



Advisory Committee on the Code of Judicial Conduct

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This is an advisory opinion by the New Mexico Advisory Committee on the Code of Judicial Conduct. Advisory opinions are responses to inquiries from judges seeking guidance on judicial ethics questions. They are not issued, approved, or endorsed by the New Mexico Supreme Court; nor are they binding.

March 4, 2021



RE: AO 21-05

Dear 

You have asked the Advisory Committee on the Code of Judicial Conduct whether you may serve as a non-voting member of the New Mexico Drug Recognition Expert Committee (D.R.E. Committee).

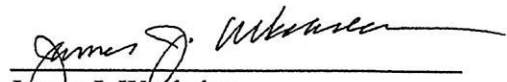
According to its bylaws, the D.R.E. Committee “was created to **streamline communications between impaired driving enforcement stakeholders in New Mexico to ensure the utmost efficiency in keeping our roadways safe.**” (Emphasis in original.). It was not created by statute. The bylaws state the purpose of the D.R.E. Committee as meeting to discuss issues that include legal challenges with the drug recognition expert (DRE) protocol; program updates; issues from DREs in the field; issues from traffic safety resource prosecutors and state and federal assistant district attorneys; and correlation of standardized field sobriety testing. The voting members are six certified DREs from different regions of the state and the state DRE coordinator. Nine non-voting positions are reserved for a Department of Transportation representative; an assistant district attorney; two traffic safety resource prosecutors; two representatives of the New Mexico Standardized Field Sobriety Testing program; a trial-level judge; a defense attorney; and a representative of the U.S. Attorney’s office. The D.R.E. Committee’s duties include recommending to the state coordinator the certification, suspension, and de-certification of DREs.

Rule 21-301 NMRA permits a judge to engage in extrajudicial activities subject to certain restrictions. One of the restrictions prohibits a judge from participating “in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality[.]” Rule 21-301(C). As stated in a leading treatise, a “judge should avoid membership in even the most praiseworthy and non-controversial organizations if they espouse, or are dedicated to, a particular legal philosophy or position that could impugn the judge’s impartiality.” 1 Geyh, Alfani, Lubet and Shaman, *Judicial Conduct and Ethics*, § 9.06 at 28 (5th ed. 2018).

The D.R.E. Committee's focus is the enforcement of impaired driving. It addresses issues concerning certification, training, and practices of DREs, who are certified as experts in drug recognition, enabling them to investigate driving impairment and, at least in part, to testify as experts witnesses in court proceedings. If you served on the D.R.E. Committee, DREs who received certification, promotions, or award recognition at a meeting at which you participated may be called to testify before you in a court proceeding. The DREs will principally act on behalf of law enforcement. As such, the Advisory Committee believes that your identification and participation with the D.R.E. Committee, even as a non-voting member, would reasonably give rise to the belief that you would be predisposed toward DREs or law enforcement. It would thereby affect the appearance of your impartiality in driving impairment cases.

The Advisory Committee notes that the D.R.E. Committee bylaws reserve one non-voting member position to a defense attorney. You have been informed that the purpose of the defense attorney is "to promote transparency and counter conflict issues." Nevertheless, the D.R.E. Committee mostly includes DREs, and six of the nine non-voting members are representative of law enforcement and prosecutorial entities. The Advisory Committee does not believe that the presence of a single defense attorney undermines the reasonableness of the appearance of impartiality conveyed by the purpose and composition of the D.R.E. Committee.

The Advisory Committee believes that the Code of Judicial Conduct does not support your membership on the D.R.E. Committee.


James J. Wechsler
Chair