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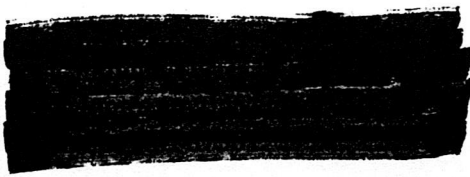


Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Co-Chair (ret.)
Hon. Kristina Bogardus, Co-Chair
Paul L. Biderman, Esq.
Judge Yvette Gonzales
Hon. Freddie Romero

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.

April 24, 2023



RE: AO 23-02

Dear Judge 

You have inquired of the Advisory Committee on the Code of Judicial Conduct as to the ethical duty of, and appropriate action to be taken by, a judge who learns that a district court judge is signing orders drafted by staff attorneys disposing of appeals from administrative agencies, "basically as a rubber stamp."

The Committee agrees with you that review by district judges of appeals from administrative agency decisions requires full record reviews and decisions based upon that record. Such determinations call for detailed and thoughtful consideration by the assigned judge, and cannot be delegated wholesale to staff, however capable.

As stated in *Anaya v. New Mexico State Personnel Board*, 1988-NMCA-077, ¶ 9, 107 N.M., 622, 762 P.2d 909, "a reviewing court on appeal must affirm the decision of the Board 'unless the decision is found to be: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence; or (3) not otherwise in accordance with law.'" ¹ Determinations of this nature require the exercise of sound and experienced judgment, discretion and understanding of the law—attributes considered in the very selection and retention of judges. Determination of arbitrariness or abuse of discretion, for example, depends on careful consideration of the circumstances and facts of each case. It is the responsibility of the judge to attain the full picture of the hearing in the administrative agency and to apply the judge's own expertise and wisdom to the evaluation of the agency's findings and ruling. This role cannot be delegated.

These observations are not intended to prevent a district judge from assigning staff attorneys to perform initial reviews of the administrative record and preparing drafts of a decision for the judge to consider. The Committee cautions, however, that the judge in such circumstances

¹ This statement is derived from NMSA 1978, Section 39-1-1.1 (1953), which does not govern all administrative appeals. Nevertheless, the standard has been applied other appeals; see e.g., Rule 1-077 (J) NMRA.

must nevertheless personally analyze the administrative record and independently determine the appropriate outcome of the appeal.

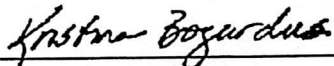
Rule 21-215(C) NMRA defines the ethical responsibilities of a judge who ascertains that another judge is acting in violation of the Code of Judicial Conduct. The ethical rules that a district judge engaging in the conduct you describe would violate include:

- Rule 21-205(A) NMRA: "A judge shall perform judicial and administrative duties competently and diligently."
- Rule 21-206(A) NMRA: "A judge shall accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law."
- Rule 21-207 NMRA: "A judge shall hear and decide matters assigned to the judge[.]"

We agree that the conduct of which you have become aware does not constitute a violation "that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge," such that Rule 21-215(A) mandates you to inform the Judicial Standards Commission. Instead, subsection C of that rule requires that you take "appropriate action." This is defined in code comment [2] as including, but not limited to: "communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body."

The Committee believes that the appropriate action for you to take in this matter would most likely involve discussing this matter with the chief judge of the district involved, but it could also include talking directly with the non-compliant judge yourself if your relationship with that judge supports that approach. It might also include bringing in a respected senior judge to explain the inappropriateness and ethical implications of delegating this responsibility to legal staff.

The chief judge should also consider whether any rulings written by legal staff and signed off by the judge without proper analysis or review should be reviewed for insufficiency of due process. Since the parties are presumably unaware of the judge's actions, they would not have had the occasion to object to this practice.



Kristina Bogardus
Co-Chair



James J. Wechsler
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