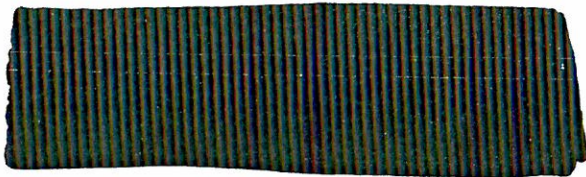
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Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Co-Chair (ret.)
Hon. Julie J. Vargas, Co-Chair
Paul L. Biderman, Esq.
Prof. Robert L. Schwartz
Hon. Freddie J. Romero
Hon. Sandra W. Engel

This is an advisory opinion by the New Mexico Advisory Committee on the Code of Judicial Conduct. Advisory opinions are responses to inquiries from judges seeking guidance on judicial ethics questions. They are not issued, approved, or endorsed by the New Mexico Supreme Court; nor are they binding.

December 7, 2017



Re: Judicial Advisory Opinion No. 17-05 (Re-issued)

Dear 

You were recently appointed to the bench and are the presiding judge in a legal malpractice case against a law firm and its individual partners. You initiated contact with one of the defendants prior to your appointment and with another immediately after your appointment. You have asked the Advisory Committee on the Code of Judicial Conduct for advice as to whether you should disqualify yourself from the case.

You made the first contact with one of the defendants to discuss his experience with a previous judicial nominating commission and appointment process. At that time, of course, you were not a judge, and you did not know about the case that was pending in the court. After your appointment, but before you assumed your position, you left a telephone message for this defendant to thank him for his assistance.

Your contact with the other defendant began after your appointment. You exchanged telephone message both to set up a meeting and to discuss possible dates for your investiture. This defendant is a state senator, and you planned to invite him. You met with him after your appointment but before taking your oath of office and discussed your upcoming election and the political landscape. Although he informed you that he would not endorse any candidate, he agreed to introduce you to his legislative colleagues. When you learned of the existence of the lawsuit, you abandoned any effort to follow up on this meeting.

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The attorney for the plaintiff in the case has written you, asking that “you consider whether it would be appropriate for you to recuse yourself in this case.” In addition to citing the contacts you have had with the two defendants, the attorney notes that two other judges have recused and suggests that they did so because of the senator’s capacity to influence the court’s budget and other matters affecting the court.

Rule 21-211(A) NMRA addresses the circumstances that require a judge’s disqualification. It provides that a “judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.” Rule 21-211(A)(1) cites the example of a judge’s “personal bias” concerning “a party or a party’s lawyer” as a circumstance requiring disqualification.

In addressing the standard for disqualification, we note that the example of Rule 21-211(A)(1) focuses on when a judge has an actual bias toward a party or the party’s lawyer. You have advised the Committee that you do not have an actual bias toward the defendants as a result of your contact with them and that you believe that you can impartially preside over this case. Notwithstanding the language of this example, however, the rule requires an objective, rather than a subjective determination. It specifically requires disqualification if “the judge’s impartiality might reasonably be questioned.” See also Rule 21-102 NMRA (requiring a judge to avoid the appearance of impropriety). By using the word “might,” the rule specifically embraces situations in which there is merely the possibility that a reasonable person could question the judge’s impartiality. See American Heritage Dictionary of the English Language 1115 (5th ed. 2011) (defining “might” as indicating “a possibility or probability that is weaker than ‘may’”). This wording indicates the Code’s intent to favor disqualification if reasonable minds could disagree as to the judge’s ability to be impartial.

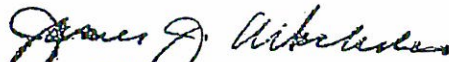
Under this analysis required by Rule 21-211, the Committee believes that your contact with the senator-defendant might reasonably give rise to a question concerning your ability to act impartially in light of the defendant’s agreement to introduce you to his legislative colleagues. We observe that you did not take any knowing action to place yourself in this position; you had not reason to know of the pending case at the time of your contacts because you were not yet in your position. We also acknowledge that the campaign requirements for a newly-appointed judge require reaching out to persons in the community in ways that you would not otherwise endeavor to do. Nevertheless, Rule 21-211 requires disqualification when a judge’s impartiality might reasonably be questioned.

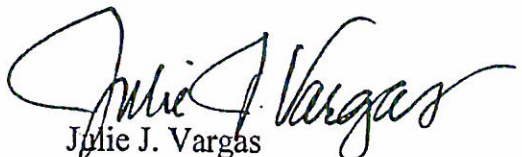
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The Committee believes that the plaintiff's attorney question concerning you impartiality in this case is not unreasonable and recommends that you disqualify yourself from the case. You initiated the contact and met with the senator. As a result of your meeting, he agreed to perform a favor for you - to introduce you to his legislative colleagues. Objectively, such an introduction would be a political benefit to you. Notwithstanding that you decided not to pursue this favor, the agreement had been made. To the objective observer, he had recently made a commitment to you and was now a defendant in a case reflecting upon the propriety of his law firm's actions. Such observer might reasonably believe that you could not put his previous commitment entirely aside when he appears before you as a party in the case.

The Committee does not believe that the fact that the senator passes on the court's budget or other legislation affecting the court requires disqualification. The senator in such circumstances is acting in his official duties. Moreover, if such responsibilities would require disqualification, no judge would be able to preside over the case. Additionally, the Committee considers the senator's position as a party to be significant to our analysis. We do not take a position as to disqualification if the senator had been a lawyer, not a party. Lastly, the Committee does not believe that your contact with the defendant concerning the judicial nominating commission and the appointment process requires disqualification.

Very truly yours,


James J. Wechsler
Co-Chair


Julie J. Vargas
Co-Chair

cc: Hon. Sandra W. Engel
Hon. Freddie J. Romero
Professor Robert L. Schwartz

*Please note that Paul L. Biderman was not involved in this decision by the Committee.