

# Code of Judicial Conduct

## Preamble

An independent and honorable judiciary is indispensable to justice in our society. The provisions of this Code should be construed and applied to further that objective.

## 21-001. Definitions.

As used in this Code:

A. "candidate" means a person seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as the person makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support. The term "candidate" has the same meaning when applied to a judge seeking election or appointment to nonjudicial office;

B. "election" means a municipal, primary or general election and includes partisan elections, nonpartisan elections and retention elections;

C. "fiduciary" includes such relationships as executor, personal representative, attorney in fact, trustee and guardian;

D. "impartiality" or "impartial" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

E. "knowingly," "knowledge," "known" or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances;

F. "law" means court rules, statutes, the United States Constitution, the Constitution of the State of New Mexico and decisional law of this jurisdiction;

G. "member of the candidate's family" or "member of the judge's family" means a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship;

H. "member of the judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household;

I. "nonpublic information" means information that, by law or court order, is not available to the public; and

J. "require," when used in rules prescribing that a judge "require" certain conduct of others, means that a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

[Adopted, effective February 16, 1995; as amended, effective August 31, 2004.]

### ANNOTATIONS

**The 2004 amendment**, effective August 31, 2004, added a new Paragraph D defining "impartiality" or "impartial" and relettered former Paragraphs D to I as present Paragraphs E to J.

### **21-100. A judge shall uphold the integrity and independence of the judiciary.**

A judge shall participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.

[As amended, effective February 16, 1995.]

### ANNOTATIONS

#### COMMITTEE COMMENTARY

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness and soundness of character. An independent judiciary is one free of inappropriate outside influences. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

**The 1995 amendment**, effective February 16, 1995, rewrote the rule and rewrote the commentary.

**The 2004 amendment**, effective August 31, 2004, added two new sentences to the commentary as follows: "A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness and soundness of character. An independent judiciary is one free of inappropriate outside influences."

**Failure to recuse when appearance of impropriety occurs.** — Where district judge had a personal relationship with the defendant's attorney, who was defendant's

boyfriend and who subsequently became the defendant's husband, and where district judge continued to preside over criminal case even though he acknowledged that his continued involvement in the case would foster the appearance of impropriety, the actions of district judge constituted willful misconduct in office. In re McBee, 2006-NMSC-024, 139 N.M. 529, 134 P.3d 769.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 46 Am. Jur. 2d Judges § 1 et seq.

48A C.J.S. Judges § 35 et seq.

## **21-200. A judge shall avoid impropriety and the appearance of impropriety in all the judge's activities.**

A. **Respect for the law.** A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. **Impartiality.** A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interest of the judge or others; nor should a judge convey or permit others subject to the judge's direction and control to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. **Membership in organizations.** A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

[As amended, effective February 16, 1995.]

### **ANNOTATIONS**

#### **COMMITTEE COMMENTARY**

##### **Paragraph A**

The commentary to Rule 21-100 NMRA also applies to Paragraph A.

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Examples are the restrictions on judicial speech imposed by Subparagraphs (10) and (11) of Paragraph B of Rules 21-300 NMRA that are indispensable to the maintenance of the integrity, impartiality and independence of the judiciary.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

See *also* Commentary to Paragraph C of this rule.

### **Paragraph B**

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. (As to the acceptance of awards, see Paragraph D(5)(a) of Rule 21-500 and Committee Commentary.)

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation.

Judges may participate in the process of judicial selection as provided by law and by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for judgeship. (See *also* Rule 21-700 regarding use of a judge's name in political activities.)

A judge must not testify voluntarily as a character witness because to do so might lend the prestige of the judicial office in support of the party for whom the judge testifies, and such testimony may be misunderstood to be an official testimonial. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands

of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

### **Paragraph C**

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Paragraph C of this rule refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership. See *New York State Club Ass'n Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

It would be a violation of this rule for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under this rule and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Paragraph A of this rule.

When a judge learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Paragraph C or Paragraph A of this rule, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

**The 1995 amendment**, effective February 16, 1995, added Paragraph C, made gender neutral changes throughout the rule, and rewrote the commentary.

**The 2004 amendment**, effective August 31, 2004, added a new sentence to the second paragraph of Paragraph A of the commentary as follows: "Examples are the restrictions on judicial speech imposed by Subparagraphs (10) and (11) of Paragraph B of Rules

21-300 NMRA that are indispensable to the maintenance of the integrity, impartiality and independence of the judiciary".

**Stringent code of conduct.** — The conduct prescribed for judges and justices is more stringent than conduct generally imposed on other public officials. *In re Romero*, 100 N.M. 180, 668 P.2d 296 (1983) (decided prior to 1995 amendment).

**Suspension resulting from willful violation.** — Judge who willfully violated Code of Judicial Conduct in that he accepted favor from a person appearing before his court, thus giving rise to an appearance of impropriety, was suspended for 30 days without pay. *In re Terry*, 101 N.M. 360, 683 P.2d 42 (1984) (decided prior to 1995 amendment).

**Improper comments.** — Judge who was critical of the legal system during voir dire, implying that the system is governed by legislative whim rather than by well-settled principles, and who told the jury during trial of the consequences of their verdict, in terms of the mandated sentences for first- and second-degree murder, committed reversible error by depriving defendant of a fair trial. *State v. Henderson*, 1998-NMSC-018, 125 N.M. 434, 963 P.2d 511.

**Circumspect behavior off the bench.** — Judge who identified himself as a judge during issuance of citations to his son and his son's friends for violation of municipal ordinance, who asked officer issuing the citations if she knew who he was, and who involved himself in the municipal court proceedings on the citations acted with impropriety and his conduct constituted willful misconduct in office. *In re Ramirez*, 2006-NMSC-021, 139 N.M. 529, 135 P.3d 230.

**Delegation of duty.** — A judge was suspended for having delegated the duty to perform marriages to a municipal court clerk. *In re Perea*, 103 N.M. 617, 711 P.2d 894 (Ct. App. 1985) (decided prior to 1995 amendment).

**Judge's relatives having ties to victim.** — Recusal of a judge at a murder trial was not required where the judge's brother-in-law was the attorney representing the victim's family in a wrongful death action against defendant and the judge's son was employed as a law clerk by the district attorney. *State v. Fero*, 105 N.M. 339, 732 P.2d 866 (1987), *aff'd*, 107 N.M. 369, 758 P.2d 783 (1988) (decided prior to 1995 amendment).

**Request for findings of fact and conclusions of law.** — Because the court had decided in the state's favor, it was reasonable for the trial court to want to see requested findings of fact and conclusions of law from the plaintiff. Its request for those findings and conclusions did not show a bias or prejudice that would necessitate recusal, despite the defendants assertion of an apparent personal interest of the court in ensuring that the state submit its requested findings and conclusions. *State ex rel. Taxation & Revenue Dep't Motor Vehicle Div. v. Van Ruiten*, 107 N.M. 536, 760 P.2d 1302 (Ct. App.), *cert. denied*, 107 N.M. 413, 759 P.2d 200 (1988) (decided prior to 1995 amendment).

**Failure to recuse when appearance of impropriety occurs.** — Where district judge had a personal relationship with the defendant's attorney, who was defendant's boyfriend and who subsequently became the defendant's husband, and where district judge continued to preside over criminal case even though he acknowledged that his continued involvement in the case would foster the appearance of impropriety, the actions of district judge constituted willful misconduct in office. *In re McBee*, 2006-NMSC-024, 139 N.M. 529, 134 P.3d 769.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 46 Am. Jur. 2d Judges §§ 86, 88.

Judge as witness in cause not on trial before him, 86 A.L.R.3d 633.

Consorting with, or maintaining social relations with, criminal figure as ground for disciplinary action against judge, 15 A.L.R.5th 923.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case, 85 A.L.R.5th 471.

Disqualification of judge for having decided different case against litigant - state cases, 85 A.L.R.5th 547.

48A C.J.S. Judges §§ 36, 37, 59, 107 to 129.

## **21-300. A judge shall perform the duties of office impartially and diligently.**

A. **Judicial duties in general.** The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

### **B. Adjudicative responsibilities.**

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall maintain order and decorum in judicial proceedings.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, marital status, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, marital status, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This subparagraph does not preclude legitimate advocacy or consideration by the court when race, sex, religion, national origin, disability, age, marital status, sexual orientation or socioeconomic status, or other similar factors, are issues in or relevant to the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. 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 concerning a pending or impending proceeding except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication if it might reasonably be perceived that the party contacting the judge may have gained a tactical advantage.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer with the parties and their lawyers in an effort to mediate or settle matters pending before the judge. Ordinarily the judge will meet jointly with the parties.

(e) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.



(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

(9) All cases decided by an opinion of an appellate court shall be by a collegial opinion. Before an opinion is placed in final form, the participating justices or judges shall attempt to reconcile any differences between them. Each justice or judge on each panel is charged with the duty of carefully reading and analyzing the pertinent submitted material on each case in which the justice or judge participates.

(10) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This subparagraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This subparagraph does not apply to proceedings in which the judge is a litigant in a personal capacity.

(11) A judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

(12) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(13) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

### **C. Administrative responsibilities.**

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall inform and require the judge's staff, court officials and others subject to the judge's direction and control to observe the standards of confidentiality, fidelity and diligence that apply to the judge and to refrain from manifesting bias and prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid

nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

**D. Disciplinary responsibilities.**

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge who knows that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the New Mexico Judicial Standards Commission.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. A judge who knows that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the New Mexico Disciplinary Board.

(3) The requirements of Subparagraphs (1) and (2) of this paragraph do not apply to any communication concerning alcohol or substance abuse by a judge or attorney that is:

(a) made for the purpose of reporting substance abuse or recommending, seeking or furthering the diagnosis, counseling or treatment of a judge or an attorney for alcohol or substance abuse; and

(b) made to, by or among members or representatives of the Lawyer's Assistance Committee of the State Bar, Alcoholics Anonymous, Narcotics Anonymous or other support group recognized by the Judicial Standards Commission or the Disciplinary Board. Recognition of any additional support group by the Judicial Standards Commission or Disciplinary Board shall be published in the Bar Bulletin.

This exception does not apply to information that is required by law to be reported, including information that must be reported under Paragraph E of this rule, or to disclosures or threats of future criminal acts or violations of these rules.

(4) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Subparagraphs (1) and (2) of Paragraph D of this rule are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

**E. Judicial misconduct involving unlawful drugs; reporting requirement.**

Notwithstanding the provisions of Paragraph D, any incumbent judge who illegally sells, purchases, possesses, or uses drugs or any substance considered unlawful under

the provisions of the Controlled Substances Act, shall be subject to discipline under the Code of Judicial Conduct.

Any judge who has specific, objective, and articulable facts, or reasonable inferences that can be drawn from those facts, that a judge has engaged in such misconduct shall report those facts to the New Mexico Judicial Standards Commission. Reports of such misconduct shall include the following information:

- (1) name of the person filing the report;
- (2) address and telephone number where the person may be contacted;
- (3) a detailed description of the alleged misconduct;
- (4) dates of the alleged misconduct; and
- (5) any supporting evidence or material that may be available to the reporting person.

The Judicial Standards Commission shall review and evaluate reports of such misconduct to determine if the report warrants further review or investigation.

**F. Definition.** As used in this rule, "court personnel" does not include the lawyers in a proceeding before a judge.

[As amended, effective March 1, 1991; February 16, 1995; August 31, 2004; as amended by Supreme Court Order No. 09-8300-002, effective March 23, 2009.]

## **ANNOTATIONS**

### **COMMITTEE COMMENTARY**

#### **Paragraph A**

The commentary to Rule 21-100 NMRA also applies to Paragraph A of this rule.

#### **Paragraph B (4)**

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

#### **Commentary B (5)**

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

### **Paragraph B (7)**

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Subparagraph (7) of Paragraph B, it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus curiae*.

Certain *ex parte* communication is approved by Subparagraph (7) of Paragraph B to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage *ex parte* communication and allow it only if all the criteria stated in Subparagraph (7) are clearly met. A judge must disclose to all parties all *ex parte* communications described in Subparagraphs (a) and (b) of Subparagraph (7) of this paragraph regarding a proceeding pending or impending before the judge if it might reasonably be perceived that the party contacting the judge may have gained a tactical advantage. On rare occasions the judge may, with the consent of the parties, meet separately with the parties.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Subparagraph (7) of Paragraph B of this rule is not violated through law clerks or other personnel on the judge's staff. See Paragraph E of this rule for the definition of "court personnel".

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

### **Paragraph B (8)**

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts. See Rule 11-408 NMRA of the Rules of Evidence relating to communications relating to compromise.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

The practices of a judge in the enjoyment of hours of personal holiday or recreation should leave no public perception that the business of the court is not a full-time demand or that the avoidance of delays in the administration of justice is not dependent upon active management of the judiciary.

### **Paragraphs B (10) and (11)**

Paragraphs B (10) and (11) restrictions on judicial speech are essential to the maintenance of the integrity, impartiality and independence of the judiciary. A pending proceeding is one that has begun but not yet reached final disposition. An impending proceeding is one that is anticipated but not yet begun. The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. Subparagraphs (10) and (11) of Paragraph B do not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly.

### **Paragraph B (12)**

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

### **Paragraph C**

Appointees of the judge include officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

### **Paragraph D**

Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.

### **Paragraph E**

The definition of "court personnel" was taken from the Model Code of Judicial Conduct "terminology" section. It is used in Subparagraph (7)(c) and Subparagraph (9) of Paragraph B of this rule.

**2008 Committee Commentary.** — Notwithstanding the provisions of Paragraph D, Paragraph E sets forth the requirements for mandatory reporting of judicial misconduct involving unlawful drugs. See *In re Garza*, 2007-NMSC-028, 141 N.M. 831, 161 P.3d 876. In addition to the mandatory reporting requirements set forth in Paragraph E, the Supreme Court encourages any judge, employee of the judiciary, or lawyer who has a good faith basis to believe a judge is engaged in such misconduct, but does not have specific and articulable facts regarding such conduct, to report such belief to the Lawyer Assistance Committee hotline. The suggested reporting is to encourage members of the judiciary to seek appropriate help for alcohol and/or substance abuse problems.

[As amended, effective March 1, 1991; February 16, 1995; August 31, 2004; as amended by Supreme Court Order No. 09-8300-002, effective March 23, 2009.]

**Cross references.** — For broadcasting, televising, photographing and recording of court proceedings, see Rule 23-107 NMRA.

**The 1995 amendment**, effective February 16, 1995, rewrote the rule and rewrote the commentary.

**The 2004 amendment**, effective August 31, 2004, added a new Subparagraph (11) of Paragraph B prohibiting a judge with respect to cases, controversies or issues from making pledges, promises or commitments "that are inconsistent with the impartial performance of the adjudicative duties of the office", redesignated Subparagraphs (11)

and (12) as Subparagraphs (12) and (13); amended the commentary to change the heading "Paragraph B (9)" to "Paragraphs B (10) and (11)"; added the first three sentences after the rewritten heading relating to restrictions on judicial speech; and revised internal references in the commentary to be consistent with the 2004 amendment.

**The 2009 amendment**, as approved by Supreme Court Order 09-8300-002, effective March 23, 2009, in Subparagraph (1) of Paragraph D, replaced "having knowledge" with "who knows" and replaced "appropriate authority" with "New Mexico Judicial Standards Commission"; in Subparagraph (2) of Paragraph D, replaced "having knowledge" with "who knows" and replaced "appropriate authority" with "New Mexico Disciplinary Board"; in Subparagraph (3) of Paragraph D, deleted "(a) intended to be confidential"; renumbered "(b)" as "(a)" and "(c)" as "(b)"; in renumbered "(b)", replaced "a lawyers support group" with "the Lawyers Assistance Committee of the State Bar" and added "including information that must be reported under Paragraph E of this rule,"; added a new Paragraph E; and renumbered former Paragraph E as Paragraph F.

**Delegation of duty.** — A judge was suspended for having delegated the duty to perform marriages to a municipal court clerk. *In re Perea*, 103 N.M. 617, 711 P.2d 894 (Ct. App. 1985) (decided prior to 1995 amendment).

**Order and decorum.** — Judge failed to maintain order and decorum in the courtroom when he raised his voice to attorney appearing before him, prevented attorney from making full objections for the record, and admonished attorney in front of her client and his conduct constituted misconduct in office. *In re Ramirez*, 2006-NMSC-021, 139 N.M. 529, 135 P.3d 230.

**Breach of agreement with chief judge.** — Where district judge agreed with chief judge of district court that district judge would recuse himself in a case in which his continued involvement would create the appearance of impropriety and where district judge subsequently breached the agreement and reinserted himself in the case, the actions of district judge constituted willful misconduct in office. *In re McBee*, 2006-NMSC-024, 139 N.M. 529, 134 P.3d 769.

**Ex parte communications.** — Where district judge recused himself in a criminal case, but subsequently engaged in ex parte communications with defense counsel concerning his plans to reassert control over the case, the actions of district judge constituted willful misconduct in office. *In re McBee*, 2006-NMSC-024, 139 N.M. 529, 134 P.3d 769.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Abuse or misuse of contempt power as ground for removal or discipline of judge, 76 A.L.R.4th 982.

Disciplinary action against judge for engaging in ex parte communication with attorney, party, or witness, 82 A.L.R.4th 567.

Removal or discipline of state judge for neglect of, or failure to perform, judicial duties, 87 A.L.R.4th 727.

Disciplinary action against judge on ground of abusive or intemperate language or conduct toward attorneys, court personnel, or parties to or witnesses in actions, and the like, 89 A.L.R.4th 278.

Gestures, facial expressions, or other nonverbal communication of trial judge in criminal case as ground for relief, 45 A.L.R.5th 531.

Disqualification of judge based on property-ownership interest in litigation which consists of more than mere stock-state cases, 56 A.L.R.5th 783.

## **21-400. Disqualification.**

A. **Recusal.** A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(1) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a witness concerning it;

(3) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child, wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter of the controversy or in a party to the proceeding or has any other more than *de minimis* interest that could be substantially affected by the proceeding;

(4) the judge acted in an official capacity in any inferior court;

(5) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(a) is a party to the proceeding, or an officer, director or trustee of a party;

(b) is acting as a lawyer in the proceeding;

(c) is known by the judge to have a more than *de minimis* interest that could be substantially affected by the proceeding; or

(d) is to the judge's knowledge likely to be a material witness in the proceeding;



(6) the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to:

- (a) an issue in the proceeding; or
- (b) the controversy in the proceeding.

**B. Duty to be informed.** A judge shall use reasonable efforts to keep informed about the judge's personal and fiduciary economic interests, and make reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household. In keeping informed about the judge's personal economic and fiduciary interests, the judge may rely on representations of professional investment or financial advisors.

**C. Remittal of disqualification.** A judge disqualified by the terms of Paragraph A of this rule may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

**D. Definitions.** As used in this rule:

(1) "*de minimis*" means an insignificant interest that could not raise reasonable question as to a judge's impartiality;

(2) "economic interest" means ownership of a more than *de minimis* legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(a) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(b) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(c) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in

the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(d) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities; and

(3) "third degree of relationship" means the following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

[Approved, January 1, 1984; as amended, effective February 16, 1995; August 31, 2004.]

**Committee commentary.—**

**Paragraph A. Recusal.**

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Paragraph A of this rule apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge. A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

The fact that an employee of the court is a party to the proceeding does not of itself disqualify the judge. The judge shall consider the specifics of the case in determining whether the judge's impartiality might reasonably be questioned and if a recusal is required.

**Paragraph A (1) and (2)**

A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of Subparagraph (2) of Paragraph A; a judge formerly employed by a governmental agency, however, should disqualify

himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

### **Paragraph A (3)**

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Subparagraph (1) of Paragraph A, or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Paragraph A(5)(c) of this rule may require the judge's disqualification.

### **Paragraph A (6)**

Subparagraph (6) of Paragraph A prohibits a judge from pre-judging an issue. This Subparagraph is not intended to limit any comment allowed under Rule 21-500 NMRA.

### **Paragraph C. Remittal of disqualification.**

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

The issue of whether a judge is required to recuse for an appearance of impropriety after being threatened by a defendant is "whether an objective, disinterested observer, fully informed of the underlying facts, would entertain significant doubt that justice would be done absent recusal." *State v. Riordan*, 2009-NMSC-022, ¶ 11, 146 N.M. 281, 209 P.3d 773 (internal quotation marks and citations omitted). Threats alone do not require recusal, and deference should be given to the trial court's decision when there is a significant possibility that the defendant is attempting to manipulate the justice system.

[Amended by Supreme Court Order No. 09-8300-023, effective September 4, 2009.]

## **ANNOTATIONS**

**Compiler's notes.** — The commentary relating to A(6) is not a part of the ABA commentary.

**The 1995 amendment**, effective February 16, 1995, rewrote the prior rule to comprise Paragraph A, added Subparagraph A(3), added Paragraphs B, C, and D, and rewrote the commentary.

**The 2004 amendment**, effective August 31, 2004, added a new Subparagraph (6) of Paragraph A providing for the recusal of a judge in a judicial proceeding if the judge, while a judge or a candidate for judicial office, made a public statement that commits, or appears to commit, the judge with respect to an issue or controversy in the judicial proceeding; and added Paragraph A (6) of the committee commentary.

**The 2009 amendment**, approved by Supreme Court Order No. 09-8300-023, effective September 4, 2009, added the last paragraph of the committee commentary.

**Threats against a presiding judge.** — Where three criminal cases pending against the defendant were assigned to the same judge; during the pendency of the three cases, the defendant was charged with conspiring to commit an assault with a deadly weapon on the judge; the judge filed a recusal in the conspiracy case, but not in the other three pending cases; and there was no showing of bias by the judge against the defendant, the judge did not abuse the judge's discretion in denying the defendant's motion requesting the recusal of the judge. *State v. Riordan*, 2009-NMSC-022, 146 N.M. 281, 209 P.3d 773.

**Denial of recusal not an abuse of discretion.** — Where defendant was a child offender under the juvenile system; the court determined that defendant was not amenable to rehabilitation or treatment as a child and sentenced defendant as an adult after defendant pled guilty to second degree murder; prior to being appointed as district judge, the trial judge had been appointed as a contract public defender to represent the victim, who had been murdered by defendant, in a juvenile delinquency proceeding; the judge's former law partner actually appeared at all the hearings in the victim's case; and the judge did not personally represent the victim, engage in plea negotiations on the victim's behalf, discuss a plea with the victim or the victim's parents, appear before the court on behalf of the victim or the victim's parents, or have direct contact with the victim in the juvenile proceedings, the judge did not err in denying defendant's request for recusal. *State v. Trujillo*, 2009-NMCA-128, 147 N.M. 334, 222 P.3d 1040, *cert. granted*, 2009-NMCERT-011.

**Judge acting as mediator and as hearing officer to impose sanctions.** — Where a district judge appointed another district judge as a mediator to conduct a settlement conference; the mediator judge was subsequently appointed to hear motions for sanctions against one party for alleged bad faith participation in the settlement conference; the mediator judge heard the motions, made findings of fact, concluded that the party had conducted itself in bad faith at the conference, and entered an order requiring the party to pay a sanction; and the appointing district judge independently reviewed the mediator judge's decision and came to its own independent conclusions regarding sanctions; the appointing judge did not abuse its discretion in appointing the mediator judge to hear the motions for sanctions. *Carlsbad Hotel Associates, L.L.C. v.*

Patterson-UTI Drilling Co., 2009-NMCA-005, 145 N.M. 385, 199 P.3d 288, cert. granted, 2009-NMCERT-001.

**Motion to recuse after waiver.** — Where the district judge disclosed the basis for his disqualification and the respondent waived disqualification by agreeing to abide by the judge's decisions on all issues of the case, the judge was not required to recuse himself upon the motion of the petitioner after the waiver. In the Matter of Adoption Petn. of Rebecca M., 2008-NMCA-038, 143 NM 554, 178 P.3d 839.

**Stringent code of conduct.** — The conduct prescribed for judges and justices is more stringent than conduct generally imposed on other public officials. In re Romero, 100 N.M. 180, 668 P.2d 296 (1983) (decided prior to 1995 amendment).

**Duty to exercise judicial function.** — Except in those cases where a judge's impartiality might be reasonably questioned, he must exercise his judicial function. Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

**Recusal rests within discretion of trial judge.** Demers v. Gerety, 92 N.M. 749, 595 P.2d 387 (Ct. App.), aff'd in part, rev'd on other grounds, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment); Klindere v. Worley Mills, Inc., 96 N.M. 743, 634 P.2d 1295 (Ct. App. 1981);(decided prior to 1995 amendment).

**Judge has discretionary power to disqualify himself sua sponte** whenever the existence of any semblance of judicial bias or impropriety in a proceeding in his court comes to his attention. Demers v. Gerety, 92 N.M. 749, 595 P.2d 387 (Ct. App.), aff'd in part, rev'd on other grounds, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

**Statement of reasons for recusal not required.** — When a recusal is challenged, and the challenge is denied, a district judge does not have a duty to state in the order of denial that he has valid reasons for recusing himself. Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

**Compelling constitutional, statutory or ethical reason for recusal required.** — Although the reasons for a judge to disqualify himself may be personal and he need not state them, nonetheless a judge has a duty to perform his judicial role, and he has no right to disqualify himself unless there is a compelling constitutional, statutory or ethical cause for so doing. Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

**Grounds relied on for disqualification must be adequate,** because a judge has no right to disqualify himself in the absence of a valid reason. Demers v. Gerety, 92 N.M. 749, 595 P.2d 387 (Ct. App.), aff'd in part, rev'd on other grounds, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

**Suspicion of bias or prejudice is not enough to disqualify a judge.** Roybal v. Morris, 100 N.M. 305, 669 P.2d 1100 (Ct. App. 1983) (decided prior to 1995 amendment).

**Casual transaction cannot be basis of disqualification.** — A casual transaction between two people is not a negative confrontation, so as to amount to an appearance of bias requiring voluntary disqualification. Lujan v. New Mexico State Police Bd., 100 N.M. 149, 667 P.2d 456 (1983) (decided prior to 1995 amendment).

**Establishing record of impropriety.** — Improper for trial judge to refuse defense counsel an opportunity to establish on the record defense counsel's objections to comments he claimed the trial judge had made during a recess. State v. Martin, 101 N.M. 595, 686 P.2d 937 (1984) (decided prior to 1995 amendment).

**Impartiality throughout case required.** — When judge believes he will be unable to remain impartial he should remove himself from the case in order to avoid any hint of impropriety. Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

**Bias or prejudice as grounds for disqualification.** — Bias or prejudice towards an attorney on each matter raised in the trial court is insufficient to disqualify a judge. This rule, however, is not absolute. If the bias and prejudice toward an attorney is of such a degree as to adversely affect the interest of the client, bias and prejudice toward an attorney is sufficient. Martinez v. Carmona, 95 N.M. 545, 624 P.2d 54 (Ct. App. 1980) (decided prior to 1995 amendment).

When a district judge believes that his impartiality might reasonably be questioned with reference to bias and prejudice concerning a party, he must not exercise his judicial function. Martinez v. Carmona, 95 N.M. 545, 624 P.2d 54 (Ct. App. 1980) (decided prior to 1995 amendment) Klindera v. Worley Mills, Inc., 96 N.M. 743, 634 P.2d 1295 (Ct. App. 1981);(decided prior to 1995 amendment).

**Extrajudicial source.** — Refusal of the judge to recuse himself in a malicious abuse of process case was proper pursuant to this rule where the analogy the court drew between a party and a well-known literary character (Jay Gatsby) did not establish any meaningful extrajudicial source. Dawley v. La Puerta Architectural Antiques, Inc., 2003-NMCA-029, 133 N.M. 389, 62 P.3d 1271.

**Recusal not required for prior judicial encounters.** — The defendant's arguments that the trial judge was biased, based on the judge's previous contempt charges and sanctions or dislike toward the defendant, were without merit, since bias requiring recusal must arise from a personal, extra-judicial source, not a judicial source. Purpura v. Purpura, 115 N.M. 80, 847 P.2d 314 (Ct. App. 1993) (decided prior to 1995 amendment).

**Failure to recuse when appearance of impropriety occurs.** — Where district judge had a personal relationship with the defendant's attorney, who was defendant's boyfriend and who subsequently became the defendant's husband, and where district judge continued to preside over criminal case even though he acknowledged that his continued involvement in the case would foster the appearance of impropriety, the actions of district judge constituted willful misconduct in office. *In re McBee*, 2006-NMSC-024, 139 N.M. 529, 134 P.3d 769.

**Review of decision not to recuse.** — A decision contrary to recusal is reviewable on appeal only if it amounts to an abuse of sound judicial discretion. *Martinez v. Carmona*, 95 N.M. 545, 624 P.2d 54 (Ct. App. 1980) (decided prior to 1995 amendment).

When a movant has failed to meet its burden of establishing that the judge has a personal or extrajudicial bias or prejudice against it, the judge's refusal to disqualify himself is proper. *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981) (decided prior to 1995 amendment).

**The constitutional right to disqualify a judge may be waived.** *State v. Lucero*, 104 N.M. 587, 725 P.2d 266 (Ct. App. 1986) (decided prior to 1995 amendment).

**Comment reflecting feelings about violent crimes after conviction obtained.** — Comment reflecting judge's feelings about violent crimes once a conviction was obtained did not suggest that the judge had a personal bias or prejudice against defendant during trial. *State v. Swafford*, 109 N.M. 132, 782 P.2d 385 (Ct. App. 1989) (decided prior to 1995 amendment).

A claim of judicial bias cannot be based upon the imposition of the maximum legal sentence. *State v. Swafford*, 109 N.M. 132, 782 P.2d 385 (Ct. App. 1989) (decided prior to 1995 amendment).

**Judge's refusal to accept a tendered plea agreement** did not demonstrate judicial bias or prejudice, where, when the plea and disposition agreement was tendered, the judge reserved ruling on it until he could consider a presentence report, information on treatment programs, and written statements from the victim of the crime and her brother regarding their feelings and views on the proposed disposition. *State v. Swafford*, 109 N.M. 132, 782 P.2d 385 (Ct. App. 1989) (decided prior to 1995 amendment).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 46 Am. Jur. 2d Judges § 95 et seq.

Relationship of judge to one who is party in an official or representative capacity as disqualification, 10 A.L.R.2d 1307.

Relationship to attorney in case as disqualifying judge, 50 A.L.R.2d 143.

Remarks or acts of trial judge criticizing, rebuking or punishing defense counsel in criminal case, as requiring reversal, 62 A.L.R.2d 166.

Prior representation or activity as attorney or counsel as disqualifying judge, 72 A.L.R.2d 443, 16 A.L.R.4th 550.

Prejudicial effect of trial judge's remark during civil jury trial disparaging the litigants, the witnesses or the subject matter of the litigation, 83 A.L.R.2d 1128, 35 A.L.R.5th 1.

Prejudicial effect of remarks of trial judge criticizing counsel in civil case, 94 A.L.R.2d 826.

Disqualification of judge for bias against counsel for litigant, 23 A.L.R.3d 1416.

Disqualification of judge by relative's ownership of stock in corporation which is party to action or proceeding, 25 A.L.R.3d 1331.

Prejudicial effect of trial judge's remarks, during criminal trial, disparaging accused, 34 A.L.R.3d 1313.

Disqualification of judge or one acting in judicial capacity to preside in a case in which he has a pecuniary interest in the fine, penalty or forfeiture imposed upon the defendant, 72 A.L.R.3d 375.

Membership in fraternal or social club or order affected by a case as ground for disqualification of judge, 75 A.L.R.3d 1021.

Validity, propriety, and effect of allowing or prohibiting media's broadcasting, recording, or photographing court proceedings, 14 A.L.R.4th 121.

Waiver or loss of right to disqualify judge by participation in proceedings - modern state civil cases, 24 A.L.R.4th 870.

Disqualification of judge because of assault or threat against him by party or person associated with party, 25 A.L.R.4th 923.

Disqualification of judge because of political association or relation to attorney in case, 65 A.L.R.4th 73.

Judge's previous legal association with attorney connected to current case as warranting disqualification, 85 A.L.R.4th 700.

Disqualification of judge as affecting validity of decision in which other nondisqualified judges participated, 29 A.L.R.5th 722.

Disqualification of judge for bias against counsel for litigant, 54 A.L.R.5th 575.



Disqualification of judge based on property-ownership interest in litigation which consists of more than mere stock-state cases, 56 A.L.R.5th 783.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case, 85 A.L.R.5th 471.

Disqualification of judge for having decided different case against litigant - state cases, 85 A.L.R.5th 547.

Conduct or bias of law clerk or other judicial support personnel as warranting recusal of federal judge or magistrate, 65 A.L.R. Fed. 775.

48A C.J.S. Judges §§ 107 to 129.

## **21-500. A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.**

A. **Extra-judicial activities in general.** A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast doubt on the judge's capacity to act impartially as a judge;
- (2) demean the judicial office;
- (3) interfere with the proper performance of judicial duties; or
- (4) violate the judge's oath and obligation to uphold the laws and constitutions of the United States and the State of New Mexico.

B. **Avocational activities.** A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

### **C. Governmental, civic or charitable activities.**

(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the judiciary or matters relating to the judiciary or which affect the interests of the judiciary, the legal system or the administration of justice or except when acting *pro se* in a matter involving the judge or the judge's interests;

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities;

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal, or civic organization not conducted for profit, subject to the following limitations and other requirements of this Code:

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization:

(i) will be engaged in proceedings that would ordinarily come before the judge; or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Subparagraph (3)(b)(i) of this paragraph, if the membership solicitation is essentially a fund-raising mechanism;

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

#### **D. Financial activities.**

(1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position; or

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

(3) A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in:

(a) a business closely held by the judge or members of the judge's family; or

(b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept a gift, bequest, favor or loan from anyone except for:

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion, including, but not limited to, a wedding anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative;

(f) a loan from a lending or similar institution in its regular course of business on the same terms generally available to persons who are not judges; or

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants.

**E. Fiduciary activities.**

(1) A judge shall not serve as the executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family or the family of a close friend, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

**F. Service as an arbitrator or mediator.** A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

**G. Practice of law.** A judge shall not practice law. Notwithstanding this prohibition, a judge may act *pro se* and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

**H. Conflicting compensated activities.** A judge shall not hold any other paid position, judicial or otherwise, that conflicts with the hours and duties the judge is required to perform for every judicial position. A judge shall devote the number of hours that is required by any judicial position held. In no event shall other paid employment or compensable activity hours be performed simultaneously.

I. No full-time municipal, magistrate, metropolitan, district or appellate judge may hold any other judicial position, elected or appointed.

[As amended, effective January 1, 1987; March 1, 1988 and October 1, 1989; February 16, 1995.]

**ANNOTATIONS**

COMMITTEE COMMENTARY

**Paragraph A. Extra-judicial activities in general**

Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.

### **Paragraph B. Avocational activities**

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

In Paragraph B and other paragraphs of this rule, the phrase "subject to the requirements of this Code" is used, notably, in connection with a judge's governmental, civic or charitable activities. This phrase is included to remind judges that the use of permissive language in various provisions of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

### **Paragraph C. Governmental, civic or charitable activities**

#### **Paragraph C(1)**

See Paragraph B of Rule 21-200 regarding the obligation to avoid improper influence.

#### **Paragraph C(2)**

Paragraph C(2) prohibits a judge from accepting any governmental position except one relating to the law, legal system or administration of justice as authorized by Paragraph C(3). The appropriateness of accepting extra judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra judicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary.

Paragraph C(2) does not govern a judge's service in a nongovernmental position. See Paragraph C(3) of this rule permitting service by a judge with organizations devoted to the improvement of the law, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civic organizations not conducted for profit. For example, service on the board of a public educational institution, unless it were a law school, would be prohibited under Paragraph C(2), but service on the board of a public law school or any private educational institution would generally be permitted under Paragraph C(3).

### **Paragraph C(3)**

Paragraph C(3) of this rule does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice; see Paragraph C(2).

See Commentary to Paragraph B of this rule regarding use of the phrase "subject to the following limitations and the other requirements of this Code". As an example of the meaning of the phrase, a judge permitted by Paragraph C(3) of this rule to serve on the board of a fraternal institution may be prohibited from such service by Paragraph A of Rule 21-200 if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.

Service by a judge on behalf of a civic or charitable organization may be governed by other provisions of Rule 21-400 in addition to Paragraph C of this rule. For example, a judge is prohibited by Paragraph G from serving as a legal advisor to a civic or charitable organization.

### **Paragraph C(3)(a)**

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the court for adjudication.

### **Paragraph C(3)(b)**

A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system or the administration of justice or a nonprofit educational, religious, charitable, fraternal or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing or by telephone except in the following cases: (1) a judge may solicit for funds or memberships other judges over whom the judge does not exercise supervisory or appellate authority; (2) a judge may solicit other persons for membership in the organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves; and (3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge's signature.

Use of an organization letterhead for fund-raising or membership solicitation does not violate Paragraph C(3)(b) provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

If requested to be a speaker or guest of honor at an organization or fund-raising event, the judge should seriously consider whether the acceptance of such a role would constitute the use of the prestige of judicial office for fund-raising purposes. Mere attendance at such an event is permissible if otherwise consistent with this Code.

## **Paragraph D. Financial activities**

### **Paragraph D(1)**

When a judge acquires information in a judicial capacity, such as material contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain. See Rule 21-200 B; see also Rule 21-300 B(12).

A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's court. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification. With respect to affiliation of relatives of judge with law firms appearing before the judge, see Commentary to Paragraph A of Rule 21-400 relating to disqualification.

Participation by a judge in financial and business dealings is subject to the general prohibitions in Paragraph A of this rule against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Rule 21-200 against activities involving impropriety or the appearance of impropriety and the prohibition in Paragraph B of Rule 21-200 against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Rule 21-100. See Commentary for Paragraph B of this rule regarding use of the phrase "subject to the requirements of this Code."

### **Paragraph D(2)**

This subparagraph provides that, subject to the requirements of this Code, a judge may hold and manage investments owned solely by the judge, investments owned solely by

a member or members of the judge's family, and investments owned jointly by the judge and members of the judge's family.

### **Paragraph D(3)**

Subject to the requirements of this Code, a judge may participate in a business that is closely held either by the judge alone, by members of the judge's family, or by the judge and members of the judge's family.

Although participation by a judge in a closely-held family business might otherwise be permitted by Paragraph D(3) of this rule, a judge may be prohibited from participation by other provisions of this Code when, for example, the business entity frequently appears before the judge's court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a closely-held family business if the judge's participation would involve misuse of the prestige of judicial office.

### **Paragraph D(5)**

Paragraph D(5) does not apply to contributions to a judge's campaign for judicial office, a matter governed by Rule 21-800. Because a gift, bequest, favor or loan to a member of the judge's family residing in the judge's household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.

### **Paragraph D(5)(d)**

A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required. See, however, Paragraph D(5)(e).

### **Paragraph D(5)(h)**

Paragraph D(5)(h) prohibits judges from accepting gifts, favors, bequests or loans from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.

### **Paragraph E. Fiduciary activities**

The restrictions imposed by this rule may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would



result from divestiture of holdings the retention of which would place the judge in violation of Subparagraph (4) of Paragraph D.

### **Paragraph F. Service as an arbitrator or mediator**

Paragraph F does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties.

### **Paragraph G. Practice of law**

This prohibition refers to the practice of law in a representative capacity and not in a *pro se* capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Paragraph B of Rule 21-200.

The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

**The 1995 amendment**, effective February 16, 1995, rewrote the rule and rewrote the commentary.

**Financial activity posing conflict of interest.** — A municipal judge was in violation of this canon because he owned and directed a "driving while intoxicated school" while serving on the bench and sentencing people to attend said school; this conflict in interest reflected adversely on his impartiality as a member of the judiciary. In re Rainaldi, 104 N.M. 762, 727 P.2d 70 (1986) (decided prior to 1995 amendment).

**Pro se appearance as party defendant not violative of Paragraph F (now G).** — State court judge's pro se appearance as a party defendant in law suit pending before federal district court does not constitute practice of law in violation of Paragraph F (now see Paragraph G). United States v. Martinez, 101 N.M. 423, 684 P.2d 509 (1984) (decided prior to 1995 amendment).

**Acceptance of gratuity for marriage ceremony.** — Except for municipal judges, a judge may not accept a gratuity in connection with the performance of a marriage ceremony without violating the New Mexico Constitution. 1991 Op. Att'y Gen. No. 91-09 (decided prior to 1995 amendment).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 46 Am. Jur. 2d Judges § 44 et seq.

Other public offices or employments within prohibitions as regards judicial officers of constitutional or statutory provisions against holding more than one office, 89 A.L.R. 1113.

What amounts to practice of law within contemplation of constitutional or statutory provision which makes such practice a condition of eligibility to a judicial office or forbids it by one holding judicial position, 106 A.L.R. 508.

Propriety and permissibility of judge engaging in practice of law, 89 A.L.R.2d 886.

Validity and application of state statute prohibiting judge from practicing law, 17 A.L.R.4th 829.

Disqualification of judge based on property-ownership interest in litigation which consists of more than mere stock-state cases, 56 A.L.R.5th 783.

48A C.J.S. Judges §§ 35 to 38.

## **21-600. Reporting quasi-judicial and extra-judicial activities and compensation.**

**A. Compensation and reimbursement.** A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if neither the source nor amount of such payments gives the appearance of influencing the judge's official duties, or otherwise gives the appearance of impropriety.

**B. Extra-judicial compensation.** Extra-judicial compensation is defined as being the consideration received for services rendered by a judge to a person, firm, corporation or association other than the salary, benefits and perquisites of office provided to the judge for the performance of official judicial duties. Extra-judicial compensation does not include income from interest, dividends, rents, royalties, working interests, proceeds of or profits from the sale or exchange of capital assets as defined by the Internal Revenue Code and regulations, or collection of fees or retirement benefits earned or reimbursement of expenses incurred prior to entering judicial service. Compensation or income of a spouse attributed to the judge by operation of community property or other law is not extra-judicial compensation of the judge. Extra-judicial compensation should not exceed a reasonable amount for the activities performed, and should not exceed what a person who is not a judge would receive for the same activity.

**C. Expense reimbursement.** Expense reimbursement should be limited to the actual cost of travel, food and lodging and other expenses reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse. Any payment in excess of actual cost is extra-judicial compensation subject to the requirements of this rule.

**D. Public reports.** In addition to all other reports required by law, a judge should report the date, place and nature of any activity for which the judge received extra-judicial compensation as defined in this rule, including the name of the payor and the amount, or character and value, of extra-judicial compensation so received. The judge's report shall be filed as a public record in the office of the clerk of the Supreme Court of New Mexico on or before April 15 of each year covering the preceding calendar year.

[As amended, effective January 1, 1987; February 16, 1995.]

## **ANNOTATIONS**

### **COMMITTEE COMMENTARY**

#### **Paragraph A. Compensation and reimbursement**

The Code does not prohibit a judge from accepting honoraria or speaking fees provided that the amount of the extra-judicial compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts of interest are created by the arrangements. A judge must not appear to trade on judicial office for personal advantage. A judge shall not spend significant time away from court duties in order to meet speaking or writing commitments. Neither the source of payment nor the amount paid as extra-judicial compensation must raise any question of undue influence or the judge's ability or willingness to be impartial. Engaging in business for profit with the State of New Mexico or any of its departments, officials, or political subdivisions, either in person or through an entity in which the judge owns an interest, should be carefully scrutinized to avoid creating a conflict of interest or suggesting that the judge is exploiting judicial office for personal advantage.

#### **Paragraph B. Extra-judicial compensation**

No judge may ask for any remuneration for performing a marriage ceremony, but may receive an unsolicited gratuity for performing a marriage outside normal business hours.

**The 1995 amendment**, effective February 16, 1995, rewrote the rule and added the commentary.

**Internal Revenue Code.** — For the Internal Revenue Code, referred to in Paragraph B, see 26 U.S.C. § 1 et seq.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 46 Am. Jur. 2d Judges § 27.

48A C.J.S. Judges § 35.

### **21-700. Elections and political activity.**

#### **A. Incumbent judges.**

(1) A judge may engage in political activity on behalf of the legal system, the administration of justice, measures to improve the law and as expressly authorized by law or by this Code.

(2) A judge may, unless and except as prohibited by law:

(a) purchase tickets for and attend political gatherings;

(b) identify the political party of the judge, except as prohibited by Subparagraph (6) of Paragraph B of this rule; and

(c) contribute to a political organization.

(3) A judge shall not:

(a) act as a leader or hold an office in a political organization;

(b) publicly endorse or publicly oppose a candidate for public office through the news media or in campaign literature;

(c) make speeches on behalf of a political organization; or

(d) solicit funds for a political organization or candidate.

**B. Candidates for election to judicial office.** Candidates for election to judicial office in partisan, non-partisan and retention elections, including judges, lawyers and non-lawyers, are permitted to participate in the electoral process, subject to the requirements that all candidates:

(1) shall maintain the dignity appropriate to judicial office, act in a manner consistent with the impartiality, integrity and independence of the judiciary and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate;

(2) shall prohibit public officials and employees subject to the candidate's direction or control from doing for the judge what the candidate is prohibited from doing under these rules;

(3) shall not allow any other person to do for the candidate what the candidate is prohibited from doing under these rules, except activities permitted to a campaign committee;

(4) shall not:

(a) with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office; or

(b) misrepresent the candidate's or the candidate's opponent's identity, qualifications, present position or other material fact;

(5) may speak at public meetings, subject to these rules;

(6) may use advertising that does not contain any misleading contents, provided that the advertising is within the bounds of proper judicial decorum and does not, in nonpartisan elections, contain any reference to the candidate's affiliation with a political party; and

(7) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Paragraph B(4) of this rule.

**C. Elections for non-judicial offices.** No judge of any court in the State of New Mexico may while in office be nominated or elected to a public non-judicial office. A judge must, when filing a statement of candidacy for a non-judicial office, resign the judge's office immediately.

**D. Candidates seeking appointment to judicial office.**

(1) A candidate for appointment to judicial office shall not solicit or accept funds, personally or through a committee or otherwise, to support the candidacy.

(2) A candidate for appointment to judicial office shall not engage in political activity to secure the appointment except that such candidate may:

(a) communicate with the appointing authority, including any nominating commission designated to screen candidates;

(b) seek support or endorsement for the appointment from organizations and from individuals to the extent requested, required or permitted by the appointing authority and the nominating commission; and

(c) provide to the appointing authority and the nominating commission information as to the candidate's qualifications for office.

**E. Judges seeking appointment to public, non-judicial office.**

(1) A judge seeking appointment to a public, non-judicial office shall not:

(a) solicit or accept funds, personally or through a committee, or otherwise, to support the candidacy;

(b) engage in any political activity to secure the appointment except:

(i) communicating with the appointing authority;

(ii) seeking the support or endorsement for the appointment from organizations and from individuals to the extent requested, required or permitted by the appointing authority; and

(iii) providing to the appointing authority information concerning the candidate's qualifications for the office.

(2) A judge seeking appointment to a public non-judicial office, during the time the appointment is sought, shall be disqualified from presiding or participating as a judge in any legal proceeding involving or materially affecting the interests of:

(a) the appointing authority; or

(b) an organization or individual that has been contacted by the candidate to make, or is known by the candidate to be making, a recommendation to the appointing authority concerning the appointment.

**F. Definition.** As used in this rule "political organization" means a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

[As amended, effective June 1, 1990; July 1, 1990; February 16, 1995; August 31, 2004.]

## ANNOTATIONS

### COMMITTEE COMMENTARY

With respect to a judge's activity on behalf of measures to improve the law, the legal system and the administration of justice, see Subparagraphs (1) through (3) of Paragraph C of Rule 21-500 NMRA. The Code does not prohibit a judge in the exercise of administrative functions from engaging in planning and other official activities with members of the executive and legislative branches of government.

A judge or candidate for judicial office retains the right to participate in the political process as a voter.

Where false information concerning a judicial candidate is made public, a judge or another judicial candidate having knowledge of the facts is not prohibited from making the facts public.

A candidate for elective judicial office is not prohibited from retaining during candidacy a public office such as county prosecutor, which is not an office in a "political organization".

A judge or judicial candidate is not prohibited from privately expressing the judge's or judicial candidate's views on judicial candidates or other candidates for public office.

A candidate for judicial office does not publicly endorse another candidate for public office by having that candidate's name on the same ticket, or by participating in joint fund-raising with other judicial candidates, or by running for election as part of a slate of judicial candidates.

Although a judicial candidate must encourage members of the judicial candidate's family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.

The Code prohibits a candidate for judicial office from making statements that commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of the candidate's personal views. The Code does not prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. Paragraph B(4) of this rule applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment.

This rule does not prohibit a candidate from initiating an evaluation by a judicial selection commission or bar association, or, subject to the requirements of the Code of Judicial Conduct, from responding to a request for information from any organization.

**Compiler's notes.** — The ABA model rule provides that a candidate may not "knowingly" misrepresent the candidate's identity, qualifications, present position or other material fact.

**The 1995 amendment,** effective February 16, 1995, rewrote the rule and added the commentary.

**The 2004 amendment,** effective August 31, 2004, made gender neutral revisions; added to Subparagraph (1) of Paragraph B to require judicial candidates to "act in a manner consistent with the impartiality, integrity and independence of the judiciary; amended Subparagraph (4)(a) of Paragraph B to prohibit judicial candidates from making pledges or commitments with respect to cases, controversies or issues that are likely to come before the court that are inconsistent with the impartial performance of the adjudicative duties; deleted former Subparagraphs (4)(b) and (4)(c) of Paragraph B; redesignated former Subparagraph (4)(d) of Paragraph B as present Subparagraph

(4)(b) and amended Subparagraph (4)(b) to prohibit a candidate from misrepresenting the candidate's opponent's position or other material fact.

**The endorsement clause is a constitutional limitation on a judge's right to endorse political candidates.** In the Matter of William A. Vincent, Jr., 2007-NMSC-056, 143 N.M. 56, 172 P.3d 605.

**Judge cannot simultaneously run for separate judicial positions.** — Paragraph B indicates that a judge may be nominated or run for another judicial office without resigning. It does not, however, state that a judge may simultaneously run for separate judicial positions. 1990 Op. Att'y Gen. No. 90-04 (decided prior to 1995 amendment).

**Judicial candidate advertising.** — Minnesota judicial advertising rule held unconstitutional under the strict scrutiny test. Republican Party of MN v. White, 536 U.S. 765 (2002).

**Law reviews.** — For article, "Judges and Politics: Accountability and Independence in an Election Year," see 12 N.M.L. Rev. 873 (1982).

For note, "Are There Any Limits on Judicial Candidates' Political Speech After Republican Party of Minnesota v. White," see 33 N.M.L. Rev. 449 (2003).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 46 Am. Jur. 2d Judges § 47.

48A C.J.S. Judges § 37.

## **21-800. A judge shall refrain from campaign fund-raising activity which has the appearance of impropriety.**

**A. Contributions creating appearance of impropriety.** Candidates for judicial office in both partisan and retention elections shall refrain from campaign fund-raising activity which has the appearance of impropriety, and shall not accept any contribution that creates an appearance of impropriety.

**B. Solicitation for other campaigns and candidates.** Subject to the restrictions of this rule, candidates in both partisan and retention elections for judicial office may solicit contributions for their own campaigns, but shall not solicit funds for any other political campaign, or for any candidate for any other office. Judicial candidates may run for election as part of a slate of judicial candidates and may participate in joint fund-raising events with other judicial candidates.

**C. Campaign committees.** Candidates in both partisan and retention elections shall establish committees of one or more responsible persons to conduct campaigns for the candidate using media advertisements, brochures, mailings, candidate forums and other means not prohibited by law or these rules. Campaign committees may solicit and accept reasonable campaign contributions, and obtain public statements of support



in behalf of the candidate, subject to the restrictions of these rules. All campaign contributions shall be paid or turned over to the campaign committee, and shall be managed and disbursed by the committee. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

**D. Unopposed candidates in partisan elections.** Candidates in partisan elections for judicial office who have a campaign fund, but who are unopposed or become unopposed in the campaign, shall return all unused and uncommitted campaign funds pro rata to the contributors of the funds, or donate the funds to a charitable organization, or to the State of New Mexico, as the candidate may choose, with disbursement of such funds to occur within thirty (30) days after the absence of opposition becomes known.

**E. Unused campaign funds.** A candidate for judicial office in either a partisan or retention election who has unused campaign funds remaining after election, and after all expenses of the campaign and election have been paid, shall refund the remaining funds pro rata to the campaign contributors, or donate the funds to a charitable organization, or to the State of New Mexico, as the candidate may choose, within thirty (30) days after the date the election results are certified.

**F. Contributions by attorneys and litigants.** Candidates for judicial office, in both partisan and retention elections, shall not personally solicit or personally accept campaign contributions from any attorney, or from any litigant in a case pending before the candidate. Contributions from attorneys and litigants shall be made only to a campaign committee, and are subject to all the requirements of this rule. Campaign committees may solicit contributions from attorneys. Campaign committees shall not knowingly solicit a contribution from a litigant whose case is then pending before the candidate. Campaign committees shall not disclose to the judge or candidate the identity or source of any funds raised by the committee. If a case is pending before any candidate for the judicial office being contested, restrictions of this subparagraph apply to all candidates for that office.

[As amended, effective February 16, 1995.]

## **ANNOTATIONS**

### **COMMITTEE COMMENTARY**

This rule restricts contributions for campaigns for judicial office to sources and amounts that do not create an appearance of impropriety. Candidates for judicial office may solicit contributions for their own campaigns, within the restrictions of this rule, but not for the campaigns for other candidates or offices. Candidates for election to judicial office are required to create campaign committees to solicit and accept contributions, to solicit public support, and to receive, manage and disburse all campaign contributions. Each candidate must instruct the campaign committee to solicit or accept only those contributions that are reasonable under the circumstances, and that meet the requirement of this rule.

Attorneys and litigants have the right as citizens to participate in the electoral process of public officers, including judges, and have the right to support and make contributions to candidates for judicial office. Therefore, campaign contributions by attorneys and litigants are permitted, within the restrictions of this rule. However, campaign contributions from litigants with cases pending before any candidate for the judicial office being contested may not be knowingly solicited or accepted by any candidate for that office, or that candidate's campaign committee.

Campaign committees established under this rule should attempt to manage campaign finances responsibly, avoiding deficits that may necessitate post-election fund-raising.

**The 1995 amendment**, effective February 16, 1995, rewrote the rule and added the commentary.

## **21-900. Violations.**

**A. Violations by incumbents.** Violations of any of the rules of the Code of Judicial Conduct by incumbent judges shall be investigated, proceeded upon and disposed of by the Judicial Standards Commission in accordance with its authority and rules of procedure, and by the Supreme Court of New Mexico acting under its powers of contempt and superintending control. Judges shall comply with all rules, requirements and procedures of the Judicial Standards Commission, shall cooperate with the Judicial Standards Commission in the performance of its functions and shall comply with all laws applicable to judicial office.

**B. Violations by candidates for judicial office.** All candidates for judicial office shall comply with Rules 21-700, 21-800, 21-900 and 21-901 NMRA of the Code of Judicial Conduct. Violations of those rules by persons who are members of the bar shall be deemed to constitute violations of the Rules of Professional Conduct. Violations of those rules by candidates who are not lawyers are within the superintending control of the Supreme Court, and may be grounds for petitioning the Supreme Court for relief by way of mandamus, injunction or other equitable relief to require compliance and rectify non-compliance.

**C. Challenges of violations in election campaigns.** A candidate may bring an action to challenge a violation by the candidate's opponent of Paragraph B of Rule 21-700 NMRA or Rule 21-800 NMRA occurring in election campaigns for judicial office.

(1) Filing and venue. In election campaigns for the Supreme Court and Court of Appeals, by filing a complaint in the district court for Santa Fe County. In election campaigns for district, metropolitan, magistrate, municipal and probate courts, by filing a complaint in the district court of the county in which the complainant or the defendant resides, but only within the judicial district where the election is to occur. The complainant shall serve all parties within three (3) days after filing the action. If available, any statement, advertisement or publication alleged to constitute a violation shall be filed with the complaint.

(2) Standing; parties. Violations by a candidate or by a candidate's campaign committee can be challenged by an opposing candidate. The alleged violator shall be joined as a defendant and shall be served forthwith in person with the complaint, summons and notice of hearing when issued. A candidate who has not been joined as a party may intervene in the proceeding by filing a notice of intervention and a response to the complaint within the time required by this rule.

(3) Hearing. The complaint shall be heard by the district court without a jury within ten (10) days after the action is filed, unless the time is extended for good cause. Peremptory challenges to the district judge shall be filed by the complainant within three (3) days after the action is filed and by a defendant within three (3) days after service of process on that defendant. The district court shall enter its decision, findings of fact and conclusions of law, within not more than three (3) days after the hearing is completed. The decision of the district court shall constitute a final judgment immediately upon entry.

(4) Remedies. The district court is authorized to issue any order provided by the Rules of Civil Procedure for the District Courts and any remedial decrees for cessation of violations, retractions, corrective publications or other relief as may be reasonably required to rectify the effects of the violation. The district court may also refer any violation to the Judicial Standards Commission or the Disciplinary Board of the Supreme Court for additional action.

(5) Discovery. Any documentary or demonstrative evidence to be offered at the hearing shall be exchanged by the opposing parties as ordered by the district court, and in any case not less than twenty-four (24) hours prior to the commencement of the hearing. Discovery shall not delay the hearing on the merits, but wrongful refusal, obstruction or delay in discovery may be sanctioned in the discretion of the district court. The parties may by subpoena require the appearance of witnesses and the production of evidence at the hearing. The district court may allow oral testimony to be admitted telephonically.

(6) Appeals. Appeals shall be taken directly to the Supreme Court of New Mexico pursuant to the provisions of Rule 12-603 NMRA of the Rules of Appellate Procedure.

(7) Other rules applicable. The Rules of Civil Procedure for the District Courts, Rules of Appellate Procedure and Rules of Evidence shall apply unless inconsistent with this rule.

(8) Other proceedings. The jurisdiction of the Judicial Standards Commission, the Supreme Court and the Disciplinary Board to hear violations of the Code of Judicial Conduct is not affected by this paragraph.

[As amended, effective February 16, 1995; September 21, 2004.]

## ANNOTATIONS

**Cross references.** — For supreme court's power of superintending control over inferior courts, see N.M. Const., art. VI, § 3.

For judicial standards commission, see N.M. Const., art. VI, § 32, and 34-10-1 to 34-10-4 NMSA 1978.

**The 1995 amendment**, effective February 16, 1995, rewrote the rule.

**The 2004 amendment**, effective September 21, 2004, added Paragraph C.

**Campaign promises.** — Where a candidate for judicial office promised landlords that he would help them in court with their landlord-tenant case and advised the landlords on how to excuse the other judges, the actions of the candidate constituted willful misconduct. In the Matter of Rodella, 2008-NMSC-050, 144 N.M. 617, 190 P.3d 338.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 48A C.J.S. Judges § 48.

### **21-901. Applicability.**

A. **Scope.** Except as provided in this rule, all judges and all candidates for judicial office shall comply with the provisions of this Code, including, but not limited to, all judges and justices and all judicial candidates of the Supreme Court, Court of Appeals, district court, magistrate court, metropolitan court, probate court and municipal court. Any person who serves as a full-time or part-time judge is a "judge" within the meaning of this Code.

B. **Full-time magistrate and municipal judges.** A full-time magistrate or municipal court judge is not required to:

(1) comply with the provisions of Paragraph B (7)(b) of Rule 21-300 which requires notice to the parties of advice obtained by the judge from a disinterested expert on the law; or

(2) comply with the provisions of Paragraphs E of Rule 21-500.

C. **Probate and part-time magistrate and municipal judges.** A probate judge or part-time magistrate or municipal judge:

(1) is not required to:

(a) except while serving as a judge, comply with Paragraph B(10) of Rule 21-300;

(b) comply with the provisions of Paragraph C(2) of Rule 21-500 relating to appointment to other governmental positions;

(c) comply with the provisions of Paragraph B (7)(b) of Rule 21-300 which requires notice to the parties of advice obtained by the judge from a disinterested expert on the law;

(d) comply with the provisions of Paragraph D of Rule 21-500, relating to financial activities, except:

(i) the requirement of Rule 21-500(D)(1)(a) that the judge not engage in financial and business dealings that may reasonably be perceived to exploit the judge's judicial position; and

(ii) the requirement of Rule 21-500(D)(5) that the judge not accept gifts, bequests, favors or loans except as permitted by the Code of Judicial Conduct;

(e) comply with Paragraphs E through G of Rule 21-500;

(f) comply with Paragraphs A through D of Rule 21-600; or

(g) comply with the provisions of Paragraphs C and F of Rule 21-800;

(2) shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

**D. Campaign Reporting Act.** The provisions of the Campaign Reporting Act [1-19-25 to 1-19-36 NMSA 1978] shall apply to all judges who run in a primary and general election, including a judicial retention election.

**E. Time for Compliance.** A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Subparagraphs (2) and (3) of Paragraph D and Paragraph E of Rule 21-500 and shall comply with these paragraphs as soon as reasonably possible within one year after the effective date of this Code.

[As adopted, effective February 16, 1995.]

## ANNOTATIONS

### COMMITTEE COMMENTARY

The two categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. For the purposes of this section, as long as a retired judge is subject to recall the judge is

considered to "perform judicial functions." The determination of which category and, accordingly, which specific Code provisions apply to an individual judicial officer, depend upon the facts of the particular judicial service.

### **Time for compliance**

If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Paragraph E of Rule 21-500, continue to serve as fiduciary but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Paragraph D (3) of Rule 21-500, continue in that activity for a reasonable period but in no event longer than one year.

## **Table Of Corresponding Canons**

The first table below reflects the disposition of the former canons of the Code of Judicial Conduct. The left-hand column contains the former canon number, and the right-hand column contains the corresponding present canon number.

The second table below reflects the antecedent provisions in the former Code of Judicial Conduct (right-hand column) of the present canons of the Code of Judicial Conduct (left-hand columns).

Former Rule	NMRA	Former Rule	NMRA
1	21-100	6	21-600
2	21-200	7	21-700
3	21-300	8	21-800
4	21-400	Misc. Provisions	21-900
5	21-500		
NMRA	Former Rule	NMRA	Former Rule
21-100	1	21-600	6
21-200	2	21-700	7
21-300	3	21-800	8
21-400	4	21-900	Misc. Provisions
21-500	5		