PROPOSED REVISIONS TO THE CODE OF JUDICIAL CONDUCT
PROPOSAL 2023-006

March 24, 2023

The Code of Judicial Conduct Committee has recommended amendments to Rule 21-211 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at http://supremecourt.nmcourts.gov/open-for-comment.aspx or sending your written comments by mail, email, or fax to:

Elizabeth A. Garcia, Chief Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 24, 2023, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

21-211. Disqualification.

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:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(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.

(3) 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.

(4) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(5) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity 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;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

B. A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

C. A judge subject to disqualification under this rule, other than for bias or prejudice under Subparagraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

D. A judge shall disclose on the record any information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification on any of the grounds set forth in Paragraph A, even if the judge believes there is no basis for disqualification.

[Adopted by Supreme Court Order No. 11-8300-045, effective January 1, 2012; as amended by Supreme Court Order No. 15-8300-013, effective December 31, 2015; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. —

[1] Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of Subparagraphs (A)(1) through (A)(5) apply. The terms "recusal" and "disqualification" are often used interchangeably.

[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.

[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under Paragraph A, or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under Subparagraph (A)(2)(c), the judge's disqualification is required.

[5] The fact that an employee of the court is a party to the proceeding does not of itself disqualify the judge. The judge shall consider the specifics of the case in determining whether the judge's impartiality might reasonably be questioned and if a recusal is required. Specific rules of procedure, including local court rules, may dictate automatic recusal, but when no rule exists, this comment shall apply.

[6] In *Caperton v. Massey Coal Co*., 129 S. Ct. 2252 (2009), the United States Supreme Court held that the failure of a state supreme court justice to recuse when a party had made extraordinary and disproportionate contributions in support of the justice's candidacy in the previous election violated the opposing party's due process rights. The Court applied an objective standard and stated "that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising or directing the judge's election campaign when the case was pending or imminent." *Id*. at 2263-64. The Court recognized that states may, in their codes of judicial conduct, set more stringent standards for disqualification than imposed by the due process clause. *Id*. at 2267. A judge's impartiality might reasonably be questioned under Paragraph A of this rule as a result of campaign contributions even though they are not so extraordinary and disproportionate as to violate a person's due process rights. The intent of the Code of Judicial Conduct is to insulate judges from this type of bias; Rules 21-402(E) and 21-403 NMRA contemplate that a judge or judicial candidate not solicit or be informed of campaign contributions from attorneys and litigants. Despite these prohibitions, a judge may become aware of contributions made on behalf of the judge's campaign.

[7] Excessive contributions to a judge's campaign by a party or a party's attorney may also undermine the public's confidence in a fair and impartial judiciary. An appearance of impropriety may result when attorneys or parties appearing before a judge generate large amounts of money for a campaign, either by contributing directly to the campaign, by contributing to political action committees supporting the judge, or by organizing large fund raisers. However, contributions made by attorneys to the campaigns of judicial candidates would not require a judge's disqualification in the absence of extraordinary circumstances.

[8] Attorney-Client Relationship: [~~A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.~~]

(a) A judge is disqualified if the judge has an existing attorney-client relationship with a lawyer in a proceeding before the judge.

(b) A judge may be disqualified if the judge has an existing attorney-client relationship with a lawyer of the same firm as a lawyer appearing before the judge depending on the circumstances of the relationship and representation.

(c) A judge may be disqualified if the judge had a previous attorney-client relationship between the judge and a lawyer, the lawyer's law firm, or a party in a proceeding before the judge depending on the circumstances of the relationship and representation.

(d) Relevant factors in deciding whether disqualification is required under (b) and (c) above, include, but are not limited to, the nature of the representation, its duration and the period of time that has elapsed since the relationship.

[9] "Economic interest," as set forth in the terminology section, means ownership of more than a de minimis legal or equitable interest. Except for situations in which a judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

(a) an interest in the individual holdings within a mutual or common investment fund;

(b) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, officer, advisor, or other participant;

(c) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or

(d) an interest in the issuer of government securities held by the judge.

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

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

[Adopted by Supreme Court Order No. 11-8300-045, effective January 1, 2012; as amended by Supreme Court Order No. 15-8300-013, effective December 31, 2015; as amended by Supreme Court Order No. _____, effective _____.]

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[rules.supremecourt-grp] Rule Proposal Comment Form, 03/24/2023, 10:45 am

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov> Fri, Mar 24, 2023 at 10:45 AM
Reply-To: nmcourtswebforms@nmcourts.gov
To: rules.supremecourt@nmcourts.gov

Your Name:	John P Burton
Phone Number:	505-670-6325
Email:	jburton@rodey.com
Proposal Number:	2023-006
Comment:	In Rule 21-211(A)(2)(a) add something like "manager of a limited liability company" to the list of officers, directors, managing members and trustees in that subparagraph. The reason is that managers of limited liability companies perform the same functions as directors, officers, managing members, and trustees and their omission from this list is an obvious oversight. We should take this opportunity to correct the oversight. Thanks!

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] comment about proposed rule 2023-006

1 message

Jeff Baker <jeff@thebakerlawgroup.com> Fri, Mar 24, 2023 at 9:23 AM
Reply-To: jeff@thebakerlawgroup.com
To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

D. A judge shall disclose on the record any information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification on any of the grounds set forth in Paragraph A, even if the judge believes there is no basis for disqualification.

I would call this the *Judge Browning Rule*. To help judges know how this rule should work, I would send every judge a sampling of the letters Judge Browning sends to lawyers about possible conflicts. I also would ask Judge Browning to appear before one or more judicial enclaves to discuss his practice of sending such letters, and his experience with such disclosures.

Jeffrey L. Baker

jeff@bzjustice.com

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New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[rules.supremecourt-grp] Fwd: comment on proposed rule 2023-006: Judicial disqualification: what do you think?

3 messages

Elizabeth Garcia <supeag@nmcourts.gov> Mon, Apr 3, 2023 at 12:21 PM
Reply-To: supeag@nmcourts.gov
To: rules.supremecourt@nmcourts.gov

Good afternoon. See attached from Mr. Biderman on the 2023 proposed rule changes.

Best,
Liz

---------- Forwarded message ---------
From: **Paul Biderman** <biderman429@gmail.com>
Date: Mon, Apr 3, 2023 at 12:03 PM
Subject: Fwd: comment on proposed rule 2023-006: Judicial disqualification: what do you think?
To: Elizabeth Garcia <supeag@nmcourts.gov>

Dear Ms. Garcia,

I would like to comment on the proposed addition to NMRA 21-211 published for comment as proposal 2023-006. The proposed amendment would require that a judge:

disclose on the record any information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification on any of the grounds set forth in Paragraph A, even if the judge believes there is no basis for disqualification.

My concerns relate both to the application of this requirement on its face and the impact of the language of proposed new subparagraphs 8 (b) through (d) of the comments. I think the proposed rule itself would be very subjective and difficult to apply. The new comments, attempting to define when a past attorney-client relationship must be disclosed, do little to clarify the rule. Yet leaving the final decision open to determination of the "circumstances of the relationship and representation" muddy the waters even more.

Requiring the judge to anticipate what information a party could "reasonably" consider a conflict of this nature will present the most challenging issue. The judge will have to review every matter handled throughout the judge's career in law practice, which will often span decades. Then the judge will have to evaluate all the clients or issues that were addressed in that history, to see if they could be seen as presenting a conflict of interest. And, the most challenging part, the judge would have to consider whether a party or any lawyer in the pending case could reasonably consider this representation a conflict, even if the judge does not.

To this last point: if the judge does not personally believe that a situation, say the past representation of a particular client, presents a conflict requiring disqualification, then why would the judge nevertheless find that a party or lawyer now before the judge could reasonably feel otherwise? Presumably the judges will consider their own decision not to recuse reasonable-- if so, wouldn't the argument of the party or lawyer likely be unreasonable? Most significantly, will the judge be subject to discipline for making an incorrect decision on this question?

Would a judge presiding over a criminal trial have to disclose to every litigant, for example, past service as a prosecutor or defense counsel-- or both? Limited jurisdiction judges in particular see multiple defendants at arraignments: will each of them have to be told of the judge's prior practice in the criminal justice system, as an add-on to the reading of the defendant's rights? What if the judge once *advised* a criminal defendant on a similar charge to one that is pending, but then withdrew from the matter? Or pursued a civil remedy for a similar violation? Or settled a civil matter without taking it to trial?

My biggest concern is over proposed comment 8 (d), requiring the judge to consider "the circumstances of the relationship and representation." The problem with that attempt at guidance is that it provides none at all:

(d) Relevant factors in deciding whether disqualification is required under (b) and (c) above, include, but are not limited to, the nature of the representation, its duration and the period of time that has elapsed since the relationship.

Perhaps if the comment set a time limit for looking back in the judge's career, and clarified that only formal representation in a trial or appeal would require the statement on the record, the judge would have some degree of guidance. As written, the "relevant factors" in proposed comment 8 (d) would probably not be interpreted by any two judges in the same way, let alone by the judge and the parties in a given case.

I understand what the committee is trying to accomplish: full, advance disclosure on the record of potential conflicts can, in theory, avoid the kind of acrimonious disagreement as this Court has recently seen. But setting vague standards for requiring the judge's disclosure will not resolve that issue, and could even cause litigation delays as interlocutory appeals are taken by litigants citing this rule. It could also cause judges to recuse unnecessarily to avoid litigating these questions.

I urge the Court to reject this proposal in its entirety. If a rule is still needed, please send the draft back for a clearer iteration of its intended standards.

Paul Biderman, attorney at law, member, Advisory Committee on the Code of Judicial Conduct

---

Lysette Cordova <suplrc@nmcourts.gov> Mon, Apr 3, 2023 at 4:36 PM
To: Amy Feagans <supajf@nmcourts.gov>

You've got this one, Amy?
[Quoted text hidden]
--

Lysette Romero Córdova

Chief Deputy Clerk of Court

New Mexico Supreme Court

suplrc@nmcourts.gov

(505) 827-4942 (office)

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Amy Feagans <supajf@nmcourts.gov> Mon, Apr 3, 2023 at 4:36 PM
To: Lysette Cordova <suplrc@nmcourts.gov>

Sure did!
[Quoted text hidden]
--
Amy Feagans
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New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Proposal 2023-006 - Judicial Disqualification [Rule 21-211 NMRA]

1 message

Alison Orona <albdayg@nmcourts.gov> Mon, Apr 24, 2023 at 3:48 PM
Reply-To: albdayg@nmcourts.gov
To: nmsupremecourtclerk@nmcourts.gov

Dear Elizabeth Garcia,

Please see attached comment in response to Proposal 2023-006 - Judicial Disqualification [Rule 21-211 NMRA].

Sincerely,

Alison K. Orona (she/her)
Second Judicial District Court
General Counsel
Bernalillo County Courthouse
400 Lomas Blvd. NW
Albuquerque, NM 87102
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Comment on Proposal 2023-006 Judicial Disqualification Final.pdf
1939K

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April 24, 2023

Elizabeth A. Garcia, Chief Clerk of the Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Via email only to nmsupremecourtclerk@nmcourts.gov

Re: Proposal 2023-006 – Judicial Disqualification [Rule 21-211 NMRA]

Dear Ms. Garcia,

We wish to submit public comment to the proposed amendment to the Supreme Court's Rules of Practice and Procedure, Rule 21-211 NMRA, Proposal 2023-006.

The proposed revision to Rule 21-211 includes an additional requirement of Paragraph D, which provides the following in full:

> A judge shall disclose on the record *any information* that the judge believes the parties or their lawyers *might reasonably consider* relevant to a *possible motion* for disqualification on *any of the grounds* set forth *in Paragraph A, even if the judge believes there is no basis for disqualification.*

The emphasized terms and language of concern are discussed in this letter.

I. Concerns

We have concerns with the inclusion of Paragraph D in Rule 21-211.[1] First, the proposed language is both broad and vague. Second, the standard articulated in Paragraph D is confusing and unworkable. Third, the disclosure requirement of Paragraph D is moot if the judge has complied with the mandate of Paragraph A. Finally, and relatedly, the proposed language does not make clear whether Paragraph D is only required if the judge chooses not to recuse or whether it is

[1] This comment does not discuss the proposed revisions to Paragraph [8] of the commentary.

required that the judge always disclose information related to possible recusal, regardless of whether the judge recuses.

i. Paragraph D contains broad and vague language.

The proposed Paragraph D is broad and vague. The paragraph includes terms such as "any information," "possible motion," and "any of the grounds." This is overly broad because it requires the judge to disclose information that extends beyond the grounds listed in Paragraph A. Under the proposed Paragraph D, even if the judge does not believe that the judge's impartiality could be reasonably questioned, the judge would have put on the record *any* information that could *possibly* be *considered* relevant to the question of disqualification. This broad language swallows the (albeit non-exhaustive) enumeration of the grounds in Paragraph A.

The proposed language is also vague because it does not make clear what information a judge needs to disclose. The proposed rule amendment does not explain the level of detail that is required by "any information," and the term "possible motion" is not defined, making it unclear whether the motion shall have merit or be based on reasonable legal grounds.

The proposed rule amendment's broad and vague standards make it difficult for both a judge to understand how to comply with Paragraph D's mandate and for the parties to understand whether a judge is in compliance with the rule.

ii. The standard for reasonableness in Paragraph D is confusing and unworkable.

Proposed Paragraph D requires the judge to disclose "any information . . . the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification." This standard is confusing because it requires judges to consider themselves in position of the litigants. If the judge has already applied Paragraph A and remains on a case, then the judge has taken the position that the judge's impartiality cannot be questioned. In such a scenario, the judge would have no reason to think there is the possibility of a forthcoming motion for disqualification. Despite having completed this analysis, Paragraph D requires the judge to next guess at what a litigant "*might reasonably consider relevant*" to the question of impartiality, suggesting that the judge's initial analysis was insufficient. It is unworkable to hold judges the standard of what litigants *might consider* to be relevant to disqualification *after* the judge has already determined that impartiality is not at issue.

iii. Paragraph A already mandates disqualification when applicable; requiring disclosure of information when Paragraph A may be applicable is moot because the judge will have already recused.

The proposed paragraph states that a judge shall disclose information "on any grounds set forth in Paragraph A, *even if the judge believes there is no basis for disqualification.*" (Emphasis added). However, Paragraph A, like D, is a "shall" requirement. That is, a judge "*shall* disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[.]"

Rule 21-211(A) (emphasis added). Paragraph A does not allow the type of discretion that proposed Paragraph D attempts to regulate. If there are reasons under Paragraph A to disqualify oneself, then a judge *shall* recuse. Therefore, if a judge does not believe recusal is necessary under Paragraph A, there would be no information to further disclose under Paragraph D. Put differently, mandating a judge to put "any information" on the record that is relevant to Paragraph A is a moot and unnecessary requirement because Paragraph A already—under a broad reasonableness standard—mandates recusal. If a judge finds Paragraph D to be applicable, Paragraph A already requires them to recuse, thereby making Paragraph D an unnecessary step.

Thus, if Paragraph D's intent is to give the parties an opportunity to object or argue whether a judge should disqualify under Paragraph A, then Paragraph D is likely moot because a judge will already have recused.

iv. Paragraph D is unclear if it also applies in situations the judge does recuse under Paragraph A.

Finally, it is unclear whether Paragraph D requires disclosure on the record of "any information" regarding disqualification even when a judge has determined there is a basis for disqualification and has recused from the matter. *See* Paragraph D (a judge "shall" disclose on the record "any information" relevant to disqualification "*even if the judge believes there is no basis for disqualification.*" (Emphasis added.)). Read this way, a judge would have to disclose to the public every reason for appropriate recusal even after the judge has already recused.

II. Recommendation

For the reasons stated above, we first suggest striking Paragraph D in its entirety. As written, Paragraph A sets a standard that is difficult to overcome, as it merely requires that "impartially *might* be reasonably questioned." The use of the term "*might*" provides an extra precaution and makes it clear that that a mere possibility is enough for a judge to recuse. Therefore, in determining that recusal is unnecessary, the judge has determined there is no possibility that the judge's impartiality can be questioned. Judges must conduct their own analysis to reach this conclusion. Therefore, the requirements of Paragraph A would not allow Paragraph D to come into play at all, rendering Paragraph D moot. The only ways proposed Paragraph D is not moot is if the judge has failed the judge's analysis under Paragraph A or if Paragraph D is required even after the judge recuses.

We respectfully acknowledge that this recommendation is provided without the full understanding and background of Paragraph D's proposed addition and the Committee's thoughts and analysis on the same. Thus, if the Committee continues to maintain an interest in adding a disclosure provision when a judge does not think Paragraph A applies, in the alternative, we suggest rewriting Paragraph D in one of the following two ways:

> D. ~~A~~ Upon a determination that no disqualification is required pursuant to Paragraph A, the judge shall consider whether the nature of a relationship with any person related to the matter shall be disclosed on the record to allow parties the opportunity to object ~~any information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification on any of the grounds set forth in Paragraph A, even if the judge believes there is no basis for disqualification~~.

This change requires that judges consider whether they should disclose to the parties and lawyers any potential disqualification issues but does not require that the disclosure in all instances and defines what information should be disclosed ("the nature of the relationship with any person related to the matter"). This change would provide sufficient guidance to a judge and the parties to ensure compliance, as well as clarify that Paragraph D is only applicable when a judge has determined that recusal is not necessary under Paragraph A.

> Or, alternatively:
>
> D. When the judge believes there is no basis for disqualification, yet the judge is aware of a relationship that a reasonable person may find relevant to Paragraph A, ~~A~~a judge shall disclose on the record the nature of relationship with any person related to the matter that ~~information that the judge believes~~ a reasonable person ~~the parties or their lawyers to~~ may consider relevant to ~~a possible motion for~~ disqualification on any of the grounds set forth in Paragraph A~~,~~ ~~even if the judge believes there is no basis for disqualification~~.

This change still requires a judge to disclose that a relationship exists, but again clearly defines what information the judge must disclose ("the nature of relationship with any person related to the matter") and removes the additional burden placed on the judge in determining whether there are any possible motions regarding the matter. This change also clarifies that Paragraph D only applies if the judge chooses to remain on the case after analysis under Paragraph A.

The Second Judicial District Court greatly appreciates the work of the Supreme Court and the Committee in drafting the proposed rule amendments. The Second Judicial District Court is grateful for the opportunity to provide public comment. Thank you for your consideration.

Respectfully,

Marie C. Ward
Marie Ward
Chief Judge
Second Judicial District Court

Alison Orona
General Counsel
Second Judicial District Court

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Comments - Proposal 2023-006 Judicial Disqualification [Rule 21-211 NMRA]

1 message

Joshua Allison <albdjya@nmcourts.gov> Mon, Apr 24, 2023 at 3:49 PM
Reply-To: albdjya@nmcourts.gov
To: nmsupremecourtclerk@nmcourts.gov

Dear Ms. Garcia,

Please find attached my letter with comments on the proposed revisions to Rule 21-211(D) NMRA. Please let me know if you are not able to open the attachments. I hope you are well.

Very truly yours,

--
Joshua A. Allison
District Court Judge
Second Judicial District Court

LTR 20230424 - Proposal 2023-006 Revisions to Rule 21-211.pdf
292K

STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT

JOSHUA A. ALLISON
DISTRICT JUDGE

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April 24, 2023

VIA EMAIL ONLY

Elizabeth A. Garcia, Chief Clerk of Court
New Mexico Supreme Court
P O Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov

Re: Proposal 2023-006 Judicial Disqualification [Rule 21-211 NMRA]

Dear Ms. Garcia,

Thank you for considering these comments on the proposed amendments to Rule 21-211 NMRA. I write specifically to address the addition of Paragraph D to the Rule. This addition appears to move what was formerly a "should" statement from Comment 8 to the Rule and make it part of the text of the Rule itself. If Paragraph D is adopted as proposed, Rule 21-211 would require disclosure of all information that might reasonably be relevant to a motion to disqualify the judge in all circumstances.

I believe this proposed change is both unnecessary and inconsistent with New Mexico law, which provides each judge considerable discretion on matters of the judge's disqualification. More specifically, I have the following comments against the adoption of proposed Paragraph D:

1. Rule 21-211 adequately addresses disclosure in its existing Comment 8, which instructs judges to disclose information when the individual judge concludes that disclosure is required in any particular case. Comment 8 is consistent with New Mexico law by providing each judge discretion with respect to matters of disqualification. It is important for the Rule to retain this discretion with respect to disclosure so that each judge may address the varied circumstances that come before each judge/judicial officer in any particular case.

2. The proposed change to mandate disclosure in all circumstances will create unnecessary confusion and delay.

3. Finally, mandating disclosure in all circumstances will have unintended consequences for lawyers when fulfilling their professional obligations, which will negatively impact the proceeding before the judge.

I therefore respectfully suggest that this proposed change should be withdrawn and that Comment 8 to the existing Rule should remain. However, if the proposed change is adopted, I suggest that it be revised to make clear that disclosure is not required when a judge has recused or is disqualified from a case, as is already established in New Mexico jurisprudence.

1. The existing Rule adequately addresses disclosure, is consistent with New Mexico law on disqualification, and gives the judge discretion to determine when disclosure is required.

Under Rule 21-211, both as it is written now and as it is proposed to be amended, judges must disqualify themselves when their "impartiality might reasonably be questioned" for any reason, including, but not limited to, the specific circumstances listed. *See* Rule 21-211(A) NMRA. Thus, the Rule requires a judge to evaluate the specific circumstances of each case over which the judge is presiding and make a determination as to whether the judge is obligated to recuse for any reason.

This determination is a discretionary one. *See, e.g.*, *State v. Riordan*, 2009-NMSC-022, ¶ 6, 146 N.M. 281 ("Recusal rests within the discretion of the trial judge, and will only be reversed upon a showing of an abuse of that discretion."); *Gerety v. Demers*, 1978-NMSC-097, ¶ 8, 92 N.M. 396 ("[W]hen a judge believes he will not be able to remain impartial[,] he should use his discretion and remove himself from the case in order to avoid any hint of impropriety."); *Doe v. State*, 1977-NMSC-075, ¶ 11, 91 N.M. 51 (providing that previous disqualification rules "allow judges, at their discretion, to voluntarily disqualify themselves").

In fact, a judge's decision to recuse from any proceeding "is within the conscience of the judge . . . ." *Purpura v. Purpura*, 1993-NMCA-001, ¶ 16, 115 N.M. 80 ("Whether a judge should recuse himself or herself if his or her impartiality might reasonably be questioned, places disqualification within the conscience of the judge and within his or her discretion." (cleaned up)).[1] This is why New Mexico law requires recusal motions to be decided by the judge sought to be removed from the case. *See, e.g.*, *Riordan*, 2009-NMSC-022, ¶ 6, 146 N.M. 281. *See also Chandler v. Smith*, No. S-1-SC-33252, Order and Opinion Denying Motion to Recuse, at 1 (Daniels, J. Oct. 26, 2011) ("Under the law, recusal motions must be decided by the judicial officer to whom they are directed.") (non-precedential opinion). Thus, under New Mexico law, it is for the judge to determine whether recusal is necessary based upon the specific facts and circumstances of each individual case.

A similar approach should be retained with respect to the disclosure of information that is considered to be reasonably relevant to a possible motion for disqualification: *i.e.*, it should be

[1] The standard for disqualification is nonetheless an objective one. *See, e.g.*, *State v. Riordan*, 2009-NMSC-022, ¶ 11, 146 N.M. 281 ("In determining whether an objective observer would conclude that a judge's impartiality was questionable, an appellate court should look to see how the judge arrived at the decision not to recuse and then should review the judge's actions for bias.")

left to the discretion of the judge whose recusal is sought to determine if disclosure is required. This discretionary approach is currently contemplated in Comment 8 to the existing Rule.

Comment 8 provides that a judge "should" disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification. To be sure, disclosure is certainly required in some circumstances, but it should not be mandated in all circumstances as the Paragraph D would impose.

Rather, it seems to me that the obligation to disclose information relevant to disqualification should be discretionary just like the obligation to recuse is. Disqualification, after all, may be considered for very personal reasons. *See, e.g.*, *Doe*, 1977-NMSC-075, at ¶ 12 (providing that the discretionary decision to recuse may be personal in nature). Rule 21-211 presently allows a judge to weigh those facts to determine whether a reasonable person could question the judge's impartiality. The same judge, considering those same facts, should be allowed to determine whether disclosure is required as well.

2. Proposed Rule 21-211(D) will create unnecessary confusion and delay.

There are, of course, times when a judge is obligated to disclose information that the parties may consider relevant to a motion to disqualify, even if the judge believes that there is no basis for disqualification. The existing Comment 8 to the Rule makes that clear: a judge should disclose this information when an objectively reasonable person might conclude that it would be relevant to a motion for disqualification.

However, there are also times that a judge should not be compelled to make that disclosure on the record when doing so would be futile, would cause unnecessary motions practice and delay the proceeding, or would create acrimony between the judge, the parties, and their lawyers. Therefore, disclosure should be left to the judge based upon the individual circumstances of each case and subject to the judge's obligations under existing Rule 21-211, the Code of Judicial Conduct, and the State and Federal constitutions.

3. Disclosure will create unintended consequences for lawyers in fulfilling their professional obligations to their clients, which will interrupt and negatively affect the proceedings.

As I read the proposed language of Paragraph D of Rule 21-211, it requires a judge to disclose all information known to the judge when the judge believes that a lawyer or party ***might*** consider that information relevant to a ***possible*** motion for disqualification even ***after*** the judge has concluded in the judge's discretion that disqualification is not required under the Rule. In other words, the bar for the proposed mandatory disclosure is awfully low.

As a result, I would expect judges to disclose more information than they ever have before, and I would expect those disclosures to negatively impact each case in which the disclosure is made. Some examples:

- Lawyers will necessarily be placed in a position of having to advise their clients on what path to take, namely to seek the judge's disqualification based upon the disclosure or not. These discussions will take time, and a lawyer may be in the position of feeling compelled to seek disqualification because the client desires it, even if the lawyer advises against it. The decision to seek disqualification in response to a disclosure may not rest with the lawyer who is accustomed to seeing the type of information disclosed and who may better understand the judge's responsibilities under the Code of Judicial Conduct.

- A crafty (or perhaps unscrupulous) lawyer or party may use the disclosure as an opportunity to delay the case – to file a motion to disqualify in order to "slow things down." And the case would slow down for sure. Judges are careful to give disqualification motions heightened consideration, and judges should likewise consider those motions before taking any further action on a case. Also, a party (or a judge) would be hard-pressed to find that the motion to disqualify was brought for purposes of delay when it was the judge who alerted the parties to the issue in the first place.

- Another crafty lawyer or party might use the disclosure as a reason to judge-shop and/or inject the issue of the judge's alleged impartiality into the lawsuit for purposes of gaining a tactical advantage in the litigation. *See, e.g.*, *Chandler*, No. S-1-SC-33252, Order and Opinion Denying Motion to Recuse, at 8 (discussing generally the possibility of judge-shopping and motions to disqualify). This possibility should be avoided by not requiring disclosure in all circumstances.

- Some litigants may seek discovery concerning the information raised in the judge's disclosure, and the handling of those issues will impact the lawsuit. Is a party entitled to discovery on that issue before proceeding with a motion to disqualify? Can the party depose persons who may have information on that issue? Is the party entitled to further information ***from the judge*** in order to determine how to proceed? Those issues would necessarily need to be resolved in the lawsuit where the disclosure was made through motions to compel, for protective order, to quash subpoenas, for writs of superintending control, etc.

I submit that allowing the judge whose disqualification is sought to first determine whether disclosure is required under the existing Rule would mitigate against these possible concerns in all but the most complex cases.

4. **Alternatively, if the proposed disclosure requirement in adopted, the Rule should be revised to make clear that disclosure is not required when a judge recuses or is otherwise disqualified.**

The language proposed in Rule 21-211(D) can be fairly read to require a judge to disclose the reasons for the judge's disqualification even when the judge has recused from the case. Under New Mexico law, this is not required. *See Doe*, 1977-NMSC-075, at ¶ 21 ("A judge, in disqualifying himself to serve in a particular case, has discretion in taking such action, since the

reason or reasons may be personal and he need not state them." (internal quotation marks and ellipses omitted); *Gerety*, 1978-NMSC-097, at ¶ 11, (holding that a "judge must have good cause for recusal but need not state for the record that he has cause nor state the cause").

The Rule should not be amended to now require disclosure of a judge's reasons for recusal. The reasons for a judge's disqualification are personal to the judge. In many situations, disclosure after a judge has recused would needlessly invade the privacy of the judge and the judge's family. There are good reasons that judges have never been required to disclose their reasons for recusal. The Rule should clearly state that disclosure of the reasons for disqualification is not required when the judge has been disqualified.

For these reasons, I respectfully suggest that the proposed addition of Rule 21-211(D) is unnecessary, inconsistent with New Mexico law, and would cause delays and other problems in cases where disclosure is not warranted. Rather than always requiring disclosure as suggested in Rule 21-211(D), Comment 8 should remain.

Thank you again for considering these comments.

Very truly yours,

Joshua A. Allison
District Court Judge