

**PROPOSED REVISIONS TO THE CODE OF JUDICIAL CONDUCT
PROPOSAL 2025-007**

March 6, 2025

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 website at <https://supremecourt.nmcourts.gov/rules-forms-files/rules-forms/open-for-comment/> 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
rules.supremecourt@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 5, 2025, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's website for public viewing.

21-211. Disqualification.

A. A judge shall disqualify ~~[himself or herself]~~themselves 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]~~significant other, ~~[or]~~a person within the third degree of relationship to either [of them] the judge or the judge's significant other, [or] a person who is the [spouse or domestic partner of such a person] significant other of a person within the third degree of relationship to either the judge or the judge's significant other, or a member of the judge's staff is:

(a) a party to the proceeding or who is participating directly or indirectly in management of a party~~[-, 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]~~significant other, 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[-]; and

(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~~]significant other 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.

[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) 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) Relevant factors in deciding whether disqualification is required under (b) 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~~]significant other, 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.*

[12] A person who is responsible for the day to day management of a party directly participates in management of a party. Such persons may have titles including but not limited to chief executive officer, chief operating officer, chief financial officer, president, vice president, secretary, treasurer, general partner, managing member and manager.

A person who is responsible for setting policy for the party or for oversight of the management of a party indirectly participates in the management of a party. Such persons may have titles including but not limited to directors, trustees, regents and overseers.

Regardless of title, any person participating in the day to day management of a party or participating in setting policy for a party or overseeing management of a party is covered by this rule.

[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. S-1-RCR-2023-00018, effective for all cases pending or filed on or after December 31, 2023; as amended by Supreme Court Order No. _____, effective _____.]

**No Comments
Received**