



## 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.

January 30, 2018

RECEIVED

JAN 30 2018

Supreme Court Law Library  
Santa Fe, New Mexico

Re: Judicial Advisory Opinion No. 18-01

Dear [REDACTED]

You are a sitting judge and a candidate in a partisan election for your judicial position. Your campaign committee has solicited endorsement of numerous officials. It has not informed you of the responses it has received. Nevertheless, either from unsolicited conversations you have had with at least one elected official at a public event or from conversations with members of the public, you have learned of support that you have received from certain elected officials. campaign.

You have asked the Advisory Committee on the Code of Judicial Conduct whether you are disqualified from presiding over cases pending in your court in which a governmental entity represented by these officials is a party or in which the officials themselves are named as parties in their official capacity. You have informed the Committee of one specific case involving a governmental body that is currently before you. We will begin our discussion with that case and then discuss your inquiry as it relates to other examples that you are concerned may arise.

*Page Two*

In the specific case, a city councilor approached you at a public event and informed you that she was informing her constituents by email that she was supporting your campaign. You have pending before you an inverse condemnation case in which the city is named as a party. The councilor is not a party.

Rule 21-211(A) NMRA, addressing the requirements for a judge's disqualification, provides that a "judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Under the rule, a judge's personal bias concerning a party requires disqualification. *Id.* This Committee recently addressed disqualification in the context of a political campaign in AO 17-05 (attached). As we observed in that advisory opinion, Rule 21-211(A) NMRA requires disqualification even if the judge does not have an actual bias toward a party if objectively a reasonable person could question the judge's impartiality. See Rule 21-211(A) (requiring disqualification if the 'judge's impartiality might reasonably be questioned") (emphasis added).

Additionally, the Code of Judicial Conduct permits judges who are judicial candidates to engage in public contact that the Code does otherwise not permit. See Rule 21-402(A)(3) NMRA (permitting actions by a judicial candidate not permitted by a judge under Rule 21-401(C) NMRA). A judicial campaign requires public support. See Rule 21-404(A) NMRA (permitting a judge's campaign committee to conduct judicial campaign). In order to preserve the integrity of the judicial process, the Code seeks to insulate a judge from various aspects of the campaign. See Rule 21-402(E) (prohibiting a campaign committee from disclosing identity of sources of funds to judge); Rule 21-404(A) (prohibiting judge from personally soliciting or accepting funds). Nevertheless, with the public nature of a political campaign and the need for a judicial candidate to engage with the community, a judicial candidate may inadvertently receive information about the support, financial or otherwise, received by his or her campaign.

The Committee does not believe that a judicial candidate's knowledge of information concerning the support of the candidate's campaign necessarily requires disqualification under Rule 21-211(A). Again, the rule requires for disqualification that "the judge's impartiality might reasonably be questioned." *Id.* As the objective facts control the rule, the Committee believes that the circumstances of each case must



*Page Three*

be weighed in order to apply the rule. Such circumstances involve, at a minimum, a consideration of the nature of the support, the nature of the case, and the relationship of the person providing support to the case.

As to the specific case you described, the nature of the support in the form of an elected official's offer to contact all of her constituents and voice her support of your campaign is significant and clearly weighs toward your disqualification. On the other hand, the nature of the case and the councilor's relationship to the case do not weigh in favor of disqualification. The case involves an inverse condemnation claim; and though the amount of the claim is substantial, the case does not raise issues of considerable public importance. As to the relationship of the councilor to the case, she is not a party, and, as you have informed the Committee, she was not a councilor until after the filing of the case. On balance, the Committee believes that because the lawsuit was filed before the councilor held her official office, the objective facts do not demonstrate that your impartiality might reasonably be questioned so as to require your disqualification under Rule 12-211(A).

In addition to this specific case, you have informed the Committee that other officials have agreed to publicly endorse you and that some have volunteered to assist your campaign in other ways, such as completing nominating petitions, introducing you to other people, or hosting a meet-the-candidate house event. You have advised that you have pending before you cases brought by or against municipalities or counties that include actions concerning inverse condemnation, administrative appeals, vehicle forfeitures, Tort Claims Act claims, and property tax refunds. You note that if individual officials are named, they are named in their official capacity only, not as individuals.

The Committee believes that the same analysis that we applied to the specific case you described would apply to any case that may arise. Whether you would be disqualified would depend upon an objective view of the facts concerning, at least, the nature of the support provided, the nature of the case, and the relationship of the official providing the support to the case. The fact that you have already received the support would not be dispositive.

Although the Committee cannot provide a specific opinion based on the general facts that you have described, we can state our beliefs as to the weight that

*Page Four*


might be determination as to whether you are disqualified under Rule 21-211(A) would depend on a weighing of all circumstances in order to ascertain whether your "impartiality might reasonably be questioned."

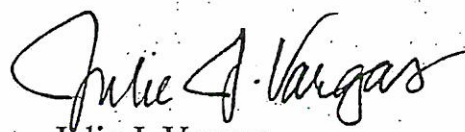
As to the nature of support, the Committee does not believe that circulating nominating petitions should be given significant weight unless there are other circumstances such as an excessive number. Likewise, introductions to others in social settings may not weigh heavily, but the circumstances would be significant, as well as the frequency. Holding an event at one's house would weigh heavily given the personal involvement of such an event.

The factors concerning the nature of the case and the nature of the relationship of the supporter to the case are related. As you point out, many of the cases before you involve municipalities or counties as named parties, not officials. These circumstances would weigh less heavily when you consider the relationship of the party providing support to the case. But, even though an official may be named in a lawsuit only in his or her official capacity does not necessarily mean that the official does not have a personal or professional stake in the outcome of the case. The nature of the case and the underlying circumstances are pertinent to this consideration. As an example, an official named in a Tort Claims suit, even in an official capacity, may have a particular interest in the case.

The Committee therefore believes that, although you are not disqualified from the specific case that you have described, you should carefully analyze whether you or your campaign committee should seek or accept support for your campaign from elected officials who are parties to, or represent parties to, cases pending before you.

Very truly yours,

  
James J. Wechsler  
Co-Chair

  
Julie J. Vargas  
Co-Chair

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