

# New Mexico Judicial Ethics Handbook



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*New Mexico Court Education Institute*

Court Education Institute  
Administrative Office of the Courts  
New Mexico  
<https://courteducation.nmcourts.gov/>  
202 E. Marcy St., Santa Fe, NM 87501

2025 Revised Edition

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## **New Mexico Judicial Ethics Handbook**

Published 1999, 2000, 2004, 2006, 2011, 2025

### **Court Education Institute**

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This handbook is intended for educational and informational purposes only. It is not intended to provide legal advice. Readers are responsible for consulting the statutes, ordinances, rules and cases pertinent to their issue or proceeding. Readers should keep in mind that laws and procedures are subject to change.

Effective Date: The information in this benchbook is current through January 2025. The benchbook is updated periodically as funds and staffing allow. Please contact the Court Education Institute at the address below for information about the status and availability of updates.

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## **FOREWORD TO THE JUDICIAL ETHICS HANDBOOK**

In 2024, the Supreme Court identified the importance of updating the Judicial Ethics Benchbook, which was last updated in 2011. Since that time, the New Mexico Code of Judicial Conduct has changed significantly, with numerous decisions and advisory opinions being issued applying the revisions in the Code. These developments have produced many useful interpretations of the rules and an entirely new numbering system for the Code of Judicial Conduct. This is an important and significant accomplishment in our continued efforts to improve our library of references and learning resources for our judges.

This Judicial Ethics Handbook incorporates references to Supreme Court cases, opinions of the Advisory Committee on the Code of Judicial Conduct, and reports from the Judicial Standards Commission issued since the printing of the original Handbook in 1999. The Court Education Institute (CEI) prepared the Judicial Ethics Handbook with substantial contributions from retired Court of Appeals Judge, the Honorable James Wechsler, who serves as co-chair of the Advisory Committee on the Code of Judicial Conduct and ex officio on the Code of Judicial Conduct Committee, and Paul L. Biderman, J.D., Director of the Institute of Public Law at the University of New Mexico School of Law.

This handbook serves as a comprehensive guide to judicial ethics, providing judges with essential principles, rules, and best practices that are fundamental to their conduct both on and off the bench. It is designed to assist judges in making ethical decisions, addressing potential conflicts of interest, and upholding the dignity and public confidence that the judiciary commands.

While the law itself provides a foundation for judicial behavior, it is the ethical responsibility of each judge to ensure their conduct reflects the core values of fairness, independence, accountability, and transparency. By adhering to these ethical principles, judges contribute not only to the fairness of individual cases, but also to the overall credibility and integrity of the judicial system.

David K. Thomson  
Chief Justice

## **PREFACE TO THE JUDICIAL ETHICS HANDBOOK**

This revised 2025 version of the Judicial Ethics Handbook incorporates references to Supreme Court cases, opinions of the Advisory Committee on the Code of Judicial Conduct, and reports from the Judicial Standards Commission issued since April 1999. It was first written and published in 1999 by the New Mexico Judicial Education Center at the University of New Mexico School of Law, supported by a grant from the State Justice Institute. Subsequent updates were published in 2000, 2004, 2006, 2011, and the current iteration in 2025.

This comprehensive revision of the Judicial Ethics Handbook is the work of the Court Education Institute of the New Mexico Supreme Court, and is funded by a special appropriation from the New Mexico Legislature.

We recognize the many people, organizations and publications whose work has contributed to the preparation of the original Handbook in 1999, including:

Organizations:

The New Mexico Supreme Court, the Administrative Office of the New Mexico Courts, the State Justice Institute; the Rules Committee for the Courts of Limited Jurisdiction; the Judicial Standards Commission, the Supreme Court Advisory Committee on the Code of Judicial Conduct, and the American Judicature Society.

Individual authors and advisors: Ann Goodman, Judith Olean, Peg Holguin, Alicia Mason Miller, Fern Goodman, Thaddeus Bejnar, Susan Page, Jenise Flowers, and Holly Harvey.

A special remembrance for Hon. Rozier E. Sanchez, who for decades inspired and provided leadership for New Mexico judicial education programs.

## **INTRODUCTION**

### **1-100. Purpose**

When conscientious new judges take the bench, they generally focus on understanding the legal and procedural issues that will confront them. Equally important are their ethical responsibilities as judges. Those responsibilities, which are quite unique to the judiciary, are embodied in the Code of Judicial Conduct. That Code has been adopted to ensure that the community trusts the judiciary's honesty, impartiality, and commitment to the rule of law. Consequently, the rules in that Code govern not only the obligations of judges while serving on the bench, but also many facets of their personal, business, social, charitable and political activities.

The Court Education Institute has organized this judicial handbook to explain the Code's ethical rules according to the situations that may cause judges to consult those rules. Issues are therefore discussed in a somewhat different order than they appear in the Code of Judicial Conduct. Thus judges, especially those in the courts of limited jurisdiction who often assume their duties without prior legal training or experience, can receive guidance on how to handle ethical issues as they arise in their daily service on the bench and in their everyday life. The courts of limited jurisdiction play a critical role in maintaining the credibility of the courts, because it is there that most people encounter the judicial system.

We hope this guide will help judges remain involved in their communities while maintaining the integrity and independence of their offices. The discussions in this judicial handbook presume that most ethical violations by judges result from inadequate information or failure to ask necessary questions, and not from any actual intent to engage in misconduct. It is from that perspective that we respectfully offer this guidance.

### **1-200. Scope**

This is a handbook, designed to make practical information available quickly and easily. It is designed to complement already available materials, such as the benchbooks for the various New Mexico courts. The discussion is organized under general topics, encompassing a range of situations in which ethical issues arise. Every situation will not be relevant for every judge--for example, issues relating to *ex parte* communications between a judge and jurors is not an issue for municipal or probate judges--but it is hoped that by illustrating various applications of the rules the judicial handbook will enhance each judge's understanding of their specific role.

### **1-300. Format**

A judicial handbook, as distinguished from a benchbook, is not intended as an exhaustive treatment of its subject. The discussions of ethical issues in this judicial handbook are presented in the form of an expanded outline, in order to cover as much ground as possible in a convenient and easily accessible package. Checklists are included as procedural aids for most topics. In the interests of space, facts and holdings of cases are mostly paraphrased by the authors, as are the substance of rules and statutes. Those summaries reflect the understandings of the authors and editors; judges may see things differently. The last word on the subject is, of course, the original text of the rules and official commentary, and their interpretation by the courts.

Each topic is addressed in a brief introductory section followed by a discussion of the substantive law and authorities, organized under subtopics. Factual summaries of cases are included in many instances to illustrate the principle or problem in question. The CEI plans to continue to update this handbook periodically, as needed to keep it current with developments.

#### **1-400. Authorities**

The authorities cited include the New Mexico Constitution, the New Mexico Statutes Annotated, judicial decisions, and court rules, including the Code of Judicial Conduct, in effect at the time of publication. Those authorities are all legally binding in New Mexico. Excerpts from the annual reports of the Judicial Standards Commission are also included, as well as summaries of the Advisory Committee on the Code of Judicial Conduct. Those opinions do not have the force of law because the Supreme Court has ultimate authority over the conduct of judges. They are, however, highly persuasive statements of the ethical standards applicable to judges in New Mexico.

The judicial handbook also includes factual summaries of cases from other states, especially when those cases discuss issues that have not appeared in our state— at least not yet. These cases from other states provide useful illustrations of how generally accepted ethical principles have been applied in response to various situations. In most cases, the ethics rules that those cases rely on are similar to those adopted by our state’s Supreme Court, since most derive from model rules promulgated by the American Bar Association. The consequences of the conduct described could, however, be different in New Mexico.

The following sections will identify the authorities that are used to help understand the ethics code that applies to the judiciary, and how they are cited. Chapter 2 will discuss in greater detail how each Court or agency enforces the Code, including procedures for initiating, investigating, and determining the validity of complaints against a judge, as well as the sanctions that can be applied when judges are found to have violated it.

#### **1-500. Citations and References**

Citations to legal authorities use the most concise style possible while still providing adequate reference information. In general, citations use the following forms:

- **New Mexico Constitution.** Provisions of the New Mexico Constitution are cited by Article, in Roman numerals, followed by the section, marked by a "\$" sign. For example: N.M. Const. art. VI, §32.
- **New Mexico laws.** Statutes are cited as §\_\_ - \_\_ - \_\_, such as §66-8-135, without NMSA 1978 or the year of enactment. Unless otherwise noted, the statutes cited are the statutes in effect at the time of publication.
- **Code of Judicial Conduct.** References in this handbook to "the Code" apply to the New Mexico Code of Judicial Conduct, which is cited in the form NMRA [New Mexico Rules Annotated] 21-100.

Each state’s code of conduct is adapted from the Model Code of Conduct adopted by the American Bar Association (ABA). The most recent ABA Model Code was published in 2007. Our state’s Supreme Court reviewed and modified that code to replace the previous state code. The Court then

adopted the basic Code that we now have, effective January 1, 2012. Modifications have occurred since 2012: the rules cited in this handbook are current as of January 31, 2025 and will be periodically reviewed as updates are needed.

- **Other New Mexico Supreme Court rules.** The Code is one of the Supreme Court's rules governing the courts. These rules are cited as NMRA \_\_ - \_\_ or Rule \_\_ - \_\_. Other rules govern, among other things, procedures used by the various courts. For example, NMRA 6- 106 refers to rule 106 in set 6 of the New Mexico Rules Annotated. Unless otherwise noted, the rules cited are the rules in effect at the time of writing.

- **New Mexico cases.** New Mexico cases are cited using the “vendor-neutral citation” form adopted in 1998, such as 1998-NMCA-039, where the first number is the year of decision and the second number is the opinion number. In this form, cases from the New Mexico Supreme Court will be cited as NMSC and cases from the New Mexico Court of Appeals will be cited as NMCA.

New Mexico Supreme Court reprimands to judges are cited only by case numbers and dates, such as *In re Guillory*, S.Ct. No. 31,920 (December 7, 2010). These reprimands may usually be found by going to New Mexico One Source and clicking on “Advanced Search” under the “Search” box. On the next screen, select “New Mexico Appellate Reports.” Toward the bottom of that page will be the box, “Judicial Reprimands.” Selecting either “reported” or “unreported” judicial reprimand should get you to a list of reprimands going back to 1982. Note, however, that some reprimands do not appear on the listings; obtaining these would require contacting the Supreme Court Law Librarian or the Clerk’s office.

- **Appellate decisions from other states.** These decisions are cited according to the regional reporter for the part of the country in which they appear: i.e., Northwest (N.W.), or Southern (So. 2d). For example, *State v. Jenkins*, 465 N.W. 2d 317, 318 (Mich. 1991), gives the name of the parties, the volume number and page of that case in the Northwest Reporter, followed by the state and the date in parentheses.

- **United States Supreme Court.** U.S. Supreme Court decisions are cited by volume and page to the United States Reports: \_\_ U.S. \_\_ (20-- \_\_).

- **New Mexico Attorney General opinions.** N.M. Att’y Gen. Op. 90-03 (1990) indicates the third advisory opinion issued by the Attorney General in 1990. These mostly are issued for statutes, but may interpret some court rules. They offer persuasive, but not legally binding, interpretations. [This office has since been renamed the New Mexico Department of Justice.]

- **Judicial Standards Commission.** Actions of the Judicial Standards Commission (JSC) are cited by reference to the Commission's annual reports. JSC 89-2F means the second matter reported under *formal* proceedings in the 1989 annual report. JSC 89-3I (where “I” is the letter “I”) means the third entry in the 1989 annual report under the category of “Investigations Not Resulting In Formal Hearings.” Rules of the Commission are cited as JSC Rule 20. Those rules may be found in NMONESOURCE or on the Commission’s website, under resources. Where the Supreme Court has acted on JSC recommendations, the Court’s docket number or citation will be cited.

Opinions issued by JSC since 2004 are reported in full online at the Commission’s website, [nmjsc.org/annual-reports/](http://nmjsc.org/annual-reports/). Opinions issued earlier than 2024 may be obtained from the commission.

▪ **Advisory Committee.** Opinions issued by the Supreme Court Advisory Committee on the Code of Judicial Conduct are in the form AO 02-3, indicating the opinion was the third issued by the Advisory Committee in 2002. The Advisory Committee issued an Advisory Opinion Concerning Social Media on February 15, 2016. This advisory opinion will be cited as “Social Media AO.”

Advisory opinions may be viewed on the New Mexico Supreme Court Law Library website, by clicking on the box entitled “Resources” and then “New Mexico Judicial Advisory Opinions.” Clicking the down arrow on the list that comes up shows all the opinions issued that year, each identified with a general category, such as “politics.” Clicking on the line “Index to the New Mexico Judicial Advisory Opinions” [immediately above the list of yearly advisory opinions] will produce a chart of all opinions on the website, year by year, with a brief summary of the specific issue addressed in each opinion.

▪ **New Mexico Department of Justice Compliance Guide to the Governmental Conduct Act.** The Governmental Conduct Act, §10-16-1 NMSA, applies to all judges of state and local courts. Since that law is explained at length in the Governmental Conduct Act Compliance Guide published on the website of the New Mexico Department of Justice, it is not addressed in this guide.

▪ **Textbooks.** *Judicial Conduct and Ethics*, Charles Gardner Geyh, James J. Alfini and James Sample, LexisNexis, Sixth Edition (2020). Referred to in this handbook as “Geyh.” David Rothman, *California Judicial Conduct Handbook* (1990) [the authors cite from this edition of Judge Rothman’s text for basic principles; a later version has been published but was unavailable.]

## LEGAL AUTHORITIES

### **2-100. Applicable Law**

N.M. Const. art. VI, §§1, 3 and 32.

N.M. Const. art. IV, §§35 and 36.

NMSA 1978, §§34-10-1 and following.

NMRA 27-101 et seq.

Procedural Rules and Regulations of the New Mexico Judicial Standards Commission. Code of Judicial Conduct, NMRA 21-001-21-406.

### **2-200. Introduction**

Historically, improper conduct by judges was dealt with by removal proceedings such as impeachment. *See E. Schoenbaum, A Historical Look at Judicial Discipline*, 54 CHI.-KENT L.REV. 1 (1977). This process was cumbersome, time-consuming and sometimes politically motivated, and resulted in either complete removal from office or no action at all. *Schoenbaum* at 5-7. Judicial conduct organizations such as the New Mexico Judicial Standards Commission are modern creations, authorized to impose a more flexible range of sanctions and structured so that complaints can be addressed with greater efficiency. In recent years every state has adopted its code of judicial conduct.

### **2-300. Constitutional provisions**

Because of the separation of powers among the branches of government, the New Mexico Constitution grants exclusive authority to the New Mexico Supreme Court to regulate the conduct of judges. No legislatively created means of disciplining or removing judicial officers is recognized. *Cooper v. Albuquerque City Comm'n*, 1974-NMSC-006, ¶¶ 46, 47.

The Board of Bar Commissioners, which regulates conduct by attorneys, has no jurisdiction over a complaint made against a district judge concerning the judge's actions in rebuking a grand jury. *In re Board of Comm'rs*, 1959-NMSC-028.

### **2-310. General grant of judicial power.**

Article VI, §1 of the New Mexico Constitution creates the courts.

The judicial power of the state shall be vested in the senate when sitting as a court of impeachment, a supreme court, a court of appeals, district courts, probate courts, magistrate courts and such other courts inferior to the district courts as may be established by law from time to time in any district, county or municipality of the state.

### **2-320. Superintending control.**

Article VI, §3 provides in part that "[t]he supreme court. . . shall have a superintending control over all inferior courts . . ." Superintending control is a broad grant of inherent authority allowing the Supreme Court to regulate the affairs of the courts as a separate branch of government. *See J.D. Cameron, The Inherent Power of a State's Highest Court to Discipline the Judiciary*, 54 CHI.-KENT L.REV. 45 (1977).

### **2-321. Authority.**

Superintending control gives the Supreme Court the power to issue writs to control litigation in the lower courts, *State v. Roy*, 1936-NMSC-048, ¶89; to supervise personnel decisions by inferior courts, *Mowrer v.*

*Rusk*, 1980-NMSC-113, ¶¶30-32, 34; to control the administrative functions of inferior courts, *Russillo v. Scarborough*, 727 F. Supp. 1402, 1409 (D.N.M. 1989); and to regulate procedure in the courts, *Ammerman v. Hubbard Broadcasting, Inc.*, 76-NMSC-031, ¶¶10, 15. This power of superintending control is distinct from other authority granted to the Supreme Court under the Constitution. It is to be used only when the remedy by appeal is inadequate or where necessary to prevent unusual hardship or expense. *Transcontinental Bus Serv. Inc. v. Carmody*, 1949-NMSC- 047, ¶ 23. The Supreme Court has this power to ensure that the state’s judges do not depart from proper judicial activity, become dictatorial or oppressive in their conduct, or otherwise behave improperly so as to interfere with or reflect upon the court system, or shake public confidence in the administration of justice and the judiciary.

### **2-322. Purpose.**

Superintending control exists so that the Supreme Court can ensure that inferior courts “do not depart from proper judicial activity, become dictatorial or oppressive in their conduct, or otherwise behave improperly so as to interfere with or reflect upon the court system or shake public confidence in the administration of justice and the judiciary.” *State ex rel. Anaya v. Scarborough*, 1966-NMSC-009, ¶ 8. It is the duty of the Court to make certain that the traditional high regard in which courts generally are held will not be impaired. A matter that could subject the court to public scorn or bring the judicial system into disrepute invokes the Supreme Court's supervisory control. *In re Board of Comm'rs of State Bar*, 1959-NMSC-028, ¶ 3.

### **2-323. Application to judicial discipline.**

The New Mexico Supreme Court invoked its power of superintending control to remove a judge from a case because the Court concluded it would be improper to require the defendant to be tried before that judge.

A writ of prohibition was issued to remove a judge from continuing to preside over a murder trial, after the judge had tried to get the defendant to plead guilty and had conducted unauthorized proceedings in the case. *State ex rel. Anaya v. Scarborough*, 1966-NMSC-009, ¶¶ 16, 21.

The grant of superintending control under Article VI, Section 3 is one of three constitutional provisions pursuant to which judicial officers may be disciplined or removed from office, all of which co-exist as alternatives. *In re Castellano*, 1995-NMSC-007; *Cooper v. Albuquerque City Comm'n*, 1974-NMSC-006. The other two are impeachment and proceedings before the Judicial Standards Commission leading to discipline by the Supreme Court.

### **2-330. Impeachment.**

N.M. Const. art. IV, §§35 and 36. Impeachment is a criminal proceeding against a public official before a quasi-political court. The New Mexico Constitution allows a district judge to be impeached by the state house of representatives and tried by the senate for crimes, misdemeanors, and malfeasance in office. By implication, judges of the courts of limited jurisdiction are not subject to impeachment. An impeached judge who is convicted is removed from office.

### **2-340. New Mexico Judicial Standards Commission.**

**2-341. Creation.**

The New Mexico Judicial Standards Commission came into being on July 1, 1968, following the adoption in 1967 of Article VI, §32 of the State Constitution. California was the first state to create such a commission; all states now have similar organizations. *Geyh, supra* §1.05.

**2-342. Jurisdiction of the Commission.**

The Commission may take non-disciplinary action, such as issuing an advisory letter; or it can recommend that the Supreme Court take disciplinary actions, including removal from office, of any justice, judge or magistrate of any court for:

- (1) willful misconduct in office;
- (2) persistent failure or inability to perform a judge's duties, or
- (3) habitual intemperance. 34-10-2.1(A), (B).

The Commission may also recommend that a judge be retired for disability that seriously and permanently interferes with the performance of the judge's duties. §34-10-2.1(A) NMSA. Prior acts of misconduct in a judicial office follow the judge to subsequent judicial office and may be the subject of disciplinary proceedings before the commission. *In re Romero*, 1983-NMSC-054.

The Commission invokes its jurisdiction by serving a notice of investigation or notice of formal proceedings upon the judge under investigation. JSC Rule 3. The jurisdiction continues even if the judge subsequently resigns or is terminated from office. JSC Rule 3. Prior acts of misconduct in a judicial office follow the judge to subsequent judicial office and may be the subject of disciplinary proceedings before the Commission. *In re Romero*, 1983-NMSC-054, ¶ 15.

**2-343. Powers.**

The Commission investigates all allegations of inappropriate judicial conduct within its constitutional jurisdiction, including violations of the Code. N.M. Const. article VI, §32; §34-10-2.1(B). It has the power to receive complaints and information, investigate, conduct hearings, take informal remedial action, and make recommendations to the Supreme Court concerning allegations against judges. §34-10-2.1(B).

**2-344. Membership.**

The Commission consists of thirteen members: two justices or judges, one magistrate, one municipal judge, two lawyers, and seven citizens, appointed by the governor in staggered terms. N.M. Const. art. VI, §32; §34-10-1. The Commission maintains a permanent office and staff in Albuquerque. *See* §§34-10-3, 34-10-4.

**2-345. Procedures.**

Anyone may file a complaint against a judge, and the Commission may commence an investigation either to explore such complaints or act on its own motion. Judges are not notified of proceedings that have been dismissed because they are unsubstantiated or outside the Commission's jurisdiction. If, after initial investigation, it appears that there is sufficient evidence to require a response from the judge, the Commission will provide the judge with a notice of investigation to which the judge must respond in writing. JSC Rule 15 (C); JSC Rule 16.

If the Commission determines that the case should proceed following review of a judge's response to the notice of investigation, it will provide the judge the opportunity to attend an informal confidential conference to address the complaint. JSC Rule 19. The judge may accept or decline the invitation and the judge's attendance in-person or by audio/visual conferencing is voluntary. JSC Rule 19. If the investigation is not resolved, the Commission will issue and serve the judge with a notice of formal proceedings and subsequently set a hearing. JSC Rule 15(D). The Commission may preside or may appoint three special masters to hear and take evidence. N.M. Const art. VI, § 32; 34-10-2.1(B)(3); JSC Rule 4(G). The parties have a right to discovery. JSC Rule 28.

At a hearing, the Rules of Evidence apply. JSC Rule 32(C)(1). The judge has a right to an attorney. Formal charges must be proved by clear and convincing evidence. *In the Matter of Robert Merle Schwartz*, 2011-NMSC-019, ¶ 13; *In re Martinez*, 1982-NMSC-115, ¶ 41.

A judge's decision not to attend an informal confidential conference is not deemed to be a failure to cooperate with the Commission.

However, a failure to cooperate with the Commission is itself a violation of the Code. NMRA 21-216(A), NMRA 27-305

A judge who knowingly evaded service upon him of a JSC order to submit to drug testing and otherwise was uncooperative in submitting to the test was found to have committed willful misconduct in office. *In re Garza*, 2007-NMSC-028.

A judge who failed to file a written response to a JSC Notice of Preliminary Investigation was found to have committed willful misconduct in office. *In re Vigil*, Supreme Court #26,328 (5/7/2001)

The Commission may issue subpoenas, §34-10-2.1(C); JSC Rule 5(B), and may compel physical and mental examinations for good cause in disability cases. JSC Rule 23(A). The Supreme Court may impose penalties for failure to obey a rule or order of the Commission. JSC Rule 10 (A).

**2-346. Confidentiality.**

All meetings of the Commission and proceedings before the Commission, including pleadings and filed documents, testimony, recorded statements, and records of proceedings, are confidential. N.M. Const art. VI, § 32; JSC Rule 6(A)(1). Papers filed with, and testimony given to, the Commission are protected against being disclosed in any lawsuit involving libel, slander, or damage to reputation. N.M. Const art. VI, § 32. The person filing a complaint may, however, communicate about the filing of the complaint, its contents, and the complainant's testimony. JSC Rule 6(C). Hearings before the Commission are closed to the public. JSC Rule 32(A). The Commission record loses its confidentiality when it is filed with the Supreme Court, but any document entitled to privilege when filed with the Commission retains the same privilege when filed with the Supreme Court. N.M. Const. art. VI, §32.

**2-347. Authorized actions.**

The Commission may make any of the following non-disciplinary dispositions:

- (a) dismissing the complaint;

- (b) issuing an advisory letter informing the judge that the judge’s conduct may violate the rules of judicial conduct; or
- (c) ordering by stipulation professional counseling, mentoring, or training. JSC Rule 35.

Based on the judge's admissions or following a formal hearing, the Commission may recommend to the Supreme Court the following formal sanctions:

- (a) removal;
- (b) retirement;
- (c) discipline, including one or more of the following:
  - (1) suspension;
  - (2) imposition of limitations or conditions on the performance of judicial duties;
  - (3) appropriate training at the judge’s expense;
  - (4) professional counseling, mentorship or other assistance at the judge’s expense;
  - (5) public censure;
  - (6) fine; and/or
  - (7) other appropriate discipline based on the conduct; and
- (d) imposition of any combination of the above sanctions. JSC Rule 36.

If the Commission determines that discipline, retirement or removal is merited, it makes its recommendation to the Supreme Court. JSC Rule 36(D). The Supreme Court may accept, reject or modify the Commission’s recommendation for discipline, retirement or removal and has de novo review of the formal hearing art. VI §32, NMRA 27-401.

**2-400. Code of Judicial Conduct**

**2-410. Citation.**

The Code of Judicial Conduct is found in Judicial Volume 3, Rules 21-001 through 21-400. The Code is part of the Supreme Court Rules Annotated, adopted under the Court's rulemaking authority.

**2-420. History.**

The first code of judicial ethics in the United States was adopted as an advisory code by the American Bar Association in 1924. In 1972, the ABA adopted a new Model Code, which became the basis for most state ethics codes, including New Mexico's. The ABA revised the Model Code in 1990 and again in 2007. On January 1, 2012, the Supreme Court adopted the 2007 Model Code with modifications for New Mexico. The Court continues to periodically make amendments to the Code.

**2-430. Judges subject to Code.**

All judges in New Mexico are subject to the Code, except as specifically exempted.

Unless a particular rule provides otherwise, the provisions of this Code apply in their entirety to full-time judges, including justices of the Supreme Court and judges of the Court of Appeals, district courts, metropolitan courts, magistrate courts, municipal courts, and probate courts. The provisions of this Code also apply to elected part-time judges of probate and municipal courts and judges serving by contract or appointment on a part-time basis, except as specifically provided in this rule or another particular rule. Where stated, the Code also applies to judicial candidates. NMRA 21-004(A).

Rule 21-004(B) excepts part-time judges, both elected and appointed, from certain rules. Hearing officers and commissioners employed by the judiciary are required to comply with certain rules as a condition of their employment. NMRA Rule 21-004(C). All judges and court officials consulting these rules should be certain to check the specific provisions of NMRA 21-004, to be sure which rules actually apply to them.

#### **2-440. Conduct subject to Code.**

Both public and private conduct is subject to discipline under the Code. “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.” NMRA 21-102. *See In re Ramirez*, 2006-NMSC-021, ¶¶ 4, 6-7, 15 (disciplining judge for actions stemming from incident involving his son in a public place). "Personal" conduct off the bench is relevant to a person's qualifications to be a judge. *Napolitano v. Ward*, 457 F.2d 279, 284 (7th Cir. 1972). Previous acts of misconduct committed by a judge in his or her official capacity during a prior term of judicial office follow the judge to any subsequent judicial office. *In re Romero*, 1983-NMSC-054, ¶ 15.

#### **2-450. Applicability of Code.**

The Code is applied to judges by the Judicial Standards Commission, acting under its constitutional authority, and by the Supreme Court.

Violations of any of the rules of the Code of Judicial Conduct by 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. NMRA 21-406(A).

#### **2-460. Standard of review.**

A judge's conduct is reviewed objectively. The Committee Commentary to the Code amplifies this objective test.

The rules of the Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions. NMRA 21-002(E).

The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge. NMRA 21-102, Com 5

#### **2-500. Other Court rules**

The Supreme Court from time to time may issue rules containing procedural and administrative requirements that, if violated by judges, may result in discipline.

Judge was sanctioned for, among other ethical violations, disregarding Covid prevention policies ordered by the Supreme Court. *Matter of Robert W. Ionta*, JSC 23-1F.

## **2-600. Statutes**

The New Mexico statutes contain jurisdictional limitations and impose duties on judges. Although the discipline of New Mexico's judges is largely directed by Court rule or constitutional provision, a judge's failure to comply with statutory requirements may raise ethical issues by indicating that the judge is not performing judicial duties properly, or may not have learned their judicial responsibilities.

Some statutes even address judicial conduct issues directly. For example, § 66-8-135 requires the courts to maintain records and send abstracts of DWI convictions to the Motor Vehicle Division. It also states that a judge's "failure to comply with this section is misconduct in office and grounds for removal." § 66-8-135(F).

## **2-700. Advisory Committee on the Code of Judicial Conduct**

The Advisory Committee on the Code of Judicial Conduct is a permanent committee of the Supreme Court to which judges may refer questions about the ethical implications of their conduct or relationships. Any judge may contact the Committee explaining the facts involved and requesting an opinion. The Committee issues its opinion in the form of a personal letter to the judge. The opinion is assigned a number and filed with the Supreme Court Law Library, where it is publicly available—but only after redaction of identifying information. Many of the opinions address questions relating to charitable work, financial dealings, conflicts due to family and professional relationships, and political campaigning. Although an advisory opinion is not binding in a disciplinary proceeding, a judge's reliance on the Committee's opinion may demonstrate the judge's good faith if the question is raised. *See* RESOURCES.

## **2-800. Types of Ethical Violations**

### **2-810. Standard of conduct.**

In view of the power entrusted to them, judges are held to a more stringent standard of conduct than other public officials. *In re Castellano*, 1995-NMSC-007, ¶ 18; *In re Romero*, 1983-NMSC-054. Moreover, judges must accept that taking the bench will cause them to be viewed and treated differently than they were before they took the bench. NMRA 21-102, Cmt. 2 ("A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens.").

### **2-820. Willful misconduct.**

Article VI, § 32 of the New Mexico Constitution states that "...[A]ny justice, judge or magistrate of any court may be disciplined or removed for willful misconduct in office...." In defining willful misconduct, the Supreme Court has stated, "[Willful] misconduct in office is improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly, and, generally, in bad faith. It is more than a mere error of judgment or an act of negligence." *In re Locatelli*, 2007-NMSC-029, ¶ 8 (per curiam) (internal quotation marks and citation omitted).

Willful misconduct is thus generally based on proof of bad faith on the judge's part in carrying out judicial responsibilities. "A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of . . . [the judge's] authority constitutes bad faith," as does an act motivated by actual malice. *In re Martinez*, 1982-NMSC-115, ¶¶38-

39. Bad faith also embraces acts within the lawful power of a judge committed for a corrupt purpose – or for any purpose other than the faithful discharge of judicial duties. *In re Martinez*, 1982-NMSC-115, ¶ 38.

**2-821. Relationship to Code.**

The Code does not control the determination of whether discipline should be imposed for willful misconduct; it only furnishes proof of what constitutes appropriate judicial conduct. *In re Locatelli*, 2007-NMSC-029, ¶ 8.2-6

**2.822. Examples.**

Although not necessary to a finding of bad faith, willful misconduct encompasses conduct involving moral turpitude, dishonesty, corruption, and any knowing misuse of the office, whatever the motive.

In *In re Martinez*, a district judge was suspended for willful misconduct for having knowingly countermanded, *ex parte*, another judge's order to transport prisoners to the penitentiary, and ordered that the district attorney be denied his right to perform duties in children's court. The Court concluded that the judge had acted in bad faith by knowingly and intentionally misusing the authority of his office to effect a purpose beyond his legitimate authority. *In re Martinez*, 1982-NMSC-115, ¶ 39.

Willful misconduct can be found for acts that the judge knew or should have known were beyond the judge's lawful power, or were within that lawful power but committed for corrupt purposes.

In *In re Naranjo*, 2013-NMSC-026, ¶ 21, the Supreme Court determined that when a judge whose stepson was facing criminal charges made an *ex parte* telephone call to the judge presiding over the stepson's case, to vouch for the character of his stepson and influence the presiding judge, that judge committed willful misconduct in office.

In *In the Matter of Robert Merle Schwartz*, 2011-NMSC-019, ¶¶ 12, 19-24, the Supreme Court found willful misconduct when the judge commenced a romantic relationship with an attorney, failed to timely recuse from the attorney's cases and gave a dishonest reason when ultimately recusing.

Prior admonitions by the Judicial Standards Commission against a judge's association with fundraising efforts by a not-for-profit organization providing volunteer services for children involved in court proceedings supported a finding of willful judicial misconduct, when similar associations with the organization's fundraising efforts continued. *In re Castellano*, 1995-NMSC-007.

Willful conduct does not include negligent acts.

In *In re Locatelli*, 2007-NMSC-029, ¶¶ 16-17, 25-26, the Judicial Standards Commission recommended discipline of a judge for issuing criminal contempt citations to two attorneys for their involvement in appeals from the judge's court and for his failure to recuse from the contempt proceedings. The Supreme Court found that, although the judge was negligent in failing to obtain a transcript of the proceedings before he charged the contempt, he researched his action before

filing the charges, and there was not clear and convincing evidence of willful misconduct. Nor was there clear and convincing evidence that the judge, who resolved to dismiss the contempt charges after reviewing the transcript, engaged in willful misconduct when he did not recuse from the case, even though hearings had been set by the clerk's office that were never held.

In *In re Rodella*, the New Mexico Supreme noted that it removes a judge from the bench when the judge's conduct threatens the independence and integrity of the judiciary. 2008-NMSC-050, ¶¶ 34–36. It observed that a new judge may engage in improper conduct through lack of knowledge, experience, or judgment that can be corrected through training, mentoring, and supervision. It removed the judge from office concluding that the judge's denial of mistakes indicated that the judge could not correct the mistakes and, moreover, was not truthful in addressing them.

In one case before the New Mexico Supreme Court, the judge, acting contrary to law, ordered a cash bond forfeited and was rude and angry toward a defendant's family. The Commission recommended that the judge be removed from office. The Court suspended the judge, although it determined that the judge's conduct did not rise to the level of "willful misconduct" as defined in *Martinez. In re Romero*, 1983-NMSC-054, ¶¶ 5-6, 10, 18-19.

#### **2-840. Relevant factors in determining appropriate sanctions.**

The Judicial Standards Commission has identified the following, non-exclusive factors as being relevant to its determination of the severity of a sanction for an ethical violation.

- (1) The extent of the misconduct.
  - (a) Whether it is an isolated incident or a pattern of misconduct.
  - (b) Whether there are multiple offenses.
- (2) The nature of the misconduct.
  - (a) Whether the misconduct occurred during performance of the judge's official duties or in the judge's private life.
  - (b) Whether the misconduct occurred in or out of the courtroom, the judge's chambers, or on court property.
  - (c) Whether the judge exploited the judicial position to satisfy personal desires.
  - (d) Whether the misconduct involved criminal acts or acts of dishonesty.
- (3) The judge's conduct in regard to the proceedings before the Commission.
  - (a) Whether the judge expressed remorse for the misconduct and made an effort to change the conduct.
  - (b) Whether the judge ceased the misconduct.
  - (c) Whether the judge cooperated with the Commission, including whether the judge was truthful in communications with the Commission and with investigative trial counsel and staff.
- (4) The judge's record of prior discipline and, if relevant, non-disciplinary disposition of prior allegations or formal charges.
- (5) The judge's reputation.
- (6) The effect the misconduct has had, or will likely have, on the integrity of the judiciary and public respect therefore.
- (7) Such other factors as are relevant to the recommendation for discipline, removal or retirement.

## **BASIC PRINCIPLES OF JUDICIAL CONDUCT**

### **3-100. Checklist**

#### **HOW DOES YOUR CONDUCT APPEAR TO SOMEONE ELSE?**

A California judge suggested that judges apply the "headline test" when deciding whether or not certain conduct is appropriate: would you mind seeing a headline in tomorrow's newspaper reporting that you engaged in that conduct? *David Rothman*, CALIFORNIA JUDICIAL CONDUCT HANDBOOK §100.200 (1990) [hereinafter *Rothman*].

- Does the conduct make it appear you are doing something improper, even if you are not?
- Are you personally involved in a legal proceeding related to any of the parties, the attorneys, or the subject matter of a case brought before you?
- Is the conduct to be engaged in public or private?
- Do you, as an individual, have a right to engage in the conduct?
- Does the conduct offend anyone or make you appear to be prejudiced or biased?
- Is the conduct law-abiding?

### **3-200. Applicable Law**

Preamble to Code of Judicial Conduct  
 NMRA 21-100 and 21-200

### **3-300. Introduction**

Members of the public expect that the courts will resolve their disputes and address infractions of societal norms in a fair manner. They expect that judges will not only act fairly but will also decide cases based on the facts of the case and the law to be applied, not upon any bias or prejudice of the judge or any external influence. This section addresses the requirements of the Code of Judicial Conduct that a judge maintain the independence, integrity, and impartiality of the judiciary, avoiding improprieties and the appearance thereof, in order to promote and maintain public confidence in the judiciary and the legal system.

The Preamble to the Code states:

An independent, fair, and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system. Rule 21-001

### **3-400. Principles Underlying the Code**

According to Rule 21-102, under Canon 1 of the Code, "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety."

These principles are essential to the meaning of the Code. As stated in the Preamble, the overarching purpose of the Code is to "maintain and enhance" public confidence in the legal system. The public will

lose trust in the system if its judges are not independent, lack integrity or impartiality, or engage in improprieties.

The Canon 1 principles also underlie each of the Code's provisions. While a violation may focus on behavior primarily addressed in one of the more specific rules of the Code, the violation may invoke the Canon 1 principles as well. Thus, more than one ethical principle may apply in a given fact situation, so that the same facts may be discussed in several ethical contexts.

By way of example, in *In the Matter of Robert Merle Schwartz*, 2011-NMSC-019, ¶¶ 18, 23, the Supreme Court suspended the judge for failing to timely recuse when the judge initiated a social relationship with, including giving of an inappropriate gift to, an attorney appearing before him. The Court stated that the judge also violated the Canon 1 rules in that the judge's behavior "damaged the public's confidence in the integrity and impartiality of the judiciary." In *In re Rodella*, 2008-NMSC-050, ¶¶ 12-17, 36, the Supreme Court removed a judge from office for multiple violations, including *ex parte* communications with the complaining witness in a domestic violence case. The Court agreed with the Judicial Standards Commission's conclusion that the judge's conduct in the domestic violence case violated the Code's provisions requiring a judge to uphold the integrity and impartiality of the judiciary and to avoid impropriety or the appearance of impropriety.

### **3-500. Social Media**

The Preamble to the Code states: "[j]udges and judicial candidates are also encouraged to pay extra attention to issues surrounding emerging technology, including social media, and are urged to exercise extreme caution in its use so as not to violate the Code." NMRA 21-001(C). The prevalence of social media in present everyday life underscores the importance of its cautious use by judges.

Although the Code may not specifically mention social media, the Code applies to a judge's use of social media in the same manner as it would to a judge's activities. Thus, a judge must ensure that any use of social media does not impair public confidence in the judiciary; interfere with the judge's independence, integrity, or impartiality; or give rise to an impropriety or appearance of impropriety. See *State v. Thomas*, 2016-NMSC-024, ¶ 47 (stating that the limitations of the Code of Judicial Conduct "apply with equal force to virtual actions and online comments and must be kept in mind if and when a judge decides to participate in electronic social media.").

A particular danger for judges in social media use is the lack of control over who sees the postings and what changes they make to them. By design, many social media formats offer mass communication and engage large groups of users in open discussions or information sharing. Communications that may appear to be private may be retransmitted even multiple times without the knowledge or desire of any of the original participants. Social Media AO, ¶ 7.

Recognizing this danger, the New Mexico Supreme Court stated that judges "should make use of privacy settings [of social media platforms] to protect their online presence but should also consider any statement posted online to be a public statement and take care to limit such actions accordingly." *State v. Thomas*, 2016-NMSC-024, ¶ 51.

A California commissioner judge was censured despite his argument that he designated his Facebook account as private but lacked the technological ability to effect his wishes. *In the Matter Concerning Gianquinto*, California Commission on Judicial Performance, August 22, 2018.

A cautious judge will not post anything online that the judge would not say in person to a group of people, including some the judge does not know, in person.

### **3-600. Compliance with Law**

A judge shall respect and comply with the law, including the Code of Judicial Conduct. NMRA 21-101

Because the role of judges is to apply and uphold the law, the public expects that judges will respect and comply with the law. A judge's contrary behavior, flaunting or violating the law, erodes public confidence in the judiciary and the legal system. It certainly diminishes the credibility of the non-complying judge.

"Requiring adherence to the law . . . even in strictly private matters is a given." *Geyh, supra*, §9.04 [1].

### **3-610. Alcohol-Related Charges**

DWI, regardless of whether there is a conviction, leads to strong sanctions, including removal or resignation from office.

The Supreme Court reprimanded and accepted the resignation of a court of appeals judge who entered a guilty plea to DWI, stating that a judge's personal conduct must be beyond reproach. *In re Robles*, S. Ct. No. 32,854 (May 31, 2011);

A district judge agreed to permanently retire from office after being charged with DWI. *In the Matter of Hon. Deborah Davis Walker*, JSC 19-6F.

A district judge who entered a no-contest plea to DWI and other motor vehicle code violations was reprimanded and resigned from office. JSC 02-4F.

The Supreme Court removed a municipal judge from office after he was convicted of DWI, continued to serve in a judicial capacity after the Supreme Court had suspended him while the DWI charges were pending, and was not truthful to the Court and the Judicial Standards Commission during oral argument in his disciplinary proceedings. *In the Matter of William A. Hocker*, JSC 99-3F.

A magistrate judge was suspended from office after being charged with DWI, domestic violence, and related offenses. The judge subsequently entered into a plea agreement and resigned from the bench. *In the Matter of Milton J. Griego*, JSC 99-1F.

A municipal judge was arrested for DWI. His breath test registered .21. The judge's actions in driving while intoxicated, causing an accident and not cooperating fully with investigating officers constituted willful misconduct and were in violation of NMRA 21-200. The Supreme Court imposed a one month's suspension because of the judge's cooperative attitude in seeking alcohol counseling. *In the Matter of Joe C. Montoya*, JSC 88-5F.

A magistrate was stopped for DWI, led officers on a high-speed chase and attempted to avoid arrest. He was found not guilty of criminal charges, but was suspended from office by the Supreme Court for willful misconduct. While still under suspension, he was again arrested for DWI. This time, he was removed from office. *In the Matter of Baltazar Archuleta*, JSC 89-1F; JSC 89-3F.

As can other alcohol-related crimes.

The Supreme Court found willful misconduct and violations of the Code in the case of a municipal judge who accompanied his minor son to a liquor store where they purchased a keg of beer that was made available to minors at the judge's home at a going away party for his son. The judge was subsequently convicted of the criminal charge of giving alcoholic beverages to minors. The judge was suspended from office for thirty days. *In the Matter of Russell F. Muffley*, JSC 90-4F.

### **3.611. Illegal Drug Use**

The use of illegal drugs is a violation of the Code, even if the judge is not prosecuted.

A magistrate judge was removed from office for Code violations, including illegal drug use. The Supreme Court stated:

“[The judge’s] use of cocaine jeopardized the integrity of the judiciary as an institution, which is essential to its efficacy, . . . Citizens appearing before a judge who is known to have used illegal drugs while serving as a judge would be unable to avoid feeling the subjects of hypocrisy and, consequently, respect for the judiciary would be diminished. . . Even if he was not under the influence of cocaine during business hours, illegal drug use by a judge cannot be tolerated. A judge is a judge at all times.” *In re Garza*, 2007-NMSC-028, ¶ 17

### **3-700. Criminal Charges**

Criminal charges against a judge undermine public confidence in the judiciary. There is at least the appearance of impropriety when a judge is charged or arrested for a crime. Supreme Court rules governing judicial standards commission procedures allow temporary suspension of a judge based upon a criminal complaint, information, or indictment, Rule 27-201(A)(4)(b). Actual improprieties include violations of law and there is greater public scrutiny when a judge is charged with a crime. Previously, the New Mexico Supreme Court has approved petitions for temporary suspensions for judges charged with crimes.

When a judge is charged with a criminal offense, there is an appearance of impropriety as well as a conflict of interest in continuing to hear criminal cases.

The Supreme Court ordered the resignation of a municipal judge who illegally shot at an artificial wildlife decoy from the road. *In the Matter of Hon. Andres Gomez*, JSC 21-4F.

A probate judge resigned after being charged with battery against a household member, criminal damage to property, and interference with communications. *Matter of Hon. Jaime J. Baca*, JSC 15-1F

A judge who does not obey the law cannot be expected to apply it.

A probate judge was charged with cocaine trafficking. The Judicial Standards Commission charged him with misconduct and when the judge did not respond, suspended him until final disposition of the charges. After the conviction, the judge was charged with willful misconduct and resigned before the disciplinary hearing. *In the Matter of David A. Lucero*, JSC 90-3F.

A magistrate judge indicted on thirteen criminal charges, including battery, criminal sexual contact, stalking, demanding a bribe, and soliciting commission of a felony, agreed to suspension without pay pending the resolution of the criminal charges, and ultimately retired with a commitment never again to seek judicial office. *In re Archie A. Valdez*, JSC 01-3F

Criminal charges against a judge that involve the judge’s functions have a direct effect on the judicial system and are particularly troublesome.

A municipal judge was removed from office for misconduct for taking bribes in exchange for dismissing serious traffic charges. *In the Matter of Lorenzo “Larry” Casaus*, JSC 91-4F.

Similarly, criminally fraudulent conduct committed by a judge undermines public confidence in the courts.

A Michigan judge was removed from office for conduct including solicitation to commit perjury and intentional misrepresentation on an insurance application. *In re Jenkins*, 465 N.W. 2d 317, 318 (Mich. 1991).

### **3-710. Inability to Continue to Preside**

If a judge is charged with a crime, the judge should not continue to hear cases involving the office prosecuting the case against the judge.

Although it is not [necessarily] a violation of the Code to be *charged* with a crime, a judge who has been charged with DWI should not continue to preside in such cases because of the appearance of impropriety and the conflict between the authority that is bringing the charges against the judge. The judge should recuse after charges are filed and proceed in all due speed in getting the matter resolved. For similar reasons, a judge charged with a felony should recuse from all criminal matters in which the DA's office prosecutes a case due to the appearance of impropriety and the obvious conflict with that office. AO 89-1.

The Supreme Court removed a municipal judge from office after he was convicted of DWI, continued to serve in a judicial capacity after the Supreme Court had suspended him while the DWI charges were pending, and was not truthful to the Court and the Judicial Standards Commission during oral argument in his disciplinary proceedings. *In the Matter of William A. Hocker*, JSC 99-3F.

After being arrested for DWI and failure to yield stipulated to a temporary suspension from office, agreeing that his continuing in judicial service during the prosecution “would create an apparent conflict of interest and that deference to . . . [his] rulings would be undermined.” He further did

not contest that “his continued judicial service would create a significant appearance of impropriety, erosion of public confidence in the integrity and impartiality of the judiciary and in the orderly administration of justice.” The Supreme Court accepted the stipulation and ordered the judge’s permanent resignation from office, *Matter of Hon. Joe I. Dominguez*, JSC 19-1F.

### **3-720. Unproven and Uncharged Violations of Law**

The facts underlying a violation of law may be grounds for discipline against a judge even if charges are not brought or proven.

An Illinois circuit judge testified under a grant of immunity about benefits he improperly received in connection with the management of the state fair. The grand jury named him an unindicted co-conspirator. The court ordered him removed from office, finding the grant of immunity did not apply to the disciplinary proceeding and the judge’s personal conduct off the bench was relevant to his qualifications to be a judge. Conduct that does not constitute a criminal offense may still violate the Judicial Canons. *Napolitano v. Ward*, 457 F.2d 279 (7th Cir. 1972).

A municipal judge sought to schedule a meeting with another judge in another part of the state but was informed by the other judge that the meeting would not be possible because of scheduling during the holiday season. The municipal judge responded that he would be traveling regardless, and the other judge left a small packet of materials for the municipal judge to pick up. The municipal judge claimed and received per diem reimbursement for two days, informing the village treasurer that the meeting had been cancelled for the unforeseen circumstance of bad weather. Despite the municipal judge’s denial that he engaged in willful misconduct for this and other violations, the Supreme Court ordered a ninety-day suspension, a formal reprimand, and reimbursement of the per diem. The judge stipulated to resign from office. *In re Lozano*, S. Ct. No. 26, 294 (June 10, 2010); JSC 14-5F.

A municipal judge resigned from office after aggressively shoving another city employee at a store after the city employee placed a lollipop in the judge’s pocket as a prank. *In re: Hon. Stephen S. Salazar*, JSC 21-3F.

A judge who wrote bad checks, failed to pay taxes, and used county facilities for her private business was placed under the mentorship of a district judge and required to repay her obligations. After failing to meet her obligations, she resigned from office. JSC 02-1F.

### **3-730. Court Procedures**

A judge must follow court rules and process.

A district judge gave written notice that an appellate court’s order would not be honored and expressed contempt for the law in a public manner calculated to undermine the integrity of the judicial system, in defiance of the judge’s solemn obligation to respect and comply with the law. The judge was suspended, placed on probation, and publicly censured. *In re Hon. Benjamin S. Eastburn*, 1996-NMSC-011, ¶ 24.

A magistrate judge was censured after releasing a defendant from jail contrary to court protocol after *ex parte* telephone calls from the defendant’s father. *In the Matter of George Anaya, Jr.*, S. Ct. Docket No. 38,714; JSC 22-5F.

### **3-800. Integrity and Independence**

Judges, through their conduct, are responsible for maintaining the credibility of the judicial system.

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary . . . NMRA 21-102

### **3-810. Integrity**

Integrity relates to a judge’s honesty, character and dedication to performing judicial duties based entirely upon the judge’s obligations as a judge. Independence relates to the ability of a judge to act independently and without consideration of external pressures from any source, including government officials, political interest groups, the media, and public popularity, friends, and family, as well as the autonomous nature of the judiciary itself.

“An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge’s friends and family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.” NMRA 21-204, Cmt. 1.

The achievement of justice is thwarted if:

the judge, consciously or unconsciously, [has] allowed the intrusion of insidious bias to command; or allowed case load and time pressures to transcend justice; or given the pretense of a hearing when, in fact, no listening took place; or failed to throw off the role of advocate on assuming the bench; or bowed to popular opinion in reaching decisions for public favor, career advancement or electoral victory. *Rothman, supra*, at xxxiii.

### **3-811. External Influences**

The Code requires that a judge not permit public opinion or criticism, or family, social, political or other interests to affect the judge’s work. NMRA 21-204 (A), (B).

Judges have been disciplined for allowing personal relationships to interfere with their judicial decisions or actions.

A district judge was disciplined for his actions in a criminal case when he failed to recuse despite acknowledging that his personal relationship with the defendant’s lawyer would foster the appearance of impropriety. *In re McBee*, 2006-NMSC-024, ¶ 13.

A magistrate judge was censured for releasing a violent offender without following court protocols after receiving two *ex parte* telephone calls from the offender’s father. *In the Matter of George Anaya, Jr.*, JSC 22-5F.

A municipal judge resigned from office after the Judicial Standards Commission brought various charges, including allegations that the judge allowed his judicial conduct to be affected by friendships with a police officer and a defendant's family. *In the Matter of Hon. Benjamin Harrison*, JSC 20-2F.

Judicial independence is impaired if judges step outside their judicial roles.

A magistrate judge was cautioned not to deliver messages from a defendant's father to a law enforcement officer because such an act is unseemly and not in the best interests of the judiciary. JSC 92-2I.

A magistrate judge was admonished not to perform the services of a law enforcement officer after he accompanied a citizen to the home of the citizen's estranged wife in order to collect some personal items. JSC 92-4I.

A judge was alleged to have requested the police allow him to participate in undercover drug operations. JSC 87-3(g) I.

A judge was alleged to have conducted investigations of complaints against police officers instead of referring them to the proper investigative agency. JSC 87-3(j)I.

### **3-820. Impartiality**

If a judge appears partial, public confidence in the judiciary is eroded.

Impartiality requires a judge to make decisions based on the law and the facts without any bias or prejudice toward any party, witness, or the subject matter of the proceeding.

Impartiality requires an open mind, not a blank mind. Through their life experiences, and law practice if applicable, judges have made countless observations and had countless experiences, thereby developing thoughts and opinions about various aspects of the law and human interactions. Impartiality requires not that a judge erase those thoughts but that the judge be able to set them aside and have an open mind to address the facts and law as presented in the case. It requires that the judges not be influenced by external factors such as a judge's personal relationship or an interest in the outcome.

The standard to test partiality is an objective one – a judge is disqualified from any proceeding in which the judge's impartiality might reasonably be questioned by an impartial observer. *See NMRA 21-211*.

### **3-821. Opinions Regarding Parties and Attorneys**

A judge may form opinions in the course of legal proceedings about the parties and their attorneys.

A judge "has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. . . . If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." *In re International Business Machines Corp.*, 618 F.2d 923, 930 (2d. Cir. 1980) (cited in *United Nuclear Corp. v. General Atomic Co.*, 1980-NMSC-094, ¶41). *See also* NMRA 21-211 DISQUALIFICATION.

### 3-822. Appearance of Impartiality

A judge must disqualify himself or herself from a case in which the judge’s impartiality might reasonably be questioned. NMRA 21-211(A).

The Supreme Court reprimanded a district judge for violating this principle of impartiality. In *In re McBee*, 2006-NMSC-024, ¶¶ 5, 16, the judge presided over a criminal case in which the judge had an ongoing personal friendship with the defendant’s attorney who was the defendant's boyfriend, and later her husband.

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including dismissing DWI and other cases of friends and relatives, without notice to the prosecutor, based upon ex parte communications, and even though some of the cases had been assigned to other judges. *In re Angie Vigil-Perez*, JSC 00-3F.

Financial interests can affect the appearance of impartiality. . .

The Supreme Court held that a municipal judge could not also run a DWI school because it adversely affected his impartiality. The judge had a direct financial interest in having individuals who appeared before him attend the school, and, even if the judge had not been paid, there was an appearance of partiality because the school's existence was directly related to the number of people sentenced in his court. *In re Rainaldi*, 1986-NMSC-079, ¶¶ 2-3.

. . . as can a judge’s involvement with attorneys representing one side of adversarial proceedings.

In response to his inquiry, a municipal judge was cautioned against attending a seminar put on by a defense attorney who practiced before the judge, when only defense perspectives would be presented at the seminar. *AO 06-04*

. . . as can a judge’s campaign activity can bear upon the judge’s impartiality.

Judge disciplined for campaign flyer reading: “above all else . . . [judge] identifies with the victims of crime,” and judge “will support our valiant law enforcement officers.” *Inquiry Concerning Kinsey*, 842 So. 2d 77 (Fla. 2003).

. . . as can social media contacts.

A Wisconsin judge was disciplined for accepting a Facebook friend request from a party in a child custody case after a contested hearing, with the party subsequently engaging with and reacting to at least twenty of the judge’s posts and posting and liking on her Facebook page information concerning domestic violence, an issue in the case. The judge did not disclose the Facebook relationship. The Wisconsin Supreme Court stated that “extreme facts” demonstrated a serious risk of actual bias. *In re Paternity of B.J.M.*, 944 N.W.2d 542 (Wisconsin 2020).

A judge may not use rulings in a case in a manner that creates an appearance of bias.

A district judge was removed from office for a pattern of misconduct, including creating an appearance of bias and partiality in his rulings on a case. The judge had delayed entry of judgment against a losing party, apparently to forestall an appeal; after being ordered to file the judgment, had attempted to prolong the case by enlarging the scope of issues to be litigated; after reversal on the merits, refused to award costs on remand, forcing another appeal. *In re Castellano*, 1995-NMSC-007.

### **3-823. Creating Potential Conflicts-of-Interest**

A judge must avoid situations and extrajudicial activity that could give rise to an appearance of bias or prejudice in proceedings before the judge.

A part-time judge may not practice law in the court on which the judge serves. NMRA 21-004(B)(1)(c).

A magistrate judge was cautioned about the appearance of impropriety created when he was present when persons he had convicted were being supervised outside the judicial complex. JSC 93-7I.

A judge was cautioned against serving as a police dispatcher to avoid the appearance of impropriety. JSC 97-4I.

### **3-900. Impropriety and Appearance of Impropriety**

#### **3-910. General rule**

A judge shall . . . avoid impropriety and the appearance of impropriety. NMRA 21-102

#### **3-920. Scope of Rule**

The rule applies to all the judge’s activities, as much to off-the-bench conduct as to conduct on the bench. NMRA 21-102, Cmt 7. *Rothman, supra*, §100.200. Both the *appearance* of impropriety and impropriety itself are prohibited, regardless of a good faith defense or exonerating facts.

The appearance of impropriety and the importance of preserving public confidence in the impartiality of the judiciary raise issues that must be viewed from the standpoint of the perception of the public. The question is not what a judge does or does not do, but what do others think the judge has done or might do. *AO 88-8*.

The test for an appearance of impropriety is a rule of reason --- “whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.” NMRA 21-102, Cmt 5.

This objective standard is needed because public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. NMRA 21-102, Cmt 1, 5. For example, a judge who speaks at length with a litigant in a pending case appears to be giving that party an advantage, even if in fact the conversation is unrelated to the case.

A judge’s behavior toward others, including parties, attorneys, and court staff, must not be improper.

In *In re Guillory*, S. Ct. No, 31,920, December 7, 2010, the Supreme Court determined that a magistrate judge’s demeaning conduct toward court staff, colleagues, and defendants and his napping in public, including once on the bench, violated, among other provisions, the Rule 21-102 requirement to avoid impropriety and the appearance of impropriety.

A district judge’s comment to the county manager that the judge “had the governor’s ear,” and if the county did not provide court requested security measures, the judge would ask the governor to veto county capital outlay funds, raised the appearance of impropriety resulting in sanction. *Matter of Hon. Albert J. Mitchell, S-1-SC 37568, JSC 19-9F.*

A judge’s social media posts can undermine public confidence in the judiciary.

A magistrate judge resigned after the Judicial Standards Commission recommended his removal for violations that included violating the Code of Judicial Conduct and the New Mexico Judicial Branch Computer and Internet Use Policy by receiving and forwarding emails that were offensive, degrading, pornographic, racist, and sexist. *Matter of Henry T. Casteneda*, Supreme Court 35,842; JSC 18-3F.

A California court commissioner was censured for posting and reposting posts of a political nature expressing political views, anti-minority sentiments, and contempt for the poor. The posts were considered “egregious” and “the type of conduct that inherently undermines public confidence in the judiciary and that brings the judicial office into disrepute.” The commissioner was disciplined despite the fact that the posts did not identify his judicial position, but identified the commissioner by his name and as an employee of working for the county, without stating his judicial position. *In the Matter Concerning Gianquinto*, California Commission on Judicial Performance, August 22, 2018.

A Texas judge was reprimanded for posting political comments critical of a political party on Facebook. *In re Burkeen*, Texas Commission, 2018.

An Arizona judge was reprimanded for a Facebook post describing a case before the judge in a disparaging manner. *In re Urie*, Arizona Commission on Judicial Conduct, June 12, 2018.

A Kentucky judge was reprimanded for posting a news story on Facebook and saying: “This murder suspect was RELEASED FROM JAIL just hours after killing a man and confessing to police.” *In re the Matter of McLaughlin*, Kentucky Judicial Conduct Commission, June 12, 2018. For New Mexico’s rule on this subject, see NMRA 21-210 (A) (“A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court....”)

### **3-930. Injudicious Conduct**

NMRA 21-102, the prohibition against actual improprieties and the appearance of improprieties, applies to both the professional and personal conduct of a judge. It is general in its description because it is

designed to cover all “conduct by judges that is harmful although not specifically mentioned in the Code.” NMRA 21-102, Cmt 7.

A municipal judge assaulted a court employee on a checkout line at a local store after the employee placed a lollipop in the judge’s pocket as a prank. The judge resigned from office. *In the Matter of Hon. Stephen S. Salazar*, S. Ct. No. 38,733, JSC 21-3F.

A district judge resigned from office after being charged with numerous violations that included sexual communications with his wife, herself an employee of that court, during working hours. *Matter of Hon. Eugenio S. Mathis*, S. Ct. No. 34,026, JSC 13-8F.

A magistrate judge was censured for actions in a dispute with his neighbor that included parking the judge’s vehicle in front of the neighbor’s house to prevent the neighbor’s grandchildren from playing basketball and making a threat concerning the neighbor’s disability payments. *In the Matter of Hon. Steve Guthrie*, S. Ct. No. 37,561; JSC 19-8F.

A district court judge committed an impropriety or created an appearance of an impropriety in his threats to the county manager that if the county did not act on the judge’s requested court-security measures, the judge would request the governor, with whom he had influence, to veto the county’s capital outlay requests. The judge was censured. *Matter of Hon. Albert J. Mitchell, Jr.*, S. Ct. No. 37,568; JSC 19-9F.

A district judge who repeatedly used contumacious language from the bench, failed to follow the law, treated litigants inappropriately, and publicly displayed contempt for the judicial system demonstrated a clear and convincing pattern of behavior that lacked respect for the constitutional, statutory and procedural limitations upon the judge’s authority and conduct and lacked respect for the concept of avoiding the appearance of impropriety. The judge was ordered to resign. JSC 98-1F.

A judge entered into an informal stipulation with the Judicial Standards Commission that the judge allegedly created an appearance of impropriety by appearing to exchange something of value for votes in an election campaign. JSC 16-3 (Informal Stipulation).

A district judge who was on probation with the Judicial Standards Commission for alcohol abuse resigned from office after he was reportedly abusive and involved in an altercation at a restaurant. *Matter of Hon. Thomas J. Hynes* S. Ct. No. 33,610; JSC 12-15F.

A judge who wrote bad checks, failed to pay taxes and used county facilities for her private business was placed under the mentorship of a district judge and required to repay her obligations. After failing to meet her obligations, she resigned from office. JSC 02-1F.

An impropriety or appearance of impropriety can arise by promoting a personal interest. . .

A magistrate was removed from office after filing two criminal complaints in his own court against a former tenant in the judge's apartment building and a visitor to a tenant, although the facts indicated the charges were for civil damages, proceeding to hear the cases in which he had an

interest, and arresting one defendant and jailing him without authority. *In re Lucero*, 1985-NMSC-053.

A judge was disciplined for intervening after his son was cited for drinking alcohol in public. The judge identified himself to the officers, showing his judicial identification, and asked one of them if she knew who he was. He further directed his volunteer bailiff to assist his son in responding to the citation. *Matter of Hon. Florencio "Larry" Ramirez*, 2006-NMSC-021.

A municipal judge was cautioned to avoid activities giving the appearance of impropriety. The judge placed a call to an individual's place of employment after the person was involved in a confrontation with members of the judge's family, and threatened the person with criminal charges. JSC 93-6I.

. . .or acting for direct financial gain.

A New York judge accepted money in exchange for dismissing charges against individuals. *In re Kuehnel*, 403 N.E.2d 167 (N.Y. App. 1980).

A judge may be disciplined for become inappropriately involved with a party outside the courtroom. . .

In *In re Terry*, 1984-NMSC-066, a municipal judge was suspended for thirty days for willfully accepting a favor from a person appearing before his court, creating an appearance of impropriety. The judge accepted a bundle of lumber from a trucker who was convicted by the judge of having an overweight load. The trucker paid the fine and then unloaded the lumber on the judge's property.

A magistrate was suspended for thirty days and publicly reprimanded for willful misconduct for drinking in his home with a man who had alcohol-related charges pending against him in the judge's court and going with him to buy more beer. The judge threatened to throw the man's "ass in jail" if he did not clear up his court problems that week. *In the Matter of Hon. Richard C. Martinez*, JSC 90-1F.

A magistrate was publicly reprimanded and suspended for 120 days by the Supreme Court for willful misconduct and violations of the Code because of conduct with a defendant who had appeared before him on arraignment for two felonies. One of the conditions of release the judge had imposed was that the defendant refrain from alcoholic beverages. Several weeks later judge encountered defendant in liquor store, gave her a ride home, drank with her, and had sexual intercourse with her. In the *Matter of Hon. Luis Martinez*, JSC 92-4F.

. . . for public behavior that demeans the judiciary;

A municipal court judge attended a wedding at which an altercation occurred. The judge intervened in the fight and was charged with obstruction of justice. The judge was admonished that such conduct did not display good judgment and tended to place the judiciary in disrepute and decrease public confidence in the judicial system. JSC 88-3I.

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including cursing in court offices, use of alcohol during court and other official proceedings, abuse of court staff, making racially biased references about court staff, and public derision of the chief judge. *In re Angie Vigil-Perez*, JSC 00-3F.

. . . or for patterns of conduct demeaning that role.

A district judge was removed from office, among other reasons, for engaging in a pattern of conduct toward court staff, litigants, and his judicial colleagues, which pattern adversely affected his reputation for impartiality, independence, and integrity. *In re Castellano*, 1995-NMSC-007.

### 3-940. Relevant Factors

The following factors may be relevant in determining impropriety:

1. *The public or private nature of the act when done.*

The more private the conduct, the greater the judge's expectation of privacy. But even private conduct is subject to disciplinary measures if it indicates bias or prejudice.

2. *The extent to which the conduct is protected as an individual right.*

Speech is constitutionally protected, but a judge's speech is circumscribed by the requirements that judges avoid the appearance of impropriety and bias or prejudice in decision making.

3. *Whether the conduct was harmful or offensive to others.*

Such conduct is inherently objectionable.

4. *The degree of respect or lack of respect for the public or individuals that the conduct demonstrates.*

Frequent use of biased epithets or stereotypes demonstrates disrespect for the public.

5. *The degree to which the conduct is indicative of bias, prejudice, or improper influence.*

“The administration of justice is prejudiced by the public perception of racial bias, whether or not it is translated into the court’s judgments and orders.” Geyh, *supra*, §9.06 [2].

### 3-950. Respect for the Law

Disrespect for the law is a specific form of impropriety.

A municipal judge who failed to sign over 700 outstanding bench warrants, routinely started court late, scheduled trials late in the evening to discourage their use, and met outside of court with defendants demonstrated a clear and convincing pattern of behavior that lacked respect for the constitutional, statutory and procedural limitations upon the judge’s authority and conduct and lacked respect for the concept of avoiding the appearance of impropriety. The Judicial Standards Commission recommended that the judge be permanently removed; the charges ultimately were dismissed as moot when the judge was not re-elected. *In the Matter of Thomas F. Fiorina*, JSC 97-1F.

A magistrate judge who served as a firearms instructor for the sheriff’s department had regular contact with the sheriff’s department through two-way radio, maintained a commission with the department, carried a concealed loaded firearm acted without jurisdiction in a domestic relations matter, unilaterally reduced a charge without an adversarial proceeding, and handled a plea and

sentence over the phone with the defendant violated the Code of Judicial Conduct and demonstrated willful misconduct in office. The judge was temporarily suspended and placed on supervised probation. *In the Matter of Edward S. Cramer*, JSC 97-2F.

**3-1000. Misuse of Prestige of Office**

Judges have substantial power. The nature of a judge's position, if properly performed, commands respect. The position of judge is, as it must be, highly respected in the community. Judges must be careful not to abuse their power or to trade upon the prestige of their office for their personal benefit or for the benefit of others.

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so. NMRA 21-103.

This topic will be discussed in Chapter 4, EXERCISE OF JUDICIAL POWER.

EXERCISE OF JUDICIAL POWER  
DEMEANOR AND IMPARTIALITY  
DISQUALIFICATION  
EX PARTE COMMUNICATIONS

## **EXERCISE OF JUDICIAL POWER**

### **Introduction to Chapter**

#### **4-200. Applicable Law**

Canons 21-100 and 21-200.

#### **4-300. Introduction**

Judges have the power and the duty to make choices. Much of this power is discretionary. Judicial discretion is the power to decide those matters that call for the exercise of personal judgment rather than the application of strict rules. *Geyh, supra*, §2.01 at 2-2.

A judge exercises discretion when the judge grants a continuance, weighs evidence, imposes a non-mandatory jail sentence, or holds a person in contempt. In order to preserve judicial independence, few fixed rules apply to the exercise of this authority. Many states adhere to the position that if the judge commits "mere legal error"--a mistaken exercise of judicial discretion--the mistake can be corrected on appeal. But a more current trend of authority has held that just because individual litigants may vindicate their rights on appeal, that "does not necessarily protect the public from a judge who repeatedly and grossly abuses his power." *Id.* But care must be taken to protect judicial independence against turning honest mistakes or different interpretations of the law into disciplinary matters. *Id.*, §2.02.

For example, judicial power can be abused by "fixing" a speeding ticket for oneself or a friend, or by making legal mistakes so serious or repetitive that the judge's conduct becomes unethical. Basically, if a judge's misuse of power is flagrant enough, serious enough, or frequent enough to raise concern about the judge's good faith or fitness to hold office, the judge risks being sanctioned for ethical violations. Such sanctions may, in the most serious cases, include removal from office.

Several Code sections relate to the exercise of power. Two general canons apply, especially to the improper use of power for the personal gain of the judge or others: NMRA 21-100, requiring a judge to uphold and promote the independence, integrity and impartiality of the judiciary and avoid both impropriety and the appearance of impropriety; and NMRA 21-200, requiring a judge to perform the duties of judicial office impartially, competently, and diligently. *See* BASIC PRINCIPLES OF JUDICIAL CONDUCT, Chapter 3.

### **Subchapter I. Avoiding Abusive Exercises of Judicial Power**

NMRA 21-103. Avoiding abuse of the prestige of judicial office.

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.

#### **4-400. Abuse of judge's power**

A judge abuses power when the judge takes advantage of the judicial authority which has been entrusted to the judge for personal reasons, including personal gain, retaliation, or helping friends or family. Such abuses profoundly violate the public's trust in the judiciary.

#### **4-410. Advancing private interests of the judge or others.**

A judge cannot use the judge’s judicial position to gain favored treatment in court for the judge or anyone else. Typically, such violations occur when friends, relatives, or business or political associates have an interest in the outcome of a pending case.

**4-411. Abusive exercises of judge’s own authority or status for the benefit of others.**

A judge may not extend special favors to litigants or otherwise give an advantage for personal reasons to someone appearing before the judge.

1. Unethical official acts:

- a. Dismissals of cases or other favored treatment of friends or family is one abuse of authority:

Judge who summarily adjudicated twenty-four traffic cases for family and friends over three-year period without hearings or evidence was removed from the bench. *Matter of Hon. J. Wayne Griego*, 2008-NMSC-020.

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including dismissing DWI and other cases of friends and relatives, without notice to the prosecutor, based upon *ex parte* communications, and even though some of the cases had been assigned to other judges. *In re Angie Vigil-Perez*, JSC 00-3F.

A magistrate was convinced by relatives of a repeat DWI offender to release him from jail because of his grandmother's illness. Without conducting a hearing, the judge suspended the jail term and released the offender, entering an amended judgment contrary to law. The judge resigned prior to the Supreme Court hearing on a charge of willful misconduct and violations of code. JSC 90-5F.

A magistrate released a violent offender for a weekend after receiving two *ex parte* phone calls from the defendant’s father. The weekend release violated court protocols limiting release to weekdays to allow district attorney the opportunity to review and comment. Judge was publicly censured and ordered to take ethics classes. *Matter of George Anaya, Jr.*, JSC 22-5F.

Judge dismissed case with prejudice after declaring the charge unconstitutional based solely on the defendant's explanation at arraignment, without giving the officer opportunity to testify. *Matter of Stephen Ryan*, JSC 13-3F.

- b. It is also unethical for judges to use their authority in attempts to influence others, such as judges or court personnel, for the purpose of affecting the course or outcome of a proceeding.

A metropolitan court judge accused of using or allowing the use of her name and title by a friend to influence the outcome of judicial and other matters in which the friend was involved was suspended from the bench and ultimately resigned office. JSC 02-F3.

A municipal judge who admitted to seeking favorable treatment from police for a friend accused of DWI was suspended, reprimanded, required to attend an ethics training at his own expense, and otherwise required to abide by the orders of the Supreme Court. JSC 02-6F.

A magistrate judge who admitted to intervening with a state police officer on behalf of a friend charged with aggravated DWI, ordering detention officers to release the defendant into his custody, and interfering in the police investigation by contacting a witness, received a formal reprimand from the court and was assigned a district judge mentor. *Matter of John W. "Buddy" Sanchez*, JSC 01-2F.

In *In re Naranjo*, 2013-NMSC-026, a magistrate judge called the district judge presiding over the magistrate's stepson's child-support enforcement case, saying that his stepson was not a flight risk, asking the bond be reduced or the stepson be released from jail, and attempting to get the case expedited favorably to the stepson.

Magistrate arraigned his nephew on criminal charges and set terms of release. He then assigned a public defender for his nephew, even though he did not qualify for one. Court ordered formal reprimand, 12-month supervised probation and mentorship, and courses at National Judicial College at his own expense. *Matter of John L. Sanchez*, JSC 13-1F.

In *In re Ramirez*, 2006-NMSC-021, the judge asked his bailiff to assist the judge's son and friends in responding to their citations, called a municipal judge, and appeared at a hearing in the cases.

- c. Other forms of favored treatment by the judge, not based in law or rules, are similarly sanctioned:

Municipal judge who called friend on bail to warn him about bail enforcement agent going to question and possibly arrest him was disciplined for conduct undermining the integrity and independence of the judiciary. *In the Matter of Barbara Aldaz-Mills*, Unreported opinion No. 31,197, S. Ct. (48 NM State Bar Bulletin 24, May 21, 2009).

A municipal judge received a letter of caution for declining to accept a complaint filed against a relative. The judge sent the complainant to file in magistrate court. The judge said he wanted to avoid the problem of having a complaint filed regarding his relative. The judge should have accepted the complaint and recused himself later. JSC 85-6I.

A municipal judge was suspended for ninety days, censured, placed on probation and ordered to pay restitution after ordering a defendant to return a motorcycle to a party who attended the same church as the judge. No case on that matter had been filed in the judge's court. The order was issued *ex parte* and was in any event outside the authority of a municipal judge. *Matter of Hon. Stephen S. Salazar*, JSC 13-4F.

A magistrate caused a court document to be backdated to allow a criminal complaint to be made before the running of the statute of limitations. These acts were committed in violation of NMRA 21-200 (disrespect for law) and NMRA 21-300 (unfaithful to law) [prior code sections] and together constituted misconduct in office. He was suspended without pay for two months. [Corresponding sections in 2012 Code include NMRA 21-103 and 21-204]. *Matter of Hon. Walter Herrera*, JSC 88-1F.

A magistrate presided over a case against her niece and intervened with court staff and the district attorney in cases against her own children. Judge retired after being charged with ethics violations. *Matter of Hon. April J. Silversmith*, JSC 21-2F.

2. Endorsements, references and fundraising:

- a. A judge abuses the prestige of judicial office by using the judicial position to benefit of others, including businesses, charitable organizations or even the judge’s courthouse or staff.

In *In re Castellano*, 1995-NMSC-007, ¶ 29, a district judge allowed his name, title, and photograph to appear in a brochure soliciting funds and allowed his stationery and official telephone number to appear for a solicitation letter.

In *In re Wingenroth*, S. Ct. No, 33,228, October 19, 2011, a magistrate judge personally solicited funds for a baseball tournament to benefit high school baseball programs.

The Judicial Standards Commission cautioned a judge for allegedly appearing in judicial robes in for-profit advertising. JSC 15-3I

A district judge abused the prestige of his office by commenting to the county manager that the judge “had the governor’s ear,” and if the county did not provide court requested security measures, the judge would ask the governor to veto county capital outlay funds. *Matter of Albert J. Mitchell, Jr.*, JSC 19-9F.

- b. Fundraising is improper in social media posts.

A Washington Supreme Court Justice was disciplined for posting and sharing posts on Facebook encouraging readers to attend fundraising activities sponsored by restaurants and others in support of public causes. *In re Svaren*, Washington State Commission on Judicial Conduct, December 7, 2018.

- c. Political activity can also lead to abuse.

In *In re Vincent*, 2007-NMSC-056, ¶ 3, a magistrate judge was sanctioned for allowing his name to appear in the media supporting a mayoral candidate. His action was also a violation of the current section NMRA 21-401(C)(2)(a), which specifically prohibits a judge from publicly endorsing a candidate for public office.

A *pro tempore* magistrate judge posted endorsements of judicial candidates on Facebook. *Matter of Hon. Philip J. Romero*, JSC 15-7F

- d. Making public recommendations or endorsements over social media is also improper.

“With Linked-In, for example if a judge ‘recommends’ or ‘endorses’ someone, this act may be considered akin to a letter of recommendation, expressing favor toward that individual over others, and requesting that someone act upon that favor,” Social Media AO, ¶ 24

“With Facebook, a judge may be inadvertently advancing the views of attorneys and parties by ‘liking’ or commenting on other users’ posts.” Social Media AO, ¶ 24

With “Twitter [now called ‘X’], a judge may . . . be inadvertently affecting the views of attorneys and parties by re-tweeting tweets made by users.” Social Media AO, ¶ 24

“With Yelp, a judge may be inadvertently advancing the economic interests of a restaurant” by giving a review. Social Media AO, ¶ 24

- e. Testifying as a character witness: Restrictions are imposed on a judge who is asked to testify as a character witness. Such testimony injects the prestige of the judicial office into a proceeding and may be misunderstood to lend the prestige of the judicial office in support of the party for whom the judge testifies.

A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned. NMRA 21-303

A judge who, without being subpoenaed, testifies as a character witness lends the prestige of judicial office to advance the interests of another. *See* Rule NMRA 21-103. A judge shall not testify as a character witness in a judicial... 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. NMRA 21-303, Cmt.1.

- f. A judge may provide references or recommendations for persons based on the judge’s personal knowledge, including use of the judge’s official letterhead, provided that the reference is indicated as a personal one and cannot reasonably be perceived as exerting pressure. *See* NMRA 21-103, Cmt. 2.

**4-420. Use of judicial power for personal gain.**

A judge flagrantly violates ethical rules by using power for the judge's advantage, including from financial, political or personal motivations.

**4-421. Avoiding criminal prosecution.**

A municipal judge who had been warned against cutting green trees by the Forest Service was caught a second time, and tried to get advantageous treatment by citing his position. A second such incident followed after an altercation at a cemetery. For this and other reasons, the judge resigned. *Matter of Hon. Roland Madrid*, JSC 14-7F.

Probate judge who had his staff shred a filed will and replace it with a different one asked the clerk to lie in sworn testimony to protect him. The Supreme Court removed him from office. *Matter of Hon. Bret Dillon*, JSC 13-6F.

**4-422. Retaliation and embroilment.**

A judge may be tempted to use power vindictively, in retaliation for a perceived personal offense.

Magistrate was suspended for, among other ethical violations, having “a firearm laying [sic] on top of [his] desk . . . pointing at the office door,” and clearly visible to employees. On that same day, he told a court clerk words to the effect that he was “going to kill” a public defender. *Matter of Robert W. Ionta*, JSC 23-1F.

A judge issued an arrest warrant with a no-bond hold, accepted a guilty plea, and imposed a ninety-day jail term for a larceny defendant— when the judge was himself the victim. Judge entered into consent decree with judicial standards commission including agreement to informal mentorship. JSC 20-11.

A district judge was removed from office for a pattern of misconduct, which included ordering the court administrator jailed for contempt. The administrator had transferred the judge's files to other judges at the direction of the chief judge, and refused to obey the judge's order seeking to countermand the transfer. *In re Castellano*, 1995-NMSC-007.

District judge was censured after threatening county officials to get legislator and governor involved if county commission did not improve courthouse security. *Matter of Hon. Albert J. Mitchell*, JSC 19-9F.

District judge attacked respondent and her attorney in her order denying their motion (in part) for the judge to recuse, over a newspaper article the judge attributed to the attorney. The judge’s order attacked the credibility and reputation of both the attorney and the client, improperly referencing a sealed doctor’s report, solely to retaliate for the article. After a hearing in the Supreme Court, the judge entered into a stipulation resulting in her censure. *Matter of Mary W. Rosner*, JSC 23-2F.

Nor may a judge lose self-control in a manner unbecoming a judge, even if the threatened action is not judicial.

A district judge was removed from office for a pattern of misconduct, which included the use of profane language and other discourteous, disrespectful and undignified treatment of court staff. *In re Castellano*, 1995-NMSC-007.

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including cursing in court offices, use of alcohol during court and other official proceedings, abuse of court staff, making racially biased references about court staff, and public derision of the chief judge. *In re Angie Vigil-Perez*, JSC 00-3F.

A magistrate judge's daughter was the subject of a law enforcement action. Later that evening the magistrate castigated and threatened to whip the chief of police. The magistrate received a letter of caution. JSC 85-2F.

After having previously been placed on probation due to a prior complaint involving alcohol use, district judge had been ordered into treatment and agreed to avoid all alcohol or drug use. Subsequently, the judge was involved in an altercation at a restaurant that refused him service due

to intoxication. Judge was permanently removed from office pursuant to stipulation. *Matter of Thomas J. Hynes*, JSC 12-12F

Magistrate judge ejected lead court worker and held her in contempt because she was performing duties as ordered by the presiding judge. Judge ordered that staff member jailed for thirty days and fined without hearing. Judge also walked out of courtroom and ignored assigned duties after presiding judge told her there would be two clerks in her court at all times due to her rude behavior toward staff. After Judicial Standards Commission trial and oral argument in Supreme Court, judge was removed for this and other misconduct. *Matter of Connie Lee Johnston*, JSC 18-1F.

Municipal judge resigned after he “willfully and aggressively shoved” a fellow city employee who had placed a lollipop in his jacket pocket on a checkout line, as a prank. *Matter of Hon. Stephen S. Salazar*, JSC 21-3F.

## **Subchapter II. Maintaining and acting with professional competence as an ethical responsibility**

NMRA 21-205

- (A) A judge shall perform judicial and administrative duties competently and diligently.
- (B) A judge shall be faithful to the law and maintain professional competence in it.

### **4-430. Resolving controversies outside the judicial process.**

Judges have been disciplined for asserting their authority on behalf of others when no judicial proceeding is involved. In these cases, the judge abuses authority by assuming an adversarial role while cloaked with judicial authority.

A magistrate who assisted creditors in the collection of debts by writing letters to alleged debtors in matters in which no complaints were filed was issued an oral caution for misusing his authority. He had used court office supplies in preparing the letters. The judge had said he believed he was only helping to reduce the amount of litigation. JSC 85-1F.

A municipal judge was suspended for ninety days, censured, placed on probation and ordered to pay restitution after ordering a defendant to return a motorcycle to a party who attended the same church as the judge. No case had been filed in the judge’s court. The order was issued *ex parte* and was in any event outside the authority of a municipal judge. *Matter of Stephen S. Salazar*, 2013-NMSC-007, JSC 13-4F.

Municipal judge who became advocate for claimant when no case was even pending before the judge undermined public confidence in integrity and impartiality of the judiciary and used prestige of judicial office for the private benefit of another person. Unreported opinion, *In the Matter of Sabino Ramirez*, No. 31,664 S. Ct. (48 NM State Bar Bulletin 31, June 26, 2009).

### **4-500. Legal Error.**

A judge's failure to follow the law may violate NMRA 21-102, which requires the judge to comply with the law and promote public confidence in the judiciary, or NMRA 21-205 (A), which requires the judge to maintain professional competence in the law. In the most serious cases, the judge's actions may indicate bad faith, supporting a finding of willful misconduct.

**4-510. Pattern of legal error.**

Violations of NMRA 21-102 and 21-205 (A) are more likely to be found when there is a pattern of legal error, indicating the judge lacks competence in the law. Continuous conduct of this sort demonstrates that a judge has not maintained professional competence in the law, disrespecting the judge's responsibilities to know and uphold the law, and is not fit to hold office.

Magistrate judge repeatedly violated procedures concerning pretrial bonds; made erroneous sentencing determinations, including failing to impose mandatory minimum sentences for DWI and domestic violence cases; improperly issued bench warrants; decided motions before responses were filed; and gave incomplete advice of rights when defendants pled to charges. After agreeing to a 30-day suspension, the judge nonetheless continued to act during that period, ultimately resigning. *Matter of Hon. Steve Guthrie*, JSC 22-2F.

**4-520. Egregious legal error.**

Extremely serious legal error can subject a judge to discipline, even if there is no continuous pattern of violations. Such cases may cast doubt on the judge's willingness or ability to accept or understand the applicable law or procedural rules.

**4-521. Abdicating decision-making responsibilities.**

These cases demonstrate flagrant disregard of judicial responsibilities.

A judge was issued a letter of caution for using a coin toss to decide a matter, improperly applying an arbitrary basis for ruling rather than using judicial discretion based on evidence presented. JSC 18-3I.

A judge was alleged to have delayed bringing criminal cases to trial until six months had passed and then dismissing under the six-month rule to avoid making a decision. JSC 87-3I (k).

**4-522. Improper delegation of judicial responsibilities.**

A judge may not delegate judicial duties or authority to non-judicial staff, even with the best intentions. Such delegation shows a lack of care in exercising judicial responsibilities, which undermines public confidence in the judiciary.

A magistrate delegated to a municipal clerk the authority to solemnize marriages, without statutory authorization, in violation of former NMRA 21-200(A), 21-300(A)(1) and 21-300(B)(2). The judge received a five-day suspension and reprimand. [Corresponding sections in the 2012 Code of Judicial Conduct would include Sections 21-201, 21-206 and 21-212 NMRA.] *In re Perea*, 1986-NMSC-001.

A municipal judge was disciplined for asking his staff to vote on whether the judge should dismiss a traffic citation. *Matter of Hon. Thomas F. Fiorina*, JSC 97-1F.

A magistrate was issued a letter of caution for having signed a criminal order expecting the accused to plead guilty and left instructions for the clerk to handle the case in his absence, in violation of the procedural requirements for entry of judgment. NMRA 6-701; JSC 89-1I.

Municipal Judge removed from office for numerous violations, including telephonically ordering his clerk to sign a judgment and sentence form, which resulted in the arrest of a defendant. *Matter of Hon. Jeff Aragon*, JSC 13-7F.

A judge allegedly issued a bench warrant on a twenty-eight-year-old citation in which the original citation had been destroyed and/or no longer existed and allowed the court clerk to sign the judgment and sentence in the case without legal authority. JSC 13-2I

#### **4-523. Improperly assuming jurisdiction.**

A judge is responsible for ensuring that the judge has jurisdiction before proceeding with the case.

A magistrate assumed jurisdiction over a case inappropriately, and was admonished to study the Supreme Court rules and not accept the advice of law enforcement officers. JSC 88-4I.

Magistrate judge heard a case against a juvenile, which was outside his jurisdiction. For that and other ethical violations, the judge resigned from the bench. *Matter of Hon. Jaime J. Baca*, JSC 15-1F.

A judge allegedly extended jurisdiction over petitioners by requiring them to attend status hearings after the court was divested of jurisdiction through issuance of final orders in the cases. The Commission cautioned the judge to refrain from scheduling such hearings after being divested of jurisdiction. JSC 14-3I.

Municipal judge issued order, without notice, requiring towing company to return a motorcycle to an acquaintance of the judge, when no case had been filed in the municipal court, the towing occurred at the direction of the magistrate court, and such an order was outside the judge's authority. Judge was suspended without pay for ninety days, required to pay restitution, censured, and put on probation. *Matter of Hon. Stephen S. Salazar*, 2013-NMSC-007, JSC 13-4F.

#### **4-524. Ignoring required procedures.**

A judge does not have discretion to bypass statutory and procedural requirements in exercising authority.

Probate Judge resigned after disregarding mentor's instructions to hold court in the county seat rather than at his business office in another city, or to get a separate court cell phone to avoid *ex parte* conversations. *Matter of Marlo Martinez*, JSC 22-4F.

A judge presiding over a child custody case, without providing proper notice, held both *pro se* parties in contempt for noncompliance with a notice from the court; swore them in and took testimony without advising them of their rights, and sentenced them to jail terms, which they served, without specifying the length of the sentence or providing for bonds. After serving over seventy days in jail, the father was again held in contempt for the same offense, violating his right against double jeopardy. Judge resigned after investigation. *Matter of Darren Kugler*, JSC 17-3F.

Municipal judge failed to adhere to numerous pre-trial procedures, depriving defendants of their due process rights to be heard and to have assistance of counsel; the judge resigned. *Matter of Hon. Benjamin Harrison*, JSC 20-2F.

Municipal judge held an incompetent defendant in jail while staff searched for a treatment center. Judge violated ethics rules by not referring the defendant to district court immediately, instead incarcerating him for 141 days. Judge was censured and suspended without pay for two weeks. *Matter of Hon. Frank M. Van Gundy*, JSC 19-5F.

**4-525. Swearing of witnesses.**

Witnesses must be properly sworn before testifying.

The JSC has reported at least three instances during the 1980's in which municipal court judges heard testimony from witnesses without first swearing them in. The judges were issued letters of caution. JSC 85-5I, JSC 86-5I, and JSC 88-2I. More recently, such oversights have resulted in stricter sanctions.

District judge retired from the bench after numerous ethical violations alleged against him, including "failure to take sworn testimony from witnesses." *Matter of William H. Brogan*, JSC 13-11F.

**4-526. Bonds.**

Irregular procedures in connection with bonds have also raised ethical issues.

A judge was alleged to have established a bond for a defendant after imposing a fine and ordering DWI school. After completion of school and payment of the fine, the judge refused to return the bond. JSC 87-3I.

A defendant's uncle posted an appearance bond in municipal court in a "driving on suspended license" case. The judge found the defendant guilty, fined him, and tendered to the uncle the difference in the amount of the fine and the bond, although the bond was for appearance only and not a guarantee of payment. The judge received a letter of admonition, cautioning that such actions tend to bring the judiciary into disrepute. JSC 88-5I.

Magistrate Judge set bond and other conditions of release for defendant at hearing from which defense counsel was absent. After an *ex parte* communication with the prosecutor, the judge conducted another hearing that same day at which defense counsel was again not present. At this second hearing the bond was increased six times over the original amount. For these and other ethical violations, judge agreed to retire. *Matter of Hon. Olivia N. Garcia*, JSC 12-9F.

**4-527. Disregarding emergency health rules.**

Emergencies like the Covid crisis have required the court system to protect public health by adopting special rules, which judges are ethically obligated to follow regardless of their personal beliefs.

Judge was sanctioned for, among other ethical violations, disregarding Covid policies ordered by the Supreme Court. *Matter of Robert W. Ionta*, JSC 23-1F.

Magistrate judge resigned after facing numerous allegations of ethical violations, including disregard for public health rules to prevent the spread of the Covid virus. *Matter of Hon. Steve Guthrie*, JSC 22-2F.

### Subchapter III. Ethical exercise of contempt power

#### 4-600. Abuse of contempt power

##### 4-610. Introduction.

One of the most important ethical responsibilities for judges is avoiding abuse of their contempt power. Judges are responsible for maintaining order, thereby ensuring due process for all parties in front of them. The following subsections and the checklist at the beginning of this section suggest a step-by-step approach to using the contempt power appropriately.

But in the emotional and consequential setting of a courtroom, factors such as fear, anger, manipulation or intimidation will lead some parties and attorneys to be on their worst behavior. This can test judges' patience, to the point that the temptation to drop the hammer of contempt may seem an appealing, easy solution. The ethical responsibility of the judge is to proceed very carefully before applying that "ultimate weapon."

The power to cite people for contempt of the courts was first embodied in a territorial-era statute enacted in 1851, but it remains valid law. It is now codified in §34-1-2 NMSA 1978:

It shall be within the power of each and every presiding officer [sic] of the several courts of this state, whether of record or not of record, to preserve order and decorum, and for that purpose to punish contempts by reprimand, arrest, fine or imprisonment, being circumscribed by the usage of the courts of the United States.

*See Concha v. Sanchez*, 2011-NMSC-031. *Concha* also reiterated the long-recognized implied power of the courts "to impose silence, respect and decorum in their presence, and submission to lawful mandates." *Id.* at ¶ 23. The ethical principles governing judges' use of their contempt authority include NMRA 21-100, NMRA 21-101, NMRA 21-102 and NMRA 21-103. Abuse of contempt authority also implicates NMRA 21-202, NMRA 21-206 and NMRA 21-208, relating to judicial demeanor and protecting the parties' right to be heard. *See* Demeanor and Impartiality. Other provisions of the Code of Conduct may also come into play in certain circumstances.

The contempt power is the judge's ultimate weapon, which enables the judge to control the courtroom to maintain decorum. But, especially in difficult circumstances, the contempt power has been subject to abuse by judges who have lost control of their own composure or are confronted by challenging situations in the courtroom. Most commonly, judges have been disciplined for using contempt in anger or to settle a personal score, especially in retaliation against a party, attorney or witness with whom the judge has been drawn into personal conflict.

Because it carries criminal penalties that reflect on the openness of the judiciary when overused, *contempt should be used as a last resort*, only for legally valid reasons, and in strict conformity with procedural

requirements. It should be used with great prudence and caution and never to intimidate litigants and witnesses or in a manner that interferes unnecessarily with a litigant's ability to consult with counsel. Any other use of the contempt power falls outside the scope of judicial authority and may subject the judge to disciplinary action, possibly implicating discipline for willful misconduct.

The following discussion looks at contempt in the context of judicial ethics, and is not otherwise a discussion of the substantive law. Judges should refer to their statutes, court rules, case law and benchbooks for the substantive law of contempt.

#### **4-620. Definition and types of contempt.**

A person commits contempt of court by performing an act that is calculated to lessen the authority or degrade the dignity of the court by embarrassing, hindering, or obstructing the court in the administration of justice.

There are two ways to classify contempt in New Mexico. One is to treat it as either “direct” or “indirect.” This distinction will be discussed below. The second way to classify contempt has historically been to divide it into “criminal” or “civil” classifications, which focused on the purpose for which the power is exercised. In *In re Victor Marshall (II)*, 2023-NMSC-009, the Supreme Court modified that dichotomy, defining contemptuous behavior as either “remedial” or “punitive.” The former term is applied to coerce a contemnor to comply in the future with an order of the court; once the contemnor complies, the sanctions end. The latter is to vindicate the authority of the court, imposing punishment for past misconduct regardless of what additional measures the contemnor may take. *Id.*, ¶¶ 11, 12.

#### **4-630. Basic legal requirements.**

For a finding of contempt to be supported, the offending person must have behaved in a manner reflecting at least one of the following types of acts as discussed in section 4-631, 4-632 and 4-632 below. Moreover, in determining the appropriate response, the judge must follow all applicable procedural requirements, including warning, any required notice, hearing, and the entry of a written order.

#### **4-631. Statutory grounds.**

In addition to the general grant of contempt power in §34-1-2 NMSA described above, magistrate and metropolitan court judges may punish for contempt only for (1) disorderly behavior or breach of the peace tending to interrupt or disturb a judicial proceeding in progress before them; (2) misbehavior by court officers (clerks and bailiffs) in official transactions; or (3) disobedience or resistance to any lawful order, rule, process, decree or command of the court. No person shall be punished until given an opportunity to be heard in their defense. NMSA 1978 §35-3-9.

#### **4-632. Direct contempt.**

Direct contempt is contemptuous conduct that takes place in the judge's presence or the court's vicinity and interrupts the course of proceedings so that the judge must take corrective action. Any person present in the courtroom can be charged with contempt, including an observer.

Direct contempt involves disorderly or insolent behavior committed in front of the judge and may therefore be punished summarily—meaning that the judge may punish the behavior without further evidentiary proceedings or finding guilt beyond a reasonable doubt, *Concha v. Sanchez*, 2011-NMSC-031, ¶ 27. Prior notice is not required because the judge personally observes the offending conduct and usually deals with

it immediately. For the judge to punish direct contempt, the judge must certify that the judge saw or heard the conduct and that it was committed in the presence of the court.

But the New Mexico Supreme Court has also held that unless the conduct punished by a contempt citation is “flagrant contemptuous conduct,” due process rights must still be afforded. *Concha v. Sanchez, id.*, at ¶42. Due process requires the judge to first warn the contemnor specifically that the judge believes the conduct to be contemptuous and to allow an opportunity for an explanation, apology, or change in conduct. The order must be in writing, so that it can be appealed.

“Because we necessarily give judges such extraordinarily unilateral powers,” the New Mexico Supreme Court has cautioned, “we must require judges to exercise a correspondingly extraordinary self-restraint to avoid abuse of these powers.” *Id.* at ¶30.

When a number of supporters of a defendant reacted loudly to a sentence they considered unjustified, and the judge responded by jailing thirty-two people on the side of the gallery where defendant’s supporters were seated, judge’s failure to identify contemnors and allow for hearings denied the alleged contemnors their due process rights. *Concha v. Sanchez*, 2011-NMSC-031.

#### **4-633. Indirect contempt.**

Indirect contempt includes all contemptuous behavior that is not direct contempt. “Indirect contempt has been characterized generally by the act of disobeying or resisting process, intimidating a witness out of the presence of the court, or making any false or grossly inadequate report of any proceeding while the same is pending before the court.” *State v. Stout*, 1983-NMSC-094, ¶ 8. Since the contemptuous act did not occur in front of the judge, punishment for indirect contempt requires a complaint, notice, hearing and a written order, like any other criminal charge.

#### **4-640. Contempt hearing procedures.**

The judge who charges the contempt is not automatically required to recuse from presiding over the contempt hearing. However, the judge who feels too personally embroiled in the controversy to be able to rule fairly should recuse.

A judge who initiated a contempt proceeding against an attorney was not automatically disqualified from presiding over the contempt hearing. The Court overruled the State’s prior *per se* rule of disqualification from contempt hearings for judges against whom the contempt was alleged to have been committed. Instead the Court adopted the “sounder determination” of the United States Supreme Court in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), that a judge should be prohibited from presiding only if the judge becomes so embroiled that it is unlikely the judge can maintain the necessary detachment, or if the judge or one of the judge’s staff will necessarily be a witness in the proceeding. *State v. Stout*, 1983-NMSC-094, ¶ 12.

#### **4-650. Pattern of abuse.**

Where judges have been disciplined for abuse of contempt power, there is often a pattern of repeated misuse. *Geyh, supra*, §2.03.

A Florida judge held an attorney in contempt without allowing him to explain why he was late to court, and held a boy's father in contempt for asking why the boy had been confined in a juvenile shelter. *In re Crowell*, 379 So. 2d 107, 108 (Fla. 1980).

A Nevada judge was removed from office for a long-standing pattern of abuse of contempt power that involved at least three instances in which the contempt had been reversed on appeal. The judge had ignored binding precedent and the fact that the judge was experienced but continued to ignore proper procedure was held to constitute the bad faith necessary to find willful misconduct. *Goldman v. Nevada Comm'n on Judicial Discipline*, 830 P.2d 107, 135 (Nev. 1992).

#### **4-660. Embroilment.**

Personal embroilment in a controversy by a judge is a frequent source of abuse of the contempt power. Some litigants intentionally try to make the judge lose control. An angry judge is more likely to abuse their authority than a judge who remains above the fray.

A judge must not . . . place the defense of his own character above his obligation to promote respect for the law in adjudicating contempt of court . . . No matter how provocative are the personal attacks or innuendos by lawyers against a judge, the judge simply "should not himself give vent to personal spleen or respond to a personal grievance" because "Justice must satisfy the appearance of justice." *McCartney v. Commission*, 526 P.2d 268, 287 (Cal. 1974).

Judges should not overreact when a party disqualifies the judge or files disciplinary charges.

A California judge used contempt to retaliate against an attorney who disqualified the judge from cases. *In re Wenger*, 630 P.2d 954, 958 (Cal. 1981).

A California judge held a litigant in contempt after she publicly posted a copy of her letter of complaint about the judge to the state's judicial conduct organization. The judge was removed from office for this and other misconduct. *Furey v. Comm'n on Judicial Performance*, 743 P.2d 919, 926-27 (Cal. 1987).

#### **4-670. Common scenarios demonstrating abuse of the contempt power.**

Attorneys, litigants, witnesses, and even persons unrelated to a court proceeding can be the subject of a judge's misuse of the contempt power. The judge's overreaction can arise from conduct in court, retaliation for past conduct, or unrelated events in the judge's personal life.

#### **4-671. Invalid underlying basis.**

The conduct itself must be contemptuous for a judge to punish someone for contempt.

Municipal judge initiated indirect contempt proceeding against a defendant who failed to appear by issuing an order for indirect contempt of court, rather than the required criminal complaint giving the defendant notice of and hearing on the alleged offense. Judge lacked personal knowledge of the failure to appear; nor was a sworn affidavit filed, either of which is required by NMRA 8-206. For this and numerous other stipulated violations, the judge resigned. *Matter of Hon. Benjamin Harrison*, JSC 20-2F.

Judge resigned from office after facing charges that he responded abusively to an outburst by a number of people in a crowded gallery after sentencing the defendant. The judge ordered, without a hearing, over thirty spectators jailed for contempt. Other than releasing several people for health or age reasons, the judge did not know which of the people he ordered jailed had participated in the outburst, and did not excuse one spectator who denied having said anything at all. The Court explained that “[e]xcept in cases of flagrant contemptuous conduct, before summary punishment for contempt may be imposed and enforced, the record should be clear that: (1) a specific warning was given by the judge; (2) an opportunity to explain was afforded; and (3) a hearing was held.” *Concha v. Sanchez*, 2011-NMSC-031, ¶ 42.

A judge was suspended for sixty days without pay and ordered to pay costs of disciplinary proceeding for conduct including citing a district attorney for contempt for filing a writ of prohibition to prevent the judge from removing the attorney from juvenile cases without authority. The judge "knowingly and intentionally misused the authority of his office to effect a purpose beyond his legitimate authority, which constituted bad faith, malicious abuse of power, and thus willful misconduct in office." *In re Martinez*, 1982-NMSC-115.

Misuse of the contempt power by a judge is willful misconduct and can be grounds for removal from office.

A district judge was removed from office for a pattern of misconduct, which included ordering the court administrator jailed for contempt. The administrator had, at the direction of the chief judge, transferred the judge's files to other judges, and refused to obey the offending judge's order seeking to countermand the ordered transfer. *In re Castellano*, 1995-NMSC-007.

Magistrate publicly ejected a lead worker from her courtroom after the worker had entered the court at the direction of the presiding judge. The staff person remained to carry out the presiding judge's directions, after which the judge held her in contempt and ordered her jailed, without providing her an opportunity to respond. *Matter of Hon. Connie Lee Johnston*, JSC 17-2F.

A judge presiding over a child custody case, without providing proper notice, held both *pro se* parties in contempt for noncompliance with a notice from the court; swore them in and took testimony without advising them of their rights, and sentenced them to jail terms, which they served, without specifying the length of the sentence or providing for bonds. After serving over 70 days in jail, the father was again held in contempt for the same offense, violating his right against double jeopardy. Judge resigned after investigation. *Matter of Darren Kugler*, JSC 17-3F.

Rudeness, while demeaning to the court, does not always justify a finding of contempt.

A California judge improperly added to the sentence for contempt when the defendant was rude to judge at sentencing. *Furey v. Comm'n on Judicial Performance*, 743 P.2d 919, 923 (Cal. 1987).

Judges have been disciplined for holding people in contempt while knowing there was an insufficient basis for the charge. . .

A California judge threatened to hold an attorney in contempt if he brought any more prostitution cases. *In re Hague*, 315 N.W.2d 524, 533 (Mich. 1982).

. . . or, for imposing contempt sanctions when the reasons cited by the judge are not supported by the facts.

Judge resigned from bench after New Mexico Supreme Court found he had jailed improperly thirty-two spectators at trial without identifying those who had acted contemptuously from anger over the severity of a sentence he had just imposed. All the observers he ordered jailed were on the east side of the gallery, where supporters of the defendant were seated. No hearing or other fact-finding process was initiated by the judge to ascertain which of the spectators seated on that side had caused the outburst. By the time the judge held the spectators in contempt, the courtroom had quieted down, so bypassing due process requirements, including notice, hearing and a right to counsel, was not justified. *Concha v. Sanchez*, 2011-NMSC-031, ¶¶37, 40.

The court record did not support the judge's claim that a lawyer whom the judge had held in contempt repeatedly ignored the rules about impeaching witnesses. *In re Turner*, 421 So. 2d 1077, 1079 (Fla. 1982).

A Florida judge held an attorney in contempt for refusing to answer the judge's questions, although the transcript showed the lawyer tried to answer. *In re Crowell*, 379 So. 2d 107, 109 (Fla. 1979).

A North Carolina judge was censured for briefly confining attorney in court after attorney had properly refused to explain reasons for motion to be relieved of representing a criminal defendant. *In re Bullock*, 403 S.E.2d 264, 267 (N.C. 1991).

#### **4-672. Animosity toward attorneys.**

Judges must maintain control of the courtroom. Lawyers must represent their clients zealously. An aggressive attorney may easily provoke the judge to use the contempt power inappropriately, especially when the attorney and judge have a history of antagonism. Quick imposition of contempt sanctions may give the appearance, if not reflecting a reality, that the judge is biased for or prejudiced against certain groups of attorneys, such as all prosecutors or all public defenders; or is overly authoritarian and quick to sanction for contempt without pursuing alternative means to control the situation.

A California judge was removed from office for a pattern of misconduct that included numerous instances of abuse of contempt power. The judge ordered incarceration of public defenders, without a hearing, for asking questions the judge did not like and for not being in the courtroom when the case was called; and would appoint substitute counsel without giving them adequate time to prepare. The judge's failure to follow procedures was in bad faith, not mere legal error. *Cannon v. Comm'n on Judicial Qualifications*, 537 P.2d 898, 908-12 (Cal. 1975).

Judges have held attorneys in contempt summarily (without a hearing) for failure to appear in court at an appointed time. The court cannot hold the attorney in contempt without first giving notice and an opportunity to explain the absence, unless the judge has personal knowledge that the attorney is absent for an unacceptable reason. Holding an attorney in contempt for exercising a right is clearly abusive.

New Mexico Supreme Court held (and the parties did not dispute) that public defender who did not appear in court at a time which had been rescheduled at that attorney's request would be guilty, if at all, of indirect contempt. Hence the attorney would have to be afforded due process before the judge could find him guilty of contempt. *State v. Stout*, 1983-NMSC-094.

#### **4-673. Animosity toward parties and witnesses.**

Parties and witnesses may have limited understanding of or appreciation for procedural rules. They may also be quick to provoke the judge by using the courtroom to vent anger and frustration.

Judge in custody litigation held both parties in contempt and jailed them, without notice or opportunity for hearing, for non-compliance with his order; shouted demeaning and personally insulting statements at the parties; and threatened them with additional jail terms without providing due process. The husband served sixty days in jail for contempt, and then was held in contempt again, violating his right not to be subject to double jeopardy. The judge resigned. *Matter of Hon. Darren Kugler*, JSC 17-3F.

A Pennsylvania judge was removed for abuse of the contempt power, including holding an attorney in contempt for persistently trying to state an objection after the judge refused to permit it. The judge was annoyed by the attorney for having asked the judge to recuse himself from a case. *Judicial Inquiry & Review Bd. v. Fink*, 532 A.2d 358, 365 (Pa. 1987).

A New Jersey judge, among other abuses, held a defendant in contempt for a remark that the defendant made to his attorney outside the courtroom. *In re Yengo*, 371 A.2d 41, 55 (N.J. 1977).

A Florida judge held an attorney in contempt and jailed him for not following the proper method of impeaching a witness; ordered the arrest of two witnesses who had given conflicting testimony until it was determined who was lying; and held a female attorney in contempt for making objections to his comments from the bench. *In re Turner*, 421 So. 2d 1077, 1079 (Fla. 1982).

Serious abuses can occur when the judge appears to be biased and uses contempt as pre-judgment punishment. *See NMRA 21-203*.

#### **4-674. Animosity toward others.**

A judge should not use indirect contempt improperly, such as by threatening or punishing a person who personally offends the judge. This is an especially serious abuse of authority if it arises in a non-judicial context, when the judge lacks even apparent authority.

Public censure was ordered of a magistrate who exceeded his authority and acted improperly by issuing a bench warrant for the arrest of a man with whom he previously had an altercation in a bar. The judge had charged the man with indirect contempt of court. *Matter of Hon. Frank Emerson*, JSC 84-1F.

In *Concha v. Sanchez*, 2011-NMSC-031, trial judge held in contempt numerous spectators on the side of the gallery where defendant's supporters were seated, without ascertaining which of them had vocally protested judges' sentence. Judge subsequently resigned.

A Georgia judge threatened to hold a person in contempt for writing letters critical of the court to a local paper. *In re Inquiry No. 693*, 321 S.E. 2d 743, 744 (Ga. 1984).

A Florida judge was reprimanded for ordering a police officer to appear before the judge under threat of contempt for refusing to turn down his police radio in a restaurant. *In re Muszynski*, 471 So.2d 1284, 1285 (Fla. 1985).

**4-680. Controlling the courtroom while avoiding contempt.**

Court proceedings may be emotionally charged. If the judge remains calm and acts quickly to diffuse a potentially volatile situation, the judge may control the problem without resorting to contempt. The late Judge David Rothman of the Superior Court of California suggested several ways to deal with such problems. A judge can:

- Instruct court staff to maintain dignity, order and decorum even when the judge is not in the courtroom.
- Open court formally to give a message of dignity.
- Provide a written set of rules to provide a clear message that certain conduct is expected.
- Notice and respond to even the first transgression.
- Escalate the penalties for each successive transgression.
- Take a recess to reflect prior to finding someone in contempt.

**Subchapter IV: Adherence to adversarial process including: respecting rights of parties, including right to assistance of counsel, pretrial release, sentencing limitations, and other due process rights**

NMRA 21-205

A. A judge shall perform judicial and administrative duties competently and diligently.

B. A judge shall cooperate with other judges and court officials in the administration of court business.

**4-700. Abuse of adversarial process**

Judges abuse their authority when they deprive parties of their rights or interfere with the judicial process by failing to follow the law. Abuses of this sort are treated as serious offenses by disciplinary authorities.

Judge failed to act competently or follow rules. Violations included seeking *ex parte* communications, taking unsworn testimony, acting without notice to State on continuances, violating parties' rights to be present during jury communication, violating prohibition against double jeopardy, and not following mandatory sex offender probation guidelines. *Matter of Hon. William H. Brogan*, JSC 13-10F.

Judge cited for legal and administrative failures, including: mismanagement of public funds, failure to arraign defendants, failure to submit abstracts of record to MVD, failure to recuse, due process violations, failure to ensure bench warrants were properly cleared, failure to impose mandatory minimum sentence, and inaccurate reporting procedures for fines, among others. *Matter of Hon. Sharon C. Torres*, JSC 13-8F.

Judge entered not guilty verdict against an alleged batterer on the grounds that the defendant “could lawfully batter the complainant in public” and “had every right to protect [her marital] union”; and issued sentences in numerous impaired driving cases below the statutorily mandated minimums. Judge stipulated to violations and resigned. *Matter of Hon. Stephen G. Ryan*, JSC 13-3F.

#### **4-710. The self-represented litigant.**

In dealing with the self-represented litigant, a judge must remain impartial but ensure that the litigant receives a fair hearing. A judge who does too *much* to help the party risks becoming an advocate; whereas one who does too *little* denies the party their fundamental right to a fair hearing. The problem is compounded if the self-represented *pro se* party tests the limits of the court's patience and the judge overreacts.

A judge was publicly censured and suspended for twenty days for his rude treatment of a self-represented litigant despite his claim that the behavior was dictated by administrative necessity and practical problems created by the litigant's appearance in court without an attorney. The judge interrupted witnesses and litigants "without regard to the effect on the confidence of witnesses, parties, attorneys and the public generally in the integrity, competence and fairness of the judicial system." *In re Kellam*, 503 A.2d 1308, 1309 (Me. 1981).

#### **4-720. Interfering with attorney-client relationship.**

It is unethical for a judge to engage in conduct that detrimentally affects the attorney-client relationship.

#### **4-721. Proceeding in absence of counsel.**

The most serious problem in this category is conducting court proceedings in the absence of counsel when the judge knows the party is represented.

Judges have been sanctioned for, among other misconduct, depriving defendants of their right to counsel by setting their conditions of pretrial release without giving the defendants a hearing or the opportunity to be represented by counsel. *Matter of Hon. Steve Guthrie*, JSC 22-2F; *Matter of Hon. Darren Kugler*, JSC 17-3F; *Matter of Hon. Olivia N. Garcia*, JSC 12-9F.

A California judge appointed an attorney in a probation violation proceeding, but before counsel arrived asked the accused whether the alleged events had taken place. *Ryan v. Comm'n on Judicial Performance*, 754 P.2d 724, 737 (Cal. 1988).

A California judge was removed from office for willful misconduct including conducting court proceedings in the absence of counsel. *Gonzales v. Comm'n on Judicial Performances*, 657 P.2d 372, 380-81 (Cal. 1983).

#### **4-722. Denying or trivializing right to counsel.**

Judges in criminal proceedings must affirmatively advise unrepresented defendants of their Sixth Amendment right to counsel so that they understand the right and the implications of proceeding without an attorney. If the judge fails to advise, or disparages the right by tone of voice or body language, the defendant may unknowingly decline their opportunity to exercise their constitutional right.

A Florida judge threatened a defendant with a harsher sentence to discourage him from requesting a public defender. *In re Damron*, 487 So. 2d 1, 2 (Fla. 1985).

A New Jersey judge stated to the defendant: "I have to go through this drill and ask you if you want a lawyer or not. . . . They make me do it. I know you don't want one, you know you don't want one but I have to go through this and waste your time anyhow." *In re Bozarth*, 604 A.2d 100, 102 (N.J. 1992).

A Maine judge detained a juvenile for almost six weeks before he received assistance of counsel. *In re Benoit*, 487 A.2d 1158, 1167 (Me. 1985).

A California judge wrongfully proceeded with a probation revocation hearing for a defendant who appeared without counsel, without appointing counsel or advising the defendant of the right to counsel. *Kloepfer v. Comm'n on Judicial Qualifications*, 782 P.2d 239, 252 (Cal. 1989).

The fact that the court is busy does not excuse a judge from advising a defendant of the right to counsel. Judges scheduling numerous arraignments at the same time may advise the defendants as a group of their rights, provided that the judge confirms with each defendant individually that they have heard and understood their right and knowingly chosen whether to exercise it or not.

A high volume of cases does not justify a judge's failure to determine whether a defendant is indigent and entitled to an attorney. *In re Field*, 576 P.2d 348, 353 (Ore. 1978).

It is also unethical to discourage a defendant from obtaining counsel by subtle means, such as giving reassurances that the defendant has nothing to worry about.

#### **4-723. Undermining the attorney-client relationship.**

The quality of legal representation varies and judges inevitably form opinions about the skills of attorneys appearing before them. The judge may not express negative opinions about the representation to a party, either directly or indirectly. If the attorney's conduct is unethical, the judge should report it to the State Bar Association disciplinary board.

Magistrate judge communicated with defendant on a case pending before the judge, bypassing the defendant's attorney, to tell the defendant that the case was mishandled by the investigator. Judge later recused from the case. Judge was suspended. *Matter of Hon. Warren G. Walton*, JSC 19-3F.

A judge allegedly participated in a discussion with a litigant concerning the litigant's attorney in a pending case. The litigant's attorney was not present, but other attorneys were present during the discussion. Cautionary letter issued to judge. JSC 16-3I.

A Pennsylvania judge attempted to convince the son of a litigant that the father's lawyer was not to be trusted. *Judicial Inquiry & Review Bd. v. Fink*, 532 A.2d 358, 362 (Pa. 1987).

A California judge willfully interfered with the attorney-client relationship by forcing newly appointed public defenders to proceed unprepared; refused to explain why she had overruled objections; told an attorney not to ask "stupid" questions, advising the attorney might want to check

on the quality of the food in the county jail. *Cannon v. Comm'n on Judicial Qualifications*, 537 P.2d 898, 900-01 (Cal. 1975).

In full court with the client present, a California judge accused a defense attorney of being psychologically afraid of going to trial and inquired about the number of cases she had tried. *Kloepfer v. Comm'n on Judicial Performance*, 782 P.2d 239, 248 (Cal. 1989).

A judge must also respect the confidentiality of attorney-client communications.

A judge ordered a defendant to answer questions in a contempt hearing about the advice the lawyer gave the client. *Wenger v. Comm'n on Judicial Performance*, 630 P.2d 954, 960 (Cal. 1981).

**4-730. Allowing non-attorney representation.**

A judge may not allow a person to be represented by a non-attorney. *Matter of Hon. Baudelio "Bobby" Rodriguez*, JSC 90-F2.

**4-740. Assuming adversarial role.**

Judges have been disciplined for abandoning their judicial function in the course of a proceeding, such as by usurping the jury's role. . .

A California judge unlawfully directed jurors to return a guilty verdict. *McCullough v. Comm'n on Judicial Performance*, 776 P.2d 259, 262 (Cal. 1989).

. . . or examining witnesses in an adversarial manner.

A judge was disciplined for examining witnesses like an advocate, creating "the impression that there was no impartial, truth-seeking judge in the courtroom." *In re McCartney*, 526 P.2d 268, 283 (Cal. 1974).

**4-750. Coercing case dispositions.**

A judge's desire to expedite case dispositions may increase the temptation to force settlement and pleas. Undue pressure from the judge is unethical because it deprives parties of their day in court and indicates the judge is no longer impartial.

This is especially problematic where plea bargains are concerned. A judge should not be involved in discussions about possible plea bargains, or engage in efforts to make a defendant plead. Court rules address this problem directly, by expressly prohibiting judges from participating in plea discussions. See NMRA 5-304 (A)(1); 6-502(D)(1); 7-502(D)(1); 8-502 (D)(1). A district judge, including a *pro tempore* district judge, who does not preside over the case may assist in attaining a plea agreement "in a manner that serves the interest of justice." NMRA 5-304 (A) (1).

A district judge was removed from a case under the Supreme Court's power of superintending control when the judge had actively engaged in efforts to get the defendant to plead guilty. *State ex rel. Anaya v. Scarborough*, 1966-NMSC-009.

A Michigan judge was suspended for five years for misconduct, including promising defendants leniency if they would take guilty pleas. The judge told one defendant he should take the plea because his attorney did not have his case together and would certainly be found guilty at a trial. *In re Del Rio*, 256 N.W.2d 727, 742 (Mich. 1977).

By holding "bargain days" when the judge imposed one-half of his customary sentence on defendants pleading guilty, a California judge deliberately misused his power and abrogated his duty to decide each case on its own merits. *Gonzalez v. Comm'n on Judicial Performance*, 657 P.2d 372, 381 (Cal. 1983).

A Maine judge was censured for having threatened to impose a significantly more severe sentence if the defendant were to reject the judge's plea offer and was subsequently convicted at trial. *In re Cox*, 553 A.2d 1255, 1256 (Me. 1989).

This rule applies even when the judge does not attempt to coerce a guilty plea.

Magistrate judge participated in plea negotiations, contrary to Rule 6-502 NMRA, *Matter of Hon. Olivia N. Garcia*, JSC 12-9F.

**4-760. Other procedures resulting in denial of due process.**

A judge who abandons proper procedure deprives parties of their rights.

A California judge's direction to the jury to "go in that room and find the defendant guilty" constituted willful misconduct. *McCulloch v. Comm'n on Judicial Performance*, 776 P.2d 259, 262 (1989).

A magistrate resigned pending allegations that he had dismissed criminal charges against a defendant without a hearing or agreement of the state. JSC 85-11.

The JSC noted with disapproval an allegation that a judge had accepted guilty pleas from defendants and then proceeded with trial on the merits. JSC 87-3I.

**4-770. Abuse of bail.**

Coercive or punitive use of bail is another form of abuse of power.

Judge set bail at hearing without defendant's attorney present; later that day, after determining defendant's criminal history after an *ex parte* conversation with prosecutor, judge held second hearing, again without defense counsel. Judge then had staff modify the prior order, multiplying by six times the amount of bond. *Matter of Hon. Olivia N. Garcia*, JSC 12-9F.

A California judge's willful misconduct included ordering a defendant back into custody when he refused to stipulate to probable cause, arbitrarily increasing bail when the defendant complained about not being released on his own recognizance, and raising bail from \$500 to \$50,000 after a defendant did not appear in court because he was in the hospital. *Cannon v. Comm'n on Judicial Qualifications*, 537 P.2d 898, fn. 4 (Cal. 1975).

**4-780. Inappropriate criminal sanctions and civil remedies.**

**4-781. External factors.**

A judge's discretion does not extend to allowing criminal sentences to be based on arbitrary, external factors. . .

Magistrate retired after allegedly imposing illegal sentences in twenty-six cases. *Matter of Hon. Wilma Charley*, JSC 12-7F.

A Louisiana judge was reprimanded for basing fines on amount of money defendants had with them at sentencing. *In re Daniels*, 340 So. 2d 301, 308 (La. 1976).

A Florida judge improperly allowed traffic offenders to avoid appearing in court by paying double the statutory fine. *In re DeFoor*, 494 So. 2d 1121, 1122 (Fla. 1986).

. . . or for imposing punishment beyond the court's authority.

A Maine judge ordered unrepresented defendants to jail for failure to complete community service that had not been court ordered. *In re Benoit*, 487 A.2d 1158, 1165-66 (Me. 1985).

**4-782. Fees and costs.**

Failure to ensure proper payment of fees and costs also can be unethical.

A magistrate was counseled for failing to award to plaintiff court costs as required by court rule. JSC 86-6I.

A California judge improperly made attorney's fees payable before fines, leaving defendants subject to further proceedings, such as probation revocation and contempt, when they could not pay both. *In re Gubler*, 688 P.2d 551, 555 (Cal. 1984).

A judge's authority does not extend to ordering a defendant to contribute to a judge's special fund instead of paying a fine, or making attorneys pay for infractions of court rules.

A judge obtained monies for a special fund he had established to assist indigent drug and alcohol abusers by fining attorneys for such infractions as arriving late to court or failure to appear. *In re Merritt*, 432 N.W. 2d 170 (Mich. 1988).

**4-790. Favoritism.**

Allowing personal relationships to affect decisions is an obvious abuse of the judicial process.

Judge showed favoritism repeatedly, including to a police officer. Judge resigned office. *Matter of Hon. Benjamin Harrison*, JSC 20-2F.

A judge allegedly abused the prestige of judicial office and created an appearance of impropriety by using the court's email system to communicate with an assistant district attorney regarding a personal matter. JSC 14-11I.

A judge was censured for releasing a friend on his own recognizance, giving him money and the telephone number of his clothing store, and offering him a ride home. *In re Lehman*, 812 P.2d 992, 993 (Ariz. 1991).

A judge dismissed a criminal case involving a personal friend without explaining his actions or advising the prosecutor. *McCullogh v. Comm'n on Judicial Performance*, 776 P.2d 259, 263 (Cal. 1989).

This prohibition includes abusing the power of appointment to benefit others.

Judge's appointments of counsel for indigent defendants demonstrated favoritism toward two attorneys. *Kennick v. Comm'n on Judicial Performance*, 787 P.2d 591, 607 (Cal. 1990).

Probate judge showed favoritism in granting appointments in hundreds of probate matters to three attorneys connected with a corporation in which the judge had an interest. *In re Ford*, 535 N.E.2d 225, 226-28 (Mass. 1989).

A Texas judge was censured for appointing his son-in-law as master in numerous cases and awarding excessive fees. *Inquiry concerning Davila* (Texas Comm. 1981).

**4-800. Related topics**

ADMINISTRATIVE DUTIES

DEMEANOR AND IMPARTIALITY

## **EX PARTE COMMUNICATIONS**

### **5-100. Introduction**

In our adversarial justice system, disputes are resolved based on the law and the facts as properly brought before the court. The parties have the right to know all the facts that the judge or jury is considering and the right to be heard that includes the opportunity to dispute the facts and cross-examine the source of the facts. Ex parte communications in which a judge communicates about a case before the judge without all parties or their attorneys present undermine this essence of our justice system. They can affect a judge's impartiality as well as the appearance of impartiality.

Ex parte contacts can arise in various aspects of a judge's life. Judges in smaller communities have greater difficulty avoiding people interested in cases before them while the judges are conducting their day-to-day personal activities. Judges must be diligent in addressing the dilemma of avoiding ex parte communications.

This section discusses the nature of ex parte communications, the manner in which they arise, and the ethical issues arising from improper ex parte communications.

### **5-200. Checklist**

#### **Identification**

You engage in conversation with a party, witness, attorney or other person interested in the subject matter of a case pending in your court.

- All parties are not present and absent parties did not receive notice.
- The subject of the conversation relates, either directly or indirectly, to the subject matter of the case.
- You are not authorized by law to make the communication.

You engage in a conversation with any other person about the subject matter of a case pending in your court and that person is not another judge or member of your court staff.

- All parties are not present and absent parties did not receive notice.
- The subject of the conversation relates, either directly or indirectly, to the subject matter of a pending case.
- You are not authorized by law to make the communication.

Another judge contacts you to influence the disposition of a case pending in your court.

You personally, or through a representative, conduct an investigation outside of court to obtain factual information relevant to a pending case.

You engage in conversation with a person about a specific legal problem the person or someone else is having.

- The problem could become a case in your court.

### **Intervention**

"I'm sorry, but we have to wait until both sides are in court."

"I'm sorry, but I'm not allowed to discuss the case with you."

"I'm sorry, but if I talk to you, I will have to notify all parties about this conversation, and I may have to take myself off the case."

### **Prevention**

Avoid all out-of-court conversations with people involved in cases before you.

If a conversation occurs, be alert if it veers toward the subject of the pending case.

Do not engage in ex parte communications even if you think the conversation will aid disposition of the case, help a reluctant witness, or improve your knowledge about the subject matter.

Be careful about discussing potential cases with attorneys and members of the public.

If the matter comes before you later, you may have to disqualify yourself.

Institute procedures in your court to minimize the opportunity for ex parte communications:

- Avoid answering the telephone at your office.
- Don't accept calls at home relating to your judicial duties.
- Have court staff "run interference" between you and the public.
- Train court staff about the effect of ex parte communications
- Avoid opening your own mail.
- Notify all parties when correcting technical errors in orders
- Discourage social visits in chambers
- Avoid private social activities that will bring you into close contact with parties, witnesses, or attorneys involved in pending cases.

If recusal is necessary, do so promptly.

### **Ex Parte Communications**

#### **5-200. Applicable Law**

NMRA 21-102, 21-209(A) and 21-206.

#### **5-300. Introduction**

"Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts." *Rose v. Florida*, 601 So. 2d 1181 (Fla. 1992).

A judge's dilemma is remaining fair and unbiased while administering the court and living in the community. While it is understandable that judges, particularly those in smaller communities, will be approached by persons interested in a case before the judge, the judge must scrupulously avoid such communications.

**5-400. General rule**

A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter. . . NMRA 21-209(A)

This rule is subject to certain exceptions described below.

"Ex parte" means "one-sided." An ex parte communication is any communication:

- 1) involving fewer than all the parties who have a legal interest in the case; and
- 2) is either oral or written; and
- 3) is about a pending or impending case; and
- 4) is made to or by the judge presiding over the case.

The principles of fairness, impartiality, and the importance of maintaining public confidence in the judiciary underlie the prohibition against ex parte communications. Therefore, ex parte communications have subjected judges to discipline under both the specific rule, NMRA 21- 209(A), 21-206, ensuring the right to be heard, and the general requirements of compliance with the law, NMRA 21-101 and of avoiding the appearance of impropriety, NMRA 21-102.

**5-600. Scope of Rule**

**5-610. Persons.**

“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 by . . . [the] rule.” NMRA 21-209, Cmt. 3. An ex parte communication may be initiated by either the judge or another person. Incidental contact between a judge and a party or attorney does not violate the rule as long as a case is not discussed.

A communication with a single party by definition is not ex parte if there is only one party to the case. Therefore, a probate judge in an informal, and therefore uncontested, proceeding is not precluded from discussing procedural requirements with the petitioner.

**5-620. Subject matter.**

Ex parte communications can occur regarding both pending and impending proceedings, until all appeals are completed or the time for filing an appeal has expired. Under NMRA 21-210(A), a judge may not make a “public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court,” or a “nonpublic statement that might substantially interfere with a fair trial or hearing.” A general discussion of law unrelated to a case pending before the judge is not prohibited; however, a communication concerning a pending or impending matter can violate the prohibition even if it does not address the ultimate merits of the case.

**5-630. Negative repercussions of ex parte communications.**

An ex parte communication can result in bias because the absent party does not have an opportunity to respond or to cross examine concerning the content of the communication. See NMRA 21-206(A) (“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 may be influenced by the communication without realizing it.
- The judge may receive inaccurate information as a result of the communication.

Even if the communication does not result in bias or misinformation, its occurrence erodes the judge's reputation for impartiality and creates an appearance of impropriety.

The judge who engages in ex parte communications may be seen in the community as being open to improper influence, affecting the judge's credibility.

Even the appearance of an ex parte communication can make a litigant feel cheated.

A judge can be disqualified from a case because of an ex parte communication, which disrupts the judicial process and encourages forum shopping.

- The judge can be disciplined for the communication.
- Practical remedies are few.

#### **5-640. Ex parte communications can violate due process**

Procedural due process requires that a judge be free of bias or prejudice and the appearance of bias or prejudice.

A magistrate judge violated the due process rights of defendants when the judge, after receiving an ex parte email communication from a police officer, granted continuance in several cases without identifying the cases by name or case number and without providing the defendants notice or an opportunity to be heard. *Matter of Hon. Warren C. Walton*, S. Ct. No. 36,763; JSC 19-3F.

A judge was cautioned that conducting a hearing when a litigant's attorney did not attend because of lack of notice denied the litigant due process. JSC 16-61.

#### **5-700. Social Media**

A judge's social media activity is subject to the same ethical restraints of the Code as any other activity. Because of its interactive nature, social media can enable unintended ex parte communications. If the judge's webpage or sites the judge accesses include information about pending or impending cases, the judge can receive ex parte information. Social Media AO, 9. Judges should therefore use caution in their social media involvement, including using security devices to avoid improper communications. *Id.*

As with any ex parte communication, if a judge receives an inadvertent ex parte communication on social media, the judge must disclose the communication and provide the opportunity to respond. NMRA 21-209(B).

#### **5-800. Permitted Ex Parte Communications**

Not all ex parte communications are prohibited. NMRA 21-209(A)(1) through (5) lists allowable communications.

#### **5-810. Communications authorized by law.**

Communications authorized by law or rule, such as issuance of temporary restraining orders, protective orders, and search warrants are permitted. NMRA 21-209(A)(5). Entry of a default judgment (or certain

other actions taken in court in the absence of a party) is not ex parte if the absent party has received prior notice of the proceeding.

**5-820. Communications with judges and court personnel.**

The rule against ex parte communications 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. NMRA 21-209(A)(3). Lawyers in a proceeding before the judge are not "court personnel," even if the lawyer is assigned to a judge's courtroom regularly.

**5-821. Scope of exception.**

This is a narrow exception. A judge may ask another judge for clarification of a point of law, but cannot delegate the judicial responsibility to decide the case. The judge must avoid receiving from other judges or court personnel facts or information that are not part of the evidence or record in a case.

**5-822. Cases pending on appeal.**

The exception for consultation with other judges does not permit communications with judges having appellate jurisdiction over a pending or impending case.

A trial judge violated the Code by sending inappropriate letters to the attorney general and a supreme court justice in connection with a murder case he had tried. After his decision was reversed by the state supreme court, the judge wrote to the attorney general asking him to petition for rehearing. He then wrote to a dissenting justice to express approval of the justice's minority position, stating he hoped the court would give serious consideration to the petition. *Harrington v. Indiana*, 584 N.E.2d 558, 560-61 (Ind. 1992).

**5-823. Influencing other judges' decisions.**

Under no circumstances does a judge have authority to contact another judge in order to influence the disposition of a case pending before that judge. Such ex parte contacts have led to discipline.

In *In re Naranjo*, 2013-NMSC-026, ¶ 4, a magistrate judge called the district judge presiding over the magistrate's stepson's child-support enforcement case, saying that his stepson was not a flight risk and asking the bond be reduced or the stepson be released from jail.

In *In re Garza*, 2007-NMSC-026, ¶ 4, the judge spoke with a colleague about a friend's case and asked for concessions concerning the bond.

In *In re Ramirez*, 2006-NMSC-021, ¶¶ 6-7, 9, the judge asked his bailiff to assist the judge's son and friends in responding to the citations, called a municipal judge, and appeared at a hearing in the cases.

A municipal judge was sanctioned for calling a magistrate judge to ask for special treatment for a defendant before the magistrate. *Matter of Hon. David Ramos, Sr.*, JSC 16-2F

A judge was cautioned for allegedly providing information to another judge concerning the substance of an issue in a case before the other judge. The judge was further cautioned about

engaging in ex parte conversations concerning cases over which the judge has appellate jurisdiction. JSC 14-9I.

## **5-824. Court personnel.**

### **5-824a. Court staff.**

A judge is responsible to ensure that court staff do not engage in improper ex parte communications.

A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this rule is not violated by court staff, court officials, and others subject to the judge's direction and control. NMRA 21-209(D).

### **5-824b. Probation officers.**

Probation officers act as "court personnel" in preparing presentence reports. Ministerial, factual inquiries about a probationer's status usually are not improper.

A judge's ex parte contact with a probation officer about an error in sentencing was not improper because the error in question was technical and the communication did not include information absent from the presentence report. *People v. Smith*, 378 N.W.2d 384, 394 (Mich. 1985).

However, a communication with a probation officer could be improper if the judge receives substantive information that the defendant does not know has been conveyed to the judge. Under these circumstances, the judge should give the defendant the opportunity to respond.

A federal judge did not have to resentence the defendant because the judge conveyed to the defendant the facts received from the probation officer. Resentencing would have been required if the judge had relied on the additional facts and had not disclosed them. *U.S. v. Gonzales*, 765 F.2d 1393, 1397 (9th Cir. 1985).

“Ex parte communication between the probation officer and the court is usually permissible where the court is merely seeking advice or analysis. To some extent, the probation office is an extension of the district court, and the probation officer and the court may consult privately about certain issues incident to criminal sentencing. . . . But where the probation officer discloses new facts that bear on the judge's sentencing, the general rule requires disclosure to the defense in advance of the sentencing hearing and an opportunity to subject the new material to whatever adversarial testing may be appropriate, . . .” *U.S. v. Marrero-Perez*, 914 F. 3d 20 (1<sup>st</sup> Cir. 2019) (citations and internal quotation marks omitted).

After motion to revoke probation, judge engaged in improper ex parte communication with asked probation officer, asking the probation officer to contact the victim's family to ascertain their position on the motion and to locate the victim. *In re Best*, 195 So. 3d 460 (La. 2016).

### **5-824c. Improper contacts.**

Parties, especially self-represented litigants, frequently try to reach the judge through court staff. Court personnel should be instructed not to relay inappropriate information to the judge. Proper training of staff is part of a judge's administrative responsibilities. *See* ADMINISTRATIVE DUTIES.

It was improper for a judge to take into consideration material that had been presented to him by a prosecutor through the judge's courtroom clerk, without making it available to the defendant. *California Comm'n Annual Report, 1991.*

**5-824d. Therapeutic, problem-solving, mental health, and drug courts**

A judge may initiate, permit, or consider ex parte communications expressly authorized by law, rule, or Supreme Court order, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others. NMRA 21-209, Cmt. 4

**5-824e. Mediators.**

A judge may not discuss substantive issues concerning a case with a mediator to whom the judge has referred a case. AO 21-03.

**5-830. Communications with legal experts.**

The Code permits communications with experts on the law, under limited circumstances.

A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received. NMRA 21-209(A)(2).

A “disinterested” expert is someone who does not have any connection with a party or participant in a case. Note that the expert opinion allowed by this rule must concern a legal issue, and the parties must have an opportunity to respond. Inviting a disinterested expert to submit an amicus curiae brief may be appropriate for a court to obtain advice on a legal issue. NMRA 21-209, Cmt. 3.

Separate rules apply to the qualification of expert witnesses on factual issues.

A special rule applies to probate judges, allowing them to obtain the written or verbal advice of a disinterested expert with regard to a legal issue without providing notice to the parties. NMRA 21-209(A)(2).

**5-840. Scheduling and administrative matters.**

Ex parte communications are allowable if circumstances require for scheduling, administrative matters, or emergencies, under several strict conditions. NMRA 21-209(A)(1).

These conditions include that (1) the communications must not deal with substantive matters or issues on the merits; (2) the judge must reasonably believe that no party will gain a procedural, substantive, or tactical advantage by the communication; and (3) if such an advantage might reasonably be perceived, the judge must provide for prompt notice of the substance of the communication to all other parties and the opportunity to respond.

Even if all of these criteria are met, however, ex parte communications are still generally discouraged.

Judge sanctioned for, among other issues, communicating with attorneys and their staff and failing to notify other parties of the substance of the communications and providing an opportunity to respond. *Matter of Warren G. Walton*, S. Ct. No. 36,763; JSC 19-3F.

A judge was cautioned for allegedly communicating with an assistant district attorney regarding scheduling and failing to promptly notify defense counsel. JSC 18-5I.

A Kentucky judge who received an ex parte letter from an attorney for parties requesting a short continuance issued an order notifying all the parties that he had received the letter and rescheduling the hearing to a specified, later date. The court of appeals determined that no party gained any procedural or tactical advantage and considered the ex parte communication to be subject to the narrow scheduling exception. *Hartlage v. Hartlage*, 601 S.W.3d 495 (Ky. Ct. App. 2020).

**5-850. Settlement discussions.**

A judge may confer with the parties and their attorneys to try to settle matters pending before the judge, if the parties consent. NMRA 21-209(A)(4). Mediation or settlement discussions may involve the judge conferring separately with parties and their attorneys if the parties consent.

**5-900. Good Faith or Non-Lawyer Status Not a Defense**

The importance of maintaining the impartiality of the courts outweighs the judge's ignorance or good faith in making an ex parte communication. Good faith is not a defense to a charge of violating the rule against ex parte communications. The fact that a judge is not a lawyer is not a defense.

A judge's ex parte communications with parties or lawyers in child custody cases violated the Code, despite strong evidence of the judge's overwhelming concern for children's welfare, which motivated the communications. *In re Sturgis*, 529 So. 2d 281, 283 (Fla. 1988).

A municipal judge who issued a temporary restraining order in an effort to “keep the peace” between parties in a small community was reprimanded because he did not have jurisdiction to enter the order. *In re Rael*, Supreme Court Docket No. 33,633, October 3, 2012, ¶ 7; JSC 16-1F.

Several judges received letters of caution advising them about ex parte communications and in particular those meetings or conversations that might give the suggestion of being ex parte. Judges should avoid the very appearance of wrongdoing even when the judge might be acting in good faith to further the cause of justice. JSC 89-2I.

**5-1000. Typical Circumstances**

Some ex parte communications are blatantly improper, and many occur out of ignorance. Many members of the public simply do not understand that a judge cannot discuss any aspect of a pending case outside of court. This problem is compounded when the judge is a friend or neighbor. Particularly in small communities, judges will see parties who are tempted to talk with the judge about their or their relatives' cases. The judge must end the communication as soon as the judge understands that it is improper, even if it appears to be discourteous.

Ex parte communications can occur in any situation in which the judge interacts with persons interested in the outcome of a case, including but by no means limited to the following.

**5-1010. Communications with attorneys.**

The daily interactions between judges and attorneys create the ideal setting for ex parte communications, or at least for their appearance. These communications can range from outright discussion of the merits of a case to granting a request for a continuance without notice to the other party.

**5-1011. Preparing orders.**

The language of orders and decrees should be discussed with all attorneys present or communicated in writing by the judge to all attorneys at the same time.

The defendant in a murder case filed a motion for post-conviction relief, and the trial judge adopted the state's proposed order denying the motion without giving a hearing to defense counsel. The Florida Supreme Court noted that the practice of asking only one party to prepare an order without involving the other side is timesaving, but "is fraught with danger and gives the appearance of impropriety." *Rose v. Florida*, 601 So. 2d 1181, 1183 (Fla. 1992)

It is preferable to correct a drafting error in an order pointed out by one side only after giving the other side appropriate notice of the proposed change. *Judicial Conduct Comm'n v. Wilson*, 461 N.W. 2d 105, 109 (N.D. 1990).

One party can prepare an order if the other side has an opportunity to object to the form of the order. It is common practice for a judge to instruct the prevailing party in open court to prepare an order reflecting the judge's ruling and to circulate it to the other party or parties for assent or objection. The judge may then enter the order if there is no objection or after resolving any objection.

When the son of a member of a municipal judge's church and an acquaintance of the judge were involved in a dispute, the judge was disciplined for requesting the acquaintance's attorney without notice to prepare an order, which the judge signed in the courthouse lobby. *In the Matter of Salazar*, 2013-NMSC-007, ¶¶ 3-4.

**5-1012. Special favor.**

Judges should discourage practices that appear to favor lawyers over litigants, or certain lawyers over others.

A California municipal judge had a practice of visiting socially in chambers with particular attorneys on days they appeared before him in court. It was not established that pending cases were discussed on those occasions, but the practice created at the least an appearance of impropriety. *Kennick v. Comm'n on Judicial Performance*, 787 P.2d 591, 609 (Cal. 1990).

A magistrate judge was censured and placed on supervised probation for actions that included ex parte contacts and contacting staff of two attorneys and giving his personal cell number with instructions that the attorneys could call the judge if they needed anything. *Matter of Hon. Warren G. Walton*, S. Ct. No. 36,763; JSC 19-3F.

A judge was cautioned after calling a party into chambers after a hearing, creating an appearance of impropriety. JSC 17-4I.

**5-1013. Improper communications with prosecutors.**

Under no circumstances may a judge ask a prosecutor to dismiss a case.

A magistrate conducted a release hearing without the defendant’s attorney being present. Later that day, the magistrate had an ex parte conversation with the prosecutor concerning the defendant’s criminal history and conducted a second hearing, again without the defendant’s attorney, questioning the defendant and changing his conditions of release. The judge resigned from office for this and other charges. *Matter of Hon. Olivia N. Garcia*, JSC 12-9F.

A Michigan judge was censured in part for providing pertinent case law in an email to a prosecutor. *In re Filip*, 923 N.W. 2d 282 (Mich. 2010).

A Texas judge conducted a hearing on a defendant’s motion to withdraw a plea and for a new trial based on the lack of jurisdiction. During a recess, the judge called another attorney from the district attorney’s office into the courtroom and discussed his belief that the court lacked jurisdiction. The defense was not present. After the recess, the judge stated that he had spoken with someone in the district attorney’s office who agreed with the judge that the court lacked jurisdiction. The judge was publicly admonished. *Public Admonition, Honorable Mark Luitjen*, Texas Commission on Judicial Conduct, December 4, 2020.

**5-1020. Communications with parties.**

**5-1021. Potential for abuse.**

Ex parte communication with a party or relative of party litigant greatly increases the likelihood of bias and opportunities for improper disposition of cases.

A magistrate judge was censured after releasing a defendant from jail after ex parte telephone calls from the defendant’s father. *In the Matter of Hon. George Anaya, Jr.*, S.Ct. No. 38,714; JSC 22-5F.

A magistrate judge was disciplined for engaging in ex parte communications with a defendant and the defendant’s mother and failing to disclose the substance of the conversations to the defendant’s attorney and the prosecutor, affording an opportunity to respond. *Matter of Hon. Warren G. Walton*, S.Ct No.36,763; JSC 19-3F

A district judge was reprimanded in part for engaging in ex parte communications with a party’s attorney concerning the judge’s intent to revoke his previous recusal and resume control of the case for sentencing. *In re McBee*, 2006-NMSC-024.

A municipal judge who communicated privately with police, through conversations and a system of drawings on citations, about the demeanor and behavior of traffic defendants appearing before the judge, was reprimanded and assigned a mentor district judge. *In re Arnold*, S. Ct. No. 26,645; JSC 01-4F.

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including dismissing DWI and other cases of friends and relatives, without notice to the prosecutor, based upon ex parte communications, and even though some of the cases had been assigned to other judges. *In re Angie Vigil-Perez*, JSC 00-3.

An inexperienced lay judge was disciplined for finding defendants not guilty without a trial or hearing. The fact that the judge's predecessor had established the improper practices did not excuse the misconduct, and the judge's inexperience and generally good intentions were not mitigating factors. *In re Seal*, 585 So.2d 741, 745-46 (Miss. 1991)

A magistrate was disciplined for modifying a judgment based on an ex parte conference with the defendant. *In the Matter of Hon. Frank Emerson*, JSC 84-1F.

**5-1021a. Ex Parte communication using social media.**

A North Carolina judge was reprimanded for friending and communicating about case proceedings with an attorney representing a party in a custody case before the judge, *Public Reprimand of Terry*, North Carolina Judicial Standards Commission (April 1, 2009).

A West Virginia judge was admonished for Facebook posts and improper communications with a woman appearing before him. *In the Matter of Fowler*, West Virginia Judicial Investigation Commission (March 14, 2014).

A Georgia judge was suspended for violations including communicating in a private Facebook chat with a woman who contacted the judge about her brother who was a defendant in a DUI case that later came before the judge. *In re Bass*, Georgia Judicial Qualifications Commission (March 18, 2013).

A judge was cautioned for allegedly posting ex parte comments on a social media site about a pending case that included comments concerning the jury's verdict. JSC 13-6I.

**5-1021b. Friending.**

A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge. NMRA 21-204(C).

Social media sites enable users to share and interconnect their posted information with other users and communicate in ways different from traditional communications. The sites also use terms to describe communications that do not share their meaning with common usage. For instance, on Facebook, a user may “friend” other users to connect posted information and may “like” postings of other users to indicate approval or support of the posting.

States have adopted differing views on whether judges may be Facebook “friends” with attorneys who may appear before the judge. Some states have adopted the strict view that judges and attorneys who may appear before them cannot be Facebook “friends” in order to avoid the public impression that there is any unfairness in the system. Social Media AO, para 18. The Advisory Committee on the Code of Judicial Conduct adopted the approach taken in other states that the meaning of “friend” on social media sites

differs from the traditional meaning and that “even judge’s professional and social friends may not be in a position to influence a judge.” Social Media AO, ¶¶ 20-21.

In making the decision whether to be Facebook “friends” with an attorney who may appear before the judge, the judge should consider all the circumstances, including: (1) the nature of the social networking site; (2) the number of friends on the page; (3) the judge’s practice in determining whom to include; and (4) how regularly the attorney appears before the judge.” Social Media AO, ¶¶ 20-21 (quoting CA Judges Assoc. Jud. Ethics Comm. Op. 66, at 8).

LinkedIn is a professional networking social media site that permits professionals to connect and recommend or endorse others. The Advisory Committee of the Code of Judicial Conduct has taken the position that while judges can connect with lawyers using LinkedIn, a judge should not recommend or endorse lawyers who appear before the judge. Moreover, the Advisory Committee encouraged judges to exercise caution in using all social media sites including LinkedIn and noted that merely because the site is considered “professional,” does not indicate that it is “permissible or advisable,” Social Media AO, ¶¶ 22-23.

#### **5-1022. Impending proceedings.**

Prohibited ex parte communications pertain to "impending" as well as "pending" proceedings. This prevents litigants from judge-shopping before filing a case in order to predetermine how a judge might rule.

A trial judge participated in a meeting of the community child protection team to consider facts presented by the department of public welfare supporting a petition in a child-in-need-of-services matter. This was a classic example of prohibited ex parte communication: a prospective litigant discussing possible evidence in the presence of a judge who would hear the case, and without the other party present. *Stivers v. Knox County Dep't of Pub. Welfare*, 482 N.E.2d 748, 751 (Ind. App. 1985)

A magistrate received a letter of caution for meeting with a lawyer of a potential litigant in chambers and discussing a problem that he had reason to believe could become the subject of a future case before him. JSC 91-5I.

SEE SPEAKING, WRITING, AND TEACHING

#### **5-1023. Discussions about legal representation.**

It is improper for a judge to discuss the quality of a party's legal representation.

Although not requiring disqualification, a juvenile court judge’s attempt to discuss the legal representation of a mother in a dependency proceeding with her without her counsel present and subsequent discussion in chambers with her and her counsel were improper. *S.S. v. Wakefield*, 764 P.2d 70, 72 (Colo. 1988).

A judge should not discuss with a party the party's desire to discharge an attorney and seek new counsel. Any discussion of this issue should be in court, with all parties present. *Maneikis v. State*, 411 N.E.2d 669 (Ind. App. 1980).

A magistrate judge was censured for, among other actions, informing the defendant's mother that her son's case was not being properly handled. *Hon. Warren G. Walton*, S. Ct. No. 36,373; JSC 19-3F.

A judge was cautioned for allegedly having a conversation with a litigant about the litigant's attorney in the absence of the attorney and in the presence of other attorneys. JSC 16-3I.

**5-1030. Communications with others.**

**5-1031. Jurors.**

Ex parte communications with jurors about the substance of a case at any stage of the proceedings is an ethical violation. Although it is not an ethical violation to discuss a case once it is completely concluded, including any appeal, the judge should make sure that any comments the judge makes do not reflect adversely on the judge's impartiality.

**5-1032. Witnesses.**

It is improper for a judge to meet with nervous or reluctant witnesses to encourage them to testify.

A magistrate judge was removed from office for Code violations that included an ex parte conversation with a complaining witness in a domestic violence case in which the judge advised the witness that, although subpoenaed, she did not need to testify against her husband, resulting in the witness failing to appear for trial. *In re Rodella*, 2008-NMSC-050, ¶¶12, 41.

**5-1033. Law enforcement personnel.**

**5-1033a. As experts.**

Judges, especially in courts of limited jurisdiction, have frequent contact with law enforcement officers. These officers often try their own cases and are well versed in the law of certain types of cases. Judges must resist the temptation to treat police officers as outside consultants. Under no circumstances may a judge discuss a case with an officer who is prosecuting or serving as a witness in the case.

An Arizona judge was censured for obtaining advice from police officers. The judge telephoned the officers from the courtroom. *In re Anderson*, 814 P.2d 773 (1991).

**5-1033b. To influence outcome.**

A judge may not respond to an officer's attempt to obtain a conviction for reasons other than the evidence presented in court. Conversely, the judge may not intercede to get charges dropped or initiate prosecution of charges.

A Maine judge got an officer to file charges against a young man for squealing tires and caused the complaint to be rescheduled so he could discourage such conduct. *In re Ross*, 428 A.2d 858, 864 (Me. 1981).

A municipal judge resigned from office after numerous Code violations including informing a defendant that the judge would speak with the arresting officer to have a citation dismissed. *Matter of Hon. Roland Madrid*, S.Ct No. 34,189; JSC 13-13F

A municipal judge who communicated privately with police, through conversations and a system of drawings on citations, about the demeanor and behavior of traffic defendants appearing before the judge, was reprimanded and assigned a mentor district judge. *In re Arnold*, S. Ct. No. 26,645; JSC 01-F4.

**5-1033c. Due Process Rights.**

A magistrate judge was censured for, among other actions, violating defendants’ due process rights by granting continuances for hearings in a number of unidentified cases after receiving an email from a state police officer without providing the defendants notice or an opportunity to respond. *Matter of Hon. Warren G. Walton*, S.Ct No. 36,763; JSC 19-3F.

**5-1040. Independent investigation by judge.**

**5-1041. Prohibition.**

A judge may not act as an independent factfinder in a case. The judge’s decision must be based only on evidence presented by the parties in court. The judge may not interview outside witnesses or talk to outside experts, except as permitted under the circumstances in NMRA 21-209 (A) (3) for experts on the law, even in the honest belief that the information obtained will be helpful to the judge. A judge also is prohibited from conducting investigations to fill gaps in the court record.

A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed. NMRA 21-209(C).

A Mississippi judge, after hearing testimony from the parties, recessed and contacted (1) the former judge on the case who was disqualified after hearing the testimony of the parties and (2) a mechanic concerning the substance of the parties’ positions. The Mississippi Supreme Court suspended, reprimanded, and fined the judge for this improper investigation as well as other violations. *Commission on Judicial Performance v. Bozeman*, 302 So.3d 1217 (Mississippi 2020).

A municipal judge was disciplined for issuing a Temporary Restraining Order without jurisdiction based on his personal knowledge obtained outside of the complaint or court proceedings. *Matter of Michael G. Rael, Sr.*, S.Ct. No. 33,633; JSC 16-2F.

Independent investigations can result in serious bias, particularly in a bench trial. Consequently, a judge who gains information about disputed evidentiary facts from sources outside the courtroom can be disqualified under NMRA 21-211(A).

A judge should have recused himself after conducting an ex parte pre-sentencing inquiry into the defendant’s background. *State v. Emmanuel*, 768 P.2d 196, 197-98 (Ariz. 1989). The defendant had stolen money while employed by the county court. The judge imposed a prison term, although the probation officer had recommended probation. Before sentencing, the judge had personally contacted former employers to obtain information not included in the presentence report.

Before ordering restitution, a judge contacted two friends in the jewelry business to confirm the defendant's statements that his income as a jewelry salesman was highly seasonal. These were improper ex parte communications even though no actual bias was shown. "Even where there is no actual bias, justice must satisfy the appearance of fairness." *State v. Romano*, 662 P.2d 406, 407 (Wash. Ct. App. 1983).

A judge cannot ask others to conduct the investigation for the judge. NMRA 21-209(D).

A judge's decision to send his law clerk to view a machine that was the subject of a breach of contract suit resulted in a motion for disqualification. The clerk's viewing of the machine without defense counsel present created a presumption of prejudice in favor of the party controlling the machine, because the defendant could not rebut any off-the-record information received at the viewing. ". . . [A] judge may not direct his law clerk to do that which is prohibited to the judge." *Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980).

An internet search concerning disputed facts is improper.

When addressing a property valuation issue at trial, a Tennessee judge researched property valuation methodology on the internet and questioned an expert witness using information gathered from the research. The Tennessee Board of Judicial Conduct publicly reprimanded the judge, stating that the prohibition against independently investigating factual issues applies "to information available in all mediums, including electronic" and that the judge's independent investigation was inconsistent with the judge's role as "impartial arbiter." *Judge Toby Gilley*, Tennessee Board of Judicial Conduct, January 4, 2024.

A North Carolina judge was reprimanded for ex parte actions that included obtaining information about a party in a custody case in a Google search. *Public Reprimand of Terry*, North Carolina Judicial Standards Commission (April 1, 2009).

#### **5-1042. Permitted investigation.**

##### **5-1042a. In-court questioning.**

A judge is allowed to question witnesses directly during a court proceeding to elicit or clarify testimony. The judge must ensure that the questioning is non-adversarial. *See* DEMEANOR AND IMPARTIALITY.

##### **5-1042b. Judicial notice.**

The Rules of Evidence permit a judge to take judicial notice in court of certain facts not in evidence that are either generally known in the community or easily verifiable. NMRA 21-209(C).

The court may judicially notice a fact that is not subject to reasonable dispute because it; (1) is generally known within the court's territorial jurisdiction; (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned; or (3) notice is provided for by statute. NMRA 11-201(B).

“A criminal record is the type of fact that may properly be judicially noticed.” A judge may research the judiciary’s case management system prior to an arraignment to determine a defendant’s criminal history. AO 14-01

**5-1100. Abuse and Prevention**

**5-1110. Misuse of authority.**

Ex parte communications initiated by judges may amount to misuse of judicial authority.

In *In re Griego*, 2008-NMSC-050, ¶ 1, the New Mexico Supreme Court determined that a metropolitan court judge “betrayed the public trust and undermined the judiciary’s integrity by bypassing evidentiary hearings and adjudicating tickets for family members and friends without state participation.”

A trial judge telephoned the president of a corporation involved in a pending case. The judge claimed he called to ensure that the president would be present at the next hearing, but the president interpreted the call as an attempt to get the company to change its position in the case. The court found that the motivation was irrelevant, because the mere fact that the call was made is a violation of the Code. These "routine types of ex parte communications can expose the court system in general, and the individual judge in particular, to precisely the types of charges” that the Judicial Conduct Code “is designed to prevent.” *In re Kaufman*, 416 S.E. 2d 480 (W. Va. 1992).

A metropolitan court judge was cautioned to avoid ex parte communications and to avoid assuming the role of law enforcement officer by calling the litigant and personally reiterating the judgment order. JSC 93-2I.

A California municipal judge engaged in willful misconduct by writing an unsolicited note to another judicial officer regarding attorney fees in a case from which the judge had been disqualified. *Gubler v. Comm’n on Judicial Performance*, 688 P.2d 551, 566 (Cal. 1984).

**5-1120. Avoiding the risk.**

Judges should avoid situations that can increase the risk of ex parte communication.

A magistrate received a letter of caution instructing him to avoid the appearance of impropriety by refraining from being present during supervision of persons convicted by the judge outside the judicial complex, in order to prevent any ex parte communications between the judge and defendants in attendance whose cases may not have been adjudicated. JSC 93-7I.

**5-1130. Remedies.**

If an ex parte communication occurs, and the judge is biased as a result, the judge should recuse from the case. *See* DISQUALIFICATION.

The judge may be able to avoid stepping down, however, by promptly disclosing the communication to the parties and providing the opportunity for a hearing at which the previously absent party can respond. If the judge is satisfied that any prejudice has been corrected, the judge may continue to hear the case.

If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond. NMRA 21-209(B).

During a criminal trial, a co-defendant sent two letters to the trial judge that strongly implied that the defendants were involved in the crimes charged and made negative comments about the other defendant. After consulting with other judges about what to do, the judge immediately informed all counsel about the letters, furnished copies, and asked for the defendant to stop sending letters. These actions were proper, and the trial record did not reveal any prejudice on the judge's part resulting from reading the letters. *State v. Perkins*, 686 P.2d 1248, 1255-56 (Ariz. 1984), *overruled on other grounds*, *State v. Noble*, 152 Ariz. 284, 731 P.2d 1228 (1987).

In disciplining a magistrate who, after receiving two ex parte telephone calls from a defendant's father, set conditions of release that were contrary to court protocols, the Supreme Court stated that the judge had the responsibility "to not allow or engage" in the communications and "should interrupt to advise the person that such communications are prohibited and redirect the person to pursue their matter through proper channels, such as through the filing of motions." The "judge must also promptly notify parties of the communication." The Court stated that "[b]y adhering to this requirement, the judge may effectively avoid any appearances of impropriety, as well as actual instances of impropriety." *In the Matter of Hon. George Anaya, Jr.*, S. Ct. No. 38,714, ¶ 7; JSC 22-5F.

A court that became aware that its former child support hearing officer had engaged in substantive ex parte communications with a child support enforcement officer on several cases was advised to assign the cases to a judge who had not previously presided; to provide notice to the parties with the opportunity to request a hearing on the issues that were subject to the ex parte communications, with a form to make the request and a reasonable time to respond; and if the judge wishes, to assign hearings to a hearing officer who had not worked on the case. AO 21-02

### **5-1200. Related Topics**

DISQUALIFICATION

DEMEANOR AND IMPARTIALITY

## DISQUALIFICATION

### 6-100. Checklist

#### Investigate early and recuse yourself early

##### When a case is assigned to you, consider:

- Do you have a financial interest in the outcome of the case?
- Does anyone in your family have a financial interest in the outcome?
- Are you related to a party in the case?
- Are you related to any of the lawyers involved?
- Do you have personal knowledge about relevant facts?
- Could you possibly be a witness in the case?
- Have you ever served as a lawyer in connection with the subject matter?
- Do you have strong personal feelings, either positive or negative, about the subject matter that could affect your ability to be impartial?
- Do you have strong personal feelings, either positive or negative, about any party or attorney that could affect your ability to be impartial?
- Is your spouse, child or parent an attorney in a firm or agency involved in a case? If so, have they:
  - entered an appearance in the case;
  - inspected the file in the case; or
  - discussed the case with anyone in the firm?

### Disqualification

#### 6-200. Applicable Law

N.M. Const. article VI, §18

NMSA 1978 §§34-7-9, 35-3-7, 35-3-8, 38-3-9 and 38-3-10.

NMRA 21-211, 1-071.5, 1-088.1, 2-106, 3-106, 6-106, 7-106 and 8-106.

### Subchapter I. Overview of disqualification

#### 6-300. Introduction

A judge cannot, and should not, operate in a social vacuum, but a judge's relationships and interests--family, personal and professional--can affect the judge's impartiality, actual or apparent. A biased judge deprives the parties of the fundamental right to an impartial tribunal. Even if the judge is not actually biased, the *appearance* of impropriety undermines the credibility of the judicial process.

In New Mexico a constitutional provision, as well as the Code, statutes and court rules, address the question of when a judge should not preside over a case because of the risk to the parties' rights to an impartial tribunal. An impartial tribunal is essential to the fair administration of justice. *Beall v. Reidy*, 1969-NMSC-092. Disqualification is mandatory in some instances, as when a member of the judge's family is a party to a case. In other instances, the disqualifying condition is less clear and the judge will have to exercise discretion, such as when the judge's personal friendship with an attorney could affect the judge's rulings.

The issue of disqualification is often challenging for the rural judge. Coming from relatively small communities, the rural judge likely knows many of the litigants and most of the lawyers that come before the court, and may be related to them. In such circumstances it may be difficult to arrange for a substitute judge to hear cases, and frequent disqualifications seriously disrupt the court's calendar and the schedules of substitute judges. Nevertheless, each judge must be concerned about the appearance of impropriety, recuse when required, make appropriate disclosure of potential conflicts to the parties, and in every case consider whether the circumstances pose any threat to the judge's impartiality, both actual and apparent.

**6-400. Policies: impartiality and the "duty to sit"**

The rules requiring judges to step down from cases derive from the New Mexico Constitution, state statutes, and judicial rules and decisions. This chapter will survey those rules, considering what situations require or authorize judges' disqualifications; what procedures are required for judges to remove themselves or be removed from cases; what restrictions those disqualifications impose upon the judges; and when disqualifications can be waived.

A judge also has an affirmative "duty to sit"--to hear a case if at all possible. "A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 21-211 NMRA, the constitution, or other law." NMRA 21- 207. This duty coexists with the parties' right to an unbiased judge. The modern disqualification rules curtail the "duty to sit" in cases in which a judge's impartiality might reasonably be questioned. "While a judge still may have a duty to sit in cases where he or she is not disqualified, there is an equally strong duty not to sit in cases where he or she is disqualified." *Geyh, supra*, §4.03.

**6-500. General rule**

A judge is disqualified and shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. NMRA 21-211 (A).

The committee commentary notes that this requirement applies regardless of whether any of the specific circumstances requiring disqualification under the rule are present. Cmt. [1]. If the judge does not recuse and is not disqualified, then the judge's duty is to decide the case.

**6-510. Overview of grounds for disqualification of a judge.**

Generally speaking, several rules define circumstances that require a judge to step down from a case. To summarize broadly, these circumstances include a judge's:

- (1) bias or prejudice in the matter;
- (2) personal knowledge of disputed facts from sources other than the proceedings;
- (3) status as a party or attorney, or that of a relative;
- (4) interest in the outcome of the proceedings, either for the judge personally or for close family members;
- (5) prior participation in the case, as an attorney or lower court judge;
- (6) likelihood of becoming a material witness; or
- (7) having made public statements outside of judicial proceedings committing the judge to a predetermined outcome.

These various sources of disqualification will be described in more detail later in this chapter.

**6-600. Duty to disclose; waiver**

A judge should disclose to the parties any facts known to the judge that could lead a reasonable person to believe the judge cannot preside with impartiality, regardless of the judge's own judgment as to the judge's ability to be fair. "A judge who is or may be disqualified must disclose the interest or the relationship to the parties. It is not the duty of the parties to search out disqualifying facts about you; it is your obligation as the judge to disclose all facts that might be grounds for disqualification." *AJS, ETHICS TRAINING* at 24. *See also*, NMRA 21-211, Cmt. [2]: "A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed."

Disqualification based on bias or prejudice may not be waived. For other disqualifying circumstances, the judge may request that the parties consider, outside the presence of and without participation by the judge or court staff, whether they want to waive the disqualifying condition. NMRA 21-211 (C).

**Subchapter II. How Can a Judge be Disqualified from a Case?****6-700. Procedures**

Generally, a judge may be removed from a case:

- (1) by a party exercising a peremptory disqualification, where permitted by the rules;
- (2) by the judge's own action (recusal); or
- (3) by the filing of a motion by a party to disqualify the judge for cause.

In New Mexico, the term "disqualification" refers to the procedure by which a judge is removed from a case by a party. A party may also "excuse," meaning to disqualify, a judge. To say that a judge "disqualifies herself" usually means that the judge recuses.

Different responsibilities arise for the court when one or more parties request that the judge step aside from their case. The peremptory right to disqualify judges of all but municipal, water and appellate courts is exercised unilaterally by a party; in such cases, the judge has no discretion. When a party moves for disqualification, or the judge considers recusing based on the judge's own concerns, the judge must consider the ethical implications of the specific facts involved. The following sections will explore each of these situations.

**6-710. Peremptory disqualification by a party.**

The first way for a judge to be removed is by a party's use of their absolute right, called "peremptory disqualification," to disqualify a judge from hearing a case; the party may not use a peremptory disqualification on more than one judge in the same proceeding. Peremptory disqualification requires the filing of an affidavit by the party. This right to disqualify is in addition to other rights arising under Article VI, Section 18 of the Constitution of New Mexico and NMRA 21-211. Exercising these rights which require the party to file a motion.

District, metropolitan, magistrate, and probate judges are subject to peremptory disqualification; municipal, water and appellate judges and supreme court justices, however, are not. The party exercises the peremptory right by filing a notice. *See* §35-3-7, NMRA 2-106 and 6-106 (authorizing peremptory disqualification of magistrates); NMRA 3-106 and 7-106 (relating to disqualification of Metropolitan court judges); §34-7-9 (disqualification of probate judges); and §38-3-9 and NMRA 1- 088.1 (peremptory challenge of district judges).

Several rules prohibit peremptory disqualification of judges: NMRA 8-106 (no right to disqualify municipal judges) and NMRA 1--071.5 (no right to peremptorily disqualify water judges). But while *peremptory* challenges are not authorized against judges of these two types of courts, such judges may still be disqualified for cause upon motion by a party, as described in this chapter. Parties wishing to disqualify appellate judges or justices may file motions under NMRA 21-211; *see* NMRA 21-004 (A).

Ethical violations that can arise after a peremptory disqualification are either: that a judge resists disqualification and/or continues to act in the case despite it; or that a judge allegedly attempts to retaliate against the disqualifying party in a subsequent proceeding.

A California judge angrily criticized public defenders for filing affidavits of disqualification, saying he would not put up with it and would take his case to the people. *McCartney v. Comm'n on Judicial Performance*, 526 P.2d 268, 280-81 (Cal. 1974).

#### **6-720. Recusal by the judge.**

Recusal is the second process by which a judge may be removed, in this case by stepping down voluntarily from hearing a case.

#### **6-721. Basis for recusal.**

"No district judge shall sit in any action in which impartiality might reasonably be questioned under the constitution or the Code of Judicial Conduct, and shall recuse himself in any such action." NMRA 1-088.1 (G).

New Mexico follows the standard enunciated in *State v. Logan*, 689 P.2d 778, 784 (Kan. 1984):

The standard which federal courts use is whether [the] facts. . . would create reasonable doubt concerning the judge's impartiality, *not* in the mind of the judge himself. . . but rather in the mind of a reasonable person with knowledge of the circumstances. AO 88-5.

A judge who knows that at least one of the parties is a relative as close or closer to the judge than a first cousin, either by blood or through marriage, must step down from the case and take no further action; N.M. Const., Article VI, § 18. That section, however, makes an exception when all parties consent to the judge continuing on the matter. In addition to the first cousin, this constitutional prohibition would include a party who is "closer than a first cousin." This would include: the judge's spouse, or a sibling, parent, grandparent, great-grandparent, child, grandchild, or great-grandchild, uncle, aunt, niece or nephew, either of the judge or the judge's spouse or domestic partner. This constitutional provision also requires that the judge recuse when other disqualifying factors are present, including the judge's: service as an attorney in the same case; service as a judge in the same case in a lower court; or having a financial or other personal interest in the outcome of the case. While not specifically listed in the state constitution, the judge must also consider recusal because of personal knowledge of facts in the case; or bias as to the case. *See* section 6-900 of this handbook.

#### **6-722. Decision and procedure to recuse.**

When disqualification or recusal is not mandated by the statute or by the constitution, the decision is discretionary with the judge. *Martinez v. Carmona*, 1980-NMCA-139, ¶21. A judge recuses by filing a

statement to that effect in the court file, and directing the clerk to notify the parties. *See, e.g.,* NMRA 1-088.1 (G). The judge does not have to state a reason, but must not recuse without in fact having a compelling reason for the recusal. *Gerety v. Demers*, 1978-NMSC-097, ¶11. Because the judge must hear all assigned cases unless disqualified, an ethical issue arises if the judge uses recusal without a valid reason, such as in an attempt to avoid disagreeable or unpopular cases, or through reluctance to take on the extra workload.

### **6-723. Timing of recusal.**

A judge should recuse as soon as possible after the need for recusal is determined. Often the need to recuse should be obvious as soon as the case is filed, because of either the judge's personal relationship to a party, attorney or substantive witness, or the judge's interest in the outcome of the case. Delaying recusal inconveniences the parties and court staff, as well as deferring disposition of the case, which can result in dismissal under the six-month time limit for prosecuting criminal cases. Delay raises questions about the judge's ability to manage the docket, and also may create an appearance, true or not, that the judge waited intentionally so that the case would be dismissed. If a recusal only becomes necessary after proceedings have begun due to a change in circumstances or because of new information, then it should be done promptly.

### **6-730. Disqualification by a party's motion.**

The third way in which a judge may become disqualified is on a motion by a party who believes the judge is not impartial. If the judge cannot be removed by peremptory challenge, the party may file a motion to disqualify the judge for cause, stating the grounds. There must be a reasonable factual basis for doubting the judge's impartiality. *State ex rel. Bardacke v. Welsh*, 1985-NMCA-028, ¶62.

To show the disqualifying bias or prejudice of a judge, the complaining party must demonstrate that the alleged attitude derives from an extrajudicial source. That is, the party must rely on evidence of bias or prejudice apart from adverse rulings in the case itself that could be remedied on appeal -- not "a statistical study of the calls" that the judge has made during the contest. *United Nuclear Corp. v. General Atomic Corp.*, 1980-NMSC-094, ¶422.

### **6-731. Timing of motion.**

A disqualification motion that is not a peremptory challenge must nevertheless be filed within a reasonable time after the party becomes aware of the grounds for disqualification. *United Nuclear Corp. v. General Atomic Corp.*, 1980-NMSC-094. While different rules govern the time limits for filing for a recusal for different courts, parties may not file for peremptory recusal after the judge has taken their first actions in the case. But motions to disqualify magistrate judges may be filed after the judges have conducted arraignments or first appearances, setting conditions of release or determining indigency. *See, e.g.,* NMRA 6-106 (C). Other rules, listed in Section 6-710 of this chapter, define the limits for moving to disqualify other judges.

### **6-732. Ruling on motion.**

The judge who is the subject of the motion to disqualify will hear the motion, unless the judge has become too embroiled in the case to preside objectively. If the judge decides not to recuse, the decision may be reviewed on appeal under an "abuse of discretion" standard. In unusual circumstances, the Supreme Court has superintending authority to step in and issue an earlier writ. *State ex rel. Anaya v. Scarborough*, 1996-NMSC-009.

**6-733. Response to motion.**

A judge should not overreact if asked by a party to recuse. Judges have been disciplined by ethics commissions for retaliation, loss of temper, and other inappropriate conduct directed toward parties.

An attorney filed a motion to disqualify a California judge because of animosity between the two arising from a prior case in which they had represented opposing parties. The judge improperly conditioned the disqualification on the attorney paying all the witness fees in the case. *Spruance v. Comm'n on Judicial Qualifications*, 532 P.2d 1209, 1214 (Cal. 1975).

A California judge was publicly censured for lack of impartiality and petty harassment of attorneys who filed affidavits of prejudice against him, including making intemperate remarks to counsel and attempting to inconvenience them by withholding judgments in unrelated cases. *In re Rasmussen*, 734 P.2d 988 (Cal. 1987).

**6-740. Consequences of disqualification or recusal.**

A judge who has been removed from a case should have no further involvement in it or attempt to communicate with the judge to whom it is assigned except to accomplish administrative reassignment of the case.

**Subchapter III. When can Disqualification be Avoided?****6-750. Waiver.**

In New Mexico, the parties can waive their objections to the possible cause of bias and allow the judge to proceed, regardless of which method for the disqualification is used. *State v. Lucero*, 1986-NMSC-085; NMRA 21-211 (C). The only exception to this in the Code of Judicial Conduct is for disqualification because of the judge's bias or prejudice. The parties must have actual and complete knowledge of the grounds for disqualification in order to waive it. The judge should not attempt to persuade the parties to waive the grounds for disqualification, such as by trying to assure them the judge can be impartial.

**6-751. Procedure for waiver.**

After the judge discloses or parties learn of the potential basis for disqualification, the parties may waive the disqualification by stating on the record that they have no objection to the judge presiding. The parties may act on their own initiative, or the judge may ask the parties to consider waiver of disqualification by discussing it outside the presence of the judge or court staff. If the parties decide to approve the waiver, it is advisable to obtain written, signed statements from all of them. NMRA 21-211, Cmt. 10. The rule requires the judge to then note the agreement to have the judge continue on the case in the court file. NMRA 21-211 (C).

**6-752. Effect of waiver.**

After waiver, the judge may proceed on the case. However, even with a waiver the judge is ethically prohibited from continuing to preside if the judge personally is, or becomes, unconfident of the ability to proceed impartially, or if the appearance of impropriety would be strong.

**6-760. Rule of necessity.**

Sometimes a judge will need to hear a case even if there are grounds for disqualification. If no judge can be found who possesses the requisite degree of impartiality, or if no other judge is available on an urgent matter or is even eligible to serve (as may be the case in some communities), then the judge may continue on the matter. NMRA 21-211, Cmt. 3. "Although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise." *United States v. Will*, 449 U.S. 200, 213 (1980). Where disqualification results in an absence of judicial machinery capable of dealing with a matter, disqualification must yield to necessity. *Eisemann v. Miller*, 619 P.2d 1145, 1149 (Idaho, 1980). An example would be a case involving judicial compensation.

**Subchapter IV. Reasons for Disqualification**

**6-900. Reasons for recusal or disqualification.**

Article VI, Section 18 of the New Mexico Constitution and NMRA 21-211 state both general and specific conditions in which a judge should not hear a case. Also, the general provisions of NMRA 21-211, which are designed to ensure impartiality and maintenance of the appearance of propriety, are relevant in disqualification cases. *See also* §35-3-8 for magistrate recusal.

**6-910. Relationship between the Constitution and the Code.**

The Code of Judicial Conduct expands upon the constitutional criteria for disqualification. *State ex rel. Bardacke v. Welsh*, 1985-NMCA-028.

**6-920. Relationship to a party.**

**6-921. Prohibition.**

**No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which either of the parties are related to him by affinity or consanguinity within the degree of first cousin<sup>1</sup> . . . N.M. Const. art. VI, §18.**

21-211(A). A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: . . .

(2) The judge knows that the judge, the judge's spouse or domestic partner, or person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person, or a member of the judge's staff is: . . .

- (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
- (b) acting as a lawyer in the proceeding;
- (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
- (d) likely to be a material witness in the proceeding.

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<sup>1</sup> A first cousin or cousin-in-law is in the fourth degree of relationship to the judge, making the constitutional provision more restrictive than even the Supreme Court Rule.

The Code modifies the constitutional prohibition to apply it to cases where a party is within the third degree of relationship to the judge or the judge's spouse or domestic partner. This includes their relatives within the third degree (parents, children, grandparents, great-grandparents, grandchildren, great-grandchildren, uncles, aunts, brothers, sisters, nieces and, nephews, as well as the spouses of such relatives). NMRA 21- 211 (A) (2). Especially in smaller communities with many related families, these restrictions could pose frequent problems, making the appointment of unrelated alternate judges for such cases an important precaution.

#### **6-922. Policy.**

General principles of impartiality dictate that a judge should not promote the judge's personal interests, or those of the judge's family or persons close to the judge, by hearing a matter in which any of those persons is a party or significantly interested (in the sense of having a direct loss or gain at stake) in the outcome.

#### **6-923. Interest as a party.**

A judge who is a party would obviously have an interest in the case, and could neither be, nor appear to be, impartial.

A magistrate was removed from office after filing two criminal complaints in his own court against a former tenant in the judge's apartment building and a visitor to a tenant, although the facts indicated the charges essentially asked for civil damages; proceeding to hear the cases in which he had an interest; and arresting one defendant whom he jailed without authority. *In re Lucero*, 1985-NMSC-053.

An Oregon judge filed trespass charges against a person who damaged an apartment house owned by the judge, then presided over the proceedings. *In re Jenkins*, 419 P.2d 618, 620 (Ore. 1966).

#### **6-924. Family relationship to a party.**

For similar reasons, a judge is precluded from hearing cases when related to any of the parties or their attorneys. This prohibition further applies to people who are neither parties nor attorneys, prohibiting judges from sitting on a case where a person who is related to the judge, as defined in the Code, has a "more than de minimis" pecuniary interest in the outcome of a lawsuit; or persons who may be called as material witnesses.

A trial judge was disqualified from hearing a case in which his son appeared as an attorney for the plaintiff when the son's law firm would be paid a contingent fee if plaintiff won the case. Because the son's compensation depended on the judge ruling a certain way, he was disqualified. *Tharp v. Massengill*, 1933-NMSC-105. (This case was decided before adoption of the Code, which also prohibits a judge from presiding in a case in which a relative appears as an attorney.)

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including dismissing DWI and other cases of friends and relatives, without notice to the prosecutor, based upon *ex parte* communications, and even though some of the cases had been assigned to other judges. *In re Angie Vigil-Perez*, JSC 00-3F.

Therefore, if the judge is related within the third degree to a person who will benefit more than a *de minimis* amount if the judge decides the matter in a certain way, Article VI, Section 18 and NMRA 21-211 require the judge to recuse unless the parties waive the disqualifying condition.

A judge should recuse himself in a case in which the judge's close relative has posted bond. The relative is within the third degree of relationship to the judge and in his capacity as bondsman and has a financial interest in the proceedings. AO 87-3.

Note that the revised rules extend this constitutional prohibition to include persons, *or spouses or domestic partners of persons*, related to the judge *or the judge's spouse or domestic partner* within the third degree of relationship. As an example of its breadth, this prohibition would make it unethical for a judge to hear a case involving the domestic partner of the uncle of the judge's domestic partner, if the judge knows of that "relationship." NMRA 21-211 (A) (2).

If the judge's spouse is employed by a law enforcement agency involved in the case but the spouse is not involved, the judge is not necessarily disqualified.

A judge is not required to automatically recuse from all cases involving the law enforcement agency in which the judge's spouse is employed. If the spouse has participated in the case or has supervisory responsibilities over those who have, the judge should recuse. If the spouse does not participate in the case, the judge must evaluate the circumstances on a case-by-case basis in light of a possible appearance of impropriety. AO 16-05.

#### **6-925. Court staff member as a party.**

The Code directs that a judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality may reasonably be questioned, including [when] . . . (2) the judge knows that . . . a member of the judge's staff is . . . (a) a party to the proceeding." But an official code comment modifies that requirement. Code Comment [5] states that, "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" in such cases. The Comment notes, however, that any local court rules that dictate automatic recusal would take precedence.

#### **6-930. Judge's service as attorney.**

Judges who are lawyers should decide whether to hear a case involving a former client or former law partner. Part-time judges who continue to practice law especially must screen their cases carefully to avoid conflicts in this area.

#### **6-931. Representation of a party.**

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including [when] . . . the judge served as a lawyer in the matter in controversy . . . NMRA 21-211(A)(5)(a).

Similarly, the New Mexico Constitution prohibits a judge from sitting in a cause *in which he was counsel*. N.M. Const. art. VI, §18.

This restriction applies not only to the obvious case in which the judge has represented the party in the matter at hand, but also to representation of the party in a prior, related matter arising from the same facts. *Geyh, supra*, §4.14 [2]. Even if the judge has only given advice informally in such a matter, the judge is almost certainly disqualified.

A party's right to disqualify a judge because of the judge's prior involvement in a case can be waived.

The sentencing judge had been a prosecutor in the original criminal proceeding. The defendant was fully aware and advised and consented. Article VI, Section 18 was complied with. *State v. French*, 1970-NMSC-159.

If a party is a former client and the case in question is unrelated to the prior representation, the rule does not require that the judge recuse. But the judge still may choose to do so in order to avoid the appearance of partiality.

### **6-932. Representation of witness.**

If the judge, as an attorney, represented a witness in a matter completely unrelated to the current matter, the disqualification rule does not require that the judge recuse, unless the judge feels that decision could be viewed as undermining the appearance of judicial impartiality.

### **6-933. Former association with lawyer in a case**

#### **6-933a. Prohibition.**

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including [when the judge] . . . was associated with a lawyer who participated substantially as a lawyer in the matter during such association. NMRA 21-211 (A) (5) (a).

In other words, a judge should not hear a case if the subject of the case was a matter handled by an associate of the judge, or the judge's former law firm, while the judge was there. Usually, recusal is not required solely because one of the attorneys is a lawyer with the judge's former firm. So long as a reasonable time period has passed since the judge's association with an attorney for a party has ended, recusal is not necessary. That time period will vary depending upon the length of the association, the size of the firm and any financial arrangement that exists between the judge and the firm. A period of five years is a general guideline. But if the judge retains a financial interest in the firm, recusal is called for. Such interests may include deferred compensation or a payout for the value of the judge's partnership interest. *See* AO 89-6 and 07-05.

#### **6-933b. Former association with attorney as judge.**

A judge need not recuse when a former colleague on the same court appears as an attorney before the judge. AO 07- 07.

#### **6-933c. Government attorneys.**

A lawyer in a governmental agency does not necessarily have an association with other attorneys employed by that agency within the meaning of this subsection. A judge formerly employed by a governmental agency where the judge "participated personally and substantially as a lawyer or public

official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy,” should recuse. NMRA 21-211 (A) (5) (b).

A district judge who was formerly a Deputy District Attorney does not have to recuse himself from criminal cases unless his impartiality might reasonably be questioned. AO 90-2, 20-01.

**6-934. Part-time judge practicing law--special case.**

A part-time judge maintaining a private law practice or otherwise working in a law firm must exercise an abundance of caution to avoid the appearance of impropriety, and the possibility of partiality, due to a financial interest in the case. A part-time judge should not allow a law partner to practice before the court, because it may appear the partner could influence the result in the case.

A part-time probate judge is prohibited from conducting probate proceedings when the attorneys involved in those proceedings are associated with the law firm that employs the judge. This prohibition helps to promote public confidence in the integrity and impartiality of the judiciary and prevents the appearance that the attorneys of the judge's firm are in a position to influence the judge. AO 86-7.

**6-940. Family relationship to an attorney.**

A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including [when] . . . the judge knows that the judge or the judge's spouse or domestic partner, or person within a third degree of relationship to either of them, or the spouse or domestic partner of such a person . . . is acting as a lawyer in the proceeding . . . NMRA 21-211 (A) (2) (b).

Questions concerning the familial relationship of judges to attorneys having a connection with a case are the subject of numerous advisory opinions. Although the answer in some circumstances is clear, typically the factors lie in a gray area and the judge must decide whether there is or will be an appearance of impropriety if the judge presides in the case. This requires that the judge apply the "reasonable person" standard: would the facts create reasonable doubt about the judge's impartiality in the mind of a reasonable person with knowledge of all the circumstances. AO 87-6.

**6-941. Third degree of relationship to attorney of record.**

The judge must recuse if the judge, spouse or domestic partner is within the third degree of relationship to an attorney of record, or to the spouse or domestic partner of that attorney. The purpose of this rule is to keep litigants from seeking favoritism by retaining a judge's relative as counsel.

**6-942. Relative has worked on the case.**

The judge also must recuse if the relative has performed legal work on the case in any capacity, even if the relative is not counsel of record. This would include conducting discovery or researching legal issues. See AO 87-2.

**6-943. Financial benefit to relative.**

The judge should recuse from any case in which the judge, the judge’s spouse, parent or child (wherever they live), or any other family member residing in the judge's household is a party to the case or financially

interested in its resolution. *NMRA 21-211 (A) (3); Smith v. Beckman*, 683 P.2d 1214, 1216 (Colo. Ct. App. 1984).

For example, recusal is ethically required in cases involving a law firm in which a relative of the judge is a partner, because the relative, especially one who is a partner, could be affected financially by the outcome.

Judges should recuse themselves in any case involving a law firm in which a close relative of the judge is an associate. Even if the relative is not directly involved as a member of the firm, the attorney has an interest that could be affected by the outcome of the proceedings. AO 86-10.

A judge whose attorney son-in-law is a shareholder in a firm should recuse from the case when the firm enters an appearance, even when the son-in-law is not counsel of record in that matter. Judges should appear to be impartial and therefore should not preside where counsel is a family member. AO 89-7.

Financial issues of this sort usually are not a factor for a lawyer in government service, where compensation and clientele are set and the prestige of the office is not greatly affected by the outcome of a particular case.

**6-944. Judge's relative is affiliated with law firm or agency appearing in case.**

Assuming the relative in question has not participated in the case, the fact that a relative of the judge is employed by a law firm or governmental agency that has litigation pending before a judge, taken alone, does not determine whether the rules of ethics require the judge to recuse. However, the judge should do so if the judge's impartiality might reasonably be questioned, because of the appearance of impropriety. *See NMRA 21-211 (A) and Cmt. 4.* This determination is made on a case-by-case basis. AO 87-2.

The appearance of impropriety may require a judge to recuse because the judge's spouse is a member or employee of a law firm or justice-related governmental agency for a party, even if the spouse has not personally worked on the case:

District judge whose wife serves as chief deputy district attorney must recuse from all criminal cases involving her office, due to her supervisory role there. AO 07-04.

But a parental relationship may not require this result.

Judge whose son-in-law is sergeant in sheriff's office must recuse from cases involving son-in-law or deputies he supervises, but not from cases involving other officers. AO 10-07

A Kansas judge was not disqualified from criminal cases because his son worked as a prosecutor, when son was not involved in the case. *State v. Logan*, 689 P.2d 778 (Kan. 1984).

A judge confronted with this dilemma should disclose the relationship to the parties and give them a chance to object.

Judge whose spouse is a non-supervisor police officer does not generally have to recuse from addressing warrant requests from the department, so long as spouse is not involved in the case. AO 16-05.

A judge whose son is employed as an Assistant District Attorney should disclose the relationship to all defendants appearing in his court, advise them that the son does not practice before the judge or participate in cases in the judge's court, and recuse himself if the defendant feels uncomfortable with the situation. AO 87-6.

A judge whose husband is a public defender may hear cases in which the public defender's office appears as counsel, provided she recuses herself in any case in which her husband is counsel of record. Even if her husband is not appearing, however, the judge should inform the prosecutors of the relationship, and should recuse herself in any case in which the relationship would raise a question of impropriety in a reasonable mind. AO 91-1.

**6-945. Judge's relative represents party in another case.**

A judge should consider whether there might be an appearance of impropriety in hearing a case involving a party who is represented by the judge's lawyer-spouse in a case before another judge.

Although each case has its own peculiar fact situation, legal questions may be common in all the pending cases involving the party. The party might deem it inappropriate for the judge to act under these circumstances, and this would reflect on the judge's impartiality. A husband and wife are within the third degree of relationship, and *ex parte* communications between the judge and the attorney/spouse are considerations in determining whether the judge should recuse him/herself. AO 86-9.

Even if disqualification is not mandatory because the facts of NMRA 21-211(A)(2) are not present, the appearance of impropriety may nonetheless require the judge to recuse because of the spousal relationship to an attorney involved with a party appearing before him.

A judge whose close relative represents a client in a matter not before the judge need not necessarily recuse him/herself in a case in which the client appears before the judge. However, the judge should consider the appearance of impropriety under these circumstances. AO 87-7.

**6-950. Personal knowledge.**

**6-951. Knowledge of facts.**

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including [when] . . . the judge has. . . personal knowledge of facts that are in dispute in the proceeding;. . . NMRA 21-211 (A) (1).

This rule applies to information gained before the case is assigned, as well as knowledge acquired from an extrajudicial source or personal inspection by the judge while the case is ongoing.

A judge should recuse himself from a case involving a landowner who has sued an electric co-op for breach of contract and trespass, when the judge previously represented the plaintiff in acquiring

the property and did legal work concerning it over a fifteen-year period. The judge has knowledge of disputed evidentiary facts and previously represented the plaintiff. AO 87-7.

*See also* discussion in EX PARTE regarding independent investigation by a judge.

Recusal is not required if the knowledge comes from prior rulings in the same case, or adjudicating the case of related parties to the same underlying transaction, or because the party has appeared before the judge in a previous case. *AJS, ETHICS TRAINING* at 22-23.

**6-952. Material witness.**

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including [when] . . . the judge knows that the judge, the judge's spouse or domestic partner, or person within the third degree of relationship to either of them, or the spouse or domestic partner of such person . . . is: . . . likely to be a material witness in the proceeding; . . . NMRA 21- 211(A)(2)(d).

The reason for this rule is that a judge's own testimony cannot serve as the basis for the judge's evidentiary rulings. Nor can the judge be expected to assess impartially the credibility of a family member's testimony.

A judge was with his brother, a police officer, when several people were arrested. The judge then presided over the arraignment. The judge violated the Code both because he was a material witness and was related to another material witness, his brother. *In re Scacchetti (unreported determination N.Y. 1981); see also Geyh, supra, §4.12.*

**6-960. Personal interest.**

**6-961. General rule.**

Under both the Constitution and the Code, a judge who has an interest in the outcome of a case may not hear it.

**No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which . . . he has an interest.** N.M. Const. art. VI, §18.

The Code recognizes that the judge's interest requiring recusal also may be indirect, through members of his family.

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including [when] . . . the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or is a party to the proceeding . . . NMRA 21-211 (A) (3).

**6-962. Economic interest.**

The most commonly understood form of "interest" is economic interest. Two sections of the Code relate to economic interest. NMRA 21-211 (A)(3), discussed in this part, is concerned with those interests,

including economic interests, that require the judge to recuse, or subject the judge to a motion to disqualify. In NMRA 21-311, discussed in Business and Financial Dealings, the Code deals with situations that commonly create financial conflicts of interest that can result in ethical violations. These provisions, while related, are discussed separately.

**6-962a. General rule.**

A judge is disqualified from a case when the judge or a relative, as defined in the rule, has an economic interest that is more than *de minimis* and that could be substantially affected by the outcome of the case. A judge acting while holding a direct pecuniary interest in a case is an especially serious ethical violation because of the risk of depriving a party of a fair trial and undermining the integrity of the judiciary.

A magistrate was removed from office after filing two criminal complaints in his own court against a former tenant in the judge's apartment building and a visitor to a tenant, although the facts indicated the charges essentially asked for civil damages; proceeding to hear the cases in which he had an interest; and arresting one defendant whom he jailed without authority. *In re Lucero*, 1985-NMSC-053.

**6-962b. Nature of interest.**

"Economic interest" and its exceptions are defined in the Code to include legal and equitable interests, and active participation (such as serving as a director, officer, or advisor) in a party's affairs. Exceptions are allowed in certain cases involving mutual investment funds, interests in securities of charitable organizations, deposit in financial institutions, or ownership of government securities. *See* NMRA 21- 003 (G).

A "de minimis" interest, which does not require disqualification, is defined as "an insignificant interest that could not raise reasonable questions as to a judge's impartiality." NMRA 21-003 (E).

Furthermore, the judge's interest must not be remote or speculative. *State ex rel. Anaya v. Scarborough*, 1966-NMSC-009. For example, the fact that a judge's ruling in a case could raise property taxes, including the judge's, is not disqualifying.

**6-962c. Business interests.**

New Mexico permits sitting judges to operate businesses that are closely held by the judge or members of their family. *See* NMRA 21-311 (A) and (B).

Judges may also manage or participate in businesses primarily engaged in investing family resources. But the judge is disqualified from any case in which those interests may impact the judge's service, such as when those interests could be substantially affected by the outcome of the case. Judges must also avoid altogether financial interests that would require their frequent disqualifications. *See* BUSINESS AND FINANCIAL DEALINGS.

Ongoing business relationships are especially likely to create problems for part-time judges, many of whom operate businesses. Part-time judges are exempt from the limitations on business activities imposed on full-time judges, under NMRA 21-004B. But they still must recuse from cases where those business dealings directly conflict with their impartiality in a case. NMRA 21-211 (A) (2) (c).

The Supreme Court upheld findings by the Judicial Standards Commission that a municipal judge improperly owned and operated a DWI school, to which he sentenced many defendants. The judge voluntarily ended the business. *In re Rainaldi*, 1986-NMSC-079.

The prohibited interest may be a passive investment interest. If a judge held a limited partnership interest in a real estate venture, she would be disqualified from hearing a case in which the value of the judge's investment could be affected.

**6-962d. Interest of family member.**

NMRA 21-211 (A) (2) (c) prohibits a judge from presiding if a member of the judge's family has a more than de minimis interest that could be substantially affected by the proceeding. The "third degree of relationship" whose interests may require the judge's disqualification include: a great grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece. An interest held by any spouse or domestic partner of such a person, or any person so related to the judge's spouse or domestic partner, may also disqualify the judge. The disqualifying interest includes not only investments and business interests, but also shareholder interest in a law firm.

A judge should recuse from all proceedings in which members of the judge's son-in-law's law firm is counsel. Because the son-in-law is a stockholder in the firm, he could be said to have a financial interest in the outcome of any proceedings where the firm represents a party. AO89-7/issue 2.

NMRA requires that a judge keep informed both about their personal and fiduciary economic interests and about those of the judge's spouse or domestic partner and minor children residing in the judge's household. NMRA 21-211 (B).

**6-970. Personal bias.**

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

- (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer. . .

A judge who is prejudiced against or biased favorably toward a party or attorney for personal reasons may not preside over their case. Manifestation of any such behavior by a judge is prohibited under NMRA 21-203. Personal bias is also disqualifying under the Article VI, Section 18 of the Constitution because it is a form of "interest." *State v. Armijo*, 1933-NMSC-087.

## DEMEANOR AND IMPARTIALITY

### 7-100. Introduction.

Judicial proceedings are important public business. They “should be conducted with fitting dignity and decorum, in a manner conducive to undisturbed deliberation, indicative of their importance to the people and to the litigants, and in an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice.” NMRA 23-104(A).

The requirement that judges be impartial dictates that parties and their attorneys be treated respectfully and that a dignified atmosphere prevail in court. A judge's demeanor is crucial to maintaining impartiality, because it is what others see. Improper demeanor can undermine the judicial process by conveying an impression of bias or indifference. “[A] judge's courtroom conduct symbolizes the law in action. . .” *Geyh, supra*, §3.01 at 3-1. In addition to demonstrating bias or prejudice, disrespectful behavior toward a litigant infringes on the litigant's right to be heard and compromises the dignity and decorum of the courtroom. Lack of courtesy also affects litigants' satisfaction with the handling of their cases and creates a negative impression of courts in general.

This section addresses judges’ conduct of judicial proceedings and the obligation of judges to ensure fair treatment of all persons both within and outside the courtroom.

### 7-200. Checklists

#### **Rule of thumb:**

A judge should (1) hear courteously (2) answer wisely (3) consider soberly (4) decide impartially. *Geyh, supra*, para 3.01 at 3-3 (noting that the list is attributed to Socrates).

#### **Do:**

- Address women and men with gender-neutral terms, such as "counselor" or "ladies and gentlemen."
- Recognize and acknowledge stereotypes based on gender, race, ethnic background, age, physical limitation, sexual orientation, social class, or ability to speak English, and remove those biases from the courtroom.
- Address all individuals by last name and appropriate titles in the public setting.
- Discuss biased or prejudiced actions with individuals who may be unaware of their behavior and its impact, and stress that such behavior will not be tolerated.
- Recognize that all matters heard by the court are important.
- Understand that the impact of biased behavior on the receiver is more important than the intent of the speaker/actor.
- Speak respectfully to parties and counsel.
- Take a deep breath and pause before responding to a rude or disrespectful remark.
- Require the parties, attorneys, and court staff in your courtroom to observe all of the above requirements.

#### **Don't:**

- Use terms of endearment toward women or men, such as "honey" or "dear" in courthouse interactions, including interactions with court personnel.

- Make assumptions about individuals based on stereotypes.
- Subject victims of crime to unjust scrutiny because of the nature of the act(s) perpetrated against them or their gender, race, ethnicity, sexual orientation, or social class.
- Subject individuals to comments, gestures, touching or other actions that can offend them or make them feel uncomfortable.
- Make sexual jokes or other remarks that play on sexual stereotypes in a courtroom setting.
- Comment on the physical appearance of others.
- Exchange personal remarks with persons present in court.
- Speak rudely to persons present in court.
- Perform judicial duties while impaired by alcohol or drugs.
- Hold membership in any discriminatory organizations.

**7-200. Applicable Law**

NMRA 21-100 and 21-200.

**7-310. Courts of limited jurisdiction.**

Demeanor and decorum are no less important in the courts of limited jurisdiction than in the general jurisdiction courts.

“The vast majority of Americans have their sole contact with American Courts in state courts of limited jurisdiction--the small claims, police and magistrate courts. Judges of those courts should be no less courteous to and considerate of litigants and counsel than should judges of other trial and appellate tribunals. While we recognize the vast volume of litigation handled by the magistrate courts, the pressures of such caseloads, and the ever present need to terminate cases with dispatch, we cannot countenance the handling of cases in any court in such a manner as to preclude to the litigants a fair opportunity to be heard, nor can we sanction judicial discourtesy to litigants and counsel.” *In re Sorter*, 551 P.2d 1255, 1256 (Kan. 1976).

**7-320. Actions and words.**

Body language, as well as words, is relevant to a judge's impartiality. Physical demeanor may indicate disbelief of a witness, thereby improperly influencing the jury or imparting messages to the parties. Treating witnesses in ways that may enhance or diminish credibility in front of the jury runs counter to a judge's duty to remain impartial. For example, a judge should not shake hands with a witness in front of the jury.

**7-400. Decorum**

A judge shall require order and decorum in judicial proceedings before the court. NMRA 21- 208(A).

**7-410. Physical surroundings.**

The courtroom should be quiet and organized so that those involved are allowed an environment in which they can proceed undisturbed. *NMRA 8-102(A)*. In smaller communities, the courtroom may be a multi-purpose room. A judge should schedule and conduct court proceedings to avoid disruptions, act with appropriate seriousness, and ensure that others maintain proper respect for the court. Due process and concerns about impropriety require proceedings to be held in open court.

A judge held the majority of arraignments and initial appearances in felony cases in chambers, over objection, and made some final dispositions in chambers. Conditions were crowded, and security was an issue. The judge was publicly censured for this and other misconduct. *In re Dwyer*, 572 P.2d 898, 899 (Kan. 1977).

**7-420. Relationships with other judges.**

A judge who criticizes another judge publicly undermines public confidence in the judiciary.

A magistrate judge was reprimanded for improper conduct that included expressing his discontent and speaking of his presiding judge in a condescending manner to court staff in an area where he could be overheard by the public. *In re Guillory*, S.Ct. No. 31,920 (December 7, 2010).

A Kentucky judge was disciplined for posting on her Facebook page “This murder suspect was RELEASED FROM JAIL just hours after killing a man and confessing to police.” *In re Matter of McLaughlin*, Kentucky Judicial Conduct Commission, June 12, 2018.

A judge who knows or receives information that another judge has violated the Code of Judicial Conduct is required to take appropriate action. NMRA 21-215(A), (C).

SEE CHAPTER 9 SPEAKING, WRITING, AND TEACHING

**7-500. Temperament**

Judicial temperament is an essential virtue. The judge must ensure that all conduct by the judge, court staff and others subject to the judge’s authority reflects the dignity, integrity and honesty expected of the judicial branch.

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, staff, court officials and others subject to the judge's direction and control. NMRA 21-208(B).

**7-510. Loss of temper.**

Judges have extraordinarily difficult jobs, beset on a daily basis with problems, some of which appear insoluble: large calendars; dilatory, unprepared and provocative attorneys; witnesses who lie; bad faith violations of court orders and rules; wastefulness; difficult decisions under high pressure; and lack of resources needed to do the work. The experience of feeling helpless, powerless or frustrated in dealing with these and other recurrent problems presented to judges can produce anger. *Rothman, supra*, §115.200 at I-6.

A judge must channel anger appropriately. For example, if a party has violated a court order by failing to appear in court, the punishment must be commensurate with the violation. Vindictive conduct is inappropriate and can lead to discipline.

A magistrate judge was reprimanded for behavior that included banging his fists on the bench and refusing to listen to a defendant. *In re Guillory*, S.Ct. No. 31,920 (December 7, 2010).

**7-520. Pattern of conduct.**

An isolated lapse of temper may be understandable; however, overly aggressive, threatening, or repeated conduct is more likely to justify discipline.

A district judge was removed from the bench for, among other reasons, using profanity and shouting at court staff, sometimes in public places. *In re Castellano*, 1995-NMSC-007.

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including cursing in court offices, use of alcohol during court and other official proceedings, abuse of court staff, making racially biased references about court staff, and public derision of the chief judge. *In re Angie Vigil-Perez*, JSC 00-3F.

A West Virginia judge was suspended until the end of his term for twenty-four Code violations that included repeated intemperance with litigants. *In re Watkins*, 757 S.E.2d 584 (W. Va. 2013).

A California judge argued with a witness and told him his testimony did not make sense, accused an attorney in court of being afraid to take a case to trial, told an inexperienced lay witness to keep her mouth shut, threatened to jail a defendant for talking to his attorney during court, and jailed a spectator who swore after tripping over her son's feet in the courtroom. *Kloepfer v. Comm'n on Judicial Performance*, 782 P.2d 239, 249-57 (Cal. 1989).

**7-530. Unsuccessful defenses.**

**7-531. Provocation.**

Judges are held to a higher standard of conduct than attorneys. Provocation by attorneys is not a legitimate excuse for being discourteous. The judge must be able to exercise self-control and resist the temptation to respond to provocative remarks by attorneys or parties.

"Civility is relevant to judges and especially trial judges because they are under greater stress than other judges and subject to the temptation to respond in kind to the insolence and bad manners of lawyers. Every judge must remember that no matter what the provocation, the judicial response must be a judicious response and that no one more surely sets a tone and pattern for courtroom conduct than the presider." Former Chief Justice Warren Burger.

"No matter how provocative are the personal attacks or innuendos by lawyers against a judge, the judge simply 'should not himself give vent to personal spleen or respond to a personal grievance' because 'justice must satisfy the appearance of justice.'" *McCartney v. Comm'n on Judicial Qualifications*, 526 P.2d 268, 287 (Cal. 1974) (citing Justice Frankfurter in *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

A judge's motivation in making a rude comment may be relevant in a disciplinary action. For example, the judge may not compound the problem by retaliating against a party who has moved to disqualify the judge or has filed disciplinary charges against the judge.

### **7-532. Heavy caseload.**

The fact that the court is overburdened does not excuse a judge's bad temper. "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. Courts can be efficient and businesslike while being patient and deliberate." NMRA 21-208, Cmt. 1.

"Necessary as it is to try cases expeditiously and to keep the court's docket current, this can be accomplished without displays of rudeness to litigants and lawyers, and it does not justify interfering with the legal representation of litigants to which the law entitled them." *In re Gustafson*, 756 P.2d 21, 29 (Or. 1988).

### **7-533. Humor.**

A judge cannot claim humor as a defense to a charge of rude or biased conduct. This is especially true of jokes with a sexual or ethnic content.

In *Gonzalez*, a California judge was removed from office for misconduct, including making racial and sexual comments he claimed were in jest. During voir dire he asked an African-American woman who had said she worked as a grocery clerk if she knew the price of watermelon, and asked a female Jewish district attorney at a party if she was afraid "her people" would produce a race of idiots because of "all the inbreeding" they do. The Commission stated:

[S]ubjective intent is not an issue . . . [A] judge is charged with the obligation to conduct himself at all times in a manner that promotes public confidence and esteem for the judiciary. . . . [F]acially blatant ethnic slurs are apt to offend minority members. . . and may be construed by the public at large as highly demeaning to minorities. *Gonzales v. Comm'n on Judicial Performance*, 657 P.2d 372, 382 (Cal. 1983).

A judge was censured, placed on six months supervised probation, and otherwise disciplined by the Supreme Court for making offensive jokes and comments about women to attorneys. *In the Matter of Hon. Michael E. Martinez*, JSC 99-2F.

The New Jersey Supreme Court removed a judge from office for offenses that included improper comments in a sexual assault case. "Judges set the tone for a courtroom. Especially when it comes to sensitive matters like domestic violence and sexual assault, that tone must be dignified, solemn, and respectful, not demeaning. *In re Russo*, 231 A.3d 563, 568 (N.J. 2020).

Even if humor is not blatantly offensive, it should be used with care. Humor can reduce tension and help the judge maintain control of the courtroom, but often humor is at someone's expense. ". . . [A] seemingly innocuous joke by the judge may assume disproportionate significance in the eyes of the parties, counsel, jurors, or other. Moreover, a captive attorney audience may feel compelled to laugh rather than risk an objection." *Rothman, supra*, §137 at I-22 (quoting *1988 Report, California Commission on Judicial Performance*).

Making fun of litigants is improper.

A Kansas judge was censured for writing a memorandum opinion in the form of a humorous poem that ridiculed the defendant. The problem was not the form of the opinion, but the ridicule cast on the defendant. *In re Rome*, 542 P.2d 676, 685 (Kan. 1975).

**7-600. Rude and abusive behavior**

"Regardless of personal style, a judge is required to show patience and dignity and use common courtesy in daily interaction with members of the public." *In re Kellam*, 503 A.2d 1308, 1311 (Me. 1986). Language that is (1) disrespectful or (2) indicative of bias, either personal or based on gender or ethnicity, is improper.

Abusive treatment that is disruptive or indicative of bias or prejudice can also violate the parties' rights to a fair hearing and therefore violate the Code:

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. NMRA 21-206(A).

A municipal judge was disciplined in part for using profane, discourteous, disrespectful, and/or undignified language at courthouse, including around staff. *Matter of Stephen G. Ryan*, JSC 13-3F.

The Supreme Court of Ohio suspended a judge who was discourteous to parties and attorneys, including laughing and making faces during cross-examination. *Disciplinary Counsel v. McCormack*, 977 N.E.2d 598 (Ohio 2012).

A New Jersey judge demonstrated discourteous behavior, disrespect, and impatience toward litigants, witnesses and others. The judge improperly invoked personal beliefs not legally relevant to the case: children of a plaintiff called plaintiff by first name, not "daddy." Judge said "If I had a kid and he called my wife Gail, his nose would be out of joint and his teeth would rattle." *In re Yaccarino*, 502 A.2d 3, 10 (N.J. 1985).

**7-610. Parties.**

There is no excuse for a judge verbally abusing or demeaning a party.

A magistrate judge was censured for failing to be dignified, courteous, and patient with a domestic violence witness because the judge refused a request for an emergency bathroom break when the witness had started her menses before retaking the witness stand. *Matter of Hon. Samantha Madrid*, JSC 19-4F.

A metropolitan court judge was reminded to exercise "judicial wisdom" in statements to litigants so they do not think that the judge is harsh, rude, or biased. JSC 92-7I.

A Texas judge was publicly admonished for his demeanor showing "a deep-seated antagonism" toward a father in a domestic relations case. "The judge failed to treat father with patience, dignity and courtesy by characterizing his trial testimony as 'ridiculous' and

‘crap’ and threatening him with prosecution for perjury.” *Public Admonition of Bailey*, Texas Commission on Judicial Conduct, July 16, 2019.

A California judge's willful misconduct included making a vulgar hand gesture to a defendant in a traffic case and giving another defendant the "raspberry" while that defendant was testifying. *Spruance v. Comm'n on Judicial Qualifications*, 532 P.2d 1209, 1222 (Cal. 1975).

A Kansas judge was disciplined for abusive conduct toward parties such as telling a defendant who had asked a question to sit there and shut up and threatening to "throw her ass out" when she responded she wished to be treated like a human being. *In re Dwyer*, 572 P.2d 898, 899 (Kan. 1977).

An Indiana judge was suspended for intemperate comments from the bench that included telling a party to “be quiet,” “zip it,” “shut [his] mouth,” and “shut up” and saying “This is just bullshit.” *In re Meade*, 200 N.E.3d 448 (Ind. 2023).

Because jurors respond to a judge’s behavior, the danger of a judge’s improper statements is accentuated if they are made before a jury.

A judge's hostile remarks can also indicate the judge has prejudged the case.

The Judicial Standards Commission issued a letter of caution to a magistrate instructing the judge to exercise care and discretion in making statements to litigants. The judge had inappropriately told a litigant: "It's a good thing the defendant did not show up for court because I would have ruled against you." JSC 93-3F.

A judge should not engage in emotional exchanges with parties about the judge's decision.

A municipal judge was cautioned to avoid making inappropriate remarks to litigants. He was encouraged to let litigants appeal decisions they do not like rather than engaging in confrontation and inappropriate conversations and letters. JSC 93-4I.

### **7-620. Attorneys.**

The judge sets the tone for everyone in the courtroom. If a judge is rude or discourteous to an attorney, the attorney’s effectiveness can be affected. Impatience, irritation, or indications of bias by the judge can impede presentation of evidence or legal argument and interfere with the parties' right to be heard.

### **7-621. Notable examples.**

Judges have been disciplined for improper treatment of attorneys such as:

- telling an attorney he was wasting the court's time
- interrupting the attorney when he was addressing the court
- implying the attorney was not being truthful
- asking the attorney "Why, do you want to get some more of this woman's money," after the client pleaded not guilty to a traffic charge

- rude treatment after attorney filed a motion to disqualify the judge
- accusing an attorney of unethical conduct in open court
- belittling an attorney in front of client or jury
- making an adverse ruling out of pique
- accusing an attorney of incompetence and questioning legal experience
- telling an attorney to shut up
- using obscenity in telephone conversation with prosecutor
- telling attorney "I don't have time to practice law for you"
- being rude to encourage settlement
- showing anger when attorney refused to stipulate to probable cause.

*Rothman, supra*, §140.100.

The Supreme Court formally reprimanded a district judge for actions that included the judge failing to be patient, dignified, and courteous by raising his voice to impede an attorney from making her objections and admonishing the attorney in front of her client. *In re Ramirez*, 2006-NMSC-021, ¶¶ 3, 19.

A two-year suspension was ordered for a Wisconsin judge who during trial interrupted the prosecutor's attempt to make an offer of proof, improperly impeached a witness in front of the jury, and repeatedly insulted and verbally abused prosecuting attorneys. *In re Breitenbach*, 482 N.W.2d 52, 54-56 (Wis. 1992).

A South Carolina judge was publicly reprimanded for scolding an attorney and telling him “to get the f\*\*ing wax out of his ears.” *In re Martin*, 878 S.E.2d 865 (S.C. 2022).

A judge in Ohio was disciplined for removing a public defender from all cases on the judge’s docket after the public defender filed a lengthy motion concerning the judge’s rejection of a plea and otherwise criticized the judge. *Ohio St. Bar Ass’n v. Evans*, 999 N.E.2d 674 (Ohio 2013).

An Iowa district court judge was suspended for continually harassing a lawyer and his firm because the judge disapproved of the lawyer's handling of a divorce case, including warning the lawyer that judges rate lawyers. *In re Eads*, 362 N.W.2d 541, 544-46 (Iowa 1985).

A Wisconsin judge was sanctioned for rude comments to attorneys, including telling an attorney who tried to vigorously defend his client that if he opened his mouth once more he was "going to have you in the pokey with your client." *In re Seraphim*, 294 N.W. 2d 485, 497 (Wis. 1980).

A California judge's misconduct included abruptly interrupting defense attorneys on a number of occasions with comments such as "why don't you try opening your ears and closing your mouth for a bit," and "Please don't make these phony motions and don't lie to me in open court." *Cannon v. Comm’n on Judicial Qualifications*, 537 P.2d 898, 904 (Cal. 1975).

### **7-622. Provocation.**

Even if a judge's rude behavior toward attorneys is provoked by the attorney's rude conduct, the judge must take appropriate steps to control the courtroom without retaliating. If a reprimand is warranted, it

should take place away from the jury. It is never appropriate to repeatedly interrupt an attorney without justification or to be abusive or ridiculing. *See* EXERCISE OF JUDICIAL POWER, Contempt.

During a custody arraignment a judge ordered a defense attorney to "get your butt out of here" after the attorney had made a disrespectful answer to the judge. An improper response by the attorney did not justify the judge's statement. The judge received a letter of admonition. JSC 86-2F.

**7-630. Witnesses.**

Trial judges have authority to question witnesses during courtroom proceedings in order to elicit or clarify testimony. The manner of questioning is subject to Code restrictions. The judge must not become an advocate for one side or interfere with a lawyer's representation. It is never permissible to ridicule or discredit the witness. The judge must be especially careful if there is a jury.

A district judge resigned from the bench, stipulating, among other violations, that he referred to witnesses and a party in cases before him in a negative manner. *Matter of Eugenio S. Mathis*, JSC 13-8F.

A letter of caution went to judge who allegedly made the following remarks to a potential witness in a case dismissed under the six-month rule: "I know who's guilty," "You know, it cost the defendant quite a bit of money to get off" and "If you really fear for your life, I suggest you carry a gun. This is still part of the Old West." JSC 86-11.

Judges were alleged to have ridiculed police officers publicly for making minor errors on citations, and to have publicly ordered them to stand up straight in the courtroom. JSC 87-31 (a) and (b).

**7-640. Others.**

A judge acted improperly in connection with a cash bond posted by a defendant's mother and verbally abused her when she tried to get it back. The Court stated that the Code requires a judge to be patient, dignified and courteous, to perform duties diligently, and to discharge administrative responsibilities. *In re Romero*, 1983-NMSC-054.

A municipal judge who was alleged to have used vulgar and obscene language and who participated in a protest against the local school board received a letter of caution to avoid using language that could bring the judiciary into disrepute and to avoid the appearance of impropriety. JSC 92-51.

A judge received a cautionary letter for making flippant and inappropriate remarks about the deceased victim of a shooting during the suspect's arraignment. JSC 91-51.

Including court staff.

A district judge resigned from the bench, stipulating, among other violations, that he made disparaging remarks about court staff and other judges. *Matter of Eugenio S. Mathis*, JSC 13-8F.

A district judge was removed from the bench for, among other reasons, using profanity and shouting at court staff, sometimes in public places. *In re Castellano*, 1995-NMSC-007.

A municipal judge resigned from office amid allegations that he used language that was profane, discourteous, disrespectful and/or undignified in the Court facility and in the presence of court employees. *Matter of Stephen G. Ryan, Esq.*, S. Ct. No. 32,369; JSC 13-3F.

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including cursing in court offices, use of alcohol during court and other official proceedings, abuse of court staff, making racially biased references about court staff, and public derision of the chief judge. *In re Angie Vigil-Perez*, JSC 00-3F.

## **7-700. Bias**

### **7-710. Introduction.**

"Bias is an attitude or point of view that colors our judgments." *New Mexico Supreme Court, HANDBOOK ON GENDER EQUALITY IN THE COURTS*, 3 (1994). Bias is one of the most common complaints lodged against judges. *Y. Begue and C. Goldstein, How Judges Get Into Trouble*, 26 *The Judges Journal* 8 (1987). The bias may be reflected in rude behavior, be motivated by personal dislike, or be based on gender, cultural, or racial stereotypes. As discussed in this section, "bias" refers to both "bias" and "prejudice." Personal bias is discussed in DISQUALIFICATION.

### **7-711. Manifestations of bias.**

Bias may be manifested either verbally or physically. Either can violate: NMRA 21-102, requiring a judge to avoid the appearance of impropriety and remain impartial; NMRA 21-202, requiring a judge to perform judicial duties fairly and impartially; NMRA 21-203, requiring a judge to perform judicial duties without bias or prejudice; or NMRA 21-208, relating to proper demeanor in the courtroom. Judicial integrity can be undermined by any indication that a judge is predisposed toward a party, a group, or a particular point of view.

### **7-712. Bias distinguished from opinion.**

Opinion, which is acceptable, should be distinguished from bias, which is unacceptable. "Proof that a Justice's mind. . . is a tabula rasa [blank slate] . . . would be evidence of lack of qualification, not lack of bias." *Laird v. Tatum*, 409 U.S. 824, 835 (1972).

**Notable examples.** Judge Rothman notes the following examples of bias revealed through demeanor:

- making prosecutorial recommendations
- giving a witness the raspberry
- passing a sympathetic note to a victim
- excessive examination of a witness
- inappropriately curtailing the examination of a witness
- disallowing cross-examination
- conducting investigation in a case
- entering judgment without giving opportunity for defense
- hometowning

- acting out of revenge
- using language that infers a defendant's guilt
- making inappropriate comments to the jury after the verdict. *Rothman, supra*, §110.500.

**7-720. Judicial Intervention.**

A judge is obliged to intervene if others make biased statements in the judge's presence, including staff and court officials under the judge's direction and control, as well as attorneys appearing before the judge. NMRA 21-203(B), (C); *see also* Handbook on Gender Bias in the Courts at 4.

The Judicial Standards Commission cautioned a judge who allegedly allowed parties to make disparaging remarks to other parties to: (1) perform judicial duties without bias or prejudice, (2) require lawyers to refrain from manifesting bias or prejudice, (3) admonish and not permit parties to gratuitously negatively stereotype in proceedings, and (4) maintain order and decorum in court proceedings. JSC 14-3I

**7-730. Race and culture.**

The Code expressly prohibits bias or prejudice in the performance of judicial duties.

A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice. NMRA 21-203(A).

NMRA 21-203(B) lists various categories in which bias or prejudice can arise in the judicial context.

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, religion, color, national origin, ethnicity, ancestry, sex, sexual orientation, gender identity, marital status, spousal affiliation, socioeconomic status, political affiliation, age, physical or mental handicap or serious medical condition; . . . NMRA 21-203(B).

It further requires judges to require court staff and lawyers to comply with the same standards. NMRA 21-203(B), (C).

The Code recognizes that the listed factors may be relevant to an issue in a case and permits legitimate reference to them under such circumstances. NMRA 21-203(D).

The Code commentary lists examples of manifestations of bias and prejudice: epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based on stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. NMRA 21-203, Cmt 2.

The Code commentary also warns judges against "[f]acial expressions and body language, in addition to oral communication," that can give an appearance of bias or prejudice and advises that a "judge must avoid conduct that may reasonably be perceived as prejudiced or biased." NMRA 21-203, Cmt. 2.

The Code explicitly instructs judges to “require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including, but not limited to, race, religion, color, national origin, ethnicity, ancestry, sex, sexual orientation, gender identity, marital status, spousal affiliation, socioeconomic status, political affiliation, age, physical or mental handicap or serious medical condition, against parties, witnesses, lawyers, or others.” NMRA 21-203(C). This does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

Racial slurs are improper in and of themselves, irrespective of whether the bias is reflected in the judge's decision. It is also irrelevant that the comments are made outside the courtroom.

After a judge was alleged to have allowed defendants to make disparaging comments to a plaintiff, the Judicial Standards Commission cautioned the judge to avoid bias and prejudice in judicial duties, to require lawyers appearing before the judge to do the same, to maintain order and decorum, and to prohibit litigants from using gratuitous negative stereotyping without admonition. JSC 14-3I.

A California judge's repeated use of racial slurs violated the code even though most of the remarks were made during in-chamber conferences and not in open court. *In re Stevens*, 645 P. 2d 99, 100 (Cal. 1982).

The Judicial Standards Commission petitioned the Supreme Court to remove a magistrate judge for numerous alleged acts of misconduct in office, including cursing in court offices, use of alcohol during court and other official proceedings, abuse of court staff, making racially-biased references about court staff, and public derision of the chief judge. *In re Angie Vigil-Perez*, JSC 00-3F.

A Texas judge was publicly reprimanded and ordered to obtain additional judicial education for actions that included exclaiming in the presence of sheriff department personnel at a jail that a black inmate “needed to be hung by ‘a f\*\*ing noose around his neck.’” *Public Reprimand and Order of Additional Education, Honorable James Baldwin*, Texas Commission on Judicial Conduct, April 9, 2021.

Racially derogatory statements, whether motivated by actual bias or not, can easily be understood to erode public confidence in the impartiality of the judiciary. See Rule 21-203, Cmt. 1 (“A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.”)

A New York judge was censured for referring to a black person as “another n...er in the woodpile.” The remark was made at the sentencing hearing of two black defendants. The judge claimed he did not intend the statement as a racial slur, but as a “metaphor” not directed at the defendant. The reviewing court found that all racial slurs are indefensible because they are insulting and erode public confidence in the judiciary. *In re Agresta*, 476 N.E.2d 285, 286 (N.Y. 1985).

A Colorado judge was publicly censured for in part, using the N-word in conversation with a court employee who was black and angry and hurt by the conversation. *In re Chase*, 485 P.3d 99 (CO. 2021).

A judge's comments about ethnic origins, including his own, can also be undignified and discourteous.

A Florida judge was reprimanded for stating at a hearing, "Now, you can throw your Italian temper around in the bars but you don't throw it around in my courtroom. . . I'm just as Irish as you are Dago." *In re Carr*, 593 So. 2d 1044, 1045 (Fla. 1992).

Racial bias is treated as a serious problem by disciplinary authorities.

A magistrate judge resigned from office after being charged with numerous improprieties, including making inappropriate racial comments to an African American public defender about how the judge's former law firm sought to hire "token" black employees. *In the Matter of Robert W. Ionta*, JSC 23-1F.

A Wisconsin judge was suspended for acting in a blatantly disrespectful manner toward black litigants. During a review of probation status, the judge said "Seventy-five percent to eighty percent, Miss Harwich, of the people I see in court are born illegitimate and black and come from welfare families, and I pay for this courtroom and the staff and I am sick of it and so is the rest of Wisconsin." Even if the statements were true the judge failed to realize that individuals are not on trial as members of a race. *In re Gorenstein*, 434 N.W.2d 603, 604-5 (Wis. 1989).

A Wisconsin judge was suspended for judicial misconduct and mistreatment of litigants. After imposing sentence on a defendant, the judge told him that when he completed his sentence he should "get out of this town and go back to Puerto Rico. . . because you can't make it in a civilized community." *In re Seraphim*, 294 N.W. 2d 485, 498 (Wis. 1980).

A pattern of such conduct may result in removal from office.

A New York family court judge was removed from office for conduct including twice making racially-charged comments. This pattern of conduct created the appearance of an unfair system for litigants and damaged public confidence in the judiciary. *In re Esworthy*, 568 N.E. 2d 1195, 1196 (N.Y. 1991).

### **7-731. Social Media.**

A judge must at all times act in a manner that promotes public confidence in the integrity of the judiciary. NMRA 21-102.

A judge who manifests bias or prejudice, even outside of the performance of judicial duties, impairs the dignity of judicial office and raises issues of whether the judge can fairly and impartially decide cases that come before the judge.

Social media provides a platform for users to express and share views that can bear upon their biases or prejudices. A judge must avoid allowing the judge's use of social media, including posting or linking of material, to appear to impair the integrity or dignity of judicial office.

A magistrate judge resigned from office after the Judicial Standards Commission filed a petition alleging that the judge abused judicial internet policies by using court equipment to forward emails that were offensive, degrading, pornographic, racist, and sexist. *Matter of Henry T. Casteneda*, JSC 18-3F.

The Pennsylvania Court of Judicial Discipline fined a Supreme Court Justice \$50,000 after the Justice re-sent blasts from an attorney that contained pictures of nude women, sexually-suggestive themes, gender stereotypes, homophobic content, socioeconomic stereotypes, violence toward women, racial humor, ethnically-based humor, and stereotypes of religious groups. The court stated that the subject matter of the emails “could cause citizens to wonder whether their cases received unbiased consideration” by the Justice and that “[a] reasonable inference that . . . [the Justice] lacked the impartiality required of judges also fundamentally lessens public confidence in the judiciary.” *In re Eakin*, Pennsylvania Court of Judicial Discipline March 24, 2016).

A Texas judge was sanctioned for posting political comments on his Facebook page that included statements about Muslims and negative descriptions of “liberals.” The Texas Commission found that the judge's postings, “including a meme endorsing the extermination of Muslims and his statements regarding “liberals” cast reasonable doubt on his capacity to act impartially as a judge” and that his actions were “clearly inconsistent with the proper performance of his duties as a judge and cast public discredit upon the judiciary and administration of justice.” *In the Matter of Burkeen*, Texas State Commission on Judicial Conduct, February 21, 2018.

A Utah judge was sanctioned for a social media post concerning a presidential candidate. *In re Kwan*, 443 P. 3d 1228 (Utah 2019).

### **7-732. Discrimination Based on Sexual Orientation.**

A judge may not discriminate based on sexual orientation.

A judge may elect to perform legal marriage ceremonies. NMSA § 40-1-2(C) (2013). If the judge elects to do so, the judge must do so without bias or prejudice. See NMRA 21-203(A). The judge may not decline to perform a legal ceremony for same-sex couples. Nor may a judge who performs marriage ceremonies decline to perform a statutorily-permitted marriage ceremony for a minor unless the judge has a valid basis to believe that the marriage would be illegal or achieve an illegal purpose. AO 19-05.

When a Texas judge displayed a pride flag behind the bench along with the American and Texas flags “to encourage commemoration and community,” the Texas Special Court of Review held that it was improper government speech unprotected by the First Amendment that did not properly reflect the neutral,

impartial environment of the court. *In re Speedlin-González*, Texas Special Court of Review (January 30, 2023).

### **7-733. Club Membership.**

The Code prohibits a judge’s membership in discriminatory organizations – a ban on conduct outside of court.

A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, religion, color, national origin, ethnicity, ancestry, sex, sexual orientation, gender identity, marital status, spousal affiliation, socioeconomic status, political affiliation, age, physical or mental handicap, or serious medical condition. NMRA 21-306(A).

The commentary to this rule indicates that the judge must evaluate the current practices of the organization for signs that the organization arbitrarily excludes from membership persons of the listed categories. Rule 21-306, Cmt. 1. Membership in a religious organization as an exercise of the right to religious freedom is not prohibited. Rule 21-306, Cmt. 4. Member selection practices that lead to discrimination are suspect, but an organization "dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members" would be acceptable regardless of the composition of its membership. Similarly, a truly intimate, purely private organization may be allowed. Organizations that otherwise arbitrarily exclude persons based on race, religion, sex, or national origin are not acceptable.

A judge may not belong to a discriminatory organization; may not arrange meetings there; and may not use its facilities. A judge’s public involvement with such an organization “gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary.” Rule 21-306, Cmt. 1. A judge must immediately resign when learning that an organization of which the judge is a member engages in invidious discrimination. Rule 21-306, Cmt. 3.

### **7-740. Gender Bias.**

Gender bias is discrimination based on sexual stereotypes and culturally-defined gender roles. Judges must be proactive in ensuring that courts offer equal access and respect to men and women. These obligations apply to the judge's own relationships with parties, lawyers, and court personnel, as well as the relationships of court staff and lawyers with others. While the increasing numbers of women who have entered the bar and serve on the bench has probably reduced the frequency of incidents of discrimination, women still suffer from gender bias more frequently than men. Such incidents are more common in informal settings such as pretrial conferences and interactions with colleagues or opposing counsel.

The Code prohibits bias or prejudice based on sex and sexual harassment. Rule 21-203(B). The Code commentary defines sexual harassment “as verbal or physical conduct that denigrates or shows hostility or aversion toward a person” based on sex. Rule 21-203, Cmt. 3. Judges are also subject to the New Mexico Judicial Branch harassment policy. Rule 21-203, Cmt. 3.

Patronizing conduct by judges and lawyers affects the effectiveness of women as attorneys by decreasing the level of confidence in their skills. Insensitive treatment of female litigants may directly affect their legal rights. Sexual harassment of any type, including of court staff, is illegal as well as unethical. Judges must not only refrain from speech, gestures, or other conduct that could reasonably be perceived as sexual

harassment; they must also require the same standard of conduct of others subject to the judge’s direction and control.

**7-741. New Mexico Supreme Court policy.**

Since 2020, the Supreme Court has supported its commitment to eliminating “the deleterious effects of the poisons of prejudice, bias and racism” through its Commission on Equity and Justice. This commission has continued to implement its ambitious goals, encompassing areas from training and resource materials to rules changes and jury instructions promoting the elimination of bias in all its forms.

Regarding gender bias, the Court has long established policies forbidding such offensive conduct as:

- (1) addressing women attorneys in an unprofessional manner, either by first names or terms such as "girls," "sweetie," or "honey;"
- (2) commenting on the physical attributes or clothing of women attorneys; and
- (3) making gender-based jokes or comments concerning women attorneys.

Other areas of concern have included ensuring that:

- (1) awards of attorney fees should not be more or less favorable for attorneys based on their gender;
- (2) equal deference should be given to female expert witnesses;
- (3) courtroom documents should be worded in a gender-neutral manner.
- (4) employees should be informed about and asked to refrain from gender-biased conduct, and be admonished if it occurs; and
- (5) judges must strive to accord attorneys the same respect and credibility, regardless of sex.

**7-742. Examples of improper conduct.**

**7-742a. Terms of endearment.**

Excessively familiar forms of address, particularly to female attorneys, are highly improper and demeaning in a professional setting. Despite the attention such misconduct has received, recent examples have continued to emerge.

A probate judge resigned after being charged with conduct that included calling a prospective litigant “sweetheart,” admitting that he “always call[s] all women sweetheart” and “it is not uncommon” for him to do so. *In the Matter of Hon. Joe Horace Lucero*, S. Ct. No 34,131, JSC 13-9F.

A magistrate judge who referred to female attorneys using such terms as “little girl,” “kiddo,” “little sister,” and “missy,” was formally reprimanded, assigned a district judge mentor, and required to attend a training program on gender bias at his own expense. *In re Vincent*, S. Ct. No, 27, 266; JSC 02-5F.

An especially shocking example was the conduct of Ninth Circuit U.S. Court of Appeals Judge Alex Kozinski. Accusations against him, including showing pornography, came from his former clerks and staff, and his behavior toward female attorneys was especially overbearing. The judge retired from his position in 2017, after the Washington Post published an article detailing an investigation that had begun into his behavior. *In re Complaint of Jud. Misconduct (Kozinski)*,

Comm. On Jud. Misconduct and Disability of the Jud. Conf. of the United States, C.C.D. No. 18-01 (April 17, 2018); Geyh, §3.04 [2].

A California judge's misconduct included regularly addressing women as "sweetheart," "sweetie," and "baby" at the courthouse during business hours. *Kennick v. Comm'n on Judicial Performance*, 787 P.2d 591, 604 (Cal. 1990).

Others are subtle, such as addressing a female lawyer by her first name but calling a male attorney "Mister." The fact that the remark is inadvertent does not lessen the effect on the recipient, who must either let it go or confront the judge and risk prejudicing her client. Similarly, referring to a middle-aged female lawyer as "young lady," is not only unrealistic but patronizing. Lawyers appropriately are addressed in court as "counsel" or "counselor." Lawyers, parties and witnesses should be addressed by last name and appropriate title: "Miss," "Mrs.," or "Ms." First names should be avoided for adults in formal courtroom proceedings. Judges should be alert to similar remarks by opposing counsel when used to demean, and are required, under NMRA 21-203 (C), to intervene when they occur.

#### **7-742b. Comments about physical appearance.**

Commenting on physical appearance or dress calls special attention to gender and sets women apart from male colleagues. Such remarks directed to a female attorney can affect the attorney-client relationship by undermining an attorney's credibility if made in the presence of her client or the jury.

#### **7-742c. Offensive remarks.**

A judge was censured, placed on six months supervised probation, and otherwise disciplined by the Supreme Court for making offensive jokes and comments about women to attorneys. *In the Matter of Hon. Michael E. Martinez*, JSC 99-2F.

A magistrate judge who criticized a female attorney for serving as a public defender when her brother was a police officer, asking "How could your brother let you do this kind of work," and comparing her unfavorably to her predecessor, was formally reprimanded, assigned a district judge mentor, and required to attend a training program on gender bias at his own expense. *In re Arnold*, S. Ct. No. 27,266: JSC 02-5F.

A Michigan judge was suspended for actions that included "guessing women attorneys' heights and weights unbidden while eyeing them," in a post-trial conference. *In re Morrow*, 976 N.W.2d 644 (Mich. 2022).

#### **7-742d. By employees.**

A North Carolina judge was censured in part for allowing a court employee under his supervision to use in chambers "sexually explicit language and profane and suggestive language directed toward" the judge's law clerks. *In re Murphy*, 852 S.E.2d 599 (N.C. 2020).

#### **7-742e. Physical advances.**

Unwelcome sexual advances made by a judge, while acting in a judicial capacity, toward a lawyer or litigant are an unethical abuse of power. If directed toward an employee, such conduct is also grounds for a sexual harassment lawsuit.

The Supreme Court formally reprimanded and suspended a male municipal judge for conduct that included his improperly touching and sexually harassing the mayor, a woman, and telling the mayor that he would guarantee her 100 votes in her reelection if she did not pursue a complaint for the improper touching. The judge, whose prior conduct toward a woman led to an EEOC complaint and settlement against the city, was also disciplined for moving his chair close to the defendant and another woman during a hearing, making them uncomfortable, and touching the defendant. *In re Lozano*, S.Ct. No. 26,264 (June 8, 2020) (49 NM Bar Bulletin 20); JSC 14-5F.

A municipal court judge instructed a convicted traffic offender to pay installment fines directly to the judge instead of to the court clerk. When the last fine was paid, the judge, in his office, embraced and kissed the defendant. The judge resigned before the commission hearing. JSC 91-6I.

A Texas judge was reprimanded for texting the chief deputy clerk “Sometimes I have naughty thoughts about you! Do you want to know what they are about?” *Public Reprimand and Order of Additional Education, Honorable Clyde Howse*, Texas Commission on Judicial Conduct (October 4, 2023).

A West Virginia judge was publicly admonished for placing his hands on the hips of a court employee from behind and spanking her at a birthday celebration. The Commission rejected the judge’s claim that he was joking. *Public Admonishment of Charles C. Cole, Sr.*, Judicial Investigation of West Virginia, April 29, 2021.

A California appellate judge was removed from office for involvement with multiple women, including the unwanted touching of four women, conduct that would reasonably be perceived as sexual harassment of seven women at the court, misusing the prestige of judicial office by attempting to begin a relationship with three women, and improperly touching and making sexual comments to a judicial colleague. *Inquiry Concerning Johnson*, 9 Cal. 5<sup>th</sup> CJP Supp. 1 (June 2020); California Commission on Judicial Performance, June 2, 2020.

#### **7-742f. Disparagement.**

The "putting down" of women litigants and attorneys by male judges indicates a lack of impartiality. When directed toward litigants, disparaging comments can be devastating, both personally and legally, particularly for victims of domestic violence or rape.

A magistrate judge who referred to a female judge on the same bench as “that stupid woman” was formally reprimanded, assigned a district judge mentor, and required to attend a training program on gender bias at his own expense. JSC 02-5F.

A North Carolina judge was censured for improper treatment of a female victim of domestic violence. He humiliated the witness by counseling her to reconcile with her husband and stated that failure to do so would ruin her children's lives and that she deserved to be hit. The judge also polled the spectators about the frequency of marital spats. *In re Greene*, 403 S.E.2d 257, 260 (N.C. 1991).

A Kansas judge was suspended in part for referring to women by profane terms. *In re Cullins*, 481 P.3d 774 (Kan, 2021).

Gender-based stereotypes can also directly affect the outcome of cases if, for example, a judge discredits or harasses female witnesses or trivializes legitimate legal claims brought by women.

A Pennsylvania judge harassed a female witness and would not let her continue to testify. *In re Morrow*, 583 A.2d 816, 817 (Pa. Super. Ct. 1990).

A California judge was censured for cutting off testimony of a witness in a child neglect hearing and telling the mother he didn't believe a word she had said. *Roberts v. Comm'n on Judicial Performance*, 661 P.2d 1064, 1066 (Cal. 1983).

Negative comments about female lawyers, such as "this pleading must have been prepared by a woman," whether or not made directly to a particular lawyer, indicate that all female attorneys are at a disadvantage in that judge's courtroom.

### **7-743. Sexual harassment.**

Sexual harassment is illegal as well as unethical. A judge who engages in prohibited conduct toward an employee of the court can be liable for damages, as well as be subject to disciplinary charges of ethical misconduct. Judges are also responsible for intervening if other court employees, such as bailiffs, engage in such conduct. See NMRA 21-203(A) ("A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code.").

#### **7-743a. Definition.**

Sexual harassment is unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. NMRA 21-203, Cmt. 4. In the employment setting, it occurs when:

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- (2) submission to or rejection of such conduct is used as the basis for employment decisions affecting such individual; or
- (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R. §1604.11(a).

The conduct must be both subjectively and objectively abusive. *Harris v. Forklift Sys.*, 510 U.S. 17 (1993).

#### **7-743b. Prohibited conduct.**

Sexually harassing conduct includes sexual propositions, touching, insulting sounds, comments about the body, sexually degrading jokes, cartoons, pin-ups, and suggestions that employment is conditioned on sexual favors.

A California appellate judge was removed from office for misconduct that included touching and propositioning a judicial colleague and court employees and that "would reasonably be perceived

as sexual harassment” as prohibited by the California rules. *Inquiry Concerning Johnson*, 9 Cal. 5<sup>th</sup> CJP Supp. 1 (June 2020); California Commission on Judicial Performance, June 2, 2020

A Kansas judge was publicly censured for having exacted and demanded sexual favors as a condition of employment. The judge had sexual relations in chambers with a female employee and demanded sex from another employee, who had refused. The judge fired both employees. *In re Hammond*, 585 P.2d 1066 (Kan. 1978).

A judge was removed from office for sexually harassing and intimidating women. He had touched employees and attorneys without consent, and made offensive comments to them. He engaged in blatantly improper sexual behavior toward women, in public and in the courtroom, such as winking at and kissing an attorney in open court and referring to his physical attraction to certain female attorneys. There was no justifiable excuse for his conduct, including "insecurity," "sense of humor" or "social maladjustment." *In re Deming*, 736 P.2d 639, 654-57 (Wash. 1987).

A Michigan judge was publicly reprimanded and suspended for six months for a pattern and practice of sexually harassing his judicial secretary for a period of three years. *In re Iddings*, 897 N.W.2d 169 (Mich. 2017).

Judge Alex Kozinski of the Ninth Circuit United States Court of Appeals resigned from office amid allegations and investigation of sexual harassment involving showing law clerks internet pornography. *In re Complaint of Jud. Misconduct (Kozinski)*, Comm. On Jud. Misconduct and Disability of the Jud. Conf. of the United States, C.C.D. No. 18-01 (April 17, 2018)

Sexual harassment is not limited to actions by male judges.

The Supreme Court removed magistrate judge, a woman, from office after misconduct that included disregarding orders of her presiding judge and, when the presiding judge informed her that court staff reported that she was recording conversations with him, lifting her shirt to reveal her undergarments and asking the presiding judge if he wanted to pat her down. *In the Matter of Connie Lee Johnston*, S. Ct. No. 35,625, JSC 18-1F.

#### **7-750. Religious affiliation.**

See discussion of NMRA 21-203 above.

A judge may not demonstrate bias for or prejudice against a particular religious group based on an extrajudicial source.

A Pennsylvania judge favored persons appearing before him based on their religious beliefs. He left the bench and physically embraced defendants as "brothers in Christ." *Judicial Inquiry & Review Board v. Fink*, 532 A.2d 358, 368 (Pa. 1987).

But religious affiliation alone does not disqualify a judge.

"When a suit is brought challenging the erection of the Nativity scene in a city hall at Christmas, who shall hear it? Must a Jewish judge recuse himself or herself? If so, must not a Christian judge?" *Menora v. Illinois High School Ass'n*, 527 F. Supp. 632, 634 (N.D. Ill. 1981).

**7-800. Substance abuse**

Substance abuse by a judge directly violates NMRA 21-100 and 21-200, and usually interferes with the judge's administrative abilities. A judge should observe complete sobriety while conducting court business.

An Ohio judge received a public reprimand for carrying out his judicial duties in an intoxicated state. He had regularly appeared in court late as a result of overindulgence in alcohol, and demeaned himself and members of the bar association by presiding over court in an intoxicated state. *Stark County Bar Ass'n. v. Weber*, 190 N.E. 2d 918, 918-19 (Ohio 1963).

A judge was removed from the bench for use of cocaine and for evading order by Judicial Standards Commission to submit to drug testing. *Matter of Hon. Carlos Garza*, 2007-NMSC-028.

Consumption of illegal drugs is a direct violation of a judge's obligation to respect and comply with the law.

A judge who observes another judge acting in a judicial capacity while impaired has the obligation to report the impaired judge to the Judicial Standards Commission. See NMRA Rule 21-215(A) ("A judge who knows that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the Judicial Standards Commission.").

**7-900. Related Topics**

EXERCISE OF JUDICIAL POWER  
DISQUALIFICATION

## ADMINISTRATIVE DUTIES

### 8-100. Checklist

#### 1. Diligence

- Keep regular hours.
- Keep track of cases subject to dismissal under the six-month rule.
- Rule promptly.
- Monitor cases taken under advisement.
- Give highest priority to your judicial duties.

#### 2. Personnel

- Explain the standards of appropriate conduct clearly to court staff.
- Be alert to instances of inappropriate behavior and intervene promptly.
- Do not ask or permit your staff to do personal favors for you as part of their employment.
- Do not ask your staff to perform judicial responsibilities.

#### 3. Financial

- Regularly review your court's receipts and expenditures.
- Screen prospective employees for trustworthiness.
- Make sure more than one person handles court funds.
- Require employees who handle money to take vacations.
- Train your employees properly.
- Do not handle money yourself.

#### 4. Reporting requirements

- Conform to AOC or municipal regulatory requirements.
- Ensure compliance with statutory requirements such as transmittal of MVD abstracts.
- Be alert to ethical violations of others and report as appropriate.

#### 5. Power of appointment

- Ensure that appointments are based on the competence of the appointee.

### 8-200. Applicable Law

NMRA 21-205, 21-212 through 21-216; and 25-101 through 104.

NMSA 1978 §§34-13-1 and -2

### 8-300. Introduction: Administrative diligence requirement

Judges must manage their courts as well as decide cases. A judge is responsible for the efficient administration of justice in the court, to save costs and preserve public trust. This involves case management--including the prompt disposition of cases, recordkeeping, management of funds, and supervision of personnel. A judge must also initiate disciplinary action in some instances, and exercise the court's authority to appoint lawyers and personnel fairly and on the basis of merit.

NMRA 21-205:

- A. A judge shall perform judicial and administrative duties competently and diligently.

B. A judge shall cooperate with other judges and court officials in the administration of court business.

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 take reasonable measures to ensure that court officials, litigants and their lawyers cooperate with the judge to that end. The business of the court is a full-time demand (at least for full-time judicial positions). NMRA 21-205, Cmt. 3.

In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor or supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. NMRA 21-205, Cmt. 4.

A magistrate failed to perform his duties by (a) accepting partial payment of fines contrary to Supreme Court memorandum; (b) keeping money received from defendants in court files; (c) delaying the issuance of final orders in civil cases; (d) taking criminal misdemeanor cases under advisement for excessive periods of time, thereby preventing preparation of DMV abstracts; (e) failing to properly administer a traffic citation tickler system (f) disposing of cases without properly recording his decisions, and (g) failing to properly perform his administrative duties. The Supreme Court suspended the judge for 2 months, ordered 1 year of probation, and required him to participate in judicial training. *Matter of Hon. Ignacio Garcia*, JSC 89-2F.

Municipal judge entered into stipulated agreement, and successfully completed remedial training and mentorship, for ethical violations. JSC report noted that violations included unspecified administrative violations characterized generally as: mismanagement of public funds, failure to submit abstracts of record to MVD, failure to ensure bench warrants were properly cleared, inaccurate reporting procedures for fines, failure to exercise judicial responsibilities, and failure to supervise. *Matter of Hon. Sharon C. Torres*, JSC 16-3F.

### **8-310: Compliance with statutory administrative requirements.**

A probate judge who repeatedly conducted court from his business in his home community, rather than from the county seat as required by statute, and despite repeated instructions to comply with that statute, ultimately resigned from office. *Matter of Marlo Martinez*, JSC 20-4F.

### **8-400. Issues relating to diligence**

#### **8-410. Delay in deciding cases.**

The most common complaints about judges arise when they are perceived as taking too long to decide cases. Geyh, *supra*, § 6.02[1] at 6-3.

A judge shall dispose of all judicial matters promptly, efficiently, and fairly. NMRA 21-205, Cmts. 3--4.

This section of the Code creates a duty to establish and maintain an adequate case management system. In a criminal case, if a judge delays bringing the case to trial, it can be dismissed under the applicable six-

month rule. *See, e.g.,* NMRA 6-506. Once the case is heard, additional unreasonable delay in reaching a decision not only is frustrating and detrimental to the parties but also undermines the credibility of the judiciary. Reasonable delays, however, are acceptable to ensure protection of defendants' constitutional rights.

#### **8-411. Supervising judges.**

Judges who supervise other judges are required "to take reasonable measures" to assure the prompt disposition of pending matters. NMRA 21-212 (B) and Cmt. 2.

#### **8-412. Unsuccessful excuses.**

The fact that the judge delayed out of good intentions generally does not excuse the delay.

A Missouri judge delayed a decision in a probate case for four years in the hope the case would settle. The judge said he wanted to avoid disrupting the relationship between the aunt and the niece concerned. *In re Kohn*, 568 S.W. 2d 255, 260-61 (Mo. 1978).

A North Dakota judge delayed judgment in small claims cases to accommodate informal case disposition procedures. He was disciplined although he was motivated by a "strong sense of morals and a gentle heart." *In re Cieminski*, 326 N.W. 2d 883, 888 (N.D. 1982).

The Maine Supreme Court publicly reprimanded a judge for delaying a decision in a probate case for seven years, believing he was fulfilling an obligation to the testator, and in a guardianship case for eighteen months. The judge mistakenly believed the delay was in the best interest of the parties, but the state Supreme Court found the judge had administered his "own personal brand of justice" that interfered with the parties' right to prompt disposition of their cases. *In re Barrett*, 512 A.2d 1030, 1034 (Me. 1986).

A heavy caseload usually is not a defense. In fact, the judge is ethically required to minimize the impact of delay on the most pressing cases. Filing inaccurate reports asserting the judge's timely disposition of cases only compounds the judge's impropriety.

A California judge was censured for failing to decide cases within the time limits set by court rule and the state constitution. The judge also executed required salary affidavits stating he had met the required time limits. *Mardikian v. Commission*, 709 P.2d 852, 857 (Cal. 1985).

A Wisconsin judge was reprimanded for persistently failing to perform judicial duties and decide cases within the required time limits, and repeatedly misrepresenting in administrative reports the filing dates of cases pending in his court. *In re Grady*, 348 N.W. 2d 559, 561-62 (Wis. 1984).

Family responsibilities are not an excuse.

A Delaware judge's chronic tardiness was not excused by heavy family responsibilities. She was the widowed mother of four children. The judge violated her obligation to diligently discharge administrative responsibilities and to set an appropriate standard for other court personnel. *In re Barrett*, 593 A.2d 529, 534 (Del. 1991).

**8-413. Pattern of delay.**

Ethical concerns arise when there is a pattern of delay.

The administrative diligence requirement is violated when a judge's record indicates a pattern of unreasonable delay or when a particular instance of delay so lacks legitimate justification that it is willful. *In re Kilburn*, 599 A.2d 1377, 1379 (Vt. 1991).

A judge was removed from office for conduct including failing to rule promptly in over forty cases and leaving matters pending for as long as fifty-nine months (one \$325 claim was pending for over six years). The judge either failed to schedule criminal cases or allowed cases to be continued whenever attorneys or defendants failed to appear, perpetuating delayed disposition of cases. *In re Lenney*, 522 N.E. 2d 38, 39 (N.Y. 1988).

An Arizona judge allowed excessive delays in numerous cases over a significant time period. The judge's repeated failure to adhere to the statutory time limit for disposing of cases constituted misconduct that was prejudicial to the administration of justice and brought the office into disrepute. *In re Weeks*, 658 P.2d 174, 177 (Ariz. 1983).

New Mexico's judges are not immune from these problems.

The JSC has investigated complaints of unreasonable delay on the part of certain judges, including neglecting to set trial dates, taking an inordinate amount of time to render a judgment after trial, and being dilatory in completing the business of the court, in violation of current rules NMRA 21-205 and 21-212. The Commission took note of large caseloads assigned to judges and crowded calendars, concluding that such delays are inconsistent with requirements of that rule and do not promote public confidence in the integrity of the judiciary. Two district judges and one magistrate were privately admonished. JSC 86-2, 3, and 4.

A district court judge was admonished for delaying a decision in a case for an inordinate amount of time. This conduct brings the judiciary into disrepute. JSC 88-8I.

A district court judge was admonished for not diligently rendering decisions in cases involving appeals by the Motor Vehicle Division. The judge had left cases undecided for at least a year. JSC 93-8I.

Statutes and court rules may set various time limits for the completion of judicial responsibilities. It is important for judges to be aware of and to comply with any such requirements as apply to them.

**8-420. Keeping hours.**

A judge's irregular or nonexistent hours contribute to delay and create a negative impression of the courts.

Judges, including municipal judges and especially part-time judges, usually have considerable discretion in setting their hours; the hours must be reasonable and the judge must adhere to them. *Mowrer v. Rusk*, 95 N.M. 48, 618 P.2d 886 (1980) (explaining that the judge, not the municipal authorities, sets the hours of the court). Judges need to ensure that absence and tardiness are minimized.

According to the commentary to NMRA 21-205, Cmt. 3: “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 take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end. The business of the court is a full-time demand. A judge’s extrajudicial activities should not unreasonably interfere with the administration of justice and the timely performance of judicial duties.”

A district judge was removed from office, among other reasons, for "working very little" and for having "deliberately failed to devote to the court the number of hours required of a district judge." *In re Castellano*, 1995-NMSC-007, ¶25.

A judge stipulated, among other things, that he was “chronically late for the business of the court, to the detriment of defendants, complainants, witnesses and attorneys.” Judge was barred from seeking further judicial office. *Matter of Stephen G. Ryan, Esq.*, JSC 13-3F.

Magistrate judge retired after facing numerous charges, including her failure to work the hours required by statute and by her judicial supervisors. She also failed to provide required doctor’s letters to support her absences or to obtain presiding judge’s approval for absences. *Matter of Hon. Wilma Charley*, JSC 12-7F.

If the activity causing the absence is undertaken for personal gain, the absence is unjustified even if the activity itself would be allowed if it occurred outside of the court's business hours.

A judge's misconduct included conducting personal business on court time. The judge personally supervised operations at a development project in which he held a financial interest during regular court hours, averaging only three hours per day at the courthouse. *In re Troy*, 306 N.E. 2d 203, 232-33 (Mass. 1973).

Gross indifference to maintaining regular hours can amount to willful misconduct and removal from office.

A municipal judge was found to have engaged in willful misconduct in office for her refusal to be available for court at scheduled time and refusal to hold court for a period of four months. The judge had agreed to hold court two days a week from 8-12 as a condition of her reinstatement, but then informed police officers that unless they presented their citations before 9 a.m. she would dismiss them. For this conduct, which violated [NMRA 21-205,] and other violations, the judge was removed from office and her pay forfeited. *Matter of Berna Garcia*, JSC 88-F4.

## **8-500. Management of court staff**

### **8-510. Supervision of court personnel.**

A judge shall require court staff, court officials, and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under this Code. NMRA 21-212 (A).

The administrative diligence requirement of NMRA 21-205 also applies to court staff. As stated in comment #1 to NMRA 21-212, “A judge is responsible for his or her own conduct and for the conduct of others, such as staff, when those persons are acting at the judge’s direction and control.”

The Judicial Standards Commission cautioned a judge, whose administrative assistant had not brought requests for hearings to the judge’s attention, to ensure that the assistant do so in the future. JSC 99-31.

District judge was charged with misconduct, mostly involving his relationship at work with his wife, an employee at his court. Allegations concerned the judge’s tolerance of her use of office time and equipment for personal purposes; disclosing confidential reports to her; disrespectful, even hateful, comments made by both the judge and his wife against her supervisors (even to point of discussing violence against them); and the judge’s interference with the court’s supervision of his wife. They also allegedly talked about having sex in the office during workdays. Many, but not all, of the allegations were admitted by the judge in a stipulation, which included his permanent resignation from this and any other judicial office. *Matter of Hon. Eugenio S. Mathis*, JSC 13-8F.

Municipal judge falsely altered his clerk’s timecard to certify that she worked five hours during which time she was actually taking vacation. She improperly received overtime pay as a result. The judge stipulated to his misconduct and retired. *Matter of Hon. Frederick Arnold*, JSC 13-12F.

A probate judge was suspended for failing to dispose of cases, largely because he did not instruct court personnel to ensure that matters did not become delinquent. *In re Van Susteren*, 348 N.W. 2d 579, 580-81 (Wis. 1984).

A judge's general failure to perform his duties promptly and to organize his court and supervise his staff so that business could be promptly dispatched constituted misconduct under the code. *In re Grady*, 348 N.W. 2d 559, 570 (Wis. 1984).

The judge must be able to control the conduct of staff who, along with the judge, set the tone for the operation of the court. What is improper for the judge is also improper for staff. Staff attorneys may not accept favors not permitted to the judge.

A justice of the Texas Supreme Court was publicly admonished because two of his staff attorneys had accepted a free weekend trip to Las Vegas from a member of a law firm that had cases pending before the court. The judge violated the Code by failing to instruct staff that they were required to observe same standards as applied to him. *9 Jud. Conduct Rptr. 1 (1987)*.

Staff must maintain appropriate demeanor in dealing with the public. Judges should be alert to reports of rude and discourteous behavior by court staff. And court personnel should not be permitted to take advantage of their association with the court for personal gain, such as in a political campaign. These and other rules, embodied in the Judicial Branch Employees’ Code of Conduct, are overseen by presiding judges.

**8-520. New Mexico Judicial Branch Code of Conduct for Judicial Employees**

The Code of Conduct for Judicial Employees adopted in 2010 by the New Mexico Supreme Court creates standards of conduct for judicial employees, including court clerks, bailiffs, secretaries and court administrators. The following discussion briefly paraphrases the rules, which may be found in their entirety at <https://humanresources.nmcourts.gov>. Select *NM Judicial Branch Personnel Rules and Policies*, and then *NMJB Code of Conduct*. These rules, comprising five canons, require the following of court personnel.

**Canon 1: Uphold the integrity and independence of the judicial branch**

This canon calls upon court personnel to exhibit attitudes and habits that will maintain public confidence in the courts, especially honesty and truthfulness.

**Canon 2: Avoid impropriety and the appearance of impropriety in all their activities for the judicial branch**

This canon calls for compliance with the law by court personnel, including: never to seek or accept gifts or favors to influence their official actions; nor to use their positions within the judicial branch for influence or secure privileges; nor to help family members obtain positions in the judiciary or to improperly use the resources of their office.

**Canon 3: Perform duties impartially and diligently, professionally and without favoritism.**

Neither family nor personal relationships may influence the actions of court personnel; nor may political considerations or fear of public opinion. Bias and prejudice must not play into their actions nor be expressed. Information and records must be accurately maintained, and produced as required by law, except where required to be confidential. Explanations of standard court procedures should be provided to the public when requested, but not legal advice or referrals to individual attorneys. And staff must meet their educational and licensing requirements where applicable. Clerks may not communicate disallowable information to judges about pending cases, including comments from others; and must report misconduct (except for minor infractions) by court personnel, including judges, to applicable supervisors, without fear of reprisals.

**Canon 4: Be sure outside activities minimize conflicts with court staff roles**

These include outside employment or business activities, which must be disclosed and approved by supervisors, as well as unpaid activity. Conflicts to be avoided include activity that could compromise the employee's financial, time, or resource commitments to the court. Potential conflicts should be disclosed to supervisors and, if necessary to prevent conflicts, the employee should withdraw from such activity.

**Canon 5: Avoid political conflicts.**

While employees of the court are encouraged to enjoy their constitutional right to vote, political activity may only be performed on their personal time, and without reference to or use of resources of their courts. Unless restricted by the federal Hatch Act (applicable only to federally funded employees), court personnel may run for office, including partisan positions, so long as their judicial impartiality is not compromised.

More details on the requirements of all these canons are provided in Section 7 of the NM Judicial Branch Personnel Rules and Policies.

**8-530. Misuse of staff.**

A judge's use of judicial staff inappropriately is an abuse of judicial authority that places the employee in a no-win situation. Judges have been disciplined for abusing their authority by requiring staff to perform personal services. . .

A state Supreme Court justice was admonished for requiring his secretary to baby-sit his child after working hours as a condition of employment and firing her when she said she could not continue. A judge should not require extensive personal services from staff. *In the Matter of Neely*, 364 S.E.2d 250, 253-54 (W. Va. 1987).

. . .or other non-court-related functions for the judge's benefit, either financial. . .

A judge required a court officer to operate a bulldozer for a project in which the judge had an interest. The work was done during court hours and the officer did not receive additional compensation for the work. *In re Troy*, 306 N.E.2d 203, 220 (Mass. 1973).

. . . or political.

A Missouri judge improperly had his employees type political correspondence and make political telephone calls in the course of their official duties. *In re Briggs*, 595 S.W.2d 270, 276 (Mo. 1980).

It is improper for a judge to direct court personnel to perform court-related duties that violate the Code.

After a probate judge allegedly had clerk shred a filed will and replace it with another one, judge further asked the clerk to lie in testimony under oath that he had not done so, which she refused. After an evidentiary hearing by the JSC, the Supreme Court removed him from office. *Matter of Hon. Bret Dillon*, JSC 13-6F.

**8-540. Improper delegation of judicial duties.**

A judge may not delegate to staff those responsibilities requiring the exercise of judicial discretion or the ultimate exercise of judicial authority.

Municipal judge, among other violations, telephoned clerk to sign a judgment and sentence form, resulting in defendant's arrest; and ordered a document to be backdated. Judge resigned. *Matter of Hon. Jeff Aragon*, JSC 13-7F.

A judge accepted a plea agreement and allegedly signed the plea paperwork without ensuring it accurately reflected the terms and the charge. Additionally, the judge allegedly failed to provide oversight and guidance to court staff to ensure that the appropriate documents were filed and inappropriate documents were not filed. JSC 16-4I.

It is improper for a judge to delegate to a clerk the performance of marriage ceremonies. *In re Perea*, 1986-NMSC-001.

A Mississippi judge was fined and reprimanded for egregious delegation of authority, including dismissing traffic offenses at the request of persons with no prosecutorial authority, and allowing clerks and highway patrol officers to adjudicate traffic cases. *In re Seal*, 585 So. 2d 741, 744-45 (Miss. 1991).

A California judge deprived defendants of their rights at the sentencing phase by allowing his bailiff to propose sentences. Even in cases where the judge did not take the bailiff's advice, there was an appearance of impropriety. *McCartney v. Comm'n on Judicial Qualifications*, 526 P.2d 268, 282 (Cal. 1974).

Under no circumstances should a judge improperly delegate the signature of forms to unauthorized persons, or sign them in advance.

A judge had signed blank arrest warrants and there was improper handling of warrants from a clerical standpoint. He was cautioned to exercise great care in the issuance of warrants and ensure that staff did likewise. JSC 85-2I.

Municipal judge had bench warrants signed by another person who was not an alternate judge. *Matter of Hon. Roland Madrid*, JSC 14-7F.

A West Virginia magistrate was reprimanded for signing blank arrest warrants and jail commitment release forms in violation of established procedures. *In re Eplin*, 410 S.E. 2d 273, 274 (W. Va. 1991).

### **8-600. Financial Management**

The administrative diligence requirement applies to the management of fines and fees collected by the court. Specific requirements are set by the Administrative Office of the Courts. These requirements are strictly adhered to because courts have a fiduciary duty to the public to account for funds received and processed by the courts.

Outright misappropriation of funds is a criminal offense. Even if there is no criminal conduct, however, judges have been disciplined for failing to follow proper financial procedures. Disciplinary authorities generally are not swayed by judges' pleas of ignorance or lack of sophistication.

A municipal judge stipulated to, among other things, incorrect performance of administrative duties. The specific acts and conduct leading to the charges fell into several categories, including: mismanagement of public funds, failure to submit abstracts of record to MVD, failure to ensure bench warrants were properly cleared; inaccurate reporting procedures for fines; failure to exercise judicial responsibilities; and failure to supervise. The judge consented to discipline. *Matter of Hon. Sharon C. Torres*, JSC 16-3F.

### **8-610. Duty to collect.**

The courts have a statutory duty to collect, deposit and report fines and lawful fees.

Most court fees charged upon convictions of certain crimes have been eliminated by the state legislature in Laws 2023, Chapter 184. Fees applicable to cases adjudicated prior to the effective date of the repeal,

mostly July 1, 2024, must still be collected. Fees continue to be collected to pay for certain court processes, such as filing fees in civil cases, and direct services such as providing copies. Certain fees imposed by local governments may also remain in effect.

#### **8-620. Payments to judge.**

Judges should never personally accept payment of fines and fees directly from a party, as such payments appear improper even when they are legitimate. Payments should be made only to the court clerk or other designated administrative staff, especially when made in cash. If the judge must accept funds, as when there is no clerk available, a photocopy of the payment and receipt, signed by the judge, should be issued to the payor and a copy retained for the court's records. But alternative methods for accepting payment should be arranged whenever possible.

#### **8-630. Timely deposit of funds.**

Funds received by the court should be deposited promptly in authorized accounts.

A municipal judge failed to deposit funds received from fines and fees or to file required monthly reports with the municipality for several *years*, which was a misdemeanor. Bond monies given to the court were also not deposited. The judge agreed to permanently resign. *Matter of Hon. Roland Madrid*, JSC 14-7F.

A New York judge was barred from further judicial office for financial mismanagement, including failing to follow required procedures regarding timely deposit of monies received in a judicial capacity. Even though the judge did not personally benefit, such conduct was a breach of the public trust. *Bartlett v. Flynn*, 378 N.Y.S.2d 145, 148 (1976).

#### **8-640. Documenting and segregating funds.**

All monies received by the court must be documented, allocated to the proper fund and accounted for. Standard accounting procedures should be followed. Strict accounting should be maintained for each kind of fee, to avoid commingling with other public funds.

A New York judge was barred from further judicial office for financial mismanagement, including the fact that substantial monies collected by the town court were commingled with village funds, and vice versa. *Bartlett v. Flynn*, 378 N.Y.S.2d 145, 147 (S. Ct. App. Div. 1976).

Public funds must never be commingled with personal funds.

A probate Judge, who also worked for the office of medical investigator (OMI), investigated a death in her capacity as OMI staff. As probate judge, she claimed that there were no next of kin. She therefore identified her own husband as next of kin to the deceased, appointing him as administrator of the estate. Actual family members of the deceased were not notified, only learning of the death later through other sources. Meanwhile, as administrator, the judge's husband transferred all of the decedent's funds, comprising nearly \$200,000, into his joint account with his wife.

Critical documents, including the petition for appointment, were entered in the court file under suspicious circumstances, with significant evidence indicating later addition and alteration of

important documents. Faced with this and other evidence of misconduct, the judge resigned. *Matter of Hon. Pamela D. Smith*, JSC 18-2F.

A Michigan judge was suspended from office for one year for failing to maintain a separate account while serving as justice of the peace, resulting in the commingling of personal and public funds. *Lavan v. State Bar*, 186 N.W.2d 331, 332 (Mich. 1971).

#### **8-650. Embezzlement.**

The Administrative Office of the Courts assigns audit staff to investigate the financial management of the state courts. To prevent misappropriation of funds by court employees, a court's internal procedures should make it impossible for a single person to have complete administrative authority over receipts and expenditures.

After alleged embezzlement of a private client's workers' compensation funds and non-cooperation with the judicial standards commission investigation, a municipal judge permanently resigned. *In the Matter of Hon. Luis Quintana*, JSC 16-8F.

#### **8-660. Dishonest expense claims**

Judges who claim expense reimbursements to which they are not entitled violate the public trust.

Municipal court judge who claimed expenses for traveling to a meeting despite having learned that it would not occur was reprimanded and suspended without pay for 90 days. *In the Matter of Javier Lozano*, No. 29,264 S. Ct. (June 8, 2010), JSC 12-1F.

#### **8-700. Recordkeeping, case management and reporting**

The judge is responsible for the accuracy and security of court records, financial and otherwise. Dockets must be kept current. Public inspection of court files must be permitted in accordance with the Inspection of Public Records Act, NMSA §14-2-1.

A municipal court judge was admonished for failure to properly instruct court clerks to allow public access to court files. JSC 88-7I.

Courts also are subject to certain statutory reporting requirements. For example, the courts must transmit to the Motor Vehicle Division abstracts reporting the disposition of traffic offenses. The statute provides that failure of a judicial officer to do so is misconduct in office and grounds for removal. NMSA §66-8-135.

Among many other administrative violations, a municipal judge failed to submit to the Motor Vehicle Division many abstracts of traffic cases, as well as omitting required information on many others that he did submit. *Matter of Hon. Roland Madrid*, JSC 14-7F.

#### **8-800. Reporting of other professional personnel**

A judge can be disciplined for failure to inform the appropriate disciplinary authorities if judges or attorneys engage in misconduct. The Code requires judges to ensure others in the judicial system uphold the integrity, independence and impartiality of the judiciary.

NMRA 21-215. Responding to judicial and lawyer misconduct.

- A. A judge who knows that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the Judicial Standards Commission.
- B. A judge who knows that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Disciplinary Board.
- C. A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.
- D. A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

**8-810. Persons to be reported.**

Judges are mandated by the Code of Conduct to report known misconduct by other judges or attorneys, if that conduct crosses the threshold of the rule. Misconduct is defined as violations of the applicable ethics code, by either judges or lawyers. If the known violation by another judge raising a substantial question that casts doubt on the fitness of the offender by calling their honesty or trustworthiness into question, then the judge who knows of the violation is mandated to report the violation to the Judicial Standards Commission. Attorneys who are known to have committed egregious misconduct must be reported to the Disciplinary Board of the State Bar Association. Loyalty to the public and to the preservation of the integrity of the legal system must outweigh friendship, respect or sympathy in such cases.

When the judge does not actually know of a violation, but has received information indicating a substantial likelihood of a violation of the applicable Code, the judge still has a duty to "take appropriate action." The commentary defines "appropriate action" to include direct communication with the offender and/or reporting the suspect conduct to the supervising judge or to the appropriate authority, agency or body. NMRA 21-215, Cmt. 2. Judicial misconduct may be reported to the Judicial Standards Commission, while the Disciplinary Board receives complaints of attorney misconduct. See RESOURCES.

The lawyers' Code of Professional Responsibility contains a complementary provision, requiring a lawyer who has knowledge of an ethical violation by a judge to inform the Judicial Standards Commission. NMRA 16-803(B).

The Judicial Standards Commission cautioned a judge to notify the Commission when the judge convicted another judge of a crime. JSC 99-4I.

**8-820. Reportable offenses.**

This is understandably a difficult area for judges, both because they must decide when a known or potential violation renders a colleague unfit, and because their determination may require them to act so as to throw the character and career of that colleague into doubt. Judges are encouraged to take appropriate action, when (1) the judge receives information indicating a "substantial likelihood" that another judge or lawyer has committed an ethical violation; (2) the judge learns of a violation that raises a substantial question about the other judge's fitness for office; or the (3) judge learns about a lawyer's violation that raises a substantial question about the lawyer's honesty or fitness. Such complaints to the Judicial Standards Commission are confidential and only become public upon order by the Supreme Court unsealing the matter. The record of a hearing on the merits becomes public upon filing with the Supreme Court. Art. VI

§ 32 of the New Mexico Constitution and Judicial Standards Commission Rules, Article I, JSC-6 and Article 7, JSC-37 (D).

Ultimately, a judge must make a difficult decision in determining whether the conduct in question should be reported. Considerations include:

1. the amount and quality of the judge's knowledge of the misconduct;
2. the seriousness of the offense; and
3. the possible remedial measures the judge can take to correct the problem.

#### **8-830. When substance abuse is indicated.**

NMRA 21-214 offers an alternative approach when the judge knows or suspects that the misconduct of the judge or attorney who is violating their ethical rules results from substance abuse or a mental, emotional or physical condition. Rule 21-214 also directs the judge to take appropriate action, but adds the option of a confidential referral to a support group recognized by the Judicial Standards Commission or Disciplinary Board, including the State Bar Lawyer's Assistance Committee. But that rule does not excuse from discipline a judge who possesses or deals in narcotics as designated under the provisions of the Controlled Substances Act, NMSA §30-31-6 (marijuana was removed from the list of controlled substances in 2021).

The comments to this rule indicate the intention to provide help to a judge or attorney in need of it, so long as the public interest in their justice system is protected. NMRA 21-214 Cmts. 1 and 2.

#### **8-900. Power of appointment**

Judges have authority to appoint people to compensated positions.

In doing so, judges are required to exercise the power of appointment impartially and on the basis of merit; avoid nepotism and favoritism; and avoid the appearance of impropriety. Judges are also prohibited from approving compensation of appointees beyond the fair value of services rendered. NMRA 21-213.

Appointees of the judge who are subject to these requirements include officials such as referees, receivers and guardians, as well as personnel such as clerks, secretaries and bailiffs. The judge's obligation under this rule is not waived by consent of the parties to the appointment. Commentary to NMRA 21-213.

One area of abuse is the appointment of attorneys in court proceedings, especially where there is the appearance of a *quid pro quo*.

A judge who appointed a former law partner as special master, with compensation far above the fair market value of the services, should have disclosed the past relationship, and the rate of compensation should be overseen to avoid excessive expense. JSC 13-11.

A California judge's misconduct included appointing two attorneys who were friends and political supporters to represent defendants in 27 criminal cases, bypassing the public defender's office and without determining indigency. *Spruance v. Comm'n on Judicial Qualifications*, 532 P.2d 1209, 1220-1223 (Cal. 1975).

A California judge appointed two attorneys who had contributed to the judge's campaign and one who owned property with the judge in a disproportionate number of criminal cases. *Kennick v. Comm'n on Judicial Performance*, 787 P.2d 591, 607-08 (Cal. 1990).

Hiring of court personnel also must be even-handed.

A judge was publicly censured for conduct, including employing as secretaries persons who had previously provided free services to the judge, before he had taken the bench. *In re Bonin*, 378 N.E.2d 669, 674 (Mass. 1978).

## **8-1000. Other administrative requirements**

### **8-1010. Administrative Office of the Courts.**

The Administrative Office of the Courts (AOC) is the administrative arm of the New Mexico Supreme Court. It supervises the administration of the courts, including management of cases and budgets. NMSA §§34-9-3 and 34-9-7. The manuals compiled by the AOC for use by the courts, after approval by the Supreme Court, carry the force of law. NMSA §34-9-8. A judge's failure to adhere to AOC requirements is, by definition, a breach of judicial responsibility and as such is subject to review as an ethical violation.

Magistrate courts operate under the direction and control of the Supreme Court and the district court of the district in which the court is located, with the district courts providing administrative support.

### **8-1020. New Mexico Municipal League.**

The New Mexico Municipal League is a nonprofit, nonpartisan association representing New Mexico's towns and cities. One of its subsections is the New Mexico Municipal Judges' Association, which assists in training municipal judges. While the League has no legal authority over municipal judges, its staff is available to assist judges in performing their duties.

### **8-1025. New Mexico Counties.**

This organization performs similar services for probate judges as the Municipal League does for municipal judges.

### **8-1030. Americans With Disabilities Act (ADA).**

The ADA applies to the courts. Because of its requirements to make public services accessible to persons with disabilities:

1. The courtroom must be accessible.
2. The court must provide a sign language interpreter if requested.
3. Hiring and other personnel decisions by the judiciary must comply with the ADA.

### **8-1040. Recording of judicial proceedings.**

Although the rules on judicial conduct no longer refer to permissible uses of media in the courtroom, other Supreme Court rules address such procedures. NMRA 23-107 permits broadcasting from all state courts if safeguards are in place to ensure that media coverage does not detract from the dignity of the proceedings or interfere with the attainment of a fair and impartial hearing.

**8-1050. Judicial Education requirement****8-1051. Court Education Institute.**

Judicial education programs are provided through the Court Education Institute of the AOC, §34-13-2. (This division is frequently referred to as the Court Education Institute (CEI), in court publications.) The CEI provides education, training and instruction for the judges and court personnel of the state, municipalities and counties. It is funded through legislative appropriations. NMSA §34-13-1(C).

**8-1052. Limited jurisdiction judges: qualification for office.**

Each magistrate court judge, municipal court judge, and probate court judge shall qualify for office by attending a judicial qualification training course approved by the AOC. NMRA 25-102(A). Domestic violence special commissioners and domestic relations hearing officers are also required to attend the minimum number of hours prescribed by the AOC. NMRA 25-102(C).

**8-1053. Continuing education requirement.**

Every magistrate court judge (including every *pro tempore* magistrate), municipal court judge and probate court judge must attend annually an approved judicial education program for not less than the minimum number of continuing judicial education hours required by the AOC. NMRA 25-103(A).

The annual requirements may be satisfied for any calendar year by:

1. attending an annual training program conducted by the AOC or CEI;
  2. attending a minimum number of hours of continuing judicial education programs approved by the AOC;
- or
3. attending the initial judicial education program required by NMRA 25-102. NMRA 25-103(B).

**8-1054. Reporting requirement.**

Unless a certificate for the year has been issued previously by the AOC, on or before December 31 of each calendar year, each magistrate court judge, magistrate judge *pro tempore*, municipal court judge and probate court judge, as well as each domestic violence special commissioner and domestic relations hearing officer, shall certify to the AOC that the judge has attended approved continuing judicial education programs for not less than the minimum number of required hours. NMRA 25-103(C).

**8-1055. Failure to attend required training.**

The Supreme Court may suspend or remove any of the judicial officers for whom education is required if the judge fails to attend the initial judicial training or the required minimum number of annual judicial education hours. NMRA 25-104.

A magistrate judge who failed to attend the required training, either in person or by video, retired for that and other reasons. *Matter of Hon. Wilma Charley*, JSC 12-7F.

Magistrate judge failed to complete a mandated training on harassment, discrimination and retaliation prevention. (Several of the numerous other charges against this judge alleged his audible watching of pornography in his office during court hours.) *In the Matter of Robert W. Ionta*, JSC 23-1; Supreme Court Docket No. S-1-Sc-39121.

Among numerous violations, municipal judge failed to obtain required continuing judicial education credits for five years, signing in for one conference without attending all the sessions. Judge resigned office by stipulation. *Matter of Hon. Roland Madrid*, JSC 14-7F.

**8-1060. Assistance for judges.**

New judges, especially those without legal training, may find their administrative responsibilities overwhelming. The staff of the AOC, the New Mexico Municipal League and New Mexico Counties are available to answer questions from judges and their staff about administrative matters. The presiding district judge, either informally or through the Supreme Court's mentor program, can also assist judges in this area.

A municipal court judge was reported for apparent lack of understanding of court procedure and poor handling of cases. After being referred to the presiding district judge, the new judge received guidance that resulted in significant improvement. JSC 89-2I.

**8-1100. Related topics**

Exercise of Judicial Power

## **SPEAKING, WRITING, AND TEACHING**

### **9-100. Checklist**

- Is your audience public or private?
- Does your audience advocate issues that come before your court or regularly appear before you?
- Is it reasonable to assume the content will be reported or otherwise repeated?
- If your audience is a governmental body, are you speaking on a law-related topic?
- Does what you say cast doubt on your impartiality concerning an issue within your jurisdiction?
- Do the remarks detract from the dignity of the judiciary?
- Do the remarks make it appear you have prejudged an issue?
- Do the remarks constitute comment on a pending or impending case?
- Does your presence at the function where you are speaking advance the interests of the sponsoring group?
- Are you being asked to write a letter of recommendation for a person you do not know well?
- Does the prospective employer frequently appear as a party or law firm in your court?
- Would your public response to criticism solve the problem or only engage you in undignified debate?

### **9-200. Applicable Law**

NMRA 21-200, 21-300, and 21-400.

### **9-300. Introduction**

On becoming a judge, a person is no longer a private citizen and cannot speak out in the same manner as before taking office. A judge may engage in public speech in a variety of settings – in the news media, before organizations and groups, before a government agency, to a class, in social media.

However, the concern with a judge’s public speech is that, if it is improper, it has the potential to undermine public confidence in the judiciary and the judicial system. Thus, although a judge may engage in speech in both the judge’s official and extrajudicial capacities, the judge’s ability to do so must be balanced against the overarching public interest, as expressed in the Code, of maintaining the independence, integrity, and impartiality of the judiciary, as well as public confidence in the judiciary and the judicial system.

### **9-400. Basic rule**

A judge has the obligation “to act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.” NMRA 21-102.

The Code allows a judge to engage in extrajudicial activities but not if the activities interfere with the judge’s proper performance of the judge’s judicial duties, lead to frequent disqualification of the judge, or reasonably appear to undermine the judge’s independence, integrity, or impartiality. NMRA 21-301.

### **9-410. Policy.**

The Code attempts to balance the judge's individual First Amendment right to free speech with the concern for maintaining the dignity and impartiality of the judicial office.

**9-420. Private conversation.**

"Judges are free to engage in private discourse on any subject. Judges, however, need to keep in mind that confidences may not be kept." Rothman, *supra*, §210.120.

**9-500. Limitations**

**9-510. Appearance before governmental bodies.**

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

A. in connection with matters concerning the legal system or the administration of justice; or

B. when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity. NMRA 21-302

Thus, a judge's official appearance before a governmental body is limited to matters concerning the law, the judiciary, or matters relating to the judiciary or that affect the interests of the judiciary, the legal system, or the administration of justice, unless the judge is acting in the judge's personal interests or as a fiduciary.

The judge must be careful, however, to avoid testifying about substantive issues that may come before the judge for decision. NMRA 21-302, Cmt. 1.

The Code commentary contemplates that a judge will need to testify before governmental bodies and consult with government officials concerning budgetary and administrative issues affecting the courts, but that judges, in doing so, "must be mindful that they remain subject to the provisions" of the Code. NMRA 21-302, Cmt. 2.

**9-500. Speaking, Writing, and Teaching.**

The Code permits judges to engage in extrajudicial activities, provided that they do not undermine the judge's obligations under the Code. NMRA 21-001; NMRA 21-301. Judges are encouraged to do so.

To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. NMRA 21-301, Cmt. 1.

Judges may desire to involve themselves in extrajudicial activities that relate to their judicial positions, but they are not limited in that way.

Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. They may also speak, write, lecture, teach, and engage in other extrajudicial activities concerning non-legal subjects, subject to the requirements of this Code. NMRA 21-301, Cmt. 1.

**9-510. Advancing private interests of the judge or others.**

A judge may not use the judicial office to advance private interests, whether the judge's own or others. NMRA 21-103. This issue arises in the context of speaking, writing, and teaching when someone may benefit personally or financially from the judge's activity.

**9-510a. Publications.**

Judges are encouraged to publish articles and books on legal subjects. "There can be little doubt that the public benefits greatly from the involvement of learned judges in educational activities." AO 93-2.

The Advisory Committee on the Code of Judicial Conduct has issued opinions addressing publication advising that:

A municipal judge may write newspaper articles to educate the public as to the operation of the court. AO 02-04

A judge may submit an essay for publication in a national magazine discussing same sex partners and their legal rights, addressing the judge's own experiences, subject to conditions. AO 09-01.

A judge who does not have jurisdiction over death penalty cases may write a newspaper article discussing the pros and cons of the death penalty. AO 16-03.

A judge, a former rodeo queen, may be featured in an article in an equestrian magazine designed to encourage young women to participate in rodeo activities when there was no indication that the magazine attempted to capitalize on the judge's position in an improper manner. AO 15-03.

**9-510b. Promotional Activity.**

Advertising of a judge's publication must be tasteful and not designed to exploit the judge's position to benefit either the publisher or the judge personally.

A judge's book may list the judge's judicial title. The judge should retain a measure of control over the advertising so it does not exploit the judicial position or advance the private interests of others. The advertising used to promote the book that describes the author should be limited to a factual description. AO 93-2 (under rule prior to 2012 Code revision).

A judge may write a book of poems on non-legal topics that includes his title in biographic information but does not unnecessarily highlight the judge's position to promote the book for increased sales. AO 09-05 (under rule prior to 2012 Code revision).

The Judicial Standards Commission cautioned a judge to refrain from exploiting the judge's judicial position by appearing in for-profit advertising while wearing judicial robes. JSC 15-31.

**9-511. Compensation.**

A judge may receive compensation and reimbursement of expenses for extrajudicial activities permitted by this Code, unless such acceptance would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. NMRA 21-315(A).

Judges may receive compensation for extrajudicial activities, including speaking and writing, such as honoraria or speaking fees when the amount is reasonable, commensurate with the tasks performed, and not exceeding compensation paid to non-judges for similar work. NMRA 21-315, Cmt.

The comment to NMRA Rule 21-315 further specifies limitations on a judge's involvement. (1) A judge has the obligation to ensure that activity does not create a conflict of interest; (2) there must not be the appearance that the judge is using the prestige of judicial office for personal advantage; (3) the judge must "not spend significant time away from court duties"; and (4) no questions are raised about undue influence or the judge's ability or willingness to be impartiality. NMRA 21-315, Cmt.

A judge may receive reasonable compensation for teaching a community college class on juvenile justice, subject to certain conditions. AO 01-08

A judge may receive reasonable compensation for teaching a community college class on business law, subject to certain conditions. AO 02-07

A judge may participate on a consulting team that makes recommendations to various states in the field of juvenile justice, provided the activity will not interfere with the impartial performance of judicial duties or conflict with these duties. AO 88-6.

A judge may teach teenagers to avoid substance abuse where few if any would appear in judge's court, and despite stipend derived from DWI fees. AO 10-08.

A probate judge may receive reasonable compensation for the preparation and airing of a program on public television concerning wills, trusts, probate, and health laws that she prepared before becoming a judge. AO 03-02

A judge may speak on the role of bonds in the judicial system at a national conference of a bail bondsman association but may not accept expense reimbursement from the association or an individual bail bondsman because the judge frequently makes rulings that affect the interests of the association and its members. AO 12-01.

#### **9-520. Limitations on extrajudicial speech.**

##### **9-521. Appearance of impropriety.**

The content of a judge's speech outside the courtroom is limited by NMRA 21-102, which requires a judge to promote public confidence in the independence, integrity, and impartiality of the judiciary and avoid impropriety and the appearance of impropriety.

##### **9-522. Prejudging issues.**

A judge must avoid any speech that gives the impression the judge is predisposed on the merits of a particular type of case or has predetermined a legal issue.

A group of judges may not publicly announce that they will sentence all convicted DWI offenders to some jail sentence. This proposed action makes it appear that the judges have been swayed by public clamor and fear of criticism and that defendants are being denied their full right to be heard;

may appear to be a comment on a pending proceeding; and may otherwise create an appearance of impropriety. The statements could also be grounds for disqualifying the judge in a DWI case. AO 91-2.

A judge allegedly made statements to the media concerning how the judge intended to sentence individuals appearing before the judge's court. The caution included avoiding prejudging cases and making statements inconsistent with the impartial performance of judicial duties. JSC 13-5I.

See NMRA 21-102 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary. . .").

A judge should not participate in a talk show where listeners call in legal questions, because the judge would be asked to give spontaneous opinions based on incomplete facts. A judge could, however, moderate the discussion of a panel of attorneys responding to pre-screened questions. South Carolina Advisory Op. 14-1991.

A Florida judge expressed his opposition to capital punishment in letters to a local newspaper in which he also affirmed he would nevertheless follow the law. The judge did not violate the Code but his criticism "came close to the dividing line." *In re Gridley*, 417 So. 2d 950, 954 (Fla. 1982).

A Florida judge wrote letters to the editor of a local newspaper criticizing the justice system and sentencing guidelines, in one letter expressing displeasure with his obligation to follow the law in sentencing a sexual offender. In publicly reprimanding the judge, the Florida Supreme Court stated that while judges may write about the legal system and the judge indicated that he would follow the law, his actions could be interpreted that he would be less than impartial. *Inquiry Concerning a Judge, re Edward Miller*, 644 So.2d 75 (Fla. 1994).

### **9-523. Bias or prejudice.**

Biased statements are improper because they indicate a judge may favor one type of litigant over another. Racially-charged and insulting remarks are rarely protected in disciplinary actions because they have no relevance to the judge's decision.

A Michigan judge was publicly censured for stating in a telephone interview that one circumstance in which he might permit a minor to have an abortion would be when a white girl is raped by black man. The state supreme court found the remarks were offensive, called into question the impartiality of the judiciary, and eroded public confidence in the judiciary. *In re Bourisseau*, 480 N.W.2d 270 (Mich. 1992).

A Florida judge was removed from office for making racially biased remarks in a published interview, including about the prevalence of blacks on welfare and in the criminal justice system and the propriety of making racial slurs. The state supreme court found the discriminatory stereotypes were inimical to state law and had eroded his ability to work with all segments of the community. *In re Petition for Removal of a Chief Judge*, 592 So. 2d 671, 672 (Fla. 1992).

A Pennsylvania supreme court justice re-sent blasts from an attorney that contained pictures of nude women, sexually-suggestive themes, gender stereotypes, homophobic content,

socioeconomic stereotypes, violence toward women, racial humor, ethnically-based humor, and stereotypes of religious groups. In imposing a fine of \$50,000, the Court of Judicial Discipline stated that the subject matter “could cause citizens to wonder whether their cases received unbiased consideration by Respondent, something that we find abhorrent to the principles to which Respondent has ostensibly dedicated his entire professional career. A reasonable inference that Respondent lacked the impartiality required of judges also fundamentally lessens public confidence in the judiciary.” *In re Eakin*, Pa. Court of Judicial Discipline, 150 A.3d 1042 (Pa. 2016).

A magistrate judge resigned from office after facing charges that included using state equipment to receive and forward “emails of a sexual, racist, derogatory, and sexist nature that would basically offend many, if not all, of the people who appear in front of him” that rendered him “incapable of performing his judicial duties in a fair and impartial manner” and had “a profoundly negative impact upon the integrity and respect for the judiciary.” *Matter of Hon. Henry T. Casteneda*, JSC 18-3F.

A Texas judge who posted a meme and comments on his Facebook page that endorsed the extermination of a religious group and criticized a political group cast a reasonable doubt on his capacity to act impartially and publicly discredited the judiciary and the administration of justice. *In the Matter of Burkeen*, Texas State Commission on Judicial Conduct, February 21, 2018.

**9-524. Unseemly or undignified subjects.**

A judge's public persona must not demean the dignity of the judge's office.

A Michigan judge was censured for making flippant remarks in the press about his visit to a Nevada brothel. *In re Tschirhart*, 371 N.W. 2d 850, 851-52 (Mich. 1985).

**9-525. Political or controversial issues.**

SEE §9-800 Social Media and §12-430.

**9-526. Comment on pending and impending cases.**

A case is pending until it is fully resolved, including while it is on appeal or possibly could be appealed. An impending case is one that is likely to occur.

A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing. NMRA 21-210(A).

The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. Rule 21-210(C).

This rule 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. It does not apply to proceedings in which the judge is a litigant in a personal capacity. NMRA 21-210(D).

If a judge makes comments about a case pending or impending in the judge’s court, it may appear to the public that the judge has already decided the case before considering the evidence and arguments.

The constitutionality of a rule prohibiting a judge’s public statement on pending or impending cases has been upheld against a first amendment challenge. *In re Broadbelt*, 683 A.2d 543, 551-52 (N.J. 1996), cert. denied, 117 S. Ct. 1251 (1997).

A judge agreed to a mentorship in a consent decree with the Judicial Standards Commission for making improper public commentary to the media concerning a pending case. JSC 13-1 – Informal Remedial Measure.

**9-526a. Cases before other judges.**

A judge also cannot comment about a case pending before another judge, because it may look like an attempt to influence a particular decision in the case.

The Judicial Standards Commission cautioned a judge, who attended a hearing and became involved in a case in another judge’s court, from making statements in a case pending in any court that could reasonably be expected to affect the outcome or impair the fairness of a matter. JSC 17-12I.

Nor should a judge enter into public debate about another judge's handling of a case.

A Florida judge improperly defended the actions of another judge who was criticized in the newspaper for his handling of a case. Neither judge could comment on judicial conduct in a pending case. Fla. AO 90-8.

The New Jersey Supreme Court upheld an advisory opinion that a municipal judge’s television appearances addressing cases in other jurisdictions violated the New Jersey Code of Judicial Conduct requiring that a judge abstain from public comment about a pending or impending proceeding in any court. *In re Broadbelt*, 683 A.2d 543, 551-52 (N.J. 1996), cert. denied, 117 S. Ct. 1251 (1997).

Comments on social media are also prohibited.

A Kentucky judge posted on her Facebook page under her name as judge: “This murder suspect was RELEASED FROM JAIL just hours after killing a man and confessing to police.” *In the Matter of McLaughlin*, Kentucky Judicial Conduct Commission, June 18, 2018.

A Kentucky judge dismissed a jury panel in a criminal case because it did not represent a fair cross-section of the community. The Kentucky AG filed a motion in the Supreme Court. The judge posted on his Facebook page criticizing the AG:

But whatever you believe the lack of representation is, it is clear that all-white juries are not in the best interest of the community that is 20% black . . . and that is what [the AG] is trying to do. *In re the Matter of Stevens*, Kentucky Judicial Conduct Commission, Agreed Order of Suspension, August 8, 2016.

**9-527. Comments to Jurors.**

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. NMRA 21-208 (C).

**9-528. Law firm-sponsored programs.**

A judge should exercise caution if invited to speak at a function sponsored by a law firm. The underlying issues are the perceived effect on the judge's impartiality and the use of the prestige of the judge's office to advance the interests of others.

A judge may not speak at a legal seminar sponsored by a law firm for current and prospective clients of the firm or on a radio program discussing legal matters when the name of the sponsoring firm was made clear at the beginning of and during the program. It is irrelevant that the subject of the programs is the administration of justice. "There is no way of escaping the fact that the judge is lending the prestige of his office to advance the private interest of the sponsoring firm." AO 91-6.

**9-530. Grants.**

A judge may voice support for programs designed to improve the legal system.

A judge may write a letter underscoring the need for a study of the use of languages other than English in the courts. The request was initiated by recognized authorities in the fields of law and language who are concerned with difficulties encountered by witnesses having limited English-speaking ability. The persons requesting the letter intended to seek funding for the study from foundations and agencies. Nothing in the Code prohibits a judge from expressing a need to study a problem associated with the legal system; however, the letter itself may not solicit or endorse the collection of funds for any particular person or organization. AO 93-5.

**9-540. Letters of reference.**

Judges often are asked to provide letters of recommendation. Each request must be decided on its own facts. The issue is whether the judge is abusing the prestige of judicial office by providing the letter. NMRA 21-103. The commentary to NMRA 21-103 states:

A judge may provide a reference or recommendation for an individual based on the judge's personal knowledge. NMRA 21-103, Cmt. 2.

Thus, a judge may respond to a request for a personal letter of recommendation if the judge can do so sincerely and with personal knowledge. However, the judge should be cautious if the recipient of the letter frequently appears in the judge's court or has a case pending. Generally, the judge should use personal stationery, not court letterhead, to avoid any inference that the judge is using the prestige of office to advance the personal interests of others.

However, "the judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office." NMRA 21-103, Cmt. 2.

A pro tempore magistrate judge was advised not to write a letter recommending a pardon on behalf of a convicted felon. AO 02-3

The Judicial Standards Commission issued a letter of caution to a judge who used judicial letterhead to write to a government agency on behalf of a family member. JSC 14-4I.

All recommendations do not implicate the prestige of judicial office to advance the interests of others. Many are merely a request made to a respected citizen for information of value to a potential employer or educational institution. The request is improper if it is being made principally because of the prestige of the judge's office; if it is to be made public; if the judge will benefit by obtaining a return favor; if the recommendation is being made for or to a lawyer or party appearing before the court; or if the judge exercises any control over the person to whom the recommendation is being made. See AO 90-3.

A judge may write a letter of recommendation to the governor or judicial nomination commissions in support of candidates for judicial positions. AO 14-08.

Noting that “[i]t is within the public’s perception that the judiciary’s support of competent counsel for indigent defendants is best for the criminal justice system[,]” a judge may write a letter of recommendation on behalf of a lawyer who appeared before the judge and who was applying to be a contract lawyer for the Office of the Public Defender. AO 12-06.

### **9-600. Responding to criticism**

Judges are frequently subjected to criticism and may be tempted to defend themselves. A judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge’s conduct in a matter if the judge can do so without violating the rules concerning pending or impending cases. NMRA 21-210 (D). A judge should exercise caution in any response.

A magistrate who had been criticized in letters to the editor by a defendant answered the criticism in a letter to the newspaper. The Judicial Standards Commission admonished the judge not to repeat this conduct and to exercise judicial patience in dealing with the public even if there is criticism that the judge might consider unfair. JSC 92-6I.

A judge may not respond to criticism by taking action in a court proceeding.

A district judge was publicly censured in part for inappropriately attacking an attorney in a court order because the judge believed the attorney criticized the judge in a newspaper article. *In the Matter of Mary W. Rosner*, JSC 23-2F.

A judge cannot respond to criticism of a judge's handling of a pending case. Rothman, *supra*, 160.551. The judge may respond to criticism about the law or the courts in general as long as the comment does not involve the merits of a pending or impending proceeding.

Judge Rothman has suggested that in responding to criticism the judge should consider:

(1) Is the story really important? If not, forget it . . .

- (2) Can you simply redirect the criticism to a more legitimate target? If the problem is really that of the legislature or the governor, point that out.
- (3) Don't try to defend the indefensible. If the story contains legitimate criticism, correct any important errors quickly and get it over with.
- (4) Never deny the truth of a story unless you are sure that it is wrong.
- (5) If a story is harmful and unfair, consider getting some advice from other judges or knowledgeable professionals. If it is up to you, make your statement quickly and without emotion. Do not engage in a dialogue. Make a dignified reply and disengage. Rothman, *supra*, 160.553.

## **9-700. Dealing with the media and interest groups**

### **9-710. Responding to questions.**

A judge should explain to media representatives that some questions cannot be answered because of the code of ethics; the reporter will be less likely to see the judge as uncooperative. A judge can speak with the media about the procedures of the court and the status of the case as long as the judge does not discuss contested issues or suggest any future action. For example, a judge can explain the jury selection process or arraignment procedure, but should steer clear of topics that could suggest partiality or premature determination of contested issues. Rothman, *supra*.

A judge was reprimanded for holding off-the-record conversations with a reporter in the midst of a murder trial in which he gave his impressions of the attorneys, witnesses, and jury. The remarks were published. *In re Hayes*, 541 So. 2d 105 (Fla. 1989).

A New Mexico judge received a letter of admonishment for commenting to a newspaper reporter that he suspected improprieties existed in another judge's court. Any inappropriate conduct should have been reported to the appropriate disciplinary body. JSC 85-I3.

### **9-720. Judicial questionnaires.**

Newspapers and special interest groups often use questionnaires to determine the views of judicial candidates during election campaigns. These questionnaires are problematic because they may ask the candidate to prejudge a legal issue.

As stated in NMRA 21-401 (C)(7), a judicial candidate may not “in connection with 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 judicial office.”

A judge should not respond to a questionnaire, or any part of a questionnaire, that asks for comments about pending matters or would generate a response that would cast doubt on a judge's impartiality or indicate a bias, prejudice, or impropriety, including of a political nature. “[C]andidates who respond to media and other inquiries should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected.” NMRA 21-402, Cmt. 11. A judge may wish to state that the judge cannot respond to the questionnaire or individual questions because of the requirements of the Code of Judicial Conduct. *See* NMRA 21-402, Cmt. 11 (“Candidates who do not respond may state their reasons for not responding, such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate’s independence or impartiality, or that it might lead to frequent disqualification.”).

**9-730. Media in the courtroom.**

See NMRA 23-107.

**9-740. Limitations on audience.**

A judge must be cautious in accepting invitations to speak to specialized audiences to avoid questions about impartiality. Problems concerning an appearance of impartiality can arise if the audience is a group that regularly appears before the court or advocates positions that underlie judicial disputes. These concerns are similar to those raised by a judge's involvement in civic and charitable organizations. See CIVIC, CHARITABLE AND SOCIAL ACTIVITIES.

**9-741. Law enforcement officers.**

Judges have been asked to teach law enforcement officers about presenting cases in court. The concern is that the judge's appearance of impartiality is impaired by educating only one side of the adversarial process.

Educational programs that are open to all sides of the adversarial process are permitted, even if the issues regularly are before the court. The judge must, however, avoid statements indicating any partiality or prejudice.

**9-742. One-sided educational programs.**

Judge advised against attending DWI defense seminar to protect public perception of impartiality. AO 06-04.

Judge advised not to speak at seminar for defense counsel, to protect public perception of impartiality. AO 08-06

**9-800 Social Media**

Judges should consider their social media activity to be public speech, even with the use of privacy settings. The New Mexico Supreme Court has stated:

Judges should make use of privacy settings to protect their online presence but should also consider any statement posted online to be a public statement and take care to limit actions accordingly. *State v. Thomas*, 2016-NMSC-024, ¶ 51.

**9-810. Applicability of Code**

The preamble to the Code states that judges must “maintain the dignity of judicial office at all times and avoid both impropriety and the appearance of impropriety in their professional and personal lives.” NMRA 21-001(B). Specifically, it states as to social media that [j]udges and judicial candidates are also encouraged to pay extra attention to issues surrounding emerging technology, including those regarding social media, and are urged to exercise caution in its use so as not to violate the Code.” NMRA 21-001(C).

Although the Code may not mention the applicability of particular rules to social media, all provisions of the Code apply to all of a judge's speech and behavior, including on social media.

“[I]t must be noted that there is no distinction between a judge's online conduct and ‘real world’ conduct regarding this Court's application of the Code and the Constitution. *In re Judge Mark B. Cohen*, Pa. Court of Judicial Discipline, May 2, 2024.

“A judge should monitor the judge’s social media activity in the same manner as the judge monitors the judge’s other activities and behaviors. Indeed, a judge should engage in the same deliberative analysis process with regard to potential violations of the Code when deciding whether to engage in social media use as the judge would engage with regard to the judge’s other activities and behaviors.” Social Media AO, ¶ 26.

For a complete discussion of the applicability of the Code to social media and potential misuse, SEE SOCIAL MEDIA AO.

### **9-820. Friending.**

A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge. NMRA 21-204(C).

Social media sites enable users to share and interconnect their posted information with other users and communicate in ways different from traditional communications. The sites also use terms to describe communications that do not share their meaning with common usage. For instance, on Facebook, a user may “friend” other users to connect posted information and may “like” postings of other users to indicate approval or support of the posting.

States have adopted differing views on whether judges may be Facebook “friends” with attorneys who may appear before the judge. Some states have adopted the strict view that judges and attorneys who may appear before them cannot be Facebook “friends” in order to avoid the public impression that there is any unfairness in the system. Social Media AO, para 18. The Advisory Committee on the Code of Judicial Conduct adopted the approach taken in other states that the meaning of “friend” on social media sites differs from the traditional meaning and that “even judge’s professional and social friends may not be in a position to influence a judge.” Social Media AO, ¶¶ 20-21.

In making the decision whether to be Facebook “friends” or similar connection on other social media sites with an attorney who may appear before the judge, the judge should consider all the circumstances, including: “(1) the nature of the social networking site; (2) the number of friends on the page; (3) the judge’s practice in determining whom to include; and (4) how regularly the attorney appears before the judge.” Social Media AO, ¶¶ 20-21 (quoting CA Judges Assoc. Jud. Ethics Comm. Op. 66, at 8).

### **9-830. Public recommendations or endorsements**

A judge’s recommendations or endorsement on social media risk the judge’s violating Rule 21-103, prohibiting a judge from abusing the prestige of judicial office to advance the interests of the judge or others.

“With Linked-In, for example if a judge ‘recommends’ or ‘endorses’ someone, this act may be considered akin to a letter of recommendation, expressing favor toward that individual over others, and requesting that someone act upon that favor.”

“With Facebook, a judge may be inadvertently advancing the views of attorneys and parties by ‘liking’ or commenting on other users’ posts.”

With “Twitter [now called ‘X’], a judge may . . . be inadvertently affecting the views of attorneys and parties by re-tweeting tweets made by users.”

“With Yelp, a judge may be inadvertently advancing the economic interests of a restaurant” by giving a review. Social Media AO, ¶ 24

A California advisory opinion permits judges to share opinions on crowd-sourced review sites such as Yelp under some circumstances if “it is highly unlikely that anyone would be able to connect the review with the judge” and the judge is writing “a legitimate review” intended to impart helpful information to others using the site.” The opinion also permits a judge to “like” a site if the judge’s “liking” will only add to the number of “likes” a business has received and only the judge and the judge’s close friends and relatives can see the “like.” California Formal Ethics Opinion No. 78, January 2020.

Solicitation for charitable causes is an improper use of the prestige of judicial office.

A Washington supreme court justice was disciplined for social media posts supporting charitable or social causes such as “The Burlington Fire Department Pancake Feed is happening now and 100% of the proceeds go to benefit the families of the victims of the recent tragedy at Cascade Mall. Please consider attending, it runs until noon today.” *In re Svaren*, Washington State Commission on Judicial Conduct, December 7, 2018.

#### **9-840. Blogs**

A judge may initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code. NMRA 21-102, Cmt. 6.

It is appropriate for a judge to use social media, in a blog or otherwise, in an effort to inform the public about the procedures of the court, even concerning a pending case. Some courts have even undertaken this responsibility.

The principal danger with a judge’s blogging about court activity is discussion of pending cases in a manner that affects the outcome or impairs the fairness of the proceeding in violation of NMRA 21-210(A).

A judge, therefore, must carefully avoid any statement that relates to the merits of a case or can reasonably be interpreted to bear on the judge’s fairness or impartiality.

Because of the interactive nature of social media, a judge’s activity also may give rise to others posting comments about pending cases on the social media site that may constitute an improper ex parte communication with the judge. The judge must be careful to avoid such communications, and, if unable to do so, disclose the communication to the parties and afford an opportunity to respond. NMRA 21-209(B).

If a judge discusses non-legal matters on a blog or elsewhere on social media, the judge must act in accordance with the requirements of the Code and particularly NMRA 21-102 that requires the judge to

“act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and . . . avoid impropriety and the appearance of impropriety.”

An Arizona judge was publicly reprimanded for an appearance of impropriety, diminishing public confidence in the judiciary. The judge posted information on Facebook about a landlord-tenant case before him. A tenant testified that the heroin found in his apartment was not his because cocaine was his drug of choice and that he keeps drugs safe. He said he did not know how the heroin got into his apartment and said; “Maybe one of the hookers I had in my apartment left it.” The judge stated, “Needless to say, the Court ruled in favor of the landlord.” A Facebook friend asked if the story was true; the judge responded that it was and “It goes without saying but the tenant wasn’t the brightest bulb in the Chandelier.” *Urie*, Arizona Commission on Judicial Conduct, June 12, 2018.

A Kentucky judge dismissed a jury panel in a criminal case because it did not represent a fair cross-section of the community. After the Kentucky AG filed a motion in the Supreme Court, the judge posted on Facebook:

But whatever you believe the lack of representation is, it is clear that all-white juries are not in the best interest of a community that is 20% black . . . and that is what [the AG is trying to do.]”

To criminal defense attorneys he posted: “Dear Counsel: Where are you? You asked me to dismiss the jury panel of 40 white jurors and 1 black juror. Yet you are silent. . .” *In re the Matter of Stevens*, Kentucky Judicial Conduct Commission, Agreed Order of Suspension, August 8, 2016.

The Judicial Standards Commission cautioned a judge who posted on social media, public and ex parte comments about an ongoing case, including comments on the jury verdict. The Commission noted that the prohibition on public statements on pending and impending cases includes social media posts and continues until final disposition, including any appeal. JSC 13-6I.

Social media presents the opportunity for users to express opinions on controversial subjects and to disseminate material that may not be appropriate for common conversation. Judges have been disciplined for posting or reposting about such topics.

A Pennsylvania judge was disciplined for Facebook partisan political posts that, among other Code violations, undermined the judge’s independence and impartiality. *In re Judge Mark B. Cohen*, Pa. Court of Judicial Discipline, May 2, 2024.

The Texas State Commission on Judicial Conduct found that a judge’s political posts, “including a meme endorsing the extermination of Muslims” and negative statement concerning a political faction “cast reasonable doubt on his capacity to act impartiality as a judge” and that the judge’s actions were “clearly inconsistent with the proper performance of his duties as a judge and cast public discredit upon the judiciary and administration of justice.” *In the Matter of Burkeen*, Texas State Commission on Judicial Conduct, February 21, 2018.

*See* Ethics Up-date Compiled by Cynthia Gray Director, NCSC Center for Judicial Ethics,  
[www.ncsc.org/cje](http://www.ncsc.org/cje)

**9-900. Related topics**

DEMEANOR AND IMPARTIALITY

EX PARTE COMMUNICATIONS

CIVIC, CHARITABLE AND SOCIAL ACTIVITIES

## **FINANCIAL AND BUSINESS DEALINGS**

### **10-100. Checklist**

#### **1. BUSINESS ACTIVITY**

- Does the activity or investment tend to reflect adversely on the judge's impartiality?
- Does the activity or investment interfere with the proper performance of judicial duties?
- Does the activity or investment exploit the judicial position?
- Does the activity or investment involve frequent transactions with lawyers or persons likely to come before the court?
- Will the activity or investment require you to disqualify yourself frequently?
- Are you considering making an investment because of information you obtained from a case?
- Does the compensation you are paid for an extrajudicial activity appear excessive?
- **\*\*Have you filed your annual disclosure statement?\***

#### **2. GIFTS, LOANS**

3. Is the source of a gift, favor, or loan you are considering accepting a person who has been a party to a case or whose interests are otherwise likely to come before you in court?
4. Is the loan a "better deal" than someone else would get?
5. Does the hospitality you are receiving have a monetary benefit?

#### **6. FIDUCIARY DUTIES**

7. Are you being asked to serve as a fiduciary for someone other than a member of your immediate family?

### **Financial and Business Dealings**

#### **10-200. Applicable Law**

NMRA 21-200, 21-300

#### **10-300. Introduction**

Business and finance is another area in which judges must accept restrictions on their activities not required of ordinary citizens. Because financial activities can create an appearance that the judicial office is being used to advance private interests of the judge or others, restrictions are necessary to preserve the judge's independence and impartiality. A related problem is that the judge may neglect judicial duties in favor of personal financial pursuits. The Code tries to preserve judicial independence while recognizing that judges necessarily have financial interests. Canon 3 states "A judge shall conduct the judge's personal . . . activities to minimize the risk of conflict with the obligations of judicial office." NMRA 21-300.

In addressing business and financial issues, the Code deals with both disqualification and those situations requiring a judge's attention even if disqualification is not required. NMRA 21-211 requires disqualification if the judge has a financial interest; NMRA 21-311(C)(1), (5) requires a judge to refrain from business and financial activities that might interfere with impartial performance of judicial duties. *See* DISQUALIFICATION.

**10-400. Permitted Business and Financial Activities: exceptions**

A judge may hold and manage investments of the judge and members of the judge’s family. NMRA 21-311(A).

A full-time judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in:

- (1) a business closely held by the judge or members of the judge’s family; or
- (2) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge’s family. NMRA 21-311(B).

The Code recognizes that part-time judges may have business or employment activity in addition to being a judge. Part-time probate and municipal judges and judges serving by contract or appointment on a part-time basis are not required to comply with Rule 21-311(B). NMRA 21-004(B)(1)(a), (2)(a).

No judge, full-time or part-time, may “engage in financial and business dealings that:

- (1) will interfere with the proper performance of judicial duties;
- (2) will lead to frequent disqualification of the judge;
- (3) will involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves;
- (4) may reasonably be perceived to exploit the judge’s judicial position; or
- (5) will result in violation of other provisions of . . . [the] Code.” NMRA 21-311(C).

The exceptions in NMRA 21-311(C) are consistent with those relating to other off-the-bench activities such as speaking and writing or involvement in charitable work.

**10-500. Investments**

NMRA 21-311(A) allows judges to hold passive investments, subject to exceptions. Stock ownership is a problem if the corporation appears as a party in a judge's court, because the judge's financial interest, if more than de minimis, may appear to be affected by the outcome of the case. It is the appearance of a conflict, and not the actual existence of a conflict, that is significant. A judge who owns interests in several local businesses or real estate ventures could, as a consequence, be required to disqualify himself or herself from cases involving those interests.

A New York judge should not have continued to invest heavily in New York City bonds during a financial crisis, while there was a chance that a lawsuit challenging the city's financial plan would reach the judge's court. The investments created the impression that the judge was trading on inside information, although there was no evidence he did so. *In re Fuchsberg*, 426 N.Y.S.2d 639, 642-43 (Ct. Jud. 1978).

**10-600. Direct involvement in business**

**10-610. New Mexico rule.**

New Mexico does not completely bar judges from engaging in business. There are restrictions, however, on business activities and relationships.

A full-time judge may only manage or participate in a business that is either closely held by the judge or a member of the judge's family; or a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family. NMRA 21-311(B). A full-time judge may not be associated with any other type of business.

**10-620. Examples of permitted and prohibited business activity.**

A pro tempore judge was advised as to the limitations of serving as a private investigator. AO 02-3

A part-time probate judge may also serve as municipal police chief so long as there is no conflict of time or interest. AO-07-02.

A part-time judge may serve as an elected trustee of an electric cooperative subject to the requirements of NMRA 21-301. AO 13-02.

A judge may participate as a member of a limited liability company in which its ten members will purchase and fly a hot air balloon for recreational rather than business purposes. None of the prohibitions of NMRA 21-311(C) is applicable. AO 12-09.

A part-time judge was advised to divest an interest in a family-owned business that contracted with a state agency to operated marinas and provide retail services to visitors to a state park because of the likelihood of frequent disqualification and the continued business relationship with the state agency that employs the park rangers who would initiate cases in the judge's court. AO 14-04.

A judge may not sell the judge's house through owner financing to an attorney who appears before the judge even using title and escrow companies in order to avoid a continuing business relationship with the attorney. AO 06-06. The judge may sell to the attorney in an arm's-length transaction with commercial financing if the judge recuses from the attorney's cases until the transaction is closed. AO 07-06.

A district judge may lease offices to a state organization providing parenting services through a local program when the lease would not lead to frequent disqualification (the judge had only seven parenting program witnesses appear in five years on the bench), and the lease would not involve the judge's dealing with the local program. The minimal occasions in which the program's representative may appear as a witness may be addressed under NMRA 21-211, including the remittal of disqualification provision. NMRA 21-211(C). AO 13-11.

**10-700. Divestiture**

Judicial efficiency and the judge's "duty to sit" require judges to divest themselves of financial interests that will require frequent disqualification.

A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. A new judge and a judge who becomes aware of a conflicting financial interest must “[a]s soon as is practicable without serious financial detriment” “divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate” the rule. NMRA 21-311, Cmt. 2.

By way of example, a judge who holds more than a de minimis interest in stock in a local bank should sell it if the bank frequently files collection cases in that judge's court. Frequent recusal slows down the judicial process, especially in smaller communities where an alternate judge may not always be available.

A magistrate judge who rented office space to an organization to which the court refers defendants for counseling, as well as to a driving improvement program that takes referrals from the court, was advised to divest himself or herself of the property. AO 01-04

**10-800. Prohibited business and financial activity.**

**10-810. Improper management of personal finances.**

Impropriety in the management of a judge's personal finances can justify discipline.

A Kansas judge pledged the same car as security for two different loans; sold the car without the consent of the creditor; defaulted on notes to several financial institutions in his district, stalled creditors, made false promises of payment, evaded attempts to contact him, and wrote over 100 rubber checks. This conduct showed a total disregard for judicial system and its processes, the laws the judge had sworn to uphold, and the contractual and legal rights of creditors. *In re Yandell*, 772 P.2d 807, 810-11 (Kan. 1989).

In some jurisdictions judges who are allowed to operate a business may not operate liquor establishments because of the appearance of impropriety. New Mexico does not have any opinions on this subject.

Ownership of a bar was not a per se conflict of interest with the office of justice of the peace. *In re Biggins*, 737 P.2d 1077, 1082 (Ariz. 1987).

**10-820. Apparent impartiality.**

Usually, the nature of the interest is the problem. A judge should not have a financial interest that could appear to affect the judge's impartiality. For example, there have been problems with judges having financial interests in court-related services such as DWI schools.

A magistrate judge who rented office space to an organization to which the court referred defendants for counseling, as well as to a driving improvement program that took referrals from the court, was advised to divest of the property. AO 01-04

A municipal judge's ownership and directorship of a DWI school created an appearance of impropriety and tended to reflect adversely on his impartiality, because the judge had a direct financial gain from those he sentenced to school. The judge was paid \$5,000 per year for running the school, so had a direct pecuniary interest in having individuals appear before him and then attend the school. Even if he received no compensation, there was an appearance of partiality. The existence of the school was directly related to the number of people sentenced. *In re Rainaldi*, 1986-NMSC-079.

A district judge owned a partnership interest in a company that conducted DWI schools. The judge's participation in this business simultaneously with his role as district judge violated the Code. The judge was ordered to divest himself of his interest. *In the Matter of Benjamin S. Eastburn*, JSC 87-F2.

A process-serving business also presents conflicts.

A probate judge may not operate a legal process service in the same county in which the judge serves. The business serves summons and subpoenas for the district court, magistrate court, sheriff's office, county commission, and all local attorneys. The service would create the appearance of impropriety and a conflict of interest with the judge's duties since attorneys using the service may appear frequently before the judge. Also, the judge could be placed in an adversarial position with the attorneys if he is called upon to testify when the return of service is challenged. The fact that lawyers who use the service appear before the judge creates an appearance of impropriety. AO 88-1.

### **10-830. Exploiting judicial position.**

It is an abuse of power for a judge to benefit personally from knowledge gained from a case. *See also* EXERCISE OF JUDICIAL POWER. Even the appearance of exploitation is unethical, so the problem is compounded if deceit is involved.

A judge shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties. NMRA 21-305.

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. NMRA 21-311, Cmt. 3.

A New Jersey judge used confidential information obtained in the course of proceedings to develop an interest in real property that was the subject of litigation. The judge tried to buy the property at an unreasonably favorable price and pressured the owner, a litigant, to make the sale. *In re Yaccarino*, 502 A.2d 3, 19-24 (N.J. 1985).

A judge does not exploit his judicial position by participating in a foreclosure sale of real property scheduled after a default judgment in the court in which the judge sits. The judge did not have any involvement in the case, did not know the special master, learned about the sale from public information, and would not participate or be present at the bidding. AO 11-03.

Exploiting judicial office based on information obtained from extrajudicial employment is also improper.

A probate judge who worked for the New Mexico Office of the Medical Examiner (OMI) responded to an unattended death in her OMI capacity. In her OMI report, she erroneously identified her husband as next of kin and did not disclose the contents of a suitcase found at the scene that contained financial information of the deceased. She arranged for the police department to take control of the suitcase for safekeeping and later, in her OMI capacity, obtained possession of the suitcase. The following day, the judge opened a probate case in which she appointed her husband special administrator. As special administrator, her husband transferred monies from two bank accounts of the decedent to a joint bank account of the husband and the judge and closed the decedent's accounts. The judge resigned from office, and the Supreme Court provided copies of all filed documents to the district attorney. *Matter of Hon. Pamela D. Smith*, JSC 18-2F.

### **10-831. Property.**

Judges have improperly dealt in property that is the subject of judicial proceedings.

A Maryland judge violated the code by selling real estate that was listed in inventories filed in her court. *In re Happ*, 566 A.2d 763, 764 (Md. 1990).

A Florida trial judge's conduct in suggesting a buyer for marital property in a divorce case that the judge was hearing raised a question of impartiality. *Wayland v. Wayland*, 595 So. 2d 234 (Fla. Dist. Ct. App. 1992).

### **10-832. Personal benefit.**

Judges may not benefit personally from relationships with litigants.

A judge accepted favorable rental rates from an auto dealer, during which time he presided over two cases involving the dealership. *In re Seraphim*, 294 N.W.2d 485, 494 (Wis. 1980).

An Alaska judge met with the governor in an effort to have the governor intervene in a manner favorable to the judge's substantial business interests in a case pending against the state. A "reasonably objective person could easily conclude that petitioner was using the prestige of his office to encourage the Governor to intercede on his behalf." *Inquiry concerning a Judge*, 822 P.2d 1333, 1342 (Alaska 1991).

A judge directed that settlements be deposited in a credit union with which he had interest-free loans, creating the appearance that his decision was influenced by personal profit motives. *In re Cohen*, 543 N.E.2d 711, 713 (N.Y. 1989).

### **10-833. Court facilities and personnel.**

Court supplies and office space must be used only for official business. Court personnel may not conduct personal business for the judge. The judge may not conduct personal business on court time.

A Florida judge was removed from office for actions that included operating a private business from her chambers during official time, using office space, utilities, equipment, and staff. *In re Hawkins*, 151 So. 3d 1200 (Fla. 2014).

A Massachusetts judge instructed an officer of the court to provide bulldozing services for a project in which the judge held a financial interest. The work was conducted on court time and without additional compensation to the officer. *In re Troy*, 306 N.E.2d 203 (Mass. 1973).

The Judicial Standards Commission sent a letter of caution to a judge who was alleged to have conducted a pawn business during court hours. JSC 91-11.

Conversely, the judge should not conduct court business while acting in a personal capacity.

A pro tempore judge was cautioned not to use his law office stationery to correspond with parties about official court business. JSC 92-3I.

**10-834. Asserting judicial authority.**

It is an ethical violation for a judge to use the judge's official position to promote the private business, for example, by persuading lawyers and parties to patronize the business or mentioning the judicial position in advertising. Judges have been disciplined for asserting their judicial authority when acting as bail bondsmen, or in conducting a collection business. See NMRA 21-103 and 21-211. *See also* EXERCISE OF JUDICIAL POWER.

[I]t would be improper for a judge to use his or her official title or appear in judicial robes in business advertising, or to conduct his or her business or financial affairs in such a way that disqualification is frequently required. NMRA 21-311, Cmt. 1.

A New York judge who acted as loan broker was disciplined for operating a business and "exploiting judicial position" in collecting debts. The judge's conduct justified the suspicion that he was using the prestige of his office to persuade or coerce others to patronize or contribute to the success of his private business. *Steinberg v. State Comm'n on Judicial Conduct*, 409 N.E. 2d 1378, 1382 (N.Y. Ct. App. 1980).

A Mississippi judge operated a check collection business out of the same office in which he held court and basically with the same personnel. *In re Lambert*, 421 So. 2d 1023, 1023-24 (Miss. 1980).

The Judicial Standards Commission cautioned a judge to refrain from exploiting the judge's position by appearing in a for-profit business advertisement in judicial robes. JSC 15-3I.

**10-840. Interference with judicial duties.**

A judge may not allow financial interests to interfere with the judge's performance of judicial duties. *See* NMRA 21-201. *See also* ADMINISTRATIVE DUTIES.

[I]t would be improper for a judge to spend so much time on business activities that it interferes with or unduly burdens the performance of judicial duties. NMRA 21-311, Cmt. 1.

**10-841. 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. NMRA 21-312(B)

A district judge was removed from office, among other reasons, for having "deliberately failed to devote to the court the number of hours required of a district judge." *In re Castellano*, 1995-NMSC-007, ¶ 24.

A judge's misconduct included personally supervising operations at a development project in which he held a financial interest during regular court hours, averaging only three hours per day at the courthouse. *In re Troy*, 306 N.E. 2d 203, 232-33 (Mass. 1973).

A municipal judge and his staff may not operate a DWI school, even if there is no compensation. A judge, and the judge's staff, must devote his full time during working hours to the operation of the court, not to the operation of other activities, even those related to the court. Even if the judge were not involved, court staff could not do administrative work for the school during court hours. The judge's clerk may work as an instructor in the school on her own time. AO 88-4.

Part-time probate judge may also serve as municipal police chief so long as there is no conflict of time or interest. AO-07-02.

A judge may work in a teen court program in an adjoining county that would require the judge's presence one afternoon each week because the judge's court does not regularly schedule a docket Thursday afternoon, and the judge could rearrange the judge's schedule to properly perform all the judge's judicial duties and work a full work week. AO 13-06

A magistrate may serve as a sporting-event referee for a small stipend in the evenings and weekends but not during business hours. Section 35-1-36.1 and Supreme Court Policy Directive No. 4 (September 2009) require a magistrate to maintain office hours during court business hours. AO 12-05.

A judge may host a music program on a local radio station that will not involve issues that relate to the judge's judicial position and will not use the judge's title either during the program or in its promotion. The program would air on Saturday mornings, and the judge was cautioned that if preparation time interfered with the judicial duties, it would not be appropriate to continue as program host. AO 07-11.

**10-842. Other judicial positions.**

No full-time municipal, magistrate, metropolitan, district, or appellate judge may hold any other judicial position, elected or appointed. NMRA 21-311(D).

The Code presumes that the holding of a full-time judicial position is incompatible with the holding of another judicial position. See also POLITICAL ACTIVITIES.

A full-time judge may not also serve as a tribal court judge, even though the hours the courts are in session do not conflict. AO 05-01; AO 01-07

A magistrate who was also serving as a municipal court judge resigned his municipal court position after being informed by the Judicial Standards Commission that it was a violation of the code, prohibiting conflicting compensated activity. JSC 87-11.

A retired magistrate serving pro tempore may additionally serve as an alternate municipal judge provided there would not be a conflict with the hours or duties relating to the judge's service as a magistrate pro tempore. AO 11-01.

A part-time probate judge may hold another judicial position, provided there are no other conflicts.

In New Mexico, the position of probate judge is part-time. Therefore, the judge may hold another paid position, judicial or otherwise, as long as the paid position does not conflict with the hours and duties required of a probate judge. The other position may not interfere with the integrity and independence of the judiciary, give the appearance of impropriety, or interfere with the duty to perform impartially and diligently. AO 88-3.

**10-850. Financial dealings with parties or lawyers.**

To avoid the appearance of partiality and impropriety, a judge should avoid financial ties to anyone reasonably likely to appear in the judge's court as a party or lawyer.

A judge shall not engage in financial activities permitted under Paragraphs A and B if they:

(3) will involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; NMRA 21-311(C).

A judge was advised to use commercial financing to sell an office building to an attorney who appears before the judge, rather than to finance the sale personally, to avoid creating a continuing business relationship with the attorney. AO 01-09.

A judge may not sell his house to an attorney involved in a pending case, even with full disclosure to the parties. It is unclear whether the sale would be proper after the case is decided. Both the judge and the attorney attempted to avoid knowing about the other's involvement in the contingent sale; however, the situation gives the appearance of impropriety, and judges should not engage in financial transactions with lawyers appearing before them. AO 91-5.

A hearing officer may not sell his house to an attorney who appears before him on a real estate contract, which would create a continuing business relationship with the attorney. However, after the attorney obtained commercial financing allowing him to buy the hearing officer's home outright, the transaction was acceptable, so long as the attorney did not appear before the hearing officer until after closing. AO 06-06 and 07-06.

A municipal judge was advised against leasing a warehouse to a drug task force that included municipal police officers because other members of the municipal police department regularly appear in the judge's court, and there would be an appearance of an improper, ongoing business relationship. AO 05-04.

A district judge was removed from office, among other reasons, for having cooperated with his wife, a salaried employee of a non-profit child advocacy organization, in her funding solicitation efforts. These efforts included distribution of a brochure featuring the judge's name and photograph and acceptance of contributions from law firms with a client or relative of firm members appearing before the judge. *In re Castellano*, 1995-NMSC-007.

By borrowing money from at least six different banks within his jurisdiction, a Kansas judge “failed to manage his financial interests so as to minimize the number of cases in which he might be disqualified.” *In re Yandell*, 772 P.2d 807, 812 (Kan. 1989).

Judge may sell phone number of prior law firm to an attorney who solicited the sale and does not practice before judge, but parties must dispel any suggestion of special relationship between them. AO 07-01.

### **10-860. Statutory prohibitions.**

#### **10-861. Governmental Conduct Act.**

Judges are subject to the Governmental Conduct Act, Sections 10-16-1 – 18. *See* Section 10-16-2(I) (defining “public officer or employee” as “any elected or appointed official or employee of a state agency or local government agency who receives compensation in the form of salary or is eligible for per diem or mileage but excludes legislators”). Section 10-16-4(C) provides:

No public officer during the term for which elected and no public employee during the period of employment shall acquire a financial interest when the public officer or employee believes or should have reason to believe that the new financial interest will be directly affected by the officer's or employee's official act.

*See* New Mexico Department of Justice Governmental Conduct Act Compliance Guide, [nmdoj.gov/publications](http://nmdoj.gov/publications).

#### **10-862. Magistrates.**

Section 35-7-7 is a conflict-of-interest statute for magistrates providing that a magistrate may not, directly or indirectly:

- “(1) buy or be interested in buying any evidence of indebtedness or cause of action for the purpose of bringing any action before any court;
- (2) lend or advance or procure to be lent or advanced any money or other valuable thing to any person in consideration of or as a reward or inducement for placing any cause of action for prosecution or collection in any court;
- (3) operate or be interested in a collection agency;
- (4) with or without suit, collect or attempt to collect or become interested in collecting any claim where . . . [the judge] receives any commission, percentage, fee or charge other than those allowed by law;
- (5) institute or influence any other person to institute any suit in any magistrate court;
- (6) publish advertising relating to . . . [the judge’s] office;
- (7) operate or be interested in a bail or appeal bond business; or

(8) serve as surety on any bond posted in any court.”

**10-900. Gifts, loans and scholarships.**

The Code limits the right of judges and their families to accept gifts or other financial benefits out of concern for compromising the judge's impartiality.

A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality, or if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge. NMRA 21-313(A).

A gift to a member of the judge’s family residing in the judge’s household can be viewed as an attempt to indirectly influence the judge. The concern is reduced if the benefit to the judge is merely incidental. “A judge should, however, remind family and household members of the restrictions imposed upon judges, and urge them to take these restrictions into account when making decisions about accepting such gifts or benefits.” NMRA 21-313, Cmt. 4.

The Code excepts from its prohibition certain types of gifts that have limited risk of appearance problems.

B. Unless otherwise prohibited by law, or by Paragraph A, a judge may accept the following:

- (1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;
- (2) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending or impending before the judge would in any event require disqualification of the judge under Rule 21-211 NMRA;
- (3) ordinary social hospitality;
- (4) commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges;
- (5) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;
- (6) scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based upon the same terms and criteria;
- (7) books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use;
- (8) gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner, or other family member of a judge residing in the judge’s household, but that incidentally benefit the judge;

- (9) gifts incident to a public testimonial; or
- (10) invitations to the judge and the judge's spouse, domestic partner, or guest to attend without charge:
  - (a) an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or
  - (b) an event associated with any of the judge's educational, religious, charitable, fraternal, or civic activities permitted by this Code, if the same invitation is offered to non-judges who are engaged in similar ways in the activity as is the judge. NMRA 21-313(B).

**10-910. Improper Gifts.**

A gift is a voluntary transfer of property with no strings attached. A "gift" to a judge in exchange for favorable treatment by the judge is a bribe, not a gift. The question underlying the propriety of any gift is whether the person making the gift could have an interest in a case that could come before the judge.

Some examples of improper "gifts" are obvious.

Eight judges were removed from office for accepting cash gifts ranging from \$200 to \$500 from a union official, when they knew or should have known that the gifts were offered to obtain favorable results for the union in litigation. The size of the gift was irrelevant if given and received to influence a judge. The judge's intent not to show favor is irrelevant. *In re Cunningham*, 538 A.2d 473, 479-80 (Pa. 1988).

An improper "gift" also may be made if the judge is offered something on more favorable terms than are available to the general public.

Accepting a gift of items at a price not offered to the general public from a business during and after it appeared before the judge is a violation of the rule against creating the appearance of impropriety. *In re Seraphim*, 294 N.W.2d 485, 499 (Wis. 1980).

**10-911. Gifts from parties.**

Accepting a gift from a party in a pending case creates an immediate appearance of favored treatment.

A Massachusetts judge accepted a \$4,000 gift from a person who had a case pending in federal court after the judge made inquiry of a prosecutor concerning the case. *In re Morrissey*, 313 N.E. 2d 878, 879 (Mass. 1974).

A municipal judge was suspended for thirty days for accepting a favor from a person appearing before his court, creating an appearance of impropriety. *In re Terry*, 101 N.M. 360, 683 P.2d 42 (1984).

**10-012. Gifts to parties.**

Gifts to parties raise questions concerning the impartiality of the judge.

A judge handling kinship guardianship cases was advised not to participate in a program in which the local bar would donate gift cards to appointed kinship guardians who were petitioners in cases before the court to help defray guardianship expenses. The program sponsor could work with another office of the court to distribute the gift cards, and the judge could direct guardians to that office after informing them that the program is independent of the court. AO 22-03.

### **10-913. Gifts from attorneys.**

Professional courtesies extended to judges may be improper. For example, judges should not accept free legal services from lawyers who appear in their courts. The Code Commentary states:

Rule 21-313 NMRA prohibits a judge from accepting free or discounted legal services:

- a. from any lawyer who has appeared or is likely to appear before the judge or whose interests have or are likely to come before the judge; and
- b. from any lawyer employed by a law firm if other lawyers in that law firm at the time of the proposed legal services have appeared or are likely to appear before the judge, . . . or if those other lawyers' interests are likely to come before the judge. NMRA 21-313, Cmt. 6.

Exceptions apply for legal services that would be permitted under NMRA 21-313(B)(2) and (4) and for “legal services provided by attorneys assigned by insurers or governmental agencies under preexisting agreements to represent judges in connection with matters arising in the course of their employment.” NMRA 21-313, Cmt. 6.

Free or discounted legal services are gifts within the prohibition of NMRA 21-313; a judge is prohibited from receiving free or discounted legal services in cases before the Judicial Standards Commission from a lawyer who has come or is likely to come before the judge, or whose interests have or are likely to come before the judge.” AO 21-07.

A judge whose former limited liability company law firm was sued and without significant assets was advised that the LLC was not prohibited from receiving free or discounted legal services to handle the case because (1) the LLC, not the judge, was the party and the client; (2) the judge was not involved in the lawsuit or subject to personal liability; and (3) having only a minority interest, the judge could not refuse the offer. AO 22-01.

A Michigan judge received free legal services from a lawyer practicing before him and appointed the lawyer to represent indigent defendants. *In re Lawrence*, 335 N.W. 2d 456, 461 (Mich. 1983).

A Massachusetts judge appointed a lawyer who did private legal work for him without charge as an attorney for indigent defendants. *In re Troy*, 306 N.E.2d 203, 228-29 (Mass. 1973).

### **10-920. Exceptions to prohibitions.**

#### **10-921. Holiday gifts of candy and food.**

Advisory opinions differ regarding the acceptance of gifts such as candy and food from lawyers during the holiday season. *See* National Center for State Courts, *Judicial Conduct Reporter* (Fall 2017) at 17. Some opinions, as from Kentucky, focus on code prohibitions of judges and staff receiving gifts from

lawyers who have come or are likely to come before the judge. Kentucky Advisory Opinion JE 86 (1995). Other opinions have concluded, as did Wisconsin, that gifts of candy and food of de minimis nature fall within the ability of a judge to accept gifts of ordinary social hospitality. Wisconsin Advisory Opinion 98-10R. Judges and staff should not accept holiday gifts that have any significant value.

#### **10-921. Law firm parties.**

Generally, a judge's attending a law firm holiday party or office-opening is an acceptable as ordinary social hospitality. *See* National Center for State Courts, *Judicial Conduct Reporter* (Fall 2017) at 18. Judges should avoid events that seem to exceed the norm of ordinary social hospitality in their nature or cost. Judges should also consider whether attendance would give any appearance of compromising the judge's independence or impartiality.

#### **10-922. Bar-related functions.**

A judge and the judge's spouse domestic partner or guest may accept an invitation to attend a bar-related function devoted to improvement of the law, the legal system, or the administration of justice. NMRA 21-313(B)(10)(a). This rule is not absolute. Accepting an invitation from a law firm for a lavish trip to an out-of-town convention would not be acceptable.

It is usually permissible to accept honorary membership in a bar associations, if other judges receive such invitations. The judge should decline, however, if the association has an advocacy position within the legal system.

A judge may accept free memberships and hospitality from bar associations if its meetings are law related and all judges receive honorary memberships. Fl. AO 84-4.

A judge may attend a bar association function even if it is lavish. NY AO 87-12.

#### **10-923. Social hospitality.**

To be acceptable, the social hospitality must be "ordinary." Problems arise when the judge has a social relationship with attorneys and interest groups. *See* CIVIC, CHARITABLE AND SOCIAL ACTIVITIES.

A New York judge violated the Code by allowing the law firm of a close friend to pay for the judge and his wife to spend a weekend at a country club. Although there was no evidence of favored treatment by judge, acceptance of gift went well beyond ordinary social hospitality. *In re Vaccaro*, 409 N.Y.S.2d 1009, 1010 (N.Y. Court on Judiciary 1977).

A worker's compensation judge was a regular lunch guest of lawyers and representatives of insurance companies with worker's compensation cases pending. The association created an appearance of impropriety. *In re D'Auria*, 334 A.2d 332, 333 (N.J. 1975).

#### **10-924. "Safe" gifts.**

A judge or a member of his family residing in his household may accept:

- a gift incident to a public testimonial;
- books, tapes or other resource materials supplied by a publisher on a complimentary basis for official use;

- a wedding or engagement gift from someone whose appearance in a case would require the judge's disqualification under NMRA 21-211;
- a gift from a relative; or
- a gift to a family member arising from his or her business or other separate activity.

NMRA 21-313(B).

Other gifts are acceptable as long as person making the gift is not a party or other person whose interests have come or are likely to come before the judge, and the gift is not disproportionately large for the occasion. The judge's jurisdictional authority is an important consideration.

An administrative law judge should not accept a \$25,000 gift from a close personal friend who is an executive with a large company that is occasionally involved in proceedings before the judge. Georgia AO 96 (1987).

### **10-930. Loans.**

Judges and family members may accept a loan from a relative, or from a lending or similar institution on the terms available to other people. NMRA 21-313(B)(4).

Judges may not solicit loans from attorneys or others over whom they have power.

An Indiana judge was removed from office for soliciting and accepting a \$2,000 loan from an attorney practicing in his court, failing to report it as required, failing to disclose the loan to parties and attorneys in lawsuits over which the judge presided that involved the attorney's law firm, and failing to disqualify himself in those cases; misrepresenting the source of a loan that in fact was from one of his girlfriends; failing to report loans from a girlfriend and her mother and retaliating against them for cooperating in the investigation; and soliciting a large loan from his court reporter. *In re Drury*, 602 N.E.2d 1000, 1010 (Ind. 1992).

These restrictions also apply to the co-signing of loans. *See Rothman, supra*, 210.500.

### **10-940. Scholarships.**

Judges and family members may also accept scholarships or fellowships awarded on the terms and based on the same criteria applied to other applicants. NMRA 21-313(B)(6).

### **10-950. Awards.**

A judge may accept an award that is available to similarly situated persons who are not judges, based upon the same terms and criteria, as long as it does not appear to exploit the judge's judicial position or interfere with the performance of judicial duties NMRA 21-313(B)(6).

If a judge receives an award in connection with a fundraising event for an organization listed in NMRA 21-307(A), the judge" must not personally or expressly solicit financial support during the event." NMRA 21-307(A)(3).

Judges may accept a gift incident to a public testimonial to the judge. NMRA 21-313(B)(9).

**10-1000. Serving as fiduciary.**

**10-1010. Prohibition.**

Judges may not serve in a fiduciary capacity “except for the estate, trust, or person of a member of the judge’s family.” NMRA 21-308(A).

Even if the exception applies, the judge may not serve if such service will interfere with the proper performance of the judge’s judicial duties or “if the judge as fiduciary will likely 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.” NMRA 21-308(A), (B).

A judge who is a fiduciary when assuming the bench must comply with the requirements of the rule “as soon as reasonably practicable,” but not later than one year from becoming a judge. NMRA 21-308(D).

**10-1100. Serving as arbitrator/mediator.**

A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge’s official duties unless expressly authorized by law. NMRA 21-309.

A judge may participate in arbitration, mediation, or settlement conferences performed as part of assigned judicial duties. NMRA 21-309, Cmt. 1.

A judge may not advertise or offer the judge’s services as a dispute mediator. Arbitration and mediation are prohibited activities, and it is irrelevant whether fees would be charged for these services. AO 88-6.

**10-1200. Practice of law**

**10-1210. Practice of law prohibited for full-time judges.**

A full-time judge shall not practice law unless with the written approval of the Supreme Court while on unpaid leave. NMRA 21-310.

**10-1211. General rule.**

A full-time judge may 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.” NMRA 21-310.

The limitations on practicing law apply not only to appearance in court, but to any form of legal advice. A judge cannot prepare documents, promissory notes, wills, or any legal document for anyone except the judge or a family member.

A judge may not prepare form pleadings to be used by litigants to initiate actions in the judge’s court. The pleadings would provide instructions to litigants that reflect the judge’s experience in raising justiciable issues. Providing these forms falls within the limitation on the “practice of law” in the Code. These actions also could create a perception of partiality, because in a contested action the court would appear unlikely to uphold a legal challenge to the pleadings. A0 93-3.

The Judicial Standards Commission cautioned a judge to refrain from practicing law by providing legal advice and preparing legal documents for people who were not family members, and, if practicing law, must do so while on unpaid leave with the written approval of the Supreme Court. JSC 17-3I.

A magistrate resigned after allegations including that he failed to withdraw as attorney-of-record from several cases after he became a judge, moving for a continuance in one case. *Matter of Hon. Rudy Martin*, JSC 15-2F.

**10-1212. Pro se representation.**

Judges, like anyone else, have the right to represent themselves in court. NMRA 21-310.

A state court judge's pro se appearance as a party defendant in a lawsuit pending before the federal district court does not constitute the practice of law in violation of canons. A pro se appearance is not representation, and the judge has a sixth amendment right to self-representation in the first stage of a criminal action and a qualified right to appear pro se in a civil action. *U.S. v. Martinez*, 1984-NMSC-072.

**10-1220. Practice of law by part-time judges.**

The Code provisions excepting part-time judges from certain Code requirements state that probate and municipal judges and judges serving part-time by appointment or contract (1) “shall not practice law in the court on which the judge serves,” and (2) “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.” NMRA 21-004(B)(1)(c), (2)(d).

By implication, they may engage in law practice, subject to the stated limitations.

There is potential for conflict between the judicial and adversarial roles.

A judge may not hear cases in which members of her firm appear as counsel. See AO 86-7.

A judge may not serve as a contract public defender in the municipal court in which he serves as an alternate judge. AO 89-5.

An alternate municipal judge also is precluded from representing clients in other courts located within the same county. AO 89-1. *See* DISQUALIFICATION.

An attorney who applied to be a part-time municipal judge had a full-time practice in the municipality of the court that included representation of law enforcement officers and organizations within the municipality. Because law enforcement officers regularly appear in the municipal court, the attorney could not serve as a judge while representing clients involved in law enforcement. To do so would create a prohibited appearance of impropriety and partiality. AO 04-02.

**10-1300. Compensation for extrajudicial activities**

**10-1310. General rule.**

A judge may receive compensation and reimbursement of expenses for extrajudicial activities permitted by . . . [the] Code or other law unless such acceptance would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. NMRA 21-312(A).

Neither the source nor amount of such payments may give the appearance of influencing the judge's official duties or otherwise give the appearance of impropriety. NMRA 21-315, Cmt.

The compensated activity must not be a part of the judge's official duties--in other words, the judge may not be paid for something that is already required of the judge.

**10-1311. Conflicting compensated activities.**

No paid extrajudicial activity may interfere with the judge's ability to perform judicial duties. A part-time judge may hold more than one part-time judicial position provided the hours and duties do not conflict.

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. NMRA 21-312(B).

A judge must be able to spend the time required to perform any judicial position.

A judge shall devote the number of hours that is required by any judicial position held. NMRA 21-312(B).

In no event shall other paid employment or compensable activity hours be performed simultaneously. NMRA 21-312(B).

**10-1320. Definition of "extrajudicial compensation."**

Extrajudicial compensation is defined as "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." NMRA 21-315(B)(1).

It does not include:

(a) interest, dividends, rents, royalties, working interests, proceeds of or profits from the sale or exchange of assets;

(b) compensation or income earned prior to entering judicial service, including fees, salary, benefits, perquisites, disability benefits, or retirement benefits;

(c) reimbursement of expenses incurred prior to entering judicial service; or

(d) compensation or income of a spouse or domestic partner attributed to the judge by operation of community property or other law." NMRA 21-315(B)(2).

The amount of extrajudicial compensation must be reasonable.

“Extrajudicial 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.” NMRA 21-315(B)(3).

A judge may receive honoraria or speaking fees, reasonable in amount and commensurate with the task performed. NMRA 21-315, Cmt.

**10-1330. Expense reimbursement.**

A judge may receive reasonable reimbursement for expenses incurred in connection with permitted extrajudicial activities.

Unless otherwise prohibited by Rules 21-301 and 21-313A NMRA or other law [Section 10-16-4.1 of the Governmental Conduct Act], a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge’s employing entity, if the expenses or charges are associated with the judge’s participation in extrajudicial activities permitted by this Code. NMRA 21-314(A).

Reimbursement for necessary travel, food, lodging, and other incidental expenses shall include only the actual costs of the judge and, if appropriate, the judge’s spouse, domestic partner, or guest. NMRA 21-314(B).

A judge must be satisfied that any expense reimbursement or fee waiver does not reasonably appear to undermine the judge’s independence, integrity, or impartiality. NMRA 21-314, Cmt. 3.

**10-1340. Reporting.**

Judges are required to file a public report annually in the office of the clerk of the judge’s court or other office as designated by law, which shall be posted on the court’s website if technically feasible, stating:

- (1) the date, place, and nature of activity for which the judge received extrajudicial compensation or expense reimbursement;
- (2) the amount of compensation or reimbursement or character and value; and
- (3) the name of the payor.

NMRA 21-315(D).

The Supreme Court suspended application of this rule: (1) to part-time probate and municipal judges; (2) to “extrajudicial compensation that includes 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 the collection of fees or retirement benefits earned or reimbursement of expenses incurred prior to entering judicial service;” and (3) “the reimbursement of expenses and the waiver of fees and charges by a governmental entity or entity primarily funded by state or federal funds, in connection with judicial education and training.” Supreme Court Order Nos. 13-8300-045 and 15-8300-013.

Failure to file as required can result in disciplinary action.

A South Carolina magistrate was publicly reprimanded for filing a false affidavit to avoid paying taxes on a truck purchased in-state and for failing to file reports of gifts and compensation. *In re Henderson*, 387 S.E.2d 264, 264-65 (S.C. 1990).

**10-1350. Marriage ceremonies.**

A judge may not receive any compensation or gratuity for performing a marriage ceremony. NMRA 21-312, Cmt. 3.

The New Mexico Constitution has the following prohibitions.

No officer of the state who receives a salary, shall accept or receive to his own use any compensation, fees, allowance or emoluments for or on account of his office, in any form whatever, except the salary provided by law. N.M. Const. art. XX, §9.

No county officer shall receive any fees or emoluments other than an annual salary, as established by the board of county commissioners. All fees collected by a county official shall be paid into the treasury of the county. N.M. Const. art. X, §1.

A judge may receive reimbursement for expenses reasonable and necessary for travel, food, lodging, or otherwise incidental to the judge's performing of a wedding ceremony. Rule 21-314.

**10-1400. Related topics**

DISQUALIFICATION

EXERCISE OF JUDICIAL POWER

ADMINISTRATIVE DUTIES

## **CIVIC, CHARITABLE, SOCIAL ACTIVITIES**

### **11-200. Applicable Law**

NMRA 21-100, 21-200, and 21-301, 21-307

### **11-300. Introduction**

The Code encourages judges to engage in extrajudicial activities that do not compromise their judicial performance or appearance of impartiality. “Participation [of judges] in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.” NMRA 21-301, Cmt. 2. But the Code requires that, in selecting which activities to engage in, the judge strike a balance between interaction with their communities and avoiding an appearance of partiality or coercion on behalf of community groups, especially when attending fundraising events. NMRA 21-307, Cmt. 3. Activities that conflict with or take excessive time away from judicial duties must also be avoided.

### **11-310. Overview: permissible extrajudicial activity**

#### a. Activities concerned with the law, legal system, or administration of justice

The Code specifically has long encouraged judges to participate in activities of organizations or government bodies concerned with the law, the legal system and the administration of justice. NMRA 21-301, Cmt. 1 notes the unique qualification of judges to speak, write, teach or participate in research projects involving these law-related areas.

Judge was advised that membership on board of association of drug court professionals was acceptable, so long as judge’s impartiality was not subject to question as a result. AO 10-04.

A judge may serve on New Mexico Intimate Partner Violence Death Review Team since it will not reflect on judge’s impartiality, has no formal authority and is not identified with any particular view or position, so long as the team will not ordinarily come before the judge. AO 06-2.

Judges have been advised that teaching classes or publishing articles advising the public about the law and legal institutions are acceptable, with certain limitations. The judge should ensure that such activities do not undermine the judge’s appearance of impartiality, consume excessive time that would interfere with judicial duties, or result in unreasonable compensation. AO’s 02-04, 02-07, 01-08 and 01-05.

NMRA 21-307 (A)(4) additionally authorizes judges to make recommendations regarding programs and activities of public or private fund-granting organizations that are concerned with the legal system or the administration of justice.

Judge was advised that writing a letter supporting funding for a legal aid organization would not violate the Code. The Advisory Committee said that the impartiality of the judge could not reasonably be questioned, and the judge’s letter would serve the Code’s interest of advancing the legal system. AO 13-04.

A judge may encourage lawyers to provide *pro bono publico* legal services. NMRA 21-307 (B).

b. Other educational, religious, charitable, fraternal or civic non-profit organizations and activities

The Code of Conduct has evolved to also validate public service by judges that is unrelated to law. NMRA 21-307. Such activities may include service to non-profit educational, religious, charitable, fraternal or civic organizations. NMRA 21-307 (A). That section delineates acceptable activities for judges, such as serving on non-profit boards, giving non-legal advice to organizations on programming, fundraising and investments, and participating in the organization's events, including fundraising events. The judge may not personally solicit donations, at fundraising events or otherwise, except from family members or from other judges over whom the judge exercises no supervisory or appellate authority. The judge's participation in any such events may, however, include speaking, receiving recognitions such as awards, being featured on the program and authorizing use of the judge's title in connection with the event. NMRA 21-307 (A) (3), Cmt. 3 adds that the judge may prepare or serve food, participate in theatrical or musical performances, introduce speakers or present awards. Geyh, at §8.04 [2].

Judge could host an event at the courthouse to celebrate holidays and distribute gifts through "Santa Claus," provided that no public funds were used and title is not limited to Christmas. AO 19-04

Judge may serve as adult troop leader for Boy Scouts. AO 18-06.

Judge may organize concerts for charitable purposes, subject to certain limitations. AO 16-01.

Pottery made by a judge may be sold at fundraiser for law school, with proceeds divided between judge and school, subject to safeguards to prevent appearance of undue influence for purchasers. AO 13-09.

Judge may host music program on local radio, so long as he says nothing to undermine his appearance of impartiality or to demean the judicial position. AO 07-11

**11-320. Limitations**

But judicial participation in or activity in support of even the most respectable and worthy organizations is subject to limitations to preserve judicial integrity. Summarizing those restrictions in NMRA 21-301 and 21-307 (A), a judge may not:

1. engage in activities that conflict with, or take excessive time away from, the judge's performance of official duties [NMRA 21-301 (A)];
2. inappropriately use judicial resources for such outside activities [NMRA 21-301 (E)];
3. serve as an officer, director, trustee or nonlegal advisor in an organization that would ordinarily come before the judge [NMRA 21-307 (A) (5) (a)];
4. serve in any such capacity in an organization that will engage in frequent adversarial proceedings before the judge's court, or, for appellate judges, in any court subject to that judge's appellate jurisdiction [NMRA 21-307 (A) (5) (b)];
5. directly solicit funds or organizational memberships at the group's events or otherwise, except from the limited types of persons permitted by the Code [NMRA 21-307 (A) (2)];

6. take any action, such as solicitation of funds or memberships for a non-profit organization, even from family or other judges as permitted in NMRA 21-307 (A) (2), in a manner that could reasonably be perceived as coercive [NMRA 21-307 (D)];
7. act in a manner that could be perceived as abusing the prestige of judicial office to fundraise for a particular organization [NMRA 21-307, Cmt. 3]; or
8. otherwise engage in activity that would appear, to a reasonable person, to undermine the judge's independence, integrity or impartiality [NMRA 21-301 (C)].

Advisory opinions in New Mexico have advised judges against participating in certain kinds of outside activities, including:

Participation as a non-voting member of a statewide drug recognition committee, which would require a judge to advise law enforcement agencies on standards for drug recognition experts, and to attend meetings where these experts would be certified. This would undermine the appearance of impartiality of the judge if any such DRE's appeared before the judge. AO 21-05.

Participation by a judge in a "dunk-a-judge" charitable fundraising event, which would constitute improper use of the prestige of office. AO 04-04

The American Judicature Society has stated succinctly in new judge training materials: "Even laudable civic and charitable activities may create the impression that a judge is biased in favor of particular causes or issues, may distract or appear to distract a judge from judicial duties, or may exploit or appear to exploit the judicial office for the benefit of private organizations. Therefore, judges need to carefully examine their membership and involvement in and fund-raising on behalf of civic and charitable organizations even, or perhaps particularly, law-related organizations."

Judges can refer their questions concerning the ethics of their participation in outside organizations to the Supreme Court Advisory Committee on the Code of Judicial Conduct. See RESOURCES.

#### **11-400. Affiliation with civic, educational and charitable organizations**

Ethical questions may also arise concerning membership by judges in outside organizations. Judges must review not only what organizations they join when taking the bench, but also memberships they already have.

#### **11-410. Organizational memberships**

##### a. Discriminatory organizations

The Code's strictest prohibition on participation in outside activities lies against judge's membership in an organization that practices invidious discrimination. NMRA 21-306. This rule is intended to prevent the appearance of bias or prejudice evidenced by the judge's affiliation with discriminatory groups. In effect, it creates an irrebuttable presumption, correct or not, that membership in such a group reflects the judge's own beliefs in its discriminatory attitudes toward the identified categories of people.

Hence, New Mexico judges may not belong to any organization that discriminates against people in the following categories:

race, religion, color, national origin, ethnicity, ancestry, sex, sexual orientation, gender identity, marital status, spousal affiliation, socioeconomic status, political affiliation, age, physical or mental handicap, or serious medical condition. NMRA 21-306 (A).

NMRA 21-306 (A) prohibits a judge's membership in an organization that is committed to, or simply practices, invidious discrimination and denial of rights to these identified groups. A judge who learns of the discriminatory policies of a group to which the judge belongs must resign immediately. Invidious discrimination is most easily defined by the group's arbitrary exclusion from membership of any otherwise qualified person based on any of the protected categories. NMRA 21-306, Cmt. 2. That comment goes on to explain other factors used to determine whether the group practices invidious discrimination.

NMRA 21-306, Cmt. 2 further explains that the rule is not intended to preclude membership in a group "dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members." *Id.* NMRA 21-306, Cmt. 4 explicitly exempts membership in religious organizations from its prohibition.

A judge may not use the facilities or benefits of an organization that practices such invidious discrimination. NMSA 21-306 (B). Prohibited benefits may, for example, include group insurance benefits, advertising space in the organization's newsletter, meeting space, or parking privileges.

b. Membership in organizations advocating for rights or other public interest causes

Judges who belong to organizations advocating for rights of particular groups or public policies, however sincere their motives, may cast shadows over their capacity to preside impartially over trials in which those organizations are interested. For example, a defendant charged with DWI could question the fairness of a judge who belongs to Mothers Against Drunk Driving (MADD). AO 88-7. Membership in law enforcement organizations such as the Fraternal Order of Police or the Sheriff's posse, groups advocating for victims of domestic violence, and specialized bar associations such as a defense lawyers' association, all reflect on a judge's impartiality in applicable criminal proceedings. Similarly, a judge who is a member of a civil rights advocacy, indigent legal services, or environmental organizations would be barred from presiding over litigation by such groups.

A district judge was removed from the bench for, among other reasons, allowing his chambers, telephone, stationery, photograph, name and title to be used on a solicitation letter for a non-profit organization. The organization's volunteers would frequently appear in court on behalf of children in foster care. The judge's wife served as the organization's director. The judge was found to have used the prestige of his office to solicit funds, and to have conveyed the appearance that persons who contributed to the organization would be able to influence the court. *In re Castellano*, 1995-NMSC-007.

A judge was advised against serving on a DWI program advisory council whose activities were closely associated with support for law enforcement and prosecution-oriented organizations. AO 02-05.

By contrast, membership in the American Bar Association or other groups that promote legal education and professionalism is acceptable, and even laudable. But even there, the judge must take care not to participate in public debates and resolutions on issues where the judge's participation may give the appearance of a pre-existing mindset for or against legal positions on which the judge may have to rule.

A judge was advised that service on several non-profit boards and on a governmental commission involving the administration of justice would be allowable, but that service on another non-profit board of an organization that might appear in judicial proceedings would not be. AO 02-06.

A judge should recuse from any case as soon as such a conflict becomes evident.

A judge was publicly censured for serving on the board of a hospital but refusing to disqualify himself from cases in which the hospital was a party. *In re Anderson*, 814 P.2d 773, 776 (Ariz. 1991).

This rule applies to a judge's service to educational institutions.

A full-time judge may not serve as a member of the Board of Regents of a state educational institution. AO 90-9.

#### **11-420. Service in leadership roles**

The Code permits judges to serve in leadership roles in any organization to which they may belong with exceptions. NMRA 21-307 (A) (5).

These include service as an officer, director, trustee or nonlegal advisor to the organization. But the judge may not so serve if the organization will either be "(a) engaged in proceedings that would ordinarily come before the judge, or (b) will frequently be engaged 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." NMRA 21-307 (A) (5) (a) and (b).

Part (b) means that a district court judge would be barred from leadership role in an organization that will frequently appear in that judge's court, whether that judge or a colleague on that same court would preside. But in addition, a state court of appeals judge or supreme court justice would be barred from a leadership role in such an organization, if the organization would engage in frequent adversary proceedings before the district court. As a leader in the organization, the appellate judge would be unable to hear such cases on appeal, forcing that task on colleagues.

While the explicit conditions of this rule only directly prohibit a judge from serving in the organization's leadership roles, judges should be cognizant of Cmt. 2, which requires judges to consider whether any of their organizational memberships or activities "reflect adversely upon [their] independence, integrity, and impartiality." Stated explicitly in this rule or not, the likelihood that an organization may appear before the judge or the judge's colleagues on the same court is a significant factor in that determination. NMRA 21-307, Cmt. 2.

A judge may serve as a member or officer in a council on crime and delinquency as long as the prestige of office is not used for the benefit of the organization. AO 86-4.

Judge seeking to join or serve as director in NM Association of Drug Court Professionals is given detailed guidance on conditions to protect against damage to the judge's appearance of impartiality. AO 10-04.

A judge should not serve as president of the board of directors of a shelter for victims of domestic violence, even though board members have no fund-raising responsibilities or access to the names of those served by the charity. Service on this committee would nonetheless create an appearance of impropriety and cast doubt on the judge's impartiality, with defendants in such actions likely to reasonably believe that the judge knew the victim or was biased in favor of the victim. AO 88-7.

Of course, direct intervention in a legal proceeding involving a charity in which the judge holds a leadership role constitutes serious ethical misconduct.

A New York judge was removed from office for attempting to use judicial status to secure preferential treatment from city health law enforcement agencies for a charity of which he was trustee, appeared at a court hearing involving the charity and attempted to engage in ex parte conversation with the trial judge. *Shilling v. State Comm'n on Judicial Conduct*, 415 N.E.2d 900, 900-01 (NY 1980).

**11-421. Organizations conducted for profit.**

A judge may not serve as a director, officer, trustee or nonlegal advisor of an organization operated for profit unless that organization is closely held by the judge or members of the judge's family, or is primarily engaged in investing their financial resources. NMRA 21-311. SEE FINANCIAL AND BUSINESS DEALINGS.

**11-430. Fundraising**

**11-431. General anti-solicitation rule.**

Subject to the requirements of Rule 21-301 NMRA, a judge may participate in activities sponsored by [not for profit] organizations or governmental entities . . . including . . . (2) soliciting contributions for such an organization or entity, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority. . . NMRA 21-307 (A) (2).

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so. NMRA 21-103.

**11-432. Policy.**

The purpose of the anti-solicitation rules is to prevent people from donating money because they fear they will offend the judge or because they hope to gain favorable treatment. These rules also prevent use of the prestige of the judicial office to inappropriately promote the interest of people or organizations.

**11-433. Scope of prohibition.**

The rule is strictly interpreted to prevent a judge from raising funds on behalf of an organization. A judge must disassociate from the fundraising activities of any organization, except for participating in planning, or in soliciting from family or certain other judges. NMRA 21-307 (A) (2). Both indirect and direct solicitation are prohibited. The critical question is whether the judge's participation can be perceived as use of the judge's status to entice people to attend an event and/or encourage people to contribute to the organization.

*a. Direct solicitation.*

The obvious case of direct solicitation is when a judge personally, perhaps in chambers, asks for charitable contributions--such as cash contributions or ticket purchases--from lawyers or employees. Outside the courthouse, judges may not canvass door-to-door, for example, for their church or the Red Cross, or participate in a phone-a-thon where the judge speaks to, but does not see, the person being solicited. Speaking at fundraising events also is prohibited, even if the judge does not approach people individually. Geyh, at §8.04 [2].

A judge may not ask individuals or associations to purchase a ticket or table for a luncheon for The New Mexico Council on Crime and Delinquency. The judge would be using the prestige of office for the benefit of the organization. It is irrelevant that the ticket purchaser is an attorney. AO 86-4.

The restriction on fundraising also applies to law-related organizations.

A judge may not participate in either the fellow nominating process of the New Mexico Bar Foundation or fund-raising for it. A judge's prestige would be used to solicit money from attorneys who appear in front of the judge, and the prestige would extend to "encouraging" an attorney/nominee to accept an invitation to become a fellow since that requires a certain contribution. AO 89-3.

*b. Indirect solicitation.*

Solicitation may occur without face-to-face contact. A judge's appearance on a telethon is a problem because the judge is abusing the prestige of office to raise funds for a charitable organization. But public appearances not associated with fundraising are permitted.

A probate judge's name may be aired during a public television fundraiser in a program created by the judge (before the judge took the bench) and then revised by the judge, on wills, trusts, probate and health laws without violating the prohibition against direct solicitation of funds by judges as long as the judge did not personally participate in any fundraising activities. AO 03-02.

*c. Solicitation letters.*

The anti-solicitation rule does not prevent an organization from listing a judge's name on its letterhead.

It shall be permissible for a judge's name to appear on an organization's letterhead, even if the letter solicits funds or membership, as long as the judge is not personally involved in the solicitation. A judge's title, however, shall not appear on an organization's letterhead for any purpose. NMRA 21-307, Cmt. 4.

A family court judge should not allow a non-profit family services organization to continue using the judge's name on its letterhead, where the judge resigned as a director upon taking the bench, where potential contributors would be likely to appear before the judge. AO 07-08. [Decided under previous rule]

d. Creative sentencing.

The practice of allowing traffic offenders to make contributions to charity in lieu of paying a fine is a prohibited form of solicitation. This prohibition does not apply to a defendant's fulfillment of a community service obligation imposed as part of sentencing.

The Judicial Standards Commission considered asking the Supreme Court to impose sanctions against a municipal judge for conducting an annual "turkeys for tickets" program, whereby traffic fines were substantially reduced for violators who donated Thanksgiving turkeys to the court for distribution to charities. The judge agreed to comply voluntarily with the Commission's recommendations out of respect for its role within the judiciary and the matter was not pursued. *In re: Fiorina*, unreported matter.

e. Attending fundraising events.

A judge may *attend* fundraising functions of nonprofit organizations as a contributor. Prohibiting such attendance would isolate judges from their communities. NMRA 21-307, Cmt. 3.

The rule permits the judge to speak or introduce speakers, accept personal recognition such as awards, or even allow their name to be used in connection with the event, so long as the judge does not "personally or expressly solicit financial support during the event." NMRA 21-307 (A) (3).

Sometimes the restriction on fundraising is one of several factors making a judge's service to an organization inappropriate.

It would be inappropriate for a judge to serve as co-chairman of a national committee for the racing industry. Various groups that fund the racing commissions, including the commissions themselves, are likely to appear before the judge's court. Because the racing industry is an important state industry, the judge's capacity for impartially deciding cases dealing with horse racing might reasonably be questioned. AO 88-8.

**11-440. Duty to review activity.**

The changing nature of some organizations and of their relationship to the law makes it necessary for judges regularly to reexamine the activities of each organization with which they are affiliated, to determine if it is proper to continue the relationship. This vigilance can ensure that a judge does not allow changing organizational purposes to "conflict with the judge's obligation to refrain from activities that reflect adversely upon [the] judge's independence, integrity, and impartiality." NMRA 21-307, Cmt. 2. For

example, charitable hospitals may find themselves in court more often over time, and the boards of legal aid organizations may make policy decisions of political significance or imply commitment to causes that may come before the courts for adjudication.

### **11-500. Government Commissions**

The Code limits a judge's appointment to government bodies, including committees, boards and commissions, to those that are law-related. The judge may also represent a governmental entity at ceremonial or similar events, or in connection with historical, educational, or cultural activities. NMRA 21-304 (A) and (B). Even permissible service, however, remains subject to the constraints of the Code, including considerations of time and other resources, and the requirements of independence and impartiality of the judiciary. NMRA 21-304, Cmt. 1.

The Code also provides that:

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

- A. in connection with matters concerning the legal system or the administration of justice; or
- B. when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity. NMRA 21-302 (A) and (B).

Commentary to this section explains that while it is inappropriate for judges to testify as to their opinions on substantive legal issues, judges' expertise in the legal system and the administration of justice is important to help government make informed policy decisions. NMRA 21-302, Cmt. 1. Additionally, the commentary reminds judges not to use inappropriately the prestige of their office, nor to make public comment on pending or impending matters, or act in a matter that appears to a reasonable person to undermine the judge's independence, integrity, or impartiality. *Id.*, Cmt. 2.

The Code also recognizes that preventing judges from protecting their personal interests before government bodies would be an undue burden. But Cmt. 3 cautions judges not to refer to their judicial positions in such appearances, and to otherwise avoid using the prestige of their office.

### **11-600. Social Activities**

#### **11-610. Social hospitality.**

A judge may accept ordinary social hospitality . . . NMRA 21- 313 (B) (3).

The line between "ordinary social hospitality" and improper attempts to gain the judge's favor can be difficult to draw. The context is important and more than one factor may need to be considered in deciding whether it is proper for the judge to attend the event. These factors can include impacts of the social relationships on the reality and appearance of the judge's independence, integrity, obligation to respect the law, impartiality, or timely performance of judicial duties.

When invited to a social occasion, the judge should be alert to situations that might cause a reasonable observer to question how attending might affect the judge. Is the person making the social contact an old

friend or recent acquaintance? Does the person have an unsavory reputation in the community? Is the gathering large or intimate? Is it spontaneous or prearranged? Is alcohol being served? Will the judge receive any benefits or gifts beyond normal hospitality?

Perhaps most importantly: does anyone else who is attending practice regularly, or have a case pending or impending, before the judge? Geyh, §7.14 [5].

Judge was suspended for spending a weekend at a country club as the guest of a law firm with a case pending before the judge. *In re Vaccaro*, 409 NYS 2d 1009 (NY Ct. Jud. 1977).

### **11-611. Relationships with attorneys.**

Most judges, especially those who are lawyers, have friends who are attorneys. Judges are not expected to abandon such friendships, but should be careful about social contacts with attorneys in certain situations.

Judge was censured for accepting football game tickets in open court from an attorney appearing before him. State Supreme Court rejected characterization of gift as “ordinary social hospitality.” *In re Haley*, 720 N.W. 2d 246 (Mich. 2006).

Judges should, as a rule, avoid socializing with attorneys who have cases pending, or who appear repeatedly before the judge, to avoid ex parte communications and the appearance of impropriety. The smaller the group, the greater the restriction. For example, while the judge may attend a public function such as a community picnic or bar association function, attending an intimate dinner party when the lawyer will be present becomes more difficult.

In communities with few attorneys, however, strict adherence to such a policy may result in a distressing state of isolation of the judge and the judge’s family from long-time friends. Where more than one judge serves on the same bench or alternates are available, a judge should recuse when close friends appear in that court.

The test to apply in such circumstances may best be characterized as: whether the judge feels capable of disregarding the relationship and whether others can reasonably be expected to believe that the relationship is disregarded. Geyh, §4.07 [4].

A judge presided over a criminal case in which one of the prosecutors was a close friend. The relationship was so close that the two families were going on vacation together immediately after the sentencing in the case. The reviewing court found there was a reasonable question about the judge's impartiality in this instance, but upheld the conviction because the other lawyer knew about the friendship and did not object until after the conviction. *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985).

In itself, the fact that the judge is acquainted with the attorney is not disqualifying.

**11-612. Relationships with parties.**

The same analysis applies to parties. Under the objective test, a judge should recuse if one of the parties is an intimate friend. *See* DISQUALIFICATION. It is also improper for a judge to have social contact with someone close to proceedings in the pending case.

The Supreme Court reprimanded a district judge for presiding over a criminal case while having an ongoing personal friendship with the defendant's attorney, who was also the defendant's boyfriend. *In re McBee*, 2006-NMSC-024.

A Florida judge was removed from office for misconduct including engaging in sale of land to the father of a daughter whose criminal case was pending in his court. *In re Leon*, 440 So. 2d 1267, 1269 (Fla. 1983).

**11-613. Relationships with criminals.**

A judge who engages in a "close and intimate association" with a criminal compromises the integrity of the judiciary.

A New Jersey judge attended a picnic hosted by old friend who had recently entered a plea to racketeering charges. This conduct could reasonably cast doubt on the judge's commitment to obedience to the law or his tolerance of criminal behavior. *In re Blackman*, 591 A.2d 1339, 1341-42 (N.J. 1991).

A Louisiana judge accepted meals, drinks and travel expenses from a known felon and aided him in his efforts to have the conviction overturned. The association created an appearance of disrespect for the law. The State Supreme Court, however, did not find gross misconduct sufficient to remove the judge from office. *State v. O'Hara*, 211 So.2d 641, 644-46 (La. 1968).

Another Louisiana judge was suspended from office for one year for having associated with prostitutes and smoking marijuana in violation of state and federal law. Judges must avoid fraternizing with persons who are known criminals. Intentional association with such persons is prejudicial to the administration of justice and brings discredit to the judicial office. *In re Whitaker*, 463 So. 2d 1291, 1303 (La. 1985).

**11-700. Related topics**

DISQUALIFICATION

IMPARTIALITY

GIFTS, LOANS AND SCHOLARSHIPS

## **POLITICAL ACTIVITIES**

### **12-100. Checklist**

- Have you determined whether you are able to fundraise for your campaign?
- If so, have you established a campaign committee to fundraise?
- Are you considering personally asking for campaign funds from a party or attorney in a case pending in your court?
- Have you asked your campaign committee to tell you the names of contributors?
- Are you engaging in fundraising, or attending a fundraiser, for another political candidate?
- Are you taking any action to support your political party?
- Does your campaign advertising accurately represent your qualifications and experience?
- Are you using judicial letterhead or office resources for your campaign?
- Is your staff campaigning for you while on duty?

### **12-200. Applicable Law**

NMRA 21-102; 21-004; and 21-400 through -405.

### **12-300. Introduction**

As with every other public office, becoming and remaining a judge in New Mexico requires the exercise of political efforts and skills. Every person who aspires to attain and keep a state or local, full or part-time judicial seat must face the possibility of at least one contested election. Some judges will in addition need to seek favorable ratings from judicial nominating committees followed by gubernatorial appointment, and eventually go before the voters for retention. Just like all other candidates for state and local office, judicial candidates are subject to statutory and regulatory limitations on campaigning, fundraising and reporting.

But while judicial candidates are subject to all of the same electoral rules as other candidates, they face additional, stricter ethical constraints than aspirants for or holders of any other position of public trust. This is because public confidence in the independence, integrity and impartiality of the judicial system is critical to its effectiveness. And the integrity of the judiciary as a whole rises or falls with the trustworthiness of each individual occupant of the bench.

This chapter on political activities will first summarize rules that apply to the political activity of all judges, regardless of the court on which they serve. It will then review the differences among factors, such as the methods for judicial selection, that determine which other political rules apply to which judges. The greatest part of this chapter will then focus on reviewing the rules that apply to each set of judges under the Code of Judicial Conduct. It should be noted that the political activity to be discussed here includes more than direct campaigning for election, such as participation in other elections and political events that take place between election cycles.

### **12-310. Political Laws and Rules other than the Code**

**It is important to note that the Code of Judicial Conduct adds to, and *does not replace*, the statutes and rules that govern all political candidates. While the Code generally imposes stricter rules on judicial campaigns than the state laws, ordinances and rules controlling other election campaigns, the political activities of judges and candidates for judicial office remain subject to these legal**

requirements unless exempted by the laws. *See, e.g.,* the Campaign Reporting Act, §1-19-25 – 37 and the Nonpartisan Judicial Retention Act, §1-26-1 – 6.

**Candidates for municipal judge in home rule municipalities must adhere to the requirements of municipal ordinances, state statutes *and* the Code of Judicial Conduct. *See* §1-22-1—19. This Handbook only addresses the requirements of the Code of Judicial Conduct. For other state political rules, please consult the website of the Secretary of State, at [nm.sos.gov/candidates&campaigns](http://nm.sos.gov/candidates&campaigns); or call the Bureau of Elections at 505-827-3600 (option 2), during normal working hours. Municipal rules are also available through the clerks of each county.**

### **12-320. Political rules applicable to all judges under the Code of Judicial Conduct**

Quite a few of the rules in the Code governing political activities apply to all judges and candidates for judicial office. These rules are fundamental to assuring the integrity of every judicial office as political processes and campaigns occur. Some of them, such as restrictions against making commitments as to how they will decide cases once elected, are the exact opposite of the expectations of candidates for other public offices.

Examples of these rules include:

NMRA 21-400, canon 4: A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.

No judges or judicial candidates may:

- make commitments that they will rule a certain way in cases likely to come to their court, NMRA 21-401 (C) (7);
- act as leaders, hold office in, or make speeches on behalf of, a political organization; or publicly endorse, oppose or solicit funds for other candidates for political office, NMRA 21-401 (C) (1), (2) and (3), and 21-402 (C);
- make any false or misleading statements knowingly or with reckless disregard for the truth, NMRA 21-401 (C) (5);
- personally solicit or accept contributions for the candidate’s own campaign; allow their campaign committees to solicit or accept contributions that are unreasonable in amount or could create grounds for disqualification; or attempt to ascertain the names of donors to the campaigns of the candidate or opponents, NMRA 21-404 (A) and Cmt. 3, and 21-402 (A) (2);
- use their official letterhead, or other resources of their office, to benefit their campaigns;
- accept a nomination or be elected to any non-judicial public office; a judge filing a statement of candidacy for such an office must immediately resign. NMRA 21-405 (C).

While these examples all prohibit certain political activities, the rules recognize that (except for appointed or contract part-time judges) all judges are required to participate in elections, many of which will be contested. Since the people of the state choose to have their judiciary directly responsible to the electorate, they must allow the judicial candidates to engage in political activity. The Code therefore enumerates political steps these candidates may take to get elected.

**12-330. Overview of selection and retention processes**

The Code imposes different political rules depending on the circumstances applicable to each judicial position. These circumstances include: the selection process for each judicial office; whether a candidate for reelection to judicial office is engaged in a campaign through a contested or retention election; whether the judicial position is full or part-time; whether positions are to be filled by partisan or non-partisan elections; and how much campaign funding the candidate intends to raise. When determining the applicable rules, it is important for each judge to consult the appropriate rule for that position and that campaign.

The selection processes for various judicial positions in New Mexico, as they relate to the political rules of the Code, are as follows:

**Appellate courts:** justices of the supreme court and judges on the court of appeals are initially appointed by the governor to fill any vacancy, for a full term or for the duration of a term for each appointment. The governor must choose from a list of candidates determined to be eligible by an appellate judges nominating commission, comprising persons from around the state who are appointed by certain public officials, according to rules set out in Article VI, §35 of the State Constitution. The commission members solicit and review statements of the qualifications of the applicants, consider comments from members of the bar and the public, and send a list of recommended applicants to the governor for consideration. After the first term of each justice or judge has been completed, the appointed justice or judge stands for a partisan election, in which any person meeting the constitutional qualifications may compete. To remain in office after standing for that one (potentially contested) election, the justice or judge may stand for an unlimited number of retention elections. The retention election does not permit any opposition candidates, and the justice or judge must receive at least a 57% “yes” majority to retain their seat.

**State district courts:** the procedure, set forth in Article VI, §36, is essentially the same as that for appellate justices and judges, except the voting members on the nominating commission for each judge are all drawn from the judicial district where the vacancy has arisen.

**Metropolitan courts:** Article VI, §37 sets forth essentially the same procedure. Since the only metropolitan court is located in Bernalillo County, all voting members of the nominating commission come from there.

**Magistrate and probate judges:** these judges stand for partisan election every four years. They are selected for their party’s nomination through primary elections, and then face any opponents in general elections. These judges are elected by voters in the counties where they reside and serve.

**Municipal court judges:** are selected to serve each municipality by its voters, either according to state law or, for home rule municipalities, as provided in their charters.

The code tries to “reconcile the perceived need for an elected judiciary with the general desire for a judiciary of unquestioned integrity, independence, and impartiality.” *Geyh, supra*, §10.01. When judges campaign or engage in other political activity, the public may become concerned that they are indebted to particular supporters, parties or politicians. The restrictions of the Code attempt to strike this balance.

**12-340. Overview of Code’s rules on political activity.**

The Code sets forth rules on political activity according to whether or not the judges are currently running for election, what kind of election campaign they are conducting, or whether they are undertaking an effort to be appointed to judicial office.

Rule 21-401: addresses judges’ political activity and elections in general, including when they are not running for election. This set of rules defines what political activity judges may and may not undertake at any time, whether or not they are engaged in an election campaign.

Rule 21-402: describes political activity that judicial candidates, both incumbents and challengers, may or may not conduct during their election campaigns. This rule includes fundraising requirements and limitations on identifying with a political party.

Rule 21-403: identifies allowable political activity for a candidate for appointment to judicial office.

Rule 21-404: discusses the role and responsibilities of campaign committees.

Rule 21-405: states the requirements for judges who seek non-judicial office.

**12-400. Political Activity by Judges in General**

Regardless of whether a judge is involved in an election campaign, the Code regulates judges’ political activity for their entire tenure. These rules are intended to avoid an appearance that the judge’s independence, integrity or impartiality are compromised by loyalty to a political party or a political ideology.

**12-410. Activity on behalf of the legal system**

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. NMRA 21-401 (A).

The rule allowing judges to engage in activity involving the legal system, such as by offering testimony to legislative bodies, is consistent with the judge's authority to appear at public hearings, serve on government committees, and to otherwise share their expertise in the legal system with bodies of the other branches of government. NMRA 21-302 (A) and 21-304 (A). NMRA 21-302, Cmt. 2, gives the example of a chief justice providing legislative testimony on budgetary or administrative issues for the judiciary, which the rules allow.

Municipal judge is advised that Code permits the judge’s speaking and conducting other political activity against a proposed constitutional amendment to require that all municipal judges be licensed attorneys, subject to constraints to protect the integrity, independence and impartiality of the judiciary. AO 08-01.

**12-420. Support for candidates and political organizations**

NMRA 21-401 (C) prohibits judges from acting as leaders or holding office in political organizations. Nor may judges publicly endorse or oppose candidates for public office or ballot issues that do not relate to the administration of justice or to the legal system. This prevents judges from signing onto advertisements

endorsing candidates, or constitutional amendments that are unrelated to the judicial system, for example. *Id.* Cmt. 8.

Judges running in retention or non-partisan elections may not identify as candidates of a political organization, NMRA 21-402 (G), but candidates in partisan elections may do so. NMRA 21-402 (F).

All judicial candidates may run as part of a slate and participate in permissible joint fundraising events organized by their campaign committees with other judicial candidates; however, candidates in partisan, non-partisan, and retention elections for judicial office shall not solicit funds for any other political campaign or for any other candidate for any other office NMRA 21-402 (C).

Magistrate judge who authorized use of his name in a newspaper endorsement of a mayoral candidate violated the Code, even though his judicial title was not included. *In re Vincent*, 2007- NMSC-056.

Magistrate Judge who continued serving as contract pro tempore magistrate after retiring faced the Judicial Standards Commission for again endorsing candidates and posting their campaign materials on his Facebook page. The judge had previously discontinued doing so after being investigated by JSC while in his full-time position. Judge agreed to retire from his pro tempore position. *Matter of Hon. Philip J. Romero*, JSC 15-7F. [Decided under former rule; current NMRA 21-401 (C) (2) (a) and 21-004 (B) (2) (c) would prohibit endorsements only while the pro tempore judge is serving as a judge.]

Judge cautioned for violating restrictions against political activity for campaigning publicly for candidates for non-judicial office by distributing an endorsement letter, recording radio ads stating the judge's name and carrying a sign at a primary election polling site. JSC 13-3I.

Judges are further barred by NMRA 21-401 (C) (3) from making speeches in support of a political organization. NMRA 21-402 (A) (3) (b) and (c) also bar judges from contributing to a political organization or candidate. NMRA 21-401 (C) (2) (a), Cmt. 3. But that prohibition is suspended when the judge declares and is running as a candidate for judicial office, NMRA 21-402 (A) (3) (c). A judge, whether or not running for election, should always avoid endorsing other candidates, including members of the judge's family. NMRA 21-401 (C) (4), Cmt. 3.

Judge was advised that NMRA 21-401 (C) (4) prohibits making a contribution to the political campaign of the judge's spouse, but that the spouse may contribute to the campaign from community funds managed by both spouses. For campaign reporting purposes, however, depositing the funds first into a separate account owned by the spouse would prevent the judge's name from appearing as a contributor. AO 17-01

District judge was indicted on several felony charges. The charges alleged that the judge solicited from a candidate for appointment to the bench a bribe to be paid to the governor, who was the appointing official, and who was unaware of the solicitation. The judge was suspended during the pendency of the proceedings because the charges cast doubt on his integrity, honesty and character. He ultimately pleaded no contest to misdemeanor charges,

disposing of the felony charges, and resigned permanently from the bench. *Matter of Hon. Michael T. Murphy*, JSC 12-5F.

Several additional restrictions apply only to metropolitan, district and appellate court judges who are not candidates. They may not buy tickets for or attend fundraising events for political organizations or candidates. When such judges become candidates, they may buy tickets and attend the events. These restrictions do not apply to magistrate, probate or municipal court judges or candidates for those offices.

The restrictions listed above do not prevent the judge from *privately* endorsing candidates, NMRA 21-401, Cmt. 8; or from attending political gatherings where no fundraising takes place, NMRA 21-401 (A). It is also important to note that a judge may not ask others to do or say things that the Code prohibits for judges; and is also expected to take reasonable measures to ensure that no other person violates the judge's own ethical responsibilities. NMRA 21-401 (E).

### **12-430. Limitations on statements**

The Code also protects the integrity, independence and impartiality of the judiciary by restricting some kinds of public statements by judges, whether or not they are made during an election campaign.

NMRA 21-401 (C) (5) prohibits judicial candidates from knowingly or with reckless disregard for the truth make any false or misleading statements misrepresenting their own or their opponent's qualifications, present position or other material fact.

A probate judge running for a seat on the magistrate court was advised not to advertise "elect *Judge X* to the magistrate court," because of the implication that the candidate was already on the magistrate court. The ad could identify the candidate as a probate judge. AO 02—01.

Nor can a candidate campaign for "re-election" to a judicial office to which the judge had originally been appointed. JSC 93-2I.

Campaign literature may not include a photograph of a candidate in judicial robes or otherwise imply that the candidate is an incumbent, unless the candidate has served in a judicial office that the literature identifies. AO 92-03

During debate broadcast over radio, magistrate's false or misleading statement that no judicial disciplinary complaints had been filed against her was found to constitute willful misconduct in office. *In re Miller-Byrnes*, S. Ct. No. 28-716 (August 31, 2004).

A judicial candidate may respond to personal attacks or misleading statements about the candidate's record, so long as the response would not affect the outcome or fairness of a matter pending or impending in any court. NMRA 21-402 (A) (3) (e) and 401 (B) (6); AO 04-05.

NMRA 21-401 (C) (6) prevents statements that could reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in *any* court, while subparagraph (7) prohibits pledges, promises or commitments inconsistent with the judges' obligation to be impartial in any matter likely to

come before the judge. Both these restrictions apply whether or not the offending statements are made about a case the judge is actually hearing.

Magistrate judge, while candidate for office, advised landlord to file suit against troublesome tenant in judge's court after the judge was elected and explained how to excuse other judges. Judge was removed from office. *In re Rodella*, 2008-NMSC-050.

But the rules permit judges and candidates to make commitments concerning the honest and efficient operation of their courts should they be elected. Additionally, the U.S. Supreme Court has ruled that judges, both as candidates and while serving on the bench, retain a constitutionally protected right to speak publicly about their views on issues, so long as no pledge, promise or commitment is made to rule a particular way. *Republican Party v. White*, 536 U.S. 765 (2002).

Finally, a judge or candidate for judicial office must avoid making any commitments on how the judge will rule on matters likely to come before the court. NMRA 21-401 (C) (7). Since such statements would indicate that the judge's mind has been made up before having heard evidence or arguments, they are inconsistent with the duty of impartiality. *Id.*, Cmts. 5-6.

While campaigning for election to judicial office, candidates may be asked to elaborate on their judicial philosophy. This may occur in direct questions from voters or through questionnaires from media or advocacy groups. The limited guidance given by the Code for handling this is found mostly in NMRA 21-401 (C) (7), which prohibits the making of "pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." Comment 11 to NMRA 21-402 acknowledges that this provision "does not specifically address judicial responses to such inquiries." That comment advises candidates that, if they feel the need to respond to such inquiries, they "should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected." Comment 11 also suggests language that the candidate may use to explain reasons for not responding.

The most current authority on this issue reviews example of rulings from different state Supreme Courts, which vary somewhat. Geyh, §10.09 [1]. That authority finds that "[t]he general sense of these opinions is that anything that could be interpreted as a pledge that the candidate will take a particular approach in deciding cases or a particular class of cases is prohibited." *Id.* That author points to examples of such unacceptable statements as including blanket opposition to plea bargaining, a commitment to be "tough on drunk driving," or even adhering to "a strict sentencing philosophy." *Id.*

#### **12-440. Resign to run rule**

When any judge decides to seek appointment or election to public, nonjudicial office, possible conflicts arise. These include the danger that the judge will have to make commitments related to the position they are seeking that may undermine the judge's obligation to be impartial when serving on the bench. The Code addresses this by creating two rules, one for judges seeking appointment and the other for those filing for election. NMRA 21-405.

Finding those potential conflicts too serious to be overcome in the latter case, the Code creates a "resign-to-run" rule for judges who file for election to non-judicial office. NMRA 21-405 (C). As the name of the rule implies, upon filing to compete for elective, non-judicial office, the judge must resign from the bench

immediately. This obligation arises from the Code's recognition that the possibility is too strong that the judge may either use their office to promote their candidacy, retaliate in the event of electoral defeat, or be perceived as doing so.

Municipal judge who, on erroneous advice of counsel, failed to resign from bench after filing candidacy for county commission seat, subsequently resigned by stipulation. *Matter of Hon. Dorothy Encinias*, JSC 19-6F.

Magistrate running for District Attorney was required to take leave without pay upon filing of statement of candidacy. The office of district attorney is not a judicial office for purposes of [NMRA 21-405 (C)]. [Decided under former rule that did not require judge to resign to run.] *In the Matter of the Applicability of Amended Canon 7 of the Code of Judicial Conduct: Magistrate Judge Gloria Lyons*, 101 NM 220 (1984).

The requirement of resignation to run for election to non-judicial office does not extend to applying for appointed office. NMRA 21-405 (A) and (B) put restrictions short of resignation on what a judge may do when applying. Those restrictions include: soliciting or accepting funds to support the candidacy, or engaging in any political activity other than communicating with the appointing authority, seeking endorsements, and submitting the candidate's qualifications. The judge is also disqualified from acting as a judge in any legal proceeding involving the appointing authority, or any person making a recommendation to them, whether or not at the request of the judge.

The less strict rule applicable when the judge seeks appointment reflects the interpretation by the Code drafters that the dangers of apparent misuse of judicial authority, or of making commitments that would undermine judicial impartiality to obtain the appointment, are not sufficient to require the applicant's resignation.

### **12-500. Political and campaign activities of judicial candidates**

The ethical guidelines in NMRA 21-401 apply to judges throughout their service on the bench. NMRA 21-402, Cmt. 6. But special rules regarding judges' electoral campaigns, some of which may supersede requirements in Rule 21-401, take effect when judges announce or file for election, or otherwise manifest their candidacy. *Id.*, Cmt. 5.

The additional rules regulating campaigning in NMRA 21-402 and 21-404 are intended to strike a balance between the judicial obligations of integrity, independence and impartiality, and the ability of judicial candidates to conduct informative and persuasive election campaigns. NMRA 21-400, Cmts. 1 & 2.

### **12-510. Campaign committees: insulation of candidates from fundraising conflicts**

**Caution: the solicitation and acceptance of campaign contributions presents lengthy and complex issues, implicating several rules within the Code. The following summary will not cover every aspect of this topic. Judges and candidates are advised to read the provisions of the Code in full before taking action, and use the following summary only as a guide to finding the applicable rules.**

Many voters seeking to anticipate the performance of candidates should they be elected to office look to the contributors to their campaigns. Voters assume that big contributors are likely to get access to the

officials they help elect, as well as receiving at least some consideration from them. The Code recognizes these concerns by imposing several constraints on fundraising that are intended to alleviate such concerns as to elected judges.

One of the most effective mechanisms in the Code of Conduct to prevent any appearance that big contributors gain undue influence over judges is the creation of campaign committees. NMRA 21-402 (A) (1) (e) requires each candidate for election who intends to accept or expend funds exceeding one thousand dollars to establish a campaign committee of one or more persons, pursuant to NMRA 21-404.

The campaign committee rules insulate judicial candidates from campaign donors. These rules require that all solicitation and receipt of funds or in-kind donations go through the committees, with no involvement by the judge or judicial candidate. NMRA 21-404 (A) and Cmt.1. The committee must conduct the campaign and manage the expenditure of the funds. Id. The candidates are responsible for ensuring that the committees comply with the applicable laws. Id., Cmt. 2. Candidates are required to instruct their campaign committee to ask for and accept only reasonable, appropriate and legally compliant contributions. Id., Cmt. 3.

Importantly, only the committee, and not the candidates, may solicit or accept campaign donations. NMRA 21-402 (C). The candidates may not ask or be told by the campaign committee who has donated to the campaign of either the candidate or the candidate's opponent. NMRA 21-402 (A) (2) (a).

Advisory committee directed judge running for statewide office to amended rule clarifying that seed money and qualifying contributions to attain public financing are subject to the same restrictions as other campaign contributions. AO 15-02.

Especially sensitive is the issue of accepting donations from people who are either parties or lawyers appearing in the judge's court, or may become so. The Code recognizes that all persons have a right to contribute to judicial campaigns. But allowing solicitation or acceptance of donations benefiting the campaign of a judge who might preside over a case creates a potential appearance of undue influence for the donor. The Code therefore prohibits committees from soliciting or accepting contributions from litigants in a case that will go before the successful judicial candidate. If a donation from a litigant is unknowingly accepted, it must be returned once the committee learns that the contributor is a litigant. NMRA 21-402, Cmt. 2. Committees may solicit contributions from lawyers in such cases, but should be alert to appearances of impropriety, such as unusually large contributions from small law firms while they are seeking rulings from the judge.

Judge who inadvertently learned of actions by public official supporting the judge's reelection campaign was advised of considerations to weigh in deciding whether to recuse from cases involving the public official's governmental entity. In case leading to the inquiry, the judge was advised that recusal was unnecessary. AO 18-01

The committees thus take on a heavy responsibility. For example, while they will likely have fundraising targets and deadlines, they must decline excessive contributions that seem inappropriate. This may impose difficult choices on them-- which the candidate, who may not be told the identity of contributors, cannot help them address.

Nonetheless, the committees provide a valuable buffer between the ultimately successful candidate for judicial office and the donors to that candidate's campaign. So long as these rules are adhered to, the successful candidate cannot reasonably be accused either of rewarding donors to their campaign, or punishing those who opposed them—since the judge will not know who, or how generous, either the supporters or opponent were.

The U.S. Supreme Court held the refusal of a state supreme court justice to recuse from case involving party who had made disproportionately large (\$3 million) expenditures in support of his campaign, after which the justice cast deciding vote favoring that party, deprived opposing party of due process of law. *Caperton v. Massey Coal Company*, 556 U.S. 868 (2009).

### **12-520. Campaign limitations relating to specific judicial positions**

#### **a. Appointed positions:**

Justices and judges who serve on the appellate, district and metropolitan court benches are first appointed by the governor as described in section 12-330. Since each candidate must be vetted by a nominating commission that determines which candidates the governor may consider, the candidates must choose how to introduce themselves to the commission and explain their qualifications. Those designated by each commission as qualified must then provide such information to the governor.

NMRA 21-403 (B) permits candidates for appointment to communicate with their nominating commissions and the appointing authority, to seek endorsement letters and to provide information on their qualifications. NMRA 21-403 (A) prohibits any fundraising, including through a campaign committee, to support the effort. Cmts. 1 and 2 require the applicants to adhere to the limitations and standards of the Code protecting the impartiality of the judiciary.

#### **b. Identification with partisan political organizations**

NMRA 21-402 (F) and (G) address the ability of judicial candidates to identify themselves with partisan political organizations. Paragraph (F) permits candidates in partisan elections to identify as candidates of a particular political organization, generally a political party. This will apply to all campaigns of magistrate and probate judges, and to the first election for appellate, district and metropolitan court justices and judges after their appointment. Paragraph (G) prohibits party identification of candidates in retention or non-partisan elections. This will apply to subsequent elections to the appellate, district and metropolitan court benches, and to all elections of municipal judges.

The rule allows all these judicial candidates, except in the case of retention elections, to seek, accept and use endorsements from partisan political organizations. NMRA 21-402 (F) (2) and (G) (2).

#### **c. Political rules for part-time judges**

All *elected* part-time probate or municipal court judges, or those appointed to fill a vacancy for those positions, are subject to the same political rules as full-time judges on those courts. NMRA 21-004 (A) (1). Judges *appointed or contracted* to serve part-time, however, are exempt from political rules NMRA 21-401 (C) (1) through (4)—except when they are serving as judge.

Thus, for example, during their time serving on the bench, a part-time appointed or contract judge may not hold office in a political organization, publicly endorse candidates, make speeches for or raise or

contribute funds to a political organization. But other constraints of this rule, such as the prohibitions in subparagraphs (5) – (7), still apply to those judges throughout the duration of their appointment or contract. These prohibitions would prevent the making of statements likely to influence the outcome of a case in any court, or stating commitments that would show prejudgment of an issue pending or impending in their court.

Some of these limitations on part-time unelected judges may be challenging to navigate. For example, if such a person is elected county treasurer of a political party, it could be impractical to resign only for the duration of their assignment as a part-time judge, especially if such assignments occur repeatedly. Consideration must therefore be given to such obligations before accepting a part-time appointment or contract.

d. Campaign funds of candidates who become unopposed or whose balances exceed expenditures. When candidates in partisan or non-partisan elections who have established campaign funds determine that they will not face an opponent, NMRA 21-402 (D) requires that the funds be liquidated within thirty days. Similarly, after all campaign expenditures of any campaign have been paid for, NMRA 21-404 (B) requires liquidation of the remaining balance. The rule delineates options available to the candidate to dispose of the unused funds in either situation.

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## **Resources**

### **Judicial Standards Commission**

Judicial Standards Commission  
6200 Uptown Blvd. NE  
Suite 340  
Albuquerque, NM 87110  
(505) 222-9353

### **New Mexico Judicial Advisory Opinions**

New Mexico Judicial Advisory Opinions are available on the Supreme Court Law Library website: <https://lawlibrary.nmcourts.gov/resources/new-mexico-judicial-advisory-opinions/>

### **New Mexico Advisory Committee on the Code of Judicial Conduct**

Chair:

The Honorable James J. Wechsler, Judge  
[aocjjw@nmcourts.gov](mailto:aocjjw@nmcourts.gov)

### **New Mexico Judicial Code of Conduct**

<https://nmonesource.com/nmos/nmra/en/item/5674/index.do#21-001>