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Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Chair

~~Hon. Maria R. Baca~~

Hon. Kevin L. Fitzwater

Paul L. Biderman, Esq.


Prof. Robert L. Schwartz

Freddie J. Romero

June 19, 2012



Re: Judicial Advisory Opinion No. 12-05

Dear Judge 

You have asked the Advisory Committee on the Code of Judicial Conduct questions concerning your service as a referee at sporting events for which you often receive a small stipend for your work. Specifically, you have asked whether you may serve as a referee in the evenings and on weekends, when your court is closed, and during court business hours if you are on vacation.

The pertinent provisions of the Code in response to your inquiry are Rules 21-301 NMRA and 21-312 NMRA. Rule 21-301 addresses extrajudicial activities in general and provides:

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

- A. participate in activities that will interfere with the proper performance of the judge's judicial duties;
- B. participate in activities that will lead to frequent disqualification of the judge;

C. participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;

D. engage in conduct that would appear to a reasonable person to be coercive; or

E. make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice.

Rule 21-312(A) permits a judge to accept reasonable compensation for permitted extrajudicial activities "unless such acceptance would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. (Your receiving a small stipend would appear to be reasonable compensation.) Rule 21-312(B) further addresses conflicting compensated activities by stating

A judge shall not hold any other paid position, judicial or otherwise, that conflicts with the hours and duties the judge is required to perform for every judicial position. A judge shall devote the number of hours that is required by any judicial position held. In no event shall other paid employment or compensable activity hours be performed simultaneously.

With respect to your questions, Rule 21-301 permits you to serve as a referee at sporting events when your court is closed unless your doing so would trigger any of the prohibitions of Rule 21-301(A)-(D). You have not provided the Committee with any information that would indicate that these prohibitions present a problem, however, the Committee advises you to carefully scrutinize the activity that your serving as a referee would entail in order to determine for yourself that no such prohibition exists. As stated in Rule 21-301(E), you may not use court facilities for this activity.

Your serving as a referee during court business hours presents a different analysis. Rule 21-312(B) prevents you from holding another paid position that conflicts with the hours that you must perform for your position as judge. Although you suggest that you may take vacation time when you serve as a referee during court business hours, as an elected public official, you are not subject to the New Mexico

Judicial Branch Personnel Rules, which govern the leave of judicial employees.

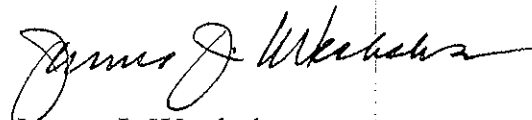
Moreover, specific statutory and Supreme Court policy provisions limit your ability to engage in extrajudicial employment during court business hours. NMSA 1978, Section 35-1-36.1(1994) provides that all magistrates shall be full-time and defines a "full-time magistrate" as "a magistrate who holds office hours a minimum of forty hours per week and who holds no other employment that may conflict with his full-time judicial duties." The Supreme Court has issued a policy directive interpreting this statute. It requires that magistrates "spend at least thirty-five (35) hours per week physically present at a court, traveling to a court, or on court-related activities such as serving on committees or attending training." In re Superintending Control over Magistrate Courts, No. 09-8200, Policy Directive No. 4 (September 2009). It also observes that magistrates must be available after business hours to respond to requests of law enforcement. *Id.* While these provisions do not prevent you from taking leave to be out of your office, they do not address your doing so during business hours for other employment. The Committee believes that the issue of whether a magistrate may use leave for other compensated activities depends on the facts of each situation.

As to your situation, because of the public nature of your referee service, even if you were not compensated for your referee service during the business hours of your court, the Committee believes that your activity is problematic. The intent of Section 35-1-36.1 and Policy Directive No. 4 is that you maintain office hours at your court during business hours. Under Rule 21-301(A), you may not participate in extrajudicial activities that interfere with the proper performance of your judicial duties. Under Rule 21-102 NMRA, you are obligated to promote public confidence in the judiciary and avoid even an appearance of impropriety. In light of Section 35-1-16.1 and Policy Directive No. 4, referee activity during court business hours may provide an improper appearance.

The Committee therefore advises that the Code permits you to serve as a referee during the hours that your court is closed and to receive a small stipend for your service provided that none of the prohibitions of Rule 21-301 or Rule 21-312 applies. You should carefully scrutinize these prohibitions to determine whether they apply to your circumstances. In addition, you should note the requirement of Policy Directive No. 4 that you be available for contact by law enforcement during non-business hours and ensure that your extrajudicial service does not interfere with your

availability. The Committee advises against your serving as a referee during court business hours.

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