Advisory Committee on the Code of Judicial Conduct

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February 15, 2021

[redacted]

RE: AO 21-02

Dear [redacted]

You have recently become aware that a child support hearing officer formerly employed at your court engaged in ex parte communications involving cases he was handling. You have asked the Advisory Committee on the Code of Judicial Conduct to advise you as to the manner in which the Code of Judicial Conduct applies and whether the Committee advises that you take any remedial action.

Rule 21-209(A) NMRA

With exceptions that are not applicable to your inquiry, Rule 21-209(A) NMRA states that a "judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter[.]" By the wording of the rule, an "ex parte communication" is a communication "made to the judge outside the presence of the parties or their lawyers." *See* Black's Law Dictionary 337 (10th ed. 2014) (defining "ex parte communication" as "[a] communication between counsel and the court when opposing counsel is not present"). The Code applies to child support hearing officers as a condition of their employment by the judicial branch. Rule 21-004(C) NMRA.

You have advised the Committee that the communications that have been brought to your attention were email communications between the hearing officer

and attorneys for the Child Support Enforcement Division (CSED), a party to the cases involved. Some of the communications were substantive and discussed specific details of the cases; the other parties were not included. Such substantive communications were clearly prohibited by Rule 21-209(A).

Remedial Action for Substantive Communications

Ex parte communications undermine the adversary system under which our judiciary operates. *In re Naranjo*, 2013-NMSC-026, ¶ 15, 303 P.3d 849. They "threaten the fairness of a proceeding[] and create an appearance of bias and impartiality." *Id.* (internal quotation marks and citation omitted). In the cases at issue, the hearing officer's ex parte communications concerning the substance of a case with the CSED's attorneys raise serious concerns about the fairness of the hearing officer's recommendations regarding the parents' child support obligations.

Although the Code does not specifically address action to be taken upon the discovery of this type of ex parte communication, the Committee believes that Rule 21-209(B) provides guidance. Under that provision, "[i]f a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond." Rule 21-209(B) requires a judge receiving such an ex parte communication to notify the parties in order to eliminate or limit any unfairness that may have arisen from the communication.

The communications you have described were not inadvertent, and, in many instances, were initiated by the hearing officer. Nonetheless, the remedial provisions of Rule 21-209(B) requiring notice to the other parties also would be appropriate to address any unfairness or prejudice that may have arisen from the hearing officer's ex parte communications. The Committee recommends that the parties in each of the cases in which there has been an ex parte communication in which the details of the case were discussed be informed of the substance of the communications.

The Committee additionally recommends that, different from Rule 21-209(B), the parties be informed not only that they may respond, but that they may request that a new hearing be granted in their case. The Committee makes this recommendation with the understanding that the vast majority of the cases heard by the hearing officer involve self-represented litigants.

To address any unfairness that may have resulted from the ex parte communications, the Committee suggests a notice procedure such as the following: (1) each case in which there has been an ex parte communication involving the substance of a case, even if it has been closed, should be assigned to a district judge who has not previously acted in the case; (2) the district judge should provide notice to the parties of the ex parte communication and the opportunity for the parties to request a new hearing on the issues addressed by the hearing officer; (3) the notice should include a reasonable time period for the parties to make the request; (4) the notice should include a form for the parties to complete and submit to request a hearing; and (5) if a hearing is requested, the district judge may assign the case to a hearing officer who has not previously acted in the case to make recommendations to the district judge.

Remedial Action for Procedural Communications

You have also informed the Committee that there was an occasion in which the hearing officer exchanged email communications with the CSED attorney regarding vacating hearings set for two particular days. Not all hearings set for those days were vacated. If the hearing was vacated, the parties received an order vacating their scheduled hearing. No notice was provided to parties whose hearing was held.

Rule 21-209(A)(1) permits a judge or hearing officer to engage in ex parte communications for scheduling or emergency purposes provided that the judge or hearing officer "reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication" and the judge or hearing officer promptly notifies the other parties of the substance of the communication and an opportunity to respond. Although the hearing officer issued an order in each vacated case, he did not comply with the requirement of Rule 21-209(A)(1) that he promptly inform the other parties of the communications that he had regarding vacating the hearings.

The hearing officer's communications violated Rule 21-209(A). Nevertheless, if the communications were solely for scheduling or emergency purposes without any "procedural, substantive, or tactical advantage" to the child support enforcement division, it would not appear that there was any prejudice to the parental parties in the cases. The Committee recommends that your court examine the communications and their context in the cases at issue to determine if there is

either the possibility or the appearance that the ex parte communications gave rise to a "procedural, substantive, or tactical advantage" to the child support enforcement division. If so, the Committee recommends that you follow the remedial action for substantive communications set forth above for any such case.

Additional Action

Rule 21-215(D) NMRA requires a "judge who receives information indicating a substantial likelihood that a lawyer has committed violations of the Rules of Professional Conduct" to "take appropriate action." Appropriate action includes "communicating directly with the lawyer who may have committed the violation[] or reporting the suspected violation to the appropriate" disciplinary authority. Rule 21-215, comm. cmt 2.

The Committee recommends that you "take appropriate action" as required by Rule 21-215(D). The hearing officer was subject to the Code of Judicial Conduct as part of his employment, and you have information that indicates that he violated the Code.[1] The Rules of Professional Conduct prohibit the child support enforcement division attorneys from engaging in improper ex parte communications. Rule 16-305(A), (B) NMRA. In deciding the action to take concerning the hearing officer and the child support enforcement division attorneys, the Committee suggests that you consider the seriousness of the violations and the actions involved, their impact on the fairness of the cases and the public perception of the judicial process, and the number of cases involved.

In addition, because of the nature and scope of the improper communications, the Committee suggests that you inform the Supreme Court of the problem.

James J. Wechsler
Chair

[1] The Judicial Standards Commission does not address complaints concerning hearing officers.