



Advisory Committee on the Code of Judicial Conduct

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March 23, 2023

[REDACTED]

RE: AO-23-01

Dear Judge [REDACTED]

You are presiding over a divorce case in which you sanctioned the husband after he admitted under oath that he altered bank documents produced during discovery. The wife's attorney referred the case to the district attorney's office, which filed criminal charges against the husband. The divorce case is ready for trial, and the wife has filed a stipulated motion requesting that you disqualify yourself because the district attorney's office named you as a fact witness in the criminal case. You have asked the Advisory Committee on the Code of Judicial Conduct whether you may continue to preside over the divorce case.

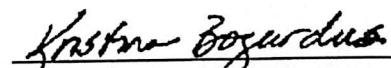
Under Rule 21-211 NMRA of the Code of Judicial Conduct, "[A] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[.]" Rule 21-211(A). Rule 21-211 provides specific examples requiring disqualification, including if the judge "has a personal bias or prejudice concerning a party[.]" Rule 21-211(A)(1), or the judge is "likely to be a material witness in the proceeding." Rule 21-211(A)(2)(d). It does not mention circumstances in which a judge may be a witness involving the parties in a separate proceeding.

The Committee does not believe that, based on the information you have provided, you are disqualified from the divorce case. First, despite the fact that you sanctioned the husband in the divorce case, you did so in the performance of your judicial responsibilities in the divorce case, and you have informed the Committee that you do not harbor any personal bias or prejudice concerning either of the parties in the case. *See Purpura v. Purpura*, 1993-NMCA-001, ¶¶ 8-12, 115 N.M. 80, 847 P. 2d 314 (holding that a judge need not recuse from a contempt hearing despite previous contempt charges and sanctions imposed) (decided prior to 2011 compilation of The Code of Judicial Conduct).

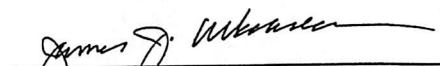
Second, the divorce case is set for trial, and you believe that it will be completed before the criminal case comes to trial. Although you have been named as a fact witness in the criminal case, there is no certainty that you will be called as a witness or that the criminal case will even come to trial. If it were to proceed to trial, you anticipate that you will testify to the admission that the husband made under oath in the divorce case—raising a question as to the materiality of your testimony in that regard.

The circumstances you describe are not comparable to those in which a judge may be a material witness in the same proceeding. See *In re Crane*, 253 Ga. 667, 324 S.E. 2d 443, 445 (1985) (holding that judge who was likely to be a material witness in a contempt proceeding was disqualified from presiding over the proceeding). Moreover, notably, the facts that give rise to the disqualification motion all stem from the divorce case, a judicial proceeding before you. Generally, occurrences in a judicial proceeding before a judge do not justify disqualification. See *United Nuclear Corp. v. General Atomic Co.*, 1980-NMSC-094, ¶¶ 11-18, 96 N.M. 155, 629 P. 2d 231 (holding that a judge was not disqualified because of criticism the judge had of a party in the course of a court hearing and stating that the basis for disqualification “must stem from an extrajudicial source”) (internal quotation marks and citation omitted) (decided prior to 2011 compilation of The Code of Judicial Conduct); *Purpura* 1993-NMCA-001, ¶¶ 8-12 (holding that a judge need not recuse from a contempt hearing despite previous contempt charges and sanctions imposed) (decided prior to 2011 compilation of The Code of Judicial Conduct). Otherwise, there is the danger that parties may initiate actions to create a disqualification when none exists.

You have informed the Committee that you have scheduled a hearing on the stipulated motion. The Committee does not express an opinion as to the manner you should rule on the motion as your ruling depends on the circumstances and arguments as presented in the pleadings and at the hearing.



Kristina Bogardus
Co-Chair



James J. Wechsler
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