



Advisory Committee on the Code of Judicial Conduct

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December 2, 2021

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RE: [REDACTED] AO 21-07

Dear [REDACTED]

You have asked the Advisory Committee on the Code of Judicial Conduct whether a judge may accept legal representation from lawyers regarding matters before the Judicial Standards Commission on a discounted or pro bono basis.

Rule 21-313(A) NMRA provides:

A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality, or if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge.

Discounted fee or free legal services are gifts or something of value under Rule 21-313(A).

The language concerning the source of a gift clearly prohibits a judge from receiving a gift from a lawyer who has or is likely to appear before a judge; it is a blanket prohibition. Significantly, Rule 21-313(A) does not address gifts from lawyers who appear before the judge in the same manner as other gifts that are prohibited if they would appear to undermine the judge's independence, integrity, and impartiality. Rather, Rule 21-313(A) does not indicate that a judge who receives a gift from a lawyer who appears before the judge is then disqualified from cases involving the lawyer or that, after receiving such a gift, Rule 21-211 NMRA concerning disqualification would apply. By establishing this blanket prohibition, Rule 21-313(A) attempts to preempt the need for an analysis under Rule 21-211. It recognizes that a judge has the obligation to avoid placing himself or herself in a situation that may give rise to the judge's disqualification. *See* Rule 21-300 NMRA Canon 3 ("A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office."). The Committee does not believe that a judge may accept discounted fee or free legal services from a lawyer who has appeared or is likely to appear before the judge.

You have directed the Committee's attention to the Commonwealth of Massachusetts and the State of Iowa that treat discounted or free legal services differently from New Mexico. In those jurisdictions, the codes of judicial conduct prohibit a judge from receiving a gift or thing of value that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality as also stated in Rule 21-313(A). The provisions of these other states, however, do not contain the second express prohibition of Rule 21-313(A) that applies to lawyers who have or are likely to come before the judge. Massachusetts Code of Judicial Conduct Rule 3.13(A); Iowa Code of Judicial Conduct Rule 51:3.13(A).

In Massachusetts, comments to the code state that a judge's acceptance of a gift from a lawyer who has, is, or likely will appear before the judge would raise concerns to a reasonable person about the judge's independence, integrity, or impartiality. Mass. Rule 3.313, cmnt [3], [11]. Mass. Rule 3.313 comment 11 specifically discusses matters before the Massachusetts Commission on Judicial Conduct. It states that a reasonable person would not believe that a gift or benefit would undermine the judge's independence, integrity, or impartiality

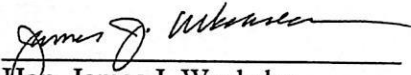
when the same discount is extended to non-judges in comparable circumstances, and the lawyer's, the lawyer's firm, and their interests are not before the judge, have not come before the judge in the reasonably recent past, and are not likely to come before the judge in the reasonably near future.

It cites as an example "a lawyer's policy" "to offer discounted legal services both to lawyers facing proceedings before the Board of Bar Overseers and to judges facing proceedings before the Commission on Judicial Conduct." Mass. Rule 3.313 comment 11 further notes that a judge may accept free or discounted legal services from a relative or close personal friend "whose appearance in a matter would require the judge's disqualification." Interestingly, by statute, Massachusetts permits its Supreme Judicial Court to award payment of reasonable legal fees by the Commonwealth in matter before its Commission on Judicial Conduct, and the Supreme Judicial Court may also determine that free or discounted legal fees would serve the public interest. Mass. Rule 3.13, cmnts [11A], [11B].

The Iowa Supreme Court considered free legal services in *In re Howes*, 880 N.W.2d 184 (Iowa 2016). The lawyer had represented the judge in the judge's marriage dissolution. *Id.* at 189. The Court held that there was a reasonable basis to question the judge's impartiality when the judge had been recently represented by the attorney in a case before her and that the judge had the obligation to disqualify herself or disclose to the parties the relevant facts and obtain a waiver of disqualification. *Id.* at 200. With regard to a gift of free legal services, the court observed that such a gift was not prohibited in all circumstances and stated that a judge receiving such services "must either disqualify himself or herself from any matter in which the attorney or firm who provided the services appears or disclose his or her acceptance of free legal services and obtain a waiver of the disqualification requirement from the parties." *Id.* at 206. According to the court, the Iowa code required the judge to ensure that the judge's acceptance of free legal services "does not reasonably appear to undermine" the judge's independence, integrity, or impartiality. *Id.*

The Massachusetts and Iowa codes are different from the New Mexico code in that they do not contain the blanket prohibition of our Rule 21-313(A). Thus, because the codes of those states rest on the determination of whether the acceptance of a gift would appear to a reasonable person to undermine the judge's independence, integrity, and impartiality, they contemplate circumstances in which the provisions of their disqualification rules may apply to a gift of free legal services. Because our Rule 21-313(A) also contains the blanket prohibition concerning gifts from lawyers who have come, or are likely to come, before the judge, the Massachusetts rules and Iowa case do not apply in New Mexico.

In New Mexico, Rule 21-313(A) prohibits a judge from receiving discounted or free legal services of any type from a lawyer who "has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge."



Hon. James J. Wechsler
Chair