

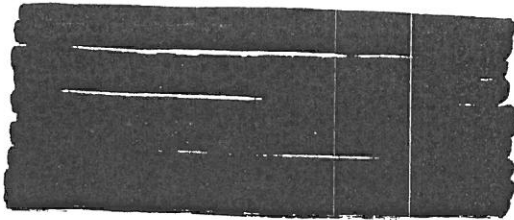


## Advisory Committee on the Code of Judicial Conduct

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

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March 29, 2019



AO 19-02

Dear 

You were recently appointed a district judge. In your law practice you represented the district attorney of your district in a personal criminal matter that attracted substantial public attention. The case was mostly resolved, but one issue is now on appeal in the Court of Appeals. You have withdrawn from the case, and the district attorney will be hiring new counsel. You no longer have any interest, financial or otherwise, in the matter.

While you were practicing before the district court in criminal matters, the district attorney arranged for the deputy district attorney to supervise any case in which you were an attorney, removing the district attorney from involvement in your cases. The deputy has since left the office.

You have asked the Advisory Committee on the Code of Judicial Conduct whether the Code of Judicial Conduct precludes you from handling a criminal docket as a district judge because of your representation of the district attorney, and, if not, the conditions that may apply to your situation.

Rule 21-211(A) NMRA provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ." The Committee believes that your attorney-client relationship with the district attorney in a recent, highly-publicized, personal criminal matter that is still pending on appeal gives rise to an appearance that affects your impartiality in cases prosecuted by the district attorney. The Committee thus believes that you should not preside over any case in which the district attorney personally appears.

Generally, when a judge is disqualified because of a relationship with an attorney who has supervisory authority over other attorneys, the judge is also disqualified from hearing cases of the supervised attorneys. However, if it is possible in the district attorney's office to insulate the district attorney in such a manner so that the district attorney is not involved in supervising assistant district attorneys who handle cases before you as district judge, the Committee believes that you can avoid disqualification in those cases, provided that your court provides notice to criminal defendants as discussed below. The Committee understands that it may not be feasible to insulate the district attorney from all aspects of a criminal prosecution because the district attorney makes policy decisions that may have general applicability to cases in the district attorney's office. The Committee believes, however, that you can avoid disqualification if the district attorney is not directly involved in the prosecution or supervision of the case before you, provided that no general policy directive of the district attorney is raised as an issue in the case.

As to notice if the district attorney's office is able to insulate the district attorney from your cases, the Committee believes that the defendants in criminal cases assigned to you must receive notice of: (1) your previous attorney-client relationship with the district attorney; (2) the manner in which their case will be handled by the district attorney's office; and (3) the opportunity to have another judge assigned to

their case exclusive of the procedure for exercising a peremptory challenge set forth in Rule 5-106 NMRA. Because the nature of your disqualification involves the district attorney's office, the Committee does not believe that a formal remittal as set forth in Rule 21-211(C) is needed. See Rule 21-211(C) (permitting a judge subject to disqualification to disclose the basis on the record and allowing the parties to waive disqualification). Instead, the Committee believes that it would be sufficient if the clerk of the court provided written notice to the defendants with the notice designating you as the judge.



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James J. Wechsler  
Co-Chair

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