

Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Chair  
Hon. Mane A. Baca  
Paul L. Biderman, Esq.  
Thaddeus Bejnar, Esq.

April 22, 2004

**Re: Judicial Advisory Opinion No.04-01**

Dear Judge:

Your memorandum of March 31, 2004 asks for the advice of the Advisory Committee on the Code of Judicial Conduct<sup>1</sup> on how you may conduct certain work of the Ad Hoc Stream Adjudication Rules Committee (hereinafter " Ad Hoc Committee") in compliance with the Code of Judicial Conduct. Specifically, you have asked how the Ad Hoc Committee can fulfill its responsibility to recommend to the Supreme Court improved rules of procedure for water litigation and stream adjudications without violating the Code's prohibition against ex parte communications. Your question arises particularly from the fact that the Ad Hoc Committee comprises not only judges and special masters involved in stream adjudications, but also attorney and/or academic experts, including representatives of the Office of the State Engineer, most of whom are, or are associated with, parties to those adjudications. Procedural orders have already been adopted in some adjudications in which these attorney members may have entered appearances, and the creation of a new model case management order by the Ad Hoc Committee might ultimately result in changes to those existing orders. You have consequently proposed certain specific measures intended to avoid any such impropriety.

Background

On October 15,2002, the New Mexico Supreme Court established an Ad Hoc Committee "to make recommendations to this Court concerning rules of procedure for water litigation and stream adjudications in New Mexico state courts," S.Ct. Order No 02-8110, at 1. The order directed the Ad Hoc Committee to "examine and study the

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<sup>1</sup> One member of this advisory opinion also serves, in his capacity as State Judicial Educator, on the education subcommittee of the Ad Hoc Committee. Because opinions of this Advisory Committee are strictly advisory rather than adjudicatory in nature, the Advisory Committee does not deem this to be a conflict of interest. The service of this Advisory Committee member on the education subcommittee entails no financial or litigative interest for him, and will provide access to background information helpful to this advisory opinion.

promulgation of rules of procedure for water litigation and stream adjudications in New Mexico," *id.* The Court's order appointed nine members to this committee, including one district judge engaged in water litigation, two special masters in water adjudications, law professors, and the then-State Engineer. Most of the Court's appointees to the Ad Hoc Committee were involved in one or more existing stream adjudications, either as parties, counsel, judge, or special masters.

You have explained that immediately after the Ad Hoc Committee was formed, you advised the attorneys in the stream adjudication over which you preside of the Committee's creation and invited their comments. You have further indicated to us that "any attorney who asks if he or she can attend is informed that Committee meetings are open, attendance permitted and comments welcome." Moreover, you have advised members of your committee that "discussions could not be indicative of any judicial decision if an issue were properly raised before the court in pending litigation," and that "to the extent possible, the discussion should be general and not specific to any adjudication." Finally, you have pointed out to us that the larger pending stream adjudications involve thousands of litigants, very few of whom are represented by counsel.

Your memorandum to this Advisory Committee describes the Ad Hoc Committee's plans to develop a suggested model case management order for submission to the Supreme Court as the Ad Hoc Committee's report. (The Ad Hoc Committee apparently has determined that drafting a model order is necessary to fulfill the Court's directive to "examine and study the promulgation of rules of procedure" without creating constitutional problems by revising or creating new procedural rules governing pending cases. ) You have described the process by which this model will be created, drawing upon two distinct subcommittees of the Ad Hoc Committee. The judicial subcommittee, comprising the judge and special master members who preside over pending adjudications, would draft the model order. A second, academic subcommittee, consisting of the law professors and attorneys, some of whom represent or are associated with parties to one or more adjudications, would separately review and comment on this draft model. The resulting edited version would then be submitted to all counsel of record in the five stream adjudications for their comments. The Ad Hoc Committee would review those comments, then submit the final model case management order, with the Ad Hoc Committee's recommendations, to the Supreme Court as the Committee's report. Any adoption or adaptation of the model case management order in any pending adjudication would presumably occur only after notice and hearing in that adjudication.

In addition, you have indicated that the Ad Hoc Committee intends to:

- establish written guidelines regarding ex parte contacts; and
- work with the Judicial Information Division to create a website on which the Ad Hoc Committee would post agendas, minutes, circulated substantive correspondence, drafts, or products of the Ad Hoc Committee.

## Authority

The nature of oral and written communications you (and other judicial officers who are committee members) may receive, as a member of the committee, is constrained by Rule 21-300(B)(7) NMRA 2004, which provides in pertinent part:

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

- (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
  - (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
  - (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication if it might reasonably be perceived that the party contacting the judge may have gained a tactical advantage.
- (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

Official commentary to this provision of the Code includes the statement, "The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participating in the proceeding, except to the limited extent permitted. ...To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge." (Emphasis added.)

Rule 21-300(B)(10) provides:

A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. ...This subparagraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. ...

## Analysis

While your inquiry focuses on the possibility of ex parte communications, it is important to consider the context in which the communications in question are occurring. The appointment of the Ad Hoc Committee by the Supreme Court, and your service as its chair, are clearly permissible under the Code of Judicial Conduct. Although the Court's order does not detail the underlying reasons for creating the Ad Hoc Committee, other than the fact that Legislative Judicial System Study Committee had heard testimony on this subject several months earlier, the rationale for the Court's interest is easy to understand. Stream adjudications are highly complex, often extremely lengthy proceedings involving numerous parties. Courts handling stream adjudications face numerous challenges in attempting to conduct these cases consistently with due process, including, by way of example, identification of stakeholders, constant substitution of parties and counsel (not to mention judges), notice, management of claims asserted by numerous litigants appearing pro se, and lawsuits between individual interest holders in other courts affecting the larger adjudication. The Ad Hoc Committee has therefore directed its attention to identifying ways to improve the management and progress of such adjudications, as well as ensuring expeditious and fair handling of litigation among individual interest holders. Its decision to develop a model case management order is equivalent to, and in this case a necessary substitute for, development of a model rule. As such, it is in the nature of a general, academic exercise (albeit with significant potential implications) rather than an action with direct and immediate impact on any pending adjudication.

The Court's appointments to the Ad Hoc Committee represent an experienced team of judges, special masters, water law attorneys, academics and government experts participating in existing stream adjudications. Only persons with experience in existing adjudications would be able to anticipate and address with confidence case management and procedural issues likely to arise in future adjudications and other proceedings on this subject. It is inevitable to such an inquiry that some of the group's discussions will draw and even focus upon examples from the pending adjudications in which the Ad Hoc Committee membership are participating. This is because it is only within those proceedings that examples of issues that need to be addressed by the Ad Hoc Committee will arise. To disregard the very issues that have emerged from the pending adjudications would defeat the purpose for which the Committee was convened, namely, to review and recommend procedures in water adjudications. The Committee has thus signaled its intention to adopt measures that will prevent such discussions from crossing the line into ex parte communication.<sup>2</sup>

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<sup>2</sup> The Code's exemption in Rule 21-300 B (7) (a) of certain procedural matters from the prohibition against ex parte communication does not alone alleviate this concern. This exemption exists to allow the court to accommodate relatively minor scheduling and administrative developments. By contrast, there seems to be no question that the nature of the procedural issues under consideration by the Committee could render them quite significant in determining the course of any of the adjudications. Nor would the academic experts critiquing the draft model order all qualify as "disinterested" within the meaning of the exception in Rule 21-200 B (7) (b), since at least some of them represent, or *are*, parties

Your proposal to create judicial and academic subcommittees, each of which will conduct separate deliberations concerning the development of the model case management order, will assist in preventing improper communication. By separating the drafting role of the judges from the critiquing role of the academic subcommittee, opinions of the academic members, and particularly of those who are attorneys in pending adjudications, should not be expected to influence the judge or special master presiding over a particular case. This approach, combined with the requirement that no change occur in any procedural order in any pending adjudication without full notice and hearing to the parties, insulates a judge from the concern that the judge will be influenced by ex parte communications from the non-judicial Ad Hoc Committee members.

Your memorandum does not specify how the Ad Hoc Committee will review any comments on the model order from the non-Committee member attorneys who review it. If the judicial subcommittee at this point believes there is still a potential issue that relates to a pending or impending issue in any adjudication over which one of them presides, this Committee advises that such further review should also be conducted through the separate judicial and academic subcommittees, not in a joint meeting. This approach will avoid any appearance that the academic subcommittee members may be in a position to communicate ex parte to the presiding judges or judicial officers on the recommendations of opposing counsel. The Ad Hoc Committee may meet in its entirety to approve the final proposed model order when it is clear that there will not be discussion of any pending or impending issue in any adjudication involving a judicial member of the Committee.

We also note that your memorandum acknowledges that the self-represented parties may not have the opportunity to comment on the draft model order prior to its presentation to the Court. The opportunity for comment is preferable. However, we assume that notice and an opportunity to be heard would be afforded to pro se litigants if the adoption of the model order is proposed for any specific adjudication. Moreover, if a judge of the Ad Hoc Committee believes that there is any appearance question concerning the Committee's involvement of its academic members, concerning any pending or impending issue in an adjudication over which the judge presides, the judge may wish to provide additional disclosure in the adjudication and provide all parties the opportunity for comment. See Rule 21-300(B)(7)(b).

Please let me know if the Advisory Committee can be of further assistance.

Very truly yours,

James J. Wechsler  
Chair