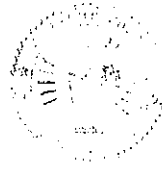


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Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Chair

~~Hon. James J. Wechsler~~

Hon. Kevin L. Fitzwater

Paul L. Biderman, Esq.

Prof. Robert L. Schwartz

Hon. Freddie J. Romero

August 24, 2011



Re: Judicial Advisory Opinion No. 11-02

Dear 

You have asked the Advisory Committee on the Code of Judicial Conduct whether you may preside in criminal cases brought to your court through the actions of the New Mexico State Police, when your husband, a State Police Officer, has been promoted to major in the central office of the State Police. The Committee previously addressed a similar question that you had posed to us, resulting in our issuance of Advisory Opinion No. 09-04. In that opinion, we stated that your husband's responsibility "for the supervision and management of the district, including its legal obligations," "for all of the district's operational and administrative functions," and "for establishing 'liaison with the courts and prosecutors to develop [a] good working relationship with all personnel' in the district," cumulatively could lead parties to reasonably question your impartiality in cases involving officers under his supervision. In our opinion that would conflict with your obligations under Rule 21-400 (A) NMRA.

The difference between the situation that we addressed in that opinion and your current request lies in the change in your husband's position within the State Police.

Previously, he served as the sole captain for the three-county state police district in which your court is located. Your renewed inquiry is prompted by his promotion to a position as major in the central office.

Notwithstanding this change in position, and based on the information we have received as to your husband's new job responsibilities, our response remains the same as that in Advisory Opinion 09-04. The job description we have been provided for a major in the State Police includes responsibilities such as:

assigned as commander of a designated division/office/zone/bureau;

plans, directs and insures continuity of assigned operations;

oversight to the district commanders who formally manage each of the districts in the [assigned] zone.

We further understand that the zone in which your husband bears these responsibilities includes the territorial jurisdiction of your court.

We see your inquiry as posing two questions: (1) whether there is a conflict between your husband's new position within the State Police and your ability actually to remain impartial in cases involving State Police Officers; and (2) even if there is no actual conflict, whether it could reasonably appear to an affected party that your husband's position would make your impartiality at least questionable. While our understanding of the facts in this matter leads us to believe that no actual conflict exists, in our opinion, there is a substantial likelihood of a reasonable appearance of bias on your part, requiring you to recuse from such cases.

The Code of Judicial Conduct, Rule 21-400(A)(5)(a), provides some guidance on this matter:

A. Recusal. A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

.....

(5) the judge or the judge's spouse, . . .

(a) is a party to the proceeding, or an officer, director or trustee of a party[.]

While we read the term “officer” in this rule in its corporate rather than law enforcement sense, the Code here tells us that the managerial-level status of a judge’s spouse within an organization appearing before the court necessitates the spouse-judge’s recusal. Recusal is required regardless of whether the spouse has any personal role or interest in the litigation or outcome of the case. While the rule does not specifically address a conflict created by a spouse’s employment status within a law enforcement agency, the strict prohibition in this rule strongly suggests that we apply a similar reading for a managerial level employee of the State Police.

In developing this advisory letter, we have inquired in some depth into the nature of your husband’s responsibilities in his new position. We have looked specifically into whether his responsibilities could come into actual conflict with your duty to serve impartially in cases involving the State Police. Given the nature of his duties as we understand them, we do not believe that to be the case. He no longer has any day-to-day responsibility for managing operations within the State Police zone that includes your court’s jurisdiction, and in particular he has no responsibility over the conduct of criminal trials by State Police. Especially important is the fact that he is not charged with, and plays no role in, holding accountable State Police Officers or supervisors for their performance or rates of success in prosecuting criminal cases. It does not appear that the rulings by a judge presiding over criminal cases brought by the State Police could inure to the benefit or detriment of your husband’s record or bear favorably or unfavorably upon his career.

Nonetheless, even absent actual conflict, a judge must recuse from a case in which a “judge’s impartiality might reasonably be questioned.” Rule 21-400(A). In our opinion, criminal defendants and their attorneys could reasonably question whether a judge in your circumstances could be counted on to rule objectively should the defendants allege unauthorized searches or interrogations, failures to appear for discovery hearings, or other practices that could lead to excessive dismissal of cases or to civil suits. Identification by a judge of any such hypothetical practices would reasonably appear to inure to the detriment of your husband’s record of oversight of the local commanders in his district and to threaten his professional standing. Indeed,

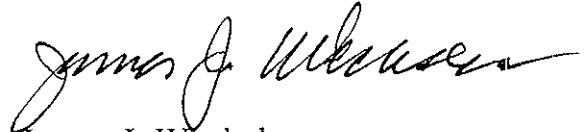
as we read the list of responsibilities, your husband now oversees the officials who bear the same responsibilities he had in his previous position, which we addressed in our Advisory Opinion 09-04. In that opinion, we concluded that his supervisory role as a local commander presented a direct conflict for you as a judge.

We are not suggesting that any such unlawful practices have occurred in fact or would ever occur; but the public must be able to count upon the judiciary to exercise an impartial check on law enforcement in the event that they did. Your husband's new position places him in a supervisory role over the officials whose actions would be called into question should such circumstances ever arise. Even if his supervisory authority does not extend to disciplining or correcting any officers or their immediate supervisors, the public could easily lose confidence in the court's ability to provide a fair hearing in those issues.

You have expressed your concern, which we share, that foreclosing your ability to hear these cases places the entire burden for managing this caseload on a single non-conflicted judge within your district. That problem may be addressed in a number of possible ways, such as redistribution of cases within your jurisdiction; the assignment of judges pro tempore, either judges from other courts or retired judges; or, where possible, certification of cases to higher trial courts. While the Code also provides a remittal procedure whereby informed parties may waive disqualification in Rule 21-400(C), we have already addressed in our Advisory Opinion 09-04 why this should not ordinarily be used. Although your disqualification undoubtedly creates administrative and financial burdens, we believe that the Code of Judicial Conduct is sufficiently clear as to mandate your disqualification under these circumstances, as we understand them.

Since the changed circumstances that you have described are not sufficiently different to change our prior opinion, the restrictions we outlined in Advisory Opinion 09-04 remain: namely, you should recuse yourself from hearing any cases involving State Police Officers within your husband's zone of responsibility, and you should not have such cases assigned to you after which you would advise parties of the situation and their opportunity to ask for your recusal. We see no conflict with your ability to handle criminal cases brought by other law enforcement agencies, nor by State Police Officers from outside your husband's zone of authority.

Very truly yours,

A handwritten signature in black ink, appearing to read "James J. Wechsler". The signature is fluid and cursive, with a long horizontal stroke at the end.

James J. Wechsler
Chair

JJW:ow

cc: Hon. Kevin L. Fitzwater
Hon. Freddie J. Romero
Paul L. Biderman
Professor Robert L. Schwartz



Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Chair
~~Hon. Marie A. Piro~~
Hon. Kevin L. Fitzwater
Paul L. Biderman, Esq.
Prof. Robert L. Schwartz
Hon. Freddie J. Romero

November 4, 2009

[REDACTED]

Dear [REDACTED]

Re: Judicial Advisory Opinion No. 09-04

You have asked the Advisory Committee on the Code of Judicial Conduct for advice concerning your handling of cases involving the New Mexico State Police. You currently recuse on such cases because your husband is the captain for the three-county state police district in which your court is located. You are interested in whether you are disqualified from cases involving the New Mexico State Police, and, if so, whether such cases can nevertheless be assigned to you for you to determine if the parties will waive your disqualification.

You have provided the Committee with the official description of your husband's responsibilities as the only captain in the district. He is responsible for the supervision and management of the district, including its legal obligations. He is responsible for all of the district's operational and administrative functions. He is specifically responsible for establishing "liaison with the courts and prosecutors to develop [a] good working relationship with all personnel" in the district.

Under Rule 21-400(A) NMRA, “[a] judge is disqualified and shall recuse himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” Because of your husband’s overall responsibility for the district’s operational and administrative functions, the Committee believes that your impartiality might reasonably be questioned in cases involving state police officers working in the district. Indeed, not only is your husband at least indirectly responsible for their work on their cases, he is also directly responsible to provide liaison with the courts and prosecutors for the work of the officers within the district.

Rule 21-400(A) also specifically lists instances in which a judge must recuse, including when the judge knows that the judge’s spouse has “more than *de minimis* interest that could be substantially affected by the proceeding.” Rule 21-400(A)(5)(c). Because of your husband’s supervisory and administrative oversight of the district, it would also be reasonable to believe that the success of the officers in the district in prosecuting their court cases may have bearing on his continued employment in his position. Rule 21-400(A) disqualifies you from participating in cases involving officers within your husband’s supervision.

In cases of a judge’s disqualification, Rule 21-400(C) nonetheless permits a judge to participate in a case if the judge discloses on the record the basis for disqualification and allows the parties and their lawyers to consider, outside of the judge’s presence, whether they all agree to waive disqualification and proceed with the case before the judge. This agreement must be made part of the record in the case. Rule 21-400(C). Thus, as a general rule, in cases in which there is a Rule 21-400(C) remittal, a disqualified judge may proceed as the judge in the case.

You have suggested that, even though you are disqualified, the clerk of your court can nevertheless assign the cases to you, the parties can then appear before you, and you could then advise them of your disqualification and their right to waive it. As the Committee understands your docket, in many cases the defendants appear pro se and the State is represented by a state police officer. Rule 21-400(C) does not apply to such circumstances. In order to ensure that “the question of remittal is made independently of the judge,” it contemplates that a judge “not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation.” Commentary to Rule 21-400(C). Without attorneys, even if the court, independent of your involvement, were to inform the parties of their waiver right, there would be no firm basis to conclude that the

parties made a knowing and voluntary waiver. In addition, because state police officers and prosecutors would need to agree to a waiver, and your husband either supervises or acts as liaison with them, there could be a reasonable appearance of impropriety that could affect the public's perception of the integrity of the judicial process. *See* Rule 21-100(A) (noting the need for a judge to preserve the integrity of the judiciary).

As a result, the Committee believes that you are disqualified from hearing New Mexico State Police cases involving officers within your husband's supervision and that you may not accept such cases subject to possible waiver of your disqualification by the parties.

Very truly yours,



James J. Wechsler
Chair

JJW:ow

cc: Hon. Kevin L. Fitzwater
Hon. Freddie J. Romero
Paul L. Biderman, IPL Director
Professor Robert L. Schwartz