



Advisory Committee on the Code of Judicial Conduct

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October 16, 2025

[REDACTED]

Re: AO 25-02

Dear Judge [REDACTED]

Your court has a single staff attorney who assists the court with legal research, draft opinions, and case management. The staff attorney is married to the assistant public defender recently assigned to your court. The public defender regularly represents defendants in cases before you. The staff attorney will not work on these cases.

You have asked the Advisory Committee on the Code of Judicial Conduct the following questions:

Does the relationship between the judge's staff attorney and the assistant public defender create an appearance of partiality or impropriety under Rule 21-211(A) NMRA that requires the judge's disqualification in all cases involving the public defender's office?

If disqualification is initially required under Rule 21-211, can the judge accept a waiver of that disqualification from the parties and their lawyers, pursuant to Rule 21-211(C)? Are there any additional factors or circumstances that should be considered to determine whether disqualification is necessary or whether a waiver would be appropriate in this situation?

Question 1

Rule 21-211(A) NMRA provides in relevant part:

A judge shall disqualify himself or herself 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, or person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person, or a member of the judge's staff is:

....

(b) acting as a lawyer in the proceeding[].

Further, a judge must perform the judge's duties fairly and impartially and at all times avoid impropriety and the appearance of impropriety. Rule 21-202; Rule 21-102.

Your question addresses the general prohibition of Rule 21-211(A), whether your impartiality might reasonably be questioned because of the relationship of your staff attorney and the assistant public defender. The specific prohibitions of Rule 21-211(A)(1) and (2)(b) do not apply. You have informed the Committee that you do not have any personal bias or prejudice toward the assistant public defender. The prohibition concerning a relative acting as an attorney in a case applies only to the judge, not an employee.

With regard to whether your impartiality might reasonably be questioned because your staff attorney's spouse is a defendant's attorney, it is significant that your staff attorney will not work in any way on such cases. As the judge, you have the responsibility to hear and decide the cases before you fairly and impartially. Rule 21-202. The staff attorney, as a court employee, works to assist you in your judicial responsibilities as requested by you. He is not a judge. It is entirely within your purview to restrict the staff attorney's work to insulate him from any court activity related in any way to the assistant district attorney.

There are, of course, circumstances in which the involvement of a court employee may be disqualifying of a judge. If a court employee, or even an employee's close relative, is a party, the impartiality of a judge who works closely with the employee might reasonably be questioned. *See* Rule 21-211(A)(2)(a) and Comment 5 (discussing disqualification when a member of the judge's staff is a party if the judge's impartiality might reasonably be questioned based on the specifics of the case). When a court employee's relative is an attorney in a case, however, the danger is more remote. The attorney is an officer of the court, not a party whose interests are being adjudicated. Moreover, the danger is even less problematic in the facts you present because the City, the party prosecuting the assistant public defender's clients, is an institutional party and knowledgeable of the process.

This Committee has also addressed circumstances involving court employees that are instructive to our analysis. In Advisory Opinion No. 17-02, we advised that a courtroom clerk who lived with and co-parented a child with an assistant district attorney should not be present during the assistant district attorney's cases. Similarly, you have determined that your staff attorney would be insulated from any case involving his spouse. In Advisory Opinion No. 07-04, this Committee advised that a judge was disqualified from hearing cases of the district attorney's office in which the judge's spouse was the deputy district attorney. Although the question was not posed, there was no issue with the judge's spouse appearing before other judges in the district. The fact that the husband judge was a member of the court, like your staff attorney's employment by the court, would not preclude others from hearing cases in which he did not participate.

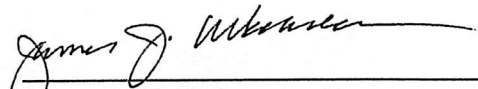
The Committee does not believe that the spousal relationship of the staff attorney and the assistant public defender requires your disqualification under Rule 21-211.

Question 2

Although we do not believe that disqualification is required under Rule 21-211(A), we note that if it were, remittal of disqualification under Rule 21-211(C) would not be practical. Remittal requires a knowing waiver on the part of all parties. Parties are, of course, entitled to advice of counsel in making that decision. Because the issue would be a waiver that concerns the assistant public defender, she would not be in the position to objectively advise her client. Without the assignment of a second assistant public defender to your court who could advise clients about remittal, the procedure is a not practical one.

Question 3

In addition, the Committee advises that when the assistant public defender appears in a case that you disclose the relationship of your staff attorney and the assistant public defender. As the same prosecutors regularly appear in your court, you need only make the disclosure when you have not previously made it to the prosecutors or parties in the case before you.


James J. Wechsler
Chair

*Paul L. Biderman, Esq. did not participate in this opinion.